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LA HAYE

YEAR 1991

Public sitting

held on Monday 1 July 1991, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Passage through the Great Belt

Request for the Indication of Provisional Measures

(Finland v. Denmark)

VERBATIM RECORD

ANNEE l991

Audience publique

tenue le lundi 1er juillet 1991, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président,

en l'affaire du Passage par le Grand-Belt

Demande en indication de mesures conservatoires

(Finlande c. Danemark)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Lachs
	Elias
	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
Judges *ad hoc*	Bengt Broms
	Paul Henning Fischer
Registrar	Valencia-Ospina

Présents:

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Lachs
Elias
Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva, Juges
MM. Bengt Broms
Paul Henning Fischer, Juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Finland is represented by:

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as Agent;

Mr. Martti Koskenniemi, Counsellor, Legal Department, Ministry of Foreign Affairs,

as Co-Agent;

Sir Ian Sinclair,

Professor Tullio Treves,

as Counsel;

Mr. Tuula Svinhufvud, Attaché, Legal Department, Ministry of Foreign Affairs,

Mr. Kari Hakapää, Associate Professor, University of Lapland,

Mr. Erkki Kourula, Minister Counsellor, The Permanent Mission of Finland in the United Nations, New York,

Mr. Seppo Silvonen, Marketing Director, Rauma-Repola Offshore,

Mr. Aarne Jutila, Professor, Helsinki University of Technology,

as Advisers.

The Government of Denmark is represented by:

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Mr. Per Magid, Attorney,

H. E. Mr. Per Fergo, Ambassador, Ministry of Foreign Affairs,

as Agents;

Dr. Eduardo Jiménez de Aréchaga,

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Professor of International Law, Queen's College, University of Cambridge,

Mr. N. J. Gimsing, Professor, Technical University of Denmark, Adviser to A/S Storebaeltsforbindelsen,

Mr. Claus Gulmann, Professor, University of Copenhagen,

as Counsel and Advocates:

Le Gouvernement de la Finlande est représenté par :

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comme agent;

M. Martti Koskenniemi, conseiller au département juridique du ministère des affaires étrangères,

comme coagent;

Sir Ian Sinclair,

M. Tullio Treves, professeur,

comme conseils;

M. Tuula Svinhufvud, attaché au département juridique du ministère des affaires étrangères,

M. Kari Hakapää, professeur associé à l'Université de Laponie,

M. Erkki Kourula, ministre-conseiller de la mission permanente de Finlande auprès de l'Organisation des Nations Unies à New York,

M. Seppo Silvonen, directeur de la commercialisation de la société Rauma-Repola Offshore,

M. Aarne Jutila, professeur à l'Université de technologie d'Helsinki,

comme conseillers.

Le Gouvernement du Danemark est représenté par :

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M. Per Magid, avocat,

S. Exc. M. Per Fergo, ambassadeur, ministère des affaires étrangères,

comme agents;

M. Eduardo Jiménez de Aréchaga,

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M. N. J. Gimsing, professeur à l'Université technique du Danemark, conseiller de la société A/S Storebaeltsforbindelsen,

M. Claus Gulmann, professeur à l'Université de Copenhague,

comme conseils et avocats:

Mr. Kurt Lykstoft Larsen, Acting Head of Planning, Ministry of Transport,

Mr. Søren Strange, Head of Section, Danish Energy Agency,

Mr. Leif Sjøgren, Project Manager, A/S Storebaeltsforbindelsen,

Mrs. Lene Rasmussen, Attorney, A/S Storebaeltsforbindelsen,

Mr. Niels Mogensen, Deputy Head of Division, Danish Maritime Authority,

Mr. Henrik Dhal, Attorney,

Mr. J. R. Lilje-Jensen, Head of Secretariat, Ministry of Foreign Affairs,

Mr. Jakob Høyrup, Head of Section, Ministry of Foreign Affairs,

as Advisers;

Mrs. Jeanett Probst Osborn, Ministry of Foreign Affairs,

as Secretary.

M. Kurt Lykstoft Larsen, chef par intérim de la planification au ministère des transports,

M. Søren Strange, chef de section à l'agence danoise pour l'énergie,

M. Leif Sjøgren, directeur de projet de la société A/S Storebaeltsforbindelsen,

Mme Lene Rasmussen, avocat de la société A/S Storebaeltsforbindelsen,

M. Niels Mogensen, chef de division adjoint de l'autorité maritime danoise,

M. Henrik Dahl, avocat,

M. J. R. Lilje-Jensen, chef de secrétariat au ministère des affaires étrangères,

M. Jakob Høyrup, chef de section au ministère des affaires étrangères,

comme conseillers;

Mme Jeanett Probst Osborn, ministère des affaires étrangères,

comme secrétaire.

The PRESIDENT: Please be seated.

The sitting is open.

The Court meets today, pursuant to Article 74 of the Rules of Court, to hear oral argument on a request made by the Republic of Finland for the indication of provisional measures, under Article 41 of the Statute of the Court, in proceedings instituted by Finland against the Kingdom of Denmark in respect of a dispute concerning passage through the strait known as the Great Belt. Judge Elias, for reasons duly explained to me in accordance with Article 23 of the Statute, will be absent during the hearing and during the determination of this Request.

The proceedings to which this request for the indication of interim measures relates were instituted by an Application by Finland in the Registry of the Court on 17 May 1991, referring to a project of the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the Great Belt, one of the straits connecting the Baltic Sea with the Cattegat and Skagerrak and the North Sea. According to the Application, the effect of the implementation of that project would be to close the Baltic for deep draught vessels requiring over 65 metres of clearance above sea level, and this would put an end to Finnish commercial production and export of oil rigs and drill ships requiring more than 65 metres' clearance. Finland claims that the Great Belt is a strait used for international navigation, that there is a right of free passage through it, which extends to drill ships, oil rigs and possible future designs of ship, and that the construction of the fixed traffic connection as at present planned by Denmark would violate Finland's rights to free passage as established in the relevant conventions and in customary international law.

I request the Registrar to read the submissions of Finland as set out in its Application.

The REGISTRAR:

"The Government of Finland asks the Court to adjudge and declare:

(a) that there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;

(b) that this right extends to drill ships, oil rigs and reasonably foreseeable ships;

(c) that the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the right of passage

mentioned in subparagraphs *(a)* and *(b)* above;

(d) that Denmark and Finland should start negotiations, in good faith, on how the right of free passage, as set out in subparagraphs *(a)* to *(c)* above, shall be guaranteed.

Finland reserves its right to modify or to add to the above submissions and in particular its right to claim compensation for any damage or loss arising from the bridge project."

The PRESIDENT: On 23 May 1991, Finland filed in the Registry a request for the indication of provisional measures under Article 41 of the Statute of the Court and Article 73 of the Rules of Court. I request the Registrar to read the statement in that request of the measures which Finland requests the Court to indicate.

The REGISTRAR:

"(1) Denmark should, pending the decision by the Court on the merits of the present case, refrain from continuing or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards; and

(2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings."

The PRESIDENT: On 28 June 1991, Denmark filed in the Registry written observations upon the request for provisional measures, as contemplated in Article 74, paragraph 3, of the Rules of Court. Those observations will be accessible to the public with effect from the opening of these oral proceedings and I now request the Registrar to read the submissions presented by Denmark in its written observations.

The REGISTRAR:

"The Government of Denmark requests the Court

(1) To adjudge and declare that, in the light of the law and the facts outlined above, the Request of Finland for an order of provisional measures be rejected.

(2) In the alternative, and in the event that the Court should grant the Request in whole or part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject

Finland's submissions on the merits.

The PRESIDENT: Since the Court does not include upon the bench a judge of the nationality of either of the Parties, each Party has chosen a judge *ad hoc* to sit in the case. The Government of Finland chose Professor Bengt Henry Gabriel Arne Broms, Professor of International and Constitutional Law in the University of Helsinki, and Judge and Chairman of the First Chamber of the Iran-United States Claims Tribunal. The Government of Denmark chose Dr. Paul Henning Fischer, formerly Permanent Under-Secretary of State for Foreign Affairs of Denmark, Ambassador, and Member of the Permanent Court of Arbitration, who is already sitting as judge ad hoc appointed by Denmark in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*. In accordance with Article 7, paragraph 3, of the Rules of Court, Judge Fischer and Judge Broms take precedence after Members of the Court in that order - the order of seniority of age.

Article 31, paragraph 6 and Article 20 of the Statute require a judge *ad hoc*, before taking up his duties, to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. I therefore invite the two judges ad hoc in this case to make that declaration, the text of which is contained in Article 4 of the Rules of Court. Will all those present please stand whilst those declarations are made.

First Judge Fischer, please.

Judge FISCHER: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT: Judge Broms.

Judge BROMS: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT: Thank you; please be seated.

I place on record the solemn declarations just made by Judge Fischer and by Judge Broms,

and declare them duly installed to sit as judges *ad hoc* in the case concerning *Passage through the Great Belt*.

I note the presence in the Court of the Agents and counsel of the two Parties, and I give the floor to the Agent of Finland, Ambassador Tom Grönberg.

H.E. Mr. GRONBERG: Mr. President, Members of the Court: as you are aware, this is the first time that an agent of Finland has had the occasion to address this Court in a contentious case before it. This is not, of course, due to an absence of interest on Finland's part on the functioning of this body. Quite the contrary, Finland has always supported the Court and stressed its importance as the principal judicial organ of the United Nations. In accordance with the Nordic cultural and political heritage, Finland - as well as Denmark - has traditionally stressed the need to settle international disputes peacefully and in accordance with the rule of law.

