

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING PASSAGE
THROUGH THE GREAT BELT**

(FINLAND *v.* DENMARK)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 29 JULY 1991

1991

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE
DU PASSAGE PAR LE GRAND-BELT**

(FINLANDE *c.* DANEMARK)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 29 JUILLET 1991

Official citation :

*Passage through the Great Belt (Finland v. Denmark),
Provisional Measures, Order of 29 July 1991,
I.C.J. Reports 1991, p. 12*

Mode officiel de citation :

*Passage par le Grand-Belt (Finlande c. Danemark),
mesures conservatoires, ordonnance du 29 juillet 1991,
C.I.J. Recueil 1991, p. 12*

Sales number
N° de vente :

595

29 JULY 1991

ORDER

PASSAGE THROUGH THE GREAT BELT
(FINLAND *v.* DENMARK)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES



PASSAGE PAR LE GRAND-BELT
(FINLANDE *c.* DANEMARK)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

29 JUILLET 1991

ORDONNANCE

1991
29 July
General List
No. 86

INTERNATIONAL COURT OF JUSTICE

YEAR 1991

29 July 1991

CASE CONCERNING PASSAGE
THROUGH THE GREAT BELT

(FINLAND *v.* DENMARK)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

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* FISCHER, BROMS;
Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court, and to
Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the Republic of Finland filed in the
Registry of the Court on 17 May 1991, instituting proceedings against the
Kingdom of Denmark in respect of a dispute concerning passage through
the Great Belt (Storebælt);

Makes the following Order:

1. Whereas by the above-mentioned Application the Republic of Finland brought before the Court a dispute which has arisen between the two States concerning a project of the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the strait of the Great Belt, one of the Danish Straits connecting the Baltic with the Kattegat;

2. Whereas in its Application Finland states that the Danish project involves the construction over the West Channel of the Great Belt of a low-level bridge for road and rail traffic, and over the East Channel (the main channel) of a high-level suspension bridge for road traffic, with clearance for passage of 65 metres above mean sea level; and that the construction of, in particular, the East Channel Bridge as planned would permanently close the Baltic for deep draught vessels of over 65 metres' height;

3. Whereas in the Application it is further explained that drill ships and oil rigs have been constructed in Finland since 1972, and that most of them have navigated to their exploration or production fields through the Great Belt; that the projected East Channel Bridge would prevent the passage of such of those drill ships and oil rigs as require more than 65 metres' clearance; and that if the projected construction works are carried out as planned, that would mean an end to Finnish commercial activity in the field of production of such craft, as well as in respect of the production of ships of reasonably foreseeable design requiring more than such clearance;

4. Whereas Finland founds the jurisdiction of the Court on the declarations of acceptance of the jurisdiction of the Court deposited by both States under Article 36 of the Statute of the Court, and observes that a basis of jurisdiction is also provided by the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes adopted at Geneva by the First United Nations Conference on the Law of the Sea on 29 April 1958;

5. Whereas Finland claims in its Application that the Great Belt is a strait used for international navigation, that there is a right of free passage through the Great Belt, governed by the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and that in this respect account has also to be taken of customary international law and of the transit passage régime of the 1982 United Nations Convention on the Law of the Sea, and that the right of free passage through the Great Belt extends to drill ships and oil rigs and to ships of reasonably foreseeable design;

6. Whereas Finland in its Application therefore asks 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”;

7. Whereas by a request dated 22 May 1991, and filed in the Registry on 23 May 1991, the Republic of Finland, relying on Article 41 of the Statute of the Court and Article 73 of the Rules of Court, 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; and
- (2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings”;

8. Whereas on 17 May 1991 the Registrar transmitted a copy of the Application to the Government of Denmark and on 23 May 1991 the Registrar notified Denmark of the filing of the request for provisional measures;

9. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the Application were transmitted to the Members of the United Nations through the Secretary-General and to other States entitled to appear before the Court;

10. Whereas inasmuch as the Court does not include upon the bench a judge of the nationality of either of the Parties, the Government of Denmark has chosen Mr. Paul Fischer, and the Government of Finland Mr. Bengt Broms, to sit as judges *ad hoc* in this case;

