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held on Thursday, 25 September 2003, at 3.00 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President L. Dolliver M. Nelson presiding

Case concerning Land Reclamation by Singapore in and around the Straits of Johor

(Request for provisional measures)

(Malaysia v. *Singapore)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	L. Dolliver M. Nelson
	Vice-President	Budislav Vukas
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		Thomas A. Mensah
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Tafsir Malick Ndiaye
		José Luis Jesus
		Guangjian Xu
		Jean-Pierre Cot
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	Judges *ad hoc*	Kamal Hossain
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Mr Chee Leong Foong, Head, Pollution Control Department, National Environment Agency,

as Advisers.

CLERK OF THE TRIBUNAL: All rise.

PRESIDENT: Please be seated. I now give the floor to Professor James Crawford.

PROFESSOR CRAWFORD: Mr President, Members of the Tribunal, in this presentation I wish to deal with the territorial sea rights of Malaysia which are affected by Singapore's actions. For a number of years there has been a dispute between the two States as to the delimitation of their respective territorial seas beyond the terminal points fixed in the 1995 Agreement. Neither State has made a declaration under Article 298 excepting from compulsory jurisdiction issues of sea boundary delimitation. Accordingly, the merits tribunal has jurisdiction over delimitation, as well as over other aspects of the dispute concerning Singapore's reclamation projects; and this Tribunal has corresponding jurisdiction to protect the claimed rights of Malaysia by appropriate provisional measures, pending the constitution of an arbitral tribunal to hear the merits.

I will deal later this afternoon with the meaning of the phrase "Pending the constitution of an arbitral tribunal"; what I will say then applies equally to this issue. But before I discuss the maritime boundary, certain preliminary points should be made.

The first point is that, although the issue of the maritime boundary arose at a much earlier date than the issue of the impacts of Singapore's reclamation projects, the two issues are both at stake in the present case and have both been submitted to arbitration under Part 15 of the Convention in a single proceeding. In these circumstances, it is not really necessary to ask whether there are two separate disputes, one about maritime delimitation and one about land reclamation, or a single dispute covering both issues. In the present case nothing turns on that distinction.

Clearly, the two are now intimately related. They are related physically, concerning the same confined area and the same bits of sea or putative land. But they are also related legally, since Malaysia denies that artificial extensions of land area, not constituting permanent harbour works within the meaning of Article 11, can constitute base-points for maritime delimitation. Both the actual impacts of these reclamations, and their legal status for delimitation purposes, are in dispute in the proceedings commenced on 4 July. So the two separate questions are closely linked in the western sector, and indeed, they are closely linked on the base points in the eastern sector. There is nothing in Part XV which prevents the submission of two analytically distinct legal issues to arbitration before a single instance, provided that the two are nonetheless factually related and are both in dispute, as is the case here.

The second preliminary point is obvious enough. Malaysia claims rights to maritime areas at both ends of the existing maritime boundary in the Straits of Johor, and the gaps at both ends of that boundary are in issue in the present dispute submitted to arbitration under the Convention. However, in the present application for provisional measures, all that is at stake is the maritime boundary in the western sector, where

Malaysia's claim and Singapore's land reclamation activities are clearly at odds and create a direct clash of rights and duties. By contrast, at the eastern end of the boundary there is currently no proposal for land reclamation by Singapore which would cut across Malaysia's claim, and even if there were, since nothing is being constructed in the relevant area, there would be no urgency in this sector. Malaysia does not rest its claim to provisional measures in the eastern sector upon any issue of maritime delimitation. Nonetheless, in order to place the dispute in context I will briefly trace in this presentation the history of the boundary as a whole.

I turn to that issue, noting, of course, that the waters concerned are territorial sea, that is to say, waters which are within 12 nautical miles of the nearest land.

The territorial sea boundary in the Straits of Johor was first laid down in a 1927 Agreement between Great Britain and Johor, and it consisted of a line drawn on the basis of no particular or apparent principle but running between islands belonging to Johor and those belonging to Singapore. Thus the boundary ran northwards around the islands of Pulau Ubin and Pulau Tekong in the east, and in the west it ran just on the Singapore side of Pulau Merambong, which is being indicated on the screen and which belongs to Johor.

Then in 1969 Malaysia and Indonesia agreed on a maritime boundary—partly a territorial sea boundary, partly continental shelf, but stopping short on each side of the Straits of Singapore.

Then in 1973 Singapore and Indonesia agreed a territorial sea boundary, shown on this map, which is Tab 25 in your folders, and which fell short of the terminal points of the 1927 Singapore-Johor boundary.

Then in 1979, Malaysia published a map which showed its maritime boundary claim from the end points of the agreed 1969 boundary with Indonesia up to the end points of the 1927 Singapore-Johor boundary. You can see this shown on the map which is Tab 26 in your folders. It was this event, the publication of this map, which led to the territorial sea dispute with Singapore.

So far as Singapore was concerned, Malaysia's 1979 claim line affected it in two areas, Points 19, 20 and 21 in the west and Points 22 and 23 in the east. These points were determined applying the principle of equidistance from the nearest points on the territory of Singapore and Johor, as they then were. At the time the claim was made and the dispute crystallized, Points 20 and 23, the extreme points of the claim, were not affected by any land reclamation proposals, still less by any projects.

Now it is well settled that when an international tribunal determines a maritime boundary, it does not share out a previously undivided whole; it does not cut up the whole cake. It acts in a declaratory way with respect to existing rights under international law. Thus if Malaysia's claim to what Singapore deigns to call a sliver of territorial sea west of Point 20 was justified in 1979, then Malaysia's rights were vested rights at that time. Wherever the maritime boundary would have been drawn

in 1980, when the dispute crystallised with Singapore's protest, that is where it should be drawn now. There has been no change in the presumption of equidistance so far as delimitation of the territorial sea is concerned; if anything, as I shall briefly show, the presumption is stronger than ever. Thus any subsequent infringement of Malaysia's rights by Singapore could not have produced any effects in law; and of course all such infringements were promptly and continuously protested.

The next step occurred in 1995, when Singapore and Malaysia agreed on precise coordinates of the 1927 boundary. You can see this on Tab 27 in your folders. It was further agreed that the boundary line would be a fixed, not a dynamic one, irrespective of changes in the coastline. At this time there had been some land reclamation work done by Singapore, but nothing impinging on the maritime boundary and nothing to give Malaysia notice of what was to come. In particular, the dispute over Point 20 claimed by Malaysia in the west remained unresolved, but Point 20 was well away from the nearest point on Singapore's coastline.

I said earlier that Point 20 was determined in 1979 by application of the principle of equidistance from the nearest territory belonging to the parties. The 1927 Agreement did not follow an equidistance line; indeed the terminal sections of the 1927 line followed no discernible principle at all. Malaysia's position was and is that the line should forthwith revert to the equidistance line after Agreed Point 21, and you can see on the screen now, and in Tab 28 on your folders, the basis for this calculation. Point 20 is equidistant between Sultan Shoal and Tanjung Teretip on the Singapore side and Pulau Merambong on the Malaysian side.

For the sake of completeness, and this is Tab 29, I should add that Point 23 at the eastern entrance to the Straits of Johor is also drawn in accordance with that principle.

Mr President, Members of the Court, having outlined the history of the boundary, I will show that Malaysia's claim to a maritime boundary in the western sector is *prima facie* justifiable under the relevant provisions of the 1982 Convention, and that for Singapore to proceed as it has done is *prima facie* an infringement of the Convention, in particular Article 15.

Article 15 is vital to this, and I am afraid I am going to read it. It may seem strange. There are two sentences.

> "When the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median point every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured."

That is the first sentence. The second sentence reads:

"The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit" –

and I stress those words –

" the territorial sea of the two States in way which is at variance therewith."

Three points must be made about Article 15.

First, it is essentially declaratory of general international law. It does not mark a departure form the 1958 position.

