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

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 25, 26 AND 27 SEPTEMBER AND ON 8 OCTOBER 2003

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. *Singapore), Provisional Measures*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 25, 26 ET 27 SEPTEMBRE ET DU 8 OCTOBRE 2003

Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour), mesures conservatoires

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.

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Minutes of the Public Sittings
held on 25, 26 and 27 September and on 8 October 2003

Procès-verbal des audiences publiques
des 25, 26 et 27 septembre et du 8 octobre 2003

PUBLIC SITTING HELD ON 25 SEPTEMBER 2003, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

Malaysia is represented by:

Mr Ahmad Fuzi Haji Abdul Razak,
Secretary General, Ministry of Foreign Affairs,

as Agent;

Mr Kamal Ismaun,
Ambassador, Embassy of Malaysia, Berlin, Germany,

as Co-Agent;

and

Mr Abdul Gani Patail,
Attorney-General,

Mr Elihu Lauterpacht, C.B.E., Q.C.,
Honorary Professor of International Law, University of Cambridge, Cambridge, United Kingdom,

Mr James Crawford S.C., F.B.A.,
Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,

Mr Nico Schrijver,
Professor of International Law, Free University Amsterdam and Institute of Social Studies, The Hague, Netherlands,

as Counsel and Advocates;

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Director-General, National Security Division, Prime Minister's Department,

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Director General of Survey and Mapping, Department of Survey and Mapping,

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Mr Haji Mohamad Razali Mahusin,
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Deputy Port Master, Maritime Port Authority of Singapore,

Mr Parry Soe Ling Oei,
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Mr Chee Leong Foong,
Head, Pollution Control Department, National Environment Agency,

as Advisers.

AUDIENCE PUBLIQUE DU 25 SEPTEMBRE 2003, 10 H 00

Tribunal

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M. Parry Soe Ling Oei,
Hydrographe adjoint, Autorité portuaire maritime de Singapour,

M. Chee Leong Foong,
Chef du Département de lutte contre la pollution, Agence nationale de l'environnement,

comme conseillers.

Opening of the Oral Proceedings
[PV.03/01, E, p. 7–9; Fr, p. 1–4]

Le Greffier :
Le 5 septembre 2003, une demande en prescription de mesures conservatoires, en attendant la constitution d'un tribunal arbitral devant être constitué conformément à l'Annexe VII de la Convention des Nations Unies sur le droit de la mer, fut présentée au Tribunal par la Malaisie contre Singapour dans un différend relatif à des activités de poldérisation par Singapour.

La demande a été présentée en vertu de l'article 290, paragraphe 5, de la Convention des Nations Unies sur le droit de la mer.

L'affaire a été dénommée *Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor* et a été inscrite dans le rôle des affaires sous le n° 12.

Monsieur le Président.

The President:
This public sitting is being held pursuant to article 26 of the Statute of the Tribunal to hear the parties present their evidence and arguments in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.

I call on the Registrar to read out the submissions of Malaysia as contained in its Request.

The Registrar:
The Applicant requests the Tribunal to prescribe provisional measures as follows:

> 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.

Mr President.

The President:
On 5 September 2003 a copy of the Request was transmitted to the Government of Singapore. By Order of 10 September 2003, the Tribunal fixed 25 September 2003 as the date for the opening of the hearing of the case. On 20 September 2003 Singapore filed its Response

regarding the Request of Malaysia. I now call on the Registrar to read out the submissions of the Government of Singapore.

The Registrar:
The Respondent requests the Tribunal:

> For the reasons given in its Response 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.

The President:
In accordance with the Rules of the Tribunal, copies of the Request and the Response are being made accessible to the public as of today.

The Tribunal notes the presence in court of Mr Tan Sri Ahmad Fuzi Haji Abdul Razak, the Agent of Malaysia, and Mr Tommy Koh, the Agent of Singapore.

I now call on the Agent of the Applicant to note the representation of Malaysia.

