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held on Tuesday 2 July 1991, at 3 p.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Passage through the Great Belt

Request for the Indication of Provisional Measures

(Finland v. Denmark)

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Audience publique

tenue le mardi 2 juillet 1991, à 15 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président,

en l'affaire du Passage par le Grand-Belt

Demande en indication de mesures conservatoires

(Finlande c. Danemark)

COMPTE RENDU

Present:

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

Registrar Valencia-Ospina

Présents:

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

M. Valencia-Ospina, Greffier

The Government of Finland is represented by:

H. E. Mr. Tom Grönberg, Director general, Legal Department, Ministry of Foreign Affairs,

as Agent;

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

as Co-Agent;

Sir Ian Sinclair,

Professor Tullio Treves,

as Counsel;

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

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

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

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

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

as Advisers.

The Government of Denmark is represented by:

H. E. Mr. Tyge Lehmann, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs,

Mr. Per Magid, Attorney,

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

as Agents;

Dr. Eduardo Jiménez de Aréchaga,

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

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

Mr. Claus Gulmann, Professor, University of Copenhagen,

as Counsel and Advocates:

Le Gouvernement de la Finlande est représenté par :

S. Exc. M. Tom Grönberg, directeur général du département juridique du ministère des affaires étrangères,

comme agent;

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

comme coagent;

Sir Ian Sinclair,

M. Tullio Treves, professeur,

comme conseils;

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

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

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

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

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

comme conseillers.

Le Gouvernement du Danemark est représenté par :

S. Exc. M. Tyge Lehmann, ambassadeur, conseiller juridique principal du ministère des affaires étrangères,

M. Per Magid, avocat,

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

comme agents;

M. Eduardo Jiménez de Aréchaga,

M. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., professeur de droit international à l'Université de Cambridge, Queen's College,

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

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

comme conseils et avocats:

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

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

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

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

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

Mr. Henrik Dhal, Attorney,

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

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

as Advisers;

Mrs. Jeanett Probst Osborn, Ministry of Foreign Affairs,

as Secretary.

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

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

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

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

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

M. Henrik Dahl, avocat,

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

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

comme conseillers;

Mme Jeanett Probst Osborn, ministère des affaires étrangères,

comme secrétaire.

The PRESIDENT: We continue with the case of Denmark and I call upon Professor Bowett.

Mr. BOWETT: Thank you, Mr. President.

Mr. President, Members of the Court, it is my task to examine the question whether Finland has satisfied the burden of proving that the interim measures it requests are necessary for the protection of the economic interests of the Finnish Company Rauma-Repola Offshore. Interim measures are a quite exceptional remedy, for they impose restraints upon a State's conduct before that conduct has been examined on the merits, and found to be unlawful. The Court's jurisprudence demonstrates the care - I might even say caution - with which the Court has examined requests for such measures. I believe it to be a fair assessment of that jurisprudence to say that the Court has always insisted on strict proof of two elements: first, that there is such urgency as to require interim measures, and, second, that without such measures irreparable harm will be caused to the Applicant. Let me deal with these two elements separately.

1. Proof of "urgency"

One can see the Court's insistence on this element by comparing its handling of two cases: the *Trial of Pakistani Prisoners of War* case and the *Nuclear Tests* case. In the latter, at the stage when interim measures were granted, further nuclear tests were believed to be imminent. In the former case, the very fact that the Parties sought some delay to allow for negotiations belied any real urgency, and so the request was denied.

In the present case, in considering whether Finland has established that there is real urgency, there are a number of factors which, in my submission, the Court will wish to bear in mind.

First, there is Finland's own apathy. As the Agent for Denmark has explained, Finland was notified of the possibility of a bridge being built in May 1977. If it takes 13 years to react, does this suggest "urgency"? Of course, as we heard yesterday, Finland seeks to avoid the accusation of apathy by suggesting that the decision to build a bridge, rather than a tunnel, was reached only in October 1989. But this explanation will scarcely do. Because it was clear much earlier that a bridge was the more likely option, and other States, like the Soviet Union, very sensibly reacted. They did not wait for the final decision for the very good reason that they knew that the reactions of the Baltic

States were needed before the final decision was made. Obviously, opposition or lack of opposition was crucial to that decision. What was the use of waiting, until *after* the final decision had been made?