Seventy years ago Finland was instrumental in the submission by the Council of the League of Nations of a request for advisory opinion to the predecessor of the present Court. That request related to a matter very different from the present one. As you no doubt recall, the Permanent Court finally decided that giving the requested opinion in the circumstances would have been inappropriate.

The situation in respect of the present case is, of course, entirely different from the circumstances of that early attempt to engage the Court in what was in essence a bilateral dispute. It is a paradox observed by sociologists of law that the stronger the consensus which exists in society, the more recourse is had to litigation in the settlement of disputes over rights. The paradox is, of course, only apparent. The more there is agreement about the basics of social life, the more confidence there is on the legitimacy of courts and the judiciary in general.

Finland and Denmark share a common Nordic background in which the belief in the rule of law is an essential element. Whatever differences of view there might exist on the substance of the present case between the two countries, there should be no disagreement about the appropriateness of using this body in order to put the dispute behind us. Whatever arguments will be put to the Court on the merits of this case, it seems manifestly the case that both Parties have endowed the Court with jurisdiction through their declarations made in the case of Finland on 25 June 1958 and in the case of

Denmark on 10 December 1956. In this way, our common adherence to the principles of the *Rechtstaat* and our wish to apply those principles also in our international relations have created the necessary and sufficient conditions for our appearance here today.

Mr. President, Members of the Court, let me at this point introduce my colleagues in the Finnish delegation. My Co-Agent, Dr. Martti Koskenniemi; our counsel and advocates Sir Ian Sinclair, Professor Tullio Treves, advisers Professor Aarne Jutila from the Helsinki University of Technology, Associate Professor Kari Hakapää from the University of Lapland, Marketing Director Seppo Silvonen from the Finnish company Rauma-Repola Offshore; attaché Tuula Svinhufvud, Ministry for Foreign Affairs. Later this week, we shall be joined by Minister Counsellor Dr. Erkki Kourula from our Permanent Mission in the United Nations.

Mr. President, Members of the Court, in my opening statement on behalf of Finland I intend to set down the general context of the present dispute between Finland and Denmark. To do so, I shall first describe the rights which are the subject of the Finnish Application and, in accordance with Article 41, paragraph 1, of the Court's Statute, also the present request for provisional measures. I shall then make a brief overview of the attempts to settle the matter by negotiations between our two countries and of the conflicting legal points of view which have appeared during those attempts. Finally, I shall say something about the formulation of the Finnish submissions and the request for provisional measures, particularly in light of the interests which Finland seeks to protect by this legal action.

After my statement, I shall ask the floor to be given to our counsel, Sir Ian Sinclair, who will present the legal basis of the Finnish request for provisional measures, particularly in light of the jurisprudence of this Court. A second statement will deal with the factual aspects of the request and will be presented by our Co-Agent, Dr. Martti Koskenniemi.

I come now to my first point, the legal context of the case.

The substantive contentions of Finland will, of course, be the main subject of the later phases of this case. In light of the need to show a correspondence between the rights sought to be preserved and the rights at issue in the main proceedings, as required by the jurisprudence of this Court, it is

necessary - as well as useful - to say something here about the rights on which Finland bases its case.

Finland claims that there is a right of free passage through the Danish strait of the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards. This is our main contention. The right of free passage in the Great Belt is, I believe, something on which Finland and Denmark agree.

Throughout the past decades Denmark has consistently maintained the position that the Great Belt strait - which is one of the three Danish straits - is an "international strait" or a "strait used for international navigation" within the meaning of this Court's Judgment in the *Corfu Channel* case.

I need not detain you long to argue that there is a special regime of navigation which exists in international straits. In the case I just mentioned, the Court itself affirmed that there is a customary right of passage of foreign ships through international straits. This position was then adopted by the first UN Conference on the Law of the Sea which met in Geneva in 1958. As a result, we now have article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone which provides that:

> "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

The Geneva Convention adopted the conception of "innocent passage" through international straits. It may be noted that that Convention was ratified by Denmark on 26 September 1968 and by Finland on 16 February 1965.

The third UN Conference on the Law of the Sea, as is well-known, further strengthened this regime by adopting the notion of "transit passage", written into Articles 37-44 of the 1982 UN Convention on the Law of the Sea. Though the Convention is not yet in force, a good case can be made that this notion has already become a part of customary international law. Let me also note that both Denmark and Finland signed the UN Convention on 10 December 1982.

The Danish straits, however, are also covered by the special regime established by the Treaty of Copenhagen of 14 March 1857 for the Redemption of the Sound Dues. In that Treaty, 16 parties,

among them of course Denmark, agreed *inter alia* that:

> "No vessel shall henceforth, under any pretext whatsoever, be subjected, in its passage of the Sound or Belts, to any detention or hindrance." (Article I, paragraph 1, original French, translation of the Treaty in Churchill-Nordqvist, *New Directions in the Law of the Sea*, Vol. IV (1975), pp. 320-4.)

I shall not dwell now more on the differences or overlaps between these various sources of the law regarding the conditions of passage in the Danish straits and in the Great Belt in particular. Suffice it to note that there is a right of free, unhampered passage which applies in the Great Belt and that this right has not been contested by the Danish Government.

For Finland, the right of free passage in the Danish straits is of particular importance because of Finland's geographical location. Finland's coastline extends only in the Baltic. The Danish straits are the only available natural passage-ways between Finnish ports and world oceans. My Co-Agent will give further details on the exceptional dependence of Finland on the conditions of passage in the Danish straits. Let me just note that about 40 per cent of our foreign trade takes place through goods transports utilizing the Danish straits.

As I observed, Denmark has consistently maintained the view that the right of free passage applies in the Danish straits. Thus, for example, in the Danish Note Verbal of 30 June 1987, in which foreign missions in Copenhagen were informed about the Danish plans to construct a fixed link over the Great Belt, it was specifically observed that, in case a bridge solution is chosen:

> "the erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past".

However, in October 1989 it became apparent that the Danish Government had indeed chosen the bridge option and had decided that the main channel of the Great Belt strait - the East Channel - will be closed by a suspension bridge which will be erected in the height of 65 metres.

Mr. President, Members of the Court, Finland's substantive contention is that the construction of the fixed link in the Great Belt in the presently planned form violates the right of free passage established in the various instruments and in customary international law to which I referred a moment ago. Two bridges will close both the two channels of this strait in a way which will

permanently prevent the passage of certain categories of ships between the Baltic Sea and world oceans. This is so because the Great Belt contains the only deep-draught passage-way to and from the Baltic. Once the project is finished, deep-draught ships with a height of 65 metres or more no longer can move through the Danish straits.

Suggestions for a fixed link in the Great Belt strait originate quite far back in time. These suggestions received a concrete form first in the late 1950's, then during the 1970's and then again in the late 1980's. The earlier project reached as far as a law on a bridge over the Great Belt, passed in 1973. In May 1977, foreign missions in Copenhagen were informed about the project. Nevertheless, that project met with much internal opposition and the official political agreement to suspend it was taken already the following summer, 1978. As a consequence, the company established to implement the Project was dissolved.

In 1987, the Danish Parliament passed a new law which provided for a bridge or a tunnel alternative to link the two parts of Denmark, Fyn and Jutland in the West and Sjaeland-Lolland in the East, together. In 1989, foreign embassies in Copenhagen were informed that Denmark's intention was to create a high-level bridge with a clearance of 65 metres in the main navigable channel - the East Channel - of the Great Belt.

Through the incidence of geography, such a project has automatic and permanent consequences for Finland's international traffic connections. It will prevent the passage of very large passenger ships, special ships such as certain of ultra-large oil tankers and heavy lift vessels, as well as most offshore exploration craft, from navigating to and from the Baltic. A large number of such vessels have been constructed in Finnish shipyards and operate between Finnish ports and world oceans.

But the issue is not only about the rights to be applied to the movements of special ships or offshore craft. The problem is much more wide-reaching and has a bearing on the freedom of navigation more generally. For Finland, passage right in the Danish straits is not an abstract, academic question but, because of its geographical position, a highly practical issue of great relevance. Without an unhampered right of passage through the Danish straits, Finland's right to the

freedom of the seas becomes restricted in a parallel fashion. In order to be able to enjoy this freedom, Finland first has to enjoy access to the places where it exists - to world oceans. For Finland, the freedom of navigation is just as broad or narrow as the right of passage through the Danish straits.

And here I come to the crux of the matter: is it thinkable that Denmark may restrict the right of free passage in an international strait by a unilateral undertaking such as the present plan for the fixed link in the Great Belt? Is it justifiable that the completion of the project will permanently prevent the passage of craft which have continuously used it since 1972 and which have no other feasible access to and from the Baltic?

The matter is crucial for future Finnish traffic connections generally. Let me note here that the largest passenger ships already produced in Finland and delivered for use outside the Baltic, reach a height of 56.3 metres and some of the special ships reach from 62 metres' to 150 metres' height. And the international trend is generally towards even larger ship units. Thus the limit of 65 metres - which is, I may add, anyway a theoretical limit, the operative height being much lower - will become a permanent and arbitrary limit to Finland's capacity to develop such units. It is also an arbitrary way to close such vessels outside the Baltic. That large ships are no science-fiction is, I believe, demonstrated by the fact that even the height of the Queen Mary - now removed from active service - was 64.5 metres.

From Finland's perspective, the present Danish project for a fixed link appears as a unilateral attempt to limit a right which has existed in the past and which Finland has also in practice enjoyed. Finland can see no justification in international law for such unilateral action.

Much detailed discussion will undoubtedly be devoted to the development of ship sizes and heights during the latter stages of the proceedings. I need not go into that problem here. Let me conclude this overview of the substance of the right of free passage through the Great Belt, which Finland claims, by noting that the relevant right is not contested between Finland and Denmark. What is contested is its application in the particular circumstances of Finland and in respect of ships to which Finland undertakes that it should extend.