Mr Razak:
Mr President, members of the Tribunal, I have the honour to introduce to this Tribunal the members of the Malaysian delegation. They are: H.E. Dr Kamal Ismaun, Ambassador of Malaysia to the Federal Republic of Germany, as Co-Agent; The Hon. Tan Sri Abdul Gani Patail, Attorney-General of Malaysia; Prof. Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge; Prof. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the International Law Commission; Prof. Nico Schrijver, Professor of International Law, Free University, Amsterdam, and Institute of Social Studies, The Hague, member of the Permanent Court of Arbitration as Counsel and Advocate; Prof. Roger Alexander Falconer, Professor of Water Management, Cardiff University, Chartered Civil and European Engineer, Chartered Water and Environmental Manager, Fellow of the Royal Academy of Engineering as Technical Expert; Prof. Dr Sharifah Mastura Syed Abdullah, Universiti Kebangsaan, Malaysia, as Principal Expert, Technical Adviser, and other members of the delegation who act as Advisers and Technical Advisers.

Thank you.

The President:
Thank you.

I now call on the Agent of Singapore to note the delegation of Singapore.

Mr Koh:
Mr President, Mr Vice-President, distinguished Judges, my learned friends representing Malaysia, ladies and gentlemen.

This is a very important day for me. Like many of the Judges, I have spent over ten years of my life helping to negotiate the landmark United Nations Convention on the Law of the Sea.

We had many dreams which inspired and sustained us during our long and sometimes arduous journey. One of our dreams was that disputes between States relating to the law of the sea would be settled peacefully without resort to force. That dream has become a reality.

Another dream was that the International Tribunal for the Law of the Sea would make an important contribution to the peaceful settlement of disputes, to the progressive development of international law and to the rule of law in the world. I also dreamt, Mr President, that one day I would have the privilege of appearing before this distinguished Tribunal.

Let me now turn to introduce the members of the speaking team of the Singapore delegation.

Singapore's submissions will be presented in the following order: Singapore's Attorney-General, Mr S.K. Chan, will make our opening statement and outline Singapore's Response. The presence of the Attorney-General is a reflection of our seriousness and of our respect for this Tribunal. The factual background will be presented by Mrs Cheong, a senior official in the Ministry of National Development. I will concentrate on the diplomatic history of the case and on Point 20. Prof. Michael Reisman, Myres McDougal Professor of Law, Yale University, will deal with issues of jurisdiction, admissibility and the principles governing the prescription of provisional measures. Finally Prof. Vaughan Lowe, Chichele Professor of Public International Law, Oxford University, will apply the principles to the specific circumstances of this case. He will also deal with Malaysia's four specific requests.

Thank you, Mr President.

The President:

Thank you. Following consultations with the Agents of the parties, it has been decided that the Applicant will be the first to present its arguments and evidence. Accordingly, the Tribunal first will hear Malaysia today. The Tribunal will hear Singapore tomorrow.

I now call on the Agent of Malaysia to begin his statement.

Argument of Malaysia

STATEMENT OF MR RAZAK
AGENT OF MALAYSIA
[PV.03/01, E, p. 10–12]

Mr Razak:
Mr President, members of the Tribunal. It is an honour for me to appear before this Tribunal as Agent for Malaysia. The underlying dispute before us concerns vital issues, namely the unilateral resort by Singapore to major land reclamation activities in a semi-enclosed area of the sea, without any prior attempt at consultation or any proper assessment, and without any prior delimitation of a disputed maritime boundary.

Malaysia hopes that its resort to Part XV of the 1982 Convention will help to settle a dispute which is souring relations between the two neighbouring countries. But as a first and absolutely necessary step, it is for this Tribunal to call on Singapore to cease its continued, hasty, unilateral action and instead to adopt a cooperative approach – in short, to suspend the massive attempt at a *fait accompli* represented by these two projects, projects which self-evidently risk harm to Malaysia.

Mr President, members of the Tribunal, jurisdiction in the present case is based on Malaysia's invocation of Part XV, Section 2, of the UN Convention on the Law of the Sea, which provides a general system of dispute settlement binding on all the parties to the Convention. Singapore considers Malaysia's claim to be premature. As the Attorney-General of Malaysia will explain later, Malaysia has always sought a negotiated settlement of the dispute, something Singapore flatly refused until after these proceedings were commenced.

You will have noted from the diplomatic correspondence the change in the tone of Singapore's language after 4 July 2003. That change is itself a testament to the importance of Part XV of the Convention. Malaysia only wishes there had been an equivalent change in Singapore's conduct. But what we have seen since the filing of this claim has been soft words from my good friend, Professor Koh, but a continuation of hard actions from his Government. That is the fact, and it is a fact which only the binding order of this Tribunal will begin to alter.

