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Public sitting

held on Monday 1 July 1991, at 3 p.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 15 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
Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Judges *ad hoc* Paul Henning Fischer
Bengt Broms

Registrar Valencia-Ospina

Présents:

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

M. Valencia-Ospina, Greffier

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comme secrétaire.

The PRESIDENT: Please be seated. May I call on Mr. Koskenniemi please.

Mr. KOSKENNIEMI: Mr. President, Members of the Court. May I first note how honoured I feel to be able to represent my country before you. As most nordic lawyers I have been brought up to believe in the central role of international law and indeed the role that this Court can play in the establishment of a more peaceful and more just world.

Mr. President, Members of the Court, in this third address to the Court today by Finland I shall discuss the factual aspects of the Finnish request for provisional measures. My presentation will build upon the analysis of the law and jurisprudence of this Court as performed this morning by our counsel, Sir Ian Sinclair.

My statement will consist of four parts.

First, I shall describe the geographical situation in the Great Belt strait as the main navigational link between the Baltic and the North Sea. I shall link this geographical characterization with an explanation of its economic significance to the Baltic States generally and to Finland more particularly;

Second, I shall briefly explain the nature of the unilateral action that Denmark has embarked upon so as to change the existing situation;

Third, I shall in somewhat more detail explore the kinds of irreparable prejudice which is suffered by Finland and Finnish rights as elaborated in the Finnish Application in case Denmark will continue its chosen unilateral action to change the navigational situation in the Great Belt;

And *fourth*, my intention is to dwell upon the question of the urgency of an order of provisional measures particularly in light of the Finnish request.

In a nutshell, Mr. President, Members of the Court, my four points are intended to show that there is an existing situation of great importance to many countries, but in particular to Finland; that this situation is about to be significantly modified by Danish activity; that the activity threatens to cause irreparable prejudice to existing, undisputed rights which are the subject of the main proceedings in this case; and that it is therefore urgent that provisional measures be indicated to

preserve these rights. In the appropriate places, I aim to make some reference to the Written Observations submitted by Denmark on 28 June, though I shall of course reserve our right to come back to those observations more fully at a later stage.

1. The present situation: its geographical and economic aspects

For Finland, as was explained by our Agent, Ambassador Grönberg, the geographical aspects of this case provide the perspective from which the legal rights and duties of the parties are to be ascertained. These aspects will be elaborated in greater detail during the later stages of the procedures. Nevertheless, it might be useful at this stage to view the dispute from its broad geographical perspective.

Finland is a country which possesses a coastline only in the Baltic Sea. The Danish straits are the only natural waterway between the Baltic and world oceans. All maritime transport between Finland and locations outside the Baltic must thus pass through the Danish straits. In this respect, Finland's situation is comparable to that of Poland and, to some extent, the Soviet Union - the latter, however, having access to oceans also from its Arctic and Black Sea ports. All other Baltic nations have a coastline also in the North Sea and thus easy access to maritime locations around the world. All Baltic States are to a greater or lesser extent dependent on the conditions of passage in the Danish straits - but for none of them is this dependence as absolute as in the case of Finland and Poland.

The exceptional dependence of Finland on the conditions of passage in the Danish straits may be illustrated by the fact that last year (1990) over 90 per cent of Finnish exports and 82 per cent of Finnish imports was carried by sea. And out of this total of 52.5 million tons or thereabouts, about 46 per cent passed through the Danish straits. As regards Finnish maritime exports, over 60 per cent (over 11 million tons) travels through the Great Belt or the Sound while out of imports, the relevant share is 37 per cent (12.5 million tons).

But the importance of the Danish straits is not restricted to their role as an important - indeed the only - natural waterway for goods and people to travel between the coasts of Finland and world oceans. The conditions of passage there are also crucial for an undisturbed functioning of a

flourishing shipbuilding industry in Finland. During the period 1982-1988, for example, shipbuilding accounted for over 10 per cent of the value of Finnish exports from the metal and engineering industry. During the peak years (1982, 1983) its share of the exports in those branches was well over 20 per cent. During the past years, Finland has established itself as one of the major shipbuilding nations in Western Europe. Specializing early, the Finnish yards are now building a relatively high number of large special-purpose vessels. In 1989, for example, Finnish yards delivered 61 ships with a combined tonnage of over 500,000 GRT. The main international contenders for these orders have been France, Germany, Italy and, of course, Finland. Despite the international shipbuilding crisis, the building of large passenger and special vessels seems to continue as before.

