*CR 91/13*

International Court
of Justice
THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1991

*Public sitting*

*held on Thursday 4 July 1991, at 10 a.m., at the Peace Palace,*

*President Sir Robert Jennings presiding*

*in the case concerning Passage through the Great Belt*

*Request for the Indication of Provisional Measures*

*(Finland v. Denmark)*

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VERBATIM RECORD

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ANNEE 1991

*Audience publique*

*tenue le jeudi 4 juillet 1991, à 10 heures, au Palais de la Paix,*

*sous la présidence de sir Robert Jennings, Président,*

*en l'affaire du Passage par le Grand-Belt*

*Demande en indication de mesures conservatoires*

*(Finlande c. Danemark)*

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COMPTE RENDU

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*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

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

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*comme secrétaire.*

The PRESIDENT: This morning we turn to the second round of the oral pleadings and hear throughout this morning the case for the Republic of Finland. I think both Agents know that two Judges will wish to ask questions of one of the Parties and we would propose to do that at the end of this morning's session. The question of replies we can perhaps discuss later. So straight away I will ask the Agent for Finland, Ambassador Grönberg to take the floor.

H.E. Mr. GRONBERG: Mr. President, Members of the Court, last Tuesday we heard a very remarkable reconstruction of the Finnish claim and both its legal and factual background. In litigation one of the first and often the most important battles is fought about the terrain on which the rest of the war - if you allow me to use a military metaphor - will be waged. You will no doubt have noticed that the terrain looked very different from the ground on which Finland had stood the day before.

This change of terrain seemed to affect even the very perception of the purpose of the present oral hearings. Where Finland concentrated on proving the presence of the conditions for provisional measures under Article 41 of the Statute, Denmark chose to argue about Finland having no rights on the merits. Where Finland spoke about the substance of the right of free passage, Denmark advanced economic and technical data. Where Finland saw the dispute in light of the general conflict of interests between a strait State and a user State, Denmark painted a picture about a private company's economic interests being countered by the economic interests of the Danish society as a whole. Where Finland formulated a request for provisional measures in the most reasonable and limited terms, Denmark argues that the consequences of its acceptance are as if it were formulated in the widest imaginable terms.

What might be the reason for Denmark's unwillingness to meet Finland on the precise grounds of the Finnish request and indeed of the Application? I can hardly believe there to be any other reason than Denmark's belief that its argument will not stand if it tries to rebut Finland's actual contentions in the light of the actual rights that Finland claims. Instead, it has attacked a straw man, an imaginary construction of what the Finnish request might have been - but most decidedly is not.

In my statement today, I shall first contest Denmark's view of what it is that Finland aims to

attain and its characterization of the dispute as a conflict between the private economic interests of a company and the Danish society at large. This I will do in order to move discussion back to the substantive right of free passage which is the object of the main proceedings and the need for an indication of interim measures to safeguard that right.

Thereafter, I shall say a few words about how Denmark's view that Finland has not even a prima facie right in this case - a remarkable contention - is based on its distorted characterization of the core of these proceedings.

Thirdly, I shall turn to the question of the alleged acquiescence by Finland in the Danish project.

*First*, the question of the actual content of the Finnish request. Ambassador Lehmann claimed on Tuesday that Finland "submits that provisional measures be indicated to stop further construction of the bridge over the Great Belt". This same view about the scope of the Finnish request was then repeated throughout the Danish statements. This is not only an incorrect reading of the very terms of the Finnish request but is contradicted by everything that we had said here on Monday. What Finland is requesting is not the complete cessation of the fixed link project. That would indeed be an unreasonable request - though, one might argue, that would be a request which would perhaps be easier to defend. What Finland is requesting is instead something both limited and reasonable - a general declaration by the Court that the project should not be carried out, pending the judgment, in such a fashion as to prejudice the rights claimed in the main proceedings.

What should be noted about that remedy is that it incorporates the very notions of reasonableness and proportionality which provide the grounds on which Denmark hopes to challenge it. Such a remedy in fact constitutes a balance between the rights of Finland and Denmark. On the one hand, it will minimize harm to Finland's rights while the merits are being considered. On the other hand, it enables Denmark to choose between the different alternatives for safeguarding the Finnish rights the one which is least prejudicial to its own interests. The request specifically avoids the imposition on Denmark of any one solution - and thus also the risk of arbitrarily and unreasonably preferring one among the several existing technical alternatives to satisfy Finland's

rights regardless of the costs Denmark would incur. Denmark's attempt to argue that Finland in fact seeks a blanket prohibition is baseless and, as I shall argue in a moment, thrown against Finland only to establish a more favourable ground for Denmark from which to argue that the Finnish request is unreasonable.

Finland is not trying to impose any technical solution on Denmark - among them the solution of full cessation of works. We believe that the reasonable solution is the one which leaves Denmark maximum freedom of choice. I might, however, note one available alternative which would seem to answer fully to the present request and the costs of which would not be exorbitant.

This is the possibility to modify the design of the East Bridge so as to postpone the final construction of the two intermediate supports plus the corresponding three spans. This would allow work to continue on the suspension bridge itself as well as with the access spans at the other end of the bridge. By this means - on a stretch of 330 metres - provision would have been made for a possibility to construct an opening - for example in the form of a swing bridge - in that section of the bridge in case the final judgment turns in Finland's favour. This would have virtually no effect on the construction schedule and would minimize any additional work necessary to safeguard free passage, That additional work would mainly have to do with dredging the deep water channel into the place where the opening exists, that is to say, that would mean the execution of the same type of work as was already done when constructing the artificial island of Sprogø.

According to a very preliminary Finnish cost estimate, the construction in such a place of a bridge - not taking into account the necessary dredging - would cost perhaps US$ 50 million more than the fixed bridge. That is the additional cost that would ensue from the de- and reassembly of the towers of three to four offshore rigs. A cable-stayed swing bridge, according to another estimation, might also be an elegant alternative with reasonable cost.

Other possibly available alternatives would be:

(l) to make provision for the opening of the West Bridge - which is possible using conventional techniques - and for the dredging of the West Channel. The main problem here would relate to the safety precautions needed in the event of opening a railway bridge;

(2) a second alternative would simply consist of the dredging in the Sound at Drogden, so that it could accommodate deep-draught vessels. I understand that such a venture has already been proposed by the city and harbour of Copenhagen and that it would have a significant, positive impact on the harbour itself.

Now, I am certain that my Danish colleagues know these and other alternatives and are aware of the advantages they have and of the difficulties their realization might entail. After all, they have been studying them for half a century. But my point really is that technical alternatives do exist and that Finland has refrained from trying to impose any of them on Denmark, because of the relative arbitrariness and unreasonableness of doing so. Finland was accordingly astonished by the Danish presentation of the exhorbitant consequences that the Finnish request might entail.

Let me at this point note a persistent inconsistency in the Danish case. Though Denmark has based its arguments on the enormous social costs that granting the request would entail to Danish society, it has, simultaneously claimed that there is no urgency in the matter because, as Professor Bowett noted "the estimate is that the Great Belt will not be obstructed by the new bridge until late 1994, at the earliest" (CR 91/12, p. 10,).

If the former argument is correct, i.e., if the only way to safeguard Finnish rights is to cease the works completely, then we do not really understand how Denmark could claim that there is no urgency and that it can anyway continue the work until 1994. If the latter argument is correct - that there is no harm until 1994 - then we must remain puzzled about the claimed need for a complete cessation of works and the enormous social costs this would entail. Surely Denmark must choose between these two tacks: are the works immediately harmful? In which case, complete cessation is not only needed but seems to follow from the requirements of urgency and irreparability. Or, is no such immediate harm entailed? In which case, the whole argument about enormous social costs loses its foundation.

So, let me repeat that the interpretation of the Finnish request as if it were a request for a blanket cessation of all works is an incorrect reading of the terms of the very request. Nor can it be argued, on the Danish side, that it anyway can be complied with only by a complete cessation of

works, for, on their own words, the project will not create an obstacle before 1994. An order to that effect might provide the relief Finland is seeking, though, I submit, this would be an order whose consequences would indeed seem extensive if Denmark took no precaution for the possibility of a final judgment in Finland's favour.

Now, I believe that Denmark knows all too well that the Finnish request in fact contains the element of reasonableness in itself. This it tries to disguise by pretending that the measures requested would be the simple cessation of all works. This is a very convenient interpretation to take, as it will allow Denmark to embark upon what we must regard as the core of its argument against the indication of interim measures, namely the argument that the measures, if granted, would be wholly out of proportion and put a completely unreasonable burden on Denmark.

Thus, we heard Mr. Magid set out the enormous losses and "substantial economic and social damage: CR 91/11, p. 31) that would be entailed, as he put it, "in the event of a suspension of the Great Belt project" (*ibid*.). A complete cessation of the motorway part of the project for three years would amount to US$ 500 million, plus very extensive losses for the public and private sectors with investments dependent on the continuation fo the project. Professor Bowett, likewise, spoke of a "total stoppage of all further construction work" and its "devastating effect" (CR 91/12, p. 21).

All of this, I submit, completely ignores the terms of the Finnish request and the arguments Denmark has itself put forward about the absence of urgency and irreparable harm in this case. It is a tactical move to put Denmark in the position of the unfortunate underdog, whose present plans are being "interfered with" (CR 91/11, p. 9), as Ambassador Lehmann put it, by Finland, or, rather, not really Finland at all but by what Professor Bowett called a capitalistic company's private interest.

The matter starts to look now as if it were Finland that aimed to change the existing situation. There is no word about Finland's right of passage and the importance of that right, not only to Finnish society but to the continued enjoyment by all States of this right. I need hardly point to the consequences, if the straits regime generally would be looked at from the perspective which Denmark has taken: its point is that there is a right of innocent passage and that is, as paragraph 103 of the Written Observation puts it, "all there is".

