

CASE CONCERNING PASSAGE THROUGH THE GREAT BELT (FINLAND *v.* DENMARK) (PROVISIONAL MEASURES)

Order of 29 July 1991

In an Order made in the case concerning the Passage through the Great Belt (Finland *v.* Denmark) the Court found, unanimously, that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

The Court was composed as follows: President Sir Robert Yewdall Jennings; Vice-President Shigeru Oda; Judges: Manfred Lachs, Roberto Ago, Stephen M. Schwebel, Mohammed Bedjaoui, Ni Zhengyu, Jens Evensen, Nikolai Tarassov, Gilbert Guillaume, Mohamed Shahabuddeen, Andrés Aguilar Mawdsley, Christopher G. Weeramantry, Raymond Ranjeva; Judges *ad hoc* Paul Fischer and Bengt Broms.

Judge Tarassov appended a declaration to the Order of the Court.

Vice-President ODA, Judge Shahabuddeen and Judge *ad hoc* Broms appended separate opinions to the Order of the Court.

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In its Order, the Court recalls that on 17 May 1991 Finland instituted proceedings against Denmark in respect of a dispute concerning passage through the Great Belt (Storebaelt), and the project by the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the West and East Channels of the Great Belt. The effect of this project, and in particular of the planned high-level suspension bridge over the East Channel, would be permanently to close the Baltic for deep draught vessels of over 65 metres' height, thus preventing the passage of such drill ships and oil rigs manufactured in Finland as require more than that clearance.

The Government of Finland requested the Court to adjudge and declare:

“(a) That there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;

“(b) That this right extends to drill ships, oil rigs and reasonably foreseeable ships;

“(c) That the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the right of passage mentioned in subparagraphs (a) and (b) above;

“(d) That Denmark and Finland should start negotiations, in good faith, on how the right of free passage, as set out in subparagraphs (a) to (c) above shall be guaranteed.”

On 23 May 1991, Finland filed in the Registry of the Court a request for indication of provisional measures, relying on Article 41 of the Statute of the Court and Article 73 of the

Rules of Court, by which it requested the Court to indicate the following provisional measures:

“(1) Denmark should, pending the decision by the Court on the merits of the present case, 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;

“(2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings.”

On 28 June 1991 Denmark filed in the Registry of the Court its written observations on the request for provisional measures and requested the Court

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

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

At public hearings held from 1 to 5 July 1991 the Court heard oral argument presented on behalf of the two Parties.

On the question of jurisdiction, the Court, recalling that it ought not to indicate provisional measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded, noted that Finland founded the jurisdiction of the Court primarily upon declarations made by the Parties accepting the compulsory jurisdiction of the Court, and that it had been stated by Denmark that the Court's jurisdiction on the merit was not in dispute. The Court concluded that in the circumstances of the case it was satisfied that it had the power to indicate provisional measures.

The right which Finland submits is entitled to protection is the right of passage through the Great Belt of ships, including drill ships and oil rigs; this right is of particular importance because, according to Finland, the East Channel of the Great Belt is for certain vessels the only passage-way to and from the Baltic. Denmark, while acknowledging that there is a right of free passage through the Danish Straits for merchant ships of all States, denies that there is such a right of passage for structures up to 170 metres high, on the ground, *inter alia*, that such structures are not ships. Denmark contends that no measures should be granted because not even a *prima facie* case has been made out in favour of Finland. The Court however notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over its nature and extent, and concludes that such a disputed right may be protected by provisional measures.

The Court observes that provisional measures are only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before a final decision is given. According to the planned schedule for construction of the East Channel Bridge, no physical hindrance for the passage through the Great Belt will occur before the end of 1994; Denmark contends that by that time the case could have been finally decided by the Court, so that no indication of provisional measures is required. Denmark also contends that the construction of the East Channel Bridge will hardly represent any practical hindrance for the passing of drill ships and oil rigs, inasmuch as most of the units in question will be able to take another route, and the remainder will be able to pass under the planned East Channel Bridge if left partly unassembled until after passage of the bridge.

The Court however notes that the right claimed by Finland is to passage specifically through the Great Belt of its drill ships and oil rigs, without modification or disassembly, in the same way as such passage has been effected in the past, and observes that it cannot at this interlocutory stage of the proceedings suppose that interference with the right claimed by Finland might be justified on the grounds that the passage to and from the Baltic of drill ships and oil rigs might be achieved by other means, which may moreover be less convenient or more costly. The Court concludes that if construction works on the East Channel Bridge which would obstruct the right of passage claimed were expected to be carried out prior to the decision of the Court on the merits, this might justify the indication of provisional measures. However the Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings.

Finland claims moreover that the Danish project is already causing damage to tangible economic interests inasmuch as Finnish shipyards can no longer fully participate in tenders regarding vessels which would be unable to pass through the Great Belt after completion of the East Channel Bridge, and that the existence of the bridge project is having and will continue to have a negative effect on the behaviour of potential customers of those shipyards. In this respect, however, the Court finds that proof of the damage alleged has not been supplied.