Secondly, the two sentences in Article 15 are directed at different actors. The first sentence is directed individually at each of the coastal States. It is couched in strong terms, in the negative. Neither of the coastal States acting alone is entitled to encroach beyond the equidistance line. This contrasts with Articles 74 and 83, which do not contain any equivalent prohibition. Failing agreement, neither Party can act unilaterally to go beyond the equidistance line.

If we turn to the second sentence of Article 15, this allows, exceptionally, for a solution other than equidistance for the territorial sea. But, unlike the first sentence, it is not directed at the individual States. It concerns the process of delimitation, and that is not something which any individual State can carry out in the context of opposite or adjacent states. Whatever claims a State may make, delimitation is a process based either on agreement between the states or on the authoritative decision of a competent third party. It cannot be achieved by the unilateral act.

Moreover. the exception in the second sentence of Article 15 is a very limited one, for historic title or other special circumstances. The special circumstance must clearly be a strong one to be equated to historic title.

Now, until 2001, Singapore had never proclaimed a territorial sea limit beyond the agreed Point 21. But in that year, as you can see from the graphic on the screen which is Tab 31 in your folders, Singapore issued Port Marine Notices infringing on Malaysia's claimed territorial sea and going beyond the equidistance line. This was not delimitation; Singapore was not competent to do this unilaterally. Indeed, it did not even purport to be delimitation. It was just an internal act, careless of international requirements and of the obligations of Singapore under Article 15, first sentence.

Mr President, Members of the Court, you may think that, notwithstanding the strict language of Article 15 ,first sentence, the presumption of equidistance in territorial sea delimitation is not so strong as to produce abrupt changes in a delimitation line. But that is certainly not the case, as you can see from Tab 32 in your folders. This shows the actual delimitation of the maritime zones of Nigeria and Cameroon effected by the International Court in its judgment of 10 October 2002. Point G, which you see on the screen, was determined by agreement between the parties in the Maroua Declaration of 1975, which the Court held was a valid agreement. The Maroua line, as it is called, the line to the north of Point G, was not an equidistance

line. It was an agreed line departing from the equidistance line. The Court, however, had to delimit the maritime boundary beyond Point G, there being no agreement. The Court immediately reverted to the equidistance line at a point it called Point X, with a sharp right angled turn. The agreed line came to a shuddering halt at Point G, and then did a sharp right-hand turn, under the driving guidance of the Court, you might say. I refer to paragraphs 289 and 307 of the judgment. That is in essence what Malaysia did in determining the location of Points 20 and 23. Malaysia was not bound to follow the direction of the 1995 alignment beyond the last agreed point in that alignment, Point 21, and more than Cameroon was bound to do so beyond the last agreed point of the Maroua line, Point G. It is as simple as that.

Now, Singapore argues that its coastline includes reclamation works carried out in recent years, so that even if Malaysia was right in principle in reverting to the equidistance line, Point 20 is still wrongly calculated. But this assumes that Singapore's artificial coastline can constitute a base-point for this purpose. Article 11 of the Convention is clear in limiting the use of artificial installations to "the outermost permanent harbour works which form an integral part of the harbour", and at the time when this dispute crystallised, in 1980, there were no such harbour works. Singapore cannot have improved its position by its recent unilateral reclamation works, the legality of which Malaysia has consistently opposed.

Mr President, Members of the Tribunal, this may seem a technical presentation and therefore it is blissfully short. The necessary corollary of what I have said – it is a mater of law -- is that provisional measures must be granted as to the western sector to protect Malaysia's rights, pending an authoritative delimitation. Clearly, that delimitation is a matter for the merits and is not to be carried out now, as it were proleptically. Equally, until it is carried out, Malaysia's rights under the first sentence of Article 15 have to be preserved. Singapore is extending and consolidating its reclamations in areas which, for the time being, are the subject of a *prima facie* valid Malaysian claim. These works are evidently intended to be permanent and the damage done to Malaysia if they are completed would be irreparable in money terms. The matter is urgent because the work us proceeding from day to day. The conditions for an order of provisional measures are accordingly met.

Mr President, Members of the Tribunal, the distinguished Agent for Malaysia began this morning's proceedings by observing that Malaysia's position is not unreasonable. That is true here as well. Malaysia's interest is not so much in maintaining its sovereignty over a small sliver of territorial sea in the triangle between Points 19, 20 and 21. In the context of a final delimitation, it will be for the merits tribunal to apply the second sentence of Article 15 to the situation.

But it is not for Singapore to apply it, or for Singapore unilaterally to determine what is reasonable in its eyes. Malaysia's essential point here is a procedural one, or at least one as to the appropriate *process* for the resolution of this dispute. In the give and take of a proper negotiation, the issue concerning Point 20 could have been resolved. But Singapore refused to negotiate, refused to define its position except by way of negation; and acting unilaterally, Singapore is not a delimitation authority. Singapore's conduct in going ahead with its reclamations without attempting to

resolve the delimitation dispute is of a piece with its going ahead with those projects without taking Malaysia's other interests into consideration. Far from the give and take of negotiations, with Singapore, it is always all take and no give. Around Point 20 as around Pulau Tekong, what we have witnessed is a land grab at sea, which, whatever its ultimate rationale and its ultimate impact on the environment of the region and on navigation rights, ought not to have been effected unilaterally, without any attempt to negotiate or to take the reasonable claims of its neighbour into account. That is the fundamental underlying issue in this dispute as a whole, and it is in this respect that the Tribunal in dealing with the present request can act as a circuit-breaker, can take a real step towards healing the multiple ruptures in the relationship between these two States that Singapore's unilateral action has produced.

Mr. President, Members of the Tribunal, thank you for your attention. I would ask you now to call on my colleague, Professor Schrijver, who will outline the rights of Malaysia outside the scope of maritime delimitation which are at issue in this case.

THE PRESIDENT: Thank you, Professor Crawford. I now give the floor to Professor Nico Schrijver.

PROFESSOR SCHRIJVER: Mr President, Members of the Tribunal, this is the first time that I have the honour of addressing you and I would like to express my deep respect for your distinguished Tribunal and to record my pleasure at participating in these proceedings on behalf of the Government of Malaysia.

My task today is to outline Malaysia's rights under the 1982 Convention with respect to the transboundary impact of Singapore's land reclamation projects. I will first say a few words on the concept of land reclamation in international law and on the integrated approach of the Convention with respect to various uses of maritime zones. Next I will show that Malaysia's rights as a coastal State, and as a neighbouring State of Singapore, are threatened by Singapore's conduct. Lastly, I will make some brief remarks on the applicability, in accordance with the Convention, of certain overarching principles of the law of the sea in these proceedings.

In the context of the diplomatic correspondence and during the bilateral consultations Malaysia has time and again specified which of its rights are at stake and what their basis in law is. Hence, Malaysia learnt with considerable surprise that Singapore is of the view that, and I quote from the response from Singapore, "Malaysia has grossly failed to meet the specification test" under Article 290, paragraph 5 of the Convention and Article 89 of the ITLOS Rules and that, consequently, Malaysia's request for provisional measures is inadmissible. Mr President, Members of the Tribunal, in Malaysia's view it really would be rather staggering if after all these exchanges Singapore still fails to appreciate what Malaysia's problems are with the land reclamation works. Indeed, it may be indicative of the very reason for the dispute that Singapore professes to be unable to understand that Malaysia could have genuine concerns about what is happening, that it could have concerns about the total lack of prior consultation and about the potential impact on Malaysia's rights, that it could have concerns as to the likelihood of harm to the marine environment.

Of course it is not necessary in these proceedings for Malaysia to prove that its rights *are* infringed, or to show definitively that the marine environment *is* being seriously harmed by Singapore; those are matters for the merits. But we do have to point to the basis of Malaysia's claims, and to facts that apparently engage those rights. To this task I now turn.

The 1982 Convention deals with various forms of man-made works which may impact on territorial sea boundaries. Beyond that, it does not deal specifically with land reclamation. Of course books on international law address the issue of "accretion", the increase of land through new formations. While accretion is normally associated with natural phenomena, it can also result from human activity. But in that case it must be carried out having regard to the rights and interests of neighbouring states. Thus, in *Oppenheim's International Law* it is stated with respect to artificial formations along the bank of a boundary river or the coastline of the sea:

> "…no State is allowed to alter the natural condition of its own territory to the disadvantage of the natural conditions of a neighbouring state territory, a state cannot build embankments and the like, without a previous agreement with the neighbouring state."