Having painted that distorted picture of the present case and of Finland's position in the matter, Denmark then proceeds, in the different parts of its argument, to seek to demonstrate that the Finnish claim is unjustified - indeed, its own argument presses it so far as even to hint at the extreme position that there might be some kind of wrongfulness entailed by starting this legal action. Thus, Denmark argues about proportionality, reasonableness, balancing of interests, etc. - all considerations which seek to divert attention from the law - i.e., Article 41 of the Court's Statute - to equity and economic considerations.

I do understand that Denmark might feel it reasonable that Finland proposes one concrete alternative on how the Finnish rights could be safeguarded.

I have earlier sketched, with some hesitation I might add, three such alternatives together with their cost-estimates and I have done this to show that Finland is prepared to participate in technical discussions. But I have a feeling that Denmark will come tomorrow with the reply it has given us whenever we have suggested these alternatives: a blanket denial of the possibility to realize the suggestions and a dognmatic insistence on going ahead with the already established plans.

Denmark's straw man construction also belies its claim that there is not even a prima facie right by Finland and, as Ambassador Lehmann argued, "not even a prima facie case exists in favour of Finland's contention". This is an interesting statement from someone who has written in a recent textbook, together with two other eminent Danish authors, that not only is there a right of free passage in the Danish straits and that there is no right to barrage these straits but that

> "it is all the less permitted to prevent navigation through straits by the construction of bridges, tunnels or other such installations. The construction of such installations in the main channel of a strait must therefore take into account the largest existing ships." (Folkeret, Klaus Gulmann, John Bernhardt, Tyge Lehmann, Copenhagen 1989, original in Danish.)

It has been a consistently held Danish position ever since it was laid down in Max Sorensen' statement to the Danish Great Belt Committee in February 1957 that there is a right of free passage in the Danish straits and that this right extends to all existing ships (*cf.* Appendix to Annex 26 of the Report of the Great Belt Committee; see also his statement of 29 January 1962, published in Danish in *Fast Forbindelse Over Store Baelt,* Betaenkning No. 508 (1968) p. 109-112). In view of such

statements, whatever one thinks the final judgment should be, the Finnish right clearly possesses a prima facie validity. Even from the Danish perspective - that is to say, even if we grant the correctness of the view held by Max Sorensen and Tyge Lehmann - the only open question would seem to be whether drill ships, semi-submersible drill rigs and heavy-lift ships are "existing ships" in the meaning of the Danish doctrine. There is nowhere a suggestion that the right of free passge would not exist, or would exist only for some categories of activities or ships.

Now throughout our contacts with the Danish side, it has been argued consistent with that Danish doctrine - that the craft moving in and out of Finland are not ships, and that they do not therefore enjoy the right of passage. We have not really heard that argument here, though Ambassador Fergo attempted to belittle the importance of several conventions which unambiguously consider moving offshore craft as ships. The Danish side has not been impressed by the argument that even the International Registry of Shipping of Denmark lists these craft as ships, as do the registries of all the Nordic countries and that many recent academic materials have been published in all the Nordic countries in which the position has been taken that these craft either are "ships" or that, at least, the same rules of navigation should be applied to them as are applied to regular ships. Indeed, if these rules were not applied to them it is difficult to see how they could move - and could have moved - at sea at all.

All this is merits, of course, and I do not wish to dwell upon it longer. I have made these points only to show how inconsistent the view is that there is not even a prima facie case in Finland's favour with what I have called the Danish doctrine. The merits of this case will not turn on whether or not there exists a right - we agree on free passage - but on how that right should be interpreted, whether it should be extensive or narrow and whether it should be applied to certain craft which have always enjoyed it everywhere, including in Denmark's territorial sea. To my knowledge, there is not a single case, not one example from the practice of any country in which the rights of passage of the kinds of craft manufactured in Finland would have been effectively denied.

Mr. President, Members of the Court, I will now move to the second point: the question of the alleged Finnish acquiescence. First, of course, I have to add that I do this with some unease as it is

so obviously a question of the merits. But I shall address it anyway as it has been consistently claimed from the Danish side that Finland has agreed - albeit silently - in the cutting off of the possibility of free passage by some ships manufactured in it from travelling beyond the Baltic.

It is clearly one of the principal substantive contentions of Denmark that, as formulated by Ambassador Lehmann:

> "the Danish circular Note of 12 May 1977, notifying foreign States about the then ongoing project to construct a high-level bridge across the Great Belt, was left unanswered by Finland" (p. 10).

This is then taken to signify that Finland saw no problem in the then ongoing project because, as Ambassador Lehmann observed, Finland did not respond according to the normal practice within a year's time.

Let me first note that there is no particular magic in the year 1977. The first plans for a bridge originate in the 1930s. The Governmental Committee was set up in 1948 and made a report in 1960 in which a high-level bridge was suggested. Several studies on the matter were carried out during the 1960s and 1970s and different technical alternatives appeared and disappeared. The law on which the 1977 note was based had been passed four years earlier, signifying that there hardly was any particular rush in the project itself.

I would then wish to make three points. First, that project was substantially different from the present one. This seems to be admitted by Ambassador Lehmann as well when he does not refer to 1977 as the project but the "then ongoing project". Indeed, that project provided for a high-level and a low-level bridge, whereas the project initiated in 1987 contains the two alternatives of a high-level bridge and a tunnel in the East Channel. That the later project is a different one, is perhaps best manifested by the fact that the Danish Government felt it necessary to inform foreign missions anew. And of course this was the correct procedure as the law on which it was based as well as the modalities provided by the new law were completely different from the old one. Consequently, the old law (No. 414 of 16 June 1973) was completely repealed, not modified by the new Law (Law No. 380 (1987)). The tunnel alternative was envisaged by the new law, I understand, as a prerequisite for a political consensus between the major parties in Denmark, out of which, for instance, Venstre

had been opposed to the bridge project.

Second, as we have already noted, the 1977 project was hotly contested in Denmark from the outset. A motion for the suspension of the project was made in the Danish Parliament already in 1976 and thereafter motions for suspension were taken up, as noted in the Parliamentary debate by Mr. Jorgen Fredriksen about every six months. The Danish Note of June 1977 was sent to Foreign Missions in the midst of a political controversy. A new proposal to suspend the project was debated in the Parliament on 28 October 1977 and after a lengthy debate the matter was sent to the committee of public works. That proposal was finally rejected in March 1978. Nevertheless, political discussion continued among the main parties and within the political-economic committee of the Parliament. Finally an agreement was reached on 30 August 1978 that the project be suspended. The same day the Danish Prime Minister informed the public that an agreement had been reached between the Social Democrats and Venstre to suspend the project *sine die* (udskudt pa obestemt tid) as stated in (En redogorelse for Statsbroen Store Baelt p. 18). The final decision on suspension, which contains no reference to any period that the matter might be taken up was then made on 19 October 1978. Under such circumstances, I submit, there was already at the very moment the Note of June 1977 was received, a reasonable expectation that the project - like all the projects preceding it - would eventually be abandoned. And this expectation was of course finally fulfilled.

Third, in the ten years between 1977 and 1987 13 Finnish offshore craft passed through the Danish straits. Surely whatever implied consent it might be argued Finland had given in 1977 must be deemed to have expired by the continuous passage of such ships. In particular, as I noted on Monday, important investments were made by the City of Pori as well as Rauma-Repola Offshore to provide for the continued production of large offshore craft in its shipyard.

Taking into account the continuous use of Finnish offshore craft of the Danish straits, one might in fact be tempted to turn the argument about acquiescence on its head. Is it not really Denmark which has acquiesced in the passage of such craft in the Danish straits? That the Danish authorities knew about the passage of the rigs there can be no doubt. Also, there is no report of these authorities having ever intervened in any way to argue that these craft did not posses the right

of free passage. So I believe that in fact the better argument is the one this Court used in the case concerning *Right of Passage over Indian Territory*, where certain kinds of Portuguese passage "were not subject to any restriction, beyond routine control", and in which there had been established thus a "constant and uniform practice allowing free passage between Damao and the enclaves" (*I.C.J. Reports 1960*, p. 40). Whatever the differences between that case and the present, it seems difficult to ignore the silence of the Danish maritime officials and other Danish officials in face of a continuous practice taking place right under their eyes.

But that of course, again, is a matter for the merits.

Our opponents have likewise argued about acquiescence in respect of the Note of 30 June 1987. Here, however, there can scarcely be talk of any Finnish consent for the reason that the note provided for a tunnel alternative and that it made express provision for the preservation of existing maritime rights. The note read:

> "In case a bridge solution is selected, the erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping as in the past."

In this way, there was no reason to believe that the continued passage of drill ships and oil rigs would be prevented by the future bridge. That became clear only in the note of 24 October 1989 - by which time the Finnish concerns had already been communicated to the Danish Ministry of Foreign Affairs.

In this way, Finalnd cannot accept the contention that it has consented to a limitation of its rights by the Danish action. Finland most certainly has not consented to the present Danish project whatever highly speculative inferences our Danish colleagues may make about the events of 1977 and 1978. Since the summer of 1989 in fact continuous contacts have taken place between Danish and Finnish authorities on the bridge, as I explained in my opening statement. The statement on paragraph 38 which refers only to the final Finnish note of protest of May 1990 paints an inaccurate picture of the events. It also sets aside the well-known fact that contacts between Nordic countries and Governmental authorities in this kind of matter - as really in any matters - are conducted on the basis of extreme informality; a formal note of protest between the two Nordic States is, I must say,

an event of extreme rarity.

Finally, let me come to another matter which has been taken up by our Danish colleagues. It has been argued by them that none of the Parties to the Copenhagen Treaty have reacted to the Danish plans and that

> "The Parties to the 1857 Treaty have accepted a clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea." (CR 91/11, p. 63.)

