

THE RULE ON INTERLOCUTORY INJUNCTIONS UNDER DOMESTIC LAW AND THE INTERIM MEASURES OF PROTECTION UNDER INTERNATIONAL LAW: SOME CRITICAL DIFFERENCES

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I. INTRODUCTION

In a recent article, commenting extensively on a leading British case, *American Cyanamid Co. v. Ethicon Ltd.*,¹ the object of an interlocutory injunction was stated as follows:

The object of an interlocutory injunction is to protect the plaintiff from irreparable loss during the inevitable delay pending the determination of his claim against the defendant. Since the defendant's interests might be prejudiced by a restraint that later proves to have been legally unwarranted, the plaintiff usually has to give an undertaking to reimburse the defendant's losses if his action is unsuccessful at the trial. It is usually impracticable for the judge to reach a definite conclusion on the issue at stake in interlocutory proceedings, especially if there is a conflict of evidence, but it is possible to consider whether the plaintiff has a *prima facie* case; in the past it has not been uncommon for extended and exhaustive analysis of the legal issues to be undertaken in interlocutory proceedings. If the judge was satisfied that the plaintiff had sufficiently established his legal case, he would consider whether the "balance of convenience" between the parties was in favour of the granting of an injunction.²

Leaving aside, for a moment, the issue concerning the precise meaning of "prima facie,"³ the above passage succinctly describes

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1. [1975] A.C. 396, [1975] 1 All E.R. 504.

2. Wallington, *Injunctions and the "Right to Demonstrate,"* 35 *CAMB. L.J.* 82, 83 (1976) (emphasis added & footnote omitted). The omitted footnote stated that an undertaking is not required if the plaintiff is the Crown acting to enforce the law. *Id.* at 83, n. 7.

3. The traditional rule of interlocutory injunctions, which required the plaintiff to show that he "has a prima facie case" as stated above, and the implications of the new rule laid down in the *Cyanamid* case, which requires the plaintiff to show only that "his case is not frivolous or vexatious" or that "there is a serious question to be tried," will be discussed at notes 32-63 *infra* and accompanying text.

not only the purpose, but also the traditional rule governing interlocutory injunctions under common law. The points made therein will serve as a useful basis for showing the differences between such proceedings and interim measures of protection under international adjudication.

It should be observed at the outset that the introduction of proceedings for interim measures in international adjudication was based on the need for a remedy analogous to the common law interlocutory injunction. The latter relied upon the rationale that parties to a dispute are to be enjoined *pendente lite* from taking any action which would prejudice the effectiveness of the judgment ultimately rendered on the merits of the case. As has been pointed out elsewhere,⁴ the need to introduce such a remedy in the context of international litigation was felt because the length of time which passed between the institution of proceedings and the rendering of a final judgment by the Permanent Court of International Justice or its successor, the International Court of Justice, was often months or even years.⁵ Thus, in order to preserve the respective rights of parties to the dispute pending litigation, Article 41 of the Statute of the International Court of Justice, which was copied virtually verbatim from Article 41 of the Statute of the Permanent Court of International Justice, gave the Court the jurisdictional power to indicate provisional measures, as follows:

1. The Court shall have the power 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.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.⁶

The available records show that, in its lifetime, the Permanent Court of International Justice was called upon to apply Article 41 only six times.⁷ The International Court of Justice, at the time of

4. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1972-73).

5. Although the Court recently amended its Rules of Procedure to remove some of the requirements which encouraged lengthy delays in the Court's proceedings, the time element in the litigations before the Court is still a matter of concern. For the text of the amendments to the Rules of Procedure adopted in 1972, see 11 INT'L LEGAL MAT'LS 899 (1972). For an analysis of the amendments, see Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1 (1973).

6. I.C.J. STAT. art. 41.

7. Denunciation of the Treaty of November 2nd, 1865, between China and Belgium, [1927] P.C.I.J., ser. A, No. 8 (Interim Order); Case Concerning the Factory at Chorzów

this writing, has considered applying the Article seven times.⁸ The arguments presented in the orders of these two Courts and the decisions of the Mixed Arbitral Tribunals,⁹ either indicating interim measures or declining to do so, illustrate one important point: there are certain considerations which are only appropriate in the context of interlocutory injunctions proceedings and not for interim measures proceedings, and vice versa.

In the *Cyanamid* case, the House of Lords rejected the old *prima facie* test for interlocutory injunctions in favor of the more lenient requirement that the plaintiff need only show "that there is a serious question to be tried."¹⁰ However, British courts in subsequent cases have had difficulty in applying this test and have cited "special factors" in reverting to the use of the *prima facie* test.¹¹ Similarly, the recent *Aegean Sea Continental Shelf Case (Greece v. Turkey)*¹² demonstrates the divisions among the Justices of the International Court of Justice regarding the tests propounded for the granting of interim measures of protection. The next section of this Article will focus upon the critical differences between proceedings in these two forums, having regard to the analogous nature of the remedy in question.

(Indemnities) [1927] P.C.I.J., ser. A, No. 12 (Interim Order); Legal Status of the South-Eastern Territory of Greenland, [1932] P.C.I.J., ser. A/B, No. 48 (Interim Order); Case Concerning the Administration of Prince von Pless, [1933] P.C.I.J., ser. A/B, No. 54 (Interim Order); Case Concerning the Polish Agrarian Reform and the German Minority, [1933] P.C.I.J., ser. A/B, No. 58 (Interim Order); The Electricity Company of Sofia and Bulgaria, [1939] P.C.I.J., ser. A/B, No. 79 (Interim Order).

8. Anglo-Iranian Oil Co. Case, [1951] I.C.J. 89 (Interim Protection); Interhandel Case, [1957] I.C.J. 105 (Interim Protection); Fisheries Jurisdiction Case, [1972] I.C.J. 12, 30 (Interim Protection); Nuclear Test Case, [1973] I.C.J. 99 (Interim Protection); Fisheries Jurisdiction Case, [1973] I.C.J. 302 (Continuance of Interim Protection); Case Concerning Trial of Pakistan Prisoners of War, [1973] I.C.J. 328 (Interim Protection); Aegean Sea Continental Shelf Case, [1976] I.C.J. 3 (Interim Protection) (*Greece v. Turkey*).