Now it is clear that both Finland's international trade as well as shipbuilding industry are completely dependent on the conditions of passage in the Danish straits. Let me now briefly describe what those conditions are presently.

Two straits, as you are aware, constitute the principal international waterways between the Baltic and the North Sea. *The Sound* (Oresund) is located between the Danish island of Sjaelland and the southern part of Sweden (Skane). The *Great Belt* is situated between the Danish islands Fyn-Langeland in the west and Sjaeland-Lolland in the east. Of these two, the Great Belt is the one used for transit by the largest and the heaviest vessels in terms of tonnage. Though the number of individual passages by ships in the Sound presently is higher than in the Great Belt, the Great Belt is displacing the Sound as an international passage-way if measured by tonnage. During the 1980s transit traffic in the Great Belt has been steadily increasing from around 18,500 passages in 1982 to over 20,000 large ships annually in 1987. In 1987 there was a daily traffic of almost 60 larger ships (over 50 GRT) in the Great Belt. The operative difference between the conditions of passage in the two straits - the Great Belt and the Sound - relates to their depths. The official depths at medium water listed for the two channels in the Sound are 7.5 and 7.7 metres, while the Great Belt will allow passage by ships with a depth of up to 17 metres. The Great Belt is more than twice as deep as the Sound and constitutes thus the only deep-water passage-way between the Baltic and the North Sea.

Because of public concern for the marine environment and, as the Head of Inspectorate of the Royal Danish Administration of Navigation and Hydrography has observed, due to "the increasing number of deep-draft vessels[1]" in the Great Belt, a special waterway - the Route T - was established and recommended to shipping by the International Maritime Organization (IMO) in 1975[2]. Since the establishment of the Route T, also a traffic separation scheme has been established in the Great Belt, at precisely the place which the projected East Channel bridge is to cross.

Now, there are many types of ships which cannot use the Sound because of its insufficient depth. Though regular passenger vessels have no difficulty in navigating through the Sound, the Great Belt is the only waterway that can be used by special deep-draught vessels. In this connection, it is relevant to note that the relative success of the

[1]Anker Nissen, "Route T; A major Danish Waterway", PIANC-AIPCN Bulletin 1991 - No. 72, p. 131.

[2]IMO Res. A. 339 (IX) November 1975

Finnish shipbuilding industry is related to its early specialization. Finnish yards have concentrated on constructing ice-breakers, other ice-protected ships, research vessels, very large luxury cruisers and other special purpose ships. The demand for such ships has been less vulnerable to fluctuations in the shipbuilding market. Through specialization, it has also been possible for a small country like Finland to direct limited resources in an efficient way.

And here, of course, Mr. President, Members of the Court, I come to the factual heart of our present problem. There are many kinds of special ships built in Finland which simply cannot use any other passage than the Great Belt to travel between the Baltic and the North Sea, or for which the alternative, the Sound, would be an imprudent choice. For example, seven of the regular ferries and very large luxury cruisers built by the Finnish company, Kvaerner Masa-Yards, during 1986-1991, have had a draught ranging from 6.5 metres to 8.0 metres. The newest passenger liner, projected for delivery in 1992, is to have a draught of 8 metres. The heavy-load transport vessel "Transshelf", built by the same company in 1987, possessed a draught of almost 9 metres.

Of particular interest for this case, however, are three other categories of ships, namely, drill ships, semi-submersible drill rigs and jack-up rigs, towed or transported by heavy-load transport vessels. Much discussion will, undoubtedly, be devoted to the character of these vessels and to the law applicable to their maritime activities during the main proceedings. I shall not go into that matter here. I would only like to note that, the Finnish company, Rauma-Repola Offshore, has manufactured 23 such vessels since 1972, among them being two so-called jack-up rigs presently being constructed in co-operation with a company from the Soviet Union. These are vessels with a transit draught usually from about 7 metres to close to 12 metres. For at least six of these vessels, the Great Belt has been the only available passage-way. As you are aware, the height of such vessels well exceeds 65 metres - the height of the planned East Channel suspension bridge projected to cross the main navigable channel of the Great Belt.