Second, the notion of "urgency" is linked to that of inevitability, for the measures are necessary now precisely because, otherwise, the damage is inevitable. But do we really have inevitability in this case? As Ambassador Fergo has explained, the drill-ships can all pass through the Sound, and so can the jack-up platforms. At least that is if they are towed. It is not *inevitable* that they be transported on heavy lift ships with a draught that exceeds the depth of the Sound.

Third, the suggestion that there is an urgent need for provisional measures to remove the uncertainties in the present situation makes little sense. Whatever uncertainties exist, no order for provisional measures will remove them. Only the Court's final judgment on the merits will do that.

Fourth, in any event, no one envisages the construction of the bridge proceeding very quickly. The estimate is that the Great Belt will not be obstructed by the new bridge until late 1994 at the earliest. And by then the Court will have dealt with the merits. So, what is the urgency? Of course, one can anticipate Finland's response to that question. Finland will doubtless say that unless the project is stopped now, it will never be stopped. In fact Dr. Koskenniemi said precisely that yesterday. When he spoke of the work soon reaching a "point of no return" - those were his words - "a point of no return" - he was simply expressing the view that the work may soon reach the stage at which Denmark simply could not modify the design for the East Bridge, or replace it by a tunnel.

But that can only mean that Finland is applying for interim measures on the basis that it believes that Denmark will not comply with a judgment on the merits against Denmark. Finland has no basis for such a belief, and the belief is not one which this Court can adopt. It is simply not possible for this Court to grant an application for interim measures on the basis that the Court does not believe the Respondent State will comply with the Court's judgment on the merits.

So, in my submission, Finland has failed to show that there is any real urgency. I turn, now, to the second element, the need for proof of irreparable damage, unless an order is made.

2. Article 41 of the Statute: the need for proof of irreparable damage

Necessarily, we must start from the Court's Statute. The Court's discretionary power to order interim measures is conditional on a finding that such measures are necessary: the actual words used in Article 41 are "if it considers that circumstances so require ...". But if the circumstances must require such measures, this can only mean that such measures have been proved to the satisfaction of the Court, to be necessary. Had the Statute used such words as "that circumstances indicate to be desirable" or "that circumstances suggest to be opportune", we might have had a much less-demanding test. But if the measures have to be "required", the test is, in effect, one of necessity.

When one looks to the practice of the Court one can see how the Court has conformed faithfully to the Statute and applied the test rigorously. Some of the cases are abundantly clear.

For example, in the *Nuclear Tests* case the Order of 22 June 1973, paragraph 27, recited the Australian view that damage caused by radio-active fall-out would be irreparable and "irremediable by any payment of damages". So, too, in the Court's Order of 15 December 1979 in the *Tehran Hostages* case, where the Court noted that the United Nations Secretary-General had regarded the situation as posing "a serious threat to international peace and security" and stated its own conclusion that there was "even danger to life and health and thus to a serious possibility of irreparable harm" (para. 42).

The Court's Order of 10 May 1984 in the case concerning *Military and Paramility Activities in and against Nicaragua* was based on similar considerations. Nicaragua alleged that 1,400 deaths and 1,700 serious injuries had already occurred. The Court, in paragraph 32 of its Order, while not subscribing to these numbers, did refer expressly to "the rights of Nicaraguan citizens to life, liberty and security". It seems clear that the Court viewed violations of these rights as not adequately compensated by any award of damages.

In the *Burkina Faso/Mali* case, the Order of 10 January 1986 noted that persons and property were exposed to a "serious risk of irreparable damage" (para. 21).

Conversely, in the *Aegean Sea* case, in its Order of 11 September 1976, the Court declined to make any order because any breach by Turkey of the rights of Greece "might be capable of reparation by appropriate means" (para. 33). It seems certain that the Court had financial

compensation in mind.

It might be thought that the *Fisheries Jurisdiction* case represented something of an exception, for the Court's Order of 17 August 1972 indicated certain interim measures when the interests likely to be damaged - I refer to the loss of fishing rights - were economic and could be compensated by damages. But in fact in that case the United Kingdom had explained to the Court that, with the loss of a whole season's catch, many fishermen would be bankrupt, their ships forfeited, and their livelihood ruined. So the damage was truly irreparable.

In fact, the only case that does not quite fit into this consistent pattern is the early Order in 1951 in the *Anglo-Iranian Oil Company* case (*I.C.J. Reports 1951*, p. 103) and perhaps that is best explained by Iran's failure to appear and contest the application by the United Kingdom.

