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Public sitting

held on Tuesday 2 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 mardi 2 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
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
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Schwebel
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Evensen
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Aguilar Mawdsley
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The PRESIDENT: Today we will hear the reply of the Government of Denmark and may I first give the floor to Ambassador Lehmann.

H.E. Mr. LEHMANN: Mr. President, distinguished Members of the Court. Though this is the first time that I have the honour to plead before the Court, it is not the first time that Denmark is appearing before this august assembly to have a final settlement of an inter-State dispute. As is well-known to the Court, Denmark is and has always been a strong supporter of the Court's function and role in the international community of nations. This attitude is also reflected in the present case where, as stated in paragraph 84 of our Written Observations, Denmark has taken it for granted that the Court has jurisdiction to adjudicate the matter now before it. We are, therefore, ready to enter directly into the merits of the case, including the merits of the request for indication of interim measures and, with your permission, Mr. President, I shall do so now.

It is indeed a bold submission with which the Kingdom of Denmark is confronted in the present case. The Government of Finland submits that provisional measures be indicated to stop further construction of the bridge over the Great Belt - a project which has been planned and debated in full public for more than half a century, a project which has been specifically notified to all foreign missions in Copenhagen since 1977, a project which has now been under actual construction for more than 3 years. In the course of this whole process, no reaction to the project has ever come out from Helsinki.

How can Finland legitimately ask for an urgent action now to stop a project, if it has never before raised any objection to that project? How can there be "urgency" after so much passivity on the part of Finland? It is Finland which, through its own conduct, belatedly has created an urgent situation for itself. Denmark has been acting all along in good faith and with maximum publicity. When there might still have been time to adapt the project to concrete demands within the margin of a reasonable degree of proportionality, no requests were made by Finland. The Finnish objection is raised years after the implementation of the project started, i.e., at a time where the changes demanded by Finland cannot be made and would be out of all proportion to the changes that the Finnish industry may have to consider in order to adapt their drilling platforms and drilling ships to

the dimensions of the bridge over the Great Belt.

From this point of view alone, the request for provisional measures is, I submit, not an appropriate request and Finland should not be allowed to interfere with the project at this advanced stage.

The Danish delegation to these pleadings shall explain to the Court, in more detail, the reasons why the Finnish request should be dismissed.

At this introductory stage of our pleadings, I shall limit myself to state the essential factors which the Danish Government believes must govern the decision on Finland's request concerning provisional measures.

(1) *First*, the *time factor*. According to the Danish view - and, I venture to suggest, according to common sense - this element must be regarded as an essential factor in the Court's deliberations in the present case. Successive Danish Governments have, since the early 1970s, taken great care when planning the construction of a permanent link over the Great Belt to take into account the existing traffic of ships through that Strait. The result of these careful considerations has been that a bridge over the eastern channel of the Great Belt, with a clearance of 65 metres, would not hamper the passage of existing ships through the Strait. In order to have as much assurance as possible about the exact height of the bridge, notifications about the project have been communicated to all foreign missions in Copenhagen.

The Danish notifications were made in 1977 and again in 1987, and in 1989, respectively (see Annexes 2, 8 and 11 to our Written Observations). A note from Finland, protesting against the construction of the bridge was not, however, received in the Danish Ministry of Foreign Affairs until June 1990. In particular, it is to be noted that the Danish Circular Note of 12 May 1977, notifying foreign States about the then ongoing project to construct a high level bridge across the Great Belt, was left unanswered by Finland, meaning that the Finnish Government, along with all other States, did not see any problem from the point of view of international law in the construction of the bridge. If they had, it would have been in accordance with normal diplomatic procedures to react to the Note within a year, as did the Soviet Union. In Finland's Application instituting proceedings in the present case, no reference at all has been made to this crucial Note of May 1977, although it was

circulated at a time when the Finnish private company, Rauma-Repola, did produce and transported their offshore units through the Danish Straits.

It is worth noticing in this respect that no general notification was issued when the Turkish Government initiated its plans for the construction of two fixed bridges over the Strait of Bosporus in 1973 and 1988, with a clearance of 64 metres. Nor did Japan issue a notification before erecting bridges across its straits with a maximum clearance of 65 metres. Apparently, both Turkey and Japan found themselves to act within their sovereign rights - as did the international community as a whole, by raising no objections to the building of those bridges.

In short, the Danish Government has acted in good faith when carrying out its plans for the construction of a permanent link between the two main parts of the Realm divided by the Great Belt and cannot, therefore, accept to be stopped in the middle of the enterprise by an objection which is long overdue.

In the view of the Danish Government, the conduct on the part of Finland should not be rewarded by indicating provisional measures against Denmark, but should rather be considered as a factor which estops Finland from pursuing the matter further. Denmark has had no reason to believe that the project to construct a bridge over the Great Belt would not be acceptable to the international community at large, including the Baltic States. No objections have been levelled by States against this project and, relying on this *opinio juris* among States, the sudden change in the position on the part of Finland would, if sanctioned by the Court, cause exorbitant damage to the Kingdom of Denmark.

The time factor may also be looked at from the point of view that no physical hindrance for passage of the Great Belt will exist before, at the earliest, towards the end of 1994. At that time, the present case could easily have found its final decision by the Court. Thus, there is no imminent danger requiring indication of provisional measures.

It may even seriously be questioned - as we have done in our Written Observations, in paragraphs 47 to 57 - if the construction of the bridge across the eastern channel of the Great Belt will represent a hindrance of passage through the Danish Straits for the Finnish mobile offshore drilling units to the extent claimed by Finland.

The drilling units which have been produced and delivered have already left the Baltic and passed through the Danish Straits. As to the drilling units currently under production at Rauma-Repola, we were told yesterday by Dr. Martti Koskenniemi that the latest craft, constructed in co-operation with the Vyborg shipyard in the USSR, will pass through the Great Belt during this summer. The following passage will take place sometime next year. Where is then the imminent danger justifying the indication of provisional measures, with all the serious consequences that entail, if none of the rigs at present under construction will encounter any problem in passing through the Danish straits, either because they will have passed through the Great Belt before the bridge is finally erected or because the rigs can pass through so-called Drogden channel and I assume here, of course, that one cannot speak of an imminent danger in relation to offshore units and ships contemplated for future construction. That would give innovative companies like Rauma-Repola a permanent veto over decisions taken in this respect by the National Danish constitutional authorities. I am satisfied to note that Sir Ian Sinclair, in his intervention yesterday morning, stressed the fact that Finland's request for indication of provisional measures does not extend to reasonably foreseeable ships, like the Application itself does, but is confined to existing drill ships and oil rigs.

(2) *Secondly*, the factor of *irreparable prejudice or harm* as developed in the case-law of the Court must be taken into account. The State requesting provisional measures must be able to show that irreparable damage will ensure if certain specific measures are not introduced against the other State. In the present case no irreparable damage will ensue from the construction of the bridge over the Great Belt. The economic interests of a private Finnish company will suffer from the construction, but the suffering will not be irreparable. It can be compensated by a certain amount of money, namely the amount required to adapt the construction of the very few oil rigs that may not be able to pass under the bridge or through the Sound. In paragraph 18 of the Application, Finland has itself made an estimate of the additional cost needed in that respect. A figure between US$ 7.5 upto 13.75 million for each construction has been indicated. Even if one takes this figure as a basis and considerable doubt can be raied in this respect, as we have done in our Written Observations, paragraph 58, the discrepancy between that amount and the damage inflicted upon Denmark if the current project were to be stopped in the middle of its construction, is exorbitant. According to our

calculations the damage for A/S Storebaeltsforbindelsen (Great Belt A.S.) would be in the order of half a billion US$. To adopt provisional measures having such a disproportionate effect would not render justice to the Kingdom of Denmark.

(3) The *third* element which must be addressed is the very foundation or rather lack of foundation of the alleged Finnish right to be preserved through indication of provisional measures. Not even a prima facie case exists in favour of the Finnish contention that the right of passage through the Great Belt applies to all ships, including drill ships, oil rigs and reasonably foreseeable ships entering and leaving Finnish ports and shipyards - irrespective of their heights. It is to preserve this alleged "right" that Finland is asking the Court to decide upon certain provisional measures. But even if Finland is not required during these proceedings to substantiate fully that it enjoys such a right under international law, it follows from the general principles of law recognized by States that the Finnish Government must be able to substantiate the alleged right to a point where reasonable prospect of success in the main case exists. And the Danish Government fails to see that even the slightest proof towards that end has been established by Finland. It is worth noticing in this respect that Finland has found it appopriate to insert the word "interests" along with the word "rights" in its request for interim measures (see paragrah 13 of the request). In reality Finland is seeking protection for the economic interests of a private company, Rauma-Repola, against the sovereign right of Denmark to construct a historic traffic link between the two main parts of the country. But economic interests do not create legal rights. According to the submissions in the Application, the alleged right Finland is invoking or rather inventing, is an absolute, unconditional and even elastic right applying to future ships.

The Finnish Government admits, though, in their Application, in paragraph 29, that "it is clear that the right of free passage should not be assumed to extend to any imaginable vessels". In other words, the right of innocent passage is not an absolute right extending to whatever kind of vessel one could imagine for the future. So, at least we agree on that question. Then the question arises: where is the limit to the right of innocent passage?

In the present case the question is whether offshore units, such as oil rigs and vessels with drilling tower and equipment installed reaching heights of up to 150 metres and more, can qualify as

ships demanding a certain height clearance in relation to the construction of a bridge over the Great Belt. The answer is that they cannot. If they could, Denmark's right to construct such bridges would be eliminated. In other words, private companies like Rauma-Repola Offshore Oy, which construct mobile offshore drilling units, must bear the risk themselves for inventing constructions with extreme heights which may not pass through an international strait where prospects exist for erecting bridges.

The legal considerations supporting this conclusion have been outlined in our Written Observations and will be presented in more detail later during today's pleadings. Suffice it at this stage to refer to some essential facts.

The two bridges erected over the Turkish straits in 1973 and 1988, both with a clearance of 64 metres, support the existing legal position according to which international law does not prohibit the building of bridges over international straits as long as existing shipping traffic at the time of the construction is not hampered by the bridge. The same position was taken by Japan when the Government decided in 1973 to construct bridges across the strait between Honshu and Shikoku with a clearance of maximum 65 metres, the same height chosen for the East Bridge across the Great Belt.

No objections having been voiced against the construction of the bridges over the Turkish and Japanese straits, the *opinio juris* among States must be that contemporary international law on the subject supports the conduct of Turkey, Japan and Denmark.