9. The cases before the Mixed Arbitral Tribunals on which requests for interim measures were made were: Leon von Tiedemant v. Polish State, 3 Trib. Arb. Mixtes 596, 607 (1925); Frauenverein Szamothly v. Polish State, 6 Trib. Arb. Mixtes 326 (1925); Ungarische Erdgas A.G. v. Roumanian State, 5 Trib. Arb. Mixtes 591 (1925); Count Hadik Barcozy v. Czechoslovakian State (1927), reported in 32 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 35 (1928); Trail Smelter Case (United States v. Canada) 3 U.N.R.I.A.A. 1907 (1938). An arbitral tribunal constituted under the International Centre for the Settlement of Investment Disputes also dealt with a request for interim measures in the case of Holiday Inns, S.A. v. Morocco, reported in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, [1972-73] SEVENTH ANNUAL REPORT 21-22.

10. [1975] A.C. 396, 407, [1975] 1 All E.R. 504, 510. See notes 32-42 *infra* and accompanying text.

11. See notes 43-63 *infra* and accompanying text.

12. [1976] I.C.J. 3. See notes 77-86 *infra* and accompanying text.

II. THE CRITICAL DIFFERENCES

A. *The Problem of Jurisdiction—Consent and Urgency*

The sole basis for international adjudication is the consent of a state to be sued. Thus, the determination of the nature and scope of the consent given by a state with respect to a certain forum is always a crucial issue in international proceedings. Accordingly, the question of whether a particular international forum has jurisdiction to entertain a request for interim measures has remained a source of difficulty. This is especially true when such requests are made before the forum itself has had the opportunity to determine its competence in the case.¹³

In contrast, the problem of jurisdiction is not always as critical in domestic interlocutory injunction proceedings as it is with interim measures. This is because a plaintiff who seeks the remedy of an interlocutory injunction will always go to a court or a tribunal upon which domestic law has clearly conferred jurisdiction. A question of jurisdiction may, however, arise in a case where the defendant, for example, claims sovereign immunity, or, as in the United States, in the context of competing jurisdiction between federal and state courts.¹⁴ Except in such cases, domestic courts in injunction proceedings have jurisdiction over the subject matter of the dispute conferred on them specifically by law, independent of the consent of the parties. The same is clearly not true with respect to international courts and tribunals.

A crucial difference exists, therefore, between international proceedings for interim measures and interlocutory injunction proceedings under domestic law. Since the latter are not usually bogged down with issues of jurisdiction arising from the lack of consent of any of the parties, domestic proceedings move directly to the determination of whether or not the plaintiff's prayer for injunction is to be granted.

Article 66, paragraph 2, of the Rules of the International Court of Justice provides that a request for interim measures shall have priority over all other cases and shall be treated as a matter of

13. The extent of the Court's jurisdiction in general is beyond the scope of this Article. This issue has been exhaustively discussed by Mendelson, *supra* note 4, *passim*.

14. For discussions of the latter, see ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 172-74 (1969); Case Comment, *Garrett v. Bamford*, 90 HARV. L. REV. 616 (1977).

urgency.¹⁵ The consideration of urgency, which admittedly characterizes proceedings for interim measures, has evidently played a crucial part in the formulation of the test to be applied by international forums for deciding the important question of jurisdiction.

Relying upon the element of urgency, some have argued that delaying the indication of interim measures until the forum in question has resolved the issue of jurisdiction over the subject matter may prejudice the rights of the applicant.¹⁶ If no quick action is taken to maintain the status quo, such a delay would prevent the applicant from enjoying adequate benefit from the judgment ultimately rendered.

To counter the above argument, others have urged that the forum's prior determination of substantive jurisdiction, before an indication of interim measures, is important for several reasons.¹⁷ First, it would be unfair to the defendant if his interests were prejudiced by interim measures prescribed by a forum which is later found to have no jurisdiction over the subject matter of the dispute. There would be no way of compensating the defendant since proceedings for interim measures, unlike those for interlocutory injunctions, do not require the plaintiff to furnish an undertaking to reimburse the defendant in cases where the restraint is later found to have been legally unwarranted.¹⁸ Moreover, the indication of interim measures, without prior establishment of substantive jurisdiction, may be seen as glossing over the important element of consent, which protects states against being defendants in any international proceedings in a forum to which they have not clearly given consent to be sued. Second, it would indeed be damaging to the prestige of

15. I.C.J. R. 66, para. 2. Rule 66 further elaborates how the Court is to exercise its power conferred by Article 41 of the Statute of the Court. For the text of Article 41, see text accompanying note 6 *supra*.

16. This argument is summarized by Mendelson, *supra* note 4, at 311.

17. This argument is summarized by Mendelson, *supra* note 4, at 311-13. The two positions are compared, *id.* at 314-20.

18. For a summary of this rule, see text accompanying note 32 *infra*. One author, however, has specifically suggested the adoption of this domestic rule which requires such an undertaking by the plaintiff. See Hambro, *The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice*, in RECHTSFRAGEN DER INTERNATIONAL EN ORGANISATION 170-71 (H. von Walter Schatzel & H.-J. Schlochauer eds. 1956). Hambro argues that

the party which has requested the Court to indicate provisional measures will be under an obligation to recompense the other for all damage it may have suffered from, having complied with the provisional measures in a case where it wins the suit or where the Court declares itself to be without jurisdiction on the merits.

Id.

the forum itself if it adopted the practice of indicating interim measures in cases over which it is later found to have lacked substantive jurisdiction.

In attempting to bring a balanced approach to this issue of jurisdiction, having regard to the competing considerations noted above, judges have applied the two tests identified below.

1. THE ICJ'S TESTS FOR RESOLVING THE ISSUE OF JURISDICTION

One of the tests for jurisdiction is that, before the forum from which the remedy of interim measures is sought can deny the remedy, it must be demonstrated that the case is a priori outside the jurisdiction of the forum.¹⁹ This would be done "only if, by virtue of some well-established principle to the undisputed facts, the contrary is virtually unarguable—for example, if the matter is clearly within the 'reserved domain'."²⁰ We may refer to this as the "a priori" test.