This is not correct. The Soviet Note Verbale of 29 March 1978 does not end with the suggestion of 65 metres. After the paragraph in which that minimum height is noted, the note continues by an expression of anxiety:

> "because the Danish side, while preparing these plans, has not paid due attention to the question concerning the safeguarding of unhampered passage through the Great Belt for traffic" (cf. Annex 8 of the Danish Written Observation).

Thereafter follows a listing of the different obstacles that the bridge will anyway cause to navigation in the Great Belt and finally a request for more information so that the Soviet authorities could "scrutinize in more detail the subsequent questions and submit their viewpoints thereon". Rather than an expression of consent to the bridge plan, the note in fact lays down several grave reservations against it and clearly leaves the consent of the Soviet Union to be dependent on the two States' future exchanges. No such exchanges, I believe, have taken place - at least not to the extent that the Soviet Union might have been held to have consented to the Danish plans. As it is said on page 38 of the *Redogörelse for Broen* - a Final Report which I already referred to - "reactions gave no reason for changes in the project".

The Soviet Union has continued to express its anxiety over this projects. In the most recent session of the Council of the International Maritime Organization (IMO), held in London on 10-14 June 1991, the Soviet Union expressed its concern over the restrictive effects of the planned bridge and put forward the view that Denmark should reconsider design on the planned bridge. That country also suggested that the matter should be looked into by the legal committee of the organization. The following decision, I believe, was made at that session;

> "On the issue of the construction of a fixed bridge over the Great Belt, the Council took note of the concerns which had been expressed and requested the Secretary-General to keep the matter, which is before the International Court of Justice, under review and inform the

appropriate bodies of IMO."

The Council made the only appropriate decision in the matter - to defer it until the decision of this Court. But my point is that the bridge project has not gone unchallenged and that there is a challenge to its very legality by at least one country which is also an original party to the 1857 Treaty. Now lastly, Mr. President, Members of the Court, let me draw your attention to some of the more technical aspects of this case which came out during last Monday's and Tuesday's discussions. I shall briefly make some points on four sets of technical aspects:

First, let met take the question of the offshore rig market situation and Rauma-Repola Offshore's outlook.

The market is - like most markets - very cyclical in nature. Ten years ago - during the previous peak - over 200 rigs were under construction. The period 1986-1990 was particularly difficult: only 14 orders were made. Today the number has gone down to ten. Of these ten, as was explained on Monday, Rauma-Repola is the builder of three. In addition a contract for a fourth one has been signed. In fact, the company is today the leading offshore exploration rig builder in Europe.

What reason is there to be optimistic about the future trends, then? What is the basis for the calculation of the company's situation in the 1990s? Now, the average age of an offshore drilling unit is about 20 years (Source: *Offshore Rig Newsletter*, July 1989). Out of the present 641-unit fleet of existing jack-ups and semi-submersibles, 403 will be reaching the age of 20 years during the forthcoming ten-year period. Moreover, encouraging information about additional investments by oil companies is provided in many places (e.g., *Ocean Industry Magazine,* February 1991). Professor Bowett asked - rhetorically, I am sure - the question whether it might be possible that the demand for oil rigs will shift to the Far East. Well, we do not really know. But we have no reason to conjecture in such a fashion, as what we do know is that the largest offshore deposits are to be found outside the coasts of Northern Europe.

Another set of questions related to the draughts of the Rauma-Repola built oil rigs and the ways they have taken to pass to their buyers.

And here, Mr. President, I am afraid I now have to show pictures.

Picture 1

In this first picture we have listed the 20 oil rigs and drill ships which have travelled through the Danish Straits. One (RR-8) could have passed through the Great Belt had the fixed link been in existence already. One of them passed through the Sound (RR-6). The rest have either passed through the Great Belt or we have not yet received information about their actual routes. You will also see the dates of delivery and the actual draughts of these vessels, as established at shipyard at delivery. As regards the possibility that some of them could have passed through the Sound, I refer to Dr. Koskenniemi's statement on Monday.

Picture 2

But the issue is not only about rigs and ships actually built. The problem concerns also rigs as regards the future, particularly rigs tendered. Here are some examples of such vessels with their air and water draught. The company continues to make tenders on these types of craft.

Picture 3

Another question that was posed to us by our opponents and in particular Professor Bowett (CR 91/11, p. 13) related to the basis of our calculations relating to the additional costs of US$ 7.5 million to 14.5 million regarding the disassembly and reassembly of the derrick in case the fixed link would be in existence. Rauma-Repola Offshore constructs heavy rigs for harsh environments. Consequently, the derricks are also heavy and not designed for quick assembly. It should be noted that, before the transportation, the rig has to undergo extensive inspection and test runs. These runs will have to be made anew after the reassembly. In this picture we have explained the calculations regarding the four additional months it takes to disassemble and reassemble the derrick of a semi-submersible.

Picture 4

Here is the basis of the calculation for the sum of US$ 14.7 million regarding the disassembly and reassembly of the rig. The calculation is based on all the operations being done by Rauma-Repola Offshore personnel and equipment.

Let me then answer Professor Bowett's question "Do we know why they cannot be towed through the sound by shallow-draught vessels? We do not." (CR 91/12, p. 15). But we do know. The answer is simple. Transport by towing creates a risk of accidents which is about 20 *times as high* as the risk in transport by a heavylift ship (Source: A*ccident History of Mobile Rig Fleet*, Offshore Data Services, Houston). There have so far been too many accidents relating to towing of offshore vessels.

My second set of brief answers relates to the question of bridges. As regards the two Bosphorus bridges, the first one of them was built in 1973. At that time, there were no ships which would have needed a higher clearance than the present one and which would have needed to travel to or from the Black Sea. The height of the first bridge naturally prejudiced the height of the second. As regards the Kanmon Bridge in Japan, let me note that the situation is completely different from the Baltic. That bridge can always be evaded by detouring around Kyushu Island. Our colleagues left shyly unmentioned the similar situation at the other end of Japan's main island, Honshu, where a tunnel is constructed to lead to the Island of Hokkaido. The Verrazano Narrows Bridge in New York, the Golden Gate Bridge in San Francisco and the various other bridges referred to have only local - sometimes national - influence in a limited area. If, however, we wish to embark on listing bridges, then, for perfection, also the Tagus River Bridge in Lisboa which stands in 72 metres height, should be mentioned - as well as the non-existent Channel bridge.

All in all, we cannot infer a customary law standard merely from the existence of a set of bridges at a certain height. There will always be some bridges that are higher than other bridges and many bridges of a similar height, but to attach that fact with juridical significance without any additional proof of the *opinio juris* is simply a mistake.

Finally, as the last of my factual points I would like to present five additional technical alternatives for how Finland's rights could be safeguarded by modifications in the bridge project:

1. Replace two spans with a pontoon bridge in the Western Bridge. The basic idea of this is that when the bridge opens, the pontoon part will be moved aside in its entirety. It is a reasonable cost alternative whose main difficulty is the general difficulty of opening a railway bridge. However,

additional cost should not be more than around US$ 25 million plus the costs of the additional dredging in the Western Channel.

2. Move two spans aside by means of pontoons in the Western Channel. The advantage of this alternative is that the appearance of all the spans remains the same while the disadvantage is that the opening process is expensive and time-consuming. However, if it would be only rarely used - as it probably would - this should be no unsurmountable problem. Its cost would be around US$ 35 million plus the dredging.

3. Split two spans and turn them to the side in the West Bridge. The advantage of this option is that opening could be done relatively quickly. The problems would relate to expansion joints being perhaps problematic. The additional cost would be around US$ 30 million plus dredging.

4. Construct the East Bridge as a bascule bridge with intermediate joints across the East Channel. This could be done by replacing one span by what is called a pylon-supported truss bridge which when opened bends at two points in each half of the span. This would allow passage in the Eastern Channel. It would be a technically demanding and untested structure. It requires the changing of the main design into a shorter suspension bridge or a cable-stayed bridge. The additional cost of this structure would be perhaps around US$ 50 million.

5. Finally, there is the continuously present alternative of the tunnel - this would be the Channel alternative; tested elsewhere and still much supported in Denmark - in particular by the national so-called tunnel-group. The additional costs would, as Mr. Magid told us, be less than US$ 200 million.

Mr. President, Members of the Court, I have wished to answer some of the technical points and present some of the alternatives here in order to show that Finland continues to be seriously seeking for an acceptable solution. Of necessity, this overview has been brief and summary. I hope that the materials nevertheless have given light to some of the questions which may have arisen. Let me note, however, that the main substance of our present dispute continues, for Finland, to remain outside economic calculations and technical alternatives. The dispute is about the freedom of passage. If we have wished to go into technical detail that is not to imply that the relevant law would

be found there, but that we have given much thought to understandable economic concerns in the Danish society.

Mr. President, Members of the Court, I have dwelled at some length on four issues: the distorted perspective that our opponents have wished to present of what they wanted to call the "real object" of these proceedings; on the question of the prima facie right; on the Danish claim regarding acquiescence and on some of the technical points that were raised on Tuesday. The first and the fourth are properly matters for this stage of the proceedings. The Court's jurisprudence requires clarity over what are the rights at issue in the proceedings and the conditions for granting provisional measures require that we go to some extent into technical detail. The second and third questions are, I submit, matters relating to the merits of the case. If I have ventured to discuss them here it is only to show that the substance of the Danish case is far from being so strong as they have assumed and that there is absolutely no reason to believe that Finland is here seeking anything else than what it has repeated it seeks: an order for the protection of the right of free passage which has been hitherto enjoyed continuously by all ships entering and leaving Finnish ports and shipyards.

Thank you. I thank the Court and would like to ask to call on our counsel, Sir Ian Sinclair.

The PRESIDENT: Thank you, Mr. Grönberg. Sir Ian.

