8 OCTOBER 2003

ORDER

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (MALAYSIA *v.* SINGAPORE)

PROVISIONAL MEASURES

AFFAIRE RELATIVE AUX TRAVAUX DE POLDERISATION PAR SINGAPOUR À L'INTÉRIEUR ET À PROXIMITÉ DU DÉTROIT DE JOHOR (MALAISIE c. SINGAPOUR)

MESURES CONSERVATOIRES

8 OCTOBRE 2003

ORDONNANCE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2003

8 October 2003

List of Cases:
No. 12

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR

(MALAYSIA *v.* SINGAPORE)

Request for provisional measures

ORDER

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT, LUCKY; *Judges* ad hoc HOSSAIN, OXMAN; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the fact that Malaysia and Singapore have not made written declarations in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and Statement of Claim submitted by Malaysia to Singapore on 4 July 2003 instituting arbitral proceedings as provided for in Annex VII to the

Convention in a dispute concerning land reclamation by Singapore in and around the Straits of Johor,

Having regard to the Request for provisional measures submitted by Malaysia to Singapore on 4 July 2003 pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Having regard to the Request submitted by Malaysia to the Tribunal on 5 September 2003 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Makes the following Order:

1. *Whereas* Malaysia and Singapore are States Parties to the Convention;

2. *Whereas*, on 5 September 2003, Malaysia filed with the Registry of the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in a dispute concerning land reclamation by Singapore in and around the Straits of Johor;

3. *Whereas* a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Law and Foreign Affairs of Singapore, and also in care of the Ambassador of Singapore to Germany on that same day;

4. *Whereas*, on 5 September 2003, the Registrar was notified of the appointment of Mr Ahmad Fuzi Haji Abdul Razak, Secretary General of the Ministry of Foreign Affairs, as Agent for Malaysia, and Mr Kamal Ismaun, Ambassador of Malaysia to Germany, as Co-Agent for Malaysia;

5. *Whereas*, on 6 September 2003, the Registrar was notified of the appointment of Mr Tommy Koh, Ambassador-At-Large, Ministry of Foreign Affairs, as Agent for Singapore, and Mr A. Selverajah, Ambassador of Singapore to Germany, as Co-Agent for Singapore;

6. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the Tribunal, by Order dated 10 September 2003, fixed 25 September 2003 as the date for the opening of the hearing, notice of which was communicated forthwith to the parties;

7. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of the parties and, pursuant to article 17, paragraph 3, of the Statute, Malaysia has chosen Mr Kamal Hossain and Singapore has chosen Mr Bernard H. Oxman to sit as judges *ad hoc* in this case;

8. *Whereas*, since no objection to the choice of Mr Hossain as judge *ad hoc* was raised by Singapore, and no objection to the choice of Mr Oxman as judge *ad hoc* was raised by Malaysia, and no objections appeared to the Tribunal itself, Mr Hossain and Mr Oxman were admitted to participate in the proceedings as judges *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 24 September 2003;

9. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 5 September 2003 of the Request, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 11 September 2003;

10. *Whereas*, on 16 September 2003, the President, by teleconference with the Agents of the parties, ascertained the views of the parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

11. *Whereas*, on 20 September 2003, Singapore filed with the Registry by bearer its Response, a certified copy of which was transmitted by bearer to the Agent of Malaysia on the same day;

12. *Whereas*, on 12 September 2003, the Registrar sent a letter to the Agent of Malaysia requesting the completion of documentation and Malaysia submitted the requested documents on 22 September 2003;

13. *Whereas*, on 23 September 2003, Malaysia submitted information regarding an expert to be called by it before the Tribunal pursuant to article 72 of the Rules;

14. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 24 September 2003 concerning the written pleadings and the conduct of the case;

15. *Whereas*, on 24 September 2003, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal;

16. *Whereas*, on 24 and 25 September 2003, the President held consultations with the Agents of the parties regarding the procedure for the hearing in accordance with article 45 of the Rules;

17. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

18. *Whereas* oral statements were presented at five public sittings held on 25, 26 and 27 September 2003 by the following:

On behalf of Malaysia: Mr Ahmad Fuzi Haji Abdul Razak, Secretary General of the Ministry of Foreign Affairs,
as Agent,

Mr Abdul Gani Patail, Attorney General,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, United Kingdom,

Mr James Crawford S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, United Kingdom,

Mr Nico Schrijver, Professor of International Law, Free University Amsterdam and Institute of Social Studies, Netherlands,

as Counsel and Advocates,

Ms Sharifah Mastura Syed Abdullah, Professor in Geomorphology, Universiti Kebangsaan Malaysia,

as Technical Expert;

On behalf of Singapore: Mr Tommy Koh, Ambassador-At-Large,
Ministry of Foreign Affairs,
as Agent,

Mr Sek Keong Chan, Attorney-General,

Mr Vaughan Lowe, Chichele Professor of Public International Law, University of Oxford, United Kingdom,

Mr Michael Reisman, Myres S. McDougal Professor of Law, Yale Law School, United States of America,

as Counsel and Advocates,

Ms Koon Hean Cheong, Second Deputy Secretary, Ministry of National Development,

as Advocate;

19. *Whereas*, in the course of the oral proceedings, a number of documents, including maps, tables, graphs, photographs, a digital video and extracts from documents, were displayed on video monitors;

20. *Whereas*, on 25 September 2003, pursuant to consultations held on that day between the President and the Agents of the parties, Ms Sharifah Mastura Syed Abdullah, Professor in Geomorphology at Universiti Kebangsaan Malaysia, made a statement as a member of the delegation of Malaysia, and then, after having made the solemn declaration under article 79, subparagraph (b), of the Rules, was examined as an expert by Mr Reisman;

21. *Whereas*, on 25 September 2003, Mr Roger A. Falconer, Professor of Water Management at Cardiff University, United Kingdom, was called as an expert by Malaysia, and, after having made the solemn declaration under article 79, subparagraph (b), of the Rules, was examined by Mr Crawford, cross-examined by Mr Lowe, and re-examined by Mr Crawford;

22. *Whereas*, in the Notification and Statement of Claim of 4 July 2003, Malaysia requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the Annex VII arbitral tribunal"):

(1) to delimit the boundary between the territorial waters of the two States in the area beyond Points W25 and E47 of the 1995 Agreement;

(2) to declare that Singapore has breached its obligations under the 1982 Convention and under general international law by the initiation and continuation of its land reclamation activities without due notification and full consultation with Malaysia;

(3) to decide that, as a consequence of the aforesaid breaches, Singapore shall:

(a) cease its current land reclamation activities in any area forming part of Malaysian waters, and restore those areas to the situation they were in before the works were commenced;

(b) suspend its current land reclamation activities until it has conducted and published an adequate assessment of their potential effects on the environment and on the affected coastal areas, taking into account representations made by affected parties;

(c) as an aspect of this assessment process:

(i) provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);

(ii) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided, and

(iii) negotiate with Malaysia concerning any remaining unresolved issues;

(d) in the light of the assessment and of the required processes of consultation and negotiation with Malaysia, revise its reclamation plans so as to minimise or avoid the risks or effects of pollution or of other significant effects of those works on the marine environment (including excessive sedimentation, bed level changes and coastal erosion);

(e) provide adequate and timely information to Malaysia of projected bridges or other works tending to restrict maritime access to coastal areas and port facilities in the Straits of Johor, and take into account any representations of Malaysia so as to ensure that rights of maritime transit and access under international law are not impeded;

(f) to the extent that – notwithstanding the above measures – Malaysia, or persons or entities in Malaysia, are injuriously affected by the reclamation activities, provide full compensation for such injury, the amount of such compensation (if not previously agreed between the parties) to be determined by the Tribunal in the course of the proceedings;

23. *Whereas* the provisional measures requested by Malaysia in the Request to the Tribunal filed on 5 September 2003, and maintained in the final submissions read by the Agent of Malaysia at the public sitting held on 27 September 2003, are as follows:

(a) that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas);

(b) to the extent it has not already done so, provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);

(c) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and

(d) agree to negotiate with Malaysia concerning any remaining unresolved issues;

24. *Whereas* the submissions presented by Singapore in its Response, and maintained in the final submissions read by the Agent of Singapore at the public sitting held on 27 September 2003, are as follows:

Singapore requests the International Tribunal for the Law of the Sea to:

(a) dismiss Malaysia's Request for provisional measures; and

(b) order Malaysia to bear the costs incurred by Singapore in these proceedings;

25. *Considering* that, in accordance with article 287 of the Convention, Malaysia has, on 4 July 2003, instituted proceedings under Annex VII to the Convention against Singapore in the dispute concerning land reclamation by Singapore in and around the Straits of Johor;

26. *Considering* that Malaysia sent the notification instituting proceedings under Annex VII to the Convention to Singapore on 4 July 2003, together with a Request for provisional measures;

27. *Considering* that, on 5 September 2003, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Malaysia submitted to the Tribunal a Request for the prescription of provisional measures;

28. *Considering* that neither Malaysia nor Singapore has made a written declaration in accordance with article 298 of the Convention that it does not accept any of the procedures provided for in Part XV, section 2, of the Convention with respect to the disputes specified in that article;

29. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

30. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

31. *Considering* that Malaysia maintains that the dispute with Singapore concerns the interpretation and application of certain provisions of the Convention, including, in particular, articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206, 210 and, in relation thereto, article 300 of the Convention;