But, that one case apart, we have a consistent case-law, a *jurisprudence constante*. And it is to the effect that anticipated damages which can be adequately compensated by an award of financial damages, monetary compensation, are not to be deemed "irreparable" and do not meet the test of necessity required by Article 41.

This very rigorous test, which the Court has adopted, is clearly right. For, in effect and certainly in this case, an order by the Court for provisional measures would be an order that Denmark should cease to perform acts within its own territory which are prima facie lawful. At this stage Finland has not proved, and is not required to prove, that the acts are unlawful. Therefore, as things stand, and until Finland proves the contrary, any order by this Court would require Denmark to cease conduct which must be deemed to be lawful. It should cause little surprise to find that before taking such a step the Court has to satisfy itsself that it is absolutely necessary to make such an order.

3. The Requirement of Proportionality

I turn now to the requirement of proportionality because there is a further element in the Court's jurisprudence which is of the utmost importance in the present case. This is the element of "proportionality".

I mean by that that the Court does not simply look at the interests of the Applicant State to see

whether, by reference to that State's interests, an order is necessary. The Court looks to the interests of both Parties, and attempts to strike a balance between them. Because a measure which may appear reasonable, and even necessary, when looked at solely from the Applicant's point of view, may appear unreasonable or disproportionate when the interests of the Respondent State are brought into the picture.

The Court's endeavour to strike a balance, to make any order reasonable and proportionate in the light of the interests of both Parties, can be seen in the *Fisheries Jurisdiction* cases.

The Order of 17 August 1972, although sought by the United Kingdom as Applicant, expressly stated the following:

> "it is also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development ..." (para. 23).

Thus, to safeguard the interests of the Respondent State, Iceland, the Court imposed quota restrictions on fishing by the Applicant State, the United Kingdom.

My suggestion is that, in the case before you, the Court has a classic example of a situation in which the principle of "balance", of "proportionality", requires that the Court must look also to the interests of the Respondent State, Denmark. And, as we shall see, whatever the speculative losses that might be incurred by Rauma-Repola Offshore, the certain and enormous economic loss to Denmark is beyond question. That, in itself, argues against the granting of any order. But let us examine this comparison more closely.

(a) The anticipated losses of Rauma-Repola Offshore

Paragraph 23 of Finland's Application tells us that two jack-up rigs are presently under construction, in a joint venture with a corporation from the Soviet Union. Their value is said to be around US$ 100 million each.

As regards these two rigs, we are given very little further specific information. But, obviously, there are questions which have to be asked.

First, when will they be ready? Presumably within the next 3 years, in which case they will pass through the Great Belt before the bridge is built. In that case they really have no relevance in justifying an order of provisional measures to halt the construction of the bridge.

Second, do we know that they cannot pass through the Sound? We do not. We are told only that jack-up rigs are transported by heavy-load transport vessels with a draught of "up to 10 metres or more". Do we know that they cannot be towed through the Sound by shallow-draught vessels? We do not. Do we know why Finland refuses to contemplate the alternative of towing? We do not.

Third, do we know the cost of adaptation of the design of these rigs, so that they can be transported in sections of a height less than 65 metres and reassembled later? We do not. Or do we know what part of that cost would fall on the Finnish company, as opposed to the Soviet company? We do not. As regards other tall structures, likely to exceed 65 metres in height, Finland's Application refers only to a possible demand for between 10 and 20 drill ships and rigs during the decade of the 1990s.

So, we are to anticipate around 1.5 such ships, or rigs, each year. But this, apparently, is speculation. There are, apparently, no firm orders and, built into this speculation are a whole number of hypotheses or questions. Will Rauma-Repola get these orders in the next decade, against competition from shipbuilding yards in Germany, Holland, Norway, the United Kingdom, Japan and so on? Will the oil market over the next decade justify the assumption that, overall, some 200 to 400 new exploration rigs or drill vessels will be needed? For the anticipated share of Rauma-Repola is based on that assumption. Will Rauma-Repola continue manufacturing these rigs, even at a loss? As Ambassador Fergo has explained, the Company's 1990 Annual Report indicated that the Company was operating at a loss. Can we assume it will, nevertheless, continue to produce these rigs over the next decade, even at a loss?