In contrast, the "prima facie" test states that, before the forum in which an application for interim measures is made can withhold the indication of such measures, it must be shown that there is a prima facie total lack of jurisdiction.²¹ This depends upon how the term prima facie is used; it may "be taken as meaning that the test is whether, on a preliminary examination, the case seems *on balance* to be outside the Court's jurisdiction . . ."²²

Detailed discussion of the merits of these tests is beyond the scope of this analysis. We may, however, observe briefly that a claim has been made that more cases would be declared to be outside the Court's jurisdiction by the "prima facie" showing test²³ than by the

19. See, e.g., *Anglo-Iranian Oil Co. Case*, [1951] I.C.J. 89, 92-93 (Interim Protection).

20. Mendelson, *supra* note 4, at 271.

21. See, e.g., *Fisheries Jurisdiction Case*, [1972] I.C.J. 12, 15-16 (Interim Protection).

22. *Id.*

23. The prima facie showing of jurisdiction test may be said to turn into the actual examination of the real possibility of jurisdiction being relied on by the applicant. Thus, it is a more difficult test to apply than the a priori test. The Court has used both a "positive" and "negative" version of the prima facie test. The positive version is somewhat vaguer; it states that interim measures will not be indicated unless the provisions invoked by the applicant appear prima facie to afford a basis on which the Court's jurisdiction might be founded. See, e.g., *Nuclear Test Cases*, [1973] I.C.J. 99, 101 (Interim Protection). The test was discussed at length by Judge Lauterpacht many years earlier. *Interhandel Case*, [1957] I.C.J. 105, 118-19 (Interim Protection) (Lauterpacht, J., sep. opinion). In contrast, the negative version is quite clear; interim measures are not to be granted if prima facie the absence of jurisdiction is manifest. See, e.g., *Fisheries Jurisdiction Case*, [1972] I.C.J. 12, 15-16 (Interim Protection).

decision "a priori test."²⁴ The writer who made this claim ultimately concludes, and I agree, that

the Court ought not to fetter its discretion to determine whether "circumstances require" the indication of interim measures by laying down a hard-and-fast rule as to what degree of likelihood of substantive jurisdiction will or will not satisfy it ("manifest" cases apart). Policy, as well as the letter and spirit of Article 41 of the Statute, call for a flexible approach, in which all relevant factors are taken into consideration and given their proper weight.²⁵

Another writer has correctly observed that it is still not clear exactly what amounts to a *prima facie* showing of jurisdiction and asks the following pertinent question:

Is it enough that the applicant be able to point to a provision or set of provisions in a treaty or declaration indicating a formal possibility of jurisdiction; or is the Court concerned also with a real possibility of jurisdiction, that is, is the degree of legal controversy over the applicability of the jurisdictional provisions relevant?²⁶

One thing, however, seems clear. Judges have not found it possible to give their full benediction to the idea that a tribunal or a court is entitled to indicate interim measures before the forum has settled the question of its jurisdiction over the merits of the case. This is supported by the record in the recent 1976 order of the International Court of Justice in the *Aegean Sea Continental Shelf Case*²⁷ to be discussed more extensively in the next section. For the present argument, it need merely be observed that the Court's order rejecting Greece's application for interim measures was by a vote of twelve to one.²⁸ Of the twelve judges voting with the majority, eight delivered separate opinions.²⁹ Of the eight separate opinions, six

24. Mendelson, *supra* note 4, at 271. Under the a priori test, the forum could consider it sufficient if the applicant invokes a bilateral treaty or a *compromis* indicating patent jurisdiction. Since under this test the forum may not even find it necessary to determine whether or not the treaties or the *compromis* cited are still valid as between the parties, it is arguably a less formidable test. See, e.g., Anglo-American Oil Co. Case, [1951] I.C.J. 89, 92-93 (Interim Protection).

25. Mendelson, *supra* note 4, at 322.

26. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 259, 265 (1974).

27. [1976] I.C.J. 3 (Interim Protection). For a more extensive discussion, see notes 64-86 *infra* and accompanying text.

28. [1976] I.C.J. at 14.

29. *Id.* at 15-16 (Jiménez de Aréchaga), 17-18 (Nagendra Singh), 19-20 (Lachs), 21-22 (Morozov), 23 (Ruda), 24-26 (Mosler), 27-30 (Elias), 31-34 (Tarazi).

were delivered by judges who stressed the importance of the determination of the Court's substantive jurisdiction before it could indicate interim measures.³⁰

B. The Concept of Irreparable Harm and the Question of Balancing of Convenience—the Cyanamid Case

Both in the context of interlocutory injunctions and of interim measures proceedings the question of the showing of irreparable harm is a major consideration. Article 41 of the Statute of the Court, as we have seen, states that the provisional measures are for preserving "the respective rights of either party" to the dispute.³¹ Additionally, the preservation of rights seems to be tied to the showing of irreparable harm by the plaintiff, as will be demonstrated shortly in the ensuing discussion.

The test set out at the beginning of this Article, which described both the object of and the rule on interlocutory injunctions, referred to the concept of "balance of convenience." The test also includes the requirement that the plaintiff undertake in advance to reimburse the defendant in case the injunction granted turns out, on the merits of the case, to have been legally unwarranted. A further examination of this issue discloses that the possibility of declaring a restraint to be legally unwarranted, necessitating compensation to the defendant, is related to the concept of the "balance of convenience" and is ultimately tied to the question of irreparable harm. One writer has summarized Lord Diplock's approach to the "balance of convenience" in *Cyanamid* as follows:

First, if the plaintiff would be adequately compensated by damages which the defendant could be expected to meet, an injunction should be refused. Second, if the defendant would likewise be compensated by plaintiff's undertaking, an injunction should be granted. Only if there is likely to be uncompensable loss on both sides need the respective interests of the parties be weighed and the most important factor will be the desirability of preserving the *status quo* as it was before the defendant's alleged wrong.³²

The facts of the *Cyanamid* case may be summarized briefly.³³

30. The six judges were Jiménez de Aréchaga, Nagendra Singh, Morozov, Ruda, Mosler, and Tarazi.

31. I.C.J. STAT. art. 41. See note 6 *supra* and accompanying text.

32. Wallington, *supra* note 2, at 84. See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, 408-09, [1975] 1 All E.R. 504, 510-11.

33. [1975] A.C. at 397-98, [1975] 1 All E.R. at 506-07.

In 1966, the British subsidiary of American Cyanamid Co. (Cyanamid) registered a patent in the United Kingdom for the use, as absorbable surgical sutures, of filaments made of a particular kind of chain polymer called a polyhydroxyacetic ester (PHAE). This product became so popular that Cyanamid captured 15 percent of the market. A rival company, Ethicon Ltd., which had been the main supplier of catgut sutures in the United Kingdom, then introduced its own artificial suture, XLG. Consequently, Cyanamid, alleging infringement of its patent, brought an action against Ethicon for an injunction to restrain the marketing of XLG by Ethicon. Patent Judge Graham held that Cyanamid had made out a strong *prima facie* case against Ethicon and granted an interlocutory injunction in favor of Cyanamid.³⁴ On appeal, the Court of Appeals (Russell, Stephenson, L.J.J., and Forster, J.) reversed on the grounds that the evidence did not indicate that Cyanamid had made out a *prima facie* case.³⁵ The House of Lords then allowed the subsequent appeal by Cyanamid and reinstated the injunction originally granted by Judge Graham.³⁶

In its decision upholding the injunction, the House of Lords rejected its *prima facie* test and set forth the new rule which now requires that a plaintiff need only show that "the claim is not frivolous or vexatious, in other words that there is a serious question to be tried."³⁷

The House of Lords found that a serious question to be tried existed: the evidence indicated that there was much unquantifiable damage which Cyanamid would suffer if an injunction were refused.³⁸ Moreover, it was the view of their Lordships that, if Ethicon's product, XLG, were allowed to continue on the market, Cy-

34. *Id.* at 404, [1975] 1 All E.R. at 507.