11. Whereas written observations by Denmark on the request for provisional measures were filed in the Registry on 28 June 1991, and whereas the submissions therein, which were repeated at the close of the hearings, were as follows:

“The Government of Denmark requests 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";

12. Whereas oral observations of the Parties on the request were presented, at public hearings held, pursuant to Article 74, paragraph 3, of the Rules of Court, from 1 to 5 July 1991, by the following representatives:

on behalf of the Republic of Finland:

H.E. Mr. Tom Grönberg, *Agent*,
Mr. Martti Koskenniemi, *Co-Agent*,
Sir Ian Sinclair, Q.C.,
Mr. Tullio Treves;

on behalf of the Kingdom of Denmark:

H.E. Mr. Tyge Lehmann,
Mr. Per Magid and
H.E. Mr. Per Fergo, *Agents*,
Mr. Niels Jorgen Gimsing,
Mr. Eduardo Jiménez de Aréchaga,
Mr. Derek Bowett, Q.C.;

and replies were given by the Parties to questions put by Members of the Court during the hearings;

* *

13. Whereas the Republic of Finland claims to found the jurisdiction of the Court to entertain the present case primarily upon declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court; and whereas such declarations were deposited with the Secretary-General of the United Nations, by the Kingdom of Denmark on 10 December 1956, without reservations, and by the Republic of Finland on 25 June 1958, incorporating a reservation not material to the present case;

14. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such 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; whereas in the present case it has been stated by Denmark that the Court's jurisdiction on the merits is not in dispute;

15. Whereas the Court in the circumstances of the present case is satisfied that it has the power to indicate provisional measures;

*

16. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings;

17. Whereas the right which Finland submits is entitled to protection by the indication of provisional measures is the right of passage through the Great Belt of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards, the right of passage of “reasonably foreseeable ships”, also asserted in the Application, not being the subject of a request for provisional measures;

18. Whereas the Court is informed that there are four routes available to ship traffic to and from the Baltic, namely the Sound (Öresund) between Sweden and the Danish island of Zealand, the Great Belt (Storebælt) between the Danish islands of Zealand and Funen, the Little Belt (Lillebælt) between the island of Funen and the peninsula of Jutland, and the Kiel Canal; whereas the Little Belt and the Kiel Canal are crossed by bridges considerably lower than that planned for the East Channel of the Great Belt, while the Great Belt and the Sound have up to the present not been bridged; whereas the reason why, according to Finland, the Great Belt permits passage of vessels which cannot use the Sound is that the minimum water-depth of the “T-Channel” of the Great Belt is 17 metres while that of the Sound is less than 8 metres;

19. Whereas the particular importance to Finland of the right which it claims lies in the fact that, according to Finland, the East Channel of the Great Belt is, for certain vessels, including some drill ships and oil rigs, the only passage-way they can use when communicating to and from the Baltic; whereas Finland claims that completion of the Danish Great Belt project in its presently planned form would irreparably prejudice the right of free passage claimed by Finland in these proceedings by preventing the passage of vessels, including drill ships and oil rigs, exceeding 65 metres in height;

20. Whereas it is not disputed by Denmark that completion of its project for a fixed link across the Great Belt would prevent passage through that Strait of any vessel requiring greater clearance than that to be afforded by the East Channel Bridge, i.e., 65 metres above mean sea level (the projected road and rail bridge over the shallower West Channel having a navigational clearance of only 18 metres);

21. Whereas Denmark contends that for provisional measures to be granted it is essential that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success in the main case exists, and that not even a *prima facie* case exists in favour of the Finnish contention; whereas 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; whereas Finland argues that the Court may not enter into the merits of a particular case at the stage of deciding whether or not to indicate provisional measures, but denies in any event that Finland's case could be considered as *prima facie* unfounded;

22. Whereas it is the purpose of provisional measures to preserve "rights which are the subject of dispute in judicial proceedings" (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19, para. 36; see also *Frontier Dispute, I.C.J. Reports 1986*, p. 8, para. 13); whereas the Court 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 the nature and extent of that right, including its applicability to certain drill ships and oil rigs; whereas such a disputed right may be protected by the indication of provisional measures under Article 41 of the Statute if the Court "considers that circumstances so require";

