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Public sitting

held on Friday 5 July 1991, at 2.30 p.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Passage through the Great Belt

Request for the Indication of Provisional Measures

(Finland v. Denmark)

VERBATIM RECORD

ANNEE l991

Audience publique

tenue le vendredi 5 juillet 1991, à 14 h 30, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président,

en l'affaire du Passage par le Grand-Belt

Demande en indication de mesures conservatoires

(Finlande c. Danemark)

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents:

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

M. Valencia-Ospina, Greffier

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

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Sir Ian Sinclair,

Professor Tullio Treves,

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

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The PRESIDENT: I understand that Finland wishes first to answer the questions orally, so I give the floor to Ambassador Grönberg.

H.E. Mr. GRONBERG: Mr. President, Members of the Court, yesterday Judge Schwebel put two questions to Finland and, with your permission, Mr. President, I would like to answer them by starting with question No. 2, as this would give me a possibility to give a brief account of the various types of craft we are talking about.

Question No. 2 reads:

> "In his oral argument, the Co-Agent of Finland referred to three other categories of ships, namely, drill ships, semi-submersible drill rigs and jack-up rigs, towed or transported by heavy-load transport vessels" (CR 91/10, p. 13).
>
> Is this reference to be understood as meaning that all three types of these vessels are towed or transported by heavy-load transport vessels? If so, but, as has been indicated, one or more types are capable of being fitted out so as to move on its, or their own, power, please furnish details insofar as they have not already been provided."

As an introduction to the answers, the following illustration of various craft concerned may be shown and that is Picture No. 1. This, of course, is a picture showing the types of craft Rauma-Repola is producing. My intention, after this introductory picture, is to give a more detailed explanation of the various types of craft.

I would then like to move to picture No. 2. Drill ships are ships equipped with a derrick and other pertinent drilling equipment. They move under their own propulsion like any other ship.

Could I then please get Picture No. 3? Semi-submersible drill rigs are craft with pontoons carrying columns that support the main bit with a derrick. They, again, move by three means. First, they may have thrusters attached under the pontoons, as shown in this picture, with the help of which they are capable of navigating independently. Or, second, they may be towed; towage is usually undertaken as a means to speed up the passage. Or, third, they may be carried by heavy-lift vessels; this is done usually in case of long transports.

I would then like to move to Picture No. 5, which shows a jack-up being transported by a

heavy-lift vessel. A "jack-up" is a drilling craft with a derrick and other drilling equipment on the deck, supported by legs which are lowered on the sea bottom on the drilling location. Jack-ups are built lightweight and heavyweight, depending on the operational conditions. Jack-up rigs are transported by two means: they are often carried by heavylift transport vessels, as the picture shows; or they can be towed, especially when moved short distances from one drilling location to another.

After this, Mr. President, I would then like to move to question 1. The question is whether the Finnish view coincides with the statement contained in the Danish letter of 29 August 1989 that "drilling platforms, jacks and other high structures can usually be lowered" and that this "is often done for safety reasons in the open sea".

The answer simply is that the Finnish view coincides only to a very limited extent with that statement, for the following reasons. The question seems to require an answer as to whether the lowering of the structures under consideration can be done, and an answer as to whether it is often done for safety reasons in the open sea.

We have, in fact, a chart, Picture No. 6, which shows all the alternatives and answers. Those, of course, are based on that information which was made available to us.

But I would like to revert to the question. As regards the first aspect of the question, Finland has stated that the technical possibility exists in yard conditions. I refer here to the intervention by Dr. Koskenniemi, on 1 July 1991, and to my own intervention yesterday. I indicated also why it would be very costly and time-consuming - and here I specially refer to Annex IV in my intervention from yesterday. It must be underlined that the industry standards set requirements on strength and structures as well as on electrical, hydraulic and mechanical systems, which makes this assembly difficult because of the high complexity of the systems concerned and this is the reason why this assembly becomes so expensive.

Coming to the second aspect of the question, the information available to Finland is that such lowering operations are not often done for safety reasons in the open sea. As a matter of fact, Finland has no positive information about any such operation having been performed. In fact, as

regards heavyweight craft - and here I would like to underline that all the drill ships, semi-submersibles and jack-up rigs produced in Finland are categorized as heaveyweight craft - safety reasons that would suggest such operation do not exist, as these craft are stable and built to operate in the heaviest weather conditions. If the lowering operations were to be done for some specific reasons in the open sea, it would be extremely difficult and expensive.To illustrate this, it is sufficient to indicate that special floating cranes would be necessary, which would have to be transferred to the site where the operation would take place. Environmental conditions will certainly also set limitations to the timing of operations like this.

Even though Finland does not have precise information about lightweight jack-up rigs, it cannot be excluded that, at least in exceptional circumstances, they may have undergone lowering operations in the open sea for safety reasons. And that, Mr. President, ends the answer.

Mr. President, Members of the Court, this being the last intervention by Finland during these oral hearings, I would like to express our thanks to you, Mr. President, and to the Members of the Court for your attention. Thank you.

The PRESIDENT: Thank you very much Ambassador Grönberg and now, I think, we turn to the Danish response, Ambassador Lehmann.

H.E. Mr. LEHMANN: Mr. President, Distinguished Members of the Court. Today, the Danish team will reply to the Finnish arguments and contentions made on Monday and yesterday. We will start by rebutting Finland's presentation of the facts. This will be done by my colleague and Co-Agent, Attorney Per Magid. In the course of that presentation we will also answer the questions put to Denmark by Judge Schwebel and Judge Shahabuddeen. But first, Professor Gimsing will deal with the modifications to the bridge project proposed by Ambassador Grönberg in his address to the Court yesterday morning.

After this presentation of the factual elements, counsel for the Danish Government, Professor Bowett, will deal with the essential conditions for granting a request for an indication of provisional measures.

Finally, I will present some remarks concerning the alleged Finnish right to be protected, and

comment upon the actual terms of the Finnish request for the indication of provisional measures in the present case. I will then conclude our presentation and state our final submissions.

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Before leaving the floor to Professor Gimsing, allow me, Mr. President to place this case in its true perspective. Yesterday, Ambassador Grönberg tried to present Finland as a State championing the right of free, unimpeded navigation through international straits. It was almost as though Finland appeared before the Court to represent the interests of all the Baltic States. The specific interest of the Finnish company, Rauma-Repola, was simply incidental to this major course.

Mr. President, it is necessary for the Court to keep some essential facts in mind. No other maritime nation, whether within or outside the Baltic, has protested to Denmark about the bridge project across the Great Belt. No shipping of any kind will be impeded by the new bridge. The yearly movements of some 20,000 merchant ships passing through the Great Belt will not be affected in any way by the construction of the high-level bridge. Existing and normal traffic will continue as before.

The only movements that will be affected are not shipping movements, but the passage of these few offshore drilling units built by Rauma-Repola. Even these units will have difficulty only because Finland refuses to contemplate towing them through the Sound, which is not an intrinsically dangerous operation, or having them pass under the new bridge in sections. The passage of these units may take place only every second year, and perhaps not even then if the Finnish shipyard diversifies into other forms of construction. That is what the case is all about: some very few Finnish oil rigs foreseeing certain difficulites in passing through the Danish Straits after the bridge over the Eastern Channel of the Great Belt has been installed, towards the end of 1994, i.e., more than three years from now. Because of that future difficulty on the part of the Rauma-Repola company, Denmark, as a nation, is asked to change or to stop further construction of its bridge project, which is already far advanced and is part of an integrated project linking the two main parts of our country together.

This is by way of introduction, Mr. President. I would now like to leave the floor to Professor Gimsing to answer some of the proposals made yesterday.