I shall now come to my second point, an overview of the negotiations between our two countries about this matter.

It has been contended sometimes on the Danish side that Finland has reacted too late; and that Finland is already faced with a *fait accompli*. The bridge project, we have been informed, can no longer be modified. We fail to understand these contentions. If they refer to some of the earlier projects, we can only observe that these projects were contested immediately, as they were proposed, and differed substantially from today's plans. Besides, all Danish contacts with foreign powers in the matter of the Great Belt have consistently contained a reference to the preservation of existing navigation rights in the Great Belt. Surely Finland continues to be entitled to rely on the passage rights which it has publicly used since 1972.

It should also be noted that official notice about the erection of the East Channel bridge arrived at foreign embassies in Copenhagen - including the Finnish Embassy - only on 24 October 1989. At that point, the Finnish concerns had already been officially brought to the attention of the Danish authorities by a letter from the Finnish Embassy of 18 July 1989. The relevant correspondence is included as annexes in our Application and I will here only refer to them.

The Danish written observations argue about acquiescence. This we cannot accept. Is it credible to assume that a government would give away a right as essential as this and to do this without express notice? May I point out that in the early 1980's the Finnish government spent about 200 million FIM to dredge a channel 17.5 metres deep to Pori harbour. This was done on the assumption that offshore craft would be continuously built in Pori and that they could use the Great Belt on their way to the North Sea.

Finally, we fail to understand how we could be faced with a *fait accompli* as no such change in the existing regime has yet materialized. In as far as Finland is aware, the strait remains still open and even the contracts for the construction of the East Channel bridge - the main navigational obstacle - still wait to be concluded. As long as actual construction of the suspension bridge has not yet commenced, all modifications are possible.

Mr President, Members of the Court, Finland and Denmark have gone through several rounds

of bilateral discussions on how to safeguard the right of free passage in the Great Belt while taking account of the justified needs of Denmark to improve its internal traffic connections. I already noted the letter from the Finnish Embassy to the Danish Board of Navigation of July 1989. The matter was thereafter taken up in consultations between the Secretaries of State, Mr. Wihtol of Finland and Mr. Möller of Denmark, in Helsinki on 20 September 1989. At that meeting, Mr. Wihtol specifically repeated the Finnish concern about free passage in the Great Belt and the difficulties that some of the existing alternatives might cause to Finland.

Nevertheless, in October 1989 we were informed about the Danish choice of the bridge alternative with a navigational clearance of 65 metres.

May I here add that the Danish review of the history of the contacts as described in paragraph 38 of the written observations is slightly misleading.

The matter was then included in the agenda of the regular bilateral consultations on trade policy between the representatives of the foreign ministries of our two countries which were held in Copenhagen on 5 February 1990. At this meeting, it was for the first time argued from the Danish side that the right of free passage does not apply to the kinds of offshore craft produced in Finland because it applies only to regular "ships".

Legal experts of both countries met at the legal department of the Danish Ministry for Foreign Affairs on 15 May 1990. Again, the Danes repeated the view that the project was intended to guarantee the right of free passage of all existing ships - and that this excluded the offshore craft produced in Finland. Besides, we were told, we had anyway reacted too late.

On 19 June 1990 a Note Verbal from the Finnish Embassy in Copenhagen to the Danish Foreign Ministry explicitly repeated the Finnish points of view and suggested negotiations on how to guarantee the right of free passage in the Great Belt. The Danish Ministry of Foreign Affairs replied on 11 July 1990 that the bridge project fulfils the requirements of international law and that there is therefore no basis for negotiations. Technical consultations were, however, suggested. These consultations took place in Copenhagen on 30 August 1990. The Finnish participants were told that no review of the project is possible. In a Finnish note of 7 September it was suggested that further

discussions would also include the legal aspects of the problem - this suggestion was, however, rejected on the Danish side.

At the following meeting, which took place in Copenhagen on 17 October last year, many practical suggestions were made by Finland on how to modify the present project so as to guarantee the right of free passage. All suggestions were rejected. The Danish side relied heavily on the legal view that the Finnish craft - oil rigs and drill ships - did not enjoy a right of passage and that anyway Finland had no say in the matter. These views were repeated at our next meeting in Copenhagen on 23 January 1991.

Finally, in February 1991 Finland's Prime Minister, Mr. Harrri Holkeri, asked his Danish colleague that negotiations should start on how to accommodate the Finnish rights in the project. Denmark's Prime Minister, Mr. Poul Schlüter replied - the text of this correspondence is annexed to the Finnish Application - that there was no possibility to modify the project at this advanced stage and that Finland had anyway reacted too late. Reference was here made to a previous but different and aborted project from the 1970's. At that point, it was decided that the only way to safeguard Finnish rights would be to turn to this body - an eventuality foreseen in the Finnish Prime Minister's letter to his Danish counter-part. As the bridge project had steadily advanced during the year and a half of continued contacts, it was considered necessary to file a request for provisional measures so as to prevent Finland from being faced with a real *fait accompli* in the form of a finished or a very advanced project - and, of course, to avoid the risk to Denmark that additional costs would be involved in tearing down buildings already erected.

In conclusion, I can only note that Finland has tried its best to reach settlement in this matter by bilateral contacts. During our very frequent meetings, however, the Danish side has not moved an inch to seek an accommodation. Instead of showing comprehension for the Finnish rights and interests, our legal views have been flatly rejected - indeed, we were told that we did not enjoy the passage right because the craft we are referring to were not "ships" and that we had anyway consented to the limitation of our rights in connection with a previous project initiated in 1977 and suspended by a decision of the Danish Parliament the following year.

Mr. President, Members of the Court, we were not impressed by the Danish points of view. Throughout our bilateral contacts we had the feeling that whatever points of view we would put forward would not have any effect on the Danish side. We know that the project has been and continues to be subject to heated political debate in Denmark. We can understand that government officials do not easily give in to external pressure which might endanger the very fragile political consensus which supports the present bridge plan in Denmark. But we could not understand the Danish insistence about our having no right in the matter - about our having somehow conceded to Denmark that it can limit our rights by unilateral action.

Before I finish, let me briefly comment on what it is that we are today requesting from the Court.

Neither our Application nor the Request is intended to achieve a complete cessation or blanket prohibition of construction works for the fixed link project. We have much sympathy towards the Danish effort to improve Denmark's internal traffic connections by building this traffic link. What we want to achieve is a modification of the project so that the right of free passage can continue unviolated in the Danish straits.

Up to this day, the Danes have been unwilling even to discuss any modification. In Finland, we have drawn the conclusion that this discussion can be conducted fruitfully only after we possess an authoritative statement on what our respective rights in this matter are. This is what we have come to seek from the Court. We seek, first, a declaration of our rights in this matter. On the basis of that declaration, we then aim to attain negotiations on the different technical alternatives which might be used to safeguard our rights while taking account of the legitimate needs of Denmark.

A final point, Mr. President, Members of the Court. Much technical detail will undoubtedly be presented in these proceedings. It is of essence to note, however, that nearly all of the technical and economic aspects of this case are subject of dispute among experts. And this is not a division of opinion following strictly national boundaries. Danish experts disagree among themselves just as fully and perhaps much more fiercely on the technical and economic aspects of the different alternatives as they do with Finnish experts. There is a group of internationally renowned technical

experts in Denmark - university professors of bridge and tunnel building - who have gone so far as to believe that the bridge alternative is so much worse than the tunnel alternative - from a purely national point of view - that they have complained about the matter to the Danish Parliamentary Ombudsman claiming that the bridge decision simply failed to take account of the data supporting the tunnel alternative.

While it is clear that the case cannot be fully grasped without some understanding of the technical and economic complexities, these data cannot be decisive in regard to the parties' rights.

From Finland's perspective, the present dispute is not about which technical or economic data are correct and which experts we should believe but about what are the two countries' rights in regard to free passage in the Great Belt strait. Pending a declaration of those rights, we now seek an interim order to the effect that the rights we are claiming in the main proceedings are not prejudiced by continuous Danish activity. That we believe we do have grounds for such an interim order will, with your permission, Mr. President, Members of the Court, and unless you have any questions to me, now be explained by our distinguished counsel, Sir Ian Sinclair. Thank you.

The PRESIDENT: Thank you very much Ambassador Grönberg. Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court, it is a great honour for me to appear in these oral proceedings on behalf of Finland on the Finnish Request for provisional measures in the present case. As this is the first occasion on which I have been privileged to address the Court, I would like to emphasize the esteem and respect in which I, together with the overwhelming majority of international lawyers of my generation, hold the Court as the principal judicial organ of the United Nations. I do so the more willingly and indeed, the more ardently, because I have to begin my statement with an apology to the Court and also to our opponents. It so happens that, for over a year, the oral hearing in the Heathrow User Charges Arbitration, in which I am engaged as one of the counsel for the United Kingdom Government, has been fixed to open in this very building on 2 July, that is to say tomorrow. Accordingly, I must make my most sincere apologies to the Court and indeed to our opponents that I will regrettably be unable to participate in

the proceedings before this Court during the course of tomorrow because of this conflicting commitment. I hope and indeed intend, to be present during the course of the further oral hearings in this case later this week but I would ask the Court, and indeed our opponents, to excuse my absence - my inevitable and, I trust, understandable absence - from this Courtroom tomorrow.

Mr. President, Members of the Court, as Ambassador Grönberg has indicated, my task this morning is to analyse the legal basis for an indication of provisional measures by the Court and to demonstrate how the Finnish Request for such an indication, duly filed with the Court on 23 May this year, falls squarely within the framework of the principles already established in the jurisprudence of the Court for the grant of provisional measures.

Mr. President, Members of the Court, you will of course be aware of the terms of Article 41, paragraph 1, of the Statute of the Court which says:

> "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."