Now, our Danish colleagues have, in paragraphs 55 to 57, in particular, of their Written Observations, argues that all but one of these crafts would have been able to pass through the Sound because of the official median-water depth of the Sound of 7.7 metres. This is not correct. In

achieving that result, our Danish colleagues have neglected several factors.

Firstly, four of the semi-submersible rigs have been equipped with thrusters - that is to say propulsion systems with propellers which make them independently navigable. These thrusters add 3.9 metres to their draught, making their total draught rise to 11.7 metres. This applies to rigs RR-1, 2, 7 and 18 in Annex 15 of the Danish Written Observations.

Secondly, both of the two jack-ups (RR-21 and 23) as mentioned in Annex 15 of the Danish Observations, have been transported by heavy-lift ships and their combined transportation draught has been 9.5 and 8.5 metres. For these six craft, passage any other way would have been impossible.

Thirdly, the rest of the craft - 14 drill ships and semi-submersibles - which have been delivered through the Danish straits, have had an actual draught of 7 to 7.5 metres, as measured at the shipyard at delivery (in contrast to the figures concerning planned draughts, as contained in Annex 15 of the Danish observations).

Now one need not be an expert in offshore technology to realize that, with a draught of 7.3 metres or 7.5 metres, the passing of a strait with a nominal draught of 7.7 metres, one would be making, indeed, an extremely hazardous journey. Bearing in mind, for example, that the resolution by the International Maritime Organization No. 620, 1987, recommends that large ships navigating through the entrances to the Baltic take into account that charted depths "may be decreased by as much as 2 metres owing to unknown and moving constructions". And, in fact, records show that out of these craft only one has gone through the Sound, while at least 10 have navigated the extra 130 nautical miles that it takes to go from Finland to the North Sea, through the Great Belt. And here I must add that, despite our attempts, we still lack records of the actual routes used by seven of these craft, while one has been delivered to the Caspian Seaj through another route.

Finally, the official draughts of 7.5 and 7.7 for the Sound have, I believe, been measured at median level water. It is our understanding that the water level may change in the Danish straits due to strong easterly or westerly winds, up to 2 metres. Taking this into account, I believe it evident that even these craft - whose draught is only from 20-70 centimetres less than that of the depth of the

Sound - have passed through the Great Belt. But, we shall furnish information to the Court and to Denmark of the actual routes used by these remaining craft, as soon as we receive it from the buyers.

And thus, from the Finnish perspective, any attempt to restrict the conditions of passage in the Great Belt will constitute an immediate threat to the very basics of our shipbuilding industry. For us, it is not enough that the conditions are maintained at a level that most ships or that most "normal" ships can continue to enjoy them. The right of free passage is not restricted to any particular category but applies to all ships.

For a country whose geographical position is that of Finland's this is the only guarantee for its continued participation in international maritime commerce with a footing equal to that of other maritime nations. As Ambassador Grönberg observed in his opening statement for Finland, the freedom of the high seas is only as broad or narrow as the conditions of passage in the Great Belt.

2. The Danish Project

Mr. President, Members of the Court, I come now to my second point: description of the intended action by Denmark so as to change the existing situation.

The current plan for a fixed traffic connection over the Great Belt has been broadly described in the Finnish Application and, indeed, in the Danish Written Observations. No doubt much detail about the plan will be given by our Danish colleagues both now and during the later stages of the proceedings. For the present purpose it is, I believe, sufficient to give a very brief outline of the project in order to be able to assess the prejudice it will cause to Finnish rights and the urgency of an indication of provisional measures.

The fixed link over the Great Belt will stretch from Knudshoved on Fyn to Halsskov point on Sjaeland. The geographical location is clearly indicated in Map 3, annexed to the Danish observations. It will carry both a railway connection and a motorway connection. The project consists of three distinct though interrelated parts:

(1) The first part is the *West Bridge* between Fyn and Sprogoe island in the middle of the strait. This will be a fixed concrete bridge 6.6 km. long, carrying both road and rail traffic over the West Channel, in which there is presently no international navigational route. Nevertheless, the West

channel, too, is used for light maritime traffic by ships under 1,000 deadweight tons. The navigational clearance of the West Bridge will be only 18 metres - a compromise solution adopted between the original suggestions of either 14 or 22 metres.