35. *Id.*

36. *Id.* at 409-10, [1975] 1 All E.R. at 511-12.

37. *Id.* at 407, [1975] 1 All E.R. at 510. Referring to the *prima facie* rule which had governed until that time, Lord Diplock said:

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a *prima facie* case," or "a strong *prima facie* case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

Id. Oddly, their Lordships did not discuss their holding in *Stratford v. Lindley*, [1965] A.C. 269, [1964] 3 All E.R. 102, which set forth the *prima facie* test.

38. [1975] A.C. at 409-10, [1975] 1 All E.R. at 511-12.

anamid might find it difficult to enforce a permanent injunction, since the damaging effect on its good will would induce doctors to abandon the Cyanamid product, PHAE, which they had found useful.³⁹ Ethicon would not suffer greatly; since XLG was not yet on the market at the time of the suit, no workers would be laid off and no factories would have to be closed as a result of an injunction.⁴⁰

Announcing this new rule in which Lords Cross, Salmon, and Edmund-Davies, and Viscount Dilhorne concurred, Lord Diplock stated specifically that the decision was applicable to all cases of interlocutory injunctions.⁴¹ Thus, *Cyanamid* is now the law in the United Kingdom. However, as will be discussed shortly,⁴² subsequent British case law indicates that the application of the *Cyanamid* test has already presented some difficulties.

Apart from the importance of preserving the status quo, it is extremely doubtful that the rule of the "balance of convenience," as emphasized in *Cyanamid*, would be appropriate in international proceedings for interim measures. The rule of finding "uncompensable loss to both sides," and exclusive consideration of plaintiff's and defendant's ability to pay monetary damages to each other, would bring undesirable results in proceedings for interim measures. The relevant concept of irreparable damage and its proper application in the context of interim measures ought to be reexamined and reevaluated. But before embarking on that, it is appropriate to show the effect of the *Cyanamid* rule in the subsequent English case law. The three cases briefly mentioned below will illustrate the difficulties which have been encountered in the application of the rule.

The *Cyanamid* rule was shortly thereafter considered in *Fellowes v. Fisher*,⁴³ which involved an injunction to restrain a breach of a restrictive covenant between solicitors and their former conveyancing clerk who had covenanted not to take employment in any legal capacity within a fixed geographical area for five years after leaving the solicitors' office. All the members of the Court of Appeal: Browne, L.J., Sir John Pennycuick, and Lord Denning, M.R. were convinced in varying degrees that the restrictive cove-

39. *Id.* at 410, [1975] 1 All E.R. at 512.

40. *Id.* at 409, [1975] 1 All E.R. at 511.

41. *Id.* at 406, [1975] 1 All E.R. at 508-09.

42. See notes 43-63 *infra* and accompanying text. See also Wallington, *supra* note 2, at 83-93; Gore, *Interlocutory Injunctions—A Final Judgment?*, 38 MODERN L. REV. 672 (1975).

43. [1976] Q.B. 122, [1975] 2 All E.R. 829 (C.A.).

nant in question was unenforceable.⁴⁴ Before *Cyanamid*, the case could have been dismissed on the merits because the plaintiff would have had difficulties in making out a prima facie case. However, the allegation that the defendant had broken the covenant presented “a serious question to be tried,” so that their Lordships could apply the *Cyanamid* rule.⁴⁵

The court, however, denied the injunction unanimously, but for different reasons. Browne, L.J., and Sir John Pennycuick, both applying the *Cyanamid* rule, based their denial of an injunction on the lack of evidence as to whether the plaintiff would suffer any irreparable harm if the injunction were refused.⁴⁶ Lord Denning, on the other hand, distinguished *Cyanamid* from *Fellowes* and proceeded to apply the old rule, maintaining that, since the plaintiff had not made out a prima facie case, no injunction could be granted.⁴⁷

The *Cyanamid* rule was again scrutinized in *Hubbard v. Pitt*,⁴⁸ which involved an action by a company to restrain people who were picketing the company’s offices while carrying allegedly defamatory placards and leaflets. Forbes, J., had granted an injunction based upon the old rule, holding that a prima facie case of nuisance had been made out by the plaintiff.⁴⁹ On appeal, the injunction was upheld.⁵⁰ The Court of Appeals, Stamp and Orr, L.J.J., relying on the evidence in the affidavit that the plaintiff’s offices had been obstructed and its customers molested, applied the *Cyanamid* rule and found that there was “a serious question to be tried.”⁵¹ Lord Denning, as in the *Fellowes* case, dissented and once again distinguished *Hubbard* from *Cyanamid* based on the “special factor” of

44. See *id.* at 128-29, [1975] 2 All E.R. at 833 (Lord Denning); *id.* at 139-40, [1975] 2 All E.R. at 842 (Browne, L.J.); *id.* at 142, [1975] 2 All E.R. at 844 (Sir John Pennycuick).

45. *Id.* at 130, [1975] 2 All E.R. at 833.

46. See *id.* at 139, [1975] 2 All E.R. at 842 (Browne, L.J.), and *id.* at 141, [1975] 2 All E.R. at 844 (Sir John Pennycuick).

47. *Id.* at 133-34, [1975] 2 All E.R. at 836-38. Lord Denning felt that if either of two situations were present, the old rule of *Stratford v. Lindley* should be used. These two situations were: (1) if the individual case contained a “special factor” such as a labor strike, breach of covenant, or covenants in restraint of trade; or (2) if the case were one of “uncompensatable advantages” where damages for either side would not be an adequate remedy. Lord Denning found both a special factor, a covenant in restraint of trade, and that damages would not be sufficient. *Id.*

48. [1976] Q.B. 142, [1975] 3 All E.R. 1 (C.A.).

49. *Id.* at 160, [1975] 3 All E.R. at 6.

50. *Id.* at 142, [1975] 3 All E.R. at 1.

