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 90, 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