II.214. The Importance of Matters of Jurisdiction. Jurisdiction is the link between the general political organization of international society and the functioning of the Court. It is the channel through which the law-applying organ receives its power to decide a case with binding force for the parties to that case. The question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more. When a respondent raises a matter of jurisdiction – the term is taken from Article 36, paragraph 6, of the Statute as will be explained later – it frequently indicates the absence of political agreement that the Court should entertain the case. These are not mere technical issues. This imposes an attitude of caution in everything relating to jurisdiction. When a party challenges the jurisdiction of the Court, the Court faces one of two problems. One is that the type of case before the Court requires it to make at least a prima facie interpretation of the dispute, pending further proceedings on the merits, to see if it comes within the scope of the title of jurisdiction; the second is the need to interpret the compromissory clause in the context of the title of jurisdiction, to see if it covers the dispute. It also occurs that a decision on a matter of jurisdiction can unblock a diplomatic deadlock and open the way to a settlement of the dispute.

From the more general point of view, jurisdictional matters in the Court correspond to the preliminary question of competence and the
related procedural debates encountered in the United Nations political organs. In the Court they differ from similar issues in the political organs in four respects. First, before the Court the parties to the jurisdictional issue stand on a footing of complete procedural equality. That is not so in other organs, where a State which is not a member of the organ has no procedural standing until the preliminary issue is settled at least by the decision to accept the item on the organ’s agenda. Second, the Court’s decision is reached exclusively on the basis of law and in the application of judicial techniques. In other organs the element of political expediency, in the nature of things, is dominant. Third, the Court’s decision on the matter of its jurisdiction, if in the form of a judgment, is final and binding and acquires the force of res judicata, attracting the obligation of compliance.¹ Neither of these consequences will normally follow from a decision on the preliminary question in any other organ. Fourth, the Court has little freedom to decide whether to deal with a case submitted to it. Its function, its raison d’être, is to decide disputes that are submitted to it, and only essential deficiencies or overriding requirements of judicial propriety can lead it to refrain from determining a case – at least to the extent of whether it can entertain it.

The basic approach to all questions of jurisdiction is that in the International Court, the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. The principle actori incumbit probatio has no relevance for the Court’s jurisdiction, which is a question of law to be resolved in the light of the relevant facts. As the Court has said:

That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, “whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ‘ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it’”.²

In connection with matters of jurisdiction there is in fact no peremptory rule regarding the time during the pendency of a case at which such a

² Fisheries Jurisdiction (Spain v Canada) case, [2002] 432, 450 (paras. 37, 38), summarizing the Court’s case law on this topic.