It is clear that Article 41 of the Statute confers upon the Court a discretion to grant or not to grant provisional measures of protection; but it is a discretion which must be exercised judicially, having regard to the object and purpose of an indication of provisional measures - namely, "to preserve the respective rights of either party". As one recent commentator has observed:

> "That the powers of the Court under Article 41 are *discretionary* is a banal truth. The character of grants of interim protection is inherent in their dependence on the circumstances of a given case and in the necessity of their assessment ad hoc; it is reflected in the actual language of Article 41 ('if it [the Court] considers that circumstances so require') and of corresponding provisions related to other judicial bodies. However, it may be appropriate to recall that 'discretionary power' is not an 'arbitrary power'." (Sztucki, *Interim Measures in the Hague Court* (1983), p. 61.)

Finland sees no need to enter into the disputed question of whether the Court has an inherent power to grant provisional measures of protection, quite apart from the terms of Article 41 of the Statute, read in conjunction with Articles 73 to 78 of the 1978 Rules of Court. Finland is of course aware of the view expressed by the late and distinguished Judge Fitzmaurice in his separate opinion

in the Northern Cameroons case, where, in speaking of the Court's preliminary or "incidental" jurisdiction (for example, to decree interim measures of protection), he states:

> "Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court - or of any court of law - being able to function at all." (I.C.J. Reports 1963, p. 103.)

Whatever may be the truth of this observation, Finland is content to base its request for an indication of provisional measures in the present case on the precise terms of Article 41 of the Statute, believing, as it does, that its request falls squarely within the scope of that Article.

The object and purpose of an indication of provisional measures under Article 41 of the Statute being "to preserve the respective rights of either party" in the main proceedings, there must obviously be a link between the provisional measures sought and the rights which are or will be disputed on the merits. The "respective rights" are those which either party is likely to advance in the main proceedings on the merits and on which the Court is being called upon to adjudicate. This is confirmed by a passage from the Order of the Court of 5 July 1951 on the United Kingdom request for provisional measures in the *Anglo/Iranian Oil Company* case, where the Court stated:

> "Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court [that was of course the numbering of the Article of the Rules of Court then in force], to indicate interim measures *proprio motu*, it follows that the Court must be concerned to preserve by such measures *the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent*." (*I.C.J. Reports 1951*, p. 93; emphasis supplied.)

It is also confirmed by the Order of the Court of 11 September 1976, on the Greek request for provisional measures in the Aegean Sea case, paragraph 25 of that Order states inter alia that 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 the dispute in judicial proceedings* ..." (*I.C.J. Reports 1976*, p. 9; emphasis supplied).

Further confirmation is provided by the Order of the Court of 15 December 1979, on the United States request for provisional measures in the case of the *United States Diplomatic and Consular Staff in Tehran.* Paragraph 36 of that Order, after recalling that the power of the Court to indicate provisional measures has as its object to preserve the respective rights of the parties pending the decision of the Court, repeats the language just cited from the Order of the Court in the *Aegean Sea* case.

Again, in paragraph 24 of its recent Order of 2 March 1990, on the Guinea-Bissau request for provisional measures in the case between Guinea-Bissau and Senegal concerning the *Arbitral Award of 31 July 1989*, the Court has re-emphasized that the purpose of exercising the power conferred upon it by Article 41 of its Statute is "to protect rights which are the subject of dispute in judicial proceedings".

This necessity for a link between the provisional measures sought and the subject-matter of the Application has been stressed by the Court in other cases. Thus, in paragraph 14 of its identical Orders on the United Kingdom and Federal Republic of Germany requests for provisional measures in the *Fisheries Jurisdiction* case, the Court pointed out that:

> "the contention of the Applicant that its fishing vessels are entitled to continue fishing within the above-mentioned zone of 50 nautical miles is part of the subject-matter of the dispute submitted to the Court, and the request for provisional measures designed to protect such rights is therefore directly connected with the Application" (*I.C.J. Reports 1972*, pp. 15 and 33).

Similarly in its Orders indicating provisional measures in the *Nuclear Tests* cases, the Court stated that it was:

> "satisfied that it should indicate interim measures of protection in order to preserve the right claimed by Australia [New Zealand, as the case may be] in the present litigation in respect of the deposit of radio-active fall-out on her territory" (*I.C.J. Reports 1973*, pp. 105, para. 30 and 141, para. 31).

Thus, it is an accepted feature of the Court's jurisprudence on the exercise of its powers under Article 41 of the Statute that there must be a correspondence between the rights sought to be preserved and the rights which are in dispute between the parties. Finland submits that this

condition is fully met in the present case. The right which Finland seeks to preserve by conservatory measures, pending a decision of the Court on the merits of Finland's Application, is the continued right of free passage through the Great Belt for ships, including drill ships and oil rigs, proceeding to and from Finnish ports and shipyards. This is a right which corresponds closely to the relief sought in Finland's Application filed with the Court on 17 May. in particular, Finland's Application requests the Court to adjudge and declare *inter alia* that there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards; that this right extends to drillships, oil rigs and reasonably foreseeable ships; and that the construction of a fixed bridge over the Great Belt, as currently planned by Denmark, would be incompatible with the right of passage so defined. The requirement of a correspondence between the rights sought to be preserved and the rights which are in dispute between the Parties is thus, in Finland's submission, fully satisfied in the present case.

That this is an important requirement is illustrated by the fact that the Court has, on occasion, declined to indicate provisional measures for lack of a correspondence between the rights sought to be preserved and the rights at issue in the main proceedings. Already in the *Polish Agrarian Reform* case, the Permanent Court rejected a German request for an indication of provisional measures on this ground - that is to say the incompatibility between the main claim and the request for interim protection. And I cite a short passage from the Order of the Permanent Court in that particular case:

> "whilst the suit brought by the German Government is presented as having for its object to obtain a declaration ... that ... infractions *have been* committed ... the request for interim protection covers *all the future cases* of the application of the Polish agrarian reform law to the Polish nationals of German race ...; accordingly, the interim measures asked for would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claims ..." (*P.C.I.J., Series A/B, No. 58*, p. 177).

More recently, in the Aegean Sea case, Greece invoked, among its rights to be protected, the right of Greece to the performance by Turkey of its undertakings contained in Article 2, paragraph 4, and Article 33 of the Charter of the United Nations and in Article 33 of the General

Act of 1928. However, the Court found that:

> "the right so invoked is not the subject of any of the several claims submitted to the Court by Greece in its Application"

and that, consequently:

> "this request does not fall within the provision of Article 41" (*I.C.J. Reports 1976*, p. 11, para. 34).

Again, in the even more recent case between Guinea-Bissau and Senegal concerning the Arbitral Award of 31 July 1989, the Guinea-Bissau request for an indication of provisional measures was denied by the Court, principally on this ground. The Court will recall that, in this case, Guinea-Bissau is requesting the Court to declare that the Award of the Arbitral Tribunal of 31 July 1989, in connection with the delimitation of the maritime territories of the two States, is "inexistent" for one reason and, subsidiarily, that it is "null and void" for another reason. The provisional measure sought was, however, that the Parties should abstain in the disputed area of maritime territory from any act or action of any kind whatever. In denying the request for this provisional measure, the Court stated, in paragraph 26 of its Order of 2 March 1990:

> "Whereas the Application instituting proceedings asks the Court to declare the 1989 Award to be 'inexistent' or, subsidiarily, 'null and void', and to declare that 'the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called Award of 31 July 1989'; whereas the Application thus asks the Court to pass upon the existence and validity of the Award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; whereas accordingly, *the rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case; and whereas any such measures* could not be subsumed by the Court's judgment on the merits." (Emphasis supplied.)

It will be apparent to the Court that none of the reasons advanced for denying provisional measures in these three cases which I have discussed (the *Polish Agrarian Reform* case, the Aegean Sea case and the case concerning the Arbitral Award of 31 July 1989, between Guinea-Bissau and Senegal) is applicable in the present case. The right sought to be protected by Finland, by means of the conservatory measures requested is the right which is the principal subject of the proceedings before the Court on the merits of the case.

Of course, objection has sometimes been taken to the grant of provisional measures on the ground that there is too close a correspondence between the relief sought by way of conservatory measures under Article 41 of the Statute and the relief being sought by the Applicant in the proceedings on the merits. This objection takes the form of a claim that what the Applicant is in effect seeking by way of provisional measures in cases such as this is an interim judgment in its favour on the merits. The point first arose before the Permanent Court in the *Chorzów Factory* case where Germany put forward a request that the Court indicate an advance payment of a certain sum (presented as being beyond controversy) in partial satisfaction of the principal claim for reparation. The Court rejected this request on the ground that it could not:

> "be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application"

and it was accordingly

> "not covered by the terms of the provisions of the Statute and Rules cited therein" (*P.C.I.J., Series A, No. 8,* p. 10).

I would ask the Court, however, to note that the object and purpose of the German request in the *Chorzów Factory* case was not to conserve German rights which were at risk during the course of the proceedings, but rather to obtain satisfaction in advance of part of its principal claim. Moreover, the principal claim itself was a pecuniary claim for reparation. As Sztucki observes:

> "The dispute was about the amount of pecuniary compensation and unless the unusual question of a State's solvency arises, pecuniary claims probably do not qualify as a matter of principle for interim protection in inter-State litigation." (Sztucki, *op. cit.*, p. 93.)