The PRESIDENT: Thank you Ambassador Lehmann, Professor Gimsing please.

Mr. GIMSING: Mr. President, distinguished Members of the Court.

Comments on the proposed modifications to the bridge project presented by Finland

In the hearings on 4 July, Ambassador Grönberg proposed a number of technical solutions to the problem of modifying the Great Belt Link, so as to allow the passage of large Finnish Mobile Offshore Drilling Units (MODUs).

Apparently, the aim of presenting a range of technical solutions, accompanied by cost estimates, is to give the Court the impression that modifications can be made in many ways and at marginal costs. I will briefly take the Court through these alternative solutions, one by one.

In my view, as someone who has more than three decades of experience with the design of major bridges, I would say that none of these solutions are technically feasible and, I say this on the basis of an intimate knowledge of this particular project. I have spent the last 20 years of my life closely associated with the technical planning of this project.

I shall start by drawing the Court's attention to the verbatim record from yesterday (CR 91/13, p. 28), describing under item 1 the first solution, involving a replacement of two spans with a pontoon bridge in the West Bridge.

A pontoon bridge will necessarily have to displace its pontoons downwards to increase its uplift, to compensate for the load of a passing train. This movement will involve a dynamic behaviour and flexibility that is far beyond the specified limits for high-speed train lines. It will simply be dangerous. Anybody who has experienced the movements that occur when a train is slowly rolling onto a ferryboat will easily understand that a floating support cannot be applied under a railway bridge. In addition, the bridge must be able to withstand high ice pressures during severe winters and be robust enough to withstand ship collisions. So, it becomes evident that the pontoon

solution is technically inadequate. Such a bridge will not be sufficiently stable.

To my knowledge, we cannot anywhere find an example of a major railway bridge supported by pontoons.

Under item 2 is mentioned a second solution that, apparently, involves the idea that the original concrete spans of the West Bridge should be moved aside by pontoons and then moved back into position. I know the very elaborate process of erecting the precast girder elements that, in the construction phase, are separated by 1 meter-wide gaps in the West Bridge by a specially designed heavy-lift crane and, from this, it must be concluded that this solution is unrealistic. The positioning of these girders is so difficult that it is impossible to believe they could be moved into and out of position on a pontoon. This is, however, also reflected in the Finnish description stating that, "the opening is expensive and time-consuming".

The third solution seems to indicate a swing bridge, based on rotating the concrete girders, but that would only give an opening of 75 metres width, at the maximum, and it would, according to the Finnish description, involve problems related to the expansion joints that would be problematic. So, the opening would be insufficient and the re-instatement of the girders would be difficult to guarantee.

The fourth solution describes a solution that requires a complete redesign of the entire East Bridge and is characterized by being "technically demanding and untested". I fully agree with this Finnish characterization.

As regards the solutions with movable spans, including the solution indicated in the verbatim record (CR 91/13, p. 11), it must be pointed out that these solutions, generally, will require a construction of an unpreceded magnitude, as no bridges of this actual type have ever been built with the necessary span widths. This implies that the construction would be a prototype, as yet untested, inevitably involving unit costs far beyond those for present movable bridges.

Even in movable spans of the required size were technically feasible, it would certainly affect the overall safety of the entire project if a second navigation opening had to be added outside the large navigation span of the suspension bridge.

The very thorough investigations into navigational safety, carried out by manoeuvring simulations and based on observations of actual ship movements around bridges, have clearly indicated that the most important parameter in achieving a high degree of safety is the distance from the passing ships to the fixed objects of the bridge, i.e., the bridge piers.

With the chosen main span of 1,624 metres it is assured that the distance from a correctly manoeuvred ship to the nearest bridge pier will be 400-500 metres and this will give a comfortably large margin for accommodating deviations in the course of the ship caused by unexpected current and wind actions or by human errors. In this context it must be remembered that the passage under the bridge will take place in the open sea where the manoeuvring necessarily must be less accurate than in more sheltered waters.

If a movable span were to be introduced it would in any case have to be made with the smallest possible span due to the progression of the technical difficulties associated with any increase of the span. The longer the span, the greater the technical difficulties.

This means that, with a movable span, the passage of large Mobile Offshore Drilling Units would have to take place at a distance from essential structural parts of the bridge that is only one-tenth or less of the distance provided in the main span. Therefore, an additional risk will be introduced, hampering the whole effort to achieve a high degree of navigational safety, by the choice of the very large suspension bridge span.

The introduction of a movable span to allow the passage of very large floating objects that are difficult to manoeuvre would, therefore, be in contradiction to one of the most important design considerations regarding a very low probability of disruption of the fixed link. By disruption I refer to the risk of collisions that would lead to a partial collapse of the bridge structure.

To complete the theme of technical aspects it might be relevant also to add a few general comments on the possibilities of modifying the Finnish Mobile Offshore Drilling Units so as to allow a passage under a bridge with a clearance of 65 metres. Remarkably, Finland offers no suggestions for modifying these units.

First of all, it should be mentioned that it is much more the rule than the exception that large

structures are fabricated in a number of transport units that are finally assembled on site. Thus, a bridge is not built in full size ashore and floated into place in one piece, neither is a building prefabricated in one piece at the precasting yard, a TV tower is not transported in full length or an exhibition hall completed at the steel fabricators. So the structural engineers are trained to design the structures with erection joints that can be efficiently closed at the site - and if designed skilfully from the beginning, the economic consequences of the required separation and re-assembly are insignificant.

In the case of the large Finnish Mobile Offshore Drilling Units it should also be mentioned that transport without the highest parts of the structure in position might even give general advantages as the whole floating structure will become more stable when the centre of gravity is lowered.

And with these remarks on technical possibilities of modifying the floating structures, I shall with your permission, Mr. President, now leave the floor and pass the word on to Mr. Per Magid.

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

Mr. Per MAGID: Thank you. Mr. President, Members of the Court, today I am entrusted with the task of answering the questions put to Denmark by Judge Schwebel and Judge Shahabuddeen. Further, I will comment upon the factual issues raised by Finland during these proceedings.

My address will basically - to paraphrase Dr. Jiménez de Aréchaga - be uncorrupted by law, except for a few comments at the end in reply to what has been said by Finland's counsel on Denmark's alternative submission.

1. The Finnish Mobile Offshore Drilling Units and the possibility for passage through the Sound

On Tuesday, Ambassador Per Fergo addressed the technical specifications of the Mobile Offshore Drilling Units produced by Rauma-Repola Offshore and the possibilities for transporting these units through the Danish straits, both before and after the completion of the East Bridge.

Referring to the observations on this topic made by Finland's Agent, Dr. Koskenniemi during his intervention on Monday, Ambassador Fergo reserved the right to respond more fully to Finland's presentation of this important factual aspect of the case.

And with your permission, Mr. President, I will do so now. A response is necessary because there are misunderstandings and inaccuracies in Finland's presentation of the relevant facts.

In this part of my intervention I will clarify why only the Finnish Mobile Offshore Drilling Units are relevant to the present proceedings and briefly re-examine possibilities for passage through the Sound of each of the three relevant types of Finnish offshore units.

First, it would seem expedient to make it absolutely clear what types of vessels and offshore units are relevant to the present proceedings. In his address to the Court on Monday on Finland's dependence on the Great Belt, Dr. Koskenniemi made several references to various non-offshore vessels, such as very large luxury cruise-liners, heavy-load transport vessels, crude oil tankers, ice-breakers and ferries produced in Finland (CR 91/10, pp. 13 and 23).

The many references to these vessels and to the plight of the Finnish shipbuilding industry in general should not obscure the fact that none of these vessels, currently produced in Finland or elsewhere, will have any problems passing under the East Bridge. Apart from the Mobile Offshore Drilling Units which I will turn to in a moment, Finland has never produced a vessel that reached a height of 65 metres or more.