(2) The second part of the project is the *East Tunnel*, this will be 8 km long. It will link Sprogoe island with Halsskov on Sjaeland. This part of the fixed link will consist in fact of two drilled railway tunnels, each containing one railway.

(3) And the third part of the project will be the *East Bridge*, a 6.8 km long suspension bridge carrying motor traffic on four lanes plus an emergency lane. It will start at Sprogoe island again, in the middle of the channel and land at Halsskov on Sjaeland. Its navigational clearance will be 65 metres. The bridge will have a free span of 1,624 metres between the middle pair of piers, through which navigation in the Great Belt will be directed.

Let me stress in this very brief description the unitary but interconnected character of the project as a whole. There is both a degree of independence between and a distinct connection among its three parts. Though the right of passage through the Great Belt will be only definitely limited by the finalization of the East Bridge, the interconnected character of the project as a whole means that every earlier activity will lead closer to that final end.

Though the idea of establishing a fixed link over the Great Belt is an old one, the present project dates back to Danish Law No. 380 of 10 June 1987. The company that was created to undertake the project was established through provisions in that act and the modalities and timetable for the project were likewise based on it. The project is a Danish one. It is purely a national effort to exercise jurisdiction, which has the consequence of modifying the conditions of passage in an international strait which are laid down by international law.

3. The Question of Irreparable Prejudice to Finnish Rights

Mr. President, Members of the Court, I come now to my third point, the question of irreparable prejudice to Finnish rights.

In a general way, I believe it evident that Finnish rights will be prejudiced by the on-going Danish project to close the Great Belt from ships of over 65 metres' height. There are several types

of deep draught vessels the height of which exceeds 65 metres and for which the Great Belt is the only channel deep enough to allow unhampered passage. The question now is, as our counsel elaborated in the morning, if there indeed is a likelihood or at least a possibility that Finnish rights might be prejudiced by Danish action already before the final judgment in this case - or at least, as this Court saw it in the Nuclear Tests cases, that the possibility of damage is not excluded (*I.C.J. Reports 1973*, pp. 105, 141).

Were this a matter of municipal law before a national court, we would be facing a very typical cause for an interlocutory injunction. A person, A, is undertaking construction work in his property; his neighbour, B, thinks that this creates prejudice on the rights B has for the full enjoyment of his property. The construction might, for example, prevent lorries from using the common road that leads into B's real estate. Surely, if B asked to take the matter to a municipal tribunal and asked for an interim order to the effect that A should not complete the construction pending the time the matter is being dealt with, there would be few jurisdictions denying B that temporary relief.

Now we are not, of course, before a municipal tribunal. But I submit that the reasons for which we would immediately recognize the situation calling for the order of provisional measures are equally present in international as well as national law. There is the existing legal situation; the continuous enjoyment of free passage through the Great Belt by various offshore and other craft built in Finland since 1972. There is an attempt to change that situation - the Danish project - and a challenge to the legal justification for the change. Surely it would be difficult to accept that the change could continue unmodified and the substance of the right be prejudiced while the very entitlement to undertake that change is under a legal challenge. The element of conservation, preservation of existing rights, provides the connecting juristic rationale.

As was pointed out by the counsel for Finland this morning, there is a direct connection between the rights which are sought to be preserved in the request and those that are in dispute between the Parties. He pointed out also that, though there is a connection, the request by no means intends to achieve an interim judgment. The request is for a conservatory measure, not for the recognition of the substance of the claimed rights.

The situation is not without analogy in the practice of this Court. In the *Fisheries Jurisdiction* cases, the Court observed that:

> "the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour" *I.C.J. Reports 1972*, pp. 16 and 34).

Here there was a unilateral act aimed at changing the existing situation and consequently an order for the preservation of the rights of the applicants. Prejudice, as the Court then had occasion to observe, was constituted by the manner in which the implementation *anticipated* the judgment. In the present case, as well, we find a right (or at least a right as it is claimed to exist - the right of passage through the Great Belt - which is being prejudiced by the immediate implementation of Danish Law No. 380. Such implementation would clearly affect the possibility of the restoration of that right in case of a judgment in Finland's favour.

