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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

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> 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:

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(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.

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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

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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.

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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