INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

2003

Public sitting

held on Saturday, 27 September 2003, at 9.30 a.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
		Anthony Amos Lucky
	Judges *ad hoc*	Kamal Hossain
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	Registrar	Philippe Gautier

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Mr Abdul Aziz Abdul Rasol, Assessment Division Director, Department of Environment,
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Ms Say Khim Ong, Deputy Director, Strategic Planning, Housing and Development Board,
Mr Yan Hui Loh, Senior Vice President, Engineering, HDB Corp (Surbana) (Project Manager, P. Tekong Reclamation Works), Singapore,
Mr Way Seng Chia, Vice President, Reclamation, HDB Corp (Surbana), Singapore,
Mr Cheng Wee Lee, Deputy Port Master, Maritime Port Authority of Singapore,
Mr Parry Soe Ling Oei, Deputy Hydrographer, Maritime Port Authority of Singapore,
Mr Chee Leong Foong, Head, Pollution Control Department, National Environment Agency,

as Advisers.

CLERK OF THE TRIBUNAL: All rise.

PRESIDENT: Please be seated.

CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea is now in session.

THE PRESIDENT: I give the floor to Professor Schrijver.

PROFESSOR SCHRIJVER: Good morning, Mr President, Members of the Tribunal.

My task this morning is to emphasise that the conditions for the taking of provisional measures by this Tribunal in this Case are fully met. For this purpose I will first review the diplomatic history of the dispute between Malaysia and Singapore. I will show that the requirements of Articles 283, 281 and 290, paragraph 5 are met. Next I will demonstrate that your Tribunal is the proper forum for the taking of such provisional measures at this stage of the procedures, and that such measures are now a matter of urgency.

Following yesterday's footsteps of Professor Koh through the diplomatic history, Malaysia would like to highlight along the way those aspects of the diplomatic correspondence which matter at this stage of our proceedings, aspects which Professor Koh tended to ignore. I have to apologise that time does not allow me to refer to newspaper clippings and the like; I will focus on the documents which really matter as between States, in particular the diplomatic Notes.

As a matter of fact, there has been quite a lengthy series of diplomatic exchanges on the land reclamation issues and associated territorial questions. This is set out in paragraphs 19-20 of the Statement of Claim and may also be traced from the correspondence included in its Annex I. Five main rounds of diplomatic exchanges can be identified.

In a first protest note date 28 January 2002, Malaysia stated that it "strongly protests all work conducted by Singapore relating to the reclamation activities in and around Malaysia's Territorial Waters… Malaysia demands that the Government of Singapore…cease and desist from all reclamation activities within and around Malaysia's Territorial Waters with immediate effect".

Singapore merely responded on 20 February 2002 that "…there is no basis for Malaysia to object to…the reclamation of Tuas View Extension as the reclamation activities are clearly being carried out within Singapore Territorial Waters".

In a second round of exchanges Malaysia repeated on 2 April 2002 its demand that Singapore "completely cease with immediate effect all further land reclamation activities in and around…Point 20", and "Singapore's reclamation activities in the disputed area, without prior and proper consultations with Malaysia are clearly against international law and state practice which…Singapore claims to uphold". Therefore, Malaysia urged that a meeting of "senior officials be held to discuss the concerns of each party with a view to amicably resolve this dispute".

What was the answer of Singapore? On 11 April Singapore "categorically rejects the contention of Malaysia that the reclamation work around…Point 20 in any way affects the rights of Malaysia." Singapore did not accept the offer to convene a meeting. It stated: "Such a meeting will only be useful if…Malaysia can provide specific new facts or arguments ….." Singapore kept the door closed for Malaysia.

Malaysia gave it a new try only 19 days later, a rather magic number which proves to have been with us in an early stage. Opening a third round of diplomatic exchanges, in its letter of 30 April 2002 Malaysia strongly protested against all work conducted by Singapore relating to the reclamation activities in and around Malaysia's territorial waters. In response to Singapore's earlier request, Malaysia substantiated its concerns in considerable detail. I quote: "Malaysia wishes to inform ..Singapore that the said reclamation activities have caused serious environmental degradation as indicated in increased sedimentation, erosion, siltation, decreased flushing, hindrance to flood flow and changes in the flow pattern with the consequent degradation of marine species of fauna and flora, marine habitats and their ecosystems." As you can see, the letter continues in this vein.

Once again, Malaysia proposed that a meeting of senior officials of the two countries be held on an urgent basis to discuss the concerns raised by the Government of Malaysia with a view to amicably resolving this issue. Malaysia sought consultations. Once again, Singapore refused them. On 14 May 2002, the reply of Singapore was: "These claims and allegations are unsubstantiated and bereft of particulars. The reclamation works are carried out entirely within Singapore and in accordance with international law. There is no basis for Malaysia's claim…".

With due respect, even yesterday Ambassador Koh referred to this 30 April 2002 letter, in which Malaysia expressed its genuine concerns on a set of issues relating to the transboundary impact of land reclamation works, as "this laundry list of vague allegations". Is such a characterisation fair, Mr President, Members of the Tribunal? Do such responses prove Singapore's proposition that, if I may quote Ambassador Koh once again, "has *always* been prepared to address Malaysia's concerns seriously" and that "Singapore has never ruled out negotiations with Malaysia"?

Moving to the fourth round of expressions of serious concern, I quote from the 10 July 2002 letter in which Malaysia reminds Singapore of the consequences of the Singapore reclamation measures which involve breaches of international law such as "the failure by Singapore to consult with Malaysia on matters of mutual concern, the failure of Singapore to carry out an environmental impact assessment in accordance with current requirements of international law and the unilateral modification of the marine and fluvial environment likely to cause injury…". In this letter Malaysia also specified its rights under the Law of the Sea Convention by referring to specific articles of the Convention.

Unfortunately, on 28 August 2002 Singapore flatly rejected Malaysia's claims as "unsubstantiated and baseless". Also with respect to Malaysia's urgent request for bilateral consultations "to discuss the concern of each party with a view to amicably resolve this dispute" it was once again a matter of copy and paste: Singapore stated that such a meeting will only be useful if Malaysia could provide "specific new facts or argument to prove its contentions", a phrase we see in almost every letter.

Mr President, Members of the Tribunal, there is no need to recall in detail the recent exchange of correspondence between the parties following the delivery of the Statement of Claim on 4 July 2003 and the exchange of views between the parties, at a meeting in Singapore held on 13-14 August 2003. While Singapore shifted in words towards the language of co-operation, its actual behaviour remained consistent with past practice. Therefore, in his closing remarks at the meeting in Singapore on 14 August, Tan Sri Fuzi made an appeal to Singapore: "In order to move the situation from one of unilateral action and response to one of joint approach, Singapore needs to temporarily suspend its reclamation activities, in particular the activities in the eastern sector of the Straits of Johor. If that is done, the situation will fundamentally change. It would demonstrate Singapore's friendly gesture and sincerity in addressing the concerns of a close neighbour whose vital interests have been and would continue to be seriously affected by Singapore's unilateral action."

In its Note of 25 August Malaysia expressed the view that it is inevitable that the land reclamation works would have serious effects and that "the absence of any attempt by Singapore to account for these effects for Malaysia, or to instigate any form of joint study, is in and of itself a violation of the 1982 Convention, for which Malaysia is entitled to seek a remedy, including by way of provisional measure".

Thus at the last Malaysia made it clear: it is two minutes before twelve o'clock. In a last attempt to avoid international litigation, Malaysia put forward certain conditions, including suspension of works around Pulau Tekong and prior discussion and consultation with Malaysia on links between its offshore islands and Singapore Island as well as a jointly sponsored study of the long-term changes in the Straits. On 2 September 2003, Singapore notified Malaysia that it would not suspend works. You see part of the reply on the screen.

This review of the highlights of the diplomatic history of this dispute leads to three conclusions. First, there is a long-standing dispute about the land reclamation works by Singapore. Second, Malaysia and Singapore have been engaged in exchanges of views over a considerable period of time, even if, on the Singapore side these views have been curt and cursory. Third, Malaysia did not abruptly break off meetings in August 2003. Rather, it drew the unavoidable conclusion from Singapore's failure to accommodate its basic concerns: that is, that negotiations could only be fruitfully undertaken if not accompanied by ongoing marine reclamation activities.

Mr. President, Members of the Tribunal, yesterday, Professor Reisman tried hard to distinguish the present situation from that underlying the recent MOX Plant dispute between Ireland and the United Kingdom – up to the point of suggesting that despite its refusal to meet Malaysia's basic concern, Singapore was the party showing flexibility towards a neighbouring State that lacked the required minimum degree of open-mindedness. Mr President, Members of the Tribunal, the extracts I have presented to you do not suggest that Singapore has behaved in a particularly flexible way. They do not suggest that 4 July was the first day on which Singapore could have possibly responded to Malaysia's requests. They do not suggest that Malaysia's decision to go to your Tribunal prevented an imminent amicable

resolution of the dispute. Quite to the contrary, as Malaysia's Attorney General observed on Thursday, the situation may not be as far away from MOX Plant as Prof Reisman has suggested. There, just as here, the applicant had tried to put its case. There, just as here, there were frequent diplomatic exchanges. There, just as here, the respondent did not see the need for anything but curt and dismissive responses. And so, Mr President, Members of the Tribunal, here, just as in MOX Plant, Malaysia urges you to follow the sustained jurisprudence on Article 283 and affirm that:

"a State party [and it could well read Ireland or Malaysia] is not obliged to continue with an exchange of views when it considers that the possibilities of reaching agreement have been exhausted." (para 60 MOX Plant)

Mr President, Members of the Tribunal, please allow me to turn briefly to another issue raised by Professor Reisman yesterday. Contrary to his views, it is clear that Article 281 of the Convention does not prevent the granting of the present Request. Of course, Article 281 is one of the more notable articles of Part XV, Section 1. In the *Southern Bluefin Tuna case,* it provided the basis of the Arbitral Tribunal's decision to decline jurisdiction over Australia's and New Zealand's claim. This was widely acknowledged as a very wide – and many would say too wide – interpretation of the provision. It seemed difficult to reconcile with your earlier Order in the same case, in which you took the view that Article 281 did not form an obstacle to the proceedings. Professor Reisman seems to have been encouraged by that decision to put forward an interpretation that, with all due respect, I would call astonishing.