Nevertheless, reliance has been placed upon the above-cited dictum from the Order of the Permanent Court in the Chorzów Factory case to sustain a more general proposition that when there is exact correspondence between the principal relief sought by an Applicant State on the merits of the case and the principal relief sought by the Applicant State in a request for provisional

measures, the request must be regarded as one for an interim judgment and should therefore be refused. This general proposition does not of course sit all that well or tidily with the requirement we have already discussed and which is so clearly fixed in the jurisprudence of the Court, namely that there should be a close link between the rights sought to be protected by conservatory measures under Article 41 of the Statute and the rights at issue in the proceedings on the merits. Nor is it indeed supported by the jurisprudence of the Court, as I hope I will be able to demonstrate.

Let us take first the *Nuclear Tests* case. In its Application against France in this case, Australia asked the Court *inter alia:* "to order that the French Republic should not carry out any further such tests", that is to say: "atmospheric nuclear weapons tests in the South Pacific Ocean".

In its request for provisional measures, Australia asked the Court to indicate by way of a provisional measure:

> "that the French Government should desist from any further atmospheric nuclear tests pending the judgment of the Court in this case" (*I.C.J. Pleadings, Nuclear Tests* cases, Vol. 1, p. 57).

Thus, there was virtually exact correspondence between the relief sought by Australia in the main proceedings and in the request for provisional measures.

This coincidence of submissions was not commented upon by the Parties. Nor was it referred to in the text of the Court's Orders of 22 June 1973 indicating provisional measures in this case and also in the parallel case instituted by New Zealand against France. However, two of the Judges of the Court based their dissenting opinions on these orders partly on the ground of the coincidence of submissions. Thus, Judge Forster, in his dissenting opinion, stated:

> "The interim measures requested by Australia are so close to the actual subject-matter of the case that they are practically indistinguishable therefrom. Ultimately the only alternatives are the continuation or the cessation of the French nuclear tests in the Pacific. This is the substance of the cases, upon which, in my opinion, it was not proper to pass by means of a provisional Order, but only by a final judgment." (*I.C.J. Reports 1973*, p. 113.)

Judge Gros, in his dissenting opinion, after having referred to the motives of the Order of the Permanent Court in the Chorzów Factory case, likewise affirmed that a comparison between Australia's principal claim and its request for provisional measures: "shows that the latter was indeed designed to obtain an interim judgment" (*I.C.J. Reports 1973*, p. 123).

The same point arises, though in a much more muted form, in the case of *United States Diplomatic and Consular Staff in Tehran.* Here there was a coincidence with one of the five main submissions in the United States Application - namely, in relation to the release of all United States hostages detained in Tehran and the safe departure from Iran of all such persons and of other United States nationals in Tehran. In its written observations on the United States request for provisional measures in this case, Iran had submitted *inter alia* and I quote from Iran's written observations:

> "With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it." (*I.C.J. Reports 1979*, p. 11.)

The issue having been raised by one of the parties, the Court felt bound to pronounce on it. In the Court's Order on provisional measures of 14 December 1979, reference was again made to the Order of the Permanent Court in the *Chorzów Factory* case. The Court then stated that:

> "the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on a part of a claim for a sum of money; ... moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and ... in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claim but to preserve the substance of the rights which it claims pendente lite" (*I.C.J. Reports 1979*, p. 16, para. 28).

The Court will of course be aware that its Order of 15 December 1979 in that particular case was adopted unanimously. Thus, the doubts expressed by the dissenting Judges on the Order indicating provisional measures in the *Nuclear Tests* case, based on the assertion that the requests for provisional measures were in substance requests for an interim judgment, appear to have been, at least to some extent, dissipated. As Sztucki comments:

> "In the *US Staff* case, the Court seems to have reaffirmed for the second time (for the first time in the *Nuclear Tests* cases) the view that the substantive coincidence of submissions in the request and in the application does not per se transform a request into one for interim judgment; and consequently does not preclude action under - and in conformity with - Article 41." (*Sztucki, op. cit.*, p. 96.)

It is highly relevant in this context that the Court, in its Orders indicating provisional measures in the *Fisheries Jurisdiction* cases, for the first time included a general "without prejudice" clause covering also questions arising on the merits. The Court expressly stated in

those Orders (and this is a fairly common pattern of a paragraph included in Orders on provisional measures):

> "the decision given in the course of the present proceedings *in no way prejudices* the question of the jurisdiction of the Court to deal with the merits of the case or *any question relating to the merits themselves* and leaves unaffected the right of the Respondent to raise arguments against such jurisdiction or in respect of such merits" (*I.C.J. Reports 1972*, pp. 16 and 34 respectively, para. 20).

A generalized "without prejudice" clause of this nature has also been included in the Court's Orders on provisional measures in the subsequent *Nuclear Tests* case, the Aegean Sea case, the *United States Diplomatic and Consular Staff in Tehran* case and the *Military and Paramilitary Activities in and against Nicaragua* case. It is clear that the object and purpose of this generalized "without prejudice" clause is to reassure the Respondent (and indeed the world at large) that the Court, in making an order indicating provisional measures, is not encroaching upon any issue of contested jurisdiction nor indeed upon any disputed question relating to the merits of the case. But I suggest it does more than that: it also reflects the fact that the Court, even if it has given an indication of provisional measures, is open to opposite arguments at later stages of the case, whether on jurisdiction or on the merits. It will of course be recalled that, in the *Anglo-Iranian Oil Co.* case, the Court eventually declared that it lacked substantive jurisdiction after having earlier indicated provisional measures in the case.

Mr. President, that might be an appropriate point at which we could stop for a coffee break.

The PRESIDENT: Thank you very much Sir Ian. Yes, we will now adjourn for about ten minutes and then resume.

The Court adjourned from 11.20 to 11.40 a.m.

Sir Ian SINCLAIR: Mr. President, Members of the Court, just before the interval I had been discussing the "without prejudice" clause included within the framework of recent Orders of the Court on interim measures of protection. I did so within the framework of a wider survey of various aspects affecting the object and purpose of interim measures of protection.

Indeed, I really make no apology for having analysed in some detail this aspect of the Court's jurisprudence on provisional measures; I have to anticipate that our opponents may contend that, in the present case, Finland is in substance requesting, by way of provisional measures, an interim judgment in its favour on the merits of the case. This is most decidedly not the case, if only for two reasons:

(1) the object of Finland's request for provisional measures is to *preserve* Finnish rights or Finnish claimed rights, pending a decision by the Court on the merits; and

(2) although there is some correspondence between the Finnish request and the relief sought in the Finnish Application, there is no exact correspondence.

If I may elaborate on the first of these reasons, it is clear from the materials which Finland has presented to the Court in its Application that, since 1972, Finland has enjoyed the right of free passage through the Great Belt of drillships and oil rigs (including semi-submersible rigs and jack-up rigs) manufactured in Finnish shipyards. Finland is simply seeking to have that right preserved pending a decision by the Court on the merits of the case. In this particular respect, therefore, the position in the present case is comparable to that in the *United States Diplomatic and Consular Staff in Tehran* case where the Court found that the object of the United States request was "to preserve the substance of the rights which it claims *pendente lite*". It is a truly *conservatory* measure which Finland requests, a measure justified by the imminent threat to Finnish rights and interests which construction by Denmark of the Great Belt bridge in its presently planned form presents. Finland simply seeks to preserve the *status quo* as regards free passage through the Breat Belt pending the Court's decision on the merits of the case. In no sense can the Finnish request be interpreted as a request for an interim judgment on the merits. Sztucki, writing in 1983 and taking into account the materials available to him as at 31 May 1981, points out that

the problem under consideration has substantive aspects:

> "Even a superficial look at cases in which interim protection was granted will reveal its true meaning. The substance of all these cases (i.e., those of the *Sino-Belgian Treaty, Electricity Company, Anglo/Iranian Oil Company, Fisheries Jurisdiction, and also US Staff*) was that the respective applicants relied on recognized legal status of more or less long standing; and sought judicial relief against the respective respondents who unilaterally attempted to alter or violate that status to the detriment of the applicants." (Sztucki, *op. cit.*, p. 99.)

And Stucki continues:

> "When the Court, in such situations, grants interim protection and indicates that the applicants should provisionally, pending the final judgments, enjoy certain rights they claim to possess, the indication is not to be viewed as anticipatory of the existence of 'questionable rights', which are 'presumed to exist by the mere fact of indicating provisional measures to protect them', but rather as conservatory of a previously recognized status which became the object of a litigation. The substantive rights in dispute still [to quote from the Court's Order on provisional measures in the *Anglo/Iranian Oil Company* case] 'may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent'. This is in strict conformity with the nature of interim measures as a means of provisionally upholding or restoring the status quo." (Sztucki, *ibid*.)

This is precisely the position in which Finland finds itself at the present stage of these proceedings. Finland is threatened with action by Denmark which would irretrievably cut off access to and from the North Sea for drillships and oil rigs manufactured in Finnish shipyards. Finland simply seeks to have the existing right of free passage through the Great Belt for those drillships and oil rigs preserved pendente lite.

I need not detain the Court long in elaborating on the second reason which I have prsented, because it is, in a sense, of a subsidiary nature. As I have already indicated, there is no *exact* correspondence between the Finnish request and the relief sought in the Finnish Application. Finland has sought to confine its request to the minimum necessary to protect Finnish rights and interests. In the first place, although Finland, in its Application, submits that the right of free passage extends to drillships, oil rigs and *reasonably foreseeable* ships, the request is confined to drillships and oil rigs. In the second place (and perhaps this is even more important), the Finish request is limited to seeking an indication that Denmark should, pending a decision on the merits, "refrain from continuing or otherwise proceeding with such construction works in connection with

the planned bridge project over the East Channel of the Great Belt *as would impede the passage of ships, including drillships and oil rigs, to and from Finnish ports and shipyards*" (emphasis supplied). Finland is not seeking a blanket prohibition of all activity by Denmark in connection with the bridge project. A blanket prohibition could be considered as unreasonable and as going beyond what is strictly needed by way of protective and conservatory measures. Finland has accordingly sought to restrict its request to the bare essentials of what is urgently required to protect Finnish rights and interests in this case pending a decision on the merits.