51. *Id.* at 188-90, [1975] 3 All E.R. at 19-20.

the free speech issue and applied the old rule.⁵² He expressly denied that a prima facie case had been made out by the plaintiff.⁵³ Accordingly, no injunction could be granted.

The *Cyanamid* rule was further considered in *Bryanston Finance Ltd. v. de Vries (No. 2)*,⁵⁴ in which the plaintiff, Bryanston Finance Company, sought an injunction against one of its shareholders, Juda de Vries, to restrain him from presenting a petition to wind up the company. It was the company's view that the presentation of such winding up proceedings by Mr. de Vries amounted to abuse of process. A preliminary injunction was granted by Megarry, J.⁵⁵ Later, when de Vries filed a motion to discharge the injunction claiming changed circumstances, Oliver, J., dismissed the motion.⁵⁶ In a second action instituted by the company to restrain Mr. de Vries on the basis of further affidavits, Oliver, J., granted an ex parte injunction, reasoning, within the meaning of *Cyanamid*, that a triable issue existed—namely that, if the action was brought to trial, the company might win.⁵⁷ Mr. de Vries appealed both the dismissal of his motion by Oliver, J., in the first action and the ex parte injunction granted by the same judge in the second action.

The Court of Appeal, Buckley, L.J., Stephenson, L.J., and Sir John Pennycuik, discharged the injunction with respect to the first action and allowed the appeal in the second action.⁵⁸ In an opinion in which the other members of the Court of Appeal concurred, Buckley, L.J., relied on the old rule and distinguished *Cyanamid*.⁵⁹ The court took the view that the plaintiff company had "not yet established prima facie that it [had] the legal right which it [was] attempting to protect pending the trial."⁶⁰ According to the opinion, there was no sufficient evidence "to establish prima facie that the plaintiff [would] succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process."⁶¹

52. *Id.* at 178, [1975] 3 All E.R. at 10. Judge Stamp took issue with Lord Denning's opinion. He felt that "special factors" were only to be used in considering the "balance of convenience"; they did not justify a retreat from the rule in *Cyanamid*. *Id.* at 185, [1975] 3 All E.R. at 16.

53. *Id.* at 178, [1975] 3 All E.R. at 10.

54. [1976] Ch. 63, [1976] 1 All E.R. 25 (C.A.).

55. *Id.* at 70, [1976] 1 All E.R. at 29.

56. *Id.* at 71, [1976] 1 All E.R. at 30.

57. *Id.* at 71-72, [1976] 1 All E.R. at 30-31.

58. *Id.* at 78, [1976] 1 All E.R. at 36.

59. *Id.* at 76, [1976] 1 All E.R. at 34.

60. *Id.* at 78, [1976] 1 All E.R. at 36.

61. *Id.*

Thus, instead of applying the “triable issue” rule of *Cyanamid*, their Lordships relied upon the “prima facie” rule which allowed them to weigh the strength of the parties’ arguments and defenses. But the court also observed that the second action, being in the nature of preventing the commencement of proceedings *in limine*, was in itself a “special factor” which needed to be considered as was observed by Lord Diplock in *Cyanamid*.⁶² This special factor militated against the granting of an injunction in the case.⁶³

The above three cases demonstrate that a reconsideration of the new rule is certainly going to continue in subsequent English cases with a view to ascertaining its application in commercial cases, as opposed to those involving intangibles such as civil liberties, and cases containing “special factors.”

C. *The Test in the Aegean Sea Continental Shelf Case: Reliance upon the Concept of Irreparable Harm*

In the recent *Aegean Sea Continental Shelf Case*,⁶⁴ the International Court of Justice applied the concept of “irreparable damage.” This reflects the latest position of the Court with respect to the role of this concept in proceedings for interim measures. In order to establish a proper ground for analysis in this regard, it is necessary to present at length the relevant extracts of the Court’s opinion.

In a letter dated August 10, 1976, the government of Greece made an application to the Court submitting its dispute with Turkey over the Aegean continental shelf. In submitting the dispute to the Court, the Greek government cited, as the bases of jurisdiction, Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928,⁶⁵ read together with Articles 36(1) and 37 of the Statute of the Court,⁶⁶ and also a joint communiqué issued

62. *Id.*

63. *Id.*

64. [1976] I.C.J. 3 (Interim Protection).

65. General Act for the Pacific Settlement of International Disputes, done Sept. 26, 1928, art. 17, 93 L.N.T.S. 343.

66. I.C.J. STAT. art. 36, para. 1, 37. Article 36 provides in part:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 37 provides that:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

at Brussels on May 31, 1975. The dispute concerned the delimitation of the continental shelf appertaining to Greece and Turkey in the Aegean Sea, and also concerned the respective legal rights of both Greece and Turkey to explore and exploit the Aegean continental shelf. Relying upon Article 33 of the General Act for the Pacific Settlement of International Disputes of 1928,⁶⁷ on Article 41 of the Statute of the Court,⁶⁸ and on Article 66 of the Rules of the Court,⁶⁹ the Greek government, in a letter also dated August 10, 1976, asked the Court to indicate interim measures of protection, pending the final decision in the case. In its application for interim measures, Greece alleged specifically that the granting by Turkey in 1973 of permits to the Turkish State Petroleum Company (TPAO) for exploration for petroleum covered an area which encroached upon the continental shelf claimed by Greece as appertaining to certain Greek islands in the Aegean Sea. At the time Greece submitted the dispute to the Court, the Turkish service research vessel, *MTA Sismik I*, was observed engaging in seismic exploration of areas of the continental shelf of the Aegean Sea claimed by Greece as appertaining to it. According to the Turkish government, the research vessel was expected to operate in the Turkish territorial waters and upon the high seas. The vessel was not to be accompanied by warships, although necessary measures were to be taken by Turkey to detect immediately any attack against the research vessel and to respond instantly in case of such attack. The government of Greece, however, contended that the activities of the Turkish research vessel constituted infringements of the exclusive sovereign rights of Greece to explore and exploit the continental shelf appertaining to Greece.⁷⁰ These facts led Greece to seek interim measures of protection:

“Greece . . . requests the Court to direct that the Governments of both Greece and Turkey shall:

(1) unless with the consent of each other and pending the final judgment of the Court in this case, refrain from all exploration activity or any scientific research, with respect to the continental shelf areas within which Turkey has granted such licences or permits or adjacent to the Islands, or otherwise in dispute in the present case;

67. General Act for the Pacific Settlement of International Disputes, done Sept. 26, 1928, art. 33, 93 L.N.T.S. 343.

68. I.C.J. STAT. art. 41. Article 41 is set out at text accompanying note 6 *supra*.

69. I.C.J. R. 66.

70. [1976] I.C.J. at 7, para. 16.

