

1982 United Nations Convention on the Law of the Sea

**IN THE DISPUTE CONCERNING
LAND RECLAMATION ACTIVITIES BY SINGAPORE
IMPINGING UPON MALAYSIA'S RIGHTS IN
AND AROUND THE STRAITS OF JOHOR
INCLUSIVE OF THE AREAS AROUND POINT 20**

MALAYSIA v. SINGAPORE

REQUEST FOR PROVISIONAL MEASURES

4 SEPTEMBER 2003

REQUEST FOR PROVISIONAL MEASURES

1. Pursuant to Article 290(5) of the *United Nations Convention on the Law of the Sea* ('the 1982 Convention'), Malaysia requests that the International Tribunal for the Law of the Sea ('the Tribunal') prescribe the provisional measures specified below in Malaysia's dispute with Singapore over the effect of Singapore's land reclamation activities upon Malaysia's rights in and around the Straits of Johor.

2. Malaysia has requested the submission of its dispute with Singapore to an arbitral tribunal established under Annex VII of the Convention by written notification in the form of a diplomatic Note conveyed to Singapore on 4 July 2003 (**Annex A**). The written notification was accompanied by a statement of Malaysia's claim and the grounds upon which it is based in accordance with Annex VII, Article 1 ("the Statement of Claim") (**Annex C**).

THE FACTS

3. The facts of the dispute are as set out in paragraphs 5 - 18 of the Statement of Claim.

THE DISPUTE

4. The history of the dispute is set out in paragraphs 19 - 20 of the Statement of Claim, and may be traced from the correspondence which is set out in Annex 1 to the Statement of Claim. Following the delivery of the Statement of Claim there has been a further exchange of correspondence between the parties, which is set out as **Annex B** hereto. There has also been a further exchange of views between the parties, at a meeting in Singapore held on 13-14 August 2003. The Record of that Meeting is at **Annex D**.

5. Following the meeting, on 25 August 2003, Malaysia sent a Note to Singapore, the full text of which is at Annex B, Item: xi. That Note reads as follows:

The Ministry of Foreign Affairs, Malaysia presents its compliments to the High Commission of the Republic of Singapore and has the honour to refer to earlier correspondence concerning the dispute over land reclamation activities by Singapore impinging upon Malaysia's rights in and around the Straits of Johor inclusive of the areas around Point 20.

In addition, the Ministry refers to the meeting held in Singapore on 13 and 14 August 2003. At that meeting, the delegation of Singapore called upon Malaysia to adopt a cooperative approach, involving exchange of information and further meetings. The fact is, however, that the absence of a cooperative approach up to this time arises from the unilateral conduct of Singapore, which has simply proceeded with these major projects, projects having obvious implications for Malaysia, without any prior notification or consultation of any kind. In particular, whatever internal assessment may have occurred, there has been no sharing of reports with Malaysia, and there is no evidence of any attempt to take Malaysian data into account or to assess transboundary impacts.

As Malaysia has repeatedly made clear, it has a series of concerns about the reclamation projects. These include issues both of process and substance. Despite these concerns, the delegation of Singapore made it clear that it had no intention to suspend works, or even to vary the schedule of works, so as to address Malaysia's concerns before the new works are completed. Indeed there are indications of an acceleration of work around Pulau Tekong. Remediation of transboundary effects (e.g. coastal erosion) could be extremely expensive for Malaysia, but in its observations at the meeting the delegation of Singapore gave priority to alleged short-term concerns about the costs of a short delay to its own contractors. This is a further indication that Malaysia's legitimate concerns are being summarily dismissed or subordinated.

Independent technical advice provided to Malaysia indicates continuing legitimate concerns about the impact of the projects, including in the short term around Pulau Tekong. For example, even if close in-field studies on the Singapore side were to suggest that there is no cause for concern on the part of Singapore, it would not follow that there is no cause for concern on the Malaysian side. On the contrary, Malaysia has such concerns, which are substantiated. These concerns primarily relate to navigation, coastal deposition and deteriorating ecohydraulic and water quality conditions in sensitive waters. Moreover a great deal depends on the direction of flow and consequent effects on sediment transport and deposition. The absence of a calibrated, validated morphological hydro-environmental study means that questions cannot be answered with confidence, whatever short-term indications Singapore may have, based on in-shore data collection on the Singapore side.