32. *Considering* that Malaysia has invoked as the basis of jurisdiction of the Annex VII arbitral tribunal article 288, paragraph 1, of the Convention, which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

33. *Considering* that Singapore contends that the requirements of article 283 of the Convention have not been satisfied since, in its view, there has been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means;

34. *Considering* that Singapore maintains further that negotiations between the parties, which article 283 of the Convention makes a precondition to the activation of Part XV compulsory dispute settlement procedures, have not taken place;

35. *Considerin*g that article 283, paragraph 1, of the Convention reads as follows:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

36. C*onsidering* that article 283 of the Convention applies "when a dispute arises" and that there is no controversy between the parties that a dispute exists;

37. *Considering* that article 283 of the Convention only requires an expeditious exchange of views regarding the settlement of the dispute "by negotiation or other peaceful means";

38. *Considering* that the obligation to "proceed expeditiously to an exchange of views" applies equally to both parties to the dispute;

39. *Considering* that Malaysia states that, on several occasions prior to the institution of proceedings under Annex VII to the Convention by Malaysia on 4 July 2003, it had in diplomatic notes informed Singapore of its concerns about Singapore's land reclamation in the Straits of Johor and had requested that a meeting of senior officials of the two countries be held on an urgent basis to discuss these concerns with a view to amicably resolving the dispute;

40. *Considering* that Malaysia maintains that Singapore had categorically rejected its claims and had stated that a meeting of senior officials as requested by Malaysia would only be useful if the Government of Malaysia could provide new facts or arguments to prove its contentions;

41. *Considering* that Singapore maintains that it had consistently informed Malaysia that it was prepared to negotiate as soon as Malaysia's concerns had been specified and that Malaysia had undertaken to supply reports and studies detailing its specific concerns but did not do so prior to 4 July 2003;

42. *Considering* that Singapore states that, after receiving the Notification and Statement of Claim submitted by Malaysia on 4 July 2003 instituting arbitral proceedings in accordance with Annex VII to the Convention, Malaysia and Singapore agreed to meet in Singapore on 13 and 14 August 2003 to discuss the issues with a view to resolving them amicably;

43. *Considering* that Singapore maintains that Malaysia abruptly broke off the negotiation process of 13 and 14 August 2003 by insisting on the immediate suspension of the reclamation works as a precondition for further talks;

44. *Considering* that Malaysia stated that a further exchange of views could not be expected while the reclamation works were continuing;

45. *Considering* that Malaysia stated further that a party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted;

46. *Considering* that in fact the parties were not able to settle the dispute or agree on a means to settle it;

47. *Considering* that the Tribunal has held that "a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted" (*Southern Bluefin Tuna Cases*, Order of 27 August 1999, paragraph 60), and that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted " (*The MOX Plant Case*, Order of 3 December 2001, paragraph 60);

48. *Considering* that, in the view of the Tribunal, in the circumstances of the present case Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result;

49. *Considering* that the discussions held between the parties on 13 and 14 August 2003 were conducted, by agreement of the two parties, without prejudice to Malaysia's right to proceed with the arbitration pursuant to Annex VII to the Convention or to request the Tribunal to prescribe provisional measures in connection with the dispute;

50. *Considering* that these discussions were held after Malaysia had instituted proceedings before the Annex VII arbitral tribunal on 4 July 2003 and, accordingly, the decision of Malaysia to discontinue the discussions does not have a bearing on the applicability of article 283 of the Convention;

51. *Considering* that, in the view of the Tribunal, the requirement of article 283 is satisfied;

52. *Considering* that, as stated by the International Court of Justice, "[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court" (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303);

53. *Considering* that Singapore maintains that, after its invitation to Malaysia to resolve the differences between them was accepted by Malaysia and meetings took place in Singapore on 13 and 14 August 2003, a consensual process of negotiation had commenced and, as a legal consequence, both States had embarked upon a course of negotiation under article 281 of the Convention in an effort to arrive at an amicable solution of the dispute between them;

54. *Considering* that article 281 of the Convention reads as follows:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the

> procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit;

55. *Considering* that Malaysia accepted the invitation to the meetings of 13 and 14 August 2003 after it had already instituted proceedings under Annex VII to the Convention;

56. *Considering* that both Malaysia and Singapore agreed that this meeting and subsequent meetings would be without prejudice to Malaysia's right to proceed with the arbitration pursuant to Annex VII to the Convention or to request this Tribunal to prescribe provisional measures;

57. *Considering*, therefore, that, in the view of the Tribunal, article 281 of the Convention is not applicable in the circumstances of this case;

58. *Considering* that no other objection to jurisdiction has been raised by Singapore;

59. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

60. *Considering* that Singapore contends that Malaysia's Request (for the prescription of provisional measures) is inadmissible because it "does not 'specify … the possible consequences … for the preservation of the respective rights of the parties or for the [prevention] of serious harm to the marine environment', as required by Article 89(3) of the ITLOS Rules"; and further that the Request does not identify " 'the urgency of the situation' as required by Article 89(4) of the ITLOS Rules";

61. *Considering* that, in its Request for provisional measures of 5 September 2003, Malaysia stated that the rights which it seeks to preserve by the grant of provisional measures are those relating to the preservation of the marine and coastal environment and the preservation of its rights to maritime access to its coastline, in particular via the eastern entrance of the Straits of Johor, and claimed that these rights are guaranteed by the provisions of the Convention which it specified in the Request;

62. *Considering* that Malaysia states that in the context of the diplomatic correspondence and during the bilateral consultations it has time and again specified which of its rights are at stake and what is their basis in law;

63. *Considering* that, in the view of the Tribunal, the Request of Malaysia has fulfilled the requirements of article 89, paragraphs 3 and 4, of the Rules and therefore the Request is admissible;

64. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

65. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

66. *Considering* that Singapore contends that, as the Annex VII arbitral tribunal is to be constituted not later than 9 October 2003, there is no need to prescribe provisional measures given the short period of time remaining before that date;

67. *Considering* that, under article 290, paragraph 5, of the Convention, the Tribunal is competent to prescribe provisional measures prior to the constitution of the Annex VII arbitral tribunal, and that there is nothing in article 290 of the Convention to suggest that the measures prescribed by the Tribunal must be confined to that period;

68. *Considering* that the said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures";

69. *Considering* further that the provisional measures prescribed by the Tribunal may remain applicable beyond that period;

70. *Considering* that Malaysia alleges that, contrary to articles 2 and 15 of the Convention, Singapore has impinged on areas of Malaysia's territorial sea by its land reclamation works in the sector of Tuas, in the vicinity of Point 20, and that, for that reason, the Tribunal should prescribe the suspension of the said land reclamation works in that sector;

71. *Considering* that the existence of a claim to an area of territorial sea is not, *per se*, a sufficient basis for the prescription of provisional measures under article 290, paragraph 5, of the Convention;

72. *Considering* that, in the view of the Tribunal, the evidence presented by Malaysia does not show that there is a situation of urgency or that there is a risk that the rights it claims with respect to an area of territorial sea would suffer irreversible damage pending consideration of the merits of the case by the Annex VII arbitral tribunal;

73. *Considering* that the Tribunal, therefore, does not consider it appropriate in the circumstances to prescribe provisional measures with respect to the land reclamation by Singapore in the sector of Tuas;

74. *Considering* that Malaysia has further argued that Singapore has placed itself in breach of its obligations under international law, specifically under articles 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the Convention, and in relation thereto, article 300 of the Convention and the precautionary principle, which under international law must direct any party in the application and implementation of those obligations;

75. *Considering* that Singapore submits that in the present situation there is no room for applying the precautionary principle for the prescription of provisional measures;

76. *Considering* that, at a public sitting held on 26 September 2003, Singapore, in response to Malaysia's second requested measure, cited in paragraph 23(b) above, stated that it had already given an explicit offer to share the information that Malaysia requested in reliance on its rights under the Convention and that this offer had been made in Singapore's Note dated 17 July 2003 and its letter of 21 August 2003;

77. *Considering* that at the same sitting, in response to Malaysia's third requested measure, cited in paragraph 23(c) above, Singapore expressly stated that it would give Malaysia a full opportunity to comment on the reclamation works and their potential impacts, and that it would notify and consult Malaysia before it proceeded to construct any transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore if such links could affect Malaysia's rights of passage;

78. *Considering* that, at the same sitting, in response to Malaysia's fourth requested measure, cited in paragraph 23(d) above, Singapore declared that it had expressly stated its readiness and willingness to enter into negotiations and that it remained ready and willing to do so;

79. *Considering* that, at the public sitting held on 27 September 2003, Malaysia stated that during the hearing, Singapore had provided some further clarifications on the three requested measures, cited in paragraph 23(b), (c) and (d) above, and that, in the light of this new information, Malaysia would be prepared to accept these assurances if the Tribunal made them a matter of formal judicial record;

80. *Considering* that Malaysia stated that there had been an acceleration of work around Pulau Tekong and that Singapore had solemnly assured the Tribunal that it had not been and was not accelerating its works;

81. *Considering* that the Tribunal places on record the assurances given by Singapore as specified in paragraphs 76 to 80;