Will the rigs or ships needed be of this type, i.e., these very tall structures? Will the structural engineers who design these rigs not be able to adapt their construction techniques to overcome this problem of height? Will demand still be in the North Sea, or will it shift to the Far East, for example, thus favouring Japanese or Korean shipyards?

The Court will see that we are in an area where the damages, far from being certain, are highly speculative. In most legal systems, future, speculative and uncertain damages of this kind are not recoverable on the merits. How, therefore, can such damages justify an application for

provisional measures, even before we reach the merits?

But it is not simply that the damages are speculative. They are also, clearly, financial. They are exactly the type of damages which, once proved to the satisfaction of the Court, are met by monetary compensation. If that is so, they are not "irreparable" in the sense required for an order of provisional measures.

Lastly, the damages anticipated by Rauma-Repola are not only speculative but relatively modest. In Denmark's Written Observations, paragraph 55, we have given the cost estimate of Denmark's own experts of the likely increase in cost of reassembly for those few drilling units that cannot pass through the Sound: less than US$ 1 million per unit. So, even on the most optimistic view of Rauma-Repola's share of the market, we have an additional cost of, say, US$ 15 million over the next decade.

And, of that, no doubt, a share will be borne by the Soviet partner in the joint-venture. So, perhaps, realistically we are talking of no more than US$ 10 million as speculative damages, over a decade.

Now, I want to turn to the other side of this "balance", to see whether the losses likely to be suffered by Denmark, if this order is made, are in any sense proportionate.

(b) The anticipated losses to Denmark

There is no need for me to repeat the estimates of losses on the Danish side. In paragraphs 68 to 81 of Denmark's Written Observations, we have itemized the losses likely to be suffered by the Danish construction company if work is suspended for three years - some US$ 453 million. That, in itself, is about 30 times the losses likely to be suffered by Rauma-Repola. And these losses by the Danish company are virtually certain: they are not speculative, like the Finnish losses.

But, massive as the Danish company's losses will be, there are even greater losses likely to be incurred by the State of Denmark and by Danish society in general. When you think of the loss in employment; when you think of the postponement of new investment; when you think of the loss of time in travel and communications; when you think of the cost of maintaining large stocks in many industries because of the continuing dependence on ferry transport, you are thinking in almost

incalculable sums. The loss will be almost certainly astronomical. It will dwarf Rauma-Repola's speculative losses into insignificance.

So, where is the proportion, the balance, Mr. President? There is none. For the sake of a relatively minor, speculative profit by one Finnish company, the entire nation of Denmark is being asked to bear incalculable losses.

4. The discretionary nature of the remedy

It is clear that no party has a right to demand an order for provisional measures: the making of any such order is entirely within the discretion of the Court.

I have already identified certain factors which, according to the Court's own jurisprudence, should guide the exercise of that discretion: the necessity for the order, the irreparability of the apprehended damage, and the element of proportionality between the losses apprehended by both Parties.

But there is another element which, I would respectfully submit, the Court should take into account.

In essence, we are faced here with two Parties, each fearing damage according to whether the order is, or is not, made. But the two Parties are - when one looks to the damage - on the one hand a private, capitalist company, and on the other a State engaged in the most ambitious programme of economic development it has ever attempted. If you weigh, on the one hand, the interest of Rauma-Repola: and, on the other hand, the interests of Denmark, they can scarcely be discussed on the same plane. As the Agent of Denmark has explained, Denmark cannot - like Rauma-Repola - diversify into some other type of construction. Denmark needs this bridge, as an economic development project essential to the social and economic well-being of its people.

So the Court is not balancing two similar "rights" against each other. It is balancing a private, economic right - a right to make profits - against a nation's right to promote the well-being of its people.

Let us suppose that Rauma-Repola operated inside Denmark, as a foreign company, and

because its shipyard was located on a site needed for construction of the new bridge, Denmark proposed to expropriate. Would the Court contemplate an order for provisional measures to restrict the right of Denmark to expropriate? Certainly it may have done so, way back in 1951 in the *Anglo-Iranian Oil Co.* case. But would it do so now, given the new and universal acceptance of the right of States to sovereignty over their natural and national resources, and their right to economic development?

I submit, Mr. President, that the Court would wish to exercise great caution before using its powers under Article 41 to control or check the exercise by a State of its right to promote its own economic development, within its own territory. The precedent established thereby might be of very serious concern to many States with plans for economic development.