Sir Ian SINCLAIR: Mr. President, Members of the Court, with the permission of the Court, there are several observations I would wish to make this morning on the presentation made to the Court on Tuesday by my learned friends Dr. Jiménez de Aréchaga and Professor Bowett. I will first of all make some general remarks about what appear to be certain underlying assumptions in those presentations - assumptions which, I may say, are wholly unjustified. Thereafter, I will concentrate on responding more specifically to the arguments advanced by Professor Bowett on "irreparability" and on "urgency".

In the first place, Professor Bowett makes the basic assumption that the request for interim measures which Finland has made is "for the protection of the economic interests of the Finnish company Rauma-Repola Offshore". In a sense what I am about to say wil repeat, in slightly

different language, what Ambassador Grönberg has already said. In fact, Professor Bowett's statement mischaracterizes completely the nature of the Finnish request, and indeed of the Finnish Application. In this case, there is a dispute about the scope or extent of the right of free passage through the Great Belt. It is a genuine and in no sense a manufactured, dispute. Denmark asserts that, as the territorial sovereign, it is perfectly entitled to build a fixed link across the Great Belt in pursuance of a wide-ranging plan for the economic development of Denmark. Finland does not dispute that Denmark is in principle so entitled, but maintains that Denmark's entitlement so to proceed is limited by its obligation to respect the principle of free passage through the Great Belt - a principle you may note, whose existence Denmark does not deny, but whose scope is in dispute between the Parties.

By way of illustration of the problems which the Danish Great Belt project poses for Finland, and indeed for other States, Finland has pointed to the particular difficulties which completion of the project, in its presently planned form, will present for the Finnish offshore oil rig industry. It has of course, in a sense, been necessary to do so, given the need of Finland, in the context of a request for provisional measures, to establish that "irreparable prejudice" is being, and will continue to be, caused to Finland by completion of the East Channel bridge in its presently planned form.

That Finland is not the only State in the Baltic which has expressed concern about the more general consequences of the Great Belt project for the right of passage through the Great Belt is confirmed by the reaction of the Government of the Soviet Union to the Danish plans, not only in direct contact with Denmark, but also within the framework of current discussions within the International Maritime Organization. Ambassador Grönberg has already drawn attention to this aspect of the matter, so I will not enlarge on it.

The dispute, therefore, is *not* about the economic interests of the Finnish oil rig industry: it is about the *scope* of the right of free passage through the Great Belt. Finland contends that this right extends to drill ships and oil rigs manufactured in Finland, which have, as the Court will have noted, in practice enjoyed and exercised the right of free passage for nearly 20 years. Denmark denies this, arguing that the right of free passage does not extend that far. Finland also contends in its

Application (but not, and I repeat not, in its request for provisional measures) that the right also extends to "reasonably foreseeable" ships. This is even more vigorously denied by Denmark. This then is the nature of the dispute which is before this Court, and no other.

Now, Mr. President, Members of the Court, I turn to a second point. In his presentation on Tuesday, my friend Dr. Jiménez de Aréchaga, I may say with his customary elegance and discretion, effectively accused me of adopting what he described as a "comfortable position" by refusing, at this stage, to enter too much into the merits of the present case. But the so-called "comfortable position" is effectively dictated by the jurisprudence of the Court, which I sought - I hope fairly - to analyse in my opening statement. The fact is that the Court has been very careful indeed to refrain from any preliminary determination of the merits of a case at the stage of an application for interim measures. Sztucki, who wrote the book *Interim Measures in the Hague Court* in 1983, under the heading of "The Merits of Principal Claims" observes - and here I have a slightly lengthy quotation for you:

> "From the theoretical and formal point of view, this factor is, in principle, irrelevant [irrelevant, note]. The law of the Court does not require that the applicant and requesting States show a prima facie case and, accordingly, as a rule, they do not argue this point."

I might just interpolate in the middle of that citation that, in the light of what has happened on Monday and Tuesday of this week, perhaps Sztucki might have slightly amended that passage. However, I revert again to the quotation. Sztucki goes on to say:

> "Consequently, the Court does not have sufficient basis to assess whether a prima facie case exists or not. Also, from the material point of view, attempts to determine the existence of a prima facie case *in limine litis* would be of doubtful value in the case of the Court. For the very nature of inter-State disputes is usually complex and the legal positions of the litigants who can rely on the most competent legal expertise are more often than not fairly balanced." (Sztucki, op. cit., p. 123.)

Now, having said this, one could perhaps envisage that, in very exceptional cases - I repeat, very exceptional cases - the Court might be capable of being persuaded that an alleged right of an Applicant State on the merits of the case is so "manifestly unfounded" - to use the language of the European Convention on Human Rights - so obviously lacking in foundation in public international law, that it ought not to accede to any request for an indication of interim measures to protect that

alleged right. But that, I would submit, is certainly not the case here. Some analogy can be drawn from the Court's jurisprudence on the prospects of substantive jurisdiction where a request for interim measures of protection is made. Where the Court will obviously be without jurisdiction to hear the merits, or in all probability will be without jurisdiction - but where there is just a remote possibility that jurisdiction might exist - the Court may be reluctant to indicate interim measures. I did not review this jurisprudence in my earlier statement this week, and I do not intend to do so today because, of course, in the present case, no issue of uncertain jurisdiction arises. But it will, I trust, be obvious to the Court that, even applying this analogy - and I may say it is a very imperfect analogy, since absence of jurisdiction will preclude the Court from giving judgment on the merits - the circumstances of the present case are such that the Court should not heed Dr. Jiménez de Aréchaga's siren-call of going too much into the merits. Of course, in his presentation this morning, Ambassador Grönberg referred to certain matters relating to the merits, but that was simply because these matters had been raised in a very controversial manner by our opponents on Tuesday.

So, it is in this context that I am bound to take issue with the argument advanced by my learned friend, Dr. Jiménez de Aréchaga, that - and here I quote from page 48 of the Verbatim Record of the morning sitting on 2 July:

> "the right claimed by the Applicant State constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused" (CR 91/11, p. 48).

In challenging that submission, I do so, inevitably, with some trepidation, given the authority which he commands as a former President of this distinguished Court. But, Mr. President, I do so nonetheless with conviction and, indeed, with confidence. The Court should not - and its jurisprudence confirms this - enter into the merits of a particular case at the stage of deciding whether or not to indicate interim measures. The only qualification I would make on that proposition is the very exceptional case I have already mentioned. But, as I say, that very exceptional case is not present here. Finland, accordingly, does not accept the proposition that the right claimed by the Applicant State constitutes one of the circumstances to be taken into account in determining whether

interim relief should be granted or refused, save in the very exceptional case to which I have drawn attention, a case which, I might add, has never yet arisen in the practice of the Court. Mr. President, my learned friend, Professor Tullio Treves, will be elaborating on this aspect of the Danish argument.

Mr. President, I turn now to the arguments advanced by Professor Bowett on "irreparability" and "urgency". Professor Bowett's arguments on irreparability are largely conditioned by his view, which I have already discussed, that the present case is not about the scope of the right of free passage through the Great Belt but about the protection of the economic interests of Rauma-Repola.

Now, Professor Bowett and I obviously differ as to the conclusions to be drawn from the jurisprudence of the Court on interim measures. Professor Bowett would wish to see a reversion to what I termed in my opening statement "the irreparability in law criterion", first developed by President Huber in the *Sino-Belgian Treaty* case. He refers to those cases in which the Court has indicated interim measures in circumstances where the Court was persuaded that interim measures were called for in order to guard against "danger to life and health" (the *United States Diplomatic and Consular Staff in Tehran* case), to protect "the rights of Nicaraguan citizens to life, liberty and security" (in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and to prevent the exposure of persons and property to a "serious risk of irreparable harm" (in the *Burkina Faso/Mali* case). But, as the Court well knows, these are certainly not the only circumstances in which the Court will grant interim measures of protection. Professor Bowett seeks to distinguish those cases in which interim measures have been awarded in other circumstances, that is to say, the *Anglo-Iranian Oil Company* case and the *Fisheries Jurisdiction* case. He suggests that the order on interim measures in the *Anglo-Iranian Oil Company* case is perhaps best explained by Iran's failure to appear and contest the United Kingdom request. Now, I must submit with respect that this explanation does not carry conviction. The Court generally affords ample protection of the interests of a non-appearing party. In general terms this is the clear object and purpose of Article 53 of the Statute. Now, of course, the better view is almost certainly that Article 53 of the State is not applicable at the interim measures stage. It

certainly cannot be applied literally, since paragraph 2 of Article 53 requires that, in a case of non-appearance, the Court must, before deciding in favour in favour of the claim of an Applicant State:

> "satisfy itself, not only that it has jurisdiction in accordance with Article 36 and 37, but also, that the claim is well founded in fact and law".

The Court will well be aware that these are not the condition which have been applied or should be applied, to justify the making of an order indicating interim measures. The jurisprudence of the Court is quite clear on this point. This having been said, the Order of the Court on interim measures in the *Anglo-Iranian Oil Company* case cannot be explained away on the basis of Iran's non-appearance if, as Professor Bowett would have us believe, the Court has consistently applied the absolute irreparability in law criterion for the grant of interim measures, that is to say, by refusing to grant them in those cases where financial compensation might be a possible remedy. Nor, with respect, is Professor Bowett's explanation of the Court's Orders on interim measures in the *Fisheries Jurisdiction* cases persuasive from this point of view. The damage done to United Kingdom and German fishermen in the *Fisheries Jurisdiction* cases was no doubt quite considerable, but it was no more drastic than the damage which will be done to the Finnish ship-building industry in the present case if the Great Belt project is completed in its presently planned form. Finland accordingly continues to rely on the analysis of the jurisprudence of the Court presented in my opening statement of 1 July, as amplified by the additional points which will be made by my learned friend, Professor Treves.