Thus it is clear that not even a prima facie case exists in favour of Finland's contention. On the contrary, there is a clear *opinio juris* among States that a State divided by an international strait has a right to construct bridges across that strait as long as such bridges do not cause any undue hindrance to existing traffic by ships. This right is a simple consequence of the Strait State's sovereignty over its territorial waters. The competing right of innocent passage represents a special restriction in that sovereignty and should therefore also be interpreted restrictively.

The right of innocent passage has been safeguarded by Denmark through its decision on a bridge with a clearance of 65 metres. The right of innocent passage simply does not extend to mobile drilling units with heights of 150 metres or more. Thus, it is Denmark which has a right to be preserved, not Finland.

To conclude this general outline of the case as the Danish Government sees it, let me repeat that

- the lack of any *imminent danger* requiring interim protection of the right claimed by Finland,
- the *passivity* on the part of Finland,
- the lack of any *irreparable harm* to be suffered by Finland,
- the lack of any prima facie case in favour of the alleged Finnish right of passage through the Great Belt,
- all lead the Danish Government to *submit* that the request by the Applicant State to have the Court adopting provisional measures in the present situation be dismissed. Mr. President, this concludes my introductory statement setting out the main elements of Denmark's reasoning concerning provisional measures. We would like now, Mr. President, to proceed by substantiating our position, first by explaining to the Court in more detail the pertinent facts of the case. With your permission I shall leave the floor to my colleague and Co-Agent, attorney Per Magid, to make that presentation.

The PRESIDENT: Thank you very much Mr. Lehmann. Mr. Magid.

Mr. MAGID:

The Pertinent Facts of the Case

Mr. President, Members of the Court, before commencing my oral arguments I would like to say how much I appreciate appearing before the Court. I regard it as a privilege to serve the Court in its task to decide the issues the Parties have submitted.

My task is to give an account of the pertinent facts of the case.

My address will consist of five parts:

First, I shall explain the reasons for establishing a fixed traffic link across the Belt.

Second, I shall give an account of the historical development of the Great Belt Project. I will explain the basis for Denmark's choice of a bridge instead of a tunnel and for the choice of a bridge with a clearance of 65 metres.

Third, I shall address the Circular Notes issued by the Danish Minister of Foreign Affairs and

the consultations between Denmark and Finland.

Fourth, I shall turn to the current status of the Project and

Fifth, I shall give the Court a short description of the losses to be suffered by the Danish society in the event of a suspension of the Project.

Finally, there is a set of pertinent facts which I will not address, namely those pertaining to Mobile Offshore Drilling Units and the possibilities for passage of these units through Danish straits. This topic will later be addressed by my colleague Ambassador Per Fergo.

1. Reasons for establishing a fixed traffic link across the Great Belt

The Great Belt effectively separates Denmark into two parts. Approximately half of the population lives on Zealand and the neighbouring bridge-connected islands, the other half in Jutland and on Funen, also connected by bridges.

Transport over the Great Belt is maintained by ferry boats. Strong winds, and in hard winters the occurrence of ice, affect the ferry boat service adversely.

The Great Belt, with a minimum width of approximately 18 kilometres is the bottleneck of the Danish infrastructure.

The fixed link will reduce travel time considerably. It will allow persons living on either side of the Belt to commute to work on the other side. Traffic forecasts have estimated that the increase in the number of passengers and volume of goods carried between the two parts of the country from 1988 to the estimated completion of the Great Belt Project in 1997 will be more than 50 per cent.

The faster and more efficient transportation of goods across the Belt will offer significant logistic advantages to both production and trading companies. The present need for maintaining expensive storage of goods on both sides of the Belt will become obsolete.

Danish economists are in agreement that the fixed link will be of major benefit to the Danish society.

East Denmark will become more accessible for transport from continental Europe. This will facilitate the integration of Denmark into the single market of the European Community.

For Sweden, Norway and Finland, Zealand is the gateway to Europe. The establishment of the fixed link will significantly improve the conditions for transport between the Scandinavian

countries and the rest of Europe, in particular if and when the planned fixed link across the Sound between Denmark and Sweden comes into operation.

2. Historical development of the Great Belt Project

The plans for constructing a bridge across the Great Belt have been considered for more than 50 years. In light of the national importance and the size of such a Project this is not surprising.

Shortly after the end of the Second World War the Danish government established a commission to study the possibilities for constructing a bridge across the Great Belt. The commission's report was published in 1960. On the basis of the report, the Danish Parliament in 1961 passed an Act authorizing further investigations regarding the construction of a combined road and rail bridge across the Belt. In 1972 the investigations concluded that the construction of a bridge across the Great Belt would be a very beneficial investment for the Danish society. It was recommended that the Project should be undertaken as soon as it was technically possible.

In 1973 the Danish Parliament passed an Act enabling the Minister of Public Works to launch the Great Belt Project (Ann. 1). The Act provided that the bridge would be a combined road and rail bridge executed as a low-level bridge across the Western Channel and a high-level bridge across the Eastern Channel.

In the official comments to the Act it was stressed that the clearance of the high-level bridge should enable Denmark to honour its obligations under international law to allow the continued passage of existing ships.

In the following years, major planning and preparatory works were carried out. In 1977 the plans for the design of the Great Belt Bridge were finalized, and the Danish Ministry for Foreign Affairs advised all missions accredited to Denmark on the details of the Project, including the clearance of the high-level bridge.

In October 1978, shortly before the tender procedure for the bridge was to have been initiated, the Danish government announced a postponement of the Great Belt Project. The Minister for Public Works stated in an address to Parliament that the Project was postponed because of the serious strain it would impose on the public expenditure budget. The Minister stated in the address that the Project was not abandoned but merely postponed for an anticipated period of four to five

years. The Minister also stressed in the address that the 1973 enabling Act would remain in force. In Finland's Application it is stated that the Project was suspended *sine die*. This is wrong.

Finland's Agent said yesterday that "the project met with much internal opposition" and it might be inferred from Ambassador Grönberg's statement that the Project was suspended as a consequence of this opposition. Also this is wrong.

The estimated lapse of four to five years came true. In 1983 the government decided to examine the possibilities for a resumption of the Project. In 1986 these examinations led to a political agreement between the government and the main opposition party on the establishment of a fixed link across the Great Belt. The political agreement formed the basis of the 1987 Act on the Construction of a Fixed Link across the Great Belt (Ann. 7).

The 1987 Act is to a large extent based on the ideas, planning and preparatory work executed in connection with the 1973 Act. The 1973 Act was not repealed until the 1987 Act was passed.

Altered political and socio-economic objectives, however, led to revisions of the project. In an effort to strengthen public transport it was decided that the completion of the rail connection across the Great Belt should precede the road connection by a period of three years. It was therefore decided that the Eastern Channel should be crossed by two separate connections, one for road and one for rail traffic.

In accordance with the 1973 project, the Western Channel was to be crossed by a low-level combined road and rail bridge. The Act further provides that the rail connection shall cross the Eastern Channel through a tunnel. The Act finally provides that the motorway shall cross the Eastern Channel either by a high level-bridge or by an immersed tunnel.

The Act presupposed that the Great Belt Project should be implemented by a Government owned private company, A/S Storebaeltsforbindelsen ("Great Belt A.S."). The rationale for choosing a government owned private company was to obtain a separation between the government budget and the economy of the Great Belt Link. The Great Belt Link is to be fully paid for by the users.

The 1987 Act was passed on 10 June. Shortly after, on 30 June 1987, the Danish Minister of Foreign Affairs advised all Foreign Diplomatic Missions accredited to Denmark of the project.

Tender procedures for the railroad tunnel under the Eastern Channel were initiated as early as July 1987 and for the combined road and rail bridge across the Western Channel in October in the same year.

What was the basis for Denmark's choice of a high-level bridge instead of a tunnel?

Regarding the road crossing of the Eastern Channel the official comments to the Act state that a high-level bridge is the preferred alternative. Tenders should in any circumstances be invited for the high-level bridge. The immersed tunnel should only be put out to tender along with the bridge if that was considered technically and economically expedient.

In November 1988 the Minister of Transport decided that only a high-level road bridge should be out for tender. Considerations pertaining to technology, safety, environmental protection and economy determined the decision not to put the immersed tunnel out for tender along with the high-level bridge.

Ventilation of a motorway tunnel posed technical as well as economical problems. The construction of an immersed tunnel would have a significant adverse impact on the marine environment, as 6 million cubic metres would have to be excavated from the sea bottom and deposited elsewhere. Finally, construction costs for the tunnel were estimated to be DKK 1,300 million (US$ 193 million) higher than for the bridge. In addition operating and maintenance costs were expected to be more than 50 percent higher for the tunnel.

In June 1989 the Minister of Transport decided that the high-level East Bridge should have a navigational clearance of 65 metres. Why did Denmark choose a height of 65 metres?

Basis for Denmark's choice of a bridge clearance of 65 metres

The 1973 Act provided that the high-level bridge across the Eastern Channel should be constructed with a view to allowing continued navigational paassage.

In 1977 the Danish Ministry of Foreign Affairs advised all foreign missions in Copenhagen on the details of the Great Belt Bridge by a Circular Note (Ann. 2). It was stated in the Note that the high-level bridge across the Eastern Channel with its clearance of 62 metres in accordance with international law would allow international shipping to the Baltic to proceed as in the past.

By a Note dated 29 March 1978 the Soviet Union stressed that the bridge project should not

hamper the passage of ships through the Great Belt, The Soviet Union requested that a clearance height of no less than 65 metres should be established (Ann. 3).

Also the official comments in the 1987 Act stated that the execution of a high-level bridge should enable Denmark to abide by its obligations under international law to preserve free passage. It was then estimated that the clearance should be 76-77 metres. Prior to the Bill the Danish Maritime Authority had noted that drill ships built in Finland and in the Soviet Union had a height above water-level of between 60 and 75 metres.

Before a decision was made on the bridge clearance the internationally renowned classification agency Det Norske Veritas was commissioned to make a report on the height of large ships and offshore units (Ann. 10). The report dated 10 March 1989 concludes that all existing merchant ships will be able to pass beneath the bridge with a clearance of 65 metres.

On the basis of the Norske Veritas report Great Belt A.S. recommended to the Minister of Transport that the East Bridge be constructed with a clearance of 65 metres. The Danish Maritime Authority concurred in this view and referred specifically to the possibilities of passage through the Sound for drill ships with a height exceeding 65 metres described in the Norske Veritas report. This clearance also took account of the Soviet request for a bridge with a minimum height of 65 metres.

On 16 June 1989, the Minister of Transport decided on a bridge clearance of 65 metres.

In evaluating Denmark's choice of a bridge clearance of 65 metres the practice in other parts of the world should be kept in mind. It seems as if an international standard of around 65 metres for bridges across international straits and fairways to important port has evolved. Particular attention should be focused on the two bridges across the Bosporus, given the geographic similarities between the Black Sea and the Baltic. These bridges both have a vertical clearance of 64 metres.