82. *Considering* that Malaysia, in the first measure cited in paragraph 23(a) above, requests that Singapore shall, pending the decision of the Annex VII arbitral tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial sea by Malaysia (and specifically around Pulau Tekong and Tuas);

83. *Considering* that, at the public sitting held on 27 September 2003, Malaysia stated that it accepts the importance of land reclamation and does not claim a veto over Singapore's activities;

84. *Considering* that, at the same public sitting, Malaysia stressed, however, that infilling works in Area D at Pulau Tekong was of primary concern and that if Singapore were to give clear undertakings to the Tribunal that no effort would be made to infill Area D pending the decision of the Annex VII arbitral tribunal, and if these undertakings were likewise made a matter of formal judicial record, Malaysia's concerns would be significantly reduced;

85. *Considering* that, in response to Malaysia's first requested measure, as cited in paragraph 23(a) above, the Agent of Singapore, at the public sitting on 27 September 2003,

read out a "commitment" that the Government of Singapore had already made in its Note of 2 September 2003, as follows:

> If, after having considered the material [that is to say the material we have provided Malaysia with] Malaysia believes that Singapore had missed some point or misinterpreted some data and can point to a specific and unlawful adverse effect that would be avoided by suspending some part of the present works, Singapore would carefully study Malaysia's evidence. If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, [and I emphasize that] to deal with the adverse effect in question;

86. *Considering* that Singapore accepted the proposal that Malaysia and Singapore jointly sponsor and fund a scientific study by independent experts on terms of reference to be agreed by the two sides;

87. *Considering* that, when presenting its final submissions during the public sitting held on 27 September 2003, the Agent of Singapore stated:

> Concerning Malaysia's first [requested measure] for Singapore to stop its reclamation works immediately, which was modified by the Malaysian Agent this morning, ... Singapore is pleased to inform the Tribunal that regarding Area D, no irreversible action will be taken by Singapore to construct the stone revetment around Area D pending the completion of the joint study, which should be completed within a year;

88. *Considering* that the Tribunal places on record the commitments referred to in paragraphs 85 to 87;

89. *Considering* that the Agent of Singapore stated that:

> none of the above agreements affect[s] the rights of both Malaysia and Singapore to continue our reclamation works, which, however, must be conducted in accordance with international best practice and the rights and obligations of both parties under international law;

90. *Considering* that, having regard to the obligation of the parties not to aggravate the dispute pending its settlement, the parties have the obligation not to create an irremediable situation and in particular not to frustrate the purpose of the study to be undertaken by a group of independent experts;

91. *Considering* that Malaysia and Singapore share the same marine environment in and around the Straits of Johor;

92. *Considering* that, as this Tribunal has stated:

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the

Tribunal may consider appropriate to preserve under article 290 of the Convention (*The MOX Plant Case*, Order of 3 December 2001, paragraph 82);

93. *Considering* that Malaysia claims that Singapore, by initiating and carrying on major reclamation works in the areas concerned, has affected Malaysia's rights to the natural resources within its territorial sea and violated its rights to the integrity of the marine environment in those areas;

94. *Considering* that Singapore maintains that the land reclamation works have not caused any significant impact on Malaysia and that the necessary steps were taken to examine possible adverse impacts on the surrounding waters;

95. *Considering* that an assessment concerning the impact of the land reclamation works on waters under the jurisdiction of Malaysia has not been undertaken by Singapore;

96. *Considering* that it cannot be excluded that, in the particular circumstances of this case, the land reclamation works may have adverse effects on the marine environment;

97. *Considering* that, in the view of the Tribunal, the record of this case shows that there was insufficient cooperation between the parties up to the submission of the Statement of Claim on 4 July 2003;

98. *Considering* that the last public sitting of the hearing showed a change in the attitude of the parties resulting in the commitments which the Tribunal has put on record, and that it is urgent to build on the commitments made to ensure prompt and effective cooperation of the parties in the implementation of their commitments;

99. *Considering* that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned;

100. *Considering* that Malaysia and Singapore shall ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render;

101. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

102. *Considering* that Malaysia and Singapore should each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal;

103. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is requested to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

104. *Considering* that, in the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that parties submit reports to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise;

105. *Considering* that, in the present case, the Tribunal sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

106. *For these reasons,*

THE TRIBUNAL,

1. Unanimously,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

> Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:
>
> (a) establish promptly a group of independent experts with the mandate
>
> (i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation;
>
> (ii) to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong;
>
> (b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;
>
> (c) implement the commitments noted in this Order and avoid any action incompatible with their effective implementation, and, without prejudice to their positions on any issue before the Annex VII arbitral tribunal, consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong, including suspension or adjustment, as may be found necessary to ensure that the infilling operations pending completion of the study referred to in subparagraph (a)(i) with respect to that area do not prejudice Singapore's ability to implement the commitments referred to in paragraphs 85 to 87.

2. Unanimously,

Directs Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.

3. Unanimously,

Decides that Malaysia and Singapore shall each submit the initial report referred to in article 95, paragraph 1, of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise.

4. Unanimously,

Decides that each party shall bear its own costs.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this eighth day of October, two thousand and three, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Malaysia and the Government of Singapore, respectively.

(signed) L. DOLLIVER M. NELSON,
President.

(signed) PHILIPPE GAUTIER,
Registrar.

President NELSON and Judge ANDERSON append declarations to the Order of the Tribunal.

Judges *ad hoc* HOSSAIN and OXMAN append a joint declaration to the Order of the Tribunal.

Judges CHANDRASEKHARA RAO, NDIAYE, JESUS, COT and LUCKY append separate opinions to the Order of the Tribunal.

DECLARATION OF PRESIDENT NELSON

1. I have voted for the Order but I wish to make some brief observations.

2. At the oral pleadings which took place on 27 September 2003, Singapore read out a "commitment" that the Government of Singapore had already made in its note of 2 September 2003 to Malaysia, which reads as follows:

> If, after having considered the material [that is to say the material we have provided Malaysia with] Malaysia believes that Singapore had missed some point or misinterpreted some data and can point to a specific and unlawful adverse effect that would be avoided by suspending some part of the present works, Singapore would carefully study Malaysia's evidence. If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, [and I emphasize that] to deal with the adverse effect in question (paragraph 85 of the Order).

3. This is an important "commitment" on the part of Singapore. Singapore has publicly declared that it was prepared, in the light of the evidence, to "seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, to deal with the adverse effect in question". Singapore expressly underlined the word "suspension".

4. The Order of the Tribunal to my mind seems to run the risk of prescribing certain provisional measures which the Respondent – Singapore – has already pledged itself to undertake. In this sense the argument may be made that the Tribunal has failed to take into account an important principle of law that good faith is to be presumed (see *Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 43).

5. In this context the apt words of the Arbitral Tribunal in the Lac Lanoux Arbitration should also be recalled:

> ll ne saurait être allégué que, malgré cet engagement [l'assurance que le Gouvernement français ne portera, en aucun cas, atteinte au régime ainsi établi], l'Espagne n'aurait pas une garantie suffisante, car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas. (*Affaire du Lac Lanoux, RSA*, vol. XII, p. 305)

> It cannot be alleged that, despite this pledge [the assurance that in no case will the French Government impair the regime thus established], Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. (*Lake Lanoux Arbitration* (France *v.* Spain), 1957, *ILR*, vol. 24, p. 126; see also *Tacna-Arica, RIAA*, vol. II, pp. 929-930)

6. It may be contended that the Tribunal seems to have disregarded this cardinal principle by prescribing measures which may have been sufficiently covered by the assurances that Singapore had already given. It has to be necessarily presumed that Singapore would fulfil its commitments.

7. The Tribunal has once again rightly stressed the fundamental role and central importance of cooperation in the protection and preservation of the marine environment. With this I am in complete agreement.

(signed) L. Dolliver M. Nelson

DECLARATION OF JUDGE ANDERSON

1. I have voted in favour of the Order since I agree with its broad aim to improve cooperation in regard to the preservation of the marine environment of the Straits of Johore, the very narrow waters separating the parties, pending a decision of the arbitral tribunal. At the same time, I retain some doubts on one important issue, hence this brief declaration.

2. The issue is whether or not there exists at present an urgent requirement to prescribe, in accordance with article 290, paragraph 5, of the Convention, the measures contained in the Order. In international litigation, it is accepted that the prescription of a provisional measure is the exception, rather than the rule;[1] and that the burden is upon the Applicant to show that the necessary pre-conditions, including urgency, are satisfied.[2]

3. In this case, the particular "urgency" found to exist in paragraph 98 of the Order is "to build on the commitments made to ensure prompt and effective cooperation of the parties in the implementation of their commitments." This urgency appears to me to be less than self-evident. The existence of any *requirement* for the Tribunal to prescribe some measure(s) *pendente lite* is left unstated in paragraph 98. Now, in applying the terms of article 290, paragraph 5, "the urgency of the situation" falls to be assessed at the time when the Order is made and taking into account all the circumstances which then prevail, including therefore the commitments made by the parties before the Tribunal. These commitments form part of the situation prevailing at the time of making the Order. Moreover, the parties must be expected to carry out or implement their commitments in good faith. After all, good faith is to be presumed in litigation, just as in diplomatic relations in accordance with the principles of the United Nations Charter. Finally, in "building on" the commitments pursuant to paragraph 98, there may be a risk of duplicating obligations or using slightly different wording, thereby sowing the seeds of possible confusion.