The fact that injury to Finnish rights is irreparable in the sense disclosed by the jurisprudence of this Court has already been explained by our counsel. As he pointed out, irreparability cannot be taken to mean an absolute irreparability, irreparability in law - after all, anything can be made subject of compensation - but irreparability in fact. In the Anglo-Iranian Oil Co. as well as in the Fisheries Jurisdiction cases, the Court indicated provisional measures to protect rights whose violation would clearly have been remediable by damages - thus the Finnish case would come under the relevant requirement even if one construed it only narrowly to relate to the economic losses of one company. However, that is not the perspective Finland has on the substance of this matter. Our perspective is larger and relates to any unforeseen effects that the Danish project might have. Here I note that once the project has reached, what could be called a "point of no return" - that is to say, once the commitment has been made by Denmark to foreclose navigation by ships of over 65 metres - any construction work, any physical measure to exclude alternative solutions will, of necessity, diminish the physical possibility for the full restoration of Finnish rights. If provisional measures were not granted, this would allow the signature of contracts and the continuation and conclusion of construction works in such a way that, in case the rights claimed by Finland were granted, a declaration of Finnish rights - as requested in the Application - would be insufficient as a

remedy. Plans should be cancelled and whatever constructions there would have been erected to prejudice the right of passage should have to be torn down.

The same point can of course also be made in another way; the continuation of the fixed link project as planned would also seem to fall squarely in the category of activities likely to aggravate or extend the dispute. It would make accommodation and compromise more difficult to attain as alternative ways to safeguard the right of passage would diminish each day in the course of the construction work with each of the three parts of the project.

But irreparable prejudice does not only occur to Finnish rights, as it were, *in abstracto* if the Danish plans continue unmodified. Tangible economic interests are also affected.

The continuation of the bridge project means, of course, that Finnish shipyards can no longer fully participate in tenders regarding ships which would be unable to pass through the Great Belt after the East Bridge has been completed. Let me note here that with a bridge of 65 metres, the operative passage is, of course, much lower. In the first place, according to official Danish information, due to high westerly wind, there may be in the Great Belt in extreme conditions a rise of the sea level by 2 metres above mean sea level[3]. With heavy traffic, the level of the bridge itself will fall perhaps as much as 2 to 3 metres and most countries including, I believe the Nordic countries, require a free clearance of 1 to 2 metres. In other words, the operative height of the bridge will be 60 metres or even less.

That this is insufficient for even immediate purposes becomes clear as the largest passenger ships already possess a height of 56.3 metres. Besides, five heavy-lift ships manufactured at a Finnish shipyard in 1985-6 have had a height each of over 62 metres. At the earlier phases of the plans, the Danish Ministry of Industry had observed that vessels had been built with mastheads up to 75 metres and that there were in existence ultra-large crude oil carriers reaching the height of 68.6 metres[4].

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[3]Anker Nissen, "Route T - A Major Danish Waterway", *PIANC-AIPCN - Bulletin 1991* - No. 72, p. 133.

[4]Cf. *News from Storebaelt*, No. 6/89, p. 2.

But the most immediate impact, and the one relevant for this Request, will be felt by the Finnish offshore industry, in particular the Finnish company Rauma-Repola Offshore Oy. The height of the craft produced or under production at Rauma-Repola Offshore has varied between 80 metres, and those are drill ships, and 150 metres, and those are jack-up rigs. None of them could have travelled through the Great Belt had the now projected fixed link been in existence. As I pointed out earlier, and in contrast to the contentions made by Denmark in its Written Observations, for most of them, there would have been no other available passer-way at all, as the Sound would have been too shallow. The latest craft - constructed in co-operation with Vyborg shipyard in the Soviet Union - will pass through the Great Belt during this summer. The following passage will take place sometime next year. Though not many passages have occurred during the most recent years, the peak years - 1977 and 1982 - saw a delivery of four and three such vessels.

Let me note here that the Danish Written Observations completely by-pass the question of the project's effect on the future plans of Rauma-Repola Offshore. Those plans started already in early 1980's when a channel was dredged to the Tahkoluoto Harbour to a depth of 17.5 metres at a cost of approximately 50 million US dollars. This was done partly to allow the company to manufacture all types of craft which can utilize the Great Belt to the full. At the same time the company took in use innovative techniques to assemble both jack-ups and semi-submersibles in its shipyard.