Dr. Koskenniemi contended that the Great Belt Project will affect the capacity of the Finnish shipyards to submit tenders for very large special ships (CR 91/10, pp. 23 and 28). First of all, this claim is unsubstantiated. Finland has not demonstrated that there will be any demand for such future ships. Secondly, such future ships, whether foreseeable or not, are not covered by Finland's request for provisional measures.

Finland has not sought protection in the form of provisional measures to safeguard the passage through the Great Belt of any of these non-offshore vessels, be they present or future craft.

In the words of Sir Ian Sinclair on Monday "the request is confined to drill ships and oil rigs" (CR 91/9, p. 44). With all respect, in my opinion this renders large portions of Dr. Koskenniemi's

address on the Finnish shipbuilding industry and cargo transport through the Great Belt irrelevant (CR 91/10, pp. 10, 13, 23 and 28).

What is of interest then, is exclusively the drill ships, jack-ups and semi-submersibles of the types hitherto produced by Rauma-Repola Offshore.

It has been argued by Denmark, that the continued passage of the Finnish Mobile Offshore Drilling Units through the Danish Straits poses much less of a problem than maintained by Finland.

One would think the Parties could agree that at least until the actual erection of the suspension part of the bridge above the navigation channel, there would be no impediment to continued passage through the Great Belt. But in his address to the Court on Monday, Sir Ian Sinclair suggested "the asserted right of free passage may also be adversely affected during the construction works themselves" (CR 91/9, p. 64).

This suggestion is rejeted. Keeping the Great Belt completely open to navigation also during the construction period has been a principal concern of the Danish Government. Careful measures to that effect have therefore been taken by Denmark, and during its 36th Session in September 1990 the Sub-Committee on Safety of Navigation of the International Maritime Organization endorsed the action taken by Denmark to ensure the safety of navigation during the construction period. Thus, as it has been pointed out earlier, the passage of Finnish offshore units will in no way be affected by the construction works for the East Bridge until the end of 1994.

After 1994 the Finnish offshore units must either be slightly modified to be able to pass under the East Bridge or be navigated through the Sound. This issue was examined by Ambassador Per Fergo on Tuesday. I will reopen this important factual issue only to the extent necessary to counter or rectify the information given by Finland.

I will begin by re-examining the possibilities of passage through the Sound.

First let me clear up some misunderstandings on the Finnish side.

The deepest navigational route through the Sound is the Drogden Channel with its minimum charted depth of 7.7 metres. On Monday, Dr. Koskenniemi, speaking of the Sound, made reference to a resolution of the International Maritime Organization (No. A.620 (15), 1987) recommending

ships going to the Baltic to take into account that the charted depth "may be decreased by as much as 2 metres owing to unknown and moving obstructions" (CR 91/10, p.15).

The IMO declaration clearly does not refer to the Sound. It refers exclusively to the "T" Route, which passes through the Great Belt. In contrast to the Great Belt, the Drogden Channel is a dredged channel, regularly maintained, where such unknown and moving obstructions do not occur. The depth of 7.7 metres is consequently not merely nominal, as suggested by Finland's Agent, but genuine and reliable.

Dr. Koskenniemi further stated that the water level of the Sound might change due to strong winds by as much as 2 metres. This is somewhat exaggerated. Under extreme wind conditions, when transport of offshore oil rigs would not normally be carried out, the water level in the Sound may vary by up to 1 metre. Such unusual conditions occur only once every fifth year and may ordinarily be predicted 48 hours in advance.

As has become evident, Denmark and Finland are not in agreement as to the possibilities for transporting mobile offshore drilling units through the Sound. There are two distinct questions. One is the feasibility of taking through the Sound units or vessels with a draught close to the official water depth of 7.7 metres. Finland argues that the official depth of 7.7 metres is too shallow and that transporting units with a draught of 7.3 or 7.5 metres would be extremely hazardous (CR 91/10 p. 15).

In this connection, I would like to draw the Court's attention to another Resolution from the International Maritime Organization - No. A.579(14) - recommending *inter alia* that loaded oil tankers with a draught of 7 metres or more use the pilot service established by the Danish and Swedish Governments for passage through the Sound.

This demonstrates that it is by no means uncommon that vessels with a draught of more than 7 metres navigate by pilot through the Sound. In fact, the Danish Pilot Authority has stated that Danish pilots regularly take ships with a draught of up to 7.7 metres through the Drogden Channel.

The second question in dispute is the feasibility of towing, to avoid the use of heavy-lift vessels with a draught so deep as to make the use of the Sound impossible. This refers only to

jack-ups, as Finland has stated that all semi-submersibles have been towed through the Danish straits. Finland has suggested that towing of jack-ups is unsafe. But this is really true only of towing these large units in the open sea. Obviously, in terms of an ocean crossing, the risks of heavy seas and high winds are considerable. But the Danish Sound is a relatively sheltered area, and certainly, with pilots and sensible choice of weather conditions, towing should present no real problems.

Denmark agrees with Finland that towing the Finnish offshore units through the Sound is in most ways more inconvenient than going through the Great Belt. Transport through the Drogden Channel with a draught near the official depth will require planning, use of pilot, and an absence of unfavourable conditions. This is not unusual for offshore transport, however. But, obviously, inconvenience does not amount to impossibility.

In his address to the Court yesterday Ambassador Grönberg bypassed the Danish interventions on Tuesday on the possiblities for passage through the Sound, merely referring to Dr.Koskenniemi's statement on Monday.

Let me very briefly reiterate the position with respect to the 3 types of offshore units produced by Rauma-Repola. I will refer to the information submitted by Dr. Koskenniemi on Monday and the list of Rauma-Repola's productions shown to the Court yesterday by Ambassador Grönberg as picture 1.

The 3 drill ships produced by Rauma-Repola (RR 15, RR 16 and RR 17 in Ann. 15) all have a draught of 7.3 metres as acknowledged in the Finnish Application. Has Finland demonstrated that these ships and others of the same kind are not able to sail through the Sound? It has not. The Court will note from the aforementioned picture 1 that Finland has no record of how these ships passed the Danish straits. Danish authorities have on record that at least one of these drill ships has passed through the Sound.

According to picture 1, the 2 jack-ups produced and delivered by Rauma-Repola (RR 22 and RR 23) were transported through the Great Belt on heavy-lift ships with a combined draught of much more than 7.7 metres. But, as follows from Annex 15 to our written observations, both of these jack-ups have a floating draught of 6.4 metres. This figure has not been disputed by Finland.

Has Finland demonstrated that these jack-ups could not instead have been towed through the Sound? It has not.

In case of adverse weather conditions, the depth of the Danish waters will always allow the jack-up to lower its legs in order to stand firmly and securely on the the seabed until the weather has cleared. After passage of the Sound and before reaching the open sea, the jack-up may then be transferred to a heavy-lift ship if preferred.

In my opinion, Finland has thus been unable to point to any circumstances compelling Rauma-Repola to transport their jack-ups by heavy-lift ships. Let me end by stressing that towing is by far the most common way of transporting jack-ups.

Finally, there are the 16 semi-submersibles produced by Rauma-Repola. In his address to the Court on Monday, Dr. Koskenniemi stated that 4 of these semi-submersibles have been equipped with so-called thrusters, a sort of propeller which adds 3.9 metres to their draught. This induced Dr. Koskenniemi to conclude that for these units " passage any other way...would have been impossible" (CR 91/10, p. 14).

Denmark disagrees and I will try to substantiate our differing position. My first comment is that one of these units (RR 18) is a multi-purpose support vessel. This unit does not have a drilling tower and is only 66 metres high, see picture 1. During passage, the air-draught or height of this vessel could be decreased by 2 metres by ballasting and it would thus easily sail under the East Bridge.