4. In these circumstances, a more appropriate disposal of the Application, in my opinion, would have been an Order which simply recited the undertakings given by the Respondent, which called for the continuation and intensification of the cooperation shown by both parties since August 2003, and which also encouraged negotiation between them, but without prescribing any specific measures under article 290 of the Convention. Such an Order, following the pattern of that made by the International Court of Justice in the *Great Belt* case,[3] would have best suited the present situation in my opinion.

5. As I read the *dispositif* in this case, however, paragraph 1 prescribes no more than procedures for cooperation between the parties; paragraph 2 indicates a standard for the Respondent in conducting its land reclamation;[4] and paragraph 3 in effect "passes the baton" to the arbitral tribunal. In these circumstances, I was able to support what is intended to be constructive guidance to the parties, designed to preserve the marine environment, notwithstanding certain remaining doubts on my part as to the need to cast this guidance in a binding form and then to do so in such intricate detail. There is always the risk of

---

[1] Paragraph 32 of the Order of the International Court of Justice in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1976*, p. 3, at p. 11.
[2] Paragraph 29 of the Court's Order in the *Great Belt* case, *I.C.J. Reports 1991*, p. 12, at p. 18.
[3] *Ibid*., paragraph 38, at p. 20.
[4] In terms drawn from article 290 of the Convention and the Order of the ICJ in the *Nuclear Tests* case (Australia *v.* France), *I.C.J. Reports 1973*, p. 99, at p. 106.

unnecessarily duplicating legal obligations flowing from different sources, and there are also dangers in being overly prescriptive. Judicial caution is often appropriate.

****

6. Having had the advantage of reading in draft the Separate Opinion of Judge Chandrasekhara Rao, I wish to endorse his analysis.

(signed) David Anderson

JOINT DECLARATION OF JUDGES *AD HOC* HOSSAIN AND OXMAN

Our decisions to join in supporting the unanimous Order of the Tribunal are informed by a fundamental principle on which the Convention is built. The right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited. It is qualified by the duty to have due regard to the rights of other States and to the protection and preservation of the marine environment.

Nowhere is the importance of this principle more evident than in and around a narrow strait bordered by each party throughout its length. We discern in the final statements of both parties, in particular that Malaysia accepts the importance of land reclamation and does not claim a veto over Singapore's activities and that Singapore is prepared to make the specific commitments noted in the Order to accommodate Malaysia's concerns, a sincere effort by each party to apply this principle in the circumstances of this case.

What is most urgently required to protect the respective rights of the parties pending a decision by the Annex VII arbitral tribunal is the establishment of a joint process for addressing their most immediate concerns in this regard that builds on their respective statements and implements their duty to cooperate. Two elements are particularly important. The first is the establishment of a common base of information and evaluation regarding the effects of the land reclamation projects that can command the confidence of both parties. The second is the fact that the parties are expected to consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong, including suspension or adjustment, as may be found necessary to ensure that the infilling operations pending completion of the joint study with respect to that area do not prejudice Singapore's ability to implement its commitments.

In view of our appointment to the Annex VII arbitral tribunal, we note that our respective decisions to vote in favor of the Order in no way prejudge our respective conclusions on any question that may come before that tribunal, including the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any question relating to the admissibility of the claim or relating to the merits themselves.

(signed) Kamal Hossain

(signed) Bernard H. Oxman

SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. I have voted for the Order of the Tribunal, but would like to explain, in brief, my approach and reasoning with respect to the points of law involved in the present case.

I. *Prima facie* jurisdiction

2. Issue was joined by the parties on the question of *prima facie* jurisdiction of the Annex VII arbitral tribunal. Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), pursuant to which the present Malaysian Request for provisional measures was filed, provides, in its relevant part, that, pending the constitution of the Annex VII arbitral tribunal, the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") "may prescribe … provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires." The first issue, therefore, that arises for consideration is whether, in the opinion of the Tribunal, the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute in this case.

3. By virtue of article 286 of the Convention, the compulsory procedures entailing binding decisions set out in section 2 of Part XV of the Convention, of which article 290 is an integral part, may be invoked only where no settlement has been reached to a dispute concerning the interpretation or application of the Convention by recourse to section 1 of Part XV of the Convention. Singapore contends that Malaysia has not fulfilled its obligations under article 283, paragraph 1, which occurs in section 1 of Part XV of the Convention, and that, accordingly, a pre-condition to the activation of the compulsory dispute settlement procedures in section 2 of Part XV of the Convention is not satisfied.

4. Article 283, paragraph 1, of the Convention reads:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

5. It is fair to deduce from the records of the case that a dispute has arisen between Malaysia and Singapore over the effect of the latter's land reclamation upon the former's rights in and around the Straits of Johor. Malaysia claims that Singapore is in breach of its obligations under international law, and especially under articles 2, 15, 123,192, 194, 198, 200, 204, 205, 206 and 210 of the Convention, and in relation thereto article 300 of the Convention and the precautionary principle. Singapore denies that it is in breach of any of its obligations, as alleged. The records also show that there is a disagreement on points of fact as also a conflict of interests. That there is a dispute between Malaysia and Singapore is not denied even by Singapore.

6. Malaysia and Singapore, however, hold opposing views on the question of whether the requirement of article 283, paragraph 1, of the Convention that "the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" is satisfied.

7. In its Statement of Claim (paragraph 20) of 4 July 2003, Malaysia states:

> The correspondence demonstrates clearly the existence of a dispute between Malaysia and Singapore concerning the delimitation of territorial waters beyond the Straits of Johor and the impact of the land reclamation activities (at Tuas Reach, Pulau Ubin and Pulau Tekong) on Malaysian waters, coastlines and facilities and on the marine environment. It further demonstrates that the exchange of views embodied in this correspondence has not produced and cannot be expected to produce a settlement by negotiation. Indeed, Singapore refuses even to discuss the issues at stake. In theses circumstances there is no point in any further exchange of views between the two States.

8. Malaysia states that its repeated requests for a meeting of senior officials of the two countries on an urgent basis to discuss its concerns with a view to amicably resolving the issue were turned down by Singapore, stating that "a meeting will only be useful if the Government of Malaysia can provide new facts or arguments to prove its contentions", that Singapore thereby sought to be the judge of Malaysia's claims, and that Singapore failed to show willingness to cooperate and negotiate.

9. Following the submission of the Statement of Claim on 4 July 2003, there has been a further exchange of correspondence between the parties, which is set out as Annex B to Malaysia's Request for provisional measures. There has also been a further exchange of views between the parties at the Singapore meeting, held on 13 and 14 August 2003. Following this meeting, in a Note of 22 August 2003, Malaysia informed Singapore that:

> At the end of the meeting on 13-14 August, the delegation of Malaysia reserved its right to seek provisional measures from the International Tribunal for the Law of the Sea (ITLOS), and following that meeting the Government of Malaysia can see no alternative but to have recourse to ITLOS forthwith. Nonetheless, Malaysia is willing to make one further attempt to seek to resolve these issues by consultation. In order to do so, however, it is essential that Singapore agrees to postpone the continuation and completion of the reclamation works, in particular around Pulau Tekong. It is the firm view of the Ministry of Foreign Affairs that no meaningful negotiations concerning this matter can take place if at the same time Singapore is proceeding with all speed to complete the reclamation works, irrespective of their impacts upon Malaysia.

10. On the other hand, Singapore maintains that no substantive negotiations have taken place between the parties. It states that Malaysia filed its Statement of Claim suddenly, without first having given Singapore the opportunity to understand and address its specific concerns, and that Singapore sought particulars of Malaysia's complaints and that Malaysia had repeatedly stated that it would provide Singapore with the details of its complaints. It further points out that it was only on 4 July 2003 that Malaysia provided Singapore with the details of its concerns over the alleged adverse effects of Singapore's reclamation works, that on 17 July 2003 Singapore responded to Malaysia's concerns with substantial documentation relevant to Malaysia's expressed concerns, providing a comprehensive picture of its work projects and summaries of analyses, and expressing its willingness to engage in negotiations with Malaysia concerning any remaining unresolved issues, that the Singapore meeting was

the first occasion that the two sides had had to consider both Malaysia's concerns and Singapore's response, that this meeting had helped both Singapore and Malaysia to identify the issues that divided them as well as the issues on which their views converged, thus preparing the parties for the substantive stage of negotiations, and that Malaysia's concerns could "be accommodated through the process of negotiation". Singapore has further drawn attention to the following assurance it gave to Malaysia in its diplomatic note of 2 September 2003:

> If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, to deal with the adverse effect in question.

11. This then is the broad background for looking at the issue of obligations under article 283, paragraph 1, of the Convention. The requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.

12. The question of whether the requirements of article 283, paragraph 2, of the Convention are satisfied is to be seen as of 4 July 2003, i. e., the date on which Malaysia submitted its Statement of Claim. It is also worth noting that Malaysia took part in the Singapore meeting without prejudice to Malaysia's position as set out in its Statement of Claim (*vide* Note EC 75/2003 of the Malaysian Ministry of Foreign Affairs).