The Circular Notes issued by the Danish Ministry of Foreign Affairs
regarding the Great Belt project

Mr. President I will now direct the Court's attention to the aforementioned Circular Notes by which Denmark has furnished foreign States with information on developments of the Great Belt Project.

Denmark has informed the Heads of Missions accredited to Denmark in some details on the

developments of the Great Belt project, the most extensive construction project every undertaken by Denmark.

In 1977 the details of the design of the Great Belt bridges had been finalized. The Danish Minister for Foreign Affairs then issued a Circular Note dated 12 May 1977 advising all foreign Missions of the low-level bridge across the Western Channel and across the Eastern Channel of the high-level bridge with a 62 metres clearance (Ann. 2).

Finland did not respond to this Circular Note. This despite the fact that Rauma-Repola Offshore Oy at the time had already been producing a number of semi-submersible drilling units with a height exceeding 62 metres. Rauma-Repola had at the time delivered at least 4 units, and delivered during 1977 and 1978 an additional 5 units that were presumably under construction or at least contracted for at the time of the Note. Why this silence? Only two States responded in substance to this Circular Note. The Soviet Union requested that the clearance be changed from 62 to 65 metres (Anns. 3 and 4). The Government of Poland suggested that the future trends within the shipbuilding industry be taken into account at the finalization of the project (Ann. 5).

In 1987 the Great Belt Project was resumed. The Heads of Missions accredited to Denmark were advised on the contents of the new 1987 Act by Circular Note dated 30 June 1987 (Ann. 8). The Circular Note specifically referred to the earlier Circular Note from 1977. The 1987 Note stated that it was not yet decided whether the motorway should cross the Eastern Channel by a high-level bridge or through a tunnel. With a choice of words echoing the 1977 Note it was said that if the bridge solution is selected it 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".

Finally it was stated that the project had already been started.

No States responded in substance to this Circular Note.

The decision on a high-level bridge across the Eastern Channel instead of a tunnel was made by the Minister of Transport in November 1988. This decision was taken after some debate which had been covered in detail by the Danish news media.

The foreign missions were formally informed of the decision to build a high-level bridge

across the Eastern Channel with a clearance of 65 metres by a Circular Note dated 24 October 1989 (Ann. 11).

Mr. President, I will now turn to the

Consultations between Denmark and Finland

Despite the Danish Circular Notes from 1977 and 1987 on the details of the Great Belt Project, no inquiry was made by Finland to the Danish authorities regarding the Project until 18 July 1989. This was at a time when contracts had already been signed for the East Tunnel and for the West Bridge and tender procedure had been initiated for the East Bridge.

The Finnish approach was simply an inquiry and not a protest. It came in the form of a letter from the Commercial Department of the Embassy of Finland in Copenhagen to the Danish Maritime Authority stating that according to information available to Finland large transports of, for example, drilling platforms would be obstructed by the new bridge. If this was so, the Embassy requested information on other feasible routes (Annex 4 to the Application).

The letter was answered by the Danish Ministry of Foreign Affairs on 29 August 1989 confirming that these large transports could not go through the Great Belt (Annex 5 to the Application). The Ministry advised that an alternative route through the Sound could be employed provided the draught of the drilling platforms was not above 8 metres.

The Ministry also advised that oil rigs might be partly dismantled to allow passage underneath the East Bridge.

Nothing of substance happened between August 1989 and May 1990 when informal talks on the right of passage according to international law were held at the request of Finland. An official Finnish Note was not sent until 19 June 1990 (Ann. 12). The Note stated that Denmark was obliged not to obstruct the free passage of its straits and that negotiations should be initiated to secure the passage of oil drilling rigs prior to making a final decision on the bridge.

In its reply dated 11 July 1990, Denmark maintained that the Great Belt Project was in conformity with international law allowing all ships which had previously passed through the Great Belt continued passage (Ann. 13).

Meetings were held in the latter part of 1990 between the two sides to discuss possible

solutions to the Finnish problem. In a meeting on 30 August 1990 Mr. Silvonen, Director of Marketing of Rauma-Repola, stated that the need to preserve the competitiveness of the Finnish yard made it impossible to complete assembly of the oil rigs after passage under the bridge. At the meeting Mr. Silvonen also indicated that, if undertaken, the costs of such necessary modifications should not be borne by the yard itself.

During a meeting between representatives from Finland's Ministry of Foreign Affairs, Rauma-Repola Offshore and the Great Belt A/S on 17 October 1990, the technical possibilities of altering the East Bridge to allow for passage of the Finnish offshore units was discussed.

Such modifications was not possible because no opening could be inserted in the central part of the bridge above the navigation route as this part of the bridge was a suspension bridge. In addition, a passage opening in one of the approach spans of the bridge was not viable due to the low-water depth.

In response to a Finnish Note dated 5 November 1990, Denmark - without relinquishing its position that the project conformed with international law - agreed to examine the possibilities for modifying the West Bridge by inserting a passage opening. After detailed analysis Denmark concluded that technical difficulties made inserting an opening in the West Bridge practically impossible. An opening would render the passage of high-speed trains impossible and an opening of the required size was in fact unprecedented.

The consultations between the Danish and Finnish representatives ended with the exchange of letters between the Finnish and the Danish Prime Ministers in February 1991 (Annexes 6 and 7 to the Application).

Yesterday Ambassador Grönberg expressed the view that during the bilateral contacts between the Parties Finland tried its best to reach a settlement, whereas Denmark and I quote "has not moved an inch to seek an accommodation".

Denmark cannot concur in this presentation of the negotiations. I have just demonstrated that Denmark, in good faith, and even at a very advanced stage of the project, complied with Finland's request by examining the possibilities for modifying the project to accommodate Finland. Due to the technical difficulties referred to above a passage opening in either of the Great Belt Bridges was not

feasible.

Finland, on the contrary, has always refused to even consider solving Rauma-Repola's problem by adapting the transport or production modes of the yard to enable the offshore units to pass under the East Bridge or through the Sound. And why? No technical problems have been advanced by Finland regarding the few modifications necessary to allow the Finnish units to pass through the Danish straits.

In our opinion it is thus not Denmark that has been unco-operative in the consultations between the Parties.

4. Current Status of the Great Belt Project

Mr. President, I will now give an account of the current status of the Great Belt Project.

According to the budget, it will cost DKK 19,030 million or US$ 2,827 million in 1988 prices to complete the Great Belt Project. If financial expenses are included and corrections made for inflation the total cost is estimated to around DKK 30,000 million or US$ 4,457 million. The work on the Great Belt project is well under way and at an advanced stage. The first part of the west bridge has already been erected. Drilling work on the east tunnel has started from the Zealand side and from Sprogoe. A tremendous amount of work has already been performed on Zealand, Funen and on Sprogoe. On the east bridge, a number of preparatory works have been carried out, such as the construction of access ramps and anchor blocks for the suspension bridge.

An estimated total of 11,000 people are working for the contractors, sub-contractors and suppliers on the realization of the Great Belt project. At this point, contracts have been signed for an amount equalling 56 per cent of the budget and 28 per cent of the budget figure has actually been paid to the contractors.

The tender procedure for the east bridge has been completed and the Great Belt A.S. is now negotiating with designated contracting groups. The offers, as mentioned yesterday, submitted by the contractors expire on 18 August 1991.

5. Losses likely to be suffered by the Danish society in the event of a suspension of the Great Belt project

Mr. President, I will finally give the Court a short description of the losses likely to be

suffered by the Danish society, in the event of a suspension of the Great Belt project.

Substantial economic and social damage will be inflicted upon the Danish society if Finland prevails in its request for provisional measures and the motorway part of the Great Belt project is suspended.

A distinction has to be made between the losses that will be suffered by the Great Belt A.S. and the losses that will be suffered by the Danish society in general (see paragraphs. 68 to 81 in the Written Observations).

The economic loss imposed on the Great Belt A.S. in the event of a 3-year suspension of the motorway project - i.e. until 31 July 1994 - are relatively straightforward to compute. There are three components of this loss:

(1) increased project costs flowing from a new tender procedure with its inherent price increases. Such increases are inevitable, as all contractors will know the prices in the first bids;

(2) increased interest costs on the motorway part of the total debt of Great Bridge A.S.;

(3) loss of net earnings from toll fees.

The loss suffered by the Great Belt A.S. due to a 3-year suspension of the motorway part has been calculated to DKK 3,100 million, or around US$ 500 million. These amounts are in net present value, as of July 1991. It should be stressed that the calculation of damages is based on the assumption that only the road link will be affected by an indication of provisional measures.

In addition to this staggering loss, the Danish society in general will sustain significant losses, in the event provisional measures causing a suspension of the works on the east bridge are indicated.

The main elements constituting these losses are the following:

First, the enjoyment of the substantial timesaving benefits to the society of the bridge will be postponed. This includes the profitable rationalization of transport and stock conditions within industry and trade that will be made possible by the road link.

Second, investments have already been made, in both public and private sectors, relying on the projected date of opening of the motorway bridge. Such investments include connecting work on the existing motorway system to the Great Belt project. Return on these investments will be deferred. Third, the boats.

Fourth, a suspension of the motorway part of the project will have repercussions on the employment situation in Denmark.

Thus an indication of provisional measures necessitating a suspension of the construction of the east bridge will very seriously harm the economy of Denmark.

With the Court's permission, Mr. President, I will not leave the floor to Jørgen Gimsing, professor at the Department of Structural Constructions at the Technical University of Denmark.

The PRESIDENT: Thank you very much Mr. Magid. Professor Gimsing.

Mr. GIMSING: Mr. President, distinguished Members of the Court. It is a very great honour for me to address you at this location and to inform you about the evolution and the present state of the Great Belt project.

My presentation will be accompanied by a number of illustrations in the form of overhead transparancies, so let us go to picture No. 1:

Picture No. 1

The Baltic Sea is an inland sea in the northern part of Europe, separated from the Atlantic Ocean by the Scandinavian Peninsula, the Jutland Peninsula and the Danish Islands. Six nations have ports on the Baltic Sea - Germany, Poland, the Soviet Union, Finland, Sweden and Jutland. Among these, two have ports only on the Baltic Sea (Poland and Finland), whereas the remaining four also have ports outside the Baltic Sea.

Picture No. 2

The ship traffic to and from the Baltic Sea has four main routes to choose from:

(1) the Sound between Sweden and the Danish main island of Zealand;

(2) the T route through the Great Belt between the islands of Zealand and Funen;

(3) the Little Belt between the island of Funen and the Peninsula of Jutland; and finally,

(4) the Kiel Canal, connecting the Bay of Kiel to the mouth of the Elbe River.

In number, the major part of the ships actually utilizes the Kiel Canal; the number of ships being twice as large through the Kiel Canal as through the Great Belt. But in size, the largest ships transit either through the Great Belt or through the Sound.