As for the others, I note that thrusters are by their very nature readily dismountable; when the rig is produced the thrusters must necessarily be mounted at sea and they must be dismounted before the rig can be taken into another dock. With the thrusters dismounted these semi-submersibles may be towed through the Sound. This was already recognized in the report from Det Norske Veritas (Ann. 10) item 5.2. The subsequent mounting of the thrusters is a relatively simple operation that may often be carried out by the rig personnel at sea without the assistance of a shipyard. Thus there is no foundation for the Finnish claim for impossibility as regards passage through the Sound for these units with dismountable thrusters.

According to Finland's Picture 1, all of the remaining 12 semi-submersibles have transit draughts below the official depth of the Drogden Channel. It should be borne in mind that the quoted transit draught of a semi-submersible may be reduced even further by using less than full ballast during the transit of the Drogden Channel or by reducing the load carried on the rig.

Denmark maintains its contention that most of these units will be able to be towed through the Sound with the aid of Danish pilots.

The Court will note from Picture 1 that all of the Finnish semi-submersibles have been towed through the Danish straits and that one of them (RR 6) has been towed through the Sound. It can hardly be contended that anything would have prevented the six other semi-submersibles with identical transit draughts from using the same route.

Let me end this clarification of the issue of passage through the Sound by referring to a statemet made by Dr. Koskenniemi on Monday. Finland's Agent informed us that one of the Rauma-Repola's offshore units had not been transported through the Danish straits, but had been delivered in the Caspian Sea through another route (CR 91/10, p. 15), presumably through the Soviet Union.

Being of course unaware of the details of this report, I can only speculate. But it would seem more difficult to navigate a Mobile Offshore Drilling Unit down the rivers of the Soviet Union than through the Sound or under the future East Bridge.

Admittedly, there may be a few semi-submersibles that might not be able to pass through the Sound but will have to pass under the East Bridge. For these few units, only the top of the drilling tower will have to be left unassembled until the passage of the bridge. The limited character of this operation has been ignored by Finland in the calculation of the costs and time required for completing the assembly. The reason for this was made clear to us only yesterday when Ambassador Grönberg revealed the basis for the Finnish calculations by submitting Picture 3.

The Finnish calculations assume that not only the top, but, inexplicably, the entire derrick is disassembled; the calculations also assume that the entire drilling area equipment and systems are dismantled and reassembled, a most complicated and time-consuming - and more to the point, utterly

unnecessary operation. Denmark maintains that it is only necessary to leave the top of the derrick unassembled.

Finland's calculation of the required costs and erection time reflected in Pictures 3 and 4 submitted to the Court as has been consistently argued by Denmark, a manifestly inflated calculation as it in no way reflects the minimal modifications actually necessary to enable passage under the bridge.

As will have become apparent, the Danish Government is of the opinion that it does not require much flexibility on the part of Rauma-Repola to make the necessary modifications of their transportation or production routines to secure the continued passage of their offshore units through the Danish straits.

2. Comments on Finland's suggestion that Rauma-Repola is already suffering damages

And now Mr. President I will turn to my second topic and address the contention by Finland that the sheer notion of a planned bridge across the Great Belt is already causing hardship to Rauma-Repola.

On Monday, Sir Ian Sinclair noted that Rauma-Repola was already experiencing a falling-off of orders for offshore units, which he considered "partially attributable to the fact that potential customers are now aware that passage through the Great Belt will become physically impossible for drill ships and oil rigs" (CR 91/9, p. 63).

With all respect, this is mere speculation. The falling-off of orders is a development that must have started already in 1985, the year when Rauma-Repola delivered its last offshore unit produced in the yard at Pori. For six years the yard has not been able to secure a production order. Can this be caused, in whole or in part, by the prospects of a bridge across the Great Belt? Is it not far more likely that the absence of orders may be ascribed exclusively to the high production cost in Finland and the general recession on the oil market as was recognized in the 1990 Annual Report from Rauma-Repola, referred to by Ambassador Fergo on Tuesday?

I conclude with confidence that Finland will not suffer substantial losses if Denmark

commences or even completes the construction of the East Bridge. With the possibility for passage through the Sound and the minor modifications necessary to allow for passage under the East Bridge, the inconvenience and cost increases imposed upon Finland are minimal. More to the point for purposes of these proceedings on provisional measures, the damage that may be sustained by Finland cannot be characterized as irreparable; the damage is, on the contrary, eminently capable of compensation by monetary damages.

3. Finland's interpretation of the position of the Soviet Union to the Great Belt Project

In his address to the Court yesterday, Ambassador Grönberg explained at some length how Finland perceived the position of the Soviet Union to the Great Belt Project. It was surprising to hear from the Agent of Finland that the Soviet Union has made "a challenge to ... [the] very legality" of the Great Belt Project. I submit, Mr. President, that no such challenge has ever been made by the Soviet Union - to Denmark or to any international body.

What is the factual basis for bringing the Soviet Union into this case between Finland and Denmark?

Let us first have a look at the reaction of the Soviet Union to the 1977 notification. In the Note of 29 March 1978 the Soviet Union set forth three specific requests:

1. that the depth of the water in the Belt's channels should not be changed to a shallower depth as compared with the existing depth
2. that the clearance of the bridge should be of a minimum of 65 metres, and finally
3. that the free horizontal clearance in the channel between the bridge piers should be at least 350 metres.

The remaining part of the Note does not, as alleged by Ambassador Grönberg, "lay down several grave reservations against", the bridge plan. The note simply continues by explaining the reasons for the specific requests. The Note also raises the question of navigational safety and asks for additional technical data concerning the bridge project.

The Great Belt Project meets the three specific requests put forward by the Soviet Union in its Note of 29 March 1978. Consequently, it was not surprising to Denmark that the Soviet Union did not respond to the 1987 and to the 1989 notifications. Since the Note of 29 March 1978 - more than 13 years ago - the Danish Ministry of Foreign Affairs has not received any further notifications from the Soviet Union concerning the Great Belt Project.

The issues of navigational safety in connection with the bridge project raised in the Soviet Union's Note from 1978 have been dealt with by the International Maritime Organisation.

Within this Organisation, Finland has never expressed any reservations concerning the Great Belt Project.

It is correct that the Soviet Union at the meeting of the Council of the International Maritime Organisation, held in June 1991 expressed its concern over the planned bridge. This was done in connection with the discussions of a report from the Maritime Safety Committee.

The concern expressed by the Soviet Union could hardly be characterized as a challenge to the legality of the Great Belt Project. If it had been, the Danish Ministry of Foreign Affairs would certainly have been approached by the Soviet Union.

Mr. President, with your permission I will

4. Answer to the question posed by Judge Schwebel on the possibilities for further deepening of the Sound

Yesterday, Judge Schwebel asked Denmark the following questions:

1. "Can any further deepening of the Drogden Channel be contemplated?"

2. "if so, could such deepening be sufficient to permit oil rigs to pass?:

3. "if so, are there [any] estimates available of the dimensions of the cost of such dredging?"

I will, with your permission, answer the questions in one answer. The Drogden Channel was deepened in 1923 from 7 to 7.7 metres. The Channel has a length of 6 nautical miles and a width of 290 metres.

The possibility of a deepening of the Drogden Channel was foreseen in connection with the agreement between the Governments of Denmark and Sweden reached in March 1991 on the

establishment of a fixed link across the Sound referred to in paragraph 46 of our Written Observations. If that project is realized, the immersed tunnel between Zealand and Saltholm will be situated across a part of the Drogden Channel that has a depth of more than 10 metres. This will be done to ensure that the possibility for deepening the Drogden Channel at a later date from 7.7 to 10 metres is retained.