13. Malaysia states that, on the basis of diplomatic correspondence exchanged between the two parties between January 2002 and the submission of Malaysia's Statement of Claim, it came to the conclusion that the possibilities of reaching agreement through an exchange of views had been exhausted. The question to be asked is not whether this conclusion is the only one possible on the facts and in the circumstances of this case. Rather, the question is whether this conclusion can be said to have been based on irrelevant considerations or arrived at in bad faith. The answer appears to be in the negative. It is to be specially remembered that the Malaysian concerns primarily relate to allegations of environmental damage and that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law. This is all the more so in the case of States bordering a semi-enclosed sea. In view of the above it would have been more prudent if Singapore had agreed to Malaysia's request for a meeting of senior officials of the two countries. As held by the Tribunal in the *MOX Plant Case*, "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted". Accordingly it appears that the requirements of article 283, paragraph 1, of the Convention have *prima facie* been satisfied.

II. Provisional measures

A. Scope of article 290, paragraph 5

14. I shall turn now to the question of provisional measures, where the competence of the Tribunal to prescribe provisional measures under article 290, paragraph 5, of the Convention should not be viewed in isolation; it has to be seen in conjunction with article 290, paragraph 1, of the Convention. By virtue of article 290, paragraph 1, of the Convention, the court or the tribunal "may prescribe any provisional measures which it considers appropriate

under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."

15. In addition to the requirements of urgency imposed by article 290, paragraph 1, of the Convention, there is an additional requirement of urgency which needs to be satisfied if provisional measures are to be prescribed under article 290, paragraph 5, of the Convention, by virtue of which, pending the constitution of an arbitral tribunal to which a dispute is being submitted, the Tribunal may prescribe provisional measures if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction and that "the urgency of the situation so requires". It is obvious that the Tribunal's power to prescribe provisional measures may not be exercised after the arbitral tribunal is constituted. This is not the same thing as saying that any order that the Tribunal might make prescribing provisional measures will cease to be in force once the arbitral tribunal is constituted. That order may continue until such time as it is modified or revoked by the arbitral tribunal itself. In its Orders in the *Southern Bluefin Tuna Cases* and the *MOX Plant Case*, the Tribunal prescribed the provisional measures specified therein "pending a decision" by the Annex VII arbitral tribunal. In short, whereas under article 290, paragraph 1, of the Convention, the court or tribunal may prescribe provisional measures "pending the final decision", under article 290, paragraph 5, of the Convention, the Tribunal may prescribe such measures "pending a decision" of the arbitral tribunal. That said, what needs to be emphasized is that the power to prescribe under article 290, paragraph 5, of the Convention is further circumscribed by the requirement that it may be exercised only if the urgency of the situation is such that irreparable prejudice to the rights of the parties to the dispute or serious harm to the marine environment might occur even before the arbitral tribunal has had occasion to deal with the matter.

16. The phrase "the respective rights of the parties to the dispute" in article 290, paragraph 1, of the Convention is intended to signify that the rights to be protected are not only those of the party moving the court or tribunal but also of the opposite party. It is, therefore, imperative to ensure that the court or tribunal called upon to prescribe provisional measures takes account of the interests of both parties to the case.

B. Measures requested by Malaysia

17. The provisional measures requested by Malaysia are specified in its final submissions and they read as follows:

> Malaysia requests:
>
> (a) that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas);
>
> (b) to the extent it has not already done so, provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);

(c) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and

(d) agree to negotiate with Malaysia concerning any remaining unresolved issues.

C. Arguments of the parties

18. Malaysia contends that Singapore's land reclamation around Pulau Tekong and Tuas is causing and has the potential to cause serious and irreversible damage to the marine environment and serious prejudice to the rights of Malaysia. It is claimed that the land reclamation projects are intended to be permanent in character and that they involve a method of construction that is effectively irreversible. Malaysia has annexed to its Statement of Claim four reports to demonstrate that these projects are already causing and threaten to cause harm to the marine environment, producing major changes to the flow regime, changes in sedimentation, which especially in the eastern sector are much more likely to impact on Malaysia than on Singapore, and consequential effects in terms of coastal erosion. It is further claimed that impacts will also be felt in terms of navigation, the stability of jetties and other structures, especially at the Malaysian naval base of Pularek. Malaysia further states that the rights of Malaysia which it seeks to preserve by the grant of provisional measures are those relating to the maintenance of the marine and coastal environment and the preservation of its rights of maritime access to its coastline, in particular via the eastern entrance of the Straits of Johor.

19. Malaysia adds:

> Having regard to the extent of the reclamation works, in particular those in the vicinity of Pulau Tekong, it is impossible to assume that these would be without effects on the marine environment or the coastline (see paragraph 19 of the Request).

20. Malaysia considers that "the situation is urgent, given that there is little prospect that the Annex VII Tribunal will be established and able to render a decision on provisional measures for some time."

21. Singapore submits that the four reports annexed to Malaysia's Statement of Claim are rife with speculations, that they are based upon projected impacts generated largely by hypothetical desk-top studies and simulated hydraulic model studies and that there is no proof of harm on the basis of a comprehensive collection of data obtained in the field, that none of the reports analyses the question of the causal link between Singapore's reclamation and any observations on the marine environment, that none of the studies details any harm that might be expected within the short time-span that is the concern of the Tribunal under article 290, paragraph 5, of the Convention, and that the tentative and preliminary nature of the reports submitted by Malaysia is not a sufficient basis to found Malaysia's allegations of imminent, irreversible damage.

22. Referring to Malaysia's allegation that Singapore's reclamation encroaches upon its territory, Singapore states that the only area in dispute that is relevant for present purposes is "Point 20" and that Singapore has never accepted Malaysia's claim to it, that, even if there

were an arguable case in support of Malaysia's claim to "Point 20", Malaysia could not now seek to have reclamation works around that point suspended, since "Point 20" was reclaimed 23 months ago and most areas are already substantially filled and any additional works to be done in the next few months should not increase the effects observed now, and since suspension of the works would impose a heavy burden on Singapore without producing any benefit for Malaysia. Singapore adds that Malaysia's failure to raise the issue before "Point 20" was reclaimed is inconsistent with a claim that provisional measures are urgently required now and any urgency that there might have been would have arisen many months ago when, in full sight of Malaysia, Singapore first began to implement its published plans to reclaim the Tuas View Extension Area.

23. Singapore further states that the Pulau Tekong reclamation project is being executed in three phases, that physical construction on the site began about three years ago with works starting on 9 November 2000, that the works are now at an advanced stage and practically the full geographical extent of the outer boundary of the reclamation areas has been delineated by physical structures on the site, that most of the remaining work involves in-filling, that Phase 1 is planned to be completed by around 2005, that the last phase would comprise the completion of Area D, and that currently there are sheet piles in place at Area D, which would eventually be replaced by a sloping stone revetment wall by 2008 (see ITLOS/PV.03/03, p. 17).

24. Dealing with Malaysia's argument that the reclamation works have a permanent character that makes their construction effectively irreversible and that this constitutes serious harm to the marine environment, Singapore states that these works are "reversible", though they would be expensive to reverse or to suspend.

25. Singapore states that the precautionary principle has no application in circumstances where studies indicate that no serious harm is foreseeable and that in the present case no such harm is foreseeable.

26. Rejecting Malaysia's argument that Singapore has violated its rights under articles 123, 198, 200, 204, 205 and 206 of the Convention, Singapore maintains that it has provided Malaysia with the relevant information it has of the current and projected works and is prepared to notify and consult Malaysia before it constructs transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore if such links could affect Malaysia's passage rights and that, accordingly, Malaysia's procedural rights of notification and consultation under the Convention have not been violated. Similarly, Singapore claims that it has not violated articles 192 and 194 of the Convention, since Malaysia has not demonstrated that any harm to the marine environment is likely or imminent, and that article 210 of the Convention is not applicable in the present case, since land reclamation activities do not constitute "dumping" within the meaning of article 210 of the Convention.

27. Singapore adds that it has taken care not to infringe any right of passage through the waters around its coasts, that there is no evidence of any serious difficulty actually being encountered in berthing, that the navigational channels in the reclamation areas remain clear for shipping, and that Malaysia's concerns with regard to siltation, erosion and water quality are not significant enough to fall within the scope of the provisional measures order.

28. Singapore contends that there is no justification for Malaysia to rush to the Tribunal for provisional measures almost two years after it had full knowledge of the progress of

Singapore's reclamation works, that nothing is urgent now that was not urgent before, and that Malaysia has not pointed to any evidence of a real risk of irreparable prejudice or serious harm that might arise as a result of the reclamation works before a decision of the arbitral tribunal.

D. Assurances and clarifications

29. In the course of the oral proceedings, Malaysia stated that it would be prepared to accept the assurances given by Singapore in respect of the three measures relating to cooperation, provision of information and negotiation, which are set out in paragraph 17(b), (c) and (d) of this Opinion, "if the Tribunal made them a matter of formal judicial record." Singapore too agreed that these assurances be noted by the Tribunal in its Order. It points out that these assurances were first given by it in its note of 17 July 2003 and were later confirmed in the course of the oral proceedings. The assurances have been noted in paragraphs 76 to 78 of the Tribunal's Order.