Of course, one can anticipate Finland's reply, which may say that here the situation is different, because Rauma-Repola claims the benefit of a right of passage, guaranteed by international law. But, Mr. President, there are difficulties about that basis for a distinction. First, the so-called "right" is very much a subject of controversy, to be decided later on the merits. And, second, in many, typical expropriation situations, the foreign investor can invoke a similar "right". A right of establishment, for example, under a bilateral investment protection treaty would be an obvious example.

Now, I am not, of course, attempting to argue that international law cannot impose any legal restraints upon States in dealing with foreign investors. My purpose is rather to suggest that the remedy of an order for provisional measures is not an appropriate remedy. If there is a violation of rights, the remedy ought to lie in compensation or damages.

Now, if that is right, the question arises: why should Rauma-Repola be in a stronger position, to claim that remedy, via Finland, merely because it operates, not in Denmark, but abroad in Finland?

Mr. President, I suggest there is in fact no reason to place Rauma-Repola in a stronger position. On the contrary, all the elements that go to the exercise of the Court's discretion are against it. The lack of any real necessity, the absence of proof of any irreparable damage, the speculative

nature of such damage, the vastly greater injury to Denmark, and the inappropriateness of an order for provisional measures to prevent a State carrying out important measures of national, economic development - these are all elements in the present case that argue for a dismissal of Finland's application.

5. The nature of the remedy sought by Finland

Mr. President, I have to say that I am uncertain what, precisely, Finland is asking for.

Both the Agent for Finland and Sir Ian Sinclair emphasized that they were not seeking a blanket, comprehensive order for the cessation of all construction. It was, Sir Ian explained, a request for *minimum* measures.

But then, in the same breath, Sir Ian itemized the three factors which make it necessary that construction should stop now. He explained why it was no consolation to Finland to be told that passage through the Great Belt would be unaffected by the bridge construction, until maybe 1996 or 1997 - long after the Court's judgment on the merits. The Court will recall how he stressed the unity, the interrelated character of the whole project; how he explained that Rauma-Repola was already losing orders; how he explained that obstruction of navigation would be inevitable even during construction.

I was left with the very clear impression that there is nothing "limited" about the remedy Finland seeks. It is, in effect a total stoppage of all further construction work. Of the devastating effect that would have on Denmark's economy we heard not a word.

From this it is obvious, Mr. President, that the element of "balance", of "proportionality", which is clearly present in the case-law - although ignored by Sir Ian - is not present at all in the minds of Finland. They are so categorical on their legal rights, so obsessed with the profitability of Rauma-Repola, that they have not given a thought to the interests of Denmark. "Balance" apparently, does not enter into it.

The idea that Rauma-Repola might modify its construction techniques, before passing out of the Baltic; or might consider towing rather than carrying by heavy-lift ships through the Sound, is not to be entertained. Why? Because that would involve some costs to Rauma-Repola. So, all the

modifications must be made by Denmark, no matter what the cost.

The Court will no doubt bear these factors in mind when exercising its discretion. Certainly, Sir Ian is right, when he says discretion is not arbitrariness. Yet, in fact Finland seeks just such an exercise of arbitrariness. For it seeks a remedy based solely on the interests of Finland, and ignoring totally the interests of Denmark.

There is one final point I should make about the remedy claimed by Finland. It must be apparent that, even at this preliminary stage, the arguments by Finland are designed to pre-judge, to pre-determine, the remedy Finland seeks on the merits. The emphasis on restitution, the insistence on full preservation of Finland's existing rights, the attack on "absolute" irreparability, the doubts cast on the Order of the Court in the *Aegean Sea Continental Shelf* case: can there be any doubt where all this is leading to?

Clearly, Mr. President, it is leading to the proposition that, when we come to the merits, damages can never be an appropriate remedy. The aim is "restitution" - the complete preservation of Rauma-Repola's existing practices, without modification - and there is to be no question of an award of compensation for any additional costs Rauma-Repola might incur by having to modify its construction methods or having to tow submersibles through the Sound, or remove azimuth motors during passage through the Sound.

All of these modifications are possible - but Rauma-Repola will have nothing to do with them. Denmark must modify its plans, but not Rauma-Repola.

The argument on "urgency" goes in exactly the same direction. Why are interim measures urgent? Not because there is any imminent risk of passage being blocked: there is no such risk within the next three to four years. No, the real reason why it is urgent is that Finland believes that, unless the construction is stopped now, Finland will have no hope of an order of restitution on the merits. Finland will have to be satisfied, if it succeeds on the merits, with compensation.