Two final observations on the irreparability point:

(1) Professor Bowett's argument presupposes that the injury caused to Finland by completion of the bridge project in its presently planned form can be adequately compensated by an award of monetary damages. But this, of course, is based on the misconception that Finland's purpose in instituting the present proceedings is simply to protect the economic interests of a Finnish company. Finland's purpose, of course, is much broader. It is to try to obtain a limited modification of the Great Belt project so as to secure continued access to and from Finnish ports and shipyards of

special ships whose height may exceed the 65 metres clearance height of the proposed bridge. That is why the dispute is about access and about the extent to the right of free passage, and not about compensation.

(2) For the Court to resile from the position it has consistently taken in its more recent jurisprudence whereby irreparability connotes irreparability *in fact* or in law, would be a thoroughly retrogade step. The test which the Court now employs, and I explained this fully in my opening statement, is that a prejudice is irreparable if it makes impossible full execution of the final judgement if in favour of the Applicant State, and this without reference to whether the Applicant State might at some future stage be compensated for the injury it has suffered. I would submit that to abandon that test would be to deny the very object and purpose of interim measures as *conservatory* measures designed to preserve the respective rights of the parties pending a final judgment. I would also submit that it would in addition be a standing invitation to States to go ahead with what the Court may subsequently determine to be internationally wrongful acts on the basis that such acts could be remedied at a later stage by compensation and by compensation alone. I would submit that the Court should not countenance such a limitation upon its discretion.

I now turn slightly more briefly to the argument of urgency. Ambassador Grönberg has already dealt with the argument based on Finland's alleged acquiescence in the bridge project. How can Finland be said to have acquiesced in the construction of a bridge over the Great Belt with a clearance of 65 metres when, until October 1989, no final decision had been taken to build a road bridge rather than a tunnel, which obviously would have presented no major problems to Finland. Professor Bowett suggests that — and here again I quote from his presentation "it was clear much earlier that a bridge was the more likely option".

But is this right? Finland can no doubt be presumed to have had at least some knowledge of the project for a fixed link between England and France across the English Channel which was under consideration in the early 1980s. Finland therefore would have known that the project for a bridge over the English Channel, or even a combined bridge/tunnel, was eventually rejected by the two Governments for a number of reasons. I will not elaborate on all these reasons but one them was

certainly the need to ensure the safety of shipping in a notoriously crowded strait. May I say that, in drawing attention to the fixed link across the English Channel, I am not suggesting, on behalf of Finland, that any real parallel can be drawn between the two cases. The factual and indeed the geographical circumstances are quite different. But I am simply drawing attention to the fact that rejection of the bridge solution in the case of the English Channel fixed link by reason *inter alia* of the difficulties anticipated in securing international agreement to the erection of a bridge hardly indicates that, in the case of the Great Belt, a bridge was the more likely option.

As to Professor Bowett's second point on urgency, there are clearly differences between Denmark and Finland as to the technical possibilities for drill shps and oil rigs (including semi-submersibles and jack-ups) to pass through the Sound. Ambassador Grönberg has already responded to many of the Danish arguments on this point.

But it is perhaps Professor Bowett's fourth point which deserves most attention. This is of course the argument that there is no urgency because the East Channel of the Great Belt will not be physically obstructed by the bridge until late 1994 at the earliest. But both Dr. Koskenniemi and I, in our earlier addresses, pointed to the inter-relation between the various elements of the Great Belt project as a whole. That inter-relation has the consequence that 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. What particularly struck me about Professor Bowett's intervention was his suggestion that that could mean only that Finland believes that Denmark will not comply with a judgment on the merits against Denmark. I have to say that that is a quite unfounded allegation. The point that Finland is seeking to make is quite different. Finland is of course aware that it would be possible to reconstruct or even *in extremis* to demolish the bridge if the Court were to find in favour of Finland on the merits. But of course the cost to Denmark would then be enormous. The UK/French Study Group on the Fixed Channel Link, in considering the bridge project for the English Channel as recently as 1982, alluded to the possibility that the promoters of the bridge might abandon the site during construction, for example, following long delays or unexpected additional costs. The Study Group concluded - and I

have no reason to dispute this - that the cost of demolition could be very high. Finland therefore suggests that it is very much in Denmark's own interest to exercise such restraint in proceeding with construction works in connection with the bridge project over the Great Belt so as to permit full implementation of the Court's final judgment on the merits if in favour of Finland. Finland has no desire to see Denmark landed with such additional cost.

Finally, Mr. President, Members of the Court, I turn to Professor Bowett's peroration. Here, with respect, I think there is more than an element of exaggeration. My learned colleague, Professor Treves, will be responding to the charges that we have ignored the "balancing of burdens" notion inherent in the concept that the object of provisional measures is to preserve the respective rights of the Parties. If, as counsel for Finland, I concentrated in my opening statement on the need to protect the rights which Finland claims, that is only natural. It does not mean that Finland is not aware of the rights which Denmark claims in the main proceedings. The *real issue* is that Denmark is inexorably proceeding unilaterally with a construction or series of constructions which pay no attention to the rights which Finland is asserting on the merits. Finland has done nothing save to institute proceedings before this distinguished Court in order to have a declaration upholding the rights which Finland asserts and to have those rights protected by conservatory measures. Finland is of course aware that the grant of conservatory measures by the Court may cause considerable inconvenience to Denmark by imposing possibly some delay in the completion of the project, and possibly some additional cost. But, Mr. President, Members of the Court, with all respect, Denmark has brought this difficulty upon itself. Finland has always been prepared to negotiate with Denmark on possible modifications to the Great Belt project which could protect the right of free passage for which Finland contends. Unfortunately, Denmark has refused hitherto to contemplate any modification. Finland takes no pleasure in these proceedings against a fellow Nordic country, but has felt it necessary to come to this Court seeking protection for the rights it is asserting in the proceedings on the merits. There may indeed be a balance to be struck by the Court in determining what, in these circumstances, should be done to respect the respective rights of the Parties. But, in seeking that balance, the Court will certainly have to bear in mind that Finland is presently the

victim, I might say the innocent victim, of a project initiated by Denmark alone. This is a project which I do not dispute will carry great benefits for Denmark, but it is a project which, in Finland's submission, is clearly restrictive of the internationally recognized right of free passage through the Great Belt and which, if completed in its presently planned form, would cause serious and lasting injury to the Finnish shipbuilding industry. Thank you Mr. President.

The PRESIDENT: Thank you Sir Ian. I think it is a convenient place now to take our break and, as we have much to get through, we will try and keep it to ten minutes.

*The Court adjourned from 11.40 to 11.50 a.m.*

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The PRESIDENT: Professor Treves.

Mr. TREVES: Mr. President, Members of the Court, it is a great honour for me to appear before this Court and I am grateful to the Government of Finland to have made it possible. As this is the first time that I take the floor before this Court, let me say that for international lawyers of all generations, and certainly for me, this Court embodies the finest tradition and the highest hopes for progress of international law.

The task that has been entrusted to me is to reply to those of the legal arguments put forward by Denmark in its Written Observations and in the pleadings of its Agents and counsel which have not yet been addressed by my colleagues this morning.

The general impression which emerges from reading the Danish Written Observations and from listening to oral pleadings on Tuesday is that the defence of Denmark tries to transform the discussion of the Finnish request for interim measures in a discussion of the merits of the case. In doing so, without saying it explicitly, Denmark also tries to insinuate the thought that Finland's Application is frivolous, that it amounts to an abuse of the process of the Court.

This general impression is substantiated in the analysis of the various points of law which I shall consider this morning. These points are the following:

First, the contention, developed in particular in President Jiménez de Aréchaga's pleading, that the right claimed by Finland in its Application, and which Finland would like to see preserved by the indication of provisional measures, does not exist.

Second, the contention, put forward by Professor Bowett, that the alleged lack of consideration, in the Finnish request, for the Danish interests, would have the consequence that the requirement of proportionality would be missing.

Third, I shall address the alternative request of Denmark, illustrated by Mr. Magid in his second pleading, that, in the event that the Court should grant the request for interim measures in whole or in part, it should also indicate that Finland shall undertake to compensate Denmark for losses incurred in complying with the measures should the Court reject Finland's submissions in the merits.

I. The alleged non-existence of the Finnish right

To consider this aspect of the Danish position, it seems useful to start from the analysis of Article 41 of the Statute made in paragraph 83 of the Written Observations. According to Denmark, the object of Article 41 may be summarized by distinguishing three elements: firstly, the object to preserve the rights of the Parties; secondly, certain requirement which the power of the Court to indicate provisional measures would "presuppose" - namely irreparable prejudice, urgency and prima facie existence of the jurisdiction of the Court; and, thirdly, that circumstances require the indication of the measures. To present the prospects of substantive jurisdiction as a "precondition" and not as a "circumstance" may be helpful, and the point was made by Judge Mosler in his separate opinion in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1976*, p. 25). However, to do so as regards irreparable prejudice and urgency amounts to a rather unusual analysis of Article 41. Indeed the consequence of this analysis is that the very concept of circumstances becomes empty, or at least vague, as it appears in the section on circumstances of the Danish Written Observations - a very brief section which contains what we would more appropriately call "concluding observations".

However, it is humbly submitted, the real purpose of the Danish analysis of Article 41 is to present the rights that are to be preserved with the interim measures as an independent element whose existence has to be demonstrated in order for the measures to be indicated. It is true that the section of the Written Observations relating to this element is entitled to the "alleged" right. By doing so the Danish Written Observations merely pay lip service to the proper role which has to be reserved, in the framework of proceedings on provisional measures, to the rights under discussion on the merits. This emerges clearly from the pages that follow in the just mentioned section of the Danish Written Observations. They contain a detailed incursion into the merits of the case. This incursion concludes, in paragraph 140, by affirming that "the right for which Finland seeks interim protection does not exist". One cannot avoid underlining that such an affirmation, in proceedings for the indication of interim measures of protection, is, to say the least, rather startling.