30. In its note of 22 August 2003, Malaysia stated that it would propose that the Governments of Malaysia and Singapore jointly sponsor and jointly fund a study of long-term changes to the bed morphology in the Straits, to be carried out by an international consulting firm mutually agreed upon. In its reply note of 2 September 2003, Singapore agreed to have a joint study of the bed morphology in the Straits carried out on terms of reference to be agreed upon by the parties. During the oral proceedings, both parties agreed to have such a study undertaken on terms of reference to be agreed by the two sides. This agreement too has been noted in paragraph 86 of the Tribunal's Order.

31. In response to Malaysia's assertion that Singapore has been accelerating its reclamation works to ensure a *fait accompli*, Singapore assured the Tribunal "that Singapore has not been and is not accelerating its works" (ITLOS/PV.03/03, p. 10; ITLOS/PV.03/05, p. 37). The Tribunal's Order notes this assurance in paragraph 80.

32. Singapore has also given assurances with respect to navigation rights, when it stated that "even when the reclamation is fully completed, the existing widths of the navigation channels will remain unchanged and fully accessible to ships and small boats" (ITLOS/PV.03/03, p. 15; ITLOS/PV.03/04, p. 10).

33. Singapore stated that it will notify and consult Malaysia before it proceeds to construct any transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore "if such links could affect Malaysia's passage rights" (Singapore's note dated 3 September 2003; paragraph 171 of Singapore's Response; ITLOS/PV.03/04, p. 12).

34. At the public sitting held on 27 September 2003, while taking note of the assurance given by Singapore at the public sitting held on 26 September that no attempt would be made to construct a stone revetment along the line of sheet piles in Area D south of Pulau Tekong until 2008, Malaysia stated:

> There are a number of alternative configurations, especially for Area D, which could alleviate Malaysia's concerns. In particular, if Singapore were to give clear undertakings to the [Tribunal] that no effort would be made to infill Area D pending the decision of the merits tribunal, and if these undertakings were likewise made a matter of formal judicial record,

> Malaysia's concerns would be significantly reduced. (ITLOS/PV.03/05, p. 26)

Singapore was not willing to give any such undertaking. It stated:

> ... regarding Area D, no irreversible action will be taken by Singapore to construct the stone revetment around Area D pending the completion of the joint study, which should be completed within a year. (ITLOS/PV.03/05, p. 39)

III. Conclusion

35. There is no disagreement among the members of the Tribunal that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute and that the objections to the admissibility of the Request in terms of non-fulfilment of the applicable rules of the Tribunal do not bear judicial scrutiny.

36. As regards the prescription of provisional measures, the limited question that calls for determination by the Tribunal is whether, on the evidence before the Tribunal, it can be said that there is a reasonable possibility of either irreparable damage to the rights of Malaysia or serious harm to the marine environment in the short period before a decision of the Annex VII arbitral tribunal.

37. Malaysia contends that the Tribunal should not give credence to the argument of Singapore that Malaysia has delayed its own case for too long to make its claim of urgency credible, since the case involves the protection of the ecological interests, and the suspension of certain reclamation works can still make a difference. Assuming for the sake of argument that this is a valid justification for the delay involved, it would not absolve Malaysia from supplying proof of the damage alleged. Malaysia further contends that in matters involving protection of the environment the burden of proof lies on the State against whose conduct the case is brought. Here too, even if one were to accept this argument, it has been seen that Singapore has placed materials before the Tribunal to indicate that there is no likelihood of its actions causing irreparable prejudice to the rights of Malaysia or serious harm to the marine environment before the arbitral tribunal has had occasion to deal with Malaysia's claim. Singapore's assertions have not been seriously challenged. Proof of the damage alleged by Malaysia has not been supplied. In its Request for provisional measures, the only argument advanced in support of the urgency of the situation is that there is little prospect that the Annex VII arbitral tribunal will be established and able to render a decision on provisional measures for some time. This argument too is untenable. In the normal course of events, the arbitral tribunal will be constituted not later than 9 October 2003. There is also no reason to believe that this body will not meet shortly thereafter.

38. It appears that urgency is indeed absent in respect of the substantial relief sought by Malaysia concerning suspension of Singapore's land reclamation activities. The Tribunal observes in paragraphs 72 and 73 of its Order that Malaysia has not proven the existence of a situation of urgency in respect of its claims in relation to Singapore's land reclamation in the sector of Tuas and it accordingly declares that it does not consider it appropriate under the circumstances to prescribe provisional measures with respect to that area. It may be recalled that, at the public sitting held on 27 September 2003, Malaysia stated that its concerns would be "significantly reduced" if Singapore were to give undertakings to the Tribunal that no

effort would be made to infill Area D pending the decision of the merits tribunal. Singapore gave no such undertaking. The Tribunal's Order does not prescribe any measures requiring Singapore to stop infilling Area D, for there is no evidence before the Tribunal that such infilling would lead to irreparable prejudice to the rights of Malaysia or serious harm to the marine environment pending a decision of the arbitral tribunal. Accordingly, Malaysia has failed to prove a situation of urgency in respect of the substantial relief it sought concerning reclamation works even around Pulau Tekong. The operative part of the Order prescribes certain provisional measures which are consistent with that premise; these measures underline a sense of urgency arising out of the duty to cooperate as enshrined in Part XII of the Convention and general international law. The Tribunal is not an innovator of these measures. They emanate from the assurances given by Singapore during the course of the oral proceedings, the agreement of the parties to have a joint study undertaken of the effects of Singapore's land reclamation and the statement of Singapore that if there is compelling evidence that its reclamation works have adverse effects it would re-examine its works and consider taking such steps as are necessary and proper, including a suspension, to deal with them. The Tribunal considered it necessary to underline that, in view of the special concerns expressed by Malaysia, the group of independent experts entrusted with the mandate of determining the effects of Singapore's land reclamation should prepare an interim report on the subject of infilling works in Area D at Pulau Tekong with a view to examining as soon as possible whether Malaysia's concerns in respect of Area D are properly based. The Order further calls upon the parties to enter into consultations with a view to ensuring that the infilling operations do not prejudice Singapore's ability to implement the commitments referred to in paragraphs 85 to 87 of the Order. It recognizes the basic stand of Singapore that any suspension or adjustment of land reclamation works should follow an objective study by a group of independent experts and that corrective measures would be taken only if such a study provides proof of adverse effects of the type mentioned by Malaysia.

(signed) P. Chandrasekhara Rao

SEPARATE OPINION OF JUDGE NDIAYE

[Translation]

1. In this case Singapore (hereinafter the "Respondent") claimed that Malaysia (hereinafter the "Applicant") had failed to comply with the obligations devolving upon it under article 283, paragraph 1, of the Convention. "[T]he negotiations between the Parties, which Article 283 of the Convention makes a precondition to the activation of the Part XV compulsory dispute settlement procedures, have not occurred" (Response, paragraph 6).

2. The Respondent argued that the Applicant's referral of the matter to the (Annex VII) arbitral tribunal was premature since, contrary to the requirement of article 283 of the Convention, no exchange of views had taken place. Paragraph 1 of that article reads as follows:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

3. The Applicant stated that on a number of occasions it had requested that meetings be held to examine each party's concerns with a view to reaching an amicable settlement to the dispute. It contended that the Respondent had repeatedly refused to enter into consultations, requiring the other party to prove first the substance of its case.

The principle of prior exhaustion of the negotiation process would therefore appear to be involved; hence the objection *in limine litis*. Which poses the problem of the *actuality* of the dispute.

4. Negotiation can be taken to mean both a method of determining the subject of the dispute and a method of settling that dispute. It was in the first sense that the Permanent Court of International Justice explained that "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 15).

5. That is to say that the attitude of the parties must be such as will enable them to come to an agreement. They are not, however, required to accept a basis for settlement that would damage their own interests. Similarly, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted (see *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95 at p. 107, paragraph 60).

6. It would appear that in the present case the persistent refusal by the Respondent to examine the claims of the other party encouraged the latter to resort to the procedure established in paragraph 5 of article 290 of the Convention.

Was the Applicant thus in contravention of the provisions of article 283, paragraph 1?

7. The rule that the negotiation process should first be exhausted is to be found in certain international conventions (e.g., the *Covenant of the League of Nations*, article 13, paragraph 1). Its customary nature is doubtful, however. The rule appears as a condition governing jurisdiction of courts or as a condition governing admissibility of an action brought by means of an application.

8. In the first case, international courts examine the conditions laid down and dispose of them without any difficulty. This involves primarily a factual examination of the attitude of the two parties. The ICJ's approach to settling the question of jurisdiction in this field is wholly applicable to the facts of the present case.

The Court said:

> The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation.
>
> But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345-346).

9. Now in the present case, deadlock has clearly been reached on the questions in dispute; the parties even spoke of the negotiations "breaking down".

10. The prior exhaustion of the negotiation process would also appear to be a prerequisite, from the legal point of view, to the bringing of a case before an international court. The admissibility of the application is thus subject to compliance with this rule, which applies, however, only if the parties are bound by a contractual obligation. That is to say that the party invoking the rule of prior exhaustion of the negotiation process must provide proof that it is bound to the other party by a contractual undertaking to that effect.

11. In this case, the Respondent has not proved that such an undertaking exists between the parties. That is to say, that the Tribunal is competent and may exercise its judicial power and hear the claims of the parties in order to make its determination concerning those claims.

12. While the rule of prior exhaustion of the negotiation process is to be found in certain treaties, it hardly makes its presence felt in general international law. On a number of occasions the International Court of Justice has refused to accept it. It has even taken the

view, relying on State practice, that the application could be submitted to it while negotiations were continuing.