So, the whole strategy is designed to avoid the remedy of compensation. If Finland is to win on the merits it seeks only one remedy - restitution. These proceedings for provisional measures are simply a means to an end. They are designed to ensure that, if Finland succeeds on the merits, it will

have one - and only one - remedy - restitution.

Now, the Court will need to consider very carefully whether this is a legitimate purpose for provisional measures. And whether it wishes to have its normal discretion in choosing an appropriate remedy curtailed by a Party in this way.

Mr. President, that brings me to the end of my presentation. I thank the Court for its courtesy and patience and I would ask you to call on my colleague Per Magid.

The PRESIDENT: Thank you very much, Professor Bowett.

Now Mr. Magid please.

Mr. MAGID:

General principles of law on liability for damages caused by provisional measures

Mr. President, Members of the Court, my task is to examine the question whether international law provides that Finland, if successful in obtaining provisional measures, would be liable towards Denmark for the losses caused by these provisional measures in the event the Court rejects Finland's submissions on the merits.

Finland requests the Court to indicate provisional measures which would cause Denmark to refrain from continuing or otherwise proceeding with such construction work on the East Bridge as would impede the passage of ships, including drill ships and oil rigs. This is the way [Finland's request is worded -] Finland's written request has been worded. Finland's request for provisional measures amounts to a request for an injunction.

The position of the Government of Denmark has been made clear by my colleagues who have pleaded on behalf of Denmark. For the reasons given by them Finland's request for provisional measures should not be granted.

Should the Court, nevertheless, decide in favour of Finland, and cause Denmark to suspend the works on the East Bridge, such decision will be of grave consequence to Denmark and to the Danish economy. I have already described to the Court the enormity of the losses Denmark will

incur.

But there remains an important question: if Finland prevails on its request for provisional measures, should the Court then also indicate that Finland must undertake to compensate Denmark for all losses incurred in complying with such provisional measures in the event Finland fails in its case on the merits?

In answering this question we must look to the Statute of the Court. According to Article 38, Section 1 *(c)*, of the Statute the general principles of law recognized by civilized nations shall be applied by the Court.

I submit, Mr. President, that it is a general principle of law recognized by civilized nations, that a party requesting an injunction is liable for damages suffered by the other party as a consequence of such injunction, if the Court later decides that the acts which were subject to the injunction were legal.

My suggestion is that this principle should be applied by the Court.

When Denmark received the Request for provisional measures we undertook to find out whether this principle, which is well-founded in Danish law, is applied also in other jurisdictions.

I trust that the Court will appreciate that the short time available for the preparation of this oral hearing did not allow for making a comprehensive research. We have had to limit ourselves to obtaining opinions from lawyers in those countries where we had the easiest access to the information needed. The result of this research shows the following: all the legal systems from which opinions have been obtained recognize the principle of liability of the party requesting and obtaining an injunction for damages caused by such measures to the other party in the event the requesting party fails in the main case.

Mr. President, in the following I will refer to statutes and court decisions from various countries. To facilitate the work of the Court we have furnished the Court with copies of the statutes and the decisions to which I refer.

Scandinavia Law

Since this is a dispute between two Scandinavian countries, a relevant starting-point would be

to ascertain what rules apply in the Scandinavian countries. The Court may know that the legal systems of the Scandinavian countries have many similarities. The common historical heritage of the Scandinavian countries and a strong movement among outstanding Scandinavian legal scholars at the end of last century to promote joint legal initiatives are the main reasons for these similarities.

(a) Finland

In Finland the Execution Act, Act No. 37 of 3 December 1895 with later amendments, provides in Chapter 7, Section 16, in pertinent part:

> "A sequestration or an interdiction against sale or dispersion may not be carried out ... if the applicant has not given security or granted a guarantee to ... the execution officer for the damages which the action may cause the opponent ..."

Section 20 of the Act, as amended by Act No. 389 of 18 May 1973, provides:

> "A claimant who needlessly has asked for sequestration or injunction or other executive assistance shall compensate the debtor for the damages caused by the execution and for the costs in the matter."

(b) Sweden

Chapter 15, Section 3, of the Swedish Code of Civil Procedure, rules for issuance of injunctions subject to certain conditions.