In *Southern Bluefin Tuna*, Article 281 was held to be applicable in a situation in which the three parties to the dispute, Australia, New Zealand and Japan, were parties to a special Convention. This Tuna Convention provided for its own dispute settlement procedure, involving meetings of parties, conciliation, etc, in other words: a framework within which disputes could be settled. Now, some might have taken the view that that framework was not elaborate enough to contract out of Part XV of the Convention on the Law of the Sea; it was certainly not compulsory. On the other hand, it was contained in a treaty included a dispute resolution clause.

This may be compared to the present case. Singapore agrees that there is no general duty to negotiate after the obligation to exchange views has been met. But it introduces such a duty through the backdoor by arguing that agreement to one meeting is enough to create such an obligation. Mr President, Members of the Tribunal, may I invite you to reflect for a moment on the inconsistency of Singapore's argument put to you by Professor Reisman? Singapore, on the one hand, criticises Malaysia for allegedly not having been interested in a negotiated settlement – a contention that, as I have already shown, is unfounded. It also claims that the meeting of 13-14 August is not enough to qualify as an exchange of views in terms of Article 283. But on the other hand, according to Singapore that same one meeting is enough to create an obligation on the part of Malaysia to pursue negotiations, and to contract out of Part XV Section 2. Mr President, Members of the Tribunal, Singapore wants to have its cake and eat it and we ask you respectfully to tell Singapore that there is no such thing as a free lunch.

Next, Malaysia wants to address the issue of urgency and wishes to point to some of the fundamental issues underlying the urgency test that this Tribunal will have to

apply. The first is the so-called 19 days argument which both in Singapore's Response and in its oral presentations served as its ultimate safety net. Indeed whenever Professor Lowe got into trouble in defending the reclamation project against the charges of serious harm levelled at it, he responded by saying that at least this could not happen within 19 days.

In Malaysia's views this count down exercise is misconceived. Why should this Tribunal only have the power to act if it is 39, 29 or 19 days? The order you make is likely to last for much longer, probably for many months, if not for several years. But whatever the number of days that may be left (and estimates have varied during these very hearings), Singapore's argument is fundamentally misconceived.

For a start, Article 290(5) does not say that this Tribunal is precluded from responding if the Annex VII Tribunal could address the matter within the near future. The provision is based on the notion of urgency, which is well-defined in international jurisprudence, and which requires courts and tribunals to assess whether a right or another relevant concern needs to be protected against serious and imminent harm. This urgency test requires an analysis of the underlying risks, rights and interests; it is more than a mere exercise in counting days.

Mr President, Members of the Tribunal, the question then is whether an additional, 'special urgency' should be read into the provision. Professor Crawford has referred to the Southern Bluefin Tuna case in this context. Let me briefly put forward four arguments which show that the position you adopted in this case is convincing, and that no 'special urgency' let alone a '19 days' test of Professor Lowe should be read into Article 290(5).

First, Singapore's 19 days argument implies that an Arbitral Tribunal becomes effective on the day it is formally constituted. This is simply not realistic, as anyone involved in international arbitration will readily appreciate. More importantly, however, even if Singapore were prepared to accept this, and turn its 19 days argument into, say, a 49 days argument, it would still be unconvincing and run counter to the letter and spirit of Article 290 (5).

That provision presupposes that ITLOS has a role to play even where the merits of the dispute will eventually be heard by an Arbitral Tribunal. The Convention adopts very strict time-frames for the setting up of an Annex VII Tribunal – in fact, Article 3 of Annex VII imposes upon parties a 60 days limit. Even if an applicant submitting a claim immediately seeks provisional measures (and not, like Malaysia, pursuing the path of exchanging views and negotiations first), it would likely come to ITLOS only after say 15-20 days of those 60 days will have elapsed. If Singapore is right, and if this Tribunal accepts its argument on special urgency, then any State seeking provisional measures will face a 40 days argument. 40 days would be the uppermost limit of urgency. Article 290 (5) would effectively read: If provisional measures are required within the next 40 days, ITLOS may prescribe them. Mr President, Members of the Tribunal, this is not what the provision says, and this is not what it envisages.

Second, if Singapore's 19 days argument were correct, the Convention would penalise applicants which, like Malaysia, give negotiations a further chance. Every minute that applicants would spend negotiating after filing a claim would count

against them for the purposes of provisional measures. Instead of facing a 60 days limit, applicants pursuing negotiations would have to deal with 30 days, 20, or (in the case of Malaysia) 19 days arguments. This would run counter to the purpose of dispute resolution, which the Convention seeks to promote.

Third, if Article 290(5) was based on a special urgency test, then why would ITLOS orders be binding until revoked? Whenever an Arbitral Tribunal is effectively constituted, it can revoke or affirm provisional measures, as Article 290(5) clarifies. If ITLOS was only competent until the Arbitral Tribunal was constituted, this regulation would be meaningless.

Hence, Malaysia strongly urges this Tribunal to reject Singapore's misconceived 19 days argument and to take responsibility for what are two of your major tasks, that is, to preserve the rights of the parties in provisional measures procedures and to prevent serious harm to the marine environment. In the discharge of your responsibility in this, Malaysia would ask you to bear in mind two crucial issues.

The first is that every day, every hour the project is continued. If Malaysia is right that its rights under the Law of the Sea Convention are being violated by Singapore's conduct, then very soon this situation will become irreversible. Mr President, Members of the Tribunal, matters are now getting urgent. By now you are quite familiar with the scale, the speed and, if you like, the audacity with which Singapore conducts its land reclamation works. As you heard on Thursday, on an average each day 0.8 hectare of sea area is being reclaimed. The premises of your Tribunal including its lovely garden comprise approximately 3.6 hectares. It takes Singapore not much more than four days to fill such an area with sand, concrete and stones. Time is of the essence.

The second crucial issues also one of time. Repeatedly, Malaysia has been criticised by Singapore of being too late but this argument is misconceived. The question is not why it is so late. That is looking backwards. Provisional measures are by definition forward looking; they are concerned with the future. Hence, the real question at stake is: why now? Suspension of certain reclamation works can still make a difference and can be instrumental in preserving some of Malaysia's fundamental rights under the Law of the Sea Convention. Moreover, this argument on lateness is based on adversarial proceedings between the parties. As Judge Weeramantry observed in his separate opinion in the Gabcikovo case, it is of limited relevance in "cases involving environmental damage of a far-reaching and irreversible character". As Judge Weeramantry rather convincingly put it: "[i]nternational environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest". That equally applies to Singapore and Malaysia. Like Gabcikovo and Southern Bluefin Tuna, this case equally offers opportunity for such reflection and offers you an opportunity to contribute to the sustainable use of a sea area. If you accept Singapore's argument that Malaysia has been late in formulating its claims, the ecological interests will go unprotected, and you will not be able to discharge your special function to protect the marine environment.

Mr. President, Members of the Tribunal, this concludes Malaysia's first presentation this morning. Could I now call upon you, Mr. President, to give the floor to Professor James Crawford?

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

PROFESSOR CRAWFORD: President, members of the Tribunal, I propose to deal with three issues of fact relating to the conduct of the parties, the impact of the project and the issue of urgency.

Mr President, members of the Tribunal, we heard a great deal yesterday about pollution and other harmful activities of Malaysia, more specifically about its massive land reclamation activities of PTP opposite Tuas. You will recall the enormous tentacles of that project, shown several times on the screen by Singapore's counsel. It forms a strong counterbalance to Greater Tekong. If I were you, seeing that photograph of the PTP monster, I would have thought, what a nerve Malaysia has in coming to this Tribunal complaining of a massive land reclamation project narrowing the Straits, without an EIA, without any assessment of transboundary harm, when what it is doing is just as bad! It was a very powerful graphic. It also bears no relationship to reality.

PTP is a large container shipping terminal, owned by a private company. It is in direct competition with the Port of Singapore. It is located at Tanjung Pelepas at the entrance of the Pulai River, a substantial river more or less opposite Tuas Reach. The expansion project of which Singapore now complains has two phases with a combined size of 275 hectares. You can see it on the screen now. It compares with the 5,764 hectares of Singapore's two projects, i.e. about 5 per cent or one-twentieth of their size. It is by far the largest land reclamation project in Malaysia.

On the screen is a picture of the PTP terminal, including the reclamation works. You can see they lie substantially inshore; they reflect a large but nonetheless not monstrous project involving land reclamation, shipping and port facilities.

On the next graphic, you can see the coastline looking north-eastwards across the mouth of the Pulai River, where PTP is located on the farther side. You can see PTP and the reclamation area. You can also see the wide expanse of water. There is no obstruction of flow, no constriction of the navigational channel, no sign of monsters, just an inshore project. If a closing line was drawn across the entrance to the mouth of the Pulai River, the Phase II reclamation would only project a few hundred metres, perhaps half a kilometre, seawards of the closing line. Tuas Reach is ten kilometres away to the east.

Phase II of PTP differs from the Tekong and Tuas projects in three other respects. First, it is being carried out by a private operator, not by Malaysia, though of course within the framework of Malaysian law and procedures. Secondly, Singapore has not protested about it, or done anything to request an exchange of views under Article 283 of the Convention. Thirdly, there was an EIA for Phase I and Phase II of

the PTP project, and the EIA was approved. The EIA is not a confidential document and Malaysia would be happy to make it available to Singapore.

It is true that the private company involved has in mind that further expansion of the PTP terminal and has drawn up some general concept designs, on which Singapore's graphic was based. Those concept designs are purely speculative. They have not been submitted for approval. No EIA has been carried out because there is no specific proposal. When a proposal is made an EIA will be required by law. I am told by the company's representative that whether anything more will be done depends on market conditions; on what happens in the future and the prediction is that we are talking about a period of 15 to 25 years. As far as the Government of Malaysia is concerned, I am authorised to say that before anything resembling such a major expansion out into the Straits is considered for approval, Singapore will be informed and will be invited to present its views -- just the thing that Singapore never did with respect to Tuas Reach and Greater Tekong.

A second and related graphic, likewise shown several times, was the picture of the apparent sediment plume flowing out of the Pulai River, which was said to end up east of Tuas Reach. The assumption was that these sediments arose from dredging or reclamation activities, although the graphic did not demonstrate that. In fact the sediments shown in the satellite photo had a number of discontinuities and one would need to know more about the tidal and other circumstances before reaching any conclusion. In fact silt flowing down rivers in tropical areas is a standard phenomenon; indeed it is a standard phenomenon in non-tropical areas. You can see on the screen and in your folders, by way of example, a satellite image of the Humber Estuary in the United Kingdom. The Humber fully meets European water quality controls. It has the reputation of being the cleanest river in Europe, yet the flow of silt is obvious enough. The point I is that state-of-the-art satellite imagery can be used in a misleading manner.