In his pleading on Tuesday, President Jiménez de Aréchaga confirmed and developed the points just mentioned. He affirmed that "the existence of the right claimed by the Applicant constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused". Starting from this affirmation President Jiménez de Aréchaga embarked in an excursion into the merits even more detailed than the one to be found in the Written Observations.

With respect, this point of departure cannot be accepted and, consequently, it is not necessary to follow President Jiménez de Aréchaga in that excursion.

The existence of the right is not a "circumstance" within the meaning the term has in Article 41 of the Statute of the Court. When Article 41 refers to the "rights" to be preserved through the granting of provisional measures, it refers to "the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent", as the Court said in its Order on provisional measures in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, p. 93) and repeated in similar language at various times, more recently in its Order on provisional measures of 2 March 1990 in the case between Guinea-Bissau and Senegal concerning the *Arbitral Award of 31 July 1989* where the Court confirmed that the purpose of exercising the power which Article 41

confers to it is "to protect the rights which are the subject of dispute in legal proceedings" (*I.C.J. Reports 1990*, p. 69).

While President Jiménez de Aréchaga moves into the merits in order to examine the question whether the right claimed by Finland "really exists", Ambassador Lehmann in his introductory statement on behalf of Denmark envisages the right claimed by Finland from a different angle. In doing so he probably reveals the real purpose of this branch of the Danish arguments. He affirms that:

> "not even a prima facie case exists in favour of the Finnish contention that the right of passage through the Great Belt applies to all ships including drill ships, oil rigs and reasonably foreseeable ships"

and that

> "the Finnish Government must be able to substantiate the alleged right to a point where reasonable prospect of success in the main case exists".

As it emerges from remarks already made this morning by Ambassador Grönberg and by Sir Ian Sinclair it is Finland's contention that to establish whether there is a prima facie case for the existence of the right to be adjuged in the merits phase - or, in other words, whether there exists the so-called fumus boni juris - is, in proceedings on interim measures, as inappropriate as to consider the question as to whether the alleged right exists.

Arguments concerning fumus *boni juris* or a prima facie assessment of the merits could make sense if a provisional judgment on the merits were under discussion before the Court. But this is not the case, and cannot be the case, with the proceedings for provisional measures under Article 41 of the Statute. Only in a few individual or dissenting opinions of members of the Court did concerns for the merits emerged in the consideration of requests for provisional measures. Even in the light of these concerns, a recent commentator could not go beyond observing that:

> "the preliminary view on the merits of the case can *marginally* play a role in the assessment of circumstances of a case"

while confirming:

> "the basically non-anticipatory character of decisions concerning interim protection" (Sztucki, *Interim measures in The Hague Court,* 1983, p. 124, emphasis the quoted author's).

Even though it is not necessary to do so, out of respect for the authority of President Jiménez de Aréchaga, I would like to show that the arguments used to demonstrate that the right claimed by Finland, does not exist are, to say the least, questionable and that, consequently, it is out of the question that Finland's case could be considered as prima facie unfounded.

The basic line of reasoning of President Jiménez de Aréchaga's pleading is the following: the 1982 Law of the Sea Convention is not applicable; the Geneva 1958 Convention on the Territorial Sea is applicable, but it is so restricted that it cannot be the basis of the right claim by Finland; customary law cannot be the basis of a right of transit passage; the 1857 Treaty of Copenhagen does not encompass the right claimed by Finland, and in any case Finland cannot benefit from it as a party but only as a third State beneficiary.

Finland, obviously, reserves its right to examine these arguments in detail at the appropriate stage. For today's purposes it is sufficient to make two points.

The first is that the right of innocent passage as envisaged in the Geneva Convention is a sufficient basis for the right Finland claims for offshore craft and reasonably foreseeable ships. Indeed the "innocence" of such passage has never been questioned. There has been no question of these craft passing through the Great Belt "ex gratia" and not as a matter of right. Consequently, it is hard to see the relevance of the argument put forward by President Jiménez de Aréchaga concerning the right of the coastal State to take steps against passage that is not innocent contained in Article 16 of the Geneva Convention, and almost eliminated in the 1982 Convention. The same can be said about the argument taken from the fact that the coastal State's regulatory powers are broader according to the Geneva Convention than according to the 1982 Convention. These powers may inded be broader, or at least less clearly defined, but one thing is certain: they concern the regulation of innocent passage, not the elimination of the physical conditions for its exercise. Article 15, paragraph 1, of the Geneva Convention, repeated with further clarifications in Article 24 of the 1982 Convention, provides that:

> "The coastal State must not hamper innocent passage through the territorial sea".

It seems clear that to make innocent passage physical impossible is a very radical way of hampering!

The second point Finland would wish to make is that Denmark gives a very partial reading of the 1857 Copenhagen Treaty, and that this reading does not coincide entirely with Danish views on the same subject expressed before the present case arose.

Neither the Written Observations nor President Jiménez de Aréchaga quote one of the key substantive provisions of the Treaty. This is the provision contained in Article 1, paragraph 1, according to which:

> "no vessel shall, henceforth, under any pretext whatsoever, be subjected, in its passage of the Sound or Belts, to any detention or hindrance".

In its brevity, this provision envisages a passage which (leaving aside the question of warships) is not subject to the limitations and conditions that are found in the Geneva and in the Montego Bay Conventions.

The Danish position, as expressed both by President Jiménez de Aréchaga and by the Written Observations interprets the 1857 Copenhagen Treaty as an ordinary treaty, which gives rise to rights and obligations only for the Parties and whose consequences for third States are only those set forth in the Vienna Convention on the Law of Treaties. This reading seems again a very narrow one, if one considers that the other key substantive rule of the Treaty, namely the abolishing of all customs and dues for ships passing through the Sound or Belts is established "for ever" and that that very principle has now become a principle of customary law, as evidenced by Article 8, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contigous Zone, repeated in paragraph 1 of Article 26 of the Law of the Sea Convention of 1982, stating that:

> "No charge may be levied upon foreign ships by reason only of their passage through the territorial sea."

These elements seem to confirm that the 1857 Treaty is more than an ordinary treaty. The rule according to which passage in the Sound and Belts shall not be subject to any detention or hindrance: "is an expression of a regime of passage through the straits". This quotation is taken from a published intervention made by a well-known Danish diplomat who represented his country at the Third United Nations Conference on the Law of the Sea, Ambassador I. R. Andreasen. He comes to the conclusion that:

> "in the Danish straits a special regime of passage adapted to local conditions has been

> developed over the years, based on the Copenhagen Convention of 1857, international customary law and national regulations" (*The Law of the Sea in the 1980's,* Choon-ho-Park ed., 1983, p. 600 f.)

Similarly another distinguished Danish diplomat who also represented his country at the Third Law of the Sea Conference, Ambassador Peter Bruckner, stated, in another published intervention, that:

> "The special legal regime governing innocent passage of the Danish straits by all ships has developed over the years based on the Copenhagen Convention. The existing regime is an expression of the general rules of international customary law as reflected in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone."

It seems hardly necessary to underline that this position is very different from that put forward in the present case by Denmark. Similarly to the Finnish position, the role of customary law is recognized, while it is and vehemently so, discarded in the positions taken by Denmark in the present dispute.

Moreover, passage through the Danish straits is repeatedly qualified by Ambassadors Andreasen and Bruckner as a "regime". Whatever the exact definition of a regime in international law may be, there can be no doubt that the concept connotes an exception to the application of the ordinary rules on the law of treaties and on State succession to treaties. These are, nonetheless, the very rules Denmark relies upon in its construction of the effects of the Copenhagen Treaty.

Mr. President, Members of the Court, I wish to apologize for having embarked in a rather long *excursus* on a few of the questions pertaining to the merits of the case, which Denmark has raised in its written and oral defences. Though *strico jure* unnecessary, this excursus, it is humbly submitted, may have served to complete the argumentation put forward this morning by Ambassador Grönberg and by Sir Ian Sinclair to dissipate any possible doubt that the right claimed by Finland is prima facie non existent.

II. The alleged lack of proportionality

In his pleading on Tuesday, Professor Bowett held in rather foreceful terms the view that there is a requirement of proportionality that the Court must consider in deciding on a request for provisional measures. Professor Bowett then compared the losses Finland would incur in case the measures are not granted with the Danish losses in case the measures are granted and concluded that

the latter are by far more important. I shall not go into a discussion of the items involved in his analysis of costs. Ambassador Grönberg has shown that this analysis is, to say the least, questionable.

When closely analysed, the situation does not, it is submitted, justify the clear-cut conclusion that the granting of provisional measures would work only in the interest of Finland. What are, for either party, the advantages and disadvantages involved in the Finnish request for provisional measures?

For the purposes of such analysis it is not sufficient to compare the advantages for Finland of the granting of the measures to the costs for Denmark of complying with them. The analysis must distinguish two hypotheses, namely, that the request is accepted by the Court and that the request is rejected. Furthermore, it must distinguish in either case the hypothesis that the judgment on the merits is in favour of Finland and that it is in favour of Denmark.

If the Finnish request is rejected the disadvantages for Finland would be important: there would be a change in the status quo which would prejudice its rights were the Court subsequently find in its favour. Such change may or may not concern the physical situation in the Great Belt. It would certainly concern the possibilities of Rauma-Repola and other Finnish shipyards to receive and to accept orders for offshore craft. Denmark would have the advantage of being able to act in full freedom while the proceedings on the merits were pending. Such advantage would, however, be rather dubious: action taken in the exercise of such freedom by Denmark would probably make compliance with the judgment - should it be in Finland's favour - more difficult and costly.