Similarly in the *Encyclopedia of Public International Law*:

> "…accretion may also appear to be involved when a State expands its territory by carrying out operations thereon which modify its physical nature (artificial accretion) at the expense of either the international community or of a neighbour State. However, to the extent that natural phenomena are not the prime cause, it would seem logical in such cases to require some kind of recognition or acquiescence to consolidate acquisition of title."

One example of relevant State practice, not far away from here, is the Ems-Dollard region between Germany and the Netherlands. Germany wanted to enlarge the harbour of Emden in the 1980s. This involved considerable dredging operations and the raising of a sandbank called the *Geiseplaat* above sea level. A treaty of 1960 stipulated that land reclamation works could only be carried out after agreement between both parties. Hence, the two States entered into intensive bilateral negotiations. Even though agreement could not be reached on the precise course of the boundary between Germany and the Netherlands, the Netherlands co-operated with the German plans for expanding the harbour of Emden. As a *quid pro quo*, the entire *Geiseplaat* was included in Dutch territorial sovereignty so as to give the Netherlands an effective safeguard against potential future German industrialisation.

Mr President, Members of the Tribunal, treatises on international law and this example of State practice clearly point to the conclusion that man-made works to expand territory with an effect on the neighbouring State can only take place in consultation with, and having due regard to, the interests of the neighbouring State. In this way land reclamation works do not need to cause problems. This co-operative approach is endorsed and embodied in the 1982 Convention, as I will show in a minute.

The Law of the Sea Convention takes an integrated approach to the issues it covers. As is stated in the Preamble, with which of course you are very familiar: "…problems of ocean space are closely interrelated and need to be considered as a whole". This applies to the interrelationship of the various uses of the sea, including navigation, fishing, other forms of resource exploitation and laying of pipelines and cables. Increasingly, protection and preservation of the marine environment requirements have to be integrated into all uses of the seas and apparent conflicts between economic, social and environmental considerations have to be resolved in an integrated manner.

The Convention incorporates both substantive and procedural rights. These are not two distinct categories of rights as Singapore now suggests, but interrelated rights in the Convention. Indeed Professor Lowe eloquently pointed this out to you in the *MOX Plant* hearings, as you will no doubt remember. The substantive right of a coastal State to use its territorial waters pursuant to its own developmental and environmental policies and in accordance with its duty to protect the marine environment is qualified by the procedural right of its neighbouring State to prior notification, consultation and monitoring should serious transboundary environmental harm be likely to occur. Similarly, the substantive right of a coastal State to have unimpeded maritime access to its ports is accompanied by its right to be consulted on plans for artificial alterations which may impact on common navigation channels and safety of navigation. The interrelationship of and interaction between substantive and procedural rights contribute to the integrated approach envisaged by the 1982 Convention.

Mr President, this approach is all the more relevant for the proper management of a sea area such as the Straits of Johor, which combines one of the most intensively used economic areas in the world with a fragile marine ecosystem. It should go without saying that such a situation calls for close co-operation between Malaysia and Singapore in order to allow for the sustainable use of this sea area.

At this point I would like to proceed to Malaysia's rights as a coastal State under the territorial sea regime. Professor Crawford has already dealt with the question how land reclamation activities conducted around Point 20 in the south west of Singapore affect territorial waters claimed by Malaysia since 1979. Issues of delimitation aside, Singapore is certainly entitled like any coastal State to exercise sovereignty over its territorial sea. However, Article 2, paragraph 3 records the well-established rule that this is not an unqualified right. It provides: 'The sovereignty over the territorial sea is exercised subject to the Convention and to other rules of international law.' Or, as the International Law Convention put it in it 1956 Commentary on the similar Article 2 of the 1958 Convention on the Territorial Sea: 'Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law'.

Some of the limitations on the exercise of sovereignty over the territorial sea are listed in the Convention itself. It is a classic and widely accepted doctrine that ships of all States enjoy innocent passage through the territorial sea. This right of innocent passage, and a balancing between coastal and flag State interests in general, have been recorded in Section 3 of Part II on the Territorial Sea. No doubt these are matters primarily to be addressed at the stage of the merits. However, in Malaysia's

view, it is self-evident that the land reclamation works of Singapore, in particular those in the vicinity of Pulau Tekong, result in or at least risk creating an unreasonable interference with Malaysia's right to maritime access to Malaysian ports and its right to manage its marine eco-system and its marine resources.

From the wording and from the background and drafting history, it follows that Article 2, paragraph 3 has a wide scope and that the limitations imposed by international law on the exercise of sovereignty in the territorial sea are not listed in an exhaustive way in the Convention. As the ILC put it in 1956: 'Incidents in the territorial sea raising legal questions are also governed by general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea.' That is the very reason why both in 1958 and in 1982 the words 'and other rules of international law' were added.

The integrated approach of the Convention makes other parts of the Convention applicable to the territorial sea regime as well. For example, Article 194, paragraph 2, dealing with pollution, formulates the equally well-established rule that no State has the right to carry out activities within its jurisdiction or control which cause damage to other States and their environment. As became evident this morning, there can be little doubt that the reclamation works have - at least potentially, we say actually - a significant impact on the eco-system in and around the Straits of Johor. This places Singapore under an international law obligation, as an absolute minimum, to inform and consult with Malaysia on its on-going and planned reclamation works. Singapore has completely failed to do so.

Such a duty to co-operate and the duty of prior notification and consultation receive additional prominence in a case of a semi-enclosed sea. Article 123 of the UN Convention on the Law of Sea stipulates that:

> 'States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention.'

It is of course a matter of geographic reality and common sense that States sharing such seas have to co-operate. Article 122 defines semi-enclosed seas as 'a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.' This definition of semi-enclosed sea fits the Straits of Johor well, as Sir Elihu Lauterpacht has already shown. For they consist of the two territorial seas of Malaysia and Singapore and are an area of the sea surrounded by two States, with a narrow outlet to another sea. We have included a sketch map of the sea area under Tab 33 of your folder, the map you can currently see on your screens.

It is to be noted that Article 123 specifies that this increased duty to co-operate which is incumbent on States bordering a semi-enclosed sea, both in exercising their rights and in performing their duties under the Convention. Four main spheres of activity are set out in which States are to co-operate, including:

- to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; and
- to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

Thus Article 123 plainly recognises that activities undertaken by one State in a semi-enclosed sea may have a direct impact on the rights, duties and interests of other States bordering that same sea. The inclusion of this separate Part IX of the Convention reflects the recognition that this special geographical situation, with shared resources and often a fragile marine environment, call for enhanced co-operation among the bordering States.

The applicability and the implications of this article were recently raised by Ireland in the *MOX Plant* case. As you will recall, Ireland claimed that the United Kingdom had breached its obligations under Articles 123 and 197 in relation to the authorisation of the MOX plant, and had failed to co-operate with Ireland in the protection of the marine environment *inter alia* by refusing to share information with Ireland and/or refusing to carry out a proper environmental assessment of the impacts on the marine environment of the MOX plant and associated activities. This Tribunal ordered Ireland and the UK to co-operate and, for this purpose, to enter into consultations forthwith in order to, if I may quote from your Order:

> '(a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
> (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
> (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.'

On 24 June 2003, the Arbitral Tribunal established under Annex VII to the Law of the Sea Convention affirmed this provisional measure on co-operation and called on the parties, pending the final decision of the Tribunal, 'to ensure that no action is taken by either Party which might aggravate or extend the dispute submitted to the Tribunal'. In view of the irreparable harm which threatens to result from the land reclamation works by Singapore, the provisional measures as sought by Malaysia with respect to its rights in the Straits Johor as a semi-enclosed sea are fully justified. We would say that they follow *a fortiori* from your decision in the *MOX* case.