Then there was the attempt by Singapore to discredit Malaysia by reference to an article written by Professor Sharifah in 1992, 11 years ago. Singapore did not provide you with the full text of the article but quoted one passage from it. So that you can see the whole, it is included in your folders. But its relevance to the present proceedings is obscure. It shows that Professor Sharifah is capable of public criticism of Malaysia; I must say, having worked with her now for some time, she is capable of public criticism of almost everything, but it is criticism with a smile. This only establishes her independence.

Evidently, as the Court will be aware, there have historically been problems in Malaysia as well as in other countries in the region with environmental management and land use policy. Malaysia has gone through a rapid process of development, and in the course of the past ten years, it has been developing its policies and administrative structure to match its increasing state of development. This is not a trial of Malaysia's general land use policies; that should go without saying, though it does not seem to be obvious to Singapore. But there is, for example, a coastal zone management plan, a legislatively-mandated system of EIAs, increasing levels of waste water treatment and a national water strategy. Professor Sharifah's

statement was a call, more than a decade ago, for further progress to be made in a range of areas. That is all it was.

In discussing these sundry attempts by Singapore to "blame the victim", I am not to be taken to concede at all the relevance of this mud-throwing, or perhaps it is silt-slinging. The case is about *these* land reclamation projects, massive projects closing off, in the case of Pulau Tekong nearly 50 per cent of an area of waters which constitute a shared natural resource; in the case of Tuas, creating a new peninsula projecting 7 kilometres out to sea and placing the western part of the Straits of Johor in a sort of hydraulic shadow, with potentially significant ecological effects. This case is not about any other project. Malaysia does not lose the protection of the codified law of the sea because, according to Singapore, its land clearance or forestry practices might be improved — an allegation which in any event Singapore has done nothing to prove. If Singapore has justified concerns about PTP or other Malaysian reclamation projects affecting it, it is of course entitled to raise them, formally or informally. I am authorised to say that I promise we will not refuse to meet. We will not require Singapore to conduct its own EIA of our project. The fact is, however, that Singapore did not complain until Malaysia had commenced these proceedings – another effect of the glorious 4 July. That suggests that this is really a counterclaim that dare not speak its name, and that dare not do so because it would obviously be inadmissible.

Then there was the suggestion that Malaysia by its neglect had slept on any rights that it might have to protest at the reclamation projects. Singapore said that Malaysia has known for years that this was coming and yet, when did it begin to assess the project? It did so in 2002. The Tribunal, Singapore says, should not help a State which has been so slothful in failing to look after its own interests.

Ms Cheong laid the factual basis for this argument when she went back to the 1991 Concept Plan for Singapore. That is the cover of it. She said at page 14 of the transcript:

"The proposal for Pulau Tekong was first publicised … in the 1991 Singapore Concept Plan. The reclamation profile then underwent a few revisions before *the final profile* [I stress the words, the final profile] was granted approval in 1999."

Let us look at this famous 1991 Concept Plan, as it covered the years up to 2000. What does it show? There is no sign of Tuas Reach but then Ms Cheong accepted that. But what would Malaysia have expected around Pulau Tekong in the period before 2000 - - only this relatively modest southern extension, in shallow water, which would have relatively little impact and would call for no particular response. That was the position, as Malaysia knew it in 2001.
What about the year 2010,in the same publication? Again no sign of Greater Tekong and no sign of the Tuas Reach.

Only in the Year X, an unspecified future year supposedly after 2011, do we see any sign of Greater Tekong. This was a distant plan, a twinkle in the planner's eye, just like the assurance we appear to have had that there are no detailed plans for bridges or other links between the islands. Actually in year X there are five links between the

islands; perhaps we should dismiss them as typographical incidents. At any rate, they can be safely postponed to the Year X, the uncertain future.

But no! The Year X descends faster than we think. In 1999, Greater Tekong is rapidly accelerated. The "few revisions" Ms Cheong mentioned, leading to the "final profile" of Greater Tekong, involved a virtual doubling of the size of the Island. Work started, we are now told. It is clear that there was no time between the "few revisions" of 1999 and start of work for an EIA covering the new proposal; but then we know now for sure that there was no EIA. Yet it is inferred by Singapore that there was no acceleration of the plans, that Malaysia ought to have known all along what was going to be finished by 2008. It would not have discovered that from the 1991 Concept Plan.

It was in this rapidly changing situation that Malaysia had to respond. Under the circumstances, it did so fairly promptly. Once it realised that the Year X apparently stood for some proximate year, Malaysia complained that it had not been consulted. Singapore refused to meet unless Malaysia substantiated its concerns. Malaysia commissioned studies, which began work, including data collection and modelling, in 2002. As far as this Tribunal is concerned, there is a greater bulk of scientific material and evidence from Malaysia concerning Singapore's activities than there is from Singapore itself. Is that not remarkable? Do you not think there may be some discrepancy between Singapore's professions of openness and its reliance on glossy video clips and summary reports produced in July 2003? At any rate, the argument about Malaysia's acquiescence is evidently untenable.

I move to my second subject, the impacts of the two projects. Just as you must have felt appalled yesterday at Malaysia's conduct over the PTP Monster (which turns out not to exist, like most monsters), so you must have been appalled that a government could have made up a story on the thin advice of Professor Falconer and Professor Sharifah about environmental impact of Greater Tekong. Singapore's position, as portrayed by Professor Lowe, to whose splendid exposé of the policy of divide and reclaim yesterday I should nonetheless pay tribute, is that Greater Tekong has had no, or only trivial, impact on the environment. According to Singapore, it has been possible to plonk down a "final profile" of over 3000 hectares of reclaimed land, including areas previously covered by 15 metres of water, in a confined area of a semi-enclosed sea, in the vicinity of significant areas of mangroves, sea-grass and coastal fisheries, incorporating the estuaries of major rivers, and have no environmental impact at all or only a trivial impact. Ms Cheong, I might say, ably assisted Professor Lowe in this demonstration: no impact, no increase in velocity, no harm to fisheries – that seemed to be improving - nothing.

I have already referred to the imbalance in the written evidence before this Tribunal as between the two parties. I should briefly notice the imbalance in the oral evidence. Malaysia presented one witness for cross-examination, an independent witness, and agreed to present another for questioning. Singapore presented no-one. One wonders how potential Singapore witnesses – I will not name them - might have answered the question: was there a prior EIA with respect to these projects? Singapore's main presentation on its own impact studies was presented by a Government official, a most able Government official, I hasten to say. Malaysia's, by contrast, was by an independent-minded professor. Counsel such as

myself or Professor Lowe do not testify, you will be pleased to know; we may be misinformed and when we are (as with respect to graphic of the boat I showed you the other day) then we cheerfully admit it. But the fact is that all the oral evidence in this case was presented by Malaysia.

Mr President, Members of the Tribunal, in terms of Singapore's evidence, the only two documents you have to go on are the two Summary Reports of 15 July 2003. In the absence of anything else, these must be taken to be an accurate summary of the referenced reports; the Tribunal has no way of checking otherwise. The Reports are intended to assess "governmental studies of the possible effects and impacts of the project up to Aug[ust] 2002" having regard to Singapore laws and good practice. They are not themselves an EIA. But it may be they report the sighting of an EIA in the distance, as a traveller might have seen an elusive antelope in the dusk—they might be, as it were, secondary evidence of an EIA. If there had been a proper EIA, then one of Malaysia's main concerns might be met, even if the secondary evidence of the EIA only became available to it in July.

So it is worth asking two questions. First, what evidence is there in the Summary Reports that transboundary impacts were taken into account in Singapore's approval process? Second, was this done in reports which were produced and considered prior to the final approval of the projects in the period 1999-2000?

As to the first question, let me take the *Pulau Ubin/Pulau Tekong* Report, and read out serially all the references to Malaysia, or the Malaysian coastline, or impacts on parts of Malaysia. There are two references, under the heading "Topographic". The first: "Singapore is a republic situated in South-East Asia just off the tip of the Malayan peninsula". The second, a few sentences later, "It [that is, Singapore] is separated from Malaysia in the North, West and East by the Straits of Johor…" We do not quarrel with either of those two statements. Both those sentences are about Singapore. As far as we can find, these are the only references to Malaysian localities or interests in the Pulau Tekong Summary Report. No doubt Professor Lowe will correct me if I am wrong.

Now let me with some trepidation take you to the References at p. 46 of the Report. These are the Reports summarised in the Summary Reports, which might, like the antelope, have been EIAs. The only reports which *might* constitute an EIA are No. 5, dated January 2001; No. 6, dated July 2001, about impacts on dugong; and No 7, about mangroves on Pulau Tekong, dated 2002.

I could do exactly the same exercise in relation to Tuas Reach. The references are in my speech. There are a few more references to Malaysia, including some references to navigation to the west of Tuas Reach. So there is some difference, some improvement.

The conclusion would be the same. There was no balancing of transboundary impacts before the approval of either project. There is no evidence before the Tribunal that there has been any consideration whatever of Malaysian interests in

relation to Pulau Tekong, at any stage. In relation to Tuas Reach the position is marginally better but there was still no EIA. In short, there has never been an EIA for either project. There was certainly no prior EIA. Those are the facts established by the evidence before the Tribunal.

To be fair, Mrs Cheong yesterday was very careful; she never said there had been an EIA. What she said was that there was an approval process, and there was consultation with the population. But that appears to be all. She then tried strenuously to substitute monitoring for assessment there had been lots of subsequent monitoring, she said. All of it of course is on the Singapore side, none of it shared with Malaysia before 4 July 2003. Ignoring this earlier failure to share monitoring data possibly relevant to Malaysia, counsel for Singapore made a sort of takeover bid. Three times they said that Singapore had offered to monitor on the Malaysian side and Malaysia had not replied. Actually, Malaysian scientists can monitor; Malaysian monitoring technology may seem primitive, and certainly Singapore does not seem to believe the results of the monitoring, but there it is; it is a technical possibility on the Malaysian side.