Mr President, members of the Tribunal, let me invite you, right away, to look at the scale of Singapore's reclamations which are the subject of this complaint. Please look first at this picture, which is tab 1 in your folders. It shows Singapore's reclamation projects as they were in 2000, prior to Malaysia's complaint. Now please look at the following picture, which is tab 2 in your folders.

The difference is obvious, massive and would be of serious concern to any coastal State. Malaysia is not being unreasonable. It does not deny the importance of the issue of land reclamation for an island State like Singapore. It is not opposed to reclaiming land from the sea, which is one means of accommodating a growing population, and it has followed Singapore's inshore land reclamation activities during the last decade without protest.

But these two projects mark a new step in Singapore's land reclamation policy. They are different in kind from Singapore's previous projects. They cover an area of 5,214 hectares of sea, 3,306 hectares in the eastern sector, and 1,908 hectares at Tuas in the west. Unlike Singapore's initial reclamation projects, they do not involve shallow inshore areas adjacent to the Singapore coast, but areas of sea of up to 15 metres in depth, previously used for navigation by small boats and for other maritime activities. Once completed, these reclamation works will include a substantial proportion of the sea areas of the Straits of Johor. They threaten to have a massive impact on the marine environment of the Straits, on Malaysia's access to these waters, and on Malaysians living and working there.

It is obvious to the naked eye that these projects were bound to have serious environmental and other impacts, that they raised issues of maritime access and navigational security. Yet Singapore did not consult, did not share reports or information, did not assess their overall impact on the region; it simply went ahead, unilaterally. And now it refuses even a short suspension to allow some form of joint assessment, an initial assessment that could be carried out in a few months. It is that refusal that brings us here.

Mr President, members of the Tribunal, Malaysia regrets that this Tribunal, the "cornerstone of the system of dispute settlement", is competent only to address the Request for provisional measures. Nevertheless, your Tribunal still has a vital constitutional role to play. You are not simply a back-stop to other bodies; you are *the* Law of the Sea Tribunal.

Malaysia trusts that you will act as such, at a time when every day nearly a hectare of sea is reclaimed, at a time when, we are told by Singapore, Malaysia has no choice but to watch Singapore complete the massive project represented by the ugly wall of sheet piles you see on the screen. At the moment, the sheet piling can still be removed; it is not yet permanent. The project behind it can still be reconfigured if, in the course of the present proceedings, Singapore agrees to give up its unilateral approach. Yet Singapore pretends both that everything is irreversible and that nothing is urgent; and in the meantime it does whatever it can to delay matters between the parties at this stage of the procedure.

Mr President, members of the Tribunal, by granting the interim relief sought by Malaysia, you can notably set the stage for an eventual resolution of the dispute. To do so, it is essential that Singapore provide Malaysia with full information about current and planned projects. In the past, it has repeatedly refused to provide such information. Its attitude is encapsulated, for example, in a short statement contained in its note of 2 September 2003. Malaysia had asked Singapore to dismiss reports that Singapore planned to build a bridge, barrage, tunnel or other link between Singapore Island and the offshore areas around Pulau Tekong which are being reclaimed. In response, Singapore has been prepared to only say this:

> Singapore is prepared to notify and consult Malaysia before it proceeds to construct transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore *if such links could affect Malaysia's passage rights*. (*emphasis added*)

I repeat, "if such links could affect Malaysia's passage rights". I emphasize those last words, Mr President, members of the Tribunal. Even at a time when it seemed clear that the two countries were fast approaching international arbitration, Singapore still claimed to decide unilaterally whether specific projects could affect Malaysia's passage rights and whether it would provide Malaysia with access to information or even allow for consultation. It will notify and consult only if it thinks Malaysia's passage rights could be affected. But, as its own scientific reports show, it has never even considered whether Malaysia's rights could be affected. That is its constant attitude. By granting Malaysia's request for interim relief, you could help to bring about a change in that attitude.

Mr President, members of the Tribunal, before I conclude, allow me to give you an overview over the remainder of Malaysia's presentation. First, the Honourable Attorney-General will show that Malaysia, before seeking recourse to adjudication and arbitration, has long sought to settle the dispute by negotiation, and that there had been an exchange of views, or at least a presentation of Malaysian views, met by a stolid refusal by Singapore to take them seriously.