There are no actual official plans for a deepening of the Drogden Channel and detailed analysis of such an operation has not been made.

A deepening from 7.7 to 10 metres will necessitate the excavation of around 8 million cubic metres of material from the bottom of the sea.

The impact on the marine environment of such immense dredging works have not been thoroughly examined. Until that is done, it is not possible to give an opinion on whether said deepening would be feasible. The flow of water through the Sound would be altered by a deepening, which could result in unacceptable effects on the oxygen and salinity balances of the Baltic Sea.

Preliminary cost estimates indicate that the cost of deepening of the Drogden Channel to 10 metres will be between DKK 800 and 1,200 (approximately equalling US$ 120 million and 180 million).

Denmark and Finland differ on what water depth is required to allow for passage of the Finnish oil rigs and drill ships. As stated earlier, Denmark is of the opinion that already with the existing depth of the Sound and without further dredging most of the Finnish units can pass through this strait.

Finland has asserted and I refer to the Application, paragraph 17, that the Finnish oil rigs have transit draughts of up to 15 metres, in which case any practically conceivable deepening of the Drogden Channel would be insufficient.

5. Answer to the question posed by Judge Shahabuddeen regarding the official comments to the 1987 Act and the projected clearance height of 76-77 metres

" (i) Who or what body made the estimate that the clearance should be 76 to 77 metres?

(ii) Was the estimate referred to in the official comments in the 1987 Act? If so, is a copy of those comments available?

(iii) Was the estimate influenced by, or intended to accommodate or take account of, the point made by the Danish Maritime Authority that drill ships built in Finland and in the Soviet Union had a height above water level of between 60 and 75 metres?"

With your permission I will also answer this in one answer and before answering this question, I would like to make clear that the official comments to Danish Acts are written by the Ministry responsible for the drafting and the submission of the Bill to the Parliament. The Bill to the 1987 Act was submitted to Parliament on 21 January 1987 by the Minister for Public Works. The official comments to the Bill were prepared by the Ministry of Public Works on consultation with other Ministries and Government agencies.

Article 4, Section 2, paragraph 1 of the Act provides in pertinent part: "The Motorway link may cross the Eastern Channel on a high-level bridge with the required navigational clearance ..."

The comments to the corresponding provision in the Bill read as follows:

"By the provision that the high-level bridge is to be constructed with the required navigation clearance it is made clear by the legislature that Denmark adheres to its obligations under international law to preserve the free passage of ships. A high-level bridge shall probably have a navigational clearance of 76-77 metres."

I have provided the Court with copies of the official comments and the relevant passages translated into English.

In the official comments to the Act, the estimates of a navigational clearance of possibly 76-77 metres was thus made by the Ministry of Public Works. The Ministry based its estimate upon information from the Ministry of Industry and the Danish Maritime Authority, which had in 1986 noted that drill ships produced in the Soviet Union and Finland had a height above water level ranging between 60 and 75 metres and that a bridge clearance of 76 metres was therefore called for.

Before a final decision on the clearance height of the East Bridge was taken, the classification agency Det Norske Veritas was commissioned to make a report on the air-draught of large ships and offshore units. In item 4.2 of the report, which is Annex X to Denmark's Written Observations, Det Norske Veritas established that drill ships in general had draughts that would allow them to sail

through the Sound. Specifically referring to the Veritas report and the fact that drill ships were able to pass through the Sound, the Danish Maritime Authority in 1989 endorsed a bridge clearance of 65 metres.

The comments made by Finland's counsel on Denmark's alternative submission

Mr. President, Members of the Court, I will now turn to the comments made by Sir Ian Sinclair and Professor Treves on Denmark's alternative submission.

In his first intervention (CR 91/10, p. 67) Sir Ian Sinclair stated that Finland could not believe that Denmark's alternative submission is meant to be taken seriously. The alternative submission was described as "ill-conceived".

In any litigation each party has the right to decide to what extent he will take seriously what has been advanced by the other side. This also comprises submissions. Consequently, Finland has the right to choose not to take the alternative submission of Denmark seriously.

But if Finland were to make that choice in the belief that the Danish submission has no basis in law, that might be very unwise.

Shortly after Sir Ian Sinclair's address, Dr. Koskenniemi explained to the Court (CR 91/10, pp. 19-20) that if the present issue before the Court was a matter of national law before a national court "we would be facing a very typical cause for an interlocutory injunction". Dr. Koskenniemi illustrated this with an example describing a dispute between a person A and his neighbour B on a construction work preventing lorries from using the common road that leads into B's real estate. He found that there would be few jurisdictions deying B the right to stop the construction by an interlocutory injunction. Dr. Koskenniemi finally submitted to the Court "that for the reasons for which we would immediately recognize the situation calling for the order of provisional measures are equally present in international as well as national law".

But how can it be that Finland draws on analogies from national law when it comes to describe situations in which injunctions can be imposed but refuses to take seriously Denmark's submission that the widely accepted principle in national law on liability for damages caused by an

unjustified injunction are equally applicable in international law as a general principle of law?

I submit, Mr. President, that the potential risk for causing unjustified damages by an injunction necessitates a potential liability for the party requesting the injunction.

Sir Ian Sinclair pointed out that no request similar to the alternative Danish submission has been presented before the Court. But does this imply that the alternative Danish submission should not be taken seriously? I believe that the Court is entitled to listen to arguments based on general principles which have not been made in earlier cases and to accept such arguments if they are merited.

Finally, I submit, that an acceptance of a potential liability for a party requesting provisional measures will not as suggested by Sir Ian Sinclair cause an unacceptable increase in the risks inherent in instituting proceedings before this Court.

On the contrary, to accept that this well established principle in national law also applies in international law, will encourage moderation. A State will then know that provisional measures are not a remedy which can be used with its inherent potential for inflicting damages upon other States with no possible risk to oneself.

I must confess to some surprise at the rather cavalier fashion in which Professor Treves dismissed Denmark's reliance on general principles of law. As he well knows, Article 38 *(c)* of the Court's Statute provides for general principles of law as a principal - not a subsidiary - source of international law. And while it is true that international courts and tribunals have rarely found it necessary to make such general principles the sole basis for their decisions, because of the wealth of treaty and customary law, the reliance on general principles should not be understated. One need only recall the *Corfu Channel* case or the Court's use of estoppel in the *Temple of Preah Vihear* case, or the reference to equity in the maritime boundary cases to see how important this source is. And there are many other examples of which the Court is better aware than I am.

His real objection seems to be that the Danish submission is a novel one. But if it has a sound legal basis in general principles, and accords with justice of the situation, why should novelty be an objection?

And the objection that such a power is not vested with the Court, because it is not *expressly* provided for in the Statute or Rules is surely bad. The Court has, under its Statute, complete discretion to adopt those remedies which are appropriate to the case before it and in accordance with law.

Mr. President, Members of the Court, I thank you for your attention, patience and courtesy. And with your permission, Mr. President, I will now leave the floor to Professor Bowett.

The PRESIDENT: Thank you very much, Mr. Magid. Professor Bowett.

Mr. BOWETT: Mr. President, Members of the Court, I think there are only three points on which I can be of further assistance to the Court, and I can be brief. These three points are the element of urgency, the need for proportionality and, lastly the relationship between the need for Finland to prove its anticipated injuries are irreparable and the remedy it seeks. I shall start with the matter of urgency.

1. The question of urgency

We remain without any adequate explanation for Finland's apathy, for its extreme tardiness in warning Denmark that the Great Belt Project constituted a threat to Finnish rights. The plain fact is that Finland did nothing at a stage when common prudence dictated that a formal approach should have been made to the Danish Government.