(2) refrain from taking further military measures or actions which may endanger their peaceful relations."⁷¹

The Turkish government, in its August 25, 1976 communication to the Court, asserted that the Court lacked jurisdiction over the case.⁷² The Turkish government also contended that the interim measures requested by Greece were not required on the grounds, *inter alia*, that the exploration activities by Turkey could not be regarded as involving any prejudice to the existence of any rights of Greece over the disputed areas. Moreover, it was the view of the Turkish government that, even if it were admitted that Turkey's explorations did cause harm to the rights of Greece, there was no reason why such prejudice could not be compensated or why the explorations could affect the execution of any judgment which the Court might ultimately render. Referring to the request that both parties should "refrain from taking further military measures or actions which might endanger their relations," the Turkish government stated that it had no intention of taking the initiative in the use of force.⁷³ Accordingly, the Turkish government requested the Court to dismiss Greece's application for interim measures and appointed no agent to represent it.⁷⁴

Dealing first with the question of jurisdiction raised by Turkey, the Court found that at that stage it was not necessary to reach a final decision as to whether or not the 1928 General Act was applicable as between Greece and Turkey.⁷⁵ The Court accordingly examined its jurisdiction under Article 41 of its Statute and found it had jurisdiction under that Article. The relevant portions of the Court's decision are as follows:

22. Whereas the power of the Court to indicate interim measures under Article 41 of the Statute has as its object to preserve the respective rights of either party pending the decision of the Court; and whereas, in the present case, this power relates essentially to the preservation of the rights which are invoked in Greece's Application;

23. Whereas the several claims formulated in the submissions of the Greek Government in the Application are either different aspects or different incidents of its general claim to exclusive sover-

71. *Id.* at 4-5, para. 2.

72. *Id.* at 5, para. 8.

73. *Id.* at 8, para. 18.

74. *Id.* at 5, para. 8.

75. *Id.* at 8, para. 21.

eign rights of exploration and exploitation in certain areas of the continental shelf of the Aegean Sea; and whereas, therefore, it is essentially the preservation of those alleged rights of exploration and exploitation which concerns the Court in examining the present request for the indication of interim measures of protection;

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25. Whereas the power of the Court to indicate interim measures under Article 41 of the Statute presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court;

26. Whereas, in this regard, the Greek Government contends that the concessions granted and the continued seismic exploration undertaken by Turkey in the areas of the continental shelf which are in dispute threaten to prejudice the exclusive sovereign rights claimed by Greece in respect of those areas; and whereas it further contends that Turkey's seismic exploration threatens in particular to destroy the exclusivity of the rights claimed by Greece to acquire information concerning the availability, extent and location of the natural resources of the areas; that the acquisition and dissemination of such information without the consent of Greece prejudices its negotiating position in relation to potential purchasers of exploitation licences, thereby permanently impairing its sovereign rights with respect to the formulation of its national energy policy;

27. Whereas, on the basis of the foregoing considerations, the Greek Government maintains that the continued Turkish seismic exploration in the disputed areas constitutes a threat of irreparable prejudice to the rights claimed by Greece in its Application; that it threatens to prevent the full restoration of those rights to Greece in the event of its claims being upheld by the Court; and that the Court's power to indicate interim measures ought to be exercised when "the parties' rights might not be restored in full measure in the event of a judgment if that judgment is anticipated";

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30. Whereas, according to the information before the Court, the seismic exploration undertaken by Turkey, of which Greece complains, is carried out by a vessel traversing the surface of the high seas and causing small explosions to occur at intervals under water; whereas the purpose of these explosions is to send sound waves through the seabed so as to obtain information regarding the geophysical structure of the earth beneath it; whereas no complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources; whereas the continued seismic exploration activities under-

taken by Turkey are all of the transitory character just described, and do not involve the establishment of installations on or above the seabed of the continental shelf; and whereas no suggestion has been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute;

31. Whereas seismic exploration of the natural resources of the continental shelf without the consent of the coastal State might, no doubt, raise a question of infringement of the latter's exclusive right of exploration; whereas, accordingly, in the event that the Court should uphold Greece's claims on the merits, Turkey's activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece;

32. Whereas, on the other hand, the possibility of such a prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection; whereas, under the express terms of that Article, this power is conferred on the Court only if it considers that circumstances so require in order to preserve the respective rights of either party; and whereas this condition, as already noted, presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings;

33. Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation;

. . . .
THE COURT

Finds, by 12 votes to 1, that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate interim measures of protection;⁷⁶

76. *Id.* at 9-11, 14, paras. 22-23, 25-27, 30-33. The Court was constituted as follows: President Jiménez de Aréchaga; Vice-President Nagendra Singh; Judges Forster, Gros, Lachs, Dillard, Morozov, Sir Humphrey Waldock, Ruda, Mosler, Elias, Tarazi; Judge ad hoc Stassinopoulos.

Of the twelve judges voting with the majority, eight of them delivered separate opinions. Of the eight who delivered such opinions, six of them (Judges Jiménez de Aréchaga, Nagendra Singh, Morozov, Ruda, Mosler and Tarazi) considered the question of the Court's jurisdiction. They observed generally that had the Court been in a position to indicate interim measures, the Court would have been compelled to determine first whether or not it had jurisdiction over the merit of the case.⁷⁷

The test applied by the Court in rejecting Greece's request for interim measures was based on the concept of "irreparable harm." The Court found that Greece failed to show how the alleged activities of the Turkish research vessel would result in "irreparable harm" to Greece.⁷⁸ The Court emphasized that "the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of the areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means."⁷⁹ By taking this position, the Court seemed to have agreed with Turkey that the alleged injury was compensable, and therefore the request by Greece for interim measures should be dismissed.⁸⁰ The Court, adopting Turkey's contention, took a similar position to the holding in *Cyanamid*, where the rule for interlocutory injunctions has been summarized by Wallington: "if the plaintiff would be adequately compensated by damages which the defendant would be expected to meet, an injunction should be refused."⁸¹

The Court's reliance upon a showing of damage which cannot

77. See note 29 *supra*. The *Aegean Sea Continental Shelf Case* is a unique one in that Greece instituted proceedings in the Court as well as before the Security Council, thus seeking both legal and political relief. In its resolution of August 25, 1976, the Security Council urged both Greece and Turkey to "do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated . . ." 31 U.N. SCOR, 1953rd meeting para. 2 (1976). The Security Council also called upon the two states "to resume direct negotiations over their differences . . ." *Id.* para. 3.