This presentation will be followed, I am delighted to say, by a presentation by Sir Elihu Lauterpacht, for long Malaysia's senior counsel in international law matters, who will provide you with an overview of Malaysia's case. A visual presentation by Professor

[Mastura] of Malaysia's Universiti Kebangsaan, and expert evidence by Professor Falconer, will follow. We understand that Singapore wishes to cross-examine both of them. Following that cross-examination, there will be presentations by Professors Crawford and Schrijver on the justifications in law and fact for Malaysia's requested measures.

Mr President, members of the Tribunal, thank you for your attention. I would ask you, Mr President, to call on the Attorney-General, Tan Sri Abdul Gani Patail, to continue Malaysia's case.

The President:
Thank you very much.

I now call upon the Honourable Attorney-General, Tan Sri Abdul Gani Patail.

STATEMENT OF MR PATAIL
COUNSEL OF MALAYSIA
[PV.03/01, E, p. 12–16]

Mr Patail:
Mr President, distinguished members of the Tribunal, it is indeed a great honour for me to appear before you today as the Attorney-General of Malaysia. It is my task to outline the history of the present dispute about Singapore's land reclamation activities. Doing so serves a double function. First, it sets out the necessary diplomatic background to the present proceedings. Secondly, and more importantly, in giving an overview of Malaysia's repeated attempts at negotiations, I will rebut Singapore's claim that these proceedings have been instituted without a proper exchange of views and before exhausting available diplomatic means of dispute settlement.

In its closing statement at the negotiations of 13 and 14 August 2003, Ambassador Koh, the leader of Singapore's delegation, observed that recourse to adjudication or arbitration under Part XV, Section 2, of the 1982 United Nations Convention on the Law of the Sea was "premature", and that further negotiations were required by article 283. In the diplomatic note of 2 September, Singapore reiterated this view and stated that the dispute was "at an early stage". Singapore makes the same argument in its Response, arguing that "the first opportunity for Singapore to engage in an exchange" occurred in August of this year. These statements suggest that Malaysia had rushed to the Tribunal, disregarding its obligations under article 283 of the Convention, and it is this claim that I wish to examine briefly this morning.

Mr President, distinguished members of the Tribunal, the date on which Malaysia filed its Statement of Claim, 4 July 2003, represents a watershed in this case. Before that date Singapore had refused to meet to discuss the issues raised by the reclamation projects. Malaysia repeatedly sought a high-level meeting of officials to express and develop its concerns and to listen to Singapore's views. Singapore repeatedly declined such meetings unless Malaysia first proved to Singapore's satisfaction that Malaysia's concerns were justified. In other words, the very purpose of the proposed meetings – the discussion of Malaysian concerns – became Singapore's excuse for not having the meetings.

Then came 4 July, and suddenly Singapore's position changed. Its diary fell open, even if it was always open at a later date than Malaysia would have wanted. Not merely did Singapore want meeting after meeting; it went so far as to deny that it had ever refused to meet. Suddenly all was conviviality and invitations.

But the diplomatic record is clear. Before as well as after 4 July 2003, Malaysia sought ways to resolve this dispute, as I will now show.

The relevant legal text is article 283 of the Convention. Under article 283, paragraph 1, before submitting a dispute to adjudication or arbitration, the parties "... shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

Mr President, members of the Tribunal, a quick glance at the material assembled in the annexes of Malaysia's Statement of Claim and its Request for provisional measures shows that Malaysia has repeatedly expressed its views on this matter, and in some detail. For most of the period, Singapore, although it had every opportunity to do so, did not provide much by way of reply, other than indicating that it did not accept Malaysia's position and asserting that it was incumbent on Malaysia to prove its claims. In fact, it is not too much to say that the diplomatic correspondence between the two countries has been dominated, or rather poisoned, by fruitless exchanges of views about the subject-matter of the present dispute.

For example, let me take you to the item contained in annex 1(i) to the Statement of Claim (tab 4). You will see that it contains a diplomatic note, issued by the Ministry of Foreign Affairs of Malaysia on 30 April 2002. The second paragraph states as follows:

> The Government of Malaysia is seriously concerned over all reclamation activities conducted by the Government of the Republic of Singapore in and around Pulau Tekong and Pulau Ubin that have a transboundary environmental impact in Malaysian territorial waters ... .

After listing the various effects of the reclamation activities – including changes in the water current, erosion and siltation – the note makes a specific reference to "the basic duty [of] states not to carry out any activities ... that would injure the rights and interests of neighbouring states".