Mr. President, Members of the Court, I have so far confined myself to analysing the object and purpose of Finland's request for provisional measures in the light of the requirement in Article 41 of the Statute that the aim of provisional measures should be to "preserve the respective rights of either party", I have sought to do so by drawing upon the jurisprudence of the Court regarding the relationship between a request for provisional measures and a final judgment on the merits. I have also sought to do so by demonstrating that the Finnish request is in no sense a request for an interim judgment but is strictly conditioned by the perceived need to preserve the *status quo* until the Court has ruled on the merits of the rights claimed by Finland and Denmark respectively. Finland submits that, on this aspect of the matter, it has fully demonstrated that Finland seeks only *conservatory* measures which it is entirely within the discretion of the Court to grant in pursuance of Article 41 of the Statute.

The second part of my address is accordingly confined to an analysis of the phrase "if the Court considers that circumstances so require" which is the remaining condition in Article 41 of the Statute requiring to be satisfied. Here again, the jurisprudence of the Court furnishes clear guidelines as to the meaning of this phrase. I propose to consider these guidelines under three headings:

(1) the requirement of "irreparable prejudice";

(2) the requirement of "urgency"; and

(3) the prospects of substantive jurisdiction.

Irreparable prejudice

It has been a consistent feature of the jurisprudence of the Court (and indeed of the Permanent Court) that, before granting provisional measures, the Court must be satisfied that *irreparable prejudice* will or is likely to be caused to rights at issue in the proceedings on the merits if relief by way of interim protection is not accorded.

The first issue to be considered in this context is whether the requesting State must satisfy the Court that irreparable prejudice has already been caused or *will inevitably* be caused in the near future to the rights and interests of the requesting State as a result of acts or omissions of the respondent State. The jurisprudence of the Court (and indeed of the Permanent Court) reveals that a *probability* or a *possibility* or irreparable prejudice is regarded as sufficient to justify the Court in indicating provisional measures in accordance with Article 41 of the Statue. Thus, in the very first case in which the Permanent Court indicated provisional measures - the *Sino-Belgian Treaty* case - the order issued ex parte by the President of the Permanent Court on 8 January 1927, indicated such measures against:

> "the event of infraction - a contingency rendered possible by the situation resulting from the publication of the ... Chinese Presidential Order - of certain of the rights which Belgium or her nationals would possess in China if the Treaty of 2 November 1865, were recognized as still operative" (*P.C.I.J. Series A, No. 8*, p. 7).

Similarly, in the *Nuclear Test* cases, the present Court was satisfied that it should indicate interim measures of protection against the possiblility of damage:

> "for the purposes of the present proceedings it suffices to observe that the information submitted to the Court *does not exclude the possibility* that damage to Australia might be shown to be caused by the deposit of radio-active fall-out resulting from such tests and to be irreparable" (*I.C.J. Reports 1973*, pp. 105, para. 29 and 141, para. 30).

In the order on provisional measures in the case of *United States Diplomatic and Consular Staff,* the Court contented itself with determining that:

> "the continuance of the situation the subject of the present request exposes the human beings concerned.... to a *serious possibility of irreparable harm* (*I.C.J. Reports 1979*, p. 20, para. 42).

On one occasion, in the *Fisheries Jurisdiction* cases, the Court might be thought to have suggested a slightly more stringent test by observing that:

> "the immediate implementation by Iceland of its Regulations *would*, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom" (*I.C.J. Reports 1972*, pp. 16, paras. 22 and 34, para. 23).

It may be doubted, however, whether the Court did adopt a more stringent test in the *Fisheries Jurisdiction* cases - it was simply noting as a fact that immediate implementation of the Icelandic Regulations would entail the stated consequences, without insisting that certainty as to irreparable prejudice was a precondition for the grant of provisional measures.

In the present case, it may be noted that completion of the Danish bridge project over the Great Belt in its presently planned form would inevitably prejudice - and prejudice irreparably - the rights and interests claimed by Finland in these proceedings, that is to say the right of free passage through the Great Belt for drillships and oil rigs manufactured in Finland. It hardly needs emphasizing that construction of a bridge over the Great Belt with a 65-metre clearance would totally and irretrievably prevent the passage of vessels and craft exceeding that height from the Baltic Sea to the North Sea. This is confirmed by the fact that passage of the drillships and oil rigs manufactured in Finland through the Danish straits by way of the Sound (or Oresund) is impracticable. As pointed out in the Finnish Application, the depth of the Sound is, in certain parts, less than 8 metres, whereas the draught of some of the vessels manufactured in Finland, including drillships and oil rigs, is up to 15 metres. Furthermore, there is already in prospect a Danish/Swedish project to build a bridge across the Sound which would further restrict the right of free passage through the Danish straits. Dr. Koskenniemi will be responding this afternoon to some of what Finland regards as mis-statements in the Danish Written Observations (particularly at paragraphs 21, 43 to 46 and 55 to 58) on this aspect of the matter.

I turn now to the second issue which has to be considered in the present context: what is meant by "irreparable prejudice"? Here, it can be argued that the jurisprudence of the two Courts does not display total consistency. An early test of irreparability was laid down in the Order by the President of the Permanent Court in the *Sino-Belgian Treaty* case. In this Order, President Huber explained that interim protection was indicated because the possible infraction of certain rights at issue;

> "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (*P.C.I.J., Series A, No. 8*, p. 7).

This would condition the grant of interim measures of protection upon the criterion of what has been termed absolute irreparability in law. But this criterion has a number of deficiencies. It seems to be based on the general concept of reparation in international law as expounded by the Permanent Court in its Judgement of 13 September 1928, in the *Chorzów Factory (Indemnity)* case, where the Court stated inter alia:

> "The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed."

The Permanent Court continues in that Judgment:"Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." *(P.C.I.J., Series A, No. 17*, p. 47.)

But the Court will readily appreciate that the principles which govern, or may govern, the redress available to an Applicant State on the rendering of a final judgment in its favour are not the principles which should be applied in relation to the grant of interim measures of protection. The nature and function of an order on provisional measures differ fundamentally from the nature and function of a final judgment. An order on provisional measures is not designed to impose redress for a wrongful act already committed, but precisely in order to prevent irreparable prejudice to rights in dispute on the merits of the case. The Court does not, and should not at this stage of the proceedings, anticipate what its decision on the merits is likely to be; it is concerned solely with the perceived need to preserve the subject-matter of the litigation against acts which are likely to lead to the impossibility of complete execution of the final judgment on the merits. With one possible exception (the *Aegean Sea* case) - and I will discuss that possible exception - the more recent jurisprudence of the Court suggests that

the criterion of absolute irreparability in law has been effectively abandoned, and has been replaced by a less stringent requirement related to the prospect that restoration of the rights of the Applicant State, in the event of a final judgment in its favour, might be rendered impossible if interim measures were not granted. The development of the jurisprudence of the Court in this direction can be traced through the following cases.

In the *South-Eastern Greenland* case, the Permanent Court broadened the circumstances which might motivate an indication of provisional measures by including among these circumstances the case where:

> "the damage threatening these rights would be irreparable in fact or in law" (*P.C.I.J., Series A/B, No. 48*, p. 284; emphasis supplied).

That is a citation from the Order.

The criterion of irreparability in fact considerably extends the range of circumstances which might give rise to an indication of provisional measures.

One then begins to see the development of the concept that one of the principal objects of an indication of provisional measures is to ensure that the possibility of full execution of the final judgment is preserved. A hint of this is already to be found in the Order made by the Permanent Court on 5 December 1939, in the *Electricity Company of Sofia* case, where the Permanent Court ordered that:

> "pending the final judgment ... the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court" (*P.C.I.J., Series A/B, No. 79*, p. 199).

The Permanent Court, in addition, in that case, invoked the need:

> "to prevent ... the performance of acts likely to prejudice ... the respective rights which may result from the impending judgment" (*ibid*.).

The same idea, though expressed in slightly different language, is to be found in the Orders of the present Court on provisional measures in the *Anglo/Iranian Oil Company* case and in the *Interhandel* case. As the Court will recall, the motivation in the *Anglo/Iranian Oil*

Company case was expressed to be that the Court was:

> "concerned to preserve ... the rights which may be subsequently adjudged ... to belong either to the Applicant or the Respondent" (*I.C.J. Reports 1951*, p. 93).

Identical language is to be found in the Court's Order on provisional measures in the *Interhandel* case, although it will be recalled that the Court did not indicate interim measures of protection in that case, in view of the fact that sale of the disputed shares could only go ahead upon conclusion of judicial proceedings pending anew before the United States courts.

But it is in the Court's Orders on provisional measures in the *Fisheries Jurisdiction* cases that we see explicit reference being made to the "irreparability" criterion, in the form of relating "irreparability" to the possibility of securing full execution of the final judgment, if that judgment were in favour of the Applicant State. In the *Fisheries Jurisdiction* cases, the Court emphasized the importance of the test of irreparable prejudice by noting that its power under Article 41 of the Statute:

> "presupposes tht irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" (*I.C.J. Reports 1972*, p. 16, para. 21 and p. 34, para. 22).