Finland observes further that the inter-relation between the various elements of the Great Belt project has as a consequence that completion of any one element would reduce the possibilities of modifying other elements, and concludes that there is thus urgency, inasmuch as many of the activities involved in the project anticipate a final closing of the Great Belt by excluding practical possibilities for accommodating Finnish interests and giving effect to Finnish rights in the event of a judgment in favour of Finland. Denmark on the other hand argues that, if the Court ruled in favour of Finland on the merits, any claim by Finland could not be dealt with by an order for restitution, but could only be satisfied by damages inasmuch as restitution in kind would be excessively onerous.

The Court, while not at present called upon to determine the character of any decision which it might make on the merits, observes that in principle if it is established that the construction of works involves an infringement of a legal right, 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. The Court adds that no

action taken *pendente lite* by a State engaged in a dispute before the Court with another State can have any effect whatever as regards the legal situation which the Court is called upon to define, and such action cannot improve its legal position *vis-à-vis* that other State.

After observing 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, and 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 the Court should decide against it, the Court states 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.

In conclusion, the Court declares that it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible, and therefore it is appropriate that the Court, with the co-operation of the Parties, ensure that the decision on the merits be reached with all possible expedition.

Judge Tarassov, in a declaration, expresses his preoccupation that Denmark's East Channel Bridge project is so conceived that even in the construction process it would impose serious limitations not only on passage for Finland through the international strait of the Great Belt but on navigation into and out of the Baltic by craft of all States. Moreover, its integration in a wider communications plan would render it even less amenable to modification if Finland were to win the case.

Judge Tarassov sees the Order's main significance in its reflection of the Court's intention to forestall the *fait accompli* that could be created by any accelerated execution of an unmodified project. He analyses those paragraphs which emphasize that intention, and which alone enabled him, like the other judges, to conclude that the circumstances did not require the immediate indication of special provisional measures.

Judge Tarassov is further of the opinion that the reference to negotiations should have taken the form of a straightforward call to seek a technical method of ensuring the continuance of free passage as in the past between the Kattegat and the Baltic, and believes that the Court had power to recommend that the Parties invite the participation of experts from third countries or proceed under the aegis of the International Maritime Organization.

Vice-President Oda, in his separate opinion, agrees with the finding that no urgency existed to justify a grant of interim measures—that is, in his view, a sufficient ground for rejecting the Finnish request—but regrets that the Court did not underline the fact that such a grant would in any case have done little to help Finland, in that would-be customers of its shipyards would still have had to weigh the risk of the Court's finally rejecting Finland's case. In fact, the only way the Court could assist either Party is by handing down a judgment as soon as possible.

Meanwhile the Court had been well-advised to warn Denmark that, if it should lose the case, it could not rely on the Court's determining that compensation would be an acceptable alternative to restitution.

It had not however been necessary to suggest at this stage that Finland consider promoting reconsideration of ways to enable drill ships and oil rigs to continue passing through the Danish Straits. It would now be sufficient for Finland to recognize the obvious possibility that in the event of its losing

the case it might have to abandon or modify any plans to construct drill ships and oil rigs higher than 65 metres.

Another, in Judge Oda's view, superfluous component of the Order was the encouragement of negotiations prior to the conclusion of the case. While he was not opposed to any initiative the Parties might take in that sense, they needed the Court to resolve some central legal issues first. Indeed, their very readiness to negotiate on a basis of law made it imperative to finish the case as speedily as possible.

Judge Shahabuddeen, in his separate opinion, refers to Denmark's submission that, to justify a grant of interim measures, Finland had been required, *inter alia*, to show a prima facie case as to the existence of the right sought to be preserved. In his view, Finland had indeed been obliged to do so, in the sense of demonstrating a possibility of existence of the specific right of passage claimed in respect of drill ships and oil rigs of over 65 metres' clearance height; it had in fact done so.

The Court in its jurisprudence had never pronounced on the general validity of the proposition inherent in Denmark's submission, and Judge Shahabuddeen recognized the need to avoid any appearance of prejudging the merits of rights claimed.

Nevertheless, given the consensual basis of the Court's jurisdiction, the exceptional character of the procedure and the potentially serious impact of provisional measures on

States constrained, the Court must be concerned to satisfy itself that there is at least a possibility of the rights claimed existing, the degree of proof required depending on the circumstances of the particular case. In Judge Shahabuddeen's view, the limited nature of the required examination did not create any significant risk of prejudgment.

Judge Broms, in his separate opinion, stresses the importance of Denmark's assurance that no physical hindrance to passage through the Great Belt will exist before the end of 1994. This, combined with the Court's resolve to finish the case well before then, had enabled the issue of urgency to be seen in a new light and diminished the material grounds for indicating provisional measures. The Parties, especially Finland, had furthermore received an additional guarantee in the emphasis laid by the Court on the norm that a litigant State could not improve its legal position *vis-à-vis* its adversary by any action taken in the course of the proceedings.

Judge Broms points out that Finland, in the event of injury to its alleged right, is seeking restitution, not compensation. He therefore endorses the Court's declining to confirm Denmark's contention that compensation might be an acceptable alternative should Finland win its case and restitution appears excessively onerous. He welcomes the Court's encouragement of negotiations and considers that these might well focus on the technical possibilities of modifying the Danish project so as to accommodate an opening in the fixed-bridge for taller drill ships and oil rigs, to use their right of free passage.