Incidentally, Malaysia did reply to Singapore's generous offer, on 22 August 2003. Malaysia proposed a jointly-funded assessment process, with international input, which would obviously involve extensive monitoring and calibration. We still hope this will happen; indeed, the Tribunal may wish to indicate it. It would do quite a lot to overcome Singapore's refrain – and here, I am afraid I return Cole Porter with Rogers & Hammerstein – "anything you can monitor, I can monitor better…"

In his statement yesterday, Professor Lowe said that the test for urgency in this case was whether Singapore was likely to fail to cooperate within the next nineteen days. That entirely misapprehends Malaysia's case. You ask me what Malaysia's case is. It is that these two massive projects, with all their substantial potential effects, are now being imposed on Malaysia without any prior assessment, on the basis of a predetermined "final profile", established in 1999; the breach has already occurred and while it is not cured by a proper assessment process, including an assessment of reasonable alternatives, it continues. Moreover it is what I might call – a new phrase in the law of state responsibility – a "consolidating" breach—every ton of sand and concrete and clay poured into Tuas Reach or Greater Tekong consolidates the breach. Soon it will be a *fait accompli*, the soi-disant final profile will really be final, up to and including Area D, the Offshore Filling Site that you see on the screen. To say that it is reparable because at great expense it could be changed is to fly in the face of reality, in particular local reality.

You see this underlying attitude of Singapore in subtle ways. Like a court of construction, Singapore regards as already reclaimed that which it has decided should be reclaimed. Thus Professor Reisman said this area was sovereign territory subject only to rights of navigation. But the sovereignty of a coastal State over its territorial sea is to be exercised in accordance with international law, and not only with respect to navigation. In this case, applicable international law, in the form of the Articles of the Convention on which we rely, has not been complied with. Sheet-piles or no sheet-piles, Area D is still legally territorial waters and Malaysia's

rights under the law of the sea with respect to Area D subsist. A State cannot turn its territorial sea into dry land without regard to the rights of neighbouring States under the Convention.

Similarly Professor Koh likened Singapore's behaviour around Point 20 to Malaysia's behaviour on the island of Sipadan, which it developed for tourism notwithstanding Indonesia's claim. There are two points here: first, in the *Sipadan and Ligitan* case the Court took a very strict view of the critical date, and therefore disregarded the tourism activity. That is what we think the merits tribunal should do here with respect to subsequent reclamation work on the same basis. But the very comparison tells the story: Singapore regards Tuas Reach, or Greater Tekong, as dry land because it made a decision on their final profile in 1999 without telling Malaysia, and everything since is implementation, with Malaysia a bystander.

It is for this reason, as well as for lack of time, that I will not follow Mrs Cheong and Professor Lowe on their excursion into the details of impacts. There are many points we could make—for example Professor Lowe thought the UKM graph on fishing related to the affected area, whereas it relates to Johor as a whole; the UKM team in its interviews with fishermen focused on twenty or so fishing villages precisely in the affected area. The DID Report was not just based on computer modelling; there was collection of data.

In one respect Singapore's own conduct, however, bears out Malaysia's concerns, and that is Singapore's suspension of work around Pulau Ubin. It was done because of the need (not discovered in advance because there was no EIA in advance) to protect a small area of mangroves. Malaysia has much larger areas of mangroves in the region, as you can see. Apparently there is no need to protect *them*. But when Singapore wants to suspend work to protect natural values, it can do so. All they have to be is Singaporean; the environment apparently has a nationality.

Professor Lowe made much of minor inconsistencies between the various reports. Had we had access to Singapore's reports and been able to refer to them, I suppose we could have picked them to pieces as well. But this Tribunal does not have to descend to such details. Scientific assessments which are entirely univocal would be rather suspect, I should think. The basic point that all four reports submitted by Malaysia make, which is all we need them to make for present purposes, as distinct from the merits, is that Malaysia had and has serious grounds for concern about these projects. I would add that the project writers were in the curious position of having in effect to engage in an EIA or someone else's project without access to the project, the project documents, the project personnel or the local data. We have not been able to approach the project area, by sea or air, without being warned off by Singapore. That the Malaysian reporters of our four reports – that is to say, the four reports submitted by Malaysia – should have had to go it alone in such a handicapped way is not the least astonishing feature of this case.

I turn then to the issue of urgency as a matter of fact.

First, we should acknowledge that Singapore has been entirely straightforward about its current work, and we are grateful for certain clarifications, as the Agent will note.

The fact is that work is actively, vigorously under way on both projects with a view to finishing it well in advance of the original Concept date. You can see here — to the *west* of Pulau Tekong—some of the activity.
But for Malaysia the offshore filling area, Area D, is of primary concern, for the reasons we have already explained. To be fair, we have received some welcome assurances on the rock revetment, which counsel have assured us will not be built before 2008; at least, that is what I understood them to say. That is a relief, because it prevents the line of sheet-piles from being turned into the final profile of Greater Tekong for a period of time which will cover the decision of the merits Tribunal.

But there is still some serious uncertainty about Singapore's intentions with respect to Area D, and we await with interest any clarification of this later this morning. For example, the graphic you can see shows activities in Area D on 20 September 2003, and Mrs Cheong showed a pink-coloured solid rectangle in Area D which implied some substantial work there, at least preparatory work. We know, apparently, when the rock revetment will be started; we do not know when in-filling of Area D will be started.

Here we have a picture, taken yesterday, of another large vessel or vessels engaged in activities on the Singapore side of the line of sheet-piles. It may be that they are reinforcing the sheet-piles so that they can withstand an extended period as a temporary buffer. At least, that is one possibility; we hope that counsel for Singapore will be able to enlighten us further shortly.

Mr. President, Members of the Tribunal, that concludes this presentation. Thank you once more for your attention. Mr President, I would now ask you to call on Professor Lauterpacht who will continue the Malaysian presentation.

THE PRESIDENT: Thank you, Professor Crawford. I now give the floor to Sir Elihu Lauterpacht.

SIR ELIHU LAUTERPACHT: Mr President, Members of the Tribunal, it falls to me to conclude, subject to the Agent's final remarks, Malaysia's rebuttal. My submissions will be presented on a more general plane – a plane, which, I suggest, this Tribunal should not overlook in matters of this kind. In so doing, I am not saying that some detail is not important. Indeed, Malaysia has itself presented detail which should be sufficient to support its conclusions. But there is a danger that that the welter of detailed fact presented so beguilingly Professor Lowe yesterday may overwhelm and obscure the fundamental and basic considerations by which this Tribunal's decision should be controlled. What has been said by Singapore may have its place in the merits of the claim. It does not belong to this stage of the case

I begin by recalling that this is first and foremost a case about the protection of the environment, in much the same way as *Southern Bluefin Tuna* was a case about the protection of the environment – in that case, the protection from over-exploitation of a particular living resource of the ocean. In that case, as in this, the protection of the environment was presented in the form of an application for the protection of the rights of two States, Australia and New Zealand, just as the present case rests upon an application by Malaysia. This is perfectly understandable. The Convention

provides no means for the protection of the environment other than through individual State action. There is no provision in Part XII of UNCLOS for a Custodian of the Environment, or an Environmental Ombudsman, charged with an independent power to initiate proceedings to protect the community interest. It is up to individual States to do what is necessary, and that is what Malaysia is doing here. That is the thrust of the general provisions of Part XII of UNCLOS and in particular of its introductory Article 192:

> "States have the obligation to protect and preserve the marine environment."

It follows that any determination of this case by reference to the rights (or, in Singapore's view, the *non-rights*) of Malaysia alone, is misconceived.

Singapore has claimed that Malaysia has not put forward its complaints promptly. The factual weakness of this contention has already been explored. But the real point is that when it is an issue of public interest, what matters is not the situation at the moment of the complaint, or even the situation as it may develop over the long or short term. What matters is the pattern or sequence of conduct of which the conduct immediately complained of is a part. In *Southern Bluefin Tuna,* what mattered was not the quantity of the catch of Japan in a particular year, but that that quantity was seen as part of the destruction over time of the stock of that particular endangered species. Likewise, the issue here is not solely how much further damage may be done to the environment in days to come, but how much damage has already been done, will persist into the future, and how much more will be added. One may say that seriousness of damage increases as the scope for damage decreases. Imagine a tankful of fish of an endangered species. As the fish are taken out one by one, the danger to the species is negligible. But when all the fish are gone, except for the last three or four, then the harm done to the environment by the removal of any further individual fish is more serious because it becomes total.

An analogy may be drawn with the present situation in the areas affected by Singapore's reclamation measures, especially around Pulau Tekong. The fact that so much reclamation has been carried out already only increases the seriousness of the harm that will be done to the remaining areas by reason of the reduction of the area remaining to be harmed. That is true irrespective of whether the Tribunal is dealing with a situation that has only 19 days to run or one that will last for a longer time – as is the case here.

I cannot pass the reference to "19 days" without reaffirming the reasons which I gave in my previous speech for saying that 19 days is not a relevant period. Since Professor Schrijver has already addressed the issue, I will restrict myself to some brief observations. Earlier, I argued that the power of this Tribunal to order provisional measures was not limited to the period prior to the constitution of the Annex VII Tribunal. The Tribunal will wish to note the rather slender treatment that Professor Reisman accorded to that argument. Not a word did he say to meet my analysis of the specific words of Article 290, para 5. Nor did he advert to the authoritative precedent set by this Tribunal in the *Southern Bluefin Tuna case,* and evidently accepted without question by the subsequent Arbitral Tribunal that then dealt with the question of jurisdiction.

As has already been said without contradiction on a number of occasions this Tribunal is the judicial guardian of the marine environment. It cannot be seen to be abdicating that responsibility because a claimant's endeavour to protect of the environment is made some time after the challenged conduct has been developed. Nor can this Tribunal be seen to be measuring the seriousness of the matter by focussing solely on the situation over a period of 19 days or even more. It must judge it as part of an identifiable and, in this case, undenied pattern of behaviour by the challenged State. This goes both to "urgency" and "seriousness".

It is into this situation that Singapore has injected the idea of a "balancing of interests", coupled with the right of this Tribunal to weigh the "equities" of the matter. Recourse to such ideas in the present context is quite misplaced. When UNCLOS contemplates recourse to balancing of interests or to equity as elements in decision-making, it says so in no uncertain terms. Consider Article 59 – entitled "Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone": It provides and I quote:

"In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Comparable references to the role of equity appear in Articles 74 and 83 relating to the delimitation of the territorial sea and Continental shelf.

Now, if provisions such as these had appeared in Part XII, Singapore might have had some basis for its invocation of "equity" and "balancing of interests". But this provision appears in Parts II, V and VI. They are specific to particular situations. They do not appear in Part XII where, as I have already said, the obligation to protect and preserve the marine environment is mandatory and unqualified. There was no intention that the rights of the Parties should be exposed to so subjective or variable an element of interpretation. Equity and the balancing of interests may have their place where they are specified in UNCLOS. But this is not the time for this Tribunal to introduce them as general elements relevant to any matter whatsoever now or for it.