But the Court went even further in the *Fisheries Jurisdiction* cases. It will be recalled that the Icelandic Parliament had passed a resolution on 15 February 1972, extending Iceland's exclusive fisheries jurisdiction from 12 to 50 miles. Both the United Kingdom and the Federal Republic of Germany instituted proceedings against Iceland seeking declarations that there was no basis in international law for the intended unilateral extension of Iceland's exclusive fisheries jurisdiction; that such extension was consequently invalid or, alternatively, not opposable to the Applicant States; and that fisheries conservation measures in the disputed maritime areas required agreement with other States concerned. On 14 July 1972, Iceland issued regulations, due to come into force on 1 September 1972, to implement the resolution of the Icelandic Parliament of 15 February 1972. The United Kindgom and the Federal Republic of Germany thereupon immediately sought interim measures from the Court. In its Orders of 17 August 1972, the Court, having stressed the significance of the test

of "irreparable prejudice", went on, in the immediately following paragraph of each of the two Orders issued, to observe that to give effect to Iceland's intentions manifested in the regulations issued on 14 July 1972:

> "would prejudice the rights claimed by the United Kingdom [or the Federal Republic of Germany] and *affect the possibility of their full restoration* in the event of a judgment in its favour" (*I.C.J. Reports 1972*, p. 16, para. 22 and p. 34, para. 23.)

Here the irreparability is treated as being manifested by the impossibility of complete execution of the final judgment, if in favour of the Applicant State, and quite irrespective of whether the Applicant State might or might not be compensated for possible non-execution of the final judgment.

Now, Mr. President, Members of the Court, what might at first sight seem to be the one exception to this general trend away from the absolute irreparability *in law* criterion and in favour of the alternative (and more liberal) requirement of the impossibility of complete execution of the final judgment if in favour of the Applicant State is, as I indicated earlier, to be found in the Order of the Court on provisional measures in the Aegean Sea case. There, Greece had asked the Court inter alia to indicate the following provisional measure: "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".

The Court motivated its refusal to indicate this particular provisional measure by observing:

> "In the present instance, the alleged breach by Turkey of the exclusivity of the rights claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were establsihed, is one *that might be capable of reparation by appropriate means*; and ... 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 powers under Article 41." (*I.C.J. Reports 1976*, p. 11, para. 33.)

At first sight, this appears to constitute or could be argued to constitute, a partial reversion to the absolute irreparability in law criterion formulated by President Huber in the *Sino-Belgian Treaty* case. But closer analysis shows this, I would submit, not to be the case. Greece had invoked two highly contentious bases of jurisdiction - Article 17 of the General Act of 1928, and the so-called Brussels communiqué of the Greek and Turkish Prime Ministers of 31 May 1975. There seems little doubt that the Court was influenced in its decision not to grant provisional measures in the *Aegean Sea* case by serious doubts among the judges as to whether the Court had, or would have, jurisdiction to proceed to the merits of the case. The Order rejecting provisional measures in the *Aegean Sea* cae was made by twelve votes to one; but there were eight separate opinions, seven of which raised the question of the jurisdictional basis for action by the Court under Article 41 of the Statute. In its subsequent Judgment of 19 December 1978, on the issue of jurisdiction in the *Aegean Sea* case, the Court found, by twelve votes to two, that it was without jurisdiction in the case. The same judges who voted for the rejection of the request for provisional measures in the *Aegean Sea* case also voted in favour of the subsequent judgment declaring the Court to be without jurisdiction in the case. Sztucki has observed:

> "Taking into account the already mentioned symmetry of votes on the Order and on the Judgment; and taking further into account the massive emphasis on the jurisdictional aspect of interim protection put by the judges in their individual opinions in a situation in which this question might appear immaterial in view of the rejection of the request on other grounds - there seems to be room for a qualified guess that the order in the *Aegean Sea* case was in reality motivated at least as much by poor prospects of substantive jurisdiction as by the 'reparability' of the prejudice against which interim protection was sought." (Sztucki, op. cit., p. 249.)

Now, Mr. President, Members of the Court, Finland is not inviting the Court to speculate on the (unexpressed) motivations of the judges composing the Court in 1976. It simply cites this particular comment as being illustrative of the need to consider carefully whether the passage which I have cited from the Court's Order on provisional measures in the *Aegean Sea* case does indeed constitute a reversion to the absolute irreparability in law criterion. Finland submits that it does not, and derives support for this view in a number of the separate opinions delivered on that Order. For example, President Jiménez de Aréchaga (and we are of course delighted to see him with us

today) states *inter alia* in his separate opinion:

> "In cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render." (*I.C.J. Reports 1976*, p. 15.)

So also as Judge Mosler states:

> "The Court, when it actually indicates interim measures, should have reached the provisional conviction, based on a summary examination of the material before it (including written observations of a party not represented) and subject to any objections which may be raised in subsequent proceedings, that it has jurisdiction on the merits of the case." (*Loc. cit.*, p. 24.)

Judge Mosler indeed later observes in his separate opinion that the request had to be rejected "for the sole reason that the jurisdiction of the Court [was] not sufficiently established" (loc. cit., p. 25).

Thus, what appears primarily to have motivated those judges who delivered separate opinions on the Court's Order denying provisional measures in the *Aegean Sea* case was serious doubts as to the Court's jurisdiction on the merits of the case. The motives given in the Order itself do not appear to correspond to the real motives and anxieties of the majority of the judges, at least if the content of the eight separate opinions is taken into account. For this reason, Finland does not regard this isolated mention of the potential "reparability" of the alleged prejudice as involving a reversion to the absolute irreparability in law criterion for the indication of provisional measures.

Finland submits that the recent jurisprudence of the Court suficiently demonstrates, particularly if this analysis of the Order in the *Aegean Sea* case is taken into account, that a prejudice is considered to be irreparable for the purpose of an indication of provisional measures if it would render impossible full execution of the final judgment and thereby full restoration of the rights of the Applicant State (assuming the Court were to find in its favour); and this irrespective of whether or not the Applicant State might be compensated for the non-execution of the final judgment.

Applying this principle to the circumstances of the present case, it will be apparent that completion of the bridge project over the Great Belt in its presently planned form will constitute

irreparable prejudice to Finland's rights and interests. Even continuation of construction work in connection with that bridge project in its presently planned form constitutes irreparable prejudice to Finland's rights and interests, given that the construction work is directed precisely towards completion of the bridge project in a form which will irreversibly prevent the passage of those drillships and oil rigs manufactured in Finnish shipyards for which Finland asserts a right of free passage through the Great Belt. Finland accordingly contends that the requirement of irreparable prejudice, as a pre-condition of the grant by the Court of provisional measures, is fully met in this case, having regard to the materials presented in the Finnish Application and request for provisional measures.

Finland notes that Denmark, in paragraphs 136 to 138 of its written observations, appears to be arguing that the Court should revert to the "absolute irreparability in law" criterion for an indication of provisional measures. As my analysis of the jurisprudence of the Court amply demonstrates, that criterion originally relied upon, at least in part, by President Huber in the *Sino-Belgian Treaty* case, has now been effectively abandoned.

Mr. President, Members of the Court, I now turn to the question of urgency. As a matter of principle, the element of urgency underlying a request for provisional measures is already reflected, as a matter of procedure, in the 1978 Rules of Court governing the handling of such a request. Thus, Article 74 of the Rules of Court particularises this requirement of urgency by providing, in paragraph 1, that: "A request for provisional measures shall have priority over all other cases" and by providing, in paragraph, 2 that:

> "The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency."

Thus, the procedure before the Court applicable to a request for provisional measures is specifically geared towards dealing with such requests urgently. But these particular provisions of the Rules of Court were adopted not simply to reassure States that requests for provisional measures will be handled expeditiously. They also reflect the understanding that issues submitted to the Court in requests for interim protection are issues that demand urgent treatment; in other

words, that urgency is an essential quality of a request for interim measures and that a request lacking that quality is not one for such measures within the meaning of Article 41 of the Statute and the relevant Rules of Court.

This view of the matter is confirmed by the jurisprudence of the Court. In particular, the Order of the Court on provisional measures in the *Pakistani Prisoners of War* case is directly relevant on this point. In this case, the requesting State, Pakistan, itself asked the Court, at a certain stage of the proceedings on provisional measures, to postpone for an unspecified period further consideration of Pakistan's request so as to facilitate proposed negotiations with India. In addition, the oral hearings on Pakistan's request were adjourned three times on Pakistan's request, thus extending the duration of the proceedings on interim measures by 18 extra days. Having regard to these considerations, and taking into account in particular the request by Pakistan to postpone for an unspecified period further consideration of Pakistan's request, it is hardly surprising that the Court's Order of 13 July 1973 rejecting the Pakistani request, should have emphasised that:

> "it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency, as it is expressly recognised by the Court in Article 66, paragraph 2, of the Rules of Court".

(The reference here is of course to the 1972 Rules of Court, now replaced by the 1978 Rules of Court.)

The Court then went on to point out that the Pakistani request to the Court to postpone for an unspecified period further consideration of Pakistan's request for an indication of interim measures:

> "signifies that the Court no longer has before it a request for interim measures which is to be treated as a matter of urgency; and ... the Court was not therefore called upon to pronounce upon the said request" (*I.C.J. Reports 1973*, p. 330, para. 14).

This having been said, the requirement of urgency has not been treated by the Court, whether in relation to the procedural or substantive aspects of the matter, as a requirement of *extreme* urgency. As regards the procedural aspects, the Court has not permitted the need to decide

upon a request as a matter of urgency to override other considerations also mentioned in the Rules of Court, such as the need, mentioned in Article 74, paragraph 3, to fix a date for a hearing "which will afford the parties an opportunity of being represented at it". In a number of cases, the Court has postponed or adjourned oral hearings to accommodate the wishes of the respondent State or, as in the *Pakistani Prisoners of War* case, the applicant State.

As regards the substantive aspects of urgency, and analysing those cases in which an indication of provisional measures has been given by the Court, it would appear that in some cases (the *Sino-Belgian Treaty* case, the *Anglo/Iranian Oil Company* case, the *United States Diplomatic and Consular Staff in Tehran* case, and the *Military and Paramilitary Activities in and against Nicaragua* case) - in all these cases the events being complained of and forming the subject of the request for provisional measures had already taken place. In other cases (the *Fisheries Jurisdiction* cases and the Nuclear Tests cases), the events being complained of were or could be expected to take place within a number of weeks.