Picture No. 3

The first bridge to cross the Danish Straits was the Little Belt bridge, opened to traffic in 1935. This bridge has a vertical clearance of 33 metres and a main span of 220 metres. The main dimensions of this bridge were chosen after having surveyed the size of ships that were actually passing through the Little Belt in the 1920s. The Kiel Canal has, since its opening in 1895, been crossed by several bridges, all with a vertical clearance of 42 metres.

Picture No. 4

The first realistic plans for a bridge across the Great Belt were presented in the 1930s. It was initially assumed that a vertical clearance of 45 metres would be sufficient for the bridge across the Eastern Channel, where the international navigation route it situated. But after further studies, it was concluded that a vertical clearance of 67 metres would be required to allow free passage of all existing ships.

Picture 5

A vertical clearance of 67 metres corresponded to the clearance chosen a few years earlier for the Golden Gate Bridge that was opened in 1937 across the entrance to the San Franciso Bay in California. For this bridge it had been a firm demand that the construction should not prevent any existing ship from calling on the port of San Francisco.

Picture 6

The fact that the Great Belt bridge with a vertical clearance of 67 metres would allow the passage of all ships was illustrated on a contemporary artist's impression showing two of the tallest ships of those days, namely, the French liner Normandie and the training ship Viking.

Picture 7

The mid-1930s also saw the first realistic plans for a fixed link across the Sound between Denmark and Sweden. At that time it was assumed that bridges with a vertical clearance of 45 metres should be built across both the Danish channel, called Drogden, and the Swedish channel, called Flinterenden.

Picture 8

The Sound is today left completely open to navigation and even after the possible construction

of a fixed traffic link, the Western part, across the deepest channel in Drogden, will have to comprise a tunnel, as the proximity of the Copenhagen Airport excludes the construction of a bridge.

Picture 9

The first official report on a fixed link across the Great Belt was presented by the Great Belt Commission in 1960. In this report it was recommended to construct a high-level bridge across the Eastern Channel with a vertical clearance of 67 metres but it was mentioned that only very few ships would be prevented from passing under a bridge with a clearance of 55 metres. It was therefore recommended to conduct further investigations before making the final decision on the vertical clearance to be provided. The East Bridge proposed by the Great Belt Commission in 1960 was characterized by a maximum span of only 350 metres.

Picture 10

The fact that a vertical clearance of around 67 metres was about to be accepted as a standard for bridges across major waterways was further confirmed in 1960, when construction began on the Verrazano Narrows Bridge across the entrance to the Port of New York, at that time the busiest port in the world. The vertical clearance of the Verrazano Narrows Bridge is 217 feet, or 66 metres, within the central 2,000 feet, or 610 metres, of the main span, according to the official sea chart. The existence of the Verrazano Narrows Bridge makes it most unlikely that any cruise ship will ever be built with a higher air draught than 65 metres, as the Port of New York generally is regarded as the most attractive starting point for cruises.

Picture 11

The technical and financial problems related to the construction of a fixed link across the Great Belt were further treated in official reports presented in 1968 and 1972. In the latter, the main proposal for a high-level bridge showed a significant increase in the navigation span widths, as two 600-metre openings were to be provided in combination with a traffic separation scheme. However, it was not found necessary to reconsider the vertical clearance, which was stipulated at 68 metres for the unloaded bridge at mean temperature (corresponding to approximately 66.5 metres for the loaded bridge at high temperatures).

Picture 14

The Act on the Construction of a Bridge across the Great Belt passed the Danish Parliament for the first time in 1973. In the same year the first bridge across a strait with a similar status as the Great Belt was opened in Turkey. This bridge, the Bosphorus Bridge, was constructed with a vertical clearance of 64 metres.

Picture 15

The Bosphorus Bridge has to be passed by all ships to and from the Black Sea, which is surrounded by four nations: the Soviet Union, Romania, Bulgaria and Turkey. Of these, two nations have ports only at the Black Sea - Romania and Bulgaria. The very similar geographical conditions at the Black Sea and the Baltic Sea gave a further indication that a vertical clearance around 65 metres was acceptable to the international navigation.

Picture 16

Based on the 1973 Act, the actual designs for the East Bridge were prepared during 1977 to 1978. After a survey of the air draught of the ships that were actually passing through the Great Belt the vertical clearance was stipulated at 62 metres and this clearance was notified to all seafaring nations. Thus, the observations of the actual navigation through the Great Belt indicated that the vertical clearance could be somewhat reduced in relation to what had earlier been assumed. In contrast to this, the observations of actual ship movements indicated that the width of the navigation opening should be increased to provide safe passage. The main span of the cable-stayed option was, therefore, chosen to 780 metres, more than twice that assumed ten years earlier.

Picture 17

The first construction work to be carried out in 1977 was the erection of a 70-metre high mast on the island of Sprogø to allow wind measurements at the actual elevation of the bridge girder in the navigation span across the East Channel.

Picture 18

To investigate the technical and financial consequences of a further improvement of the navigational conditions, a second design based on a suspension bridge was also prepared in 1977 to 1978. With this bridge, a span of 1416 metres would be available for the international ship traffic. The final choice between the cable-stayed and the suspension option was never made, as the

construction of the Great Belt Link was postponed for five years, by a newly-formed coalition government, for economic reasons.

Picture 19

After having postponed the construction of the fixed link, improvements in the ferry services were carried out but, despite this, the basic drawbacks of a floating link remained: time-consuming transit, capacity problems at peak traffic and excessive energy consumption.

Picture 20

At the time when the designs for the Great Belt Bridge were prepared in 1977 to 1978, work had progressed for some time on major bridges across international straits in Japan. The first of these bridges, the Kanmon Bridge across the Kanmon Straits between the islands of Honshu and Kyushu, had actually been completed already in 1971. The Kanmon Bridge was constructed with a vertical clearance of 61 metres.

Picture 21

The following bridges across international straits in Japan were, however, constructed with a vertical clearance of 65 metres. Thus, this clearance is provided under the large bridges across the Bisan Seto between Honshu and Shikoku. In this context, it is interesting to note that the number of ships passing under the Bisan Seto Bridge is about ten times larger than in the Great Belt.

Picture 22

A vertical clearance of 65 metres will also be provided under the Akashi Kaikyo Bridge now under construction across the international navigation channel adjacent to the port of Kobe. When opened in 1998, the Akashi Kaikyo Bridge will have the longest free span of any bridge, 1990 metres. This illustrates the fact that there is a trend towards increasing the free spans for the sake of navigational safety, whereas there is no trend towards increasing the vertical clearance.

Picture 23

The Great Belt project was resumed with the passage of the Act on the Construction of a Fixed Link across the Great Belt in the Danish Parliament in June 1987, and immediately afterwards the design work was initiated. In the 1987 Act it was specified that the link should be constructed in two stages, with the railway link established first, two to four years ahead of the motorway link.

With this political requirement it was indisputable that the railway should pass under the Eastern Channel in a tunnel, whereas both the railway and the motorway most conveniently could cross the Western Channel on a low-level bridge with a vertical clearance of only 18 metres.

For the motorway crossing of the Eastern Channel the Act indicated two options, either a high-level bridge or an immersed tunnel.

Picture 24

The East Railway Tunnel will have a total length of 8 kilometres between its eastern portal on the island of Zealand, and its western portal on reclaimed land east of the small island of Sprogø in the middle of the Great Belt.

During 1989 the tunnel ramps were excavated to a depth of 22 metres below the sea level, and at the same time a site factory was ready to start production of the 60,000 concrete segments to be used for the watertight lining around the tunnel tubes.

Picture 25

The first of the four tunnel boring machines arrived at the site in May 1990 and initiated the actual boring in August 1990.

The tunnel boring process will continue throughout 1992 and into 1993. Subsequently the finishing works will be performed and test runs carried out before the opening of the railway link in late 1994.

Picture 26

The contract for the West Bridge between the islands of Sprogø and Funen was signed in June 1989.

According to this contract the West Bridge will be built as a concrete bridge with a total length of 6.6 kilometres making it the longest combined road and railway bridge in Europe.

Picture 27

The entire West Bridge is fabricated in a large site plant situated on the island of Funen close to the bridge site. On this plant the precast concrete elements weighing up to 6,000 tons are being cast on five production lines.

The casting was initiated in the summer of 1990 and it is planned to continue through 1992.

Picture 32

Several bridge piers off the coast of Funen have already been installed and before the end of 1991 the bridge will be stretching far out into the Western Channel.

Next Picture

This picture is a very recent picture taken last week and showing the positioning of the first bridge girder in the West Bridge. You will look in vain after this picture in the written material as it was not possible to have it printed in time for inclusion but it illustrates well that the Project is indeed very well underway.

The West Bridge is scheduled for completion in 1993, and the first trains will be running across the bridge in 1994. Three years later, in 1997, also cars will use the bridge.

Picture 33

The design work on the motorway link across the Eastern Channel forming the last integral part of the total project was initiated in 1987 and it comprised both a high-level bridge and an immersed tunnel, although priority was given to the bridge option.

For the high-level bridge both a suspension bridge and a cable-stayed bridge, the latter with a span of 780 metres, were investigated.

Picture 34

For the immersed road tunnel the hydrographical investigations on the water flow in and out of the Baltic Sea resulted in a tunnel length of approximately 5.3 kilometres, flanked by ramps with a length of up to 1.5 kilometres off the coasts. With these ramps a substantial impact on the local marine environment was unavoidable.

Picture 35

With a tunnel length of more than 5 kilometres an elaborate ventilation system had to be used and this required large ventilation ducts to be arranged above the roadway areas.

In all, the immersed tunnel project was far beyond anything that had been built elsewhere, and the cost was significantly higher than for a high-level bridge. Consequently, it was finally decided to exclude an immersed tunnel from further consideration.

Picture 36

For the high-level bridge option the preparatory investigations into the problems related to navigational safety clearly indicated that even a span of 780 metres could turn out to be insufficient in a number of situations.

It was, therefore, decided to initiate an in-depth investigation into all aspects related to the passage of large ships under the bridge.

The investigations comprised four different bridges with main spans ranging from 916 metres for this cable-stayed bridge to 1688 metres for this suspension bridge.

Picture 37

An important tool in the evaluation of navigational safety was manoeuvering simulations where the ship movements are simulated by a computer that is directed by controls similar to those found on the bridge of real ships.

Picture 38

Manoeuvering simulations will give a very good basis for the comparison between the different options as they can be tested under exactly the same assumptions regarding wind, current and ship size.

The tracks left by the ships are recorded and plotted so that a subsequent comparative analysis can be performed.