Were the Finnish request to be accepted, the advantages for Finland would consist in maintaining the status quo for two or three years, the time it will presumably take for the case on the merits to be brought to its conclusion. During such time no action could be taken or would be taken by Denmark, which could prejudice Finland's rights. Denmark's disadvantages would be modest. This appears in clear light if one recalls the contents of the provisional measures proposed by Finland and the clarifications given this morning by Ambassador Grönberg. These measures do not include the stopping of all construction work: they are limited to those aspects of construction work

"as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards" and the request that Denmark - and I quote again from the Finnish Request - "should refrain from any other action that might prejudice the outcome of the present proceedings". These requests leave Denmark with a wide choice of possibilities on how to comply with the measures.

This, it is humbly submitted, is the balance of the relevant considerations. The advantages which, were the judgment on the merits to be favourable to it, may ensue for Denmark from the absence of provisional measures to be complied with appear overwhelmed by the disadvantages which Denmark would incur from not adopting the restrained behaviour which the measures required were the judgment on the merits to be favourable to Finland. Even if, contrary to the assessment given above, the costs to be incurred by Denmark in complying with the provisional measures were to be as important as the Danish advocates have indicated in their pleadings, they would be no different from those Denmark would incur anyhow in adopting the restrained behaviour that it would be prudent to adopt pending the decision of the case on the merits.

In the light of the above considerations, it would seem that, on balance, the conservatory measures requested by Finland correspond also to the best interest of Denmark.

A different conclusion could perhaps be reached only in two sets of circumstances. First, that it appeared manifest that the Court lacks jurisdiction on the merits and, second, that it appeared beyond any reasonable doubt that the Finnish claim on the merits is so unfounded as to amount to an abuse of the process of this Court.

Neither set of circumstances corresponds to the situation of the present case.

As regards the Court's possible lack of jurisdiction, it is totally irrelevant in the present case, in which both Parties accept the jurisdiction of the Court.

As far as the manifest unfoundedness of the Finnish case on the merits is concerned, there is no need to underline once again that in the proceedings on a request for provisional measures no assessment of the merits is called for. The Court has often stated that its decision to grant provisional measures "in no way prejudices ... any question relating to the merits" (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 20, para. 45). This is as true

when the submission is made by application as when it is made by agreement, and is particularly true for a Nordic State as regards the decision to start a case against another Nordic State. This explains also why the case-law of the Court contains, to our knowledge, no precedent where abuse of the process of the Court is considered and why references to abuse of the process of the Court in the legal literature on the Court are minimal. Finland does not believe that the serious character of its Application can be doubted. This is confirmed by the serious attitude taken by Denmark in responding to the present request.

In the light of all the above considerations, Finland feels justified in holding the opinion that the provisional measures it is requesting the Court to indicate correspond to the interests of both Parties in view of the uncertainty, which is inherent to all cases submitted to a judge, with which both are faced as to the contents of the judgment on the merits.

Mr. President, Members of the Court, it may be added, should be added, that the provisional measures requested by Finland correspond to the restrained behaviour that is envisaged, on the one hand, in Article 74, paragraph 4, of the Rules of Court, and, on the other hand, in the provisional measure, seldom if ever requested as such by States, but always indicated by the Court, that the Parties ensure that no action of any kind is taken which migh aggravate or extend the dispute.

Of course, Article 74, paragraph 4, of the Rules of Court, concerns a specific situation which is, *ratione temporis*, already behind us. According to this provision:

> "Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."

This power of the President of the Court may be exercised, and has some times been exercised (for instance, in the *United States Diplomatic and Consular Staff in Tehran,* case, *I.C.J. Reports 1979,* p. 10, para. 6) during the time between the request for provisional measures and the decision of the Court on such a request.

The above-quoted provision of the Rules of Court seems to us, nonetheless, to be the expression of a more general principle which applies beyond the narrow time-frame for which

paragraph 4 of Article 74 has been drafted. This principle may be stated as follows: the parties to a dispute before the Court are under the obligation, until the Court has reached a decision on the merits of the case, to refrain from any steps which might have a prejudicial effect on the Court's final decision. This principle is analogous to the corresponding principle of the law of teaties according to which, pending entry into force of a treaty, a State which has signed it, or has expressed its consent to be bound by it, is obliged to refrain from acts which would defeat the object and purpose of the treaty (Article 18 of the Vienna Convention on the Law of Treaties). This principle, in turn, stems from the general idea of good faith. Both principles are indicated by Bin Cheng in his book on *General Principles of Law as Applied by International Courts and Tribunals* (1953) as concerning "circumstances in which States are required by the principle of good faith to maintain the *status quo* during a period between two events" (p. 140).

The minimal action required to maintain the status quo, in which the provisional measures requested by Finland consist, corresponds well to this general principle.

Such action corresponds also to the duty not to take action which might aggravate or extend the dispute submitted to the Court. The indication *ex officio* of this duty has indeed become a standard clause in orders by the Court indicating provisional measures: suffice it to say that, with slight variations, this clause appears in the operative parts of all such orders adopted by the International Court of Justice.

The view has been held, in particular by the late Professor O'Connell in pleading for Greece in the *Aegean Sea Continental Shelf* case, that the principle that actions should not be taken which aggravate or extend the dispute is a ground for the Court's authority to order interim measures separate from that according to which actions should not be taken which would prejudice the execution of the decision (*I.C.J. Pleadings, Aegean Sea Continental Shelf,* p. 100). Rather than dwell at length on this theoretical question, I would propose to examine the passage of the Order on provisional measures in the case of the case of the *Electricity Company of Sofia,* which was the decision on which Professor O'Connell took his stand. This passage remains the only consideration of this principle in the motives of a decision by the Court. The Permanent Court states that

Article 41, paragraph 1, of the Statute:

> "applies the principle universally accepted by international tribunals ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute (*P.C.I.J., Series A/B, No. 79*, p. 199).

In this well known passage of the 1939 Order of the Permanent Court there are two words which seem to have escaped the commentators' attention and which seem to us worth considering. These words are: "in general". The Permanent Court saw the obligation to abstain from steps which might aggravate or extend the dispute as "general" next to the obligation of abstaining from measures capable of prejudicing the execution of the decision to be given. As abstention from the latter measures corrsponds to the specific provisional measures which the Court may order, and which are usually requested by the parties, the provisional measure consisting in abstaining from action which might aggravate or extend the dispute would seem to correspond to the widest notion of what is the duty of a party pending the decision of the dispute. In other words, as remarked above, the duty to refrain from any steps which might have a prejudicial effect on the Court's final decision.

This explains, it is humbly submitted, why the Court considers it appropriate to introduce such clause *ex officio* whenever it indicates provisional measures.

Being the most general, the provisional measure contained in this clause is also the minimal one: it requires that the parties do whatever is necessary to avoid prejudice to the final decision but nothing more than that. It is also the one that gives to the parties the highest degree of discretion in its execution.

The provisional measures that Finland requests the Court to indicate, even though they are couched in specific terms, come close to the just indicated characteristics of the Court's standard clause. The request that Denmark should

> "refrain from continuing 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"

envisages the minimum Denmark could, and should, do in order to avoid prejudice to the outcome of

proceedings, and affords Denmark a wide discretion in determining the ways and means to obtain this result that is also characteristic of the Court's standard clause. The request that the Court indicates that Denmark "should refrain from any other action that might prejudice the outcome of the present proceeding" restates the general rule of conduct of parties pending a decision by a court.

It seems hardly necessary at this stage to make the point that the provisional measures requested by Finland are reasonable and in line with the jurisprudence of the Court.

Mr. President, Members of the Court, with your permission, I shall now turn to my third and last main point.

III. The requested undertaking by Finland to pay compensation

I shall now consider the Danish alternative request put forward in the Written Observations, and supported by the second pleading of Mr. Magid on Tuesday, that the Court should indicate that Finland compensate the losses that Denmark may incur in case the request for provisional measures is granted and the Court later rejects Finland's submissions on the merits.

According to Mr. Magid, liability of the State that obtains from the Court the indication of a provisional measure for the losses caused to the respondent by these measures in the event the Court rejects the applicant's submissions on the merits is dictated by a general principle of law within the meaning of Article 38 (c) of the Statute of the Court. In making this request, and in justifying it by invoking the notion of "general principles of law", Denmark invites the Court to break new ground, to innovate in its jurisprudence, and to do so twice.

Indeed, on the one hand, so far, the Court has never received a request for a provisional measure identical or similar to that put forward by Denmark, nor has it indicated such a measure ex officio according to Article 75, paragraph 1, of the Rules of Court.

On the other hand, the Court has hardly ever based a decision on a "general principle of law" within the meaning of Article 38 (c) of its Statute. As the late Professor Michel Virally says in his 1983 General Course at the Hague Academy of International Law, as regards the jurisprudence of the Permanent Court and of the present Court:

> "le recours aux principes généraux de droit a été exceptionnel et presque toujours implicite" (*RCADI*, Vol. 183, p. 172).

Judge Lachs in his General Course at the Hague Academy is of the same opinion as he states that:

> "international courts have very seldom relied on 'principles' evolved in municipal law" (*RCADI*, (1980-V), p. 196).

Neither the Statute nor the Rules of Court mention the power of the Court to order the applicant to undertake to compensate the respondent, or to pay a security, in case the judgment on the merits is not in favour of the applicant, or in any other case. It should be added that the proposal made by Judge Nyholm to include in the Rules of Court a provision which would have specifically given to the Court the power to order the payment of a security, was not adopted in the Rules of 1922 and never considered again when subsequent revisions of the Rules were adopted.

The possibility for the Court to indicate the obligation to pay compensation, in the event that the claim on the merits by the State that has obtained interim measures fails, is thus mainly a creation of legal doctrine and certainly not one that all writers on the subject have considered. While Dumbauld and Elkin mention it, it is not to be found in the authoritative books by Rosenne and Fitzmaurice, nor in the recent, particularly detailed monograph by Sztucki.