Malaysia also has legitimate concerns about newspaper reports—not denied by Singapore—that there are plans for bridges, barrages or causeways linking Pulau Tekong and Pulau Ubin to Singapore Island.

The effect of the land reclamation works is already substantially to constrain navigation in the eastern part of the Straits of Johore. It is a vital interest of Malaysia that this channel remains free for navigation at all times for ships of all sizes. Singapore's unilateral action casts doubt on this, and Singapore has done nothing to allay these doubts.

Malaysia sees no analogy whatever between in-shore land reclamation (of the kind earlier carried out by Singapore, and also carried out by Malaysia in various locations, without protest on either side) and the massive, planform area reclamations which are now being carried out, in such a way as to produce major changes to the whole coastal configuration and to close off large areas of sea. In Malaysia's view it is inevitable that such activities will have serious effects, and the absence of any attempt by Singapore to account for these effects to 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 measures.

In addition, there is an unresolved dispute over maritime boundaries at both ends of the Straits, including at the western end in areas affected by the reclamation activities. This dispute imperatively requires to be resolved.

At the end of the meeting on 13-14 August, the delegation of Malaysia reserved its right to seek provisional measures from the International Tribunal for the Law of the Sea (ITLOS), and following that meeting the Government of Malaysia can see no alternative but to have recourse to ITLOS forthwith. Nonetheless, Malaysia is willing to make one further attempt to seek to resolve these issues by consultation. In order to do so, however, it is essential that Singapore agree to postpone the continuation and completion of the reclamation works, in particular around Pulau Tekong. It is the firm view of the Ministry of Foreign Affairs that no meaningful negotiations concerning this matter can take place if at the same time Singapore is proceeding with all speed to complete the reclamation works, irrespective of their impacts upon Malaysia.

The Government of Malaysia accordingly calls upon the Government of Singapore to indicate forthwith its agreement :

- a) to suspend work on physical structures associated with the reclamation works around Pulau Tekong; and
- b) that no bridge, barrage, tunnel or other link between its offshore islands and Singapore Island will be designed or commissioned without full prior discussion and consultation with Malaysia, and that any such bridge, barrage, tunnel or other link will be designed so as not to impede existing rights of access and transit within the Straits of Johor.

This proposal is of course made without prejudice to the legal positions of both sides.

If agreement can be reached on these conditions, Malaysia would be willing to host further talks in Putrajaya at the earliest mutual convenience. In particular, at those talks, it would propose that the two Governments jointly sponsor and jointly fund a study of long-term changes to the bed morphology in the Straits, to be carried out by an international consulting firm mutually agreed upon.

The Ministry of Foreign Affairs, Malaysia avails itself of this opportunity to renew to the High Commission of Singapore the assurances of its highest consideration.

6. At the time that Note was delivered, Malaysia indicated that an early reply would be appreciated, preferably by 29 August 2003 or 2 September 2003. But no specific date was indicated in the Note, to avoid the appearance of an ultimatum. If Singapore was not prepared to countenance the request set out in the Note, of which it had ample notice, it had only to say so.

7. Singapore's response, delivered late on 2 September 2003, is set out at Annex B, Item: xiii. In its Note No.MFA/PD1/00068/2003 of 2 September 2003, Singapore refused to suspend work on its reclamation projects and denied that these had any adverse effect on Malaysia. It denied that it had accelerated work around Pulau Tekong.

8. If the positions of the parties were not clearly defined at any earlier stage, they are certainly so defined as a result of the Malaysian Note No. EC 89/2003 of 22 August 2003 and the Singapore Note No.MFA/PD1/00068/2003 of 2 September 2003. In fact, it will be clear that those positions have not changed.