Picture 39

Besides the effort to assure safe navigation much emphasis was also laid in achieving that the entire Great Belt Link would not affect the flow of salt water into the Baltic Sea.

This made it necessary to excavate some 6.8 million cubic metres from the sea bottom immediately east of the Sprogø island as compensation dredging.

Picture 40

The final result of the many thorough investigations became an East Bridge with a record-breaking main span of 1624 metres.

Within this span a vertical clearance of 65 metres will be available over a width of 750 metres for the loaded bridge at high temperatures, i.e., in the condition when the bridge girder is at its lowest elevation.

At a temperature of 10 degrees C the unloaded bridge will show a vertical clearance of 71 metres at midspan so it was not correct, as mentioned yesterday, that 65 metres is an upper limit that can go down as far as 60 metres under unfavourable conditions. On the contrary, 65 metres is a clearance under unfavourable conditions, under favourable conditions it is about 5 metres higher.

Picture 41

With the chosen span of 1624 metres it was concluded by the pilots involved in the manoeuvering simulations that the navigational conditions in the Great Belt would actually be improved after completion of the fixed link. This was partly due to the wide opening and partly to the termination of the intense ferry services across the Belt.

Picture 42

The navigational conditions will be further improved by a straightening of the T-route so that the bends will be located further away from the bridge alignment and involve a small change of direction, so the original route was the one shown with a dotted line here and the straightened route is the one with a solid line going up here.

Picture 43

The contract for the construction of the East Bridge project is planned to be signed at the end of August 1991, and six years later, in 1997, the bridge is scheduled to be opened to traffic.

However, already in 1990 a number of preparatory works for the East Bridge has been carried out. Among these was the construction of a 25-metre high embankment that will form the western ramp of the bridge on the island of Sprogø.

Picture 44

When completed in 1997 the Great Belt Link will be the largest combined road and railway link in the world.

Thus, it will be more than twice as long as the San Francisco - Oakland Bay Bridge from the 1930s and more than 50 per cent longer than Seto Ohashi in Japan from the 1980s.

Picture 45

It is to be expected that the Great Belt Link will be followed by a fixed traffic link across the Sound between Denmark and Sweden.

For this link the western part on the Danish side will be constructed as an immersed tunnel, positioned below the sea bottom, so that the water depth in the deepest navigation channel will remain at the present 7.7 metres.

This depth is the minimum depth at mean sea-level and it is only slightly influenced by wind and current and certainly not in the same magnitude of 2 metres as found in route T.

Picture 46

From the examples mentioned earlier it appears that the East Bridge of the Great Belt link is in accordance with other bridges of similar importance for international navigation. This statement also applies to bridges that are planned to be constructed in the future.

Thus, in a few years' time, it is expected that the Italians will start the construction of a bridge across the Strait of Messina between the continent and the island of Sicily.

For this bridge the International Maritime Organization (IMO) has already been notified that the vertical clearance will be 65 metres, which is the same as chosen for all major bridges in the last three decades.

Picture 47

Also an even larger bridge - across the Strait of Gibraltar - is likely to reach the construction stage within a few decades.

The Gibraltar Bridge is also planned to have a vertical clearance between 60 and 70 metres, corresponding to the established international standard.

Picture 48

In the design of the Great Belt Link both the navigational safety of the international ship traffic and the effect on the marine environment of the Baltic Sea have been carefully considered.

This has been done to such an extent that the conditions are even improved for the 22,000 ships that are going in and out of the Baltic Sea.

Furthermore, it has been assured that the bridge will only imply a height limit that has already been accepted across many other waterways of similar importance and - until now - been accepted by each and every country in the world.

For the marine environment it is assured that there will be no change in the salinity and

oxygen content of the Baltic Sea as a consequence of the construction of the fixed link.

Never before have these aspects been considered so conscientiously when designing and constructing a major bridge and tunnel link.

With these closing remarks, I thank you for your attention. Thank you.

The PRESIDENT: Thank you very much Professor Gimsing.

Could we now have a break? And perhaps it would be more realistic to say 15 minutes rather than 10 minutes. We will then be back to hear the rest of the Reply. Thank you.

The Court adjourned from 11.25 to 11.45 a.m.

The PRESIDENT: Please be seated. Now I give the floor to President Jiménez de Aréchaga.

Mr. JIMENEZ DE ARECHAGA: Mr. President, Members of the Court.

I have the honour of addressing the Court, supplementing Denmark's Written Observations, in order to examine the question whether the special right of passage Finland has invoked really exists and really deserves the provisional protection which has been requested from the Court.

This right of passage, as claimed by Finland, is a special one because it has three extraordinary characteristics. It is absolute, since Finland does not recognize the existence of a conflict between its claim with the rights of Denmark as a territorial sovereign. It is unlimited, since no upper limit of height is indicated for the bridge. Finally, it is an expanding or elastic right, because it will increase in its dimensions so as to correspond to the height of future, foreseeable platforms and other structures.

It seems legitimate to consider this basic question at the present stage, because the existence of the right claimed by the Applicant constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused.

That is why Article 41 of the Statute states that any provisional measures are to be taken "to preserve the respective *rights* of each party". And the 1972 Rules of Court required that the request shall specify "the rights to be protected", a requirement which remains implicit in the present Rules.

Yesterday, my friend, Sir Ian Sinclair, placed himself in a comfortable position. At the beginning of his statement he said that the whole case of Finland is based on its rights of passage through the Danish Straits. He added that this free passage constitutes "the right to be preserved", to which Article 41 of the Statue refers.

Yet, at the end of the morning, he stated that we cannot anticipate and discuss now the existence or the scope of the right he invoked; that that discussion is for another day, not to be examined at the present stage of the proceedings but when the Court comes to consider the merits of the case.

This is a very comfortable position to take, but an untenable one: to invoke a right but refuse to discuss now its existence and its scope. The Court seems to be asked, then, to accept blindly, as

an absolute presumption, that the right of passage exists with all the claimed special characteristics.

Also, this refusal is incompatible with the position which was taken by the Agent for Finland, Ambassador Grönberg, who said yesterday that Finland wishes to "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." (CR 91/9, p. 26.)

In consequence, Mr. President, with your permission, I shall examine the question whether the right claimed by Finland, with the extraordinary characteristics I have indicated, really exists. As a prominent counsel once said: "you may be glad to hear that I shall present a pure point of law, uncorrupted by any facts".

Inapplicability of Part III of the 1982 United Nations Convention on the Law of the Sea

In support of its alleged right, Finland has invoked two instruments - the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. However, in the Application, paragraph 25, Finland refers also to a third instrument in the following terms: "so far as applicable ... the transit passage regime of the 1982 United Nations Convention on the Law of the Sea".

This invocation of Part III of the 1982 Convention was made even more clear in a statement made yesterday by Ambassador Grönberg, who said:

> "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 to 44 of the 1982 UN Conference on the Law of the Sea." (CR 91/9, p. 16.)

The Danish Government is astonished to find this invocation by Finland of Part III of the 1982 United Nations Convention.

It is astonished because Finland's authorities must know well, perhaps better than anybody else, that Part III of the 1982 Convention is not applicable to the Danish Straits, as it is not applicable either to the Aaland Straits, according to Article 35 of the 1982 Convention. This Article provides, under the title "Scope of this part" that

> "Nothing in this part affects:
> ...

(c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

All the writers who have dealt with the subject of straits under the 1982 Convention, I will mention them, agree that examples of conventional régimes which qualify under Article 35 *(c)* are the Turkish Straits (Dardanelles and Bosphorus), the Danish Straits, the Strait of Magellan and the Finnish Aaland Straits (H. Caminos, "The Legal régime of Straits in the 1982 Convention on the Law of the Sea", *RCADI,* Vol. 205 (1989-V), pp. 130-131; J.N. Moore, *American Journal of International Law*, 1980, p. 114; Treves, edited by Dupuy-Vignes, *Traité du Nouveau Droit de la Mer,* pp. 790-791; Yturriaga, J.A., *Straits used for International Navigation,* Ninhoff, 1991, p. 292).

As a directly-concerned Strait State, Finland should have mentioned the non-applicability of Part III to the Danish, as well as to the Finnish, Straits. Such an omission is even more difficult to understand when one recalls the role that Finland played, as a protagonist, together with Denmark, in the origin of Article 35 *(c)*, which excludes the right of transit passage from both their strait regimes.

We have mentioned in our Written Observations that, on 22 July 1974, in Caracas, Denmark and Finland co-sponsored an amendment to United Kingdom proposal which had the effect of excluding from the novel concept of transit passage the Danish and the Finnish Straits and in that respect it was the original source of Article 35 (c).

With your permission, Mr. President, I will read parts of the statements made by the representatives of Denmark and of Finland, in submitting their joint amendment.

The representative of Denmark, Ambassador Fergo, pointed out that his country, as a seafaring nation with international straits within its territorial waters, was concerned with the rules applicable to international straits. The existing rules governing innocent passage through the territorial sea, which were codified in the Convention of 1958, were the result of a delicate balance between the different interests of the coastal State and international navigation. Consequently, there was no need to revise the present regime of innocent passage through international straits. A general agreement establishing maximum limit of 12 miles for the territorial sea would, however, result in the creation of a large number of new straits overlapped by the now extended territorial sea. In the

case of new straits up to a breadth of 24 miles, there might be a need for a new regime of free transit passage. On the other hand, his delegation failed to see the need to change the rules of innocent passage through straits less than 6 miles wide, where the right of free passage and overflight had never existed. The problem could be solved, in the opinion of the Danish delegate,

> "by maintaining the existing rules of innocent passage through international straits of less than 6 miles and establishing a new regime of transit passage through new wide straits, which would emerge as a result of establishing a maximum limit of 12 miles for the territorial sea".

That was the standing of the Danish representative.

A similar view was expressed by the representative of Finland, Judge Manner, who noted that none of the texts submitted so far has made an express exception for circumstances where the breadth of the territorial sea in a strait connecting two parts of the high seas will remain unchanged, in spite of the new provisions, and where the prerequisites for transit passage would thus also remain unchanged. In such straits, the provisions concerning innocent passage were applicable and could be applied also in the future. The situation had not changed, therefore, there was no reason to require the opening of such a strait to free passage. Neither fishing nor other peaceful uses of the sea required the proposed change in the status quo of straits traditionally used for international navigation based on the rules of innocent passage.

A particular solution would be - in the opinion of Judge Manner - "to provide that the minimum breadth of straits in which freedom of passage would apply should be 6 nautical miles" (Yturriaga, op.cit., pp. 116-117).

In the light of the history of Article 35 *(c)*, to invoke Part III of the 1982 Convention, as Finland has done, is either an egregious mistake or a subconscious admission that the two applicable instruments, the 1857 Treaty and the 1958 Geneva Convention, are not sufficient to support the unlimited right of passage claimed by Finland. One explanation for this "faux pas" may be that Finland realized that only the broader and more liberal transit passage regime would give legal support to the absolute, unlimited and elastic right it is claiming before the Court.