A prominent aspect of the legal regime for the seas and the oceans under the Convention is the obligation of protection and preservation of the marine environment. The Preamble sets out the objective of establishing a legal order *inter alia* to promote the study, protection and preservation of the marine environment. Part XII elaborates on this and is applicable to all maritime zones and to all uses of the seas and oceans. The concise opening Article 192 puts it in succinct terms:

> *'States have the obligation to protect and preserve the environment.'*

As stated in the Virginia Commentary:

> ‘The concept, as formulated in Part XII, goes much further than merely combating pollution after is has already taken place. It entails the active taking of legal and administrative measures, and the application of scientific methods and procedures which are all designed not simply to check or abate the deterioration of marine ecosystems, but also provide the means for protecting and preserving the marine environment from the harmful effects of pollution and other hazards.’

The core components of the comprehensive framework on the rules for the protection and preservation of the marine environment are the provisions on standard setting, on enforcement, and on safeguards. These are closely interrelated.

Part XII codifies various principles of international environmental law, including responsibility for transboundary damage, prior notification and consultation and the duty to co-operate. As regards the responsibility for transboundary damage, often referred to as Principle 21 of Stockholm, it is relevant to quote Article 194, paragraph 2, because it states unequivocally:

> “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

This paragraph 2 is a specific application of the classic maxim *sic utere tuo ut alienum non laedas*, i.e. the general rule that a State is under an obligation not to allow its territory, or any other area over which it is exercising jurisdiction or control, to be used to the detriment of another State.

Consistently with these developments, Section 4 deals with Monitoring and Environmental Assessment. Article 204, paragraph 2 provides: “…States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.”

These Articles 194 and 204 of the Convention in effect require the application of what we now call the precautionary approach, or the precautionary principle, which has now crystallised and been consolidated in contemporary international law. It is widely agreed that the core of the principle and the consensus thereon is well reflected in Principle 15 of the Rio Declaration on environment and development, which provides:

> **“**In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible harm, lack of full scientific certainty shall not be used as a reason to postponing cost-effective measures to prevent environmental degradation.”

Article 206 of the Convention elaborates *avant la lettre* on this when requiring an environmental impact assessment. It provides:

> "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of *or* significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments…"

Singapore is certainly among the States with the capability of conducting a fully-fledged environmental impact assessment. Such an assessment must also take into account the interests of Malaysia and of the marine environment in the Straits of Johor as a whole. But Singapore has produced nothing qualifying as an EIA of these major projects; rather, it has produced two summary reports, dated July 2003, which focus almost entirely on effects on Singapore, and then only to a limited degree.

In this section I have provided you with an overview of Malaysia's rights pertaining to protection of the marine environment. But, as has been demonstrated this morning, there is a serious actual threat to the environment in and around the Straits of Johor which in itself justifies this Tribunal acceding to Malaysia's request for Provisional Measures.

Mr President, Members of the Tribunal, the application of Malaysia firmly rests on a number of fundamental and overarching principles of the international law of the sea, recognised by the Law of the Sea Convention.

In its Response Singapore invokes the principle of sovereignty over the territorial sea and its natural resources as well as Singapore's right to development. Malaysia fully endorses the right of each coastal state to determine freely the management of its territorial sea for its own development, but within the limits of international law. As pointed out as early as in the 1928 decision in the Island of Palmas case, every state has "an obligation to protect within its territory the rights of other States". This is reaffirmed in Article 2, paragraph 3 of the Convention by reference to the general obligation to exercise sovereignty over the territorial sea in accordance with the Convention and other rules of international law.

Similarly, coastal state sovereignty is qualified in Articles 123 and 193 by the duty to protect and preserve the marine environment. States do not have unlimited sovereignty with regard to shared natural resources. A semi-enclosed sea and its adjacent coastal waters are to be viewed as shared natural resources. Indeed, the resource sovereignty on which Singapore places so much emphasis gives rise under the law of the sea to a series of duties as well as rights, most notably the duty to take into account the rights of other states, the duty of sustainable use of natural resources, protection of biological diversity and elimination or reduction of the effects of over-exploitation and pollution. On the evidence available it is clear that Singapore has failed to attend to these duties from the perspective of the rights of Malaysia as its neighbouring state.

The second overarching principle is good neighbourliness. A minimum interpretation of this principle is the *sic utere tuo* principle, that is, the obligation incumbent upon every state to use its own territory in such a way as to not encroach upon the rights of other states. This principle is also firmly rooted in international case law, including the *Gut Dam*, *Trail Smelter*, *Corfu Channel* and *Lac Lanoux* Cases.

This relates directly to Malaysia's right of respect for its territorial integrity and its sovereignty as well as its right to unimpeded maritime access to its ports. It has the right not to suffer from serious pollution and other significant damage to its marine environment. The idea that Singapore's "right to development" trumps its obligations under the law of the sea is unsustainable.

In any event, Malaysia has an equal right to development and to exercise sovereignty over its coastal zone and natural resources. Malaysia has never claimed a veto in this matter, irrespective of the merits of its claim under the Convention. Malaysia only claims that its rights and interests be duly taken into account, in particular its right to be consulted in relation to any projects or plans which may affect Malaysia. This has quite simply not happened, as both the diplomatic record and the various reports before the Tribunal make clear.

This leads Malaysia to the third principle, which is at the heart of this case, and that is the duty to co-operate. The duty to co-operate is well-established in the international law of the sea as can be inferred from numerous provisions in the Convention. In a relatively small sea with a sensitive ecological system such as the Straits of Johor this requires first of all bilateral co-operation in order to prevent or to contain and solve transboundary problems. At a minimum this requires notification and prior information on planned activities which may impact on the rights of the neighbouring state.

Subsequently, the duty to co-operate should give rise to consultations and negotiations with the potentially affected state to resolve differences at a bilateral or regional level. This is all in sharp contrast with the actual behaviour of Singapore in following an entirely unilateral path with its land reclamation works.

These land reclamation works of Singapore threaten to cause significant and irreparable harm to Malaysia. At the very least, there is an indication that this is so, sufficient to found Malaysia's request for provisional measures. As your Tribunal stated in the MOX Plant order, to which Sir Elihu Lauterpacht referred this morning, "the duty to co-operate 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."

Lastly, Malaysia's case rests on the precautionary principle. A precautionary approach is central to a sustainable use of a territorial sea in that it commits a state to avoid human activity which may cause significant harm to the natural resources and the ecosystem and/or serious infringement of the rights of other states.

At the root of the precautionary principle is, as *Birnie and Boyle* state in their book, an obligation of diligent prevention and control. Hence, precautionary measures should be adopted and based on up-to-date and independent scientific judgement. These measures should be transparent and be made available to all interested parties. The precautionary approach requires that, when there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures. In Malaysia's view the precautionary approach is reflected in various Articles of the Convention, notably Articles 194, 204 and 206, as well as in the definition of pollution (through the phrase "likely to result") in Article 1 of the Convention. In the *Southern Bluefin Tuna* case, your Tribunal relied on scientific uncertainty surrounding the conservation of tuna stocks to justify the award of provisional measures to protect the stock from further depletion pending the resolution of the dispute. An independent environmental impact assessment is a central tool of the international law of the precautionary principle. Such an EIA should have been conducted by Singapore, but was not—or at least was not made available to Malaysia.

Mr President, Members of the Tribunal, I come to my conclusion. Malaysia's rights as a coastal state, and as a neighbouring state of Singapore, are plainly threatened by Singapore's conduct. The provisions of the 1982 Convention on the Law of the Sea pertaining to the territorial sea in general and the semi-enclosed sea in particular and to the protection and preservation of the marine environment entitle Malaysia to protection. Furthermore, it is imperative that Singapore be moved from its unilateral path towards a co-operative system with Malaysia with respect to the Straits of Johor as a semi-enclosed sea and a shared resource.

Malaysia has clearly specified its rights under the Convention in its exchanges with Singapore, as it has done so today before this Tribunal.

Mr President, you may find this a convenient time for a break. If so, afterwards, and with your permission my colleague Professor James Crawford will further address the urgency of the Provisional Measures Malaysia requests from you.