Moreover, it may be asked, how does one "balance" the private interest of a particular State against the general interest of the protection of the marine environment? Certainly one cannot take into consideration the motivation underlying the measures that are challenged. The Tribunal has heard several times of Singapore's need for additional land to accommodate its growing population and economy. There cannot be anybody who does not admire the remarkable achievements of Singapore over the last half-century. But that desire for growth does not entitle it to disregard general environmental interests or the environmental rights of its neighbour and the implementation of appropriate procedures.

There is another point to be made in relation to the plea to balance interests. Apart from the factor of motivation, there is the factor of cost. How can one balance

interests if one has no idea of the costs involved? Singapore has asserted that reclamation has cost it billions of dollars and that an interruption of its programme will cost millions of dollars more. But these are very imprecise factual contributions to what Singapore presents as a subject for serious debate. Precisely how much has the disputed reclamation already cost Singapore? What contracts are in place for the continuation of the work? Who is being paid how much? Where does all the material, the infilling sand and the steel piling come from and how much does it cost? What extras will suspension of work add to these items of expenditure? Singapore has all the necessary information. If it really wanted the Tribunal to take such factors into account in balancing the interests, it should have produced it. But as yet, it has not, and it is now too late to do so.

This brings me to my next point. Singapore insists that the burden of proof lies on Malaysia to prove its case in terms of Article 290 of the Convention. This contention is merely another way of stating, as Singapore has done in the negotiations, that it is for Malaysia to provide proof of the basis for its concerns. This is surely a "role reversal", and an unsupportable one at that. It is the duty of Singapore to justify and support its conduct by reference to internationally acceptable standards in a fully open and transparent manner. One may argue about the status of the precautionary principle, but Malaysia submits that this Tribunal should not reject the widely-held view that it is for the State that proposes action that may detrimentally affect the environment to show, not to itself, but to those that may be affected by it, that there is no real likelihood of harm to the environment. And by Singapore's own admission, it has not done this. "Openness" and "transparency" are the words that control the Environmental Impact Assessment of a State whose conduct may affect its neighbours or the environment. Regrettably they obviously cannot be used to describe what Singapore's manner of proceeding.

Lastly, I come to Article 300 of UNCLOS. This was prayed in aid by Singapore: Fulfil obligations in good faith and exercise rights and freedoms in a manner which would not constitute an abuse of rights. Malaysia believes this to be an unexceptionable provision, but it should properly be applied to the conduct of Singapore rather than the conduct of Malaysia. What has Malaysia done to threaten environmental harm to Singapore? And, in the circumstances, it is rather a wild card to play to suggest that Malaysia in bringing these proceedings is either acting in bad faith or abusing its rights.

Mr President, Members of the Tribunal, as I approach the conclusion of my observations, I believe that there may be value in recalling some remarks made in 1982 by the President of the Third UN Conference on the Law of the Sea. Under the title *A Constitution for the Oceans*, which introduced the official text of the Convention in 1982, the President gave *inter alia* reasons why the Conference could be said to have achieved and I quote:

"our objective of producing a comprehensive constitution for the oceans which will stand the test of time."

Towards the end of his remarks, in terms which are particularly apposite here, he said and I quote:

"Although the Convention consists of a series of compromises, they form an integral whole. That is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore logically impermissible to claim rights under the Convention without being willing to assume correlative duties. Let no nation put asunder this landmark achievement of the international community."

These remarks are particularly appropriate. The exclusion of reservations means that the Parties have taken the package as a whole. It may not now be embroidered with exceptions relating to the asserted needs of particular States.

Mr President, who made these admirable observations? The President of the Conference, as I need hardly remind this Tribunal, was none other than the eminent Agent of Singapore, Ambassador Tommy Koh. With his words ringing in our ears, Mr. President, may I respectfully ask you now to call upon the Agent of Malaysia to deliver Malaysia's final observations. Thank you, Mr President.

THE PRESIDENT: Thank you, Professor Lauterpacht. I now give the floor to the Agent of Malaysia for the closing statement.

MR RAZAK: Mr President, distinguished Members of the Tribunal, it falls to me as the Agent for Malaysia to close the case for the Applicant.

Before doing so, I wish to take this opportunity to clarify a matter that was brought before you in the course of yesterday's oral hearings, by my good friend, the Agent for Singapore, Ambassador Tommy Koh.

As you will recall, Ambassador Koh quoted to you extracts from my letter to him dated 15 August 2003, following the bilateral talks held in Singapore. As Ambassador Koh pointed out, I thanked him for his hospitality during the last days. I did, if I may say so, sincerely, and I expressed the hope that both countries might be able to find an amicable solution to the dispute.

Mr President, Members of the Tribunal, I still hold to that statement. But I wish to underline that it ought not to be taken out of context. As Ambassador Koh, the leader of Singapore's delegation during the talks, will be aware, Malaysia indeed earnestly sought to pursue the path of negotiations, despite Singapore's previously uncompromising attitude. Malaysia had not closed the door to negotiations. However, Malaysia made it clear during the 13-14 August meeting that it was not prepared to enter into negotiations in the shadow of further large-scale land reclamation activities by Singapore. This had been Malaysia's consistent position throughout that meeting; it was reaffirmed at the end of the bilateral talks, and in the diplomatic note of 22 August 2003. That diplomatic note put forward a more modest proposal that, in order to resolve the dispute by negotiation, it was essential that Singapore agree to postpone the continuation and completion of the reclamation works, in particular around Pulau Tekong.

Mr President, Members of the Tribunal, since my good friend Ambassador Tommy Koh has brought up the issue, I wish to clarify what to me had seemed, and still

seems, self-evident: that my personal letter to him has to be seen in the light of Malaysia's position, expressed during and after the talks of 13-14 August 2003 and reaffirmed in a Note which, of course, as the head of the Department of Foreign Affairs, I approved. Why Ambassador Koh has chosen to focus on extracts of this letter is not clear to me. But I can assure him that it affects neither the high esteem I hold for him, nor my gratitude for the hospitality I enjoyed in Singapore on 13-14 August 2003.

Mr President, Members of the Tribunal, before presenting Malaysia's submissions, permit me to make a few remarks about the seriousness of the issues involved in the present case. Singapore has throughout stressed the relevance of land reclamation program for its future development. Malaysia accepts the importance of land reclamation, and it does not claim a veto over Singapore's activities. However, it wishes to stress that it has come to this Tribunal to defend three fundamental concerns.

First, it submits that Singapore's current land reclamation activities engage the rights and interests of Malaysia, as the neighbouring State directly affected by such activities. Second, Malaysia stresses that these projects threaten the marine environment in the Straits of Johor, a single ecosystem shared by two neighbouring countries. And third, this case is of vital importance for the future of the international law of cooperation – in this respect, cooperation between Malaysia and Singapore.

Mr President, Members of the Tribunal, in light of what you have heard in the course of the last 2½ days, and what, no doubt, you are going to hear in the remainder of the day, there appear to be three basic courses open to this Tribunal:

(i) The Tribunal can accept Singapore's "19 days" argument, and leave the matter to the Annex VII Tribunal in the hope that the Annex VII Tribunal will be constituted and will rapidly be in a position to consider a renewed request. More generally, this would mean that this Tribunal accepts that it has only a very limited role in proceedings under Article 290, paragraph 5 of the Law of the Sea Convention.

(ii) Secondly, you can dismiss Malaysia's application for other reasons, holding that Malaysia's concerns are unfounded. By so doing, you would in effect ratify Singapore's unilateral conduct in the Straits of Johor, despite the fact that it is clear there was no prior assessment of the project which took Malaysia's interests into account. Malaysia submits that this would set a dangerous precedent, that it would encourage a form of unilateralism inconsistent with the cooperative and integrated approach that the Law of the Sea Convention intends to promote. That integrated approach is well understood by my friend Ambassador Koh, one of the architects of the Convention. It would be a significant missed opportunity were it not to be applied in this case.

(iii) Thirdly, Mr President, Members of the Tribunal, you can grant the provisional measures requested by Malaysia, if not all of them, then at any rate the first and most important, either in the terms sought by Malaysia or

in some other appropriate terms. By so doing, you could take a significant step towards a settlement of this dispute.

In this last connection, Malaysia accepts that breaking the circuit of conflict in this case may involve making orders to both countries. It is, however, essential that nothing you do should impair the ability of the merits Tribunal to deal with the case as a whole. This means preventing the whole of Singapore's reclamation activities, the "final profile" laid down in 1999, from becoming an unqualified *fait accompli* pending the decision of the merits Tribunal. This has been Malaysia's objective in instituting proceedings before this Tribunal. And this protection is what it asks this Tribunal to grant now.

I now turn to the provisional measures requested by Malaysia. Here I wish to draw a distinction between the three measures relating to cooperation, provision of information and negotiation, which were set out in paragraphs 11(b), (c) and (d) of Malaysia's request. During the hearings, Singapore has provided some further clarification on these, for which Malaysia is grateful. In the light of this new information, Malaysia would be prepared to accept these assurances if the Tribunal made them a matter of formal judicial record.

I turn to the crucial issue of suspension. Here there is a fundamental distinction to be drawn between the aim Malaysia seeks and the method of achieving it. It is Malaysia's view that neither of Singapore land reclamation projects has been properly assessed. No document exists or has been produced by Singapore which could qualify as an EIA in regard to either of these projects. If there had been an EIA, we can be sure Singapore would have produced it to you. In the case of neither project is there any evidence whatever that Malaysia's rights and interests were taken into account. So far as Pulau Tekong is concerned, Singapore determined the "final profile" of the land reclamation in 1999 without any attempt to study alternatives. There are a number of alternative configurations, especially for Area D, which could alleviate Malaysia's concerns. In particular, if Singapore were to give clear undertakings to the Court that no effort would be made to infill Area D pending the decision of the merits tribunal, and if these undertakings were likewise made a matter of formal judicial record, Malaysia's concerns would be significantly reduced. In this respect, I note the unequivocal assurance by counsel for Singapore yesterday that no attempt would be made to construct a stone revetment along the line of sheet-piles in Area D south of Pulau Tekong until 2008. For the period pending the eventual decision of that merits tribunal, Malaysia would repeat its proposal, made in the letter of 22 August 2003, that both countries jointly sponsor and jointly fund a study aimed at assessing the relative impacts of the present configuration and some alternatives to it which would take into account Malaysia's concerns. This joint study could be undertaken with input from a small panel of international experts.

It is on this basis that I now present to you Malaysia's final submissions.