Dr. Koskenniemi said, quite properly, on Monday that:

> "In a sense, the very decision to opt for a bridge solution in the East Channel - instead of the tunnel alternative, which existed still in 1987 and is still provided in the relevant Danish law - already created a threat." (CR 91/10, p. 33.)

Now that is right. But why then did Finland not react in 1987? There is throughout the oral arguments of Finland the suggestion that a tunnel was an equally-likely solution, so that Finland had

no need to protest until that solution was rejected and a final decision made in favour of a bridge. But this is simply not consistent with the facts. The facts are that the Report of the Governmental Commission in 1960 envisaged a bridge, and no tunnel. So did the 1973 Act. It is certainly true that the 1987 Act left both options open, but in very different terms. The Act clearly stated that the tunnel scheme should be pursued only if, for technological and economic reasons, this seemed preferable. And the official comments to the Bill openly stated that the bridge was the preferred alternative. So, Finland knew, even then, that the bridge was the preferred and more probable choice. Of course, Dr. Koskenniemi did go on to say that the 1987 Act "did not, of itself, constitute a very immediate threat".

Frankly, I am puzzled. Finland has, quite correctly, stressed that the scheme is an integrated whole. Let me again cite Dr. Koskenniemi - these are his words:

> "The point is, of course, that the three parts in the project - the West Bridge, the East Tunnel and the East Bridge - are interlinked, so that many activities, apparently unrelated to the final closing of the Great Belt, in fact anticipate it by excluding practical possibilities for accommodating Finnish interests and giving effect to Finnish rights in the event of a judgment in our favour." (CR 91/10, p. 32)

I accept that: it is an interrelated or interlinked scheme. But surely that argues for a formal Finnish protest against the bridge alternative sooner rather than later? It seems quite extraordinary that Finland should keep silent, knowing that Denmark would begin the scheme, spending millions and millions of dollars, and keep its protest until a point in time so late that Denmark was already completely committed. The Agent for Finland suggested yesterday that one reason for the very late reaction of Finland was that the permanent link, especially in the form of a bridge, was the subject of acute political controversy within Denmark. The suggestion is, in effect, a suggestion that Finland was justified in believing that the bridge would never be built.

I must say I find this argument unpersuasive. Where Governments believe their international legal rights are under threat, they have an obligation to speak out. They would be unwise in the extreme to rely on public opinion in the other State to swing the balance in their favour and so render a protest unnecessary.

As to the rather provocative attempt to turn the acquiescence argument on its head and to

argue that Denmark has acquiesced in the passage of Rauma-Repola's offshore installations between 1977 and 1987, I can simply reply that Denmark has not, and does not, object to the passage of these installations. The issue is not, can they pass? The issue is, can they pass without modification, either in design or method of transportation, via the Great Belt, so as to make it impossible for Denmark to complete the bridge link? That is the issue.

But the apathy, or acquiescence, of Finland is one thing. It is relevant in so far as it weakens Finland's claim that there is real urgency now. But it does not explain the basis of the present plea of urgency.

It must now be clear to the Court that the plea of urgency does not really relate to the passage of these offshore installations between now and the date of judgment on the merits. We shall have that judgment before 1994, before the bridge construction does actually impede passage.

No, the urgency relates to the need, perceived by Finland, to stop the bridge construction now. Because, if it is not stopped *now*, Finland believes it will be impossible to stop it later. In other words, the construction must be stopped *now* because, unless that is done, Finland doubts that it will be able, at a later stage, when the bridge nears completion, to get an order for the full restoration of its alleged right of unimpeded passage. As I said before, the purpose of this request for provisional measures is not really to protect Finland's rights but, rather, to keep open the possibility of the remedy of restitution at the merits stage. Sir Ian Sinclair put it very fairly yesterday, when he said:

> "completion of any one element would reduce the possibilities of modifying other elements so as to enable effect to be given *to any judgment of the Court on the merits,* if that judgment were to be in Finland's favour" (emphasis added).

So, this present request is really about protecting remedies, rather than protecting rights. And I make no apologies for saying that the present request is a request for a stoppage of all further construction. As the Court will readily see, Finland seeks to make this request more palatable by suggesting that some construction could continue, subject to some modifications of the scheme, which could be left to Denmark's discretion. But this is simply "window-dressing". These imaginative modifications are simply not practicable. So Finland does, in reality, seek a total

stoppage.

Denmark, of course, recognizes that the rejection of the Finnish request does not mean that the Court has ruled in Denmark's favour on the merits. The merits are still to be argued and Denmark does not question the discretion which the Court has in the eventual choice of remedies permitted by law.

The risks for Denmark remain very considerable, both economically and commercially. But it is for Denmark to assess those risks, and the fact that Denmark is at risk is not a reason for making an order for provisional measures now. Any such order would in practice complicate Denmark's task, rather than simplify it.

2. Proportionality

I very much welcome the concession by Professor Treves that it is relevant to consider the degree of proportionality between the benefits to one Party and the cost to the other, when the Court decides to grant, or not to grant, an order for provisional measures.

His analysis is worth pursuing. Let us follow his two hypotheses. First hypothesis: the Court rejects Finland's request. He suggests that Finland would then suffer serious disadvantages. He says there would be a change in the *status quo* which would prejudice its rights were the Court to subsequently find in its favour. I must say I find it difficult to follow what the change in the *status quo* would be. The Court would at this stage be making no finding about the legal rights of either Party. The only hint of a change given by Professor Treves is that the commercial possibilities of Rauma-Repola getting further orders might be affected. But, with respect, that takes us into the realm of speculation.

As for the so-called "advantage" to Denmark, he starts of by saying that Denmark will have "full freedom" to act - I assume he means carry on building - but then he immediately qualifies that by saying that the advantage to Denmark would be very dubious, since Denmark would take that course of action at very great financial risk, for the eventual judgment on the merits might be in favour of Finland.

On his first hypothesis, this "cost-benefit" analysis is clearly incomplete. Rejection of Finland's present request would not involve any restriction of the passage of these offshore installations prior to judgment on the merits. And, as he rightly points out, Denmark would remain at great risk, pending final judgment. So, if may I say so, I see nothing very disproportionate in the advantages or disadvantages suffered by the two Parties on this hypothesis.

His second hypothesis is that the Court accepts Finland's request. He suggests the advantage to Finland is that the *status quo* is maintained. In realistic terms, all that means is that perhaps one more unit might pass through the Great Belt without modification, prior to judgment on the merits - but even that passage is speculation. So we are dealing with minimal benefits to Finland.

But when we turn to the other side of the coin - the losses to Denmark - he describes these as "modest". But that is because he assumes much of the construction work can go on on the basis of the schemes for modification proposed by Ambassador Grönberg.

Of course, the moment one accepts, as realistically we must, that there is no practical possibility of implementing any of these schemes, Denmark's losses become anything but modest. The losses will become astronomical; nearly US$ 500 million to the Storebaelt Company alone, and quite incalculable losses to Denmark.

In short, Mr. President, the analysis by Professor Treves confirms a very simple truth. The moment you contemplate acceptance of Finland's request, and you exclude Ambassador Grönberg's modification schemes as so much wishful thinking, the reality of the "balance" is absolutely clear. The losses to Denmark will be enormous, and totally disproportionate.

3. The Question of Irreparability and the Remedy sought by Finland

Mr. President, I suggested on Tuesday that the whole strategy of Finalnd's case was to prejugde the remedy it would seek in the eventual proceedings on the merits. Its aim, even at this stage, was to lay the ground for a claim to *restitution*, a claim that Finland, or more strictly Rauma-Repola, should enjoy unchanged and unmodified all the rights of unrestricted passage through the Great Belt which it had enjoyed prior to the plans for the East Bridge. It had no interest in a claim for compensation, in the event that the Court should hold, on the merits, that there had

been an infringement of Finland's rights by Denmark, and assuming that Finland could prove consequential economic loss to Rauma-Repola.