What of the present case? Finland submits that it falls somewhere between these two categories. It may be argued - and has indeed been so argued in the Danish written observations - that any irreparable prejudice to Finnish rights and interests will arise only when the bridge project has been *completed* in 1996 or 1997 and when the free passage through the Great Belt of drillships and oil rigs manufactured in Finland will have become physically impossible. It is also contended in the Danish written observations that the Court will have given its decision on the merits of the case well before 1996 or 1997. But, in Finland's submission, this view of the matter ignores entirely a number of highly relevant factors:

(1) First factor, the bridge project over the Great Belt is part of a complex of projects which, though separate, are inter-connected because they are all designed to provide a fixed link for rail and road traffic over or under the Great Belt. Even Denmark concedes that the Great Belt project constitutes - and here I am quoting from paragraph 25 of the Danish written observations - constitutes "an integrated whole". Now, the inter-connection is such that the completion of any one of these projects is heavily dependent, within the framework of the overall plan, upon eventual

completion of the other parts of the complex of projects in their *presently planned form*. Although it is the bridge project over the Great Belt which presents, and will continue to present, the greatest prejudice to Finnish rights and interests, the completion of any one of the complex of projects could indirectly prejudice Finnish rights and interests because the overall plan, as it stands at present, makes no attempt to take account of those rights and interests. 2. Finland is already suffering economic damage as a result of public knowledge that the planned bridge over the Great Belt will have a clearance of only 65 metres. The Rauma-Repola Offshore Company is already experiencing a falling-off of orders for drillships and oil rigs manufactured in their shipyard in Finland. Of course, this may be partially attributable to the effects of economic recession in those industrialized countries which provide customers for drillships and oil rigs; but it may equally be partially attributable to the fact that potential customers are now aware that passage through the Great Belt will become physically impossible for drillships and oil rigs manufactured in Finland as soon as the Great Belt bridge has been completed in its presently planned form. The time-lag involved in the construction of such massive structures as oil rigs designed for offshore exploration or exploitation activities may already, I put it no harder than that, may already be discouraging potential customers uncertain whether the rigs, when completed, will be able to proceed to their final destination. Accordingly, irreparable prejudice is *already* being caused to Finnish claimed rights and interests as a result of the planned Great Belt bridge. And that prejudice is bound to become even more apparent than it is today as construction work on the bridge proceeds and as the effects of recession on the oil producing industry world-wide begin to recede.

3. Finland assumes, and no doubt rightly assumes, that Denmark will make every effort to minimize any disruption to maritime traffic through the Great Belt during the period when the Great Belt bridge is under construction. But some disruption would seem to be inevitable. Finland's anxieties are naturally increased by the knowledge that it is not just *completion* of the bridge over the Great Belt which will finally prevent the physical passage through the Great Belt of these vessels for which Finland is asserting a right of free passage in its Application. The asserted right of free passage may also be adversely affected during the course of the construction

works themselves.

For these and other reasons upon which Dr. Koskenniemi will elaborate in his address to the Court, Finland submits that there is indeed an urgent need for the Court to indicate provisional measures in this case in order to protect the rights which the Court may subsequently adjudge to belong to Finland or to Denmark as the case may be.

Jurisdiction

I turn now, Mr. President, Members of the Court, to the third element - jurisdiction, the prospects of substantive jurisdiction.

Now, Finland is well aware of the case-law of the Court concerning the link between a potential indication of interim measures and prospects of the substantive jurisdiction of the Court on the merits of the case. In the present case, to be quite frank, the question of jurisdiction does not present a problem and I need only touch on it very briefly. Finland notes that in paragraph 84 of its Written Observations, Denmark rightly points out that

> "the Court's jurisdiction is not in dispute in so far as both Denmark and Finland according to their longstanding tradition of adhering to procedures for peaceful settlement of international disputes have accepted the Court's jurisdiction under Article 36 of the Statute".

So the Court is fortunately not confronted with any of the complex problems which may arise in indicating interim measures in cases of uncertain jurisdiction.

Mr. President, Members of the Court, you may wonder why hitherto I have made little or no reference to the Written Observations submitted by Denmark on 28 June. Finland has of course had an opportunity (albeit a limited opportunity) to study these observations over the past two days. As I have already indicated, Dr. Koskenniemi will be responding to so much of these Danish observations as relate to the facts of the present dispute. But I feel bound to state that the Danish Written Observations are directed much more towards the merits of the case which Finland asserts than they are towards the Finnish Request for interim measures of protection. Finland is participating in these oral proceedings on its request for interim measures of protection on the understanding that they do not trench upon questions or issues which would rightly be for consideration by the Court when it comes to consider the merits of the case. This is not, repeat not,

a preliminary hearing on the merits. It will soon have been apparent from the Finnish Application that there is a genuine dispute between Finland and Denmark on the scope of the right of free passage through the Great Belt, which Denmark is pledged to respect. Neither Finland's Application nor Finland's Request for interim measures of protection have been advanced frivolously. Finland has, as Ambassador Grönberg has already demonstrated this morning, sought to resolve this dispute through direct negotiations with Denmark. Unfortunately Denmark has refused negotiations on the substance of the Finnish concerns. It would seem, and I say this with respect, that Denmark is seeking to muddy the waters by trying to convert the current oral hearings into some kind of advance hearing on the merits. Finland could make many observations on the slanted presentation in the Danish Written Observations as regards both the facts and the law; but to do so beyond a certain point would be to fall into the trap of anticipatory argument on the merits. Finland must therefore at this stage make a general traverse of all the arguments advanced in the Danish Written Observations which relate to the merits of the present case. This is of course without prejudice to the particular points already made by Ambassador Grönberg and the points to be made by Dr. Koskenniemi. It is also without prejudice to two points which I would like to make even at this early stage of the oral proceedings:

(1) The first is a very simple point. Paragraphs 85 to 123 of the Danish Written Observations relate exclusively to the merits of the case and fall within the general traverse I have just enunciated. But lest there be any misunderstanding arising from the wording of paragraph 87 of the Danish Written Observations, let me make it clear (as I have done already) that Finland's Request for provisional measures is confined to drillships and oil rigs manufactured in Finnish shipyards and does not extend to "reasonably foreseeable" ships. In other words "future ships" are not the subject of the Finnish Request for interim measures.

(2) My second point is this. In paragraph 141 of its Written Observations, Denmark makes an alternative submission that the Court, in the event that it grants the Finnish Request in whole or in part, should indicate that Finland undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's

submissions on the merits. Finland cannot, with all respect, believe that this alternative submission is meant to be taken seriously. It is unsupported by any argument in the Danish Written Observations. The Court will be only too well aware that reparation (or compensation) is one of the normal consequences of an internationally wrongful act; and, in fact, earlier in my address, I cited two passages from the *Chorzów Factory (Indemnity)* case. Is it seriously being suggested that Finland is committing an internationally wrongful act in seeking to have recognized and acknowledged the right of free passage through the Great Belt of drillships and oil rigs manufactured in Finland? I personally can think of nothing more disruptive of the prospects of encouraging States to resort to this Court for the settlement of their legal disputes than the suggestion that, in doing so, they risk being asked to give an undertaking in damages against a certain contingency. As a matter of international law, Finland would submit that this alternative Danish submission is ill-conceived and cannot properly be indicated by the Court at this stage of the proceedings. There is, indeed, a question as to whether the powers of the Court under Article 41 of the Statute extend so far as to encompass a measure of this kind which would have profound consequences in the sense of substantially modifying the risks inherent in instituting proceedings before this Court. No government takes the decision to institute proceedings before this Court without giving very serious attention to the gravity and importance of the case which they are going to present. To Finland's present knowledge, no request such as that contained in the Danish alternative submission has even been presented to this Court, far less entertained; and this would appear to be confirmed by the lack of any supporting argument in the Danish Written Observations.

Mr. President, Members of the Court, in the light of the considerations which I have developed - considerations which are firmly grounded in the jurisprudence of this Court - Finland submits that all the conditions identified by the Court as being required to be satisfied before an indication of provisional measures will be granted are satisfied in the present case. The object and purpose of provisional measures is to preserve the respective rights of the Parties pending a decision by the Court on the merits of the case. It is the asserted rights and interests of Finland in

free passage through the Great Belt of drillships and oil rigs manufactured in Finland which are threatened by the unilateral action of Denmark. These are the rights which need interim protection. Finland does not dispute the right of Denmark, as the territorial sovereign, to construct a fixed link for rail and road traffic across the Great Belt; but Finland submits that this right can be exercised only subject to the limitations which international law imposes - and one of these limitations is precisely respect for the right of free passage for vessels through the Great Belt. This is the basic right which calls for interim protection by way of conservatory measures pending the outcome of the proceedings on the merits of the case; and Finland asks only for the minimum measures necessary to protect that right and ensure that Finland's position in the further proceedings in this case is not irreparably prejudiced. That it would be so prejudiced by continuing Danish action in connection with the bridge project, the effect of which would be physically to deny to drillships and oil rigs manufactured in Finland the right of free passage through the Great Belt, is clear. Finland accordingly asks the Court to indicate the provisional measures which it has specified in its request.

Mr. President, Members of the Court, I would wish to thank you all most sincerely for the courtesy, attention and patience with which you have listened to my statement.

Mr. PRESIDENT: Thank you Sir Ian. It would seem convenient now to adjourn and to meet again at 3.00 p.m. this afternoon to hear Mr. Koskenniemi. Thank you.

The Court rose at 12.45 p.m.