Mr President, Members of the Tribunal, Malaysia requests:

(a) that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary

between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas);

(b) to the extent it has not already done so, provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);

(c) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and

(d) agree to negotiate with Malaysia concerning any remaining unresolved issues.

Mr President, Members of the Tribunal. yesterday counsel for Singapore regretted that you had been, as he put it, dragged from your beds in order to hear this case. He seemed to think you spend all your time sleeping, a thought which, even if it was true it might have been better not to express, but which I know to be false. You have always been alert to protect the marine environment from serious harm, and to further the principle of cooperation between neighbouring States in the protection of the marine environment. You did it as between three State parties to a regional fisheries agreement in the *Southern Blue-fin Tuna* case; more recently, even in the absence of very much evidence of actual harm to a semi-enclosed sea, the Irish Sea, you underwrote the principle of cooperation between two neighbouring States in the form of an Order for Provisional Measures, an Order which has become a framework for improved intergovernmental cooperation. In the present case, there is evidence of harm, in Malaysia's view, serious harm, to the marine environment; there is certainly a risk of serious harm; there is also evidently a breakdown in cooperation between the two States bordering the Straits of Johor. Malaysia has come to this Tribunal seeking your assistance in a matter the substance of which — Singapore accepts — is governed by the 1982 Convention. It trusts that you will apply the principles of the Convention fairly and with a view to resolving, rather than yet again suppressing, this dispute, as Singapore has for the last two years sought to do.

Mr. President, in closing, may I thank you and the distinguished Members of the Tribunal for your patient and considerate attention to the arguments that have been presented to you.

THE PRESIDENT: Thank you very much, His Excellency Tan Sri Ahmad Fuzi Abdul Razak.

We will take a half hour break.

MR KOH: Mr President, Mr Vice-President, distinguished judges; we have just heard a very important statement by my good friend, the distinguished Agent of Malaysia.

We do not have a written copy of his statement. I would be very grateful if the Malaysian delegation could provide to me a written copy of this important statement.

I would also be very grateful if you could grant us a one hour adjournment so that I can carefully study the many proposals contained in the Malaysian Agent's statement. I would then be in a position to give you the appropriate response.

THE PRESIDENT: Thank you very much. Your wish is granted. That copy will be submitted to you. We will take an hour's break so that you can make use of that document.

(Short adjournment)

THE PRESIDENT: I now give the floor to the Agent of Singapore, Professor Reisman.

PROFESSOR REISMAN: Mr President, members of the Tribunal, I have the pleasure and privilege of responding to the observations of my colleagues from Malaysia this morning.

I would like to consider first the issue of jurisdiction and admissibility, and then return to some other points that were raised by learned counsel. I should say, before I commence, that I do not intend to engage on issues that are essentially merits. This is a procedure initiated by Malaysia for provisional measures, and the only matters, in Singapore's view, that are properly before this Tribunal are those that relate to the prescription or not of those provisional measures.

You will recall that Singapore submitted to you yesterday that the requirement of the *prima facie* jurisdiction of the Annex VII tribunal was contingent on the fulfillment of certain prerequisites prescribed in the Convention and that, in the absence of fulfilment of those requirements, jurisdiction did not mature and, as a result, it was inappropriate in those circumstances for ITLOS to consider issuing provisional measures.

Under Article 290(5), ITLOS's competence in this matter is dependent upon the *prima facie* jurisdiction of the tribunal which will be seized with the merits.

As I understood Professor Schrijver this morning, Malaysia accepts the relevance of Article 183 but contests whether we are correct in asserting that Malaysia has failed to fulfil that and that, as of the date of submission of its application on 4 July, it had not engaged in the substantive requirements of exchange of views rendered obligatory under Article 283.

The question is, as a matter of fact, whether Malaysia, in the course of its various communications, did convey something that could constitute views and that would have enabled Singapore to respond to them, and indeed oblige Singapore to respond to them.

You will recall that Singapore submitted that, in line with general international law, as expressed both in the draft Convention on Liability without fault of the International Law Commission and the Convention on the non-navigational uses of water courses,

circumstances in which one State asks another State to stop doing something that is lawfully conducted within its territory requires the other State to do more than simply say "stop", to more than simply say "I have a claim". In the language of the commentary to the Convention, a serious and substantiated belief is necessary, particularly in view of the possibility that the planning State may be required to suspend implementation of its plans under paragraph 3 of Article 18 – substantiated and serious belief, explained elsewhere as a documentary requirement – and this makes great sense. We cannot imagine a system in which one State points across the border at another and says, "I am very disturbed at what you are doing. I have a vague apprehension. Stop it". There is no obligation to do anything until there is some substantiation of that claim.

I reviewed with you the notes that had been exchanged between Singapore and Malaysia and I demonstrated yesterday that none of the notes had anything approaching substantiation. Today Professor Schrijver dwelt in particular on the note of April 30. This was the note that Professor Lowe referred to as the laundry list. I would like to read the note to you and ask you if a government that you might be representing in a hypothetical situation would have found much useful information in these assertions.

> "… the Government of Malaysia wishes to inform the Government of the Republic of Singapore that land reclamation activities have caused serious environmental degradation as indicated in increased sedimentation, erosion, situation, decreased flushing, hindrance to flood flow and changes in flow pattern with the consequent degradation of marine species of fauna and flora, marine habitats and their ecosystems. In addition, the Government of Malaysia has also noted a decline in marine living resources which has affected the livelihood of coastal fishermen and aquaculturists as a consequence of the said reclamation activities."

This is the note of April 30. Imagine that you are in the Ministry of Foreign Affairs and you receive that. You turn it over to the Ministry of Development or the Ministry of Marine Affairs and the experts there say, "But, erosion where? Erosion when Siltation where? We are talking about a very long coastline. Decline of fisheries? Can we have some more data? "

Is this a substantiated report that is required by international law? I submit that this is indeed no more than a laundry list and that it was insufficient. On May 25, a note said that in effect land reclamation activities are inevitable. Is that the substantiated report? Can we imagine an international political system in which the threshold is so low that statements like this that involve little more than complaint, without substantiation, require another State to stop its activity, to open up its archives, or is that other State entitled to say, "Would you please give me information?"

Indeed, as I said yesterday, Malaysia's own Foreign Minister said that the appropriate thing to do was to submit to Singapore a concrete report. The understanding of Singapore was that such a concrete report would come.

The fact is that until 4 July, which was the notice of arbitration, there was no

substantiated report, and, as a result, the requirement of exchange in Article 283 was not fulfilled.

When I say that a substantiated report was given on 4 July, I do not want to dignify the material that was submitted at that time as necessarily fulfilling the requirements of the substantiated report. Professor Lowe referred to is as a "do-it-yourself report": "Here are the reports; you find out, having studied the reports, exactly what problems are precipitated by activities in Singapore and visited on Malaysia". It was not a substantiated report but, as of 4 July, Singapore was willing to accept that and the process began but, as of 4 July, there still was no jurisdiction in the absence of fulfilment of Article 283 and, as a result, no basis for the issuing of provisional measures.

I have also referred to the requirement of negotiation in Article 281. Negotiation is required by international law. I referred you in my presentation yesterday to the *North Sea Continental Shelf* case and you will recall the general statement the Court made about the requirement of negotiation.

I referred also to the *Fisheries Jurisdiction* case where the Court said explicitly that in a conflict of rights, as it were, negotiation is appropriate. So there was an obligation to engage in negotiation, and indeed negotiations began at the invitation of Singapore. As I read the record of the conclusion of the August 13-14 meeting, the Leader of the Malaysian delegation indicated that both parties were in negative mode.

This should not, however, be interpreted as weakening Malaysia's resolve to continue to request Singapore to suspend land reclamation activities for as long as meetings between the two countries go on. Is that the flexibility that is required, that was demanded, in the *North Sea Continental Shelf* case – to come into the meeting with the same ultimatum with which one had started the meeting and to insist upon compliance with those terms? I submit to you that Malaysia has failed to fulfil that requirement.

Now, we are told that negotiation would have meant lost time and that if it engaged in negotiation, Malaysia would have lost the opportunity of coming to this distinguished Tribunal to ask for provisional measures.

But that is not a correct construction of the situation that obtained as of 4 July. Malaysia initiated arbitration. It specified that the arbitration was to be under Annex VII. It is up to the parties in the first instance to form the tribunal under Annex VII. Singapore indicated that it was interested in facilitating the formation and made a number of proposals that would have quickly fulfilled the constitutional requirements of the Tribunal and made it available for decision. For reasons that I do not understand, Malaysia was disinclined to cooperate. So to say that negotiation in the shadow of an Annex VII proceeding somehow or other compromised opportunities to secure provisional measures is simply wrong. What should have happened in this case was the Annex VII tribunal should have been established quickly, and had it been established quickly, a consideration of provisional measures could have been undertaken without the genetic limitation of time that is imposed on this Tribunal under Article 290(5).

I should like briefly to turn to the issue of admissibility, because I believe that this is a central part of this case. The question is, in an application for provisional measures which involve a very serious imposition on the Respondent State – in effect, a judgment is put into effect and the right to use its own territory is suspending while those provisional measures are in place – is it not appropriate to ask for a fair showing on the part of the party asking for the provisional measures that the harm that it threatens is in fact real, that it is imminent – hence the requirement of urgency – that it is irreparable and incompensable? Is it not fair to ask for that kind of material? Is that not the standard of admissibility in this procedure and in its analogues in many other international and national tribunals?

Judge Mensah said:

> "The jurisprudence of international judicial bodies makes it clear that provisional measures are essentially exceptional and discretionary in nature and are only appropriate if the court or tribunal to which a request is addressed is satisfied that two conditions have been met. The first is that the court or tribunal must find that the rights of one or the other of the parties might be prejudiced without prescription of such measures, that is, if there is a credible possibility that such prejudice of rights might occur."

The *ratio legis* here is quite plain. This is something that has to be demonstrated.

We proposed yesterday – and I think our learned colleagues accept this codification – that the fundamental principles here are that the Claimant must demonstrate by the best measures available that the Respondent's current or impending actions threaten harm to itself or the marine environment, and that cumulatively, the urgency, irreparability and incompensability of that projected harm are established; specifically, that the harm is going to occur before a final judgment or award; that the harm, if it occurs, is irreparable; and that the harm, if it occurs, is incompensable. Even if the Claimant establishes these three cumulative elements, it is still discretionary with the Tribunal as to whether to issue the provisional measures. If the Tribunal elects not to, it may nonetheless advise the parties, as has happened in the International Court, to conduct their activities in accordance with international law.