REQUEST FOR PROVISIONAL MEASURES

9. In its Note of 4 July 2003, Malaysia requested that, pending the constitution of the Arbitral Tribunal under Annex VII, Singapore agree to certain provisional measures, specified in the Note and repeated in paragraph 28 of the Statement of Claim. Malaysia further requested that if Singapore were unable to

agree to the provisional measures sought, it should agree that the question of provisional measures be forthwith submitted to the Tribunal. In its response of 17 July 2003, Singapore argued that any question of seeking provisional measures was premature and it expressed its willingness to meet to discuss the question. Indeed, Singapore denied that it had ever refused to meet with senior Malaysian officials on this issue, a denial which may be contrasted with the statements made, for example, in Singapore's Note of 11 April 2002 (Annex 1 (h) to the Statement of Claim), and repeated in subsequent correspondence.

10. Malaysia's aim has throughout been to seek to establish a proper system of consultation, notification and exchange of information with respect to these major projects. In an attempt to advance this aim, it agreed to a meeting in Singapore on the earlier of the two dates proposed by Singapore. At that meeting Singapore, after consideration, agreed to provide certain additional information, but it refused to suspend works. Malaysia repeated its request for suspension of works around Pulau Tekong, on a without prejudice basis, in one final attempt to establish a reasonable set of assurances that would allow discussion and consultation to proceed between the parties. Singapore delayed more than a week in responding to that request, but eventually declined to suspend work, by a Note delivered at the close of business on 2 September 2003 (Annex B, Item: xiii). In the circumstances the inference can legitimately be drawn that Singapore has been acting in a deliberately dilatory manner, seeking to draw out the process without making any genuine attempt to meet Malaysia's concerns.

11. Considerably more than two weeks having elapsed since the date on which Malaysia made its request to Singapore for provisional measures, and no agreement having been reached between the parties either as to the substance of the provisional measures sought or as to the procedure to be followed, in accordance with Article 290(5) of UNCLOS, Malaysia submits its request for provisional measures to the Tribunal.

12. Malaysia has nominated Dr. Kamal Hossain as its judge *ad hoc* pursuant to Article 17(3) of the Statute of the Tribunal. Dr. Hossain is a national of Bangladesh.

PROVISIONAL MEASURES REQUESTED

13. Pending the constitution of the Arbitral Tribunal, Malaysia requests that the Tribunal prescribe the following provisional measures:

- (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.

THE REASONS FOR WHICH THE REQUEST IS MADE

14. The reason for requesting provisional measures is that Singapore's action in engaging in land reclamation around Pulau Tekong and Tuas is causing and has the potential to cause serious and irreversible damage to the marine environment and serious prejudice to the rights of Malaysia.

15. A central point is that the land reclamation projects are evidently intended to be permanent in character, and they involve a method of construction that is

effectively irreversible. To the extent that the projects impair Malaysia's rights or (in their current or projected condition) cause or threaten serious harm to the marine environment, the harm caused could not be other than irreversible and irreparable.

16. Under Article 290(1), as applied to the present application by Article 290(5), the Tribunal "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment". Both conditions for the prescription of provisional measures exist here.

(a) *Serious harm to the marine environment*

17. The Malaysian Reports annexed to the Statement of Claim, to which the Tribunal is respectfully referred, demonstrate that the reclamation projects are already causing and threaten to cause harm to the marine environment, producing major changes to the flow regime, changes in sedimentation, which especially in the eastern sector are much more likely to impact on Malaysia than on Singapore, and consequential effects in terms of coastal erosion. Impacts will also be felt in terms of navigation, the stability of jetties and other structures, especially at the Malaysian naval base of Pularek,

(b) *Prejudice to the rights of Malaysia under UNCLOS*

18. The rights of Malaysia which it seeks to preserve by the grant of provisional measures are those relating to the maintenance of the marine and coastal environment and the preservation of its rights of maritime access to its coastline, in particular via the eastern entrance of the Straits of Johor. As specified in paragraphs 24-25 of its Statement of Claim, these rights are guaranteed by Articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the 1982 Convention, and in relation thereto Article 300 and the precautionary principle, which, under international law, must direct any State party in the application and implementation of those obligations.