In the *Aegean Sea Continental Shelf* case, the Court stated:

> The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973*, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function. (*Judgment, I.C.J. Reports 1978*, p. 12, paragraph 29); see also *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 440, paragraphs 106-108; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303.)

13. On the basis of the above, the Tribunal could have rejected the objection to jurisdiction raised by the Respondent, particularly as it had already taken the view that a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted (see *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 208 at p. 295, paragraph 60).

(signed) Tafsir Malick Ndiaye

SEPARATE OPINION OF JUDGE JESUS

The argument for submission of disputes to the procedure of negotiation has been often raised by parties to disputes before this Tribunal as a precondition to be fulfilled before the parties can resort to this Tribunal or to any other dispute settlement procedure referred to in Part XV of the Law of the Sea Convention (hereinafter referred to as "the Convention").

In cases of provisional measures under article 290, paragraph 5, the *prima facie* jurisdiction of this Tribunal has always been challenged, as in the instant case of land reclamation between Malaysia and Singapore, on the basis that the Annex VII arbitral tribunal lacks jurisdiction over the dispute, since the possibility of settling the dispute through negotiations has not been exhausted.

Though the Order regarding this case of land reclamation deals with this issue in a way that commands my general support, the Order does not expand on the reasoning behind its conclusions to the extent that I would have thought advisable, in light of the weight given to it by the Respondent during the proceedings.

For this reason, I thought it would be appropriate for me to make, as a matter of general interpretation of articles 279, 281 and 283 of the Convention, the following points regarding my views on this important issue.

The three articles of the Convention referred to above have different functions in canvassing the legal treatment of this issue.

Firstly, article 279, which states that

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter[1],

has the function of stating a general obligation of States not to resort to a method of settling disputes other than by peaceful means.

While this article establishes an obligation to settle disputes only by peaceful means, it does not, however, create an obligation for States to settle their dispute specifically through negotiations, as a means of dispute settlement, or through any other peaceful means in particular.

In a way, this article is the flip side of the general principle of international law, as embodied in the United Nations Charter,[2] in accordance with which States should not resort to the use

[1] Article 33, paragraph 1, of the United Nations Charter states that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".
[2] See Article 2, paragraph 4, of the United Nations Charter.

of or threat of the use of force as way of settling their disputes. Article 279 in effect couches this same principle in a positive way.

It, therefore, cannot be read as meaning or implying that States are obliged to submit their disputes to the procedure of negotiation, instead of resorting to another peaceful means.

There is nothing in the Convention or for that matter in international law that imposes a general obligation on States to settle their disputes through negotiation, instead of resorting to another peaceful means of their choice.

Secondly, the obligation to resort to negotiations and not to another peaceful means in dealing with a particular dispute can only result from an undertaking voluntarily entered into by the States concerned through a treaty provision or through any other legally valid or relevant form of expression of State consent. Such a view is to be found in article 281 of the Convention, which reads as follows:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

In this case, when a State has agreed to settle its dispute with another State through negotiation, as a particular peaceful dispute settlement device, article 281 of the Convention then creates an obligation for the States concerned not to resort to another means of peaceful dispute settlement until it is determined that negotiations have not led to a settlement of the dispute or, where an agreed time limit has been set by the two parties, until the period has elapsed.

It seems, therefore, clear that States are only obliged (prior to resorting to this Tribunal, the arbitral tribunal or any other procedure under Part XV) to submit their disputes to negotiation, as a particular means of peaceful dispute settlement, and to stick to it up until such time as it is determined that it has not produced a settlement, if they have agreed to do so.

The point that might be raised in this connection is whether a State that has formally undertaken through a treaty provision (or through another form of expression of State consent) to settle a given dispute in which it is or might be involved with another State through a particular procedure (be it the procedure of negotiation or any other peaceful means) can ignore the agreed procedure, disregarding its treaty undertaking in this respect and unilaterally declaring that the possibility of such a procedure to produce a settlement has been exhausted.

This Tribunal has addressed this point, by recognizing[3] that "a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted".

This view is, once again, reaffirmed in paragraph 47 of this Order on land reclamation.

While I concur in the interpretation made by this Tribunal in the *MOX Plant Case*,[4] in respect of article 283, since this article imposes on States only an obligation to proceed expeditiously to an exchange of views regarding a choice of procedure by the parties to settle their dispute, I do not concur entirely in the interpretation of the Tribunal in the case of article 281.

In my view, if the States parties to a dispute have agreed through a treaty provision or otherwise to settle their disputes through a particular settlement procedure, the determination of whether that procedure has run its course without producing a settlement is to be made by the concurrence of the two parties.

A withdrawal from such a procedure by one of the States parties to the dispute, based on its unilateral assessment that the possibilities of reaching a settlement through the agreed procedure have been exhausted, without the acquiescence of the other State party, can indeed constitute cause for objecting to the jurisdiction of this Tribunal, the arbitral tribunal, or any other procedure set forth under Part XV, if, in the circumstances of a concrete situation, it can be demonstrated, as a matter of evidence, that the possibility of that procedure producing a settlement has not indeed been exhausted.

Thirdly, article 283 serves a different purpose from that pursued by article 281 and cannot be seen or taken to create an obligation for States to negotiate, as a procedure to settle their disputes.

This article, which only creates the obligation of States to exchange views on certain matters, reads as follows:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

There are three different instances in which this article subjects States to the obligation to exchange views:

---

[3] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, paragraph 60.

[4] See *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, paragraph 60.

(a) an exchange of views regarding the settlement of a dispute by negotiation or other peaceful means, therefore not imposing an obligation on any State to submit the settlement of the dispute itself to the negotiation procedure, which as said before, under the Convention and international law in general, neither the procedure of negotiation nor any other particular peaceful means can be imposed on States unless accepted or agreed upon by them through a treaty provision or otherwise, as implied in articles 279 and 281;

(b) an exchange of views when a chosen procedure has not produced a settlement;

(c) an exchange of views when consultations are required to discuss the manner in which a settlement that has been reached may be implemented.

From the above it becomes clear that none of the above situations can possibly be construed as imposing negotiation as a means of dispute settlement. This article cannot, therefore, be interpreted or construed, contrary to the arguments adduced by the Respondent during the land reclamation proceedings, as providing a negotiation procedure for the settlement of the dispute itself, one that has to be exhausted before resorting to the Annex VII arbitral tribunal or to any other procedure indicated in Part XV.

The very purpose of this article indicates that, if after an expeditious exchange of views the two parties to a dispute have not chosen a given settlement procedure, then they are not obliged to continue the exchange of views, since each party is free not to accept a particular settlement procedure, unless bound by a treaty provision or otherwise.

(signed) José Luis Jesus

SEPARATE OPINION OF JUDGE COT

[Translation]

1. I subscribe to the operative part of the Order and to the reasons on which it is based. I agree with the view that Malaysia's request for the prescription of provisional measures is admissible and that the Tribunal is competent to entertain that request. I also agree with the Tribunal's view that there is no need to prescribe provisional measures in the western part of the Straits of Johor. It is my opinion that Malaysia has not established the possibility or likelihood of its rights in this area being affected or of serious harm being caused to the marine environment. This finding does not in any way prejudice the merits of the case, in particular the assessment that the Annex VII arbitral tribunal will have to make concerning Malaysia's territorial claim to point 20.

2. Like the Tribunal, I consider that the situation is different in the eastern part of the Straits. It is possible or probable that Malaysia's rights, in particular its rights of navigation and its right to preserve the marine environment falling within its sovereignty, will be affected. It is difficult to deny that land reclamation works in an international waterway up to the boundary of the neighbouring territorial sea may adversely affect the neighbour's rights. In view of the narrowness of the Straits and the proximity of the coastline on either side, the works planned by Singapore will have a drastic affect on the geography and hydrography of the Straits of Johor. If Malaysia were to undertake similar works, the Calder channel would be completely unnavigable. Furthermore, the studies made by the Applicant show that serious harm to the environment in this area is possible. In short, the condition of urgency is satisfied.

3. I believe that in the present case the appropriate measure in order to protect the rights of the Applicant would have been to prescribe the suspension of the infilling works in Area D at Pulau Tekong pending the results of the scientific study requested by the parties. In fact, I believe that this obligation devolves upon Singapore in any case. First, it results from the commitments entered into by the Government of Singapore in its diplomatic notes and in the statements made by its Agent at the hearing, in particular on Saturday, 27 September 2003 (ITLOS/PV.03/05, pp. 37 *et seq*.). Second, it results from the general obligation that parties have to

> 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 allow any step of any kind to be taken which might aggravate or extend the dispute … (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199).

4. In fact I consider the infilling works in Area D to be an irreparable measure. It is not a question of filling the area with sand which will then be able to be dredged at will, like the sandcastles built by children on the beach that are washed away by the next tide. The advocate for Singapore, Mrs Cheong, explained the land reclamation process very clearly (ITLOS/PV.03/03, pp. 13-19). The infilling to a depth of 15 metres must be of a sufficiently solid composition to serve as a foundation for buildings some twenty to thirty or more metres high, similar to those that appeared in the video she showed.