At present, the international market for offshore exploration craft has experienced a lengthy standstill. Nevertheless, out of the 10 craft now under construction in the world, Rauma-Repola Offshore participates in three: two are co-production projects with a Soviet enterprise, one is a contract with the national oil company of a Middle-Eastern country. Last year (1990), there were already tender projects for 14 offshore exploration and production craft. During the first half of this present year, the company has already submitted or is submitting tenders for seven craft - none of which (with a possible exception of one, I believe) could pass from the Danish straits using current transportation practices once the project for a fixed link is completed. Let me note that the value of each such craft is approximately from 120 million US dollars to 250 million US dollars. This is a figure which compares interestingly to the very preliminary cost-estimate we have received regarding

seven different technical alternatives for opening either one of the two bridges - these estimates ranging from 25 to 500 million US dollars.

The impact of the Danish bridge project on Rauma-Repola Offshore Oy is twofold. Already the very existence of the bridge project in its present form has had and will continue to have an effect on the behaviour of potential buyers. They feel natural hesitation to send enquiries to the company - believing that the company's capacity to deliver offshore craft will be destroyed by the bridge. Now every lost chance means a potentially lost contract. Each rig contract means at least 500,000 man hours of work for Rauma-Repola Offshore and an equal amount for its sub-contractors who are mostly Finnish - i.e. one half of the capacity available. An indication of provisional measures by the Court will give a clear signal to the international offshore market that the Danish plans are disputed and that Rauma-Repola continues to plan its activity on the basis of the right of free passage through the Great Belt hitherto enjoyed by drill ships and oil rigs manufactured in Finland.

The second stage of impact would arise through the completion of the East Bridge as planned. This would make it physically impossible to deliver most types of rigs or drill ships that are demanded by the market complete and ready for drilling. Dividing the assembly of a rig between two sites - as suggested by Denmark - is not an economically feasible option. The competitiveness of Finnish offshore craft is based on the fact that an essential part of construction work can be undertaken in the shipyard which, as I noted earlier, is specially equipped for that purpose. It has been estimated that completing the construction work only after the craft have passed the Great Belt, in the North Sea, will involve both an additional cost of approximately 7.5 to 13.75 million US dollars and an extension of time of delivery of up to four months. This would inevitably destroy their competitiveness in the international market.

Mr. President, Members of the Court, we were rather surprised by the figures our Danish colleagues put forward in paragraph 58 of their observations regarding the costs of disassembly and reassembly of a rig. Of course, I have no idea on what their calculations are based. The indicated costs and the extension of delivery time in the Finnish Application, the one I noted, is based on the experience of Rauma-Repola Offshore in drilling tower construction. It follows as a direct

consequence of customers' construction specifications. The estimate is based on the company itself undertaking the reassembly and providing for that purpose the manpower and extra equipment needed. It does not even cover the lost revenue for the client due to extended delivery time. There is here a problem of commercial confidentiality which we are presently trying to overcome. If possible, we shall provide the Court, as well as our Danish colleagues, with a written explanation of the basis of the Finnish calculation during this week.

The impact of the continuation of the Danish project as planned is such that it could not be adequately compensated ex post facto should the Court decide in favour of Finland on the merits of this case. In the fist place, the full restoration of Finnish rights would require the pulling down of the East Bridge or whatever other constructions may have been erected to prevent free passage at enormous cost to Denmark. In the seond place, the completion of the project would have significant effects on employment at Rauma-Repola Offshore. The company employs 1,000 people today in an average market situation. Where two exploration rigs are under construction the average number of employees rises to 1,500 and an equal amount of subcontractor manpower is employed at Rauma-Repola Offshore facilities and elsewhere in Finland. Thus, the effects on employment in Finland of the Danish project could be significant. The hardships for the employees and their families cannot adequately be compensated by money at the late stage in which a final judgment might recognize the Finnish rights.

In the third place an important effect is also the loss of credibility in the international market that will affect the company itself. This, together with the extra construction costs would definitely eliminate the company from the market and end offshore construction activities at Rauma-Repola Offshore facilities and probably in Finland.