Another corollay to infer from the co-sponsored proposal is that it demonstrates that in 1974, one year after the adoption of the 1973 Danish Law concerning the building of a bridge across the Great Belt with a clearance of 62 metres, in 1974 in Caracas, Finland was perfectly satisfied with

the status quo and did not feel the necessity of extending to those straits the more liberal regime of transit passage.

The 1958 Geneva Convention

The 1958 Geneva Convention on the Territorial Sea, on the contrary, is fully applicable since both Denmark and Finland have ratified it.

But, as indicated in Denmark's Written Observations, the 1958 Convention only contains a single provision concerning specifically the regime of straits, that in paragraph 4 of Article 16, forbidding suspension of the right of passage in straits used for international navigation. This provision, a part of customary law as defined by the International Court of Justice in the *Corfu Channel* case, is not relevant to the present dispute.

While the 1982 Convention on the Law of the Sea proclaims in Article 38 a right of transit through straits as a distinct and independent right, there is no equivalent or similar right proclaimed in the 1958 Convention. Passage through straits is subsumed in the regime of innocent passage through the territorial sea.

This basic difference between the respective instruments has important consequences as to the scope of the right of passage and as to the interpretation of the relevant provisions of the two conventions.

In the 1958 Convention the determination of when the passage is innocent is left in large measure to the discretion of the territorial State, which is, after all, acting in its own territory. At the third UNCLOS the maritime States, interested in a more liberal and secure right of passage, levelled serious criticism of what they called the ambiguities and inadequacies of the regime of passage through straits in the 1958 Geneva Convention.

These ambiguities and inadequacies were analysed in depth at the Conference and the consensus reached there was to proclaim in Article 38 a novel right of transit passage through straits based on the principle of freedom of navigation.

I know I am repeating to the Court what its Members know better than me, for many of them have taken very distinguished part in the negotiations or have followed them closely. Anyway, my duty compels me to summarize the main differences which result from the comparison between the

right of transit passage in the Jamaica Convention and the "innocent passage" in the Geneva Convention of 1958.

Leaving aside the passage of warships, submarines and aircraft, an important difference is that in the Geneva Convention the coastal State has direct enforcement powers over foreign ships and, as Article 16 (1) says, it "may take the necessary steps in its territorial sea to prevent passage that is not innocent".

This provision was described at the Conference by the representatve of the United States, J.N. Moore as "the most indicative of an intent to give coastal States certain rights to take unilateral action to prevent non-innocent passage" (J.N. Moore, *op. cit.*, p. 102).

This direct enforcement power over a foreign ship had disappeared in the 1982 régime of transit passage, where, as described by Caminos (*op. cit.*, p. 169)

> "ships in transit cannot be seized, refused passage, subjected to inspection or any other type of control that would impair transit passage. The only exception is when the violation causes or threatens major damage to the marine environment. Then, and only then, may the State bordering the strait 'take appropriate enforcement measures under Article 233'".

Another most important difference relates to the scope of the regulatory competence enjoyed by the coastal State.

According to the Geneva Convention the bordering State has a broad prescriptive power to issue laws and regulations defining and governing what constitutes "innocent passage". Again J.N. Moore, representative of the United States at the Conference, referred to "the uncertain and imbalanced coastal State regulatory competence provided by the 1958 Convention in Articles 14, paragraphs 5 and 17" (*op. cit.*, p. 116).

In his view the main criticism addressed to the Geneva Convention was "the subjectivity inherent in the definition of innocent passage" (*op. cit.*, p. 116).

A comparison of the scope of this regulatory competence shows that in 1982, for the transit passage, the prescriptive power of the coastal State has been drastically reduced.

For instance, Article 42, paragraph 1, of the 1982 Convention enumerates exhaustively the subject-matters which may be regulated by the littoral State: safety of navigation, fisheries, control of pollution, control of customs and immigration. And also, in respect to certain subjects, the coastal

State is obliged to give effect to applicable international regulations and in some cases these regulations have to be agreed by the competent international organization.

On the other hand, the 1958 Geneva Convention grants the territorial State a broad power of regulation, without the need to refer only to certain subject-matters and without demanding conformity with international norms or recommendations.

Thus, the broad regulatory competence of the territorial State may include the fixing of reasonable clearance limits for the floating equipment which intends to navigate its straits. The regulations as to innocent passage that have been issued by Denmark in the exercise of its regulatory power are undoubtedly restrictive but fully reasonable.

They take into account the introduction, in respect of innocent passage, of the new notion of "special characteristics of particular ships" as a ground justifying a non-discriminatory but different treatment for certain categories of ships. This notion, introduced in Part II of the 1982 Convention, is designed to take due account of scientific and technological developments which have occurred in recent years. These changes required the adoption of appropriate rules to regulate navigation of certain ships with special characteristics.

Among these are mentioned in Article 23 in Part II of the 1982 Convention nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances.

Although tankers are not expressly mentioned, H.E. Judge Oda has pointed out in his comprehensive account of the work of the Seabed Committee, that tankers also fall within the category of "ships with special characteristics" (*The Law of the Sea in Our Time*, II, *The United Nations Seabed Committee*, 1968-1973, Sijthoff, Leiden 1977, p. 247).

According to this authoritative opinion the reference to ships of special characteristics envisages the applicability of differential treatment to certain categories of ships, such as tankers and also, why not, to oil rigs when carrying platforms or other additional structures.

Obviously, the Finnish oil rigs and similar artifacts, even if they were considered ships, would fall within the non-exhaustive category of ships with special characteristics, requiring special treatment for their passage.

Consequently, it may be affirmed that those structures, once installed, do not possess the

absolute, unlimited and expanding right of passage claimed by Finland.

These exceptional structures and platforms cannot have all obstacles up to 170 metres high magically disappear at their passage. If their builders want them to pass through the Great Belt, they should erect their additional gear, "towers, columns, jack-up legs, etc." after having passed below the bridge.

Coming back to another difference between the 1958 and the 1982 régime, it is to be remarked that the 1982 Convention in Part III recognizes the right of transit passage "to all ships and aircraft".

It has been well said that

> "This granting clause in the 1982 Convention, the most important phrase from the standpoint of the user State, makes no distinction between categories of ships and aircraft, their nationality or ownership, their status as warships or merchant ships, or civil or State aircraft. The right of transit passage [in Part III] applies literally to all types of ships and aircraft, regardless of their individual characteristics." (Caminos *op. cit*, p. 144.)

All this cannot be said of the 1958 Convention. This fundamental difference is reflected in the terminology employed: innocent passage for *"ships of all States"* that is what is said in the 1958 Convention. In 1982, the transit passage is for *"all ships and aircraft"*.

This striking difference as to the placement of the word "all" in the definition of the right of passage between the two Conventions, has a significance of its own, in the carefully considered terminology of both Conventions. It signifies that, for the application of Article 38 of the 1982 Convention, among the various interpretations given to the word "ship" in different Treaties, a wide interpretation of that term is to be applied, since the text refers to "all ships".

On the contrary, Article 14 of the 1958 Convention, refers merely to "ships of all States". Consequently, a restrictive interpretation of that term "ship" is called for, taking into account not only the different terminology utilized, but also the principle that restrictions to the sovereignty of the State over its own territory, submerged or not, cannot be presumed and must be strictly interpreted.

The corollary to extract from this comparative study of the two Conventions is that the discussions and conclusions at the Conference revealed the deficiencies and inadequacies of the 1958 Convention in which Finland supports its claim. States, in particular the maritime powers, were legitimately concerned with the possibility that coastal States could deny "innocent passage" through

straits used for international navigation based on matters such as flag, cargo or destination of the vessels. It may be said, borrowing a classic expression of Professor Gidel, the great specialist on the Law of the Sea, that the fallen idol of the Conference was the "innocent passage" régime, which was considered absolutely insufficient and defective. Caminos rightly states:

> "Both the definition of innocent passage in the 1958 Convention and its enforcement criteria lacked the precision and guidance desired of any legal norm."

Caminos adds:

> "The defeat of the régime of innocent passage in straits codified in the 1958 Convention resulted from its failure to provide objective criteria with which to judge the 'innocent' component of the concept. Innocent passage, as codified, gave too much discretion to the coastal State and too little guidance to maritime States." (Pp. 105 and 140-141.)

So the answer of the Conference was to proclaim a separate and distinct "right of transit passage" including the reference to the concept of "freedom of navigation and overflight".

The negotiations and the conclusion reached at the Third United Nations Conference on the Law of the Sea reveal, *a contrario*, as a negative photograph would, the imperfections of the rights that may be derived or invoked on the basis of 1958 Convention.

Consequently, it is difficult to infer from the 1958 Convention the absolute, unlimited and expanding right claimed by Finland.

All there is is an imperfect right of "innocent passage" through the territorial waters of Denmark, subject to all the reservations and restrictions the Conference has made manifest.

Customary Law?

Finland's Application asserts that "account will also have to be taken of customary law relating to free passage through international straits".

> Ambassador Grönberg also stated yesterday that
> "though the (1982) Convention is not yet in force, a good case can be made that this notion (of transit passage) has already become a part of customary international law".

I beg to disagree. No good case can be made to that effect.

If this assertion signifies that the régime of transit passage regulated in Part III of the 1982 Convention might be applicable in this case as emerging customary law, rather than the 1958 Convention, the negative answer is very simple.

Such a substitution cannot take place between States parties to the 1958 Convention, as in the case of Denmark and Finland. Article 311 (1) of the Jamaica Convention provides "This Convention shall prevail, *as between States parties*, over the Geneva Convention on the Law of the Sea of 29 April 1958."

So it is necessary to become a party to the 1982 Convention, for the substitution to occur. From a more general point of view as to customary law, I would add the following concerning the two elements of custom.

I do not wish to enter into the delicate question of whether the actual practice of States corresponds to the provisions of Part III of the 1982 Convention. On this question both Caminos and Yturriaga reach negative conclusions. But I do not want to go into that. It is sufficient for our purposes, to point out that the insertion of Article 35 *(c)* supported and proposed by Denmark and Finland, demonstrates the total absence of *opinio juris* in the consensus of the Conference, in respect to extending to the Danish and the Finnish Straits and other historic straits, the legal régime in Part III of the Jamaica Convention. They wanted to exclude those Straits from the régime of transit passage and they did. This rules out completely the possibility of emergence of Part III as a customary law, in respect of the excluded straits.