5. Singapore referred to the cost of suspending the infilling works but was very careful not to put forward a figure or a rough estimate. Remember that we are talking about a suspension limited in time and affecting only one of the areas in question, viz. Area D at

Pulau Tekong. I have no idea of the sums involved but I note that Singapore did indeed consider the possibility of suspending the works – the Agent of Singapore even referred to this possibility at the hearing (ITLOS/PV.03/05, p. 38) – if it felt that Malaysia's rights were at stake. The cost is therefore bearable. It should be added that a financial cost is by definition not irreparable and may result in damages.

6. The provisional measures prescribed by the Tribunal go further than and at the same time fall short of the suspension requested by Malaysia. On the one hand, operative paragraph 1(c) prescribes that the parties should consult with a view to reaching a prompt agreement on measures with respect to Area D at Pulau Tekong; the text therefore adds an obligation of immediate cooperation, so that the parties agree on the measures to be taken. However, on the other hand, the Order does not specify to what extent the infilling works must be suspended or slowed down pending the results of the study referred to. On this point there is a certain degree of uncertainty concerning the precise extent of the obligation devolving upon the parties.

7. However, I believe that the application by the parties of the operative part of the Order, in good faith and with a view to the forthcoming arbitration, must enable the rights of the Applicant to be preserved. That is why I have concurred with the text.

(signed) Jean-Pierre Cot

SEPARATE OPINION OF JUDGE LUCKY

1. This dispute revolves around complex issues over which the parties are at variance because the pleadings, documentary and oral evidence indicate diverse views and opinions.

2. Briefly, Malaysia alleges that reclamation works by Singapore in the eastern and western areas of Singapore's territorial sea are causing and will cause "serious and irreparable damage to the marine environment and serious prejudice to its rights." Singapore has responded that the technical reports it has received, its careful planning as well as detailed studies, all show that no significant adverse effects would result from the reclamation works.

3. The true purpose of section I of Part XV of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") is the obligation of States Parties to settle disputes by peaceful means. Part XV in effect provides several avenues for settlement and sets out procedures and methods for an agreement, even to agree to refer the dispute to arbitration. The relevant articles are articles 283 and 290. The word "dispute" is not defined in the Convention nor is it construed in the Rules of the Tribunal. Therefore, the dictionary meaning is applicable as long as it is in conformity with the rules of customary international law.

4. Malaysia argues that there is a dispute, and this is substantiated by the fact that it has filed a Statement of Claim and seeks provisional measures.

Article 283 of the Convention provides for an obligation to "exchange views".

> Article 283
> Obligation to exchange views
>
> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

5. I find that there is a dispute in accordance with the meaning ascribed to the word "dispute" in the jurisprudence of international law and that the parties had proceeded expeditiously to an exchange of views. In fact, they continued to do so even after 4 July 2003, the date on which Malaysia filed its Statement of Claim. But in my view their meetings of 13 and 14 August 2003 did not negate the requirements of article 283 nor the request for provisional measures. This seemed to be a bilateral approach to a settlement before further action.

6. Article 290, paragraph 5, provides as follows:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

7. The above provision gives the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") the jurisdiction to grant provisional measures "[p]ending the constitution of an arbitral tribunal" if that tribunal would have jurisdiction and the urgency of the situation so requires. Article 290, paragraph 5, does not prescribe a time limit for any order the Tribunal may make. The modification, revocation or affirmation of the order is the prerogative of the arbitral tribunal after it is constituted and is functional (see the *MOX Plant Case*). Therefore, it seems to me that the Tribunal has to determine whether the arbitral tribunal "would have jurisdiction" and whether or not the situation is "urgent" enough to necessitate granting the measures being sought.

8. The parties agreed to arbitration. But, pending the constitution of the arbitral tribunal, Malaysia sought the following provisional measures:

> (a) that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas);
>
> (b) to the extent it has not already done so, provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);
>
> (c) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and
>
> (d) agree to negotiate with Malaysia concerning any remaining unresolved issues.

9. Singapore on the other hand respectfully requests the Tribunal to:

> (a) dismiss Malaysia's Request for provisional measures; and
> (b) order Malaysia to bear the costs incurred by Singapore in these proceedings.

Provisional Measures

10. Jurisprudence of some national and international bodies provides that provisional measures (which are similar to injunctive relief in most national courts) are discretionary in nature and are only granted in exceptional and urgent circumstances specifically to guarantee, even temporarily, the rights of the applicant party (see the Separate Opinion of Judge Mensah in the *MOX Plant Case*). When there is a request for provisional measures the Tribunal will not and should not deal with the merits of the case; to do so would be to usurp the function of the arbitral tribunal. Further, in an application for provisional measures which is heard *inter partes*, the parties would not have had the time nor would they, as in this case, have been able to provide *all* the evidence to prove or to refute the allegations.

The degree of proof

11. The burden of proof required in a case for provisional measures is relatively high. The Tribunal is being asked to make mandatory orders, *inter alia* to cease work on a project which is elaborate, expensive and of considerable magnitude. Therefore, several factors have to be considered: the balance of convenience or inconvenience to each side; the status quo as to whether the works are reversible; whether the decision would cause prejudice; and, whether there will be serious harm to the environment. Because of the foregoing factors, could and should the matter be deemed urgent? Nevertheless, the question to be posed and answered when considering each factor, and/or all of them jointly, is whether the decision will be fair to both parties.

Urgency

12. Perhaps, at this juncture it will be convenient to deal with the question of "urgency", which is a requirement for prescribing provisional measures. This is of particular significance in the special circumstances of this case. The view expressed here is supportive of my reason for recommending the measure in the concluding paragraph of this opinion. The work in progress, specifically in Area D off Pulau Tekong, is part of an ongoing program of land reclamation by Singapore. Malaysia is a neighbouring coastal State. It shares a common sea and ecosystem with Singapore and it is only fair that there should have been consultation, exchange of information and a joint study before the works began, to determine whether there would be irreparable harm to the environment.

Is there a *prima facie* case?

13. In my view the merits of the application have to be considered, but not determined or seemingly determined. The evidence must disclose that there would be serious harm to the environment and that the rights of the applicant party would be prejudiced. The possibility or probability of such harm cannot be based on speculation or projections as this is insufficient; the Applicant must show a very strong probability upon the facts that serious harm will accrue to it in the future. The degree of probability of future harm is not an absolute standard; what is to be aimed at is justice between the parties having regard to the circumstances. I mean no disrespect to either party because in such applications time constraints are relevant: the full "pre-trial" processes have not occurred, the defence to the Statement of Claim has not been served and neither side's case has been "proved" as at a final hearing on the merits. As I

suggested earlier, I do not find that the evidential requirements for provisional measures have been met in the western area (Tuas area).

Pulau Tekong - Area D

14. Perhaps the crucial question could be: what is the extent to which a State can carry out reclamation works in its territorial sea where it shares a common sea with its neighbour? Internal public hearings and reports and studies by the coastal State are not enough. There ought to be consultation with the neighbouring State. There was no meaningful consultation between the parties until the Statement of Claim was filed on 4 July 2003. Singapore's studies focused on Singapore alone.

15. The essence of this claim for relief is protection of the environment and rights of navigation. Article 123 deals with cooperation of States bordering enclosed or semi-enclosed seas and provides for cooperation directly or through an appropriate regional organisation. The parties did not pursue the direct or regional approach. The Convention is quite clear at many points in providing that States which border the same maritime areas should cooperate especially in matters relating to the protection and preservation of the marine environment.

16. National coastal reclamation, which is crucial and necessary for development and growth, ought to be carried out in recognition of the rights of a neighbouring State. It is an equitable maxim that persons or States ought to have their neighbours in mind when directing their minds to any act or action which may affect rights.

17. The position in respect of the areas complained of (off Pulau Tekong) is different from that of the areas off Tuas, in the west. In this area the evidence discloses the possibility of serious harm to the environment. The works in question could result in an infringement of Malaysia's rights with respect to navigation in that channels are being rearranged so that smaller vessels are diverted to the Johor Channel. It is also my view that the question of irreparable harm or, more specifically, "serious harm to the environment and marine life" has been sufficiently established to accord with the standard of proof required in an application for provisional measures.

18. Singapore suggested that it was prepared to consider suspending works if Malaysia established that its rights were being infringed. But one might ask: if Malaysia says its rights are being infringed and Singapore does not think so, who will determine the issue? An exchange of views took place but this did not result in a settlement and as time elapsed and communication broke down it became necessary to invite a third party to resolve the issue; hence the application for provisional measures before this Tribunal. As I alluded to at the beginning, the work is in progress and while certain assurances have been given and appreciated by both parties and recorded by the Tribunal, the application must be addressed and measures prescribed or denied.

19. After considering the issues and evidence I agree with the Tribunal. Might I humbly suggest that I would have added that specific measures be prescribed with respect to Area D off Pulau Tekong, i.e., that infilling works in Area D off Pulau Tekong be suspended until a joint assessment authority is established to report within three months whether there will be serious harm to the environment and whether the rights of Malaysia with respect to navigation will be infringed.

20. Although I can find no precedent in international law, I think the time has come to consider whether applicants for provisional measures should, as in some municipal systems, give an undertaking that they will pay damages and the costs incurred if the provisional measures sought are granted but subsequently discontinued when the substantive matter is determined.

21. I have voted in favour of the Order of the Tribunal.

(signed) Anthony A. Lucky