Finally, as I pointed out earlier, the bridge project will have a general effect on the capacity of Finnish shipyards to submit tenders for very large special ships (let me note, again by way of comparison, that the value of the three very large passenger vessels delivered from the Finnish shipyard I mentioned earlier ranged from 200-300 million US dollars each). There is, of course, a degree of uncertainty about suh effects - their being dependent on the fluctuations of the market and

on assumptions about the intentions of potential buyers. Proving loss of contract is obviously difficult. Nevertheless, as the Court's jurisprudence requires the establishment of a likelihood or a possibility of damage, it seems clear that the relevant test is met.

4. The question of urgency

Mr. President, Members of the Court, I move now to my fourth and final point, namely, to show that an indication of provisional measures is urgently needed in a fashion required by the Court's jurisprudence. Urgency, notes Sztucki, following this Court's pronouncement in the *Pakistani Prisoners of War* case, "is an essential quality of a request for interim protection[5]". The requirement of urgency follows from the very nature of interim protection as having to do with prohibiting the unilateral disturbance of the *status quo* pending a court's deliberations. There should, in other words, exist a threat that an infringement of a party's rights might materialize before the Court has had its final say in the matter.

I submit that such a threat has already arisen and can be eliminated only by the indication of provisional measures. To show this, it is necessary briefly to review the present state of the fixed link project.

Danish Law No. 380 which provides legislative basis for the fixed link project and the background for the Finnish Application was adopted in June 1987. Thereafter, works regarding the three parts of the project have proceeded as follows:

1. *The West Bridge*: the Great Belt Company entered into contract with the European Storebaelt Group (ESG) in June 1989. The first bridge elements were placed off Fyn in late 1990. And the first of the West Bridge sections extending above the sea surface were installed as recently as May 1991.

2. *The East Tunne*l: The Great Belt Company entered into a contract with the MT Group, an international consortium, in November 1988. The first boring operations were started in August 1990.

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[5]V. Jerzy Sztucki, Interim Measures at the Hague Court (1983), p. 113.

By 7 May this year, all four boring machines had stopped due to technical problems. Today, the bored stretch, I believe, constitutes around 861 metres. Though about two-thirds of the tunnel elements have been produced, the tunnel works are over 12 months behind schedule due to technical problems. At a meeting of the Great Belt Company in May 1991, the MT Group (the contractor) estimated that it would take between three to six months to put the machines back in operation.

3. *The East Bridge*: the submission of tenders for the East Bridge was completed in December 1990. On 17 June this year - i.e., two weeks ago - the Storebaelt Company (the Great Belt Company) was, I believe, authorized to sign the contracts. No signature, as far as we know, has yet taken place. The tenders are valid until 18 August this year.

It is clear, then, on the one hand, that substantial work for the fixed connection has commenced and is indeed quite far advanced regarding some parts of the project. The whole of Sprogoe Island in the middle of the strait has been complete refashioned so as to create two large embankments for the two bridges landing on it and to begin boring for the East Tunnel. Two artificial islands have been built in the East Channel to carry the anchor blocks for the East Bridge. Though work is proceeding, however, we are still a moment away from action that would create a definite *fait accompli*. The East Bridge contracts have not yet been signed and construction work in order to close the East Channel has not yet been begun.

Mr. President, Members of the Court, with the conclusion of the contracts projected to take place in August this year, the Danish Government will commit itself definitely to completing the fixed link project in accordance with its original plans. As I said, I believe that the validity of the tenders reaches no further than 18 August. In Finland's view, it would be appropriate that those contracts should not be concluded now or, as the case might be, they should be concluded in a modified form so as to make provision for the rights in dispute. Simultaneously, work is heading towards what I have called a "point of no return", in regard to the West Bridge and the East Tunnel. In regard to some parts of the project, we may already have passed that point. For example, the decision to construct a bored, instead of a submerged, tunnel for railway traffic under the East Channel may already have prejudiced the solution regarding the motorway link.

At this juncture, I believe it useful to anticipate one possible objection to this argument so far. For, as the Great Belt is finally closed only on completion of the East Bridge, and as that event is scheduled to take place only in 1996 or 1997, it may seem that there is no urgency to indicate provisional measures. In the Finnish view, however, and as was already pointed out by our counsel this morning, the completion of the East Bridge marks only the final step in a continuous process in which Finnish rights are irreparably harmed already, long before that final event. The point is, of course, that the three parts in the project - the West Bridge, the East Tunnel and the East Bridge - are interlinked, so that many activities, apparently unrelated to the final closing of the Great Belt, in fact anticipate it, by excluding practical possibilities for accommodating Finnish interests and given effect to Finnish rights in the event of a judgment in our favour.