And further, in the penultimate paragraph:

> The Government of Malaysia urges 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 resolve this issue.

This note provides, in April 2002, a concise summary of the dispute which is now, 18 months later, being addressed before this Tribunal. In April 2002 Malaysia set out its main concerns, referred to the relevant legal rules and sought urgent high-level talks. Similar requests can be found, for example, in the diplomatic notes of 2 April and 10 July 2002, contained in annex 1(g) and 1(l) to the Statement of Claim. As regards the connected dispute about the maritime boundary in and around Point 20, diplomatic correspondence goes back to the late 1990s. Yet Singapore now says that the first opportunity it had to respond was only last month.

In fact how did Singapore respond to Malaysia's claims? Given its avowed willingness to cooperate and negotiate, as expressed in diplomatic notes since 4 July 2003, one might have expected Singapore to agree to Malaysia's requests for high-level talks. Similarly, in the spirit of good neighbourliness which it so eloquently professes since 4 July 2003, it would surely have taken seriously Malaysia's concerns? I regret to say that Singapore's earlier replies show neither cooperation nor good neighbourliness. Instead, Singapore categorically rejected Malaysia’s claims, both with regard to the maritime boundary and with respect to the alleged violations of duties of cooperation. With respect to the question of cooperation, it summarily dismissed Malaysia’s arguments as “unsubstantiated and baseless”, stating that “the reclamation works have been carried out entirely within Singapore’s territorial waters and in accordance with international law". Perhaps most importantly, Singapore repeatedly refused to conduct any consultations, instead stating that "a meeting will only be useful if the Government of Malaysia can provide new facts or arguments to prove its contentions".

I stress the last part of the sentence. It clearly shows that Singapore was not interested in cooperation, but instead claimed as a preliminary matter – without engaging in any discussions – to be the judge of Malaysia's claims. In its view, talks would only be useful if Singapore considered Malaysia's contentions to be proven. But if they were proven, what would there be to discuss?

Mr President, distinguished members of the Tribunal, what I have said demonstrates that there had been an exchange of views before Malaysia finally decided that only legal action had any potential to produce results. But even after 4 July 2003, in a spirit of cooperation, Malaysia agreed to bilateral talks, which were held in Singapore on 13 and

14 August 2003. Indeed, these talks have brought some clarifications. During the meeting, Singapore expressly accepted that as a matter of law 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. It also provided Malaysia with some further information about the reclamation works, information which Professor Falconer will discuss in a moment. However, Singapore refused, both then and in response to Malaysia's further letter of 22 August 2003, to suspend works, or even to vary the schedule of works, so as to address Malaysia's concerns.

This is the factual background against which the present dispute has to be seen. Malaysia had its claims brushed aside and summarily dismissed over many months. For Singapore now to call the present proceedings "premature" seems – on the facts – plainly absurd. In terms of the law, I submit that article 283 of the Convention – on which Singapore also relies – provides no basis for Singapore's claims.

I refer to the Tribunal's jurisprudence on article 283, in particular your Order in the *MOX Plant Case,* in which you addressed the United Kingdom's argument that no exchange of views had taken place. Indeed, passages of that Order read as if they had been written to fit the present dispute. In paragraph 5[6], you noted the United Kingdom's argument that "the correspondence between Ireland and the United Kingdom did not amount to an exchange of views on the dispute" – an argument which you rejected, noting Ireland's view that in a diplomatic note "it had drawn the attention of the United Kingdom to the dispute" and that there had been a "further exchange of correspondence … up to the submission of the dispute".

In paragraph 59, you noted Ireland's view that it had commenced proceedings:

> only after the United Kingdom failed to indicate its willingness to consider the immediate suspension of the authorization of the MOX plant and a halt to related international transports.

And you accepted Ireland's argument.

Finally, in paragraph 60 of the same Order, you affirmed the position, already put forward in the *Southern Bluefin Tuna Cases* and accepted in international jurisprudence, that:

> a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted.

Applying this to the present case, the position is then as follows. Malaysia has repeatedly drawn Singapore's attention to the dispute. It has only submitted the dispute to arbitration after Singapore had not only "failed to indicate its willingness", but categorically rejected claims for a suspension of works. Finally, on the basis of this, Malaysia has "conclude[d] that the possibilities of reaching agreement [by diplomatic means] have been exhausted."