Chapter 15, Section 6, of the Code, provides in pertinent part:

> "A measure authorized in Section ... 3 may be granted only if the claimant deposits with the court security to recompense the adverse party for the loss he may suffer."

(c) Norway

Norwegian law contains similar provisions in the Enforcement Act, Act No. 7 of 13 August 1915.

Article 261 of the Act provides that if the party requesting a seizure of property and who does not succeed in obtaining an enforceable decision for the claim is liable to compensate the other party for all losses which the other party may have suffered due to the seizure. According to Article 268 of the Act the same rule applies to other interim measures including injunctions.

(d) Denmark

In Denmark the rules on injunctions are found in the Code on Civil Procedure (Act 731, 7 December 1988) as, in Norwegian law, the Act distinguishes between seizure and injunction.

Article 639, Section 1, of the Act provides that a person who has obtained a seizure on the basis of a claim which turns out not to exist is liable for damages to the party subjected to the seizure. According to Article 648, Section 1, of the Act, the same rule applies in case of unjustified injunctions.

The legal status in all Scandinavian countries is that a party requesting and obtaining an injunction is liable for damages caused by the injunction, if he fails in his main case. This is a strict liability. A liability which is incurred regardless of any fault, or whether there be good or bad faith on the part of the requesting party.

Mr. President, I submit that it seems just and fair that the Government of Finland should expect and accept that principles identical to its own legal system and the legal systems of the other Scandinavian countries should be applied in the present case.

Other European Countries

On the European continent, other countries have rules similar to the Scandinavian legal system.

(a) Germany

In Germany, the Code of Civil Procedure contains provisions on seizure in Articles 913 to 934 and on preliminary injunctions in Articles 935 to 945.

In the event a preliminary injunction is subsequently proven unjustified, Article 945 of the Code on Civil Procedure expressly provides that the applicant is liable for damages. The Article provides in pertinent part:

> "If the order ... of a preliminary injunction proves to have been unjustified from its inception ... the party who secured the order is liable to compensate the opponent for the damage arising from the execution of the ordered measure."

Like the Scandinavian system, liability for damages based on Article 945 of the German Code on Civil Procedure arises independently of any fault of the applicant. Direct and indirect damages which are actually caused by the execution of the preliminary injunction, including possible loss of profits, must be compensated.

(b) Italy

The Italian Code on Civil Procedure contains provisions for instituting provisional measures against what is called, I understand, "new construction". Article 1171 of the Italian Code on Civil Procedure provides in pertinent part:

> "The owner, the holder of other real right of enjoyment, or the possessor, who has reason to fear that new work undertaken by others on their own or someone else's land can cause damage to the thing that forms the object of his right or his possession, can denounce the new work to court."

And it follows:

> "The court, taking summary cognizance of the facts, can forbid continuation of the work ... ordering the appropriate security ... for payment of the damage produced by suspension of the work, when the opposition to its continuation turns out to be unfounded in the decision on the merits."

Article 700 of the Italian Code of Civil Procedure contains provisions for urgent relief.

Article 96 of the Code deals with the liability for having petitioned an ungrounded provisional relief. The relevant part of the provision states:

> "The judge who ascertains that the right for which an urgent relief order has been executed does not exist ..., upon petition of the damaged party, shall sentence to indemnification of the damage the petitioner who has acted without normal diligence."

In ordinary proceedings in Italy, damages can only be ordered if the petitioner has acted in bad faith or grossly negligent.

(c) France

The French Code of Civil Procedure contains in Articles 808 to 809 and 872 to 873, the rules for obtaining a preliminary injunction.

French courts also award damages to a party that has suffered prejudice as a result of an injunction, if the main claim lodged by the plaintiff is subsequently dismissed. I refer to the Decision of the Cour de cassation dated 12 May 1971 as an example of this. In this case, the defendant was the owner of an estate. He had obtained a building licence through a municipal decree. A dissatisfied neighbour obtained a preliminary injunction from the civil judge ordering the holder of

the building licence to stop the construction works. An administrative court later dismissed the claim of the neighbour seeking the nullity of the municipal decree. In its Decision of 12 May 1971 the Cour de cassation upheld the decision of the lower court, which had awarded compensation to the holder of the building licence for damages caused by the injunction.

