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