Mr President, Members of the Tribunal, I thank you for your kind attention.

THE PRESIDENT: Thank you very much. We will now have a break.

(Short adjournment)

THE PRESIDENT: I now give the floor to Professor James Crawford.

PROFESSOR CRAWFORD: Mr President, Members of the Tribunal, in this final presentation for Malaysia today, I will address the question of the urgency and justification of the provisional measures; I will discuss Singapore's comments on this in its Response, and will explain briefly why each of the measures Malaysia seeks is justified.

An initial question concerns your role in provisional measures under Article 290. This raises a fundamental question of principle; but it also raises questions

concerning Singapore's conduct, and in particular its attempt to confront Malaysia, and the merits tribunal, with an irreversible *fait accompli*.

Article 290(5) provides, quite simply, that this Tribunal may indicate provisional measures in case of urgency "[p]ending the constitution of an arbitral tribunal". The arbitral tribunal may take one of a number of forms, under Annex VII, Annex VIII or as a Special Chamber under Article 15 (2) of the Tribunal's Rules. I will refer to it here as the merits tribunal. Singapore argues that this Tribunal, the Law of the Sea Tribunal, has a subordinate role under Article 290(5); that urgency for the purposes of Article 290(5) means a situation of what we might call super-urgency. From Singapore's pleadings, you might think that it has to amount to utter desperation: what is the situation on Thursday week, of not being able to wait even a moment for the merits tribunal to emerge. The imminent execution of a person accused of piracy might, I suppose, qualify — by analogy with the *LaGrand* case. But it is hard to think what else might qualify, and I do not think the *raison d'être* of the Tribunal was the interim protection of pirates.

Singapore also repeats that it is only 19 days – it might be slightly less than 19, Singapore is doing the counting - before the merits tribunal bursts on to the scene, like Superman coming out of his telephone box, full of power and ready to act. So this Tribunal should defer — according to Singapore, this Tribunal is the cub reporter, or the mild mannered Clark Kent; all it can do is simply report that for Malaysia time has run out.

An initial point about this argument – and I hope I have not parodied it too much - is one of fact. It concerns the precise time at which a merits tribunal is constituted.

Let us assume that we have an Annex VII Tribunal. That is not constituted simply by virtue of your nomination of the members. It is certainly not effectively constituted. The members, no doubt living on three or more continents, have to agree to act. Possible conflicts which might give rise to a challenge to one or another of them have to be eliminated or resolved. They have to arrange a secretariat, which practice shows cannot be this secretariat, and they have to be put in funds so that they do not have to pay for their tickets. The five members have to get out their respective diaries and try to find a week when they are all free to meet, wherever that meeting may be. It is not 19 days to the Annex VII Tribunal's effective emergence from its telephone box; it could be six or eight weeks or more, six or eight weeks and, at nearly a hectare of reclamation a day, it is possible to understand the basis for Singapore's argument.

Incidentally, the picture you can see on the screen (Tab 37 in your folders) shows reclamation work underway east of Pulau Tekong, in one of the areas of maximum impact, busily working away. It was taken on 20 September 2003. It is a picture of urgency.

That brings me to my second point. Ever since 4 July 2003, Singapore has engaged in a masterly exercise of delay. The details are set out in the Request and can be traced in the correspondence; I will not go in to them here. In effect, having held out the possibility of constructive discussions, that is only after 4 July, Singapore refused

to make the slightest gesture that would have facilitated a negotiated interim solution. When it had got around to replying to the Statement of Claim, it called for a meeting. You have already heard the Attorney General on the change in Singapore's attitude to meetings. Even after the meeting of 13-14 August, Malaysia (after considerable internal debate, I might say) made one last, modified and moderate proposal for an interim solution. Singapore waited literally to the last moment to reply, and then it said "no": no counter-proposal, no suggestion for some compromise, just no, *nyet*, *nie*, *nein*, *non*. (That is about as far as my vocabulary extends.) It must have known immediately on receipt of Malaysia's Note of 22 August that its answer would be no *nyet*, *nie*, *nein*, *non*, but it deliberately delayed.

If Singapore is right, then a Claimant State under Chapter XV has a positive incentive to rush to the Tribunal, immediately after two weeks from the Statement of Claim to refuse all suggestions of talks, to make no offers, to listen to no offers. That would be more like trial by ambush than dispute settlement. Malaysia did not go down that path advisedly. Having at last induced Singapore to meet, it took the process seriously. Is it now to be penalised for having done so?

The basis of Singapore's argument under Article 290(5) is wrong anyway. Article 290 does not say that when a situation is very urgent, or extremely urgent, or ultra-urgent, your Tribunal may act. In principle, urgency is a requirement for every provisional measures order, or at least for every provisional measures order having mandatory consequences. It is true that there has become a tendency to use rather soft, inconsequential language in provisional measures orders as a sort of consolation prize; non-aggravation of the dispute is one of the favourite ones. I have never met a party that acknowledged that it was aggravating a dispute; it is just insisting on its rights. It has become customary to include those in order, but real provisional measures orders, tough provisional measures orders, have to be urgent. The drafters of Article 290 knew that the test for provisional measures in the practice of the International Court involved the concept of urgency, and that was the term they used. They did not set the barrier higher for this Tribunal than for the merits tribunal in terms of urgency. Their concern was exclusively temporal. There must be at every moment a Tribunal which is competent to order provisional measures. Pending the constitution of the merits tribunal, you are the competent body. After its constitution, you cease to be competent. It is as simple as that. Chapter XV should be read as adopting a systematic approach to dispute settlement, not an obstacle course of procedural technicalities. I can assure you that I feel, after the last two months, that I have run such an obstacle course. If provisional measures are urgent you may order them. If they are not urgent, the issue does not arise.

This was the approach you took in the *Southern Blue-fin Tuna* case, over the sole dissent of Judge Vukas. You did not regard the imminent constitution of an Annex VII Tribunal in that case as a reason not to act. If I may say so, the order you made in that case was entirely constructive in its effect. Japan complied with that order – I hope I can say that – as did Australia and New Zealand, and I feel I can say that. None of the parties took any action with respect to the Order, neither to vary it nor to claim that it had been breached. The Order was recognised by the parties as in force and binding throughout.

It is true that in the *MOX* case, you concluded that the issue of suspension of operation of the MOX plant could be reserved to the Annex VII Tribunal. You will understand that I have to be careful in what I say about the *MOX* case, and anyway you will be able to interpret your reasoning in that case better than I can. All I can say is that I do not read your judgment in the *MOX* case as involving a departure from the *Southern Bluefin Tuna* case. The facts were very different.

There is one final point on the issue of principle. It is a point which demonstrates that Article 290(5) should be given a purely temporal construction and not one which subordinates this Tribunal to a future merits tribunal at a time when the latter does not yet exist. The point is this. A provisional measures order, if you make one, does not operate only until the merits tribunal is established. Sir Elihu has already demonstrated that. It operates *sine die*, until it is varied or revoked by the merits tribunal. It is a subsisting judicial order, binding on the parties, for as long as it stands, potentially right up to the decision on the merits. Moreover, I hope I can say that your appreciation of the circumstances underlying a provisional measures order is influential, indeed helpful, for the Annex VII Tribunal. There is on assumption of conflict. An Annex VII Tribunal will be reluctant to vary it unless there is a change of circumstances, and the parties will know that. It is not the case of a competitive jurisdiction; it is the case of a temporarily organized sequence. Tribunals constituted under Part XV should act in aid of each other, and in aid of the purposes of dispute settlement in the law of the sea. There must be no period when effective recourse to provisional measures is excluded, if Article 290 is to be effective. Singapore's interpretation would tend to deprive Article 290 of effectiveness at what is likely to be a vital stage of the dispute settlement process, when any last minute attempts at settlement, if a future claimant would be so stupid as to agree to last minute attempts, have failed and there is a hiatus before the merits tribunal comes into existence. On Singapore's view, that is precisely the time when no provisional measures will be possible: it is too late for ITLOS and too early for the Annex VII Tribunal, yet it is at that time when they are likely to be needed.