The 1857 Treaties and Finland's position in respect to them

As it results from Article 35 (c) of the 1982 Convention on the Law of the Sea the Danish Straits are governed by two treaties of long standing. These are the Treaty for the Redemption of the Sound Dues between Denmark and other 12 parties, signed at Copenhagen, on 14 March 1857, and the separate bilateral Treaty between Denmark and the United States, signed at Washington D.C., 11 April 1857 for the same purpose.

Finland is not one of the parties to these agreements. It may however invoke the right of passage granted by the 1857 Treaties, as a third party beneficiary, in accordance with Article 36 of the Vienna Convention on the Law of Treaties. It might be said that Finland is not merely a third party beneficiary because it inherited, as successor of Russia, the rights Russia derived from the 1857 Treaty. But Finland, when becoming independent in 1917 declared that it was not bound by the treaties concluded by Russia (Castren, E. *Aspects récents de la Succession d'Etats, RRCADI,*

Vol. 78 (1951-I), p. 409). Consequently, if it was not bound it could not invoke the rights. Lord McNair, a great authority on the subject, states in his Law of Treaties (p. 605) that in the case of Finland there was no succession concerning the rights derived from pre-existing Russian treaties.

He indicates that in this case the parties proceeded to apply what today is described as the principle of *"tabula rasa"*.

Lord McNair says

> "Accordingly, the two Governments [the United Kingdom and Finland] proceeded to study the treaty obligations existing (though in suspense) between the United Kingdom and Russia, and to negotiate and conclude such new treaties as they considered to be necessary between themselves." (*Law of Treaties*, p. 605.)

The same attitude was adopted by Denmark in its treaty relations with Finland upon its independence in 1917.

Consequently the status of Finland with respect to the 1857 Treaty is that of a third party beneficiary.

However, as a third party beneficiary Finland cannot claim nor exercise addditional or more extensive rights than those enjoyed by the actual parties to the treaty. The parties to the 1857 Treaty have accepted a clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea. Finland cannot invoke additional rights or a more favourable treatment than the one agreed to by the actual parties to the 1857 Treaty.

As stated in Denmark's Written Observations, there cannot be two different measures for the right of passage: an elastic one for Finland, eventually more than 180 metres high, another for the parties, 65 metres high.

The above consideration is based on the letter and the spirit of Article 36 of the Vienna Convention on the Law of Treaties, an article which deals with "treaties providing for rights for third States". According to paragraph 1 of this article "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord *that right*" to the third State (emphasis added). So, what is granted to the third State is exactly the same right which was obtained by the Parties to the treaty, in this case a clearance up to 65 metres. The subordination of the right of the third State to the actual conditions obtained by the parties is further confirmed by paragraph 2 of the same Article 36 of the Vienna Convention on the Law of Treaties, which provides

that "a State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

Once Denmark establishes as the condition for clearance a height of 65 metres, in exercise of the broad regulatory competence over its territorial waters and this regulation is accepted by the other parties to the treaty, as it has been accepted, then such a regulation becomes binding on Finland, as a condition "established in conformity with the treaty", and not as an unlawful restriction of its rights.

Scope of the 1857 Treaty

To define the scope of the 1857 multilateral Treaty, attention must be paid to its object and purpose, according to the rules of interpretation in Article 27(1) of the Vienna Convention on the Law of Treaties.

The object of the 1857 Treaty is defined in the Treaty itself in the following terms: "to facilitate and to increase the commercial and maritime relations at present existing between the contracting States or through them" by means of "the complete and permanent removal of all dues levied on foreign ships and their cargoes on their passage through the Sound and the Belts".

From this definition of the object and purpose of the 1857 Treaty it results that its provisions have in mind merchant vessels, since the text refers to "foreign ships and their cargoes" and also refers to "commercial relations". The oil rigs and drilling platforms do not transport cargo or passengers since they remain stationary at the same place over long periods of time.

They can hardly be described as "merchant ships" and therefore do not have a perfect right of passage with the three characteristics we have described.

Obviously, the 1857 Treaty, applicable only to "merchant ships" is more restrictive than the regime of the 1958 Convention and of course that of the 1982 Convention.

This difference in the more or less liberal position concerning the passage of different categories of ships is no obstacle to the application of the long-standing Convention of 1857, exempted from Part III of the 1982 Convention (art. 35 (c)).

The scholars who have studied the regime of straits under the 1982 Convention coincide in affirming that:

"if a convention of long-standing exempt by Article 35 (c) calls for the application of a more

restrictive regime than would be applied under the 1982 Convention, the more restrictive regime would take precedence" (Prof. Caminos, *op. cit*. p. 135) (Cf. Prof. Treves in Dupuy R.S. and Vignes A, *Traité du Nouveau Droit de la Mer*, p. 793).

Conclusion

In conclusion of this part, Mr. President, I wish to reiterate the conclusions formulated in the part concerning the Law in Denmark's Written Observations. Denmark accepted in 1857, in response to the interest of the international community in free maritime navigation and trade, certain well-defined limitations to its sovereign rights.

It would not be fair and reasonable to interpret the long-standing commitments assumed in 1857 as imposing now, upon Denmark, a permanent, new and expanding servitude *non edificandi* over its own territory which would prevent its economic progress and impede the public works required for the well-being of its population.

Thank you, Mr. President, for your attention and courtesy. I will request you to give the floor to Ambassador Fergo.

The PRESIDENT: Thank you very much, President Jiménez de Aréchaga and now we still have time this morning to hear Ambassador Fergo.

H.E. Mr. FERGO: Mr. President, Members of the Court, let me begin with expressing my satisfaction at addressing the Court in a matter of great importance to the Danish people.

In its request to the Court for provisional measures, Finland states in paragraph B.4 that in building a bridge across the Great Belt, Denmark excludes ships over 65 metres height, including drill ships and oil rigs from enjoying the right of free passage.

I would like to show that this is not so. Denmark has made very thorough studies of the air draught - this is a technical term to indicate the height above the water - of merchant ships passing to and from the Baltic Sea. This study was carried out by the internationally recognized Classification Society "Det Norske Veritas" whose latest report of March 1989 is submitted to the Court as Annex 10 to the Written Observations submitted by the Government of Denmark.

As it appears from paragraph 3 of that document, there are no merchant ships in existence - be

it dry cargo vessels, tankers, passenger ships, ferries, sailing ships, ice breakers or fishing factory ships, that would be prevented from passing under a bridge of 65 metres clearance across the Great Belt. In fact, figure 1 on page 10 of the report shows that approximately 99 per cent of all ships in transit through the Great Belt have an air draught of less than 40 metres.

The offshore categories are treated in paragraph 4 of the report from Det Norske Veritas. However, it is the contention of Denmark that offshore constructions with their extreme heights cannot enjoy an absolute right of unhampered passage through the Danish Straits.

In paragraphs 25 and 26 of its Application, Finland refers to three instruments governing the passage through the Danish Straits: the 1857 Treaties of Copenhagen on the Abolition of the Sound Dues, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea.

As it is pointed out in the Danish Government's Written Observations, paragraphs 97 to 99, and in the presentation just made by Dr Jiménez de Aréchaga, the transit passage regime in Part III of the 1982 United Nations Convention on the Law of the Sea, which by the way has not yet been ratified neither by Denmark nor by Finland and is not yet in force, does not apply to the Danish Straits pursuant to Article 35 (c) of the Convention, which retains the existing regime of passage through straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to those straits.

The 1857 Treaties of Copenhagen are an example of such a long-standing conventions which, by their very nature and purpose, aim at merchant ships. As I have already pointed out, based on the report of "Det Norske Veritas", all merchant ships can pass under a bridge of 65 metres clearance. Clearly, these Treaties do not regulate the passage of offshore constructions through Danish straits nor does the Geneva Convention of 1958 deal with this question.

From all that I know about the preparations for and discussions under the United Nations First Conference on the Law of the Sea this problem was not considered. All the relevant provisions of the 1958 Convention relate to normal navigation and nothing else.

Since the adoption of the 1958 Geneva Convention there have, of course, been major developments in the Law of the Sea. Even so, the Final Act of the Third United Nations Conference

on the Law of the Sea of 1982, Part II, Section 3, on innocent passage in the Territorial Sea and Part II, Section 2 on Transit passage uses exactly the same term as the Convention on the Territorial Sea of 1958, namely "ships".

Although platforms had come into general use at the time of the negotiations in the Third United Nations Conference on the Law of the Sea no attempt was made to change the wording from that used in the First Conference. On the contrary, in defining the meaning of "dumping" in Article 1(5) (a) of the Final Act a distinction is made between vessels, aircraft, platforms and other manmade structures at sea. There would have been no need to mention platforms specifically if they were understood to be included in the term "vessel".

In fact no proposal was ever put forward in the Third Conference with the intent to place offshore constructions on an equal footing with ships as far as passage through international straits is concerned. The consequence of such a proposal would have been to exclude the right to build bridges across international straits because it is impossible to build bridges high enough to accommodate constructions of such extraordinary height.

As pointed out in the Danish Government's Written Observations under Part I, F, several countries had already at the time of the beginning of the Third Conference built bridges of a height at 61-64 metres over such straits. These constructions had met with no objections from the international community.

The intention of the Danish Government to follow this example was made quite clear to the Third United Nations Conference on the Law of the Sea by the Danish delegation, in an intervention on 22 July 1974, when it opposed a proposal forbidding the placing of any installation in straits which would interfere with the passage of ships. This proposal was not included in the text of the Final Act. I would like to refer the Court to paragraph 122 of the Written Observations, where you will find an account of the intervention of the Danish delegation on that occasion, taken from the summary records of that meeting.

It is inevitable that the Danish delegation to the Third United Nations Conference on the Law of the Sea would have had to react in a similar way, had any other delegation proposed to give offshore constructions the same right of passage through international straits as ships, in view of the

consequences this would have had for the Danish Government's plans to build bridges to connect the various parts of Denmark separated by geography.

In short, I would like to stress that I have not been able to find any provisions in international law to the effect that offshore constructions should have the right to pass through international straits unhampered by bridges.

In some international conventions relating to the protection of the marine environment, it is stated that the term "ship" or "vessel" includes floating craft or platforms, whether self-propelled or not. Reference is made, *inter alia*, to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters, done in London on 29 December 1972 (Article III, 2), and the Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft, done at Oslo on 15 February, 1972 (Article 19, 2). In order to serve the purpose of conventions aiming at the protection of the marine environment, it is logical that they should include all potential sources of pollution, but it is equally clear that, in order to ensure the inclusion of platforms into the term "ship" or "vessel", this has to be expressly stated in the text of the particular convention.

The conclusion of this part of my remarks is that international law does not contain any definition of the term "ship" and that the interpretation has to be decided on a case-by-case basis. In relation to the Danish straits, no rule exists that obliges Denmark to take into account the height of offshore units when constructing a bridge across these straits.