Let me give just two examples. First, although the ongoing work for the East Tunnel poses no per se threat to navigational rights in the Great Belt, the fact that the tunnel alternative is being drilled only for the railway link implies that the motorway link shall be constructed in the form of a bridge. In that sense, even the East Channel constitutes a threat to Finnish rights. Second, it is evident that decisions regarding the mere design of the East Channel Bridge - i.e., that it shall be a suspension bridge - do not concretely threaten Finnish rights. On the other hand, the exclusion of alternatives implied by any decision on the design is, again, a step towards prejudicing the final solution.

In a sense, the very decision to opt for a bridge solution in the East Channel - instead of the tunnel alternative, which existed still in 1987 and is still provided in the relevant Danish law - already created a threat. Still, it is probably correct to say that that decision, taken some time between 1987 and 1989, did not, of itself, constitute a very immediate threat. On the other hand, as I have noted already, continuing and completing the East Bridge, as planned, during the Court's deliberations would be clearly prejudicial.

The matter is complicated and much depends also on the available technical alternatives to satisfy Finnish rights. Thus, for example, it might be possible to safeguard free passage in the Great Belt by dredging a new navigational route in the West Channel of the Strait and constructing the

West Bridge - which is not a suspension bridge - with a conventional opening. In such case, continued construction of the West Bridge is of the character to have a degree of prejudice.

Let me note, in this connection, a fact which will become apparent in the later stages of the process and which has continuously complicated the Finnish-Danish discussions: technical experts disagree. They disagree about the technical and about the economic feasibility of the different alternatives to satisfy Finland's interests. The existence of disagreement also fundamentally affects how we view what particular action creates irreparable prejudice to Finland's rights.

It is probably, however, correct to assume that the relevant event which would constitute a definite prejudice to Finnish rights and would prejudice the Court's judgment, is situated somewhere between the initiation of the current project and its physical completion. The following intermediate events might come to mind: for example, acceptance of the current overall plan by the Great Belt company; start of tendering procedures (on any of the three phases); signature of contracts; or, physical start of work with any or all of the three projects.

During which of these phases does the situation become urgent, so urgent as to require the indication of provisional measures? Now, merely posing that question, I believe, shows the difficulty of answering it, bearing in mind also that many of these events have already taken place.

In the final analysis, singling out any one event in the total history of the project as the one at which a concrete threat will arise remains a matter of appreciation. A matter on which technical experts disagree. The possibililty that *any* continuation of the project might be prejudicial for the final judgment cannot be rejected out of hand - particularly if attention is on effects on the offshore market. Nevertheless, an indication that Denmark should simply stop this project for the approximately two years that it might take before the final judgment is rendered may not seem reasonable. The point is, however, that what is reasonable and what is not cannot really be determined by anyone else other than the Danish Government itself, subject, of course, to the possibility that the Court might need to indicate more specific measures, should the Danish Government fail to take adequate measures to protect Finnish rights and interests.

For this reason, Mr. President, Members of the Court, Finland has, at this stage, refrained

from indicating any particular event or action in the total project at which Denmark should cease pursuing the construction work. It is the Finnish view that an assessment of the relevant technical alternatives and the costs of leaving any of them open, or choosing between them, should be left to Denmark. A choice from among the many practical and technical ways to safeguard Finnish rights *pendente lite* would risk to be arbitrary and pose an unreasonable burden on Denmark. The same risk would be involved in a blanket prohibition regarding the continuance of any activities in the Great Belt. Therefore, it is requested that the Court give a general indication that Denmark take no such action as would impede the passage of ships, including drill ships and drill rigs, to and from Finnish ports and shipyards; or in any other way prejudice the rights claimed by Finland. In this way, the choice of the appropriate technical alternative and financial risk would be left to Denmark. I thank you.

Mr. PRESIDENT: Thank you very much Mr. Koskenniemi. That, I think, concludes the first presentation of the Finnish Application case. So we meet again tomorrow at 10.00 a.m. to hear the Danish Agent introduce his team and the case of the Kingdom of Denmark. Thank you.

The Court rose at 3.55 p.m.