The analogy with domestic law and the notion of "general principles" are mentioned in the literature (see, for instance, Dumbauld, *Interim Measures in International Controversies,* 1932, p. 162). But is this an admissible analogy? Can the notion of "general principles of law" be utilized for the purpose Denmark would wish the Court to utilize it?

Within the terms of the Court's Statute, recourse to the "general principles of law" is to be seen, to quote once again, Virally, as

> "une disposition typique du droit judiciaire, destinée à empêcher le *non liquet*, lorsque le tribunal ne trouve aucune règle de droit, parmi celles qui émanent des sources reconnues, sur la base desquelles trancher de façon raisonnable le différend qui lui est soumis" (*op. cit., loc. cit.*).

It seems hardly thinkable that such could be the case as regards the procedural law of the Court. The Statute and the Rules of Court are a very detailed body of law which, in the case of the Rules, has frequently been revised by the Court. The fate of the proposal of Judge Nyholm I alluded to a few minutes ago seems, if at all necessary, to confirm that, in the Statute and the Rules of Court, there are no lacunae to be filled.

Even if we were to follow Denmark in its quest for a general principle of law, it would be necessary to satisfy the requirement that the principle should be present in the main legal systems of the world. Again Virally specifies that the principles qualifying under the terms of Article 38 *(c)* of the Statue of the Court are:

"les principes communs à l'ensemble des systèmes juridiques développés" (*op. cit*., p. 171).

Mr. Magid's brilliant comparative law excursus does not go beyond a group of legal systems of western developed States. Other forms of legal civilization are not taken into consideration. While the practical difficulties of doing so can be easily understood, it is clear that the materials put forward by Denmark are insufficient to meet the test of Article 38 *(c)*.

Furthermore, even the materials from which Denmark claims that the existence of a general principle of law can be inferred show remarkable differences between the various systems. These differences justify questioning whether, even within the relatively narrow group of legal systems considered, there really exists the uniformity of concepts that Denmark claims there is.

It is easy to remark that while some of the legal systems considered provide some means of automatic relief, through the obligation to pay a security to be surrendered to the other party if the plaintiff fails in the main case, or through the principle of strict liability, in other systems, requirements such as fault or diligence emerge.

Even within the Nordic group of legal systems, the Finnish system is not as "identical" to the others as it would appear from the citations made by Mr. Magid. In Finnish law, there is no such think as general injunctive relief. In this respect, the Finnish legal system contrasts with at least some of the other Nordic systems. The relevant rules are highly idiosyncratic and are collected in the

Executions Act of 1895. According to that Act, sequestration or interdiction against sale or dispersion is given by an *administrative official*, not by a court. The discretion is administrative and not judicial in nature. Thus the rule of Section 20, Part 7, of the Executions Act, modified on 18 May 1973/389, quoted by Mr. Magid, is not a rule on compensation but a procedural rule: its puspose it to refer the question of compensation for damage caused by the executionary measure to a regular lower court, which will decide according to the ordinary rules of the Compensations Act, which include the requirement of fault.

One case of 1979 is sometimes quoted to support strict liability, but it was decided before entry into force of the Compensations Act. This is rather far from the strict liability and the injunctions granted by courts of the Danish, Norwegian and Swedish systems.

The indication that Finland should undertake to compensate Denmark's losses arising out of complying with the interim measures in case Finland's case fails on the merits could, perhaps, be based on some argument other than the alleged existence of a general principle of law. The power of the Court to indicate such measure could, perhaps, be argued to be based on an extensive interpretation of Article 75, paragraphs 1 and 2, of the Rules of Court, according to which the Court may "at any time" indicate *ex officio* provisional measures independently from a request of a party, and also indicate measures different from those that have been requested.

Of course, the fact that the Court has never resorted to that interpretation should not be overlooked. But there are also other, more general considerations, that suggest that the indication as a provisional measure of the undertaking to compensate, sought by Denmark, would be neither appropriate nor in conformity with the Statute. Firstly, the mere possibility of such a measure would add to the already long list of factors that discourage States from resorting to international justice. This very observation further explains why analogies with rules of civil procedure in domestic legal systems are not useful. In domestic law the system of remedies is firmly established and the subjects of law interact on the basis of the full acceptance of the ramifications of this system and of the enforcement power behind it. In international law even the submission of a dispute to a court or tribunal depends on the principle of consent: no such acceptance can consequently be

presumed.

Secondly, the provisional measure requested by Denmark would be tantamount to impose on the Applicant the payment of reparation for an act that would not be wrongful.

International law normally reserves the consequence of the payment of reparation to the commission of internationally wrongful acts. It is very difficult to see why this consequence should stem from the exercise of the right of asking the Court to pronounce on the existence of a substantive right and of requesting measures for preserving such right. The only wrongful act that could be envisaged perhaps would be - once again - a frivolous application - that it would constitute an abuse of the process of the Court. As demonstrated when we encountered this recurrent implicit contention before, this cannot be and is not the case in the circumstances of the present dispute.

Thirdly and lastly, such provisional measure would not fall within the terms of Article 41 of the Statute. How can the undertaking by Finland to indemnify Denmark for losses caused by compliance with the interim measures, in case the Finnish case is rejected on the merits, serve to preserve the right to be adjudged on the merits? The undertaking to pay such indemnity has visibly nothing to do with the right of free passage through the Great Belt, be it according to the Danish or the Finnish interpretation.

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Mr. President, Members of the Court, it is almost customary for parties to proceedings for the granting of interim measures of protection to claim that the other party is trying to pre-empt or pre-judge the decision on the merits. Indeed, this is normal advocacy technique, as both sides are, of course, perfectly aware that by definition the jurisdiction to indicate interim measures should be used "to preserve, not to confer rights", as Sir Gerald Fitzmaurice says in his book on the *Law and Procedure of the International Court of Justice* (1986, p. 547) in a section on the "inadmissible objects of the jurisdiction to indicate interim measures".

As the supremely good advocate he is, Professor Bowett has not failed to accuse Finland of

the intent of pre-judging the merits. He does so with a special element of sophistication, as he specifies that what Finland tries to pre-judge is the remedy it seeks on the merits. According to Professor Bowett, a whole series of arguments put forward by Finland lead, and I quote from his pleadings last Tuesday "to the proposition that, when we come to the merits, damages can never be an appropriate remedy".

It is easy to answer that, at the end of its Application, Finland has explicitly reserved "the right to claim compensation for any damage or loss arising from the bridge project". However, the main object of its application is a judgment declaring that there is a right of free passage through the Great Belt for all ships, including offshore craft and reasonably foreseeable ships, entering and leaving Finnish ports and shipyards, with the purpose to be able, on that basis, to start negotiations with Denmark in order to guarantee this right. Consequently, according to Finland, there should be no damage that need to be compensated. The provisional measures Finland is requesting could contribute to that result.

Mr. President, Members of the Court, I would be remiss to my duty of advocate if, at this juncture, I were not to retort the accusation of pursuing the intent of pre-judging the decision on the merits. This task is, however, extraordinarily easy. Suffice it to say that if all the contentions put forward by Denmark were accepted by the Court, there would be very little left to decide on the merits. The right which Finland seeks to preserve, and upon which the Court will be called to decide in its judgment on the merits, would be pronounced as non-existent and the Application would, implicitly at least, be branded as an abuse of the process of this Court!

Mr. President, Members of the Court, I would wish to thank you most sincerely for the courtesy, attention and patience with which you have listened to my statement.

The PRESIDENT: Thank you very much, Professor Treves.

Mr. Grönberg, I think that concludes the presentation of the case of Finland so that now we may proceed to the questions which some of the Members of the Court wish to ask the Parties. Two Judges will be asking questions. May I call first on Judge Schwebel?

Judge SCHWEBEL: Thank you, Mr. President.

1. Two questions for Finland. One, in its letter of 29 August 1989 (Annex 5 to the Application), Denmark maintains 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". Does this statement coincide with the Finnish view and, if not, why not?

2. 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.

A question for Denmark. Finland maintains that all of the oil rigs built in Finland could not traverse the Sound since the draught of some of them is more than 8 meters. Denmark deepened the Sound some years ago. Can any further deepening of Drogden Channel be contemplated? And if so, could such deepening be sufficient to permit oil rigs to pass? And if so, are there estimates available of the dimensions of the cost of such dredging? I appreciate that the Agent of Finland referred to such a possibility this morning, and to what may be a somewhat related proposal by the City of Copenhagen, but would benefit by having Denmark's views. Thank you, Mr. President. The PRESIDENT: Thank you, Judge Schwebel. And now Judge Shahabuddeen, please.

Judge SHAHBUDDEEN: Thank you, Mr. President. My question, which is in three parts, is addressed to Denmark.

> On Tuesday last Mr. Per Magid, for Denmark, told the Court the following:
> "the official comments in the 1987 Act stated that the execution of a high-level bridge should enable Denmark to abide by its obligations under international law to preserve free passage. It was then estimated that the clearance should be 76 to 77 metres. Prior to the Bill the Danish Maritime Authority had noted that drill ships built in Finland and in the Soviet Union had a height above water-level of between 60 and 75 metres." (CR 91/11, p. 25.)

There are three points which I would like to raise:

(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?

The PRESIDENT: Thank you very much, Judge Shahabuddeen. Those questions will of course be available immediately to the Agents in writing. They may be answered either orally or in writing. If Finland decides to answer orally then the time would be at the beginning of the session tomorrow afternoon and before Denmark begins its final presentation. If Denmark wishes to answer orally it would, of course, answer it wherever it wishes in the course of that oral presentation.

I should perhaps emphasize that some or all of the questions may, nevertheless, be answered in writing if the Parties so wish.

I think it has been agreed that we meet tomorrow afternoon at 2.30 p.m. instead of 3 o'clock. So we adjourn now until 2.30 tomorrow afternoon when we will hear Denmark's case. Thank you.

*The Court rose at 12.45 p.m.*

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