SEPARATE OPINION OF JUDGE BROMS

Having joined the other Members of the Court in adopting the present Order I want to explain the factual background to the adoption of the Order. In doing this I do realize that at this stage any comment must relate solely to the request for the provisional measures while the merits of the case will only be discussed when the final decision of the Court will be made. Needless to say the Parties at the hearing did refer to some of the merits in order to justify their views on the provisional measures. This turned out to be necessary in order to estimate whether the claimant had a prima facie case.

At the time the Application for the provisional measures was made by Finland the normal prerequisites seemed to exist for the granting of the request. The jurisdiction of the Court did not present any problems; the claim obviously included legal problems to be judged by the Court, and was one which on its face had reasonable chances of succeeding. The claimant also could prove that without provisional measures irreparable prejudice could be caused to the right of free passage of drill ships and oil rigs allegedly based on several international treaties and international custom. There also seemed to be the required urgency, which has often played a decisive role in the Court's decision-making on applications for provisional measures. The final construction tenders for the East Channel Bridge have an acceptance deadline of 18 August 1991 and there was a danger that tenders for Finnish oil rigs and drill ships would diminish due to the fear of the potential buyers that the construction work would be prevented in the near future due to the impossibility of making use of the right of free passage through the Great Belt.

At the hearing the Danish Government made a statement that, according to the schedule for construction of the East Channel Bridge, "no physical hindrance for the passage through the Great Belt will occur before the end of 1994" (Danish Written Observations, para. 140 (2); Public Sitting of 2 July 1991 (morning), CR 91/11, p. 11 (Lehmann)). To this it was added that by that time the case would have been finally decided by the Court. Having said this the Agent for Denmark suggested that no indication for provisional measures was required *(ibid.)*. He went on to explain that the construction of the East Channel Bridge will not present any practical hindrance for the passage of mobile offshore drilling units through the Danish Straits and the navigation may continue through the Strait as before (see para. 25 of the Order).

Thus according to the Agent of Denmark, there is no urgency. Another thing changing the original situation was that later during the deliberations of the case the Court decided to make the final decision of the case expeditiously, probably during the spring of 1992 or at the latest in the fall of 1992. When this decision is combined with the Danish assurances as to the continuation of the right of free passage, the issue of urgency must be seen in another light. Finnish ships, including the oil rigs and drill ships, are now guaranteed the right of transit at least until the end of 1994 and the Court will decide the case as expeditiously as possible — certainly before the above date. Thus, as a result of the above explained events the material grounds for the acceptance of the Application have changed. With these changes the prerequisites for the adoption of the Application diminished without any fault of the claimant. The remaining alternative was the present Order.

The present Order confirms the above-mentioned Danish assurances given to the Court. What is most important, however, is the provision included in paragraph 32, whereby the Court underlines the well-established legal norm that a State engaged in a dispute before the Court with another State cannot improve its legal position vis-à-vis that other State by any action taken *pendente lite*, and no such action "can have any effect whatever as regards the legal situation which the Court is called upon to define" (*Legal Status of the South-Eastern Territory of Greenland, P.C.I.J., Series A/B, No. 48*, p. 287). This concerns naturally both Parties but, taking into account the circumstances of the present case, this principle is especially important as a guarantee to Finland against any detrimental change which might be undertaken by the territorial power of the Great Belt.

The Order also decides another important legal issue which was taken up at the hearing by the counsel, Professor Bowett, speaking for the Government of Denmark. He suggested that in the event a restitution in kind should prove excessively onerous for Denmark, a monetary compensation of damages would suffice as a payment to Finland, should Finland's claim eventually be accepted by the Court (Public Sitting of 5 July 1991, CR 91/14, p. 45). But this is not what the claimant has been seeking. The claimant is seeking restitution in kind. Therefore, the opinion of the Court which denies the validity of the Danish theory is correct, and an important interpretation.

Finally, I also regard the contents of paragraphs 33 and 34 to be most important, especially in light of paragraph 35, where the Court welcomes the Parties to enter into negotiations to solve their dispute. The principle of equal treatment of the Parties has been quite correctly adopted in paragraphs 33 and 34. Both Parties are requested to consider alternative solutions to settle the dispute. With the help of their combined technical

expertise, the future negotiations which the Court recommends to both Parties might turn out to be decisive in finding a mutually acceptable solution.

I have not been able to avoid the impression that the dispute is one which could also possibly be solved by the use of negotiations between the two Governments. By doing this they would only be acting in the best Nordic spirit of comity and co-operation to make the utmost effort to find a solution which would satisfy both sides.

After all, the main dispute should be brought to its realistic measurements. It is not easy to understand how the building of an opening to the East Channel Bridge by means of a swing bridge, or possibly by another technical solution, could cause more expense to Denmark than a relatively small fraction of the total construction costs, which are said to be more than 4 billion dollars. Neither should such a modification cause any real delay to the construction work presuming that the necessary decision is reached in the foreseeable future. As the Order of the Court itself suggests negotiations to the Parties, the acceptance of negotiations can no longer be said to lead to any loss of face on either side. To the contrary, the Court would appreciate such an effort by the Parties. Needless to say, even if the Parties could not solve their dispute through direct negotiations, the results of such negotiations, and in particular the technical solutions which may be explored, would be helpful to the Court which, for natural reasons, is composed of legal, and not technical, representatives.

As the Court now has decided to deal expeditiously with the case this solution is in the interest of both Parties. The uncertainty of the situation should not be allowed to continue any longer than is absolutely necessary. Now that the Court has adopted the above Order it is to be hoped that with the co-operation of the two Agents the merits of the case will, indeed, be decided at the latest by the end of 1992. That way any possible damage to either Party would be minimized.

(Signed) Bengt BROMS.