In its order of September 11, 1976, in which it refused to indicate interim measures, the Court did not address itself to the issue of the legal consequences of the Security Council resolution. Judge Lachs, in his separate opinion, took issue with the Court on this point. [1976] I.C.J. at 19-20. On the other hand, Judge Elias in his separate opinion took issue with the Court's heavier reliance upon the principle that the applicant must show "irreparable harm." *Id.* at 27-30. For a more extensive discussion of Judge Elias's opinion, see notes 82-86 *infra* and accompanying text.

78. [1976] I.C.J. at 11, para. 33.

79. *Id.*

80. See note 73 *supra* and accompanying text.

81. Wallington, *supra* note 2, at 84.

be compensated either monetarily or in kind as a basis for indicating or refusing to indicate interim measures of protection was found to be an unacceptable test by Judge Elias, who filed a separate opinion relevant to our analysis.⁸² Judge Elias observed that the Court failed to maintain a sufficient balance between two elements whose proper consideration necessarily flows from the requirements of Article 41 of the Statute of the Court which confers jurisdiction and power over the Court to indicate interim measures "if circumstances require." The two elements are: (1) the preservation of the respective rights of the parties to the dispute, and (2) the prevention of possible aggravation of the situation or expansion of the dispute.⁸³ In the opinion of Judge Elias, the Court failed to maintain a sufficient balance between these two elements because it appeared to lean more towards preservation of rights and less towards prevention of aggravation of the situation.⁸⁴ The better standard to achieve a proper balance would be one requiring that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."⁸⁵ Judge Elias concluded his opinion by making the crucial point which is quoted with approval:

Finally, the apparent acceptance by the majority of the Court that, once any damage resulting from the exploration and/or exploitation by Turkey is capable of being compensated for in cash or kind, Greece cannot be said to have suffered irreparable damage does not seem to me to be a valid one. It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury by itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the action itself does not seem to matter. This is a principle upon which contemporary international law should frown: might should no longer be right in today's inter-State relations.⁸⁶

The above view illustrates clearly why the domestic rule governing the granting of injunctive relief, which relies heavily upon the

82. [1976] I.C.J. at 27-30.

83. *Id.* at 27.

84. *Id.*

85. *Id.* at 28-29, quoting from the standard laid down by the Permanent Court of International Justice in *The Electricity Company of Sofia and Bulgaria*, [1939] P.C.I.J., ser. A/B, No. 79, at 19.

86. [1976] I.C.J. at 30.

plaintiff's and defendant's ability to make monetary reparations, is not suitable for international proceedings for interim measures. So long as this rule, which tends to equate "might" with "right," is applied in domestic proceedings, there is no reason why, in similar situations involving international relations, the argument against this rule should not be given serious consideration. The test reflected in the *Aegean Sea Continental Shelf Case* ought to be viewed in the future with this point in mind.

It should be emphasized, therefore, that the recognized need to preserve the status quo through the indication of interim measures ought not rely exclusively on the showing of irreparable harm. As one writer has also rightly observed, the remedy ought to be made available "in the event of other equally compelling reasons being found to exist, [but] where irreparable harm is not conclusively established."⁸⁷ Such "equally compelling reasons" may be the desire to prevent the dispute from being aggravated or extended, as has been argued above.

III. THE PROBLEM CONCERNING THE EFFECTIVENESS OF THE ORDERS INDICATING INTERIM MEASURES

Another critical difference between proceedings for interim measures under international law, and proceedings for interlocutory injunctions under domestic law, is the legal effect of the remedies granted under the two proceedings. A decision of a domestic court or tribunal granting an interlocutory injunction is binding upon the parties in the case. The legal effect of such a remedy, when warranted by the circumstances and therefore not challengeable on that ground, is not a matter of controversy. However, the same is not true with respect to interim measures indicated by an international court. As discussed briefly below, whether or not properly prescribed interim measures constitute a binding decision upon parties to the dispute is still a matter of great controversy.

A. *The View that Orders Indicating Interim Measures are Binding*

Hambro has argued with some force that the provisional measures indicated by the International Court of Justice, for example, are binding although not enforceable by the Security Council

87. Goldie, *The Nuclear Test Cases: Restraints on Environmental Harm*, 5 J. MAR. L. & COM. 491, 497 (1974).

within the meaning of the applicable United Nations Charter provisions.⁸⁸ This argument is first predicated on the author's claim that it would be an affront to the dignity of the Court, as the principal judicial organ of the United Nations, to render decisions in contentious cases which the parties are free to ignore at will.⁸⁹ The idea that the Court is expected to render decisions in contentious cases that are not binding, according to Hambro, could be entertained only if there were no other provisions of the United Nations Charter whose interpretation could be relied upon to reach the opposite conclusion.⁹⁰ Hambro then finds that under Article 94 of the United Nations Charter, there is a possible interpretation which would render interim measures ordered by the International Court of Justice legally binding. Article 94 of the United Nations Charter states:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.⁹¹

Ambassador Hambro then makes an ingenious argument based upon his interpretation of the term "decision" used in Paragraph 1 and the term "judgment" used in Paragraph 2 of Article 94 of the United Nations Charter. His argument is as follows:

Here the first paragraph of Article 94 may be of some help. It is there stipulated that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." It is admitted, of course, that a literal interpretation of a treaty is not very satisfactory. But in this case two literal interpretations are confronted. The one says that interim measures cannot be binding because the second paragraph of our article only refers to 'judgments.' Such an *e contrario* interpretation is not wholly convincing. It is more positive to say that the first paragraph imposes upon all members an obligation to comply with the 'decision'—any decision—of the Court, and that the second

88. See Hambro, *supra* note 18, at 170-71. See also the view of the United Kingdom in the Anglo-Iranian Oil Co. Case, [1951] I.C.J. 89, 92-93.

89. Hambro, *supra* note 18, at 165.

90. *Id.* at 166.

91. U.N. CHARTER art. 94.

paragraph lays down the rule that a failure to comply with the most important of the decisions, namely a 'judgment,' should set in motion the most important part of the machinery of the Organisation, namely the action of the Security Council, eventually developing into enforcement measures. It is, therefore, submitted that Article 94 certainly does not indicate that the provisional measures are not of a binding character; and that it can be stressed to mean that the provisional measures are binding although not enforceable by the Council.⁹²

The basic conclusion in the above text, with respect to the subject of this discussion, is that interim measures are binding, although not enforceable, by the Security Council. This conclusion is arrived at by drawing a clear distinction between the term "decision" and the term "judgment," the latter being considered more important than the former.