19. Malaysia is pleased to note that on the fundamental legal issue there is agreement: in its Note of 2 September 2003, Singapore expressly accepts that both countries have an obligation to protect the marine environment of the Straits, and to ensure that the manner in which they conduct their activities does not adversely impact upon the Straits or the territory of the other State. This is a welcome convergence in the view of the two States. But underlying this apparent agreement there is a profound disagreement. Singapore has consistently, by its actions and by its failure to act, set itself up as the judge of Malaysia's rights and concerns. Having regard to the extent of the reclamation works, in particular those in the vicinity of Pulau Tekong, it is impossible to assume that these would be without effects on the marine environment or the coastline. Equally, it is impossible to assume that it would be reasonable to proceed to complete those works without any consultation, assessment or sharing of reports with the riparian State to the north of the Straits. Yet that has been Singapore's position, and it has not changed.

POSSIBLE CONSEQUENCES OF NOT GRANTING PROVISIONAL MEASURES

20. In the present case, provisional measures are necessary to ensure that any final decision of the Annex VII Arbitral Tribunal can be implemented effectively and is not meaningless. A failure to prescribe provisional measures would prejudice the rights of Malaysia.

21. On the other hand, the grant of the provisional measures sought by Malaysia would not cause irreparable prejudice to the rights of Singapore. In the event that the conduct of Singapore is found by the Annex VII Arbitral Tribunal to be consistent with international law, including UNCLOS, Singapore would then be able securely to complete its program of land reclamation. The delay, which will be of relatively short duration, would not cause irreparable harm to Singapore.

THE URGENCY OF THE SITUATION

22. The situation is urgent, given that there is little prospect that the Annex VII Arbitral Tribunal will be established and able to render a decision on provisional

measures for some time. At the date of filing this request, Singapore has not responded to Malaysia's invitation, made at the meeting on 13-14 August 2003, that the International Tribunal for the Law of the Sea should have jurisdiction to deal with the merits of the dispute. Until that response is received, the issue of the constitution of an alternative tribunal does not arise. In any event, it will necessarily take some time either for the parties to agree on the constitution of the Tribunal and the persons selected to accept their office as arbitrators, or for the Appointing Authority to assure the constitution of an Annex VII Tribunal.

PRIMA FACIE JURISDICTION OF ANNEX VII TRIBUNAL

23. Malaysia and Singapore are Parties to UNCLOS. Article 290(5) of UNCLOS provides that the Tribunal may prescribe provisional measures if, *inter alia*, it considers that, *prima facie*, the tribunal to be constituted would have jurisdiction. An Arbitral Tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute pursuant to Article 288(1) of UNCLOS.

24. UNCLOS Part XV Section 2 provides a mechanism by which a party may invoke compulsory procedures for the resolution of the dispute where no settlement has been reached by recourse to Part XV section 1. Article 286 permits these compulsory procedures to be invoked by any party to the dispute by submitting the dispute to a court or tribunal having jurisdiction under section 2.

25. Article 287 relates to the choice of court or tribunal for settling disputes. Article 287(1) permits a State Party, by way of a written declaration, to choose one or more of the means for the settlement of disputes listed in the paragraph, which include an Arbitral Tribunal established under Annex VII. As neither Malaysia nor Singapore has made a written declaration pursuant to Article 287(1), both countries are deemed by operation of Article 287(3) to have accepted arbitration in accordance with Annex VII as the means of settling disputes between them concerning the interpretation or application of UNCLOS.

26. Malaysia's dispute with Singapore concerns the interpretation or application of UNCLOS. Relevant provisions of UNCLOS have been raised

consistently in diplomatic correspondence with Singapore since the commencement of this dispute.

27. Article 286 also provides that a dispute can only be submitted at the request of any party to the court or Tribunal having jurisdiction under Part XV Section 2 where no settlement has been reached by recourse to Part XV Section 1. That condition is met in the present case.

APPOINTMENT OF AGENT AND ADDRESS FOR SERVICE

28. The Government of Malaysia appoints as its Agent, H.E Tan Sri Ahmad Fuzi Haji Abdul Razak and as its Co-Agent H.E Dato' Kamal Ismaun.

29. The Agent's and Co-Agent's address for service:

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30. The Agent may be contacted in Malaysia by:

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