But even if Singapore is right in its position, of subordination, even if it is right in saying that you are subordinated to any prospective merits tribunal once it is, as it were, slightly over the horizon, still the present case is urgent on any view. This brings me to the second part of my presentation, which deals with the general requirements for provisional measures.

Mr President, Members of the Tribunal, I do not propose to discuss in the abstract the requirements for provisional measures; the test is well enough known, and the issues are essentially ones of application. In general, there must be some threat of irreparable harm to the rights involved or the interests protected; that is, some threat if the conduct in question is not enjoined, and the matter must be urgent, not distant or remote.

On the question of irreparability, the position seems about as clear as it could be. Singapore is working hard to establish a *fait accompli*. It is obvious that this reclamation has a permanent character, and that once its footprint, its contours, are established, it will be virtually impossible to alter them even in minor respects. We do not complain about their engineering. On a rough calculation, up to a hectare

a day is being reclaimed and earlier datelines for the project, such as 2010, have been revised to bring them forward.

In the *Gabcikovo-Nagymaros Project* case, Slovakia insisted on excluding resort to provisional measures in the Special Agreement, so that by the time the International Court had to deal with the case, Variant C – that is the unilaterally constructed upstream diversion project and dam – was complete, or at least effectively complete. The Court did not need to decide, for the purposes of its discussion of countermeasures, whether Variant C was reversible, but no one who saw it (and the Court saw it) could think it was reversible. It was an engineering *fait accompli* by that time, and that fact underlies the judgment of the court. That is what Singapore is trying to create now, and what your jurisdiction to award provisional measures, which no state could exclude, exists to avoid.

For this purpose, it does not matter that the eventual consequences of the conduct in question may take some time to occur. We are talking about irreversibility and irreversibility is achieved once the thing exists irreversibly that will cause the consequences. It does not matter that the consequences will flow over time. In environmental cases this will usually be true. The point is that the cause of the harm, the actual construction, exists and is, for practical purposes, irreversible. That is the situation here, or will be: the flow regime will be permanently altered; the rights than vessels currently have to navigate in the affected waters will be permanently lost, and so on. The range of impacts and effects referred to by Professor Sharifah in her Report and by Professor Falconer in his evidence will have commenced to occur, and the underlying cause, the project itself, will be irreversible.

Mr President, Members of the Court:, there is not much more than needs to be said on the question of irreparability or irreversibility: the maxim *res ipsa loquitur* springs to mind. But I do want to say something more on the issue of urgency. Singapore argues that, even if the projects would harm the marine environment or injure Malaysia, they will not be completed for some time and in the meantime the matter can be dealt with by the merits tribunal when it gets to the merits. Naturally that argument brings to mind the *Great Belt* case, where the International Court refused provisional measures on the ground that the actual completion of the bridge was some time away. In the meantime, it accelerated its own schedule of hearings.

The *Great Belt* case was different from the present case in a number of respects. That was not a case where Finland had not been consulted at all about a project which obviously affected it. It was not a case where meetings had been refused. Finland *had* been consulted, very extensively; there had been innumerable meetings and a very complete exchange of information. In that case, the principal problem with the height of the bridge with its impact on occasional oil rigs passing from a Finnish yard on their way out of the Baltic. There was no problem for the vast majority, over 99%, of shipping because the bridge was rather high but the oil rigs could not go under it. Furthermore there were ways of resolving the oil rig problem, no doubt at some expense, by finally assembling them after they had passed through the bridge. Indeed, that was the solution eventually adopted when the case was settled before reaching the merits. Even so, the Court in the *Provisional Measures* phase warned Denmark that if Finland prevailed on the merits, issues of restitution would arise.

By contrast, however you may be able to redesign bridges, given the vast quantities of stone, concrete and sand involved in this case, the fact that works are continuing today and are even being accelerated, the comprehensive problems presented by the reclamation projects, the total failure of consultation, and the doubts about the adequacy of assessment, to put it at its lowest, in short, having regard to the rights Malaysia invokes, it is simply not credible to assert that this case is not urgent.

Of course, each case of provisional measures depends on its own facts, so let me focus a little more on the facts of this case. In terms of urgency the situation is not very different in the east and the west. The character of the intrusion into the waters is different. A 70 km projection southwards in the western sector and the massive reclamations in the eastern sector. For the purposes of this speech, I propose to focus on the channel to the east of Pulau Tekong, and the area to the south of that.

Let us first of all remind ourselves of the global situation (this is Tab 38). Taking the area of sea in the eastern sector in 1968, as bounded by those lines it was 170 km^2. The area that will be taken up by Singapore's project in this sector will be such that only 94 km^2 remains, not much more than half. And work is going on at a rapid rate in many of these sectors; it is not confined to any particular segment or little bit of the Pulau Tekong project.

Now let us look now at the south eastern segment of the Pulau Tekong reclamation work. You may see it better, I suppose, in the graphic in your folder. This segment concerns the narrow channel between the reclaimed area and the shoreline around the Malaysian naval base at Pularek (Tab 39). The picture you can see shows a view looking to the west from the Malaysian side. You can see the Pularek jetty, which is indicated, and the line of sheet piles. The boundary is a few tens of metres on this side, as it were, of the line of sheet piles.

Now let us we take an further photograph of the same location. You can see the line of sheet piles. That is a photograph made by putting a number of different photographs together. That shows you the extent of the line of sheet piles. You can see the boats at work. Pularek is just out of vision at the bottom of the picture. The small mark you see there is a bit of Pularek. It may be a tree, I am not sure.

The water depth enclosed by those sheet piles that you see in the picture is up to 15 metres. This is not a shallow immediate offshore reclamation project; it is truly massive. The area in question used to be frequented by small boats. There is a great deal of small boat traffic in this area. A boat does not actually have to be very small to sail in 15 metres of water. All these small boats, fishing craft and the like are going to be funneled into the relatively narrow navigational channels to the east and west of Greater Tekong, as I will call it. There they will have to compete, or coexist, with the large boats sailing through the narrowed channel to Malaysia's port and ship repair facilities which are along the coast of the Straits of Johor. There is more than a billion dollars worth of ship repair facilities, ports and other infrastructure along that coastline. This will have serious potential effects for all shipping going to these facilities, not just 1 per cent of them. It is irreversible once this southern segment – the sheet pile segment - is locked in place, and it is urgent because, as I will show, Singapore is seeking to lock it into place even now.

Now look at an overhead of the same area in the south-east. You can see what the potential impact is, almost at a glance - although Singapore professes not to understand it. Again, there is Pularek jetty, there is the line of sheet piles. You can see how constrained the area will become, when the temporary line of sheet piles is made permanent by rocks, concrete and sand and yet, as far as we understand, there has never been any consideration of any alternative configuration in this region that would be better for navigation, better for hydraulic flows.

Malaysian modeling suggests a predicted increase in flow velocities in this sector of the order of 70%, it could be even higher. Nothing published by Singapore indicates that this estimate is too high. It is a very serious increase. The change in velocity is much greater in magnitude as compared with predicted changes of velocity in Singapore waters. And it follows in principle from the severe narrowing of the channel here, it becomes a funnel. Mitigation measures might improve matters to some degree or they might reduce the wave echo from the line of sheet piles, but the basic parameters will be established. Moreover, as you heard Professor Falconer say, a 70 per cent increase in velocity means a much greater increase in energy, potential turbulence and sediment transport. The relationship is not linear, it is progressive.

And as soon as Singapore fills in this section, this southern triangle, the die is cast. At one stage Singapore said that the southern section, the offshore filling site as it calls it, was a distant prospect and obviously the sheet piles themselves can be removed. They were put up in a week or so and they can be taken down. But now it says, apparently, that it is going to build a rock revetment outside, that is, to the east of, the sheet piles, which will further constrict the channel and aggravate the impacts that would be caused. And however it may be presented, as a form of mitigation of wave effects, this is not a charitable act; it is an attempt to convert the temporary line of sheet piles into a permanent rock wall - yet again to create a *fait accompli*. In short, the reclamation projects are actively under way. There are indications that the schedule is being accelerated in crucial sectors. Once constructed, the whole operation is patently irreversible. If ever there was a case, in the context of a major engineering project, as distinct from a death sentence on a pirate, of combined urgency and irreversibility this is it.