I well understand that strategy. Indeed, for the purposes of an application for provisional measures, Finland was bound to adopt such a strategy. Because the moment Finland hinted in its Request for provisional measures that any future claim might lie in damages, it would, in effect, be conceding that its injury was *not* irreparable. And that would destroy the basis of its claim for provisional measures.

So, Finland had to aim for restitution. That had to be the sole remedy in comtemplation. The notion that any claim on the merits might lie in damages, or compensation, was fatal to its Request for interim measures. Of course, yesterday Professor Treves reminded us that in its Application - not the present Request - Finland has asked for damages. But that is a little disingenuous. The Application seeks a declaration upholding all Finland's claimed rights of passage, and condemning the present bridge scheme as incompatible with those rights. It is a claim for restitution. The claim for compensation is in no sense an alternative claim - it is merely for a claim for compensation for any incidental losses.

But supposing the eventual claim for restitution is legally untenable; supposing it is a claim which it is virtually impossible for the Court to grant: what then? Would not that mean that Finland would have to be satisfied with compensation or damages, even if it won on the merits? And would not that mean that the present Request is fatally flawed, because any injury would be reparable by damages?

Mr. President, with the leave of the Court I want to show now that this is indeed the case. It is no mere supposition. It is, in fact, the law that any claim on the merits by Finland could not be satisfied by an order for restitution, but could only be satisfied by compensation or damages.

The Court will be familiar with the work of the International Law Commission on the law of State Responsibility. Indeed, many Members of the Court will be far more familiar with this work than I am - so I trust they will forgive what may seem an impertinence in drawing to their attention matters of which they are already fully aware.

But in 1988, at its fortieth session, the International Law Commission turned its attention to the remedy of restitution. It did so on the basis of a Preliminary Report by Professor Arangio Ruiz in document A/CN4/416/Add. 1 of 27 May 1988.

At page 21 of that Report the Special Rapporteur turns to the question of "excessive onerousness" - to the proposition that the remedy of restitution will not be available where, to order it, would be excessively onerous for the State adjudged guilty of State responsibility. He cites Verzijl as follows:

> "it would be unreasonable to allow a claim for *restitutio in integrum* if this mode of reparation would impose a disproportionate burden upon the guilty State and if the delinquency can also be atoned by a pecuniary indemnification".

He points out that this is the view of many authors: of Verdross, of Personnaz, of Nagy, Cepelka, of Berber and Mann. It was the view of the Strupp draft of 1927, of the *Deutsche Gesellschaft* project of 1930, which contained the following provision:

> "Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person."

Now consistently with this doctrine, the International Law Commission Report proposes the following Article 7 for the draft on State responsibility:

> *"Restitution in Kind*
>
> 1. The injured State has the right to claim from the State which has committed an internationally wrongful act, restitution in kind for any injuries it suffered therefrom, provided and to the extent that, such restitution:
>
> *(a)* is not materially impossible;
>
> *(b)* would not involve a breach of an obligation arising from a peremptory norm of general international law;
>
> *(c)* would not be excessively onerous for the State which has committed the internationally wrongful act."

Paragraph 2 goes on in these terms:

> "2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(a) represent a burden out of [all] proportion with the injury caused by the wrongful act;

(b) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act."

The Court will readily see the relevance of this statement of the law. Restitution will not be available as a remedy where it would be a disproportionate burden on the delinquent State; or would seriously jeopardize its economic or social system.

I need not repeat the details of my earlier comparison of the likely economic losses: losses to Rauma-Repola of an entirely speculative character, and perhaps even then of no more than US$ 10 million over the next decade. Losses to the Danish Storebaelt Company, certain losses, of at least 30 times that amount and virtually inevitable. And losses to Denmark which are incalculable.

As to the jeopardy to the social and economic system of Denmark, can there be any doubt? The set-back will be enormous. The potential damage is incalculable.

So, Mr. President, we have here a situation which fits exactly into the notion of "excessive onerousness". It is exactly the situation in which restitution will not be granted.

So, where does this leave us? I would submit that it leaves us with the inescapable conclusion that, even if Finland should in due course succeed on the merits, any remedy will lie in damages, not restitution. And the consequence of that is that the injury apprehended by Finland is reparable - by damages. It is not irreparable. It therefore follows that this is not a case in which it would be appropriate to make any order for provisional measures.

Thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Bowett. And now, Ambassador Lehmann, please.

H.E. Mr. LEHMANN: Mr. President, distinguished Members of the Court, as you are well aware, counsel for the Danish Government, Dr. Jiménez de Aréchaga, could not remain with us

today by reason of other commitments but had asked me to present his answers to the points made yesterday by Sir Ian Sinclair and by Professor Treves, with respect to his statement last Tuesday. Those answers are embodied in the statement I shall now make.

Sir Ian Sinclair stated that the Court in its jurisprudence concerning the interim measures

> "has been very careful in refraining from any preliminary determination of the merits of the case at the stage of an application for interim measures".

That is true and it is easy to understand why. For the Court to pronounce expressly in an order concerning interim measures, on the existence or scope of the rights involved by an applicant would, of course, constitute a prejudgment of the final decision on the merits.

But this cannot mean that the existence and scope of the substantive rights cannot be discussed by counsel or should be absent from the mind of the judges when deciding such a serious matter as a request for interim measures.

If it were otherwise it would be difficult to understand why the 1972 Rules of Court, when dealing with the procedure to be followed upon a request for interim measures, requires the applicant to specify "the rights to be protected", a requirement which is implicitly retained in the present Rules. It appears, therefore, that the existence of the right is something which an Applicant State must demonstrate in making a request for provisional measures. Without clear evidence of a right, there is nothing for the Court to protect. But, obviously, any issue of the *violation* of that right, if it exists, is a matter for later consideration on the merits.

Finally, Professor Treves accepted to discuss the challenge raised by Denmark against the scope of the right invoked by Finland, although somewhat reluctantly.

His basic contention was that the unlimited and elastic right alleged by Finland with respect to oil platforms and other structures exists in the Danish straits as a customary régime.

However, Professor Treves did not explain how and when such a customary régime was established, with its special characteristics of being unlimited in its heigh and elastic in its future development. He did not explain either - if that customary régime had been established - why both Denmark and Finland jointly requested the Third United Nations Conference on the Law of the Sea

to insert a specific provision excluding their straits from the transit passage régime. Neither Ambassador Fergo, nor Judge Manner, when requesting this exception, invoked the pre-existence of an established objective régime.

Moreover, the two States replaced the alleged customary régime upon ratifying the 1958 Geneva Convention. In the exercise of the broad regulatory competence granted by this Convention, Denmark has regulated the navigation of "ships of special characteristics", such as tankers. That regulatory competence comprises the fixing, at the appropriate time, of reasonable clearance limits for the floating equipment which seeks to go through the straits.

If States did not have this regulatory competence any new bridge would be open to challenge, because offshore technology already makes possible rigs so high that no bridge could accommodate them, without their being dismantled before passage. Even bridges which crossed straits where another high seas route was available would be open to challenge. For an offshore construction company could still argue its passage was obstructed, and claim for the excess costs of detour via the longer high seas route.

Finally, the alleged existence of objective régimes, imposed by certain States with effect erga omnes is a thing of the past, not accepted in contemporary international law. The records of the Vienna Conference on the Law of Treaties and of the International Law Commission demonstrate that such legal situations as free navigation for all States, are based on stipulations in favour of third States. That is the position of Finland with respect to the 1857 Treaty and as a third party beneficiary it cannot claim rights that go beyond those which have been established by the parties to the treaty.