In terms of admissibility, has Malaysia established these criteria? Has it met the tests that we have just reviewed? I was struck this morning by the fact that there was no rebuttal whatsoever of Professor Lowe's masterly demonstration of the emptiness of Malaysia's case; no intention to deal with it. In effect, what you have is what we had on 4 July: a bundle of reports, with an implied instruction: "Do it yourself. You figure out what the grounds are."

Within this problem – we have been unable to address this problem – Malaysia now shifts the burden of proof to Singapore and says, "What have you produced? We have these four reports. They may not be particularly valuable, but what have you produced?" Mr President, Members of the Tribunal, the burden of proof is on the party seeking the provisional measures. Singapore is not obliged to prove its innocence. Singapore is doing something that is a lawful activity within its territory.

The burden is to demonstrate that something that is being done there will have serious, adverse, urgent, irreparable and incompensable effects on Malaysia.

In addition to the attempt to shift the burden of proof, Malaysia has tried to move to generalities: land reclamation has inevitable results, we are told, as if this satisfies the burden of proof.

The precautionary principle has been fluttered. Singapore takes the precautionary principle very seriously. It requires a State undertaking activities within its territory not to use scientific uncertainty as a reason for not undertaking the most rigorous preparatory arrangements to avoid dangers. We believe that Singapore has demonstrated in Mrs Cheong's presentation yesterday that Singapore has amply fulfilled that requirement of the precautionary principle.

The precautionary principle does not, however, mean that Malaysia can take all of these unsuccessful claims that have not been established, bundle them in a new package called "ecology", present it to the Court and say, "Ecology is endangered. Please issue provisional measures to protect the ecology." This is not correct. Judge Wolfrum in *MOX Plant* dealt explicitly with this. I would like you to read his words. He said:

> "Provisional measures should not anticipate a judgment on the merit. This basic limitation for the prescription of provisional measures finds its justification in the exceptional nature of provisional measures. Such limitation cannot be overruled by invoking the precautionary principle. Apart from that, the approach advanced by Ireland that this principle should be applied in aid of provisional measures would have the result that the granting of provisional measures becomes automatic when the applicant argues with some plausibility that its rights may be prejudiced or that there was serious risk to the marine environment. This cannot be the function of provisional measures, in particular since their prescription has to take into consideration the rights of all parties to the dispute."

Professor Lauterpacht in his eloquent statement today introduced the notion of the protection of the environment. I submit to you that we are all interested in the protection of the environment, but that in this procedure, once more, that word is simply one more wrapping in which one can take all the failed claims of Malaysia and try to re-present them so that they are looked at in a different light.

In conclusion, I would like to talk briefly about the jurisdiction of the Tribunal. Professor Lauterpacht has said that it should be very broad, and he has given you a very romantic vision of what this Tribunal might do. With respect, I would disagree. As I said yesterday, all international tribunals are carefully constructed creatures, with limited competencies, and the responsible judge and arbitrator in each of them is constantly referring back to the guidelines that have been provided by those who created it. This is a matter of law, and a matter of personal and professional honour. This is done all the time.

ITLOS is not the guarantor of provisional measures. ITLOS is part of Part XV, and it is Part XV that is the guarantor. Part XV has set a very complex procedure and

allocation, and if the parties in Part XV have selected an Annex VII tribunal, then the role of ITLOS is defined in a particular way.

If I may quote Judge Mensah again in a provisional measures application in *MOX Plant*:

> "The court or tribunal is only required and empowered to determine whether on the evidence adduced before it it is satisfied that there is a reasonable possibility that a prejudice of rights of the parties or serious damage to the marine environment might occur prior to the constitution of the arbitral tribunal to which the substance of the dispute is being submitted."

Judge Treves said:

> "There is no urgency under paragraph (5) if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted."

Of course, there is no question that if ITLOS, in its wisdom, issues provisional measures in a case, those provisional measures may continue as long as the Annex VII Tribunal wishes. That is not the question here. The question here is whether between now and 9 October, when we are confident that there will be an Annex VII tribunal, this Tribunal is satisfied that the requirements of urgency, irreparability and incompensability have been established and warrant an exercise of this exceptional jurisdiction.

Mr President, Members of the Tribunal, I thank you.

THE PRESIDENT: Thank you, Professor Reisman. I now give the floor to Professor Lowe.

PROFESSOR LOWE: I shall not take up much of your time. We have noted the comments that our Malaysian friends have made on their requests 2, 3 and 4 and therefore that only really leaves request 1 for me to address, and I shall address their closing remarks on the case for suspension and in particular Professor Crawford's remarks.

I would like to start by saying that Singapore does wish to emphasize that this is a common-sense matter. It is a matter that is attended by legal technicality and bound by legal rules, but ultimately, this is a Tribunal that has to find a practical solution to practical problems of the kind that arise in the real world. The question that you have before you, in essence, is: has the threshold at which this Tribunal will step in and order a State to suspend large-scale projects on the basis of complaints about their environmental impact been reached? Is this the kind of case on which the ITLOS is going to decide that it will in future be prepared to issue suspension orders against any State which happens to have a complaint made against it?

Here we have two projects, one which was begun physically in September 2000 at Tuas, the other begun physically at Tekong in January 2001. In Professor Schrijver's account this morning, the first diplomatic note that he took you

to was dated 28 January 2002, at which time the works had been physically conducted in sight of Malaysia for over a year. Even that note from January 2002 concerned only Tuas, and concerned only the alleged violation of Malaysian sovereignty. It is 30 April 2002 at which Professor Schrijver took you to the diplomatic note protesting against Tekong also, and also raising the environmental questions.

Professor Reisman has put to you the practical question: "What does one do in these circumstances?" It is as if one were building a house to accommodate part of one's family. You have brought in the architects, you have brought in the surveyors, you have had the site cleared, you have contractors lined up to come on to the site, they in turn have hired subcontractors – and each of them turned down, no doubt, other contracts in order that they can commit to do the work – and the road outside is full of equipment that has been lined up to do this work. Then the next-door neighbour comes round, two years after this has started, and says, "I am a bit worried about the effect that your project is going to have on my house." What would you do at that stage? Would you say, "This is terrible! I shall order immediately complete suspension of works" and just stop, or would you say, "Well, what's the problem? Let's have a look at what the problem is and find out how we can address that problem"?

This is precisely what Singapore has been trying to say, and we have sought the information from Malaysia since 2002. You will find that Malaysia, reasonably and happily said in 2002 that it would send notes specifying its concerns. I shall not take you through the details. You will find them set out in Annex B to the diplomatic note which Singapore sent on 17 July 2003, and that is in Annex 2 of Singapore's response. But despite Malaysia's statement that it would send these details, nothing came. In fact, nothing came at all until we had four reports attached to a writ. "The evidence is in there somewhere and we will see you in court."

Malaysia could have explained in the Statement of Claim what its case was and what its concerns were. Malaysia could have explained in the Request for Provisional Measures what its exact concerns were and why it was worried. Malaysia could have explained on Thursday morning what its case was and what impacts it feared. Under the provocation of our submissions yesterday, in which we specifically asked for clarification of Malaysia's case, you might have expected that at least they would have turned up this morning and given you one example – one example – of an impact which they fear will come about as a result of the reclamation works. But have you had a single example?

Where is their proof of urgency? Where is their proof of the impacts that they fear?

Today again they have continued as if this were the opening of a merits hearing on this case, and it is not. Professor Schrijver said he would deal with urgency, and he addressed a number of legal issues, but he never got to the facts.
Professor Crawford's submission threatened to deal with the question of urgency, but it did not get to the facts. There has been no instance – and I ask you to note this particularly – not merely of any impact which they allege will occur before October 9; they have not even pointed to any impact which they think will occur before the decision of the Arbitral Tribunal. On their own broadest case, with the

most conceivably wide jurisdiction of this Tribunal, they have not pointed to any evidence at all.

Let me turn to a number of minor points that Professor Crawford raised. You had a picture of a grab-dredger which, it was said – and I am sure Professor Crawford was advised of this, as I have been advised of the reply – was evidence of the continuing works on the part of Singapore. I am told that that grab-dredger has been parked in the offshore containment area for maintenance since 7 September this year and is not engaged in those works at all. You were shown a picture of the Amsterdam trailer doing what is known as "rainbow refilling" by throwing out jets of sand. I am told that that was a category of work perfectly regular in reclamation projects where the works are carried on within a silt barricade designed precisely to ensure that the sand that is jetted in does not escape in any way. He referred to the suspension of works a Chek Jawa on Pulau Ubin as if that was evidence that Singapore had suddenly been taken by surprise by the inadequacy of its assessment of these results and rushed to preserve Singaporean mangroves. In fact, the decision to suspend work at Chek Jawa was taken on account not specifically of mangroves but of the particular biodiversity of those mud flats and it was not suspended because of any effects of the reclamation works at all.

Professor Crawford asked, very pointedly, has there been an EIA? If there has been an EIA, why did Singapore not present it? In our submission, and this is something which we will go into on the merits, that is a question of nomenclature. Nowhere in the Law of the Sea Convention does the phrase, "environmental impact assessment" occur, and they have not suggested that it does. There is no requirement that the assessments be in any particular form. If we say that we have an extremely large grey, thick-skinned, four-legged, trunked, big-eared and tusked animal at our side, the fact that we do not put a label round its neck and say that it is an elephant does not mean it is not an elephant. The fact that Malaysia may not have been able to identify any document that has the words "environmental impact assessment" stamped on it - even if that were a relevant question – would not answer their case.

I should deal here with one particular point which appears to have confused them. They have referred to two extremely thin summary reports which Singapore handed over earlier this year and there has been some suggestion that we might regard these as being the Environmental Impact Assessment Reports. They are emphatically not. As the date on them indicates, they were prepared after matters came to a head in July. They were specifically prepared for Malaysia and they prepared in order to give Malaysia an account of what had happened. They were like a guide book to the processes through which planning had gone, which would form a basis for negotiations between the two States and the intention and the hope was that on the basis of these reports Malaysia would be able to see what had been done and then, in technical discussions, would be able to take up any specific issues on which it sought further clarification.

The final detail on Professor Crawford's point that I should mention relates to the *MOX* case and I raise it not because it is particularly relevant as a matter of law here but because it is a vivid illustration of the difference between the kind of situation where provisional measures are intended to be available and the circumstances where they are not.