There is another indication, circumstantial perhaps but significant. In its Note of 2 September 2003, Singapore declined to agree to any form of suspension of work. You will have noted the terms in which Malaysia sought such a suspension, in its Note of 22 August 2003. These were the very least that Malaysia could have asked for, and much less than it is entitled to; they were put forward in an attempt to try to build on Singapore's professions of willingness to discuss the project and to consider modifications if the case could be made. The suspension sought was deliberately limited in time and in scope.

Now let us assume that Singapore had no intention of seeking to consolidate the southern triangle of the Greater Tekong area; it could have said that. It could have given information and assurances of its intentions which, in the context, could have substituted for a formal commitment not to engage in any irreversible act in this vital area. Did it do anything of the sort? It did not. The activity on the ground - more

properly on the water - stands in stark contrast with Singapore's silence in the context of the attempted negotiations. It could have offered some comfort; it offered none. The appropriate conclusions should be drawn; Singapore is trying to create a *fait accompli* with respect to the project as a whole and it is doing so in the least completed segment of the project and the segment which causes potentially and actually the most harm to Malaysia. That in itself satisfies the requirement of urgency.

Mr President, Members of the Tribunal, Singapore makes a number of further general arguments against any form of provisional measures, and I will briefly deal with them.

One argument put forward by Singapore implies that the provisional measures sought - in particular in relation to Point 20 in the west - would "predetermine issues of territorial title". More generally there is the suggestion that the grant of provisional measures would be highly prejudicial, since it would imply that Malaysia's rights could be affected which, according to Singapore, is not the case. But such arguments mistake the character of provisional measures which, in broad terms, is to preserve the *status quo ante* pending resolution of the dispute. Indeed in the present case the provisional measures requested amount to the preservation of the subject matter of the litigation, that is to say, the areas of sea which are to be reclaimed and the shoreline and other features of the environment which, Malaysia credibly claims, are threatened by Singapore's action. The preservation of the subject matter of the litigation is a core basis for provisional measures.

In any event, as Professor Schrijver has noted, Malaysia does not need to prove its case and the Court does not need to rule on it at this stage. It is sufficient that Malaysia points to rights which are reasonably in issue in the present case, and to circumstances that credibly engage those rights, and there is no prejudice to the ultimate determination of the case in your saying that this is so. On the contrary, there would be major prejudice to Malaysia if, in the period between now and the final decision of the merits tribunal, a *fait accompli* had been created which made Malaysia's rights redundant, in the case of the procedural rights, or illusory, in the case of the substantive ones.

To summarise on this point, Malaysia seeks to preserve the *status quo ante*, Singapore seeks to create a new status quo; we will call it the *status quo post* - I think that is a new phrase - a *status quo post* the commencement of proceedings. Provisional measures exist to protect *status quo ante* and to preclude the creation of new and incompatible *status quo* by unilateral action. If provisional measures are ordered but the merits tribunal holds that Singapore is right, the reclamations can be completed. If provisional measures are refused and the merits tribunal holds that Malaysia is right, it will be an empty victory because the work will have been completed. Malaysia will have rights, but nothing else. Provided we can show that Malaysia might be right, that fact alone establishes the case for provisional measures. In conjunction with the scientific material put forward, Professor Schrijver has shown that Malaysian rights are engaged.

Mr. President, Members of the Tribunal, what I have just said on Singapore's argument about prejudgment goes to answer its further argument that suspension of

work would not produce significant benefits for Malaysia. Indeed for Singapore to make that argument, as it does, increases our concern in a number of ways.

The first point to make is that Singapore is not the judge of what constitutes significant benefits to Malaysia in a dispute about the respective rights of the parties under the Convention. Malaysia has procedural and substantive rights under the Convention which are engaged by these projects, as we have shown. The procedural rights of notification, consultation, assessment, and co-operation in general, do not exist in a vacuum or as a mere matter of form. They exist in order to allow the affected coastal State and the acting coastal State to be informed, for the affected State to propose alternatives, for the acting State to take them into account. That combination of actions, the involvement by the potentially affected State, is itself a benefit, as Sir Elihu has testified in relation to Ireland's participation in the UK's processes with respect to Sellafield.

But there is a connected range of substantive rights in relation to the marine environment of Malaysia, as Professor Schrijver has also shown. Malaysia has a right that its coastline not be seriously eroded or the subject of major sedimentation, that its sea-grass areas not be destroyed, its fisheries ruined by increased water flows, its mangrove zones affected, its navigation impaired. Obviously all of those rights have to be balanced, but Malaysia has rights and it is not Singapore to say that they have no significance. The procedural rights of notification and consultation moreover exist not in isolation but for the purposes of helping to ensure that the substantive rights protected by the Convention are not impaired or destroyed. These are, on any view, valuable rights and they are not to be overridden by Singapore's claim that they are not significant. I imagine, Mr President, that if Malaysia had built a major construction of this sort within 750 metres of a Singapore naval base, threatening the stability of the jetty and presenting difficulties for navigation, especially at slow speed, Singapore might have wanted to be consulted and to be able to propose alternatives. If the tables were turned, Singapore would not think its rights of no account.

Singapore completely overlooks this connection between procedure and substance. It seems to say that meetings are enough and the eventual exchange of information. The implication - I am sure counsel for Singapore will correct me if I am wrong - is that all Singapore expects to happen is that Malaysia will make representations which can be safely ignored. There will be a performance, one might call it a charade, and Singapore will then be able to say that it has consulted. That would be a benefit for Singapore.

Now it is true, and we accept, that Malaysia does not have a veto over Singapore's activities in Singapore's territories, in the sense that if, after compliance with the procedural requirements of the Convention, Singapore is convinced on reasonable grounds that there will be no harm to the marine environment or to the rights of Malaysia, then it does not have to defer to a contrary Malaysian view. On the other hand, it is still obliged not to harm the marine environment or cause serious damage to the neighbouring State by pollution, broadly defined. If Singapore turns out to be wrong in its assessment (and I have to say that the reports it has presented were not even designed to consider harm to the Malaysian environment; they focused on Singapore only) then it will be in breach of the Convention and Malaysia will be

entitled to reparation. But the emphasis in the Convention is on prevention of harm; issues of reparation are secondary, and the purpose of Article 290 is to allow a situation to be preserved, or potentially harmful work suspended, pending an objective assessment of the situation. This case is not just about formal consultation, not just about meetings in a diary, representations about rights made to a Government which has already publicly announced that the rights have no significance. The procedural rights and the substantive rights under the Convention are both engaged and they are interlinked. To say they are of no significance to Malaysia is to say that Singapore does not take them seriously.

I turn to a fifth general argument presented by Singapore, which is that Malaysia does not substantiate the claim that there will be serious harm to the marine environment. Well, this is not the stage of the merits and, as Singapore itself says, "a full study of the [impact] is not a matter for the provisional measures hearing". You do not need to rule on the matter now, as I have said; you need to convince yourself that there are legitimate concerns as to the impact of these reclamations in each sector, and that the concerns do not appear to be minor or easily reparable. You have heard Professor Falconer on this, you have heard Professor Shrijver, you are in a position to read the various reports for yourselves. Do you think there is no basis for concern? One only has to look at what is being done, in these sensitive and heavily utilised waters, to conclude that there is such a basis.

Singapore complains that Malaysia's concerns are speculative. Of course, the prediction of the consequences of hydro-dynamic changes on this scale involves an element of uncertainty and some of the changes take time to occur and there are many variables. But some of the changes are occurring already; there is increased turbidity, sedimentation on Malaysian beaches, impacts on fisheries and so on. The Tribunal will be aware that fish spawning is particularly sensitive to changes in water velocity, even apparently minor changes. Moreover when there are grounds for predicting a 70% increase in velocities in the eastern channel, we cannot say that consequential changes in sedimentation are speculative; it would be amazing if they did not occur. What the eventual steady state will be is a question but can only be answered by a proper long term modelling of the region, an exercise which has not been carried out as Professor Falconer said. It now needs to be carried out under joint auspices.