*

23. Whereas provisional measures under Article 41 of the Statute are indicated "pending the final decision" of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given;

24. Whereas it is stated by Denmark, and not contested by Finland, that, 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", when cable works for that bridge are due to be initiated; and whereas Denmark contends (*inter alia*) that by that time the case could have been finally decided by the Court, so that no indication of provisional measures is required;

25. Whereas Denmark contends that there is no urgency justifying the indication of provisional measures also on the ground that the construction of the East Channel Bridge will hardly represent any practical hindrance for the passing of drill ships and oil rigs through the Danish Straits, inasmuch as most of the units in question (drill ships and jack-ups) will be able to pass through the Sound without technical alterations (in the

case of jack-ups, by being towed) and the remainder (semi-submersible drilling units) will be able to pass under the planned East Channel Bridge if part of the drilling tower (derrick) is left unassembled until after passage of the bridge; whereas these contentions are not accepted by Finland, which asserts that for a number of the units constructed since 1972 by a Finnish company, Rauma-Repola Offshore Oy, and a number of those currently tendered for by that company, the Great Belt has been or will be the only practicable passage-way to and from the Baltic;

26. Whereas it appears to the Court 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; whereas the Court 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; whereas accordingly 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 in the present proceedings, this might justify the indication of provisional measures;

27. Whereas 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;

*

28. Whereas Finland claims moreover not only that continuation of the Danish project as planned will cause irreparable damage to the right of passage claimed by Finland but that the project is already causing such damage to tangible economic interests inasmuch as Finnish shipyards can no longer fully participate in tenders regarding vessels, including drill ships and oil rigs, 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 in its present form is having and will continue to have a negative effect on the behaviour of potential customers of those shipyards;

29. Whereas however evidence has not been adduced of any invitations to tender for drill ships and oil rigs which would require passage out of the

Baltic after 1994, nor has it been shown that the decline in orders to the Finnish shipyards for the construction of drill ships and oil rigs is attributable to the existence of the Great Belt project; whereas accordingly proof of the damage alleged has not been supplied;

*

30. Whereas Finland contends further that the completion of the East Channel Bridge will be only the final step in a continuous process in which Finnish rights are already being irreparably harmed; whereas Finland observes that the interrelation 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 so as to enable effect to be given to a judgment of the Court in Finland's favour on the merits, and in this connection has drawn attention to the fact that, according to Denmark, tender offers for the construction of the East Channel Bridge expire on 18 August 1991; whereas Finland 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;

31. Whereas it has been argued on behalf of Denmark in the course of the proceedings on the request for provisional measures 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; whereas the Court is not at present called upon to determine the character of any decision which it might make on the merits; whereas in principle however 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;

32. Whereas 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" (*Legal Status of the South-Eastern Territory of Greenland, P.C.I.J., Series A/B, No. 48, p. 287*), and such action cannot improve its legal position vis-à-vis that other State;

33. Whereas it is for Denmark, which is informed of the nature of Finland's claim, to consider the impact which a judgment upholding it 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;

34. Whereas likewise it is for Finland, which is informed of the Great Belt project, 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 that construction of the East Channel Bridge with a clearance of 65 metres would not infringe any right appertaining to Finland;

35. Whereas, as the Permanent Court of International Justice observed, and the present Court has reiterated,

“the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . .” (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 22, p. 13*; see also *Frontier Dispute, I.C.J. Reports 1986, p. 577, para. 46*);

whereas, 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;

36. Whereas it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; whereas 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;

*

37. Whereas the decision given in the present proceedings in no way prejudices any question relating to the merits of the case, and leaves unaffected the right of the Governments of the Republic of Finland and the Kingdom of Denmark to submit arguments in respect thereof;

* *

38. For these reasons,

THE COURT,

Unanimously,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of July, one thousand

nine hundred and ninety-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Finland and the Government of the Kingdom of Denmark, respectively.

(Signed) R. Y. JENNINGS,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge TARASSOV appends a declaration to the Order of the Court.

Vice-President ODA, Judge SHAHABUDEEN and Judge *ad hoc* BROMS append separate opinions to the Order of the Court.

(Initialed) R.Y.J.

(Initialed) E.V.O.
