SEPARATE OPINION OF VICE-PRESIDENT ODA

I am in full agreement with the conclusion of the Order to reject the request of Finland on the sufficient ground of lack of urgency. Urgency is indeed absent. Firstly, Denmark has given assurances that no physical obstruction of the East Channel will occur before the end of 1994. Secondly — and this is a point which should have been underlined —, while would-be purchasers of drill ships and oil rigs from Finnish shipyards must inevitably weigh the risk that in the meantime the Court may give a judgment adverse to the Finnish claim, that risk would have remained undiminished even if the Court had indicated the provisional measures requested, because their indication would in no way have prejudged the merits. Consequently, I saw little meaningful object in Finland's request. The only way in which the Court can concretely affect Finland's position is by passing judgment on the merits, and, in view of the negative consequences for that position flowing from the non-resolution of the dispute, the Court will render the best service by coming to a final decision at the earliest possible date.

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I also agree with the warning to Denmark that

> "the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled" (para. 31).

This phrase adds an extremely important element of balance to the rejection of the Finnish request. In connection with Denmark's risk, it may be observed that the Agent and counsel for the Respondent laid stress on the contention that, should execution of the East Channel Bridge project have reached an advanced stage before the Court gives judgment and should the Court in fact find in favour of Finland, it would then be legitimate to finish the bridge and offer compensation inasmuch as restitution in kind would be excessively onerous. As the Court in its Order has indicated, no reliance can be placed on the Court's eventually determining that this course of action could be represented as legally sufficient. To minimize the possibility of wasted efforts, it is therefore all the more desirable for Denmark also that the judgment be handed down as soon as possible.

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There are, however, two aspects of the Order which I regard as somewhat superfluous. In the first place, while it is certainly true, as the Order states, that

> "it is for Denmark . . . to consider the impact which a judgment upholding [Finland's claim] could have upon the implementation of the Great Belt project, and to decide whether or to what extent it should accordingly delay or modify that project" (para. 33),

there seems to be little reason for the Court to suggest "likewise" that

> "it is for Finland . . . to decide whether or not to promote reconsideration of ways of enabling drill ships and oil rigs to pass through the Danish Straits in the event that [Finland loses the case on the merits]" (para. 34).

What is in fact needed for Finland, at this stage, is simply to take cognizance of the obvious possibility that in the event of its losing the case on the merits it might have to abandon or modify any plans to construct drill ships and oil rigs higher than 65 metres.

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Secondly, while I am in no sense opposed to a revival of negotiations if the Parties take an initiative in that sense, here we have two brother nations in the Baltic region which, we are assured, have a trusting relationship pursued through largely informal diplomacy; it is therefore reasonable to assume that, if negotiations could lead to a solution of their dispute, recourse to the judicial process would not have been necessary. Where, indeed, is the incentive for the Parties to negotiate now, when each must believe that the strength of its position depends upon the judicial determination of its right: on one side a right of free passage of taller drill ships and oil rigs, on the other a right freely to undertake works within the national territory though recognizing a right of passage for drill ships and oil rigs of lesser height? There is no shared understanding of the relationship between these rights, or of the rules of international law relevant to their reconciliation. Thus neither Party can blame the other for reluctance to negotiate at this stage.

Moreover, if what the Court wishes to encourage is that the Parties should negotiate as to their respective attitudes or conduct pending judgment of the merits, it should be obvious that neither side will be willing to risk prejudicing its case by making concessions. Until the Court has resolved some central legal issues, the chance of stalemate is therefore so great that for the Court to point the Parties in that direction may be of little

avail. I therefore have difficulty in endorsing the sentiment expressed by the Court that

> "pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed" (para. 35).

The only fruitful direction in which the Court can bend its efforts is towards ensuring "that the decision on the merits be reached with all possible expedition" (para. 36). Indeed, it is the very readiness of the Parties to negotiate on a basis of law that makes it imperative to finish the case as speedily as possible.

(Signed) Shigeru ODA.