In any event, in a context in which there have been violations of procedural rights, it is not for the state which has failed, or apparently failed to fulfil its procedural obligations simply to assert that there is no connection between procedure and outcome, that everything will be all right in the end. This is not consistent with a precautionary approach, but above all it is not consistent with the facts as set out in the evidence made available to the Tribunal, or with any reasonable understanding of what the impacts are likely to be.

Singapore complains that the Request was lodged with this Tribunal before Malaysian experts had had the opportunity to take into account additional Singapore data, including certain studies, handed over after the 13-14 August discussions. As to the studies handed over, that statement is not true; the studies were assessed. As to the data, more work will be done.

To summarize, there is a substantial case, based on the scientific evidence, in support of Malaysia's concerns. You do not have to assess that case definitively at this stage, but you do need to determine whether it is credible. Singapore's two summary reports, which they have laid before you, which are of course dated 15 July in each case, do not include in their scope an assessment of the impacts on the Malaysian side; most of the Singapore material is concerned with the question of how best to carry out the reclamations, the question of technique, including avoidance of short-term sediment plumes arising from the works. That is a legitimate concern, and Singapore has tried to avoid such plumes, though not with entire success. But it is by no means the only concern, or the most important. In general, Singapore's reports simply do not address the long-term concerns, and to the extent they contain data bearing on the long-term problems, it is either equivocal or supports Malaysia's position. In the context of rapidly proceeding and irreversible work on the reclamations, Malaysia is entitled to measures that will effectively preserve its rights pending a decision on the merits.

Mr President, Members of the Tribunal, I turn to the question of precisely what measures should be ordered. In its Request, Malaysia sought four specific measures. You will have noticed that they were not in all respects identical to those which were requested on 4 July 2003; they took into account certain developments since, including the provision of certain additional reports.

Before I go on to deal with the specific measures now sought by Malaysia, I should make the point that this is of course a matter for the Tribunal's appreciation. The ne ultra petita rule does not apply to provisional measures. I doubt if there has ever been a case where the provisional measures granted by an international tribunal have been verbally identical to those which were sought by the requesting State. Sometimes they have been less, sometimes they have been more, or at least more detailed (as they were in the *SBT* case); virtually every time they have been different. Malaysia accepts that it is for this Tribunal to determine what will be the best and most appropriate measures in this case, taking into account the facts as they presently appear, the arguments of the parties and the law which the Tribunal was established to administer, the law of the sea under the Convention. The effective protection of the values contained in the Convention—protection of the rights of the parties, prevention of serious harm or threat of harm to the marine environment—these are the criteria for your decision.

That said, let me turn to each of the measures requested and comment on Singapore's response to them.

The first is suspension of works. This is the single most important issue you have to face, and I urge you not to duck it by general references or vague phrases to non-aggravation. The question is: is Singapore to be entitled to continue to create an irreversible situation threatening harm to the marine environment and to the rights of Malaysia in defiance of its procedural obligations to Malaysia? Malaysia submits that there can be only one answer to that question.

I have dealt already with the bulk of Singapore's objections to the suspension of works request, and I will not repeat myself. I would simply note that, consistent with

the moderate position it has taken throughout, Malaysia does not demand a stoppage of all reclamation work whatever. Its request is formulated in the following terms:

> "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)"

Evidently, this request applies to the region around Point 20, which I have already discussed. It certainly applies to the areas to the north, north-east and east of Pulau Tekong which are close to the 1995 boundary and which present a significant problem. It equally applies to the triangular area to the south of Pulau Tekong, the area of the sheet-piles which I have shown you. In particular, it is imperative that Singapore be prevented from consolidating the footprint of Greater Tekong in the south by the construction of its new rock revetment to the east of the line of sheet-piles.

The second request relates to provision of information:

> "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)"

It is true that some information has been provided, in particular, two reports by Professor Cheong's group and the Danish Hydrological Institute, which were provided in August. You will find these reports referenced in annexe 3 of Singapore's Response, page 46, reference 5, and in annexe 4 of Singapore's Response, page 49, references 1 and 2. It was agreed this morning, at Singapore's request, that no reference would be made to the content of those reports, but of course, they are referred to in other documents, and they were in fact received by Malaysia. The fact that they were received is known. Singapore has asked that we not refer to the content of those reports, and we will not do so.

I cannot refer to the content of those reports, but they were given and they led to a modification in this request.

But there are still a number of reports which have not been provided, including reports which should detail impacts of the reclamations on the Malaysian side, if such impacts have been taken into account. There is no indication anywhere that they have been. So there is considerably more which is needed on this score.

Moreover, for Singapore to assert that this request is "without point" is rather unhappy having regard to the earlier, and I would suggest manifest, lack of compliance by Singapore with its procedural obligations under the 1982 Convention. It must be rare in relation to a project this size, having evidently transboundary effects, that the neighbouring state has to carry out its own EIA on the project because the proponent state has not done so and refuses to make information available. Yet that is what happened here. Such exchange of information is the very

minimum that can be required, flowing as it does from the general obligation of cooperation which you stressed in your MOX order.

Mr President, Members of the Tribunal, I propose to deal together with Malaysia's third and fourth requests, which raise rather similar issues. In its third request, Malaysia sought an order that Singapore…

> "afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided…"

Fourthly, Malaysia requests that…

> "agree to negotiate with Malaysia concerning any remaining unresolved issues."

In its Response, Singapore seems to have accepted the substance of the third request, but it does so, we suggest, only on paper. Its conduct so far does not suggest that – to quote the award in the *Lac Lanoux* case – Malaysia's interests will be taken into account in any "reasonable manner". It was, of course, only after Malaysia had formally made its claim on 4 July that Singapore was prepared to recognize the existence of the legal duty as such. In order to elicit from Singapore that recognition, Malaysia had to commence proceedings under Part XV, and in none of the contacts Malaysia has had with Singapore since that date has there been the slightest real indication of flexibility on Singapore's part.

This is why, Mr President, Members of the Tribunal, Malaysia's third and fourth requests remain important; having regard to the record over the past two years on this issue. They are not "without point", as Singapore asserts, but will be an important aspect of any solution.

Mr President, Members of the Tribunal, 19 days or no 19 days, your function in this case is important, even if it may be transitional. On this vitally important question for the future of the Straits of Johor as an international waterway and as a vulnerable semi-enclosed sea, the resort to the Convention and to this Tribunal has so far been a potential circuit-breaker. But Singapore said "no" in real terms, whatever its professions of cooperation may have been. Singapore having declined to cooperate, for the future of this region, the next step has to be taken.

Let me put it this way: ask yourself whether, if this application were to be dismissed – perhaps with costs – Singapore would regard itself as having a mandate to complete the reclamations with their total footprint as soon as possible, and certainly before the merits tribunal could reach a conclusion. Ask yourself a further question: would anyone seeing this—the areas in yellow—think there was no potential threat to the marine environment? The combination of the size and intrusiveness of these reclamations – 5,000 or so hectares – and their proximity to Malaysia, mean that it is obvious—elementary—that Malaysia should have been consulted and alternatives examined.

If this Law of the Sea Tribunal were to leave Singapore to proceed with its current policy of unilateral action, would you be discharging your obligation to the protection

of the marine environment, and to the maintenance of the public order of the oceans which the Convention was intended to advance? You know how important estuaries are. You know how important procedural obligations, including the obligation to cooperate, are in the effective balancing of rights and duties under the Convention. You know how important prevention is, more particularly in a case where there is absolutely no certainty that there is any cure. We would ask that your Order reflect that awareness.

Mr President, this brings me to the end of my presentation and indeed to the last of Malaysia's presentations in its first round.

Mr President, Members of the Tribunal, thank you for your attention.

THE PRESIDENT: Thank you, Professor Crawford. We have just heard the last speaker for the applicant. We will hear speakers for the respondent tomorrow. The sitting is now closed.

(Adjourned at 5.25)