Mr. President, Members of the Court, I would now like to comment on various types of mobile offshore drilling units, which are the subject of the dispute in the present case. For this purpose, may I draw the attention of the Court to the drawing on page 16 of the Written Observations submitted by Denmark.

There are three main types of offshore drilling units: *drill ships*, semi-submersible drilling platforms and jack-up drilling platforms.

It is a common feature for all three units that there is a floating construction, either a ship or a platform, on top of which is fixed drilling equipment intended to drill wells for exploration of hydrocarbons.

The Danish Government does not object to the passage of these units through our straits, but

we maintain that, if the drilling equipment is too high to pass under a bridge with a vertical clearance of 65 metres, which is a standard height for most large bridges in the world, then this equipment must be dismantled before the passage and assembled afterwards. This should not present any practical problems as far as the drill tower - the so-called derrick - is concerned. For jack-up platforms the legs present an additional obstacle if they have to pass a bridge fully assembled. In this case, it would be possible to wait with the assembly of the legs, or part of them, until the bridge has been passed. This procedure is used for many jack-ups during longer transportation, to ensure stability during navigation. This is a less complicated procedure than indicated in the Finnish Application, because the legs may be built in sections which can be added to one another.

If we take a look at the specific types of drill ships which Rauma-Repola Offshore Oy has constructed up to now, we note from Finland's Application, paragraph 17, that they have a transit draught of 7.3 metres. In paragraph 10 of Finland's Request for provisional measures, it is indicated that the only deep-water route between the Baltic and the North Sea traverses the Great Belt.

However, as is well-known to all seafaring nations, there is another route from the Baltic to the North Sea, through the strait between Denmark and Sweden, the Sound. The official depth of this sea lane at its most shallow point - the Drogden - between the islands of Amager and Saltholm, near Copenhagen, is 7.7 metres. The sea lane is 290 metres wide and has a length of about 6.5 kilometres. It should be possible for offshore constructions to use this route with the necessary planning and care during passage. The drill ships which Rauma-Repola Offshore Oy has built until now - and I understand that we are talking of three ships - could all pass through the Sound. For further details about this sea lane, I would like to refer to Part I, Section D, of the Danish Government's Written Observations. It must be stated that the depth of 7.7 metres is the minimum depth of the Drogden. Yesterday Finland indicated that this depth might be reduced by 2 metres. This is a misunderstanding. The fluctuation of 2 metres in the water depth applies to the Great Belt but not to the Drogden.

At this point, I would also like to stress that, even if and when a fixed link is constructed between Denmark and Sweden across the Sound, there will be no impediment to continued passage through the Drogden. The projected fixed link across the Sound will, on the Danish side, consist of

an immersed tunnel. This is the only possible solution, due to local factors, including the proximity of Copenhagen International Airport.

If we now take a look at the platforms, I would like first to talk about the type called *jack-ups*. As I have already mentioned, it is not unusual for this kind of platform to have the top sections of its legs attached after it has been transported close to its site of operation.

However, even if these constructions are completed in advance in such a way that they cannot pass under a bridge of 65 metres elevation, the draught of jack-ups will allow them to use the route through the Drogden.

I would like again to draw your attention to Annex 10 to the Written Observations submitted by Denmark, containing the report from "Det Norske Veritas". In this Report, on page 8, in paragraph 4.3, there is a table of some typical jack-ups, most of which have a draught of between 4 and 5 metres and only one of 7.3 metres. Reference is also made to Annex 15 to our Written Observations, where the list of Rauma-Repola's production demonstrates that the jack-ups produced by the Finnish yard have a transit draught of 6.5 metres. Therefore, they should all be able to be towed through the Drogden.

I have talked about drill ships and jack-ups produced until now by Rauma-Repola Offshore Oy which, according to the information we have been able to gather from the authoritative sources mentioned in Annex 15 to our Written Observations, should all have been able to pass through the Drogden.

I now turn to the third type of offshore construction, the *semi-submersible*: Again, you will find a drawing of this construction on page 16 of the Written Observations submitted by Denmark. This is a floating unit with a derrick, usually higher than 65 metres. As I have explained earlier, this construction cannot be compared to a merchant ship which can claim an absolute right of passage through the Danish straits. It is an industrial design put on top of a platform and if the construction is too high to pass under a bridge of an elevation which corresponds to the normal height of bridges around the world, including bridges over international straits, then some modification to the derrick must be made during passage.

However, according to the information submitted in Annex 15, the semi-submersibles built in

Finland should also have a draught to enable most of these constructions to pass through the Drogden.

I am of course aware that Finland in its Application, paragraph 14, maintains that "the draught of some of the ships including oil exploration and production rigs and drill ships is up to 15 metres".

This is a very imprecise description of the draught of the Finnish offshore constructions. It is immediately contradicted in paragraph 17 which states that the drill ships delivered have had a draught of 7.3 metres.

As far as semi-submersibles and jack-ups are concerned my first comment is again that Denmark does not consider these platforms to have an unconditional right of unimpeded passage through the Danish straits. As to the draught of these platforms it is mentioned in paragraph 17 that semi-submersibles have a transit draught of up to 15 metres. But as I have already explained we believe that most if not all of the semi-submersibles produced at Rauma-Repola Offshore Oy have a draught which should have allowed them to pass through the Drogden. Finland has not substantiated its claim for a required free depth of 15 metres.

Finally, Finland states in paragraph 17 of the Application that jack-ups have had a draught of up to 10 metres or more when transported by heavylift vessels. But it is important to note that it is not the jack-up itself which has a draught of 10 metres. On the contrary as I have already explained the jack-ups produced by Rauma-Repola Offsore Oy have a transit draught of 6.4 metres when towed, and to the best of our knowledge they could have passed through the Drogden. It is only when these constructions are placed upon heavy lift ships that the draught would be too deep for passage through the Drogden.

Of course, Finland maintains that jack-ups are ships, but I submit to you that it is an unusual kind of ship that has to be placed upon another ship or towed by another ship in order to be transported. In any event it should be possible to tow the jack-up through the Drogden and if necessary put it on its transport ship after passage if it cannot continue under tow.

To sum up the information we have been able to gather about the Finnish Company Rauma-Repola Offshore Oy's production of mobile units over the period 1974-1990 we have

prepared a list which, as already indicated, appears as Annex 15 to the Written Observations. This list corresponds to the sales folder from Rauma-Repola enclosed as Annex 16 which contains pictures of the constructions in question.

The conclusion we have drawn from this material is that the transit draught of the units listed should have allowed them to pass through the Drogden with two exceptions namely RR12 and RR18. However, the latter unit should be able without modifications to pass under the future bridge over the East Channel of the Great Belt.

In fact, and perhaps this is what has been lacking up to now, with goodwill the Finnish producer of offshore units should in this way be able to solve the major part of its problem in a practical way.

Yesterday Dr. Koskenniemi stated that Denmark had neglected several factors in our Written Observations about the possibility for Finnish offshore units to pass through the Sound.

I believe that the observations he made on this subject are not valid in light of the remarks I have just made and the information contained in paragraph 5.2 of the report from "Det Norske Veritas" which explains the alternative sailing route through the Sound. However, I do not want to take up more of the Court's time with further technical explanations at this juncture but I reserve my right to revert to these matters at a later stage.

As for the few units which could not pass through the Drogden the necessary modifications to these units could be made in advance so that they could pass under the future bridge. As demonstrated the problem can be limited to a few semi-submersibles. In these units the top of the drill tower will have to be assembled after passage of the bridge. According to Danish experts subsequent assembly of the drilling tower will take under a week and cost less than US$ 1 million. This cost estimate is based on experience from similar operations carried out on Danish drilling units.

Such a procedure is not unknown in the offshore industry. There are yards in some countries located behind bridges which have to design and build offshore units that in a cost and time efficient way can be completed after the obstructions have been passed. Such yards are to be found both in the United States, in the United Kingdom and in Germany.

Finally, may I draw your attention to the front page of the sales folder of Rauma-Repola Offshore Oy produced as Annex 16 in our Written Observations. It gives a very good visual impression of a jack-up. As you can see, this is an enormous industrial construction being towed by some ships and it has no resemblance whatsoever with what one would normally call a ship.

Turning from these technological matters I would like to make a few concluding remarks on the financial aspects of the matter.

In our submission for a rejection of Finland's call for provisional measures we have among other considerations pointed to the lack of proportionality between the costs to the Danish nation of a suspension of the construction of the fixed link across the Great Belt and the damage which the building of this link is alleged to cause to the private company Rauma-Repola Offshore Oy.

The extensive costs to the Danish Society are spelt out in detail in Part I, Section G, in our Written Observations.

In paragraph 9 of its request Finland mentions that offshore constructions are an important part of the Finnish maritime industry. I am not denying that. But according to my information if you look at the export value of Finnish offshore production during the five-year period from 1986-1990 it was FIM 1,268 million. This represents 0.27 per cent of the total value of Finland's exports of goods during that five-year period, i.e., about one-fourth of 1 per cent of total Finnish exports.

This is as far as the importance of that export is concerned. In the same paragraph it is mentioned that the offshore oil exploration market will be needing from 200 to 400 new offshore exploration rigs and drillships in the 1990s. This is not in accordance with the estimates of the future market for offshore equipment made available to us. Prospects for new constructions are not evaluated as very promising in the foreseeable future.

Fortunately we have some very good authority to base this estimation on. I would like to read the following passage from the Annual Report of 1990 from the Company Rauma-Repola, page 33. It is not in the written observations provided by the Danish Government, it is the official Annual Report from the company itself. I would like to quote that passage:

"The year-end orderbook stood at FIM 420 million which is FIM 200 million below last

year's figure. Despite expectations to the contrary, the offshore market has remained difficult. The high level of costs in Finland will force Rauma-Repola Offshore to seek new ways to preseve its competitiveness on the market for oil exploration platforms.

The company's operations showed a loss."

That is the end of the quotation from the Rauma-Repola Annual Report of 1990.

It seems to me that, against this information, the assumption in paragraph 9 that Rauma-Repola Offshore Oy expects to have a demand for 10 to 20 offshore units in the 1990s seems, to put it mildly, based on very flimsy evidence.

I find it hard to believe, as stated in paragraph 12 of Finland's request, that the sole means to ensure that Finnish, i.e., Rauma-Repola's, rights and interests are preserved, is the granting of provisional measures. Such measures would indeed cause great damage to the Danish society, but they would not alter the fact that Rauma-Repola Offshore Oy, according to the annual report I have just mentioned, is losing money because of high costs of production and bleak market prospects and, not because of the project for a fixed link across the Great Belt, such as has been alleged from the Finnish side. I thank you.

The PRESIDENT: Thank you very much Ambassador Fergo. So we will adjourn now and meet again at 3.00 p.m.

The Court rose at 12.55 p.m.