Seen against this background, Singapore's assertion that Malaysia had rushed to this Tribunal before giving negotiations a chance is untenable, both in terms of the facts and the law. As I have shown to you, Malaysia, over years, has sought a negotiated settlement. Having had its views first rejected and then ignored, and now most recently dismissed, it seeks judicial recourse to this Tribunal, as it is entitled to do under Part XV of the Convention.

Mr President, distinguished members of the Tribunal, this brings me to the end of my presentation. I thank you for patiently listening to me, and would now request you,

Mr President, to call upon Sir Eli Lauterpacht to continue Malaysia's presentation. Thank you very much.

The President:
Thank you very much.

I now call upon Sir Elihu Lauterpacht.

STATEMENT OF MR LAUTERPACHT
COUNSEL OF MALAYSIA
[PV.03/01, E, p. 16–25]

Mr Lauterpacht:
Mr President and members of the Tribunal, on this, the first occasion on which I have the honour to address this Tribunal, I must confess to a special pleasure in doing so. Twenty-eight years ago, in the company of a number of the distinguished members of this Tribunal, as well as of the eminent leader of the Singapore delegation, I was able to participate in the meetings both within the Law of the Sea Conference in Geneva and at its margins in the Montreux gathering, when the fundamental elements of the novel dispute settlement system were hammered out and so I have observed the subsequent work of the Tribunal with special interest and admiration.
But I must add, in passing, that with all respect to my learned friend Professor Koh, though he played a critically important role in the achievement of the final text of UNCLOS, that does not carry with it any implication that his interpretation of the Convention should be given any special weight. The interpretation of the Convention is a matter for this high Tribunal and for no-one else.

Of the three environmental cases that have come before this Tribunal, this is perhaps the most important in its general implications. It is therefore appropriate to remind ourselves at the very outset of the definition of "pollution of the marine environment" which sets the tone for all that follows. It means, in the words of the interpretation clause in article 1 of UNCLOS:

> the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

That is the framework within which Malaysia invites this Tribunal to consider the allegations of environmental detriment that arise in this case.

The facts of this case obviously fall within the terms of this definition. It raises the issue of the extent to which a State can carry out coastal reclamation works that are likely to impinge upon the interests of a close neighbour without the prior satisfaction of two fundamental conditions. The first is the requirement of carrying out a public environmental impact assessment within its own territory – I emphasize the word "public" – and in which the interests of the affected States could be represented. Thus, in 1966, for example, a public enquiry was held in England relating to the proposal for the development of a deep waste repository at Sellafield on the Cumbrian coast abutting the Irish Sea. The Irish Government presented orally a 50-page statement to the Inspector to which, in his final report, he attached significant weight. No such opportunity has been made available to Malaysia by Singapore; and in its Response Singapore, though describing at length its own internal procedures, has not said otherwise.

The second, and perhaps even more important, requirement is that of consultation with and warning to the neighbour whose waters, coastline and fishery resources may be adversely affected. It is not enough for the actor State unilaterally and privately to determine what it thinks the environmental impact of its proposals may be. It is bound by its undertakings in UNCLOS to contemplate the likely effect that its activities may have on other

States and on the marine environment generally, and to ascertain that effect and take it into account.

None of that has happened here. As the distinguished Agent and the learned Attorney-General of Malaysia have already told the Tribunal, Singapore has proceeded unilaterally in this matter, without regard to the objectively verifiable interests of Malaysia. Singapore is not entitled to say that Malaysia should first demonstrate the adverse effects of Singapore's action, notwithstanding the fact that Singapore did not initially inform Malaysia of what that action would be. Malaysia cannot be expected to respond to a case that has not been presented in appropriate detail. Yet that is what Singapore has asked Malaysia to do; and it is legally unacceptable. So Malaysia has been obliged to introduce into the close and intensive relationship with its neighbour the divisive element of recourse to litigation. It does so with regret, but in the confidence that an impartial tribunal will uphold Malaysia's position and condemn the continuation of Singapore's arbitrary action.

It is in this context that Malaysia now seeks the prescription by this Tribunal of provisional measures. My task today is to offer the Tribunal an introduction to and summary of Malaysia's request.