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I now come to my own remarks, Mr. President, distinguished Members of the Court.

I want first to comment upon the submissions advanced by Finland with regard to the indication of provisional measures. And I must confess that what Finland asks for continues to be

something of a puzzle. Thus, in the Finnish Written Request of 22 May 1991 we find the following wording in paragraph 13 of the Request - and I quote only the pertinent words:

> "Denmark should, ... refrain from contuining or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards ... [secondly] ... Denmark should refrain from any other action that might prejudice the outcome of the present proceedings."

Here we find both a rather concrete indication of the measures sought: namely abstain from construction work on the East Bridge which would impede the passage of ships and oil rigs and a blanket indication that Denmark should abstain from any other prejudicial action.

As we have shown, there will be no impediment to the passage of any oil rig before the end of 1994 at the earliest. So there is no need for the Court to grant that part of the Request. And as to the blanket prohibition that is not an appropriate one, because it could potentially cover almost any Danish action concerning the entire Great Belt traffic link.

If one goes through the Verbatim Records of Finland's presentation - and I shall spare the Court from doing so in detail - one will realize that the Finnish position changes all the time between stating that no blanket prohibition will do, and then almost in the same breath suggesting exactly that by requesting the Court to order a general indication of no prejudicial action on the part of Denmark.

May I refer to Sir Ian's statement on page 44 and page 68 of the Verbatim Records (CR 91/9) and to Dr. Koskenniemi's statement on pages 34 to 35 of the Verbatim Records (CR 91/10).

Yesterday morning the Agent for Finland reiterated this inherent contradiction. He said: "What Finland is requesting is not the complete cessation of the fixed link project" (CR 91/13, p. 13) and almost in the same breath

> "What Finland is requesting is instead ... a *general* declaration by the Court that the project should not be carried out, pending a judgment, in such a fashion as to prejudice the rights claimed in the main proceedings."

Now what is Finland seeking? A blanket prohibition or a minimum of necessary measures? Or has Finland actually left the whole operation to the discretion of the Court? That actually appears to be the case because Dr. Koskenniemi referred to

> "the possibility that the Court might need to indicate more specific measures, should the Danish Government fail to take adequate measures to protect Finnish rights and interests" (CR 91/10, p. 34).

The idea, apparently, is that starting from an initial and very vague order, the Court will issue further more specific orders as circumstances require. So, we may foresee a whole series of proceedings between now and the merits stage. I presume the Court will need its own technical experts present at the site of the Great Belt project, to advise it on what can, and should, be done. The Court will have to judge for itself the practicability of this extraordinary idea.

Or could it be that all this uncertainty simply reflects the fact that the indication of provisional measures in relation to an integrated construction project such as the fixed traffic link across the Great Belt, which is already at a very advanced stage, is not an appropriate remedy? I believe it does. I believe that Finland during these proceedings has come to realize that restitution in kind is not an appropriate legal remedy, given the factual and legal circumstances of the present case. The practical solution to the present problem lies in the offers the Danish Government has made to co-operate with Finland in finding mutually acceptable ways and means to guide the Finnish oil rigs through the Danish straits and, if need be, to render technical assistance in dismantling and assembling those parts of the rigs which are too high to pass under the bridge in the Eastern Channel of the Great Belt. The Court's judgment on the merits of the case will then decide who is going to pay for these adjustments.

My colleague and friend, Ambassador Grönberg, stated something to this effect but in the reverse order. He said in his initial address to the Court,

> "This is what we have come to seek from the Court. We seek, first a declaration of our rights in this matter. On the basis of that declaration, we then aim to attain negotiations on the different technical alternatives which might be used to safeguard our rights while taking account of the legitimate needs of Denmark." (CR 91/9, p. 26.)

The Government of Denmark of course shares this aim of finding peaceful solutions to any dispute through negotiations. But is not Finland putting the cart before the horse in seeking first a declaration of its rights and then starting negotiations? What is the meaning of that suggested procedure which does not correspond at all to the task of the Court during the preent proceedings, which are not aimed at passing final judgment on the right of passage through the Great Belt? Moreover why do we need to negotiate if the Court has granted the absolute right of unimpeded

passage which Finland is seeking? It will then be up to Denmark simply to implement the judgment and provide the passage granted to Finland. Or is Finland trying to obtain an advantage in any future negotiations by having the Curt indirectly recognize in its contention about the right of unimpeded passage through the Great Belt? If so, such an approach, obviously, will not further the prospects of successful negotiations.

Mr. President, you and your colleagues probably know the old saying about lawyers. They can be divided into two groups: those who seek solutions to all problems and those who see problems in all solutions. I think that the Danish team would like to be identified with the first group of lawyers, but unfortunately we have been left with no other choice by Finland but to appear before this Court and state our case. Finland has neither during our bilateral contacts nor during these pleadings ever suggested that a solution might lie in some modification to their very few oil rigs which may not otherwise be able to pass under the East Bridge in the Great Belt.

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I now come to my concluding remarks and statement of our final submissions.

Mr. President, distinguished Members of the Court, you have now been presented with the Danish oral arguments concerning the subject matter before you, and I shall spare the Court from repeating, even briefly, the arguments advanced by the Danish side. I would like, however, to draw the Court's attention to the following points when deliberating on the case.

The request for provisional measures is submitted at a point in time when a sovereign decision of the Danish State has been made in good faith and in full reliance upon the acceptance by the international community of that decision. To grant the request under these circumstances would be disruptive to orderly relations between States.

We are furthermore dealing with a case where no irreparable damage would ensue for Finland if provisional measures are not indicated. Finland itself has indeed conceded this fact by submitting that Finland in particular reserves its right to claim compensation for any damage or loss arising

from the bridge project (see paragraph 33 of the Application and paragraph 135 of the Written Observations). Any damage to the private Finnish company, or other branches of Finnish private industry, can be compensated by the payment of a certain amount of money, whereas the damage to Denmark will have wide repercussions on Danish society as a whole.

Another striking element of the case relates to the fact that the alleged Finnish right to be protected cannot be substantiated to any reasonable degree. The right to be protected should be Denmark's right as a strait State to construct a bridge over its territorial waters respecting established international standards with regard to both vertical and horizontal clearances.

Finally, the question of an unimpeded right of passage will not pose any real problem before the end of 1994, i.e., after the Court has passed judgment on the merits of the case. Consequently, there is no urgency requiring the indication of provisional measures.

For all the reasons - of a factual, reasonable and legal character - advanced by the Danish Government in its Written Observations and during these oral pleadings, I respectfully request the Court:

(1) To adjudge and declare that the Request of Finland for an order of provisional measures be rejected.

(2) In the alternative, and in the event that the Court should grant the request in whole or in part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should be Court reject Finland's submissions on the merits.

I thank you, Mr. President and your distinguished colleagues.

The PRESIDENT: Thank you, Ambassador Lehmann. We are now at the end of the oral proceedings in this case concerning the *Passage through the Great Belt (Finland v. Denmark)* and the Court must now proceed to its deliberation in accordance with Article 54 of its Statute and will announce its decision over the matter in due course.

Before closing the proceedings, however, I should like, on behalf of the Court, to thank the

Agents, counsel and delegations of both Parties for the very helpful way in which they have co-operated with the Court in making the arrangements for these hearings and if I may, to congratulate them also on the way in which a strenuous argument has not been allowed to alloy the traditional friendly relations between the two countries concerned.

As is customary I must finally request the Agents of the Parties to remain at the disposal of the Court for any further information or assistance it might require and with that reservation, I now declare the oral proceedings closed.

The Court rose at 4.30 p.m.