It is, however, interesting to observe that, although Ambassador Hambro did not refer to it, Article 13, Paragraph 4 of the Covenant of the League of Nations, which is comparable to Article 94 of the United Nations Charter, makes no such distinction. Article 13 of the Covenant reads as follows:

4. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.⁹³

The clue offered in the above text prevents me from making much of Ambassador Hambro's argument that the provisional measures indicated by the International Court of Justice are binding in law although they cannot be enforced by the Security Council. At best, in my view, the question is still wide open, as further shown below.

B. The View that Orders Indicating Interim Measures of Protection are not Binding

In a discussion which includes a legislative history of Article 41 of the Statute of the PCIJ, it was once categorically observed that

92. Hambro, *supra* note 18, at 168.

93. LEAGUE OF NATIONS COVENANT art. 13, para. 4.

“[t]here is no question of a binding order.”⁹⁴ This is reinforced by the fact that, according to Article 59 of the Statute of the Court, only “decisions” of the Court have “binding force.”⁹⁵ The view has been concurred in by many writers who have sought to prove that interim measures, which are “orders” and not “decisions,” are not binding. The force of the argument runs as follows: Article 41 of the Statute of the Court⁹⁶ uses terms such as “power to indicate”⁹⁷ and “measures suggested.”⁹⁸ Thus, “the terms ‘indicate’ and ‘suggest’ employed in Article 41 exclude the interpretation that an order for interim measures has any binding force.”⁹⁹ According to this view, the use of these two terms, which are arguably permissive, was a deliberate one establishing that provisional measures merely point out “what the parties must do in order to remain in harmony with what the Court holds to be the law.”¹⁰⁰ As further argued, “[a]n indication does not have the force of *res judicata*. By Rule 66, the Court may at any time revoke or modify its ‘decision’ indicating interim measures of protection; rejection of the request does not preclude a fresh request.”¹⁰¹ The thrust of the argument is that the wording of Article 41 of the Statute of the Court leads to the unmistakable conclusion that interim measures indicated by the Court pursuant thereto are not binding. Thus, their enforceability is still open to question.¹⁰²

94. E. DUMBAULD, *INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES* 168 (1932).

95. I.C.J. STAT. art. 59. Article 59 goes on to provide that the Court's decisions are only binding “between the parties and in respect of that particular case.” *Id.*

96. Article 41 is set out in full at text accompanying note 6 *supra*.

97. I.C.J. STAT. art. 41, para. 1.

98. *Id.* art. 41, para. 2.

99. Goldsworthy, *supra* note 26, at 273-74.

100. E. DUMBAULD, *supra* note 94, at 168-69.

101. Goldsworthy, *supra* note 26, at 274. *See also* E. DUMBAULD, *supra* note 94, at 168.

102. The enforceability of interim measures was first argued in the Security Council when the United Kingdom raised the question of the failure of Iran to comply with the interim measures which the Court indicated upon the request of the United Kingdom in the *Anglo-Iranian Oil Co. Case*. *See* Letter of September 28, 1951, from the United Kingdom to the President of the Security Council, U.N. Doc. S/2357 (1951). The United Kingdom was of the view that “[t]he finding of the Court on interim measures of itself gives rise to international obligations, obligations under the Charter, which it is the right and duty of the Security Council to uphold” Statement of Sir Gladwyn Jebb of the United Kingdom, 6 U.N. SCOR, 559th meeting para. 18 (1951).

Iran took quite the opposite view and maintained, first, that the British application for interim measures was an “abusive use of process” and, second, that the decision of the Court, in granting the British request for interim measures before the Court had established its jurisdiction, was ill-advised and contrary to the Court's Statute. *See* Statement of Mr. Saleh

The view adopted in this Article is, therefore, that it is evidently necessary to state specifically, in an instrument conferring jurisdiction to indicate interim measures upon an international forum, that such measures shall be binding as between the parties to the dispute and in respect of that particular case. Without such a specific provision on the binding nature of interim measures, an instrument conferring jurisdiction will be understood as having left the question open for competing interpretation as is presently the case with respect to Article 41.

IV. CONCLUSIONS

The main purpose of this Article has been to offer a brief analysis of the critical differences between the proceedings for interlocutory injunctions under domestic law and proceedings for interim measures of protection under international law. In this final section of the Article, I will bring into focus once again the critical problems surrounding proceedings for interim measures under international law.

First, on the issue of jurisdiction, I would like to emphasize the fact that, whatever test is applied, the following ought to be the desirable result: provisional measures should not be indicated unless the Court is certain of its competence on the merits of the case.

Second, regarding the substantive rule governing what an applicant should be required to show, the following view seems reasonable: there should not be exclusive reliance upon the showing or the failure to show irreparable or uncompensable harm. Where other compelling circumstances permit, and where no irreparable harm is positively shown, interim measures may be indicated. Thus, the prevention of exacerbation of a dispute *pendente lite* must remain an equally valid consideration as the preservation of the interests of the parties through the concept of irreparable harm.

Third, on the question of the effectiveness of interim measures, the following view commands support: the wording of Article 41 of the Statute of the International Court leaves open the question of

of Iran, 6 U.N. SCOR, 560th meeting paras. 43-47, 56 (1951). The Security Council, refraining from solving the problem as posed by the United Kingdom, merely decided to postpone its decision until the Court had settled its competence, which was challenged by Iran. See 6 U.N. SCOR, Res. & Dec., at 12 (1951). The Court finally declined jurisdiction, and the case did not come back to the Security Council.

the binding effect of the interim measures. The most reasonable interpretations given to that Article support the conclusion that interim measures indicated by the Court are not binding. Accordingly, any international instrument conferring jurisdiction to an international forum, which includes the power to indicate interim measures, must address itself to this issue. If the contracting parties to such treaty or convention intend the interim measures to be binding, they must include a specific provision to that effect in the clause conferring jurisdiction upon the forum in question.

Finally, suggestions that the Court adopt the domestic practice of protecting the defendant's interest by asking the plaintiff to give an undertaking to compensate the defendant, where appropriate, require the most careful scrutiny. It may also be observed that too much emphasis upon monetary compensation in the context of interim measures seems inadvisable. Where, for example, the continued exploitation of the respondent's natural resources by the applicant is the question in dispute, the practice may have the undesirable result of interim measures being indicated merely because the applicant has undertaken to compensate the respondent in a case where the benefits received by the applicant in securing the restraint far outweigh any compensation to the respondent.