The consistency in this field of law between, on the one hand, French law and, on the other hand, Scandinavian law and German law is further supported by the Decision rendered on 4 January 1983 by the Court of Appeal of Versailles, concerning attachment of the assets of a debtor. In this Decision, it was held that an unlawfully attached debtor may sue the claimant for damages in order to receive compensation for the prejudice suffered due to the attachment.

(d) England

The general principle applied in England regarding damages for unjustified injunctions is that a court of equity will invariably make use of its power to require undertakings by the plaintiff. A common form is to request the plaintiff to:

> "abide by any order which this court may make as to damages, in case this court shall be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay".

An important English precedent is Giffith v. Blake (1884) 27 Ch.D. 474. In this case, the plaintiff, a firm of solicitors, were the tenants of a newly-erected building. A few months after they had taken possession, the Defendants, who were ironmongers and tinplate workers, occupied an adjoining house. The noise created by the defendants occupation caused the plaintiff to request an interlocutory injunction to stop the defendants work. In his dictum, Lord Justice Lindley stated:

> "if the Plaintiff's ultimately fail, the Defendants can obtain, under the undertaking, full compensation for the injury done to them by the injunction".

An English court cannot compel a plaintiff to make an undertaking, but can refuse an injunction unless he does so.

In England, as in most other jurisdictions examined, a plaintiff obtaining an injunction, but failing in the main case, is liable to pay damages for losses caused by the injunction, regardless of good or bad faith.

The United States of America

Finally, I will turn to the United States of America as the law is applied by the U.S. Federal Courts. Rule 65 *(c)* of the Federal Rules of Civil Procedure provides in pertinent part:

> "No ... preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for payment of such cost and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Rule 65 *(c)* thus make the posting of a preliminary injunction bond mandatory.

One Federal Appeals Court has explained the purpose behind the requirement to post bond as follows:

> "(I)t serves two functions (1) it assures the enjoined party that it may readily collect damages from the funds posted ... and (2) it provides the plaintiff with notice of the maximum extent of its potential liability ..." (Continuum Co., Inc. v. Independent, Inc., 873 F. 2d 801, 802 (5th Cir. 1989)

According to U.S. case-law it is an integral element of the bonding obligations that damages are payable to the enjoined party if it eventually defeats the main claim. The leading U.S. federal case of *Coyne-Delaney* v. *Capital-Development Board* (717 F.2d 385 (7th Cir. 1983)) makes clear that an applicant's good faith in seeking the preliminary injunction does not relieve it from this liability. Only in unusual circumstances, such as where the opponent of the applicant fails to mitigate its damages, will the applicant be excused from paying the damages brought about by the improvidently granted preliminary injunction. The same principle is applied in *State of Alalabama et al.* v. *U.S. Environmental Protection Agency* (925 F.2d 385 (11th Cir. 1991)).

Conclusion

I now come to my concluding remarks. I submit, Mr President, that provisional measures are a powerful, effective but potentially harmful remedy. If obtained, and respected, damage may be caused by such measures, damage which might later be proven unjustified.

In national law, a plaintiff requesting and obtaining such measures knows that he is at risk if he fails in the main case. This induces restraint on behalf of the plaintiff and at the same time it

affords the defendant some comfort. The liability established in connection with injunctions under national law also serves to create a framework for negotiations between the parties and may enhance the likelihood of friendly settlement.

Mr President, I suggest that this should be taken into consideration by the Court in the event the Court decides to indicate provisional measures.

Far-reaching decisions on provisional measures under circumstances where the parties have not yet set forth their case in full, the Court has not had the opportunity to establish the relevant facts and the Court has not ruled on the legal issues pertaining to the main case.

The survey of national law supports the contention that liability for damages caused by an unjustified injunction is a well-established general principle of law in the meaning of Article 38 of the State of the Court.

I submit, therefore, Mr. President, that if the Court does indicate provisional measures it should also impose on Finland an obligation to compensate Denmark for the losses caused by provisional measures in the event the Court rejects Finland's submissions on the merits. For otherwise, Denmark will be left to bear an enormous financial burden even though, ultimately, the Court finds Denmark to be acting lawfully.

Mr. President, this concludes the first part of Denmark's oral presentation. Thank you, Mr. President, for your courtesy and patience.

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

That, concluding the first phase of the case of the Government of Denmark, I think the agreement is that we meet again on Thursday morning at 10 o'clock to hear the Finnish rejoinder. Thank you very much.

The Court rose at 4.20 p.m.