Before doing so, however, I should very briefly outline the geographical setting of the present case. The members of the Tribunal will by now be familiar with the map which appears on their screens, a map which shows the island of Singapore lying on the northern side of the Singapore Straits. The island is surrounded on three sides by the territory of Malaysia, from which it is separated by the Johor Straits. The width of these Straits varies. On the western side there is a Johor promontory of which the most relevant marked features are Tanjung Pelepas and Tanjung Piai. At the western end of Singapore island is a point named Tuas. To the north lies the Malaysian mainland of the State of Johor which at one point is linked to Singapore by a causeway that carries vehicular and rail traffic, as well as pipelines bearing fresh water from Malaysia to Singapore. To the north-east of the eastern end of Singapore lie the Singapore islands of Pulau Ubin and, to the east of that island, Pulau Tekong. North of these two islands lies the estuary of the Johor River which flows entirely in the territory of Malaysia. To the south-east of Pulau Tekong, on the Johor shore of the Straits, lie Pularek – a naval training base – and Tanjung Pengelih.

You heard the learned Agent of Malaysia identify the additional information on the map and I will not repeat what he has said. I need only add that in addition to the yellow coloured areas there have been indications by Singapore that it intends to link by bridges or causeways the reclaimed areas in the Singapore islands with possibly adverse effects on navigation in the Kuala Johor Channel.

Mr President and members of the Tribunal, I can now turn to the substance of the present Request. First, a brief word about what Malaysia seeks in the way of provisional measures. There are four elements in Malaysia's request:

First, and most immediately important, is the request that, pending the decision of the Annex VII Tribunal, Singapore should suspend all current land reclamation activities in the vicinity of Pulau Tekong, Pulau Ubin and areas claimed as territorial waters by Malaysia.

Second, Singapore should provide Malaysia with full information as to its current and projected activities, 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.

Third, Singapore should afford Malaysia a full opportunity to comment upon these activities and their potential impacts.

Lastly, Singapore should agree to negotiate with Malaysia concerning any remaining unresolved issues.

I pass now to a consideration of the conditions governing the prescription of provisional measures by the Tribunal. UNCLOS, article 290, paragraph 5, lays down three conditions.

The first condition is the need for *prima facie* jurisdiction. This does not require, as hardly needs saying, a firm finding that there is jurisdiction – only that there is *prima facie* jurisdiction.

The elements in such a finding are as follows: First, that both parties should be Parties to UNCLOS. They are. Second, that the dispute concerns the interpretation or application of UNCLOS. There can be no doubt that this is such a dispute, as can be seen from the following summary of the main points in issue.

First, the conduct of Singapore involves manifest violations of Part XII of UNCLOS relating to the protection and preservation of the marine environment and to the rights of Malaysia. It is only necessary to mention, not to read, to this specialist court the terms of articles 192, 193, 194, 195, 198, 200, 201, 204, 205, 206 and 208. However, for the convenience of the Tribunal, these articles are reproduced at tab 6 of the bundle of documents before you. The gravamen of Malaysia's charge against Singapore is that the latter is paying no heed to the general concern for the protection and preservation of the marine environment, or to Malaysia's rights, which are reflected in detail in these articles.

That I say no more about this aspect of the case should not be seen as in any way diminishing its central importance. The essence of the present case is that it is about the fulfillment of the philosophy of the protection and preservation of the marine environment. The facts on which it is based will be described more fully presently.

The second manifest violation is Singapore's failure to cooperate or consult over its reclamation projects. This involves, first, consideration of Part IX of UNCLOS regarding enclosed and semi-enclosed seas. That the Straits of Johor fall within this category there can be no doubt, as is evident from the definition in article 122 and the obligations stated in article 123(b), that each Party shall "endeavour … to coordinate the implementation of [its] rights and duties with respect to the protection and preservation of the marine environment" and, in article 123(d), "to invite, as appropriate, other interested States … to cooperate with them in furtherance of the provisions of this article."

The third category of violation relates to Singapore's trespass within the limits of Malaysia's territorial sea. This falls within the scope of Section 2 of Part II of the Convention, especially article 15 concerning the delimitation of the territorial sea between States with opposite coasts.

The third element relative to the *prima facie* jurisdiction of the arbitral tribunal is that arbitration is deemed to be the appropriate means of dispute settlement between the parties. This follows from article 290, paragraph 5, of the Convention and the fact that, as foreseen in article 287, paragraphs 3 and 5, both Parties have not committed themselves to the jurisdiction of *this* Tribunal on the merits of the case.

The fourth element is that neither party should have made any relevant reservation to the applicability of UNCLOS, Part XV, Section 2. Neither of them has made such a reservation.