As you will remember well, in the *MOX* case we had a situation where the United Kingdom was about to press the button and commission, using nuclear materials, a new facility. There was reference in that case to the opening of the can of plutonium and that plutonium, which has, as I recall, a half-life of 225,000 years, was said by Ireland in that case to be of such a danger that once released into the plant it would be bound to contaminate the plant and Ireland said there was an inevitability of discharges of that plutonium into the Irish Sea.

We were faced with a situation there where there was an act about to take place which had no proven contractual or other urgency behind it which would result in immediate and irreversible damage to the environmental as the applicant pleaded the case. It was letting the tiger out of the cage. But this is a world away from this situation. There is no suggestion anywhere in Malaysia's statement that there is any tiger about to escape from the cage, that there is any impact which is about to be felt.

Professor Crawford, asking himself the rhetorical question, "What is Malaysia's case?" said, and I have only my own note of it, that a breach has already occurred and that breach will persist for as long as there has not been an environmental impact assessment conducted by Singapore. In our submission, that is a complete misconception of the function of provisional measures. It is suggesting that provisional measures should operate as a kind of provisional punishment, that where a State is accused of not having fulfilled procedural duties in the past (and that is a question which will go to the Merits Tribunal) that this Tribunal should order suspension on the basis that it can be supposed that the State did fail in those procedural duties.

We say that that is wholly misconceived. Provisional measures are protective. They are there to protect the rights of the applicant. They are there to protect the marine environment against serious harm. Has Malaysia shown any imminent threat to its rights? Has it shown a single example of impending harm to the marine environment? Has it answered any of the specific questions which we raised yesterday? Is salinity a problem? Is the oil and grease a problem? Will it tell the Tribunal what the water quality criteria are that are applicable in these Straits? Silence. No answer to any of those points.

There is one question before this Tribunal; has Malaysia shown any evidence of an urgent need for provisional measures? As Sir Eli Lauterpacht ended by quoting the words of one great international lawyer, I shall end by quoting the words of another great international lawyer, Sir Eli himself, who said, "As yet it has not and now it is too late for it to do so".

THE PRESIDENT: Thank you Professor Lowe. I now give the floor to the Agent of Singapore.

MR KOH: Mr President, Mr Vice-President, Distinguished Judges, my learned friends, it now gives me great pleasure to make the closing statement on behalf of Singapore.

First, as Singapore has argued yesterday, Malaysia's application is neither admissible nor within the jurisdiction of this Tribunal because Malaysia has failed to fulfil the pre-conditions required by the UN Convention on the Law of the Sea for the commencement of arbitration.

Second, Malaysia has also failed to produce sufficient evidence of a real risk of harm to Malaysia or serious harm to the marine environment if Singapore's reclamation works are not stopped immediately. The burden of proof on the State requesting provisional measures is very high, especially in a case where such provisional measures would cause great harm to the respondent State as is the case here. This high burden of proof is entirely appropriate and Malaysia has, in my humble submission, not discharged that burden. Hence, Malaysia's claim is inadmissible.

Third, Malaysia has not demonstrated the urgency for provisional measures that is required. Malaysia has delayed its case for too long to make its claim of urgency credible. Singapore's reclamation works are at an advanced state. In any case, as my colleagues and I have argued, the Annex VII Tribunal will be constituted at the latest by 9 October. No irreparable prejudice to Malaysia's rights can result from any additional works which are scheduled to take place between now and the time when the Annex VII Tribunal takes over. As the Agent of Singapore I wish to solemnly assure this Tribunal that Singapore has not and is not accelerating its works.

At our hearing yesterday, I told the Tribunal of the numerous efforts made by Singapore to persuade Malaysia to enter into negotiations with us with a view to arriving at an amicable settlement. Malaysia has described Singapore's conduct as unco-operative and unilateralist. I humbly submit that the record shows otherwise. Professor Crawford, in his submission to this Tribunal last Thursday, provoked much laughter in the court when he, in an impressive display of linguistic versatility, described Singapore as Mr No, Mr *Non*, Mr *Nyet*, Mr *Nein*, etc. I am not as gifted as he but what I want to do today is to convince the Tribunal that Singapore is not Mr No. In fact, we are Mr Yes. Let me try to persuade you.

Is Singapore willing to negotiate in good faith? Yes, we are. Is Singapore willing to provide Malaysia with all the relevant information concerning these reclamation projects? Yes, we are. Is Singapore willing to afford Malaysia an opportunity to comment on our reports? Yes, we are. Is Singapore willing to afford Malaysia an opportunity to comment on our reports? Yes, we are. Is Singapore willing to let our experts meet with their experts in order to narrow the gap between our respective scientific advisers? Yes, we are. Is Singapore willing to co-commission and co-finance a new scientific study by independent experts? Yes, we are. Is Singapore willing to undertake that it will take any necessary mitigation measure to avoid damage to Malaysia? Yes, we are.

Mr President, I wish to reiterate a very important commitment that my Government made in its note of 2 September this year, and with your permission I would like to read this very important commitment:

"If, after having considered the material *[that is to say the material we have provided Malaysia with]* Malaysia believes that Singapore had missed some point or misinterpreted some data and can point to a specific and unlawful adverse effect that

would be avoided by suspending some part of the present works, Singapore would carefully study Malaysia's evidence. If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, *[and I emphasise that]* to deal with the adverse effect in question."

Mr President, those of you who have had the pleasure of visiting Singapore will know it is one of the smallest countries in the world. Our city is even smaller than the state of Hamburg. In spite of our small size we have succeeded in providing a high quality of life for our 3 million citizens as well as for the 1 million non-Singaporeans who live and work amongst us. Singapore has the reputation in the world of being a garden city. Through careful planning, and strong environmental regulation, we have succeeded in reconciling the twin objectives of the Earth Summit, environment on the one hand and development on the other. Because of our small size we have no choice but to reclaim land from the sea. However, all our land reclamation projects have been conducted within our territorial waters and they have not impinged upon the territory or the rights of Malaysia. In addition, our land reclamation projects have been planned and implemented in accordance with the highest standards of international best practice. As a result, the quality of our environment is one of the best in the whole of Asia. Counsel for Malaysia's attempt to paint Singapore as a country which is hostile to or neglectful of the environment is just not credible given the true facts and our track record. Singapore is one of the most environmentally friendly cities in the world. Singapore must be one of the very few cities in the world that has sewered up the entire land boundary to ensure that no untreated waste escapes into the adjacent seas.

Fifth, I wish to point out that provisional measures is an exceptional legal remedy. It is a remedy derived from the principles of equity. Mr President and distinguished Judges, there are two well known maxims in equity, both of which apply in this case and I quote: "He who comes to equity must come with clean hands. He who seeks equity must do equity". Malaysia's hands are, in law, not clean because it has been responsible for the discharge of untreated domestic and industrial waste into the Straits of Johor. On the evidence before the Tribunal the pollution caused by the reclamation and other works at the Port of Tanjung Pelapas, Pasir Gudang and Tanjung Langsat, have caused much of the impact on the marine environment that is being blamed on Singapore's reclamation projects.

Sixth, Singapore submits that Malaysia's request is misconceived. In part it asks the Tribunal to order Singapore to do things which Singapore has already freely undertaken to do. In part it seeks to close down Singapore's reclamation projects on the basis of vague and unsubstantiated claims of injury. Malaysia has failed to identify a single instance of a risk which would be averted or of benefit which would be conferred by the making of the order it seeks.

Seventh, I wish to refer to the statement made this morning by my good friend, the Malaysian Agent. I welcome his statement as contained in his paragraph 10 concerning Malaysia's second, third and fourth requests for provisional measures. In this respect Singapore is pleased that the offers that we have made in our note of 17 July 2003 and confirmed in our presentation to this Tribunal yesterday be noted by this Tribunal in the same manner as it was done in the *MOX Plant* case.

Singapore is also pleased to inform the Tribunal that it accepts the proposal for Malaysia and Singapore to jointly sponsor and fund a scientific study by independent experts on terms of reference to be agreed by the two sides. The Tribunal should note that Singapore had accepted this proposal from Malaysia at a meeting in Singapore in August and had reiterated its acceptance in our Note of 2 September 2003.

Concerning Malaysia's first request for provisional measures for Singapore to stop its reclamation works immediately, which was modified by the Malaysian Agent this morning, with respect to Area D of the land reclamation works at Pulau Tekong, Singapore is pleased to inform the Tribunal that regarding Area D, no irreversible action will be taken by Singapore to construct the stone revetment around Area D pending the completion of the joint study, which should be completed within a year.

Mr President, I should state for the record that none of the above agreements affect the rights of both Malaysia and Singapore to continue our reclamation works which, however, must be conducted in accordance with international best practice and the rights and obligations of both parties under international law.

Mr President, distinguished judges, this concludes the oral statements of Singapore. With your permission, I will now proceed to make Singapore's final submission.

For the reasons which I have already stated, Singapore respectfully requests the International Tribunal for the Law of the Sea to:

(a) dismiss Malaysia's request for provisional measures, and
(b) order Malaysia to bear the costs incurred by Singapore in these proceedings.

Mr President, Mr Vice-President, distinguished judges, on behalf of the members of my delegation and on my own behalf, I would like to thank you and thank the members of your staff for the excellent arrangements you have made for our hearings during the last three days.

The Singapore delegation has tired to reciprocate your kindness by bringing the good weather of Singapore to Hamburg!

I would also like to thank my good friend, Tan Sri Ahmad Fuzi, and the members of the Malaysian delegation for their friendship and cooperation. Thank you very much.

THE PRESIDENT: Thank you.

This brings us to the end of the oral proceedings.

On behalf of this Tribunal, I must take this opportunity to express our appreciation for the high quality of the presentations of the Agents and counsel of both Malaysia and Singapore. I must also take this opportunity to thank very warmly the Agents of both Malaysia and Singapore for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to documentation.

THE REGISTRAR: Mr President, in conformity with Article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible, but in any case not later than 12 noon Hamburg time on Tuesday, 30 September 2003.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, they will be provided by the Registry with a list of the documents concerned. In accordance with the Guidelines concerning the preparation and presentation of cases before the Tribunal, they will also be requested to furnish the Registry with additional copies of documents that have not been supplied in sufficient numbers. Thank you, Mr President.

THE PRESIDENT: The Tribunal will now withdraw to deliberate on the result. The Order will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Order. That date is 8 October 2003. The Agents will be informed reasonably in advance if there is any change in this schedule.

In accordance with the usual practice, I request the Agents kindly to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Order.

This sitting is now closed.

(The hearing concluded at 1.26 p.m.)