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 preconditions, 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.

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[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.

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

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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

[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.