Fifth, it must be shown that there exists a dispute between the parties. It is evident, in the light of the diplomatic correspondence and negotiations already described by the learned Attorney-General, that a dispute exists. On the one hand, Malaysia has pointed to the failure by Singapore (a) to comply with its good neighbourly obligations under UNCLOS, (b) to notify Malaysia of projects that risk serious transboundary impact, (c) to consult with Malaysia thereon, and (d) to initiate joint consideration of the environmental consequences of the reclamation project. In opposition to this, Singapore denies that the reclamation projects impinge on Malaysia's territorial waters or that they may adversely affect Malaysia's coastal

and maritime environment. It is true that Singapore has acknowledged in its note of 2 September 2003 that, as a matter of law, both countries have an obligation to protect the marine environment of the Straits and to avoid conduct which impacts adversely on the territory of the other State. This is an important admission by Singapore. But it has not led Singapore to suspend the work, or even to agree to take the kind of action contemplated in UNCLOS. To the contrary, there are indications – though denied by Singapore – of an acceleration of work around Pulau Tekong.

Lastly, I need take no more than a moment to observe that this dispute has not been settled by any of the means contemplated in UNCLOS, Part XV, Section 1 – as has already been sufficiently elaborated.

And so, Mr President and members of the Tribunal, we may pass to the next major element in Malaysia's case. This is the demonstration that the measures sought by Malaysia are required, following the words of article 290, paragraph 1, of the Convention, "to preserve the … rights of [Malaysia] or to prevent serious harm to the marine environment, pending the final decision".

Only the briefest reference is called for at this stage to the conduct of Singapore that has led to the present proceedings. This will be dealt with presently by my learned colleagues.

The Tribunal has before it the map which demonstrates visually and in the clearest terms what Singapore is doing and proposes to continue doing. In general terms, Malaysia does not deny the right of a State to reclaim land adjacent to its coasts. But the matter is quite different when the reclamation takes place in narrow waters. This might not be open to objection if it did not adversely affect the interests of Malaysia and of the marine environment, and if it had been carried out after appropriate procedures had been followed so as to ensure the protection of Malaysia's interests and the preservation of the environment generally.

Let me just pause to emphasize that it is not only a case about Malaysia's interests. It is a case about the protection of the environment, of which this Tribunal is the guardian. But this is not what has happened here.

The Tribunal will presently be provided with a fuller elaboration of damage to the ecosystem within the Straits of Johor. For now it is enough to say that it is readily apparent – even without going into much technical detail – that the Straits and associated waters form an ecosystem of considerable sensitivity. All the waters are connected to the open sea, and consist of salt water. The various river estuaries – most importantly, the Johor River –, however, provide for fresh water inflow and moderate salinity gradients, two important factors increasing the productivity of tidal environments. There are areas of mangroves along the shoreline, which provide a habitat for prawns, crabs and fish; and the local fishery – for example, shrimp farming – is substantial. Additionally, the Malaysian coast facing the Straits is used for dockyards, wharves, jetties and fisheries. On the eastern side there is a Naval Training Base at Pularek, at Tanjung Pengelih, facing the Singapore island of Pulau Tekong, the site of the most extensive land reclamation projects, here are two.

In its diplomatic note of 2 September 2003, Singapore reiterated its view that "current and planned reclamation works have not caused and will not cause any significant impact on any of Malaysia's concerns" which, as I stated a moment ago, of course, include the protection of the marine environment. It should be noted, particularly, that Singapore's studies have been almost exclusively focused on the effects of measures in Singapore's territorial waters. Seemingly no serious attempt has been made by Singapore to obtain information, or to measure effects, on the Malaysian side of the Straits. In contrast, Malaysia *has* undertaken such studies, and conducted an in-depth assessment of the effects of the various land reclamation projects. These independent studies, whose main results will be

presented to you later today by Professors [Mastura] and Falconer, show that the reclamation activities are already causing, and threaten to continue to cause, serious harm to the marine environment, especially in the eastern sector of the Straits of Johor. Three points seem particularly relevant.

First, the reclamation works will bring about major changes to the flow regime in the Straits, especially west of Pulau Tekong. A quick glance at the map makes this plain. Malaysia calculates that the sea around the reclamation site has been reduced by 45 per cent, i.e., from 170 km^2 in 1968 to 94 km^2 in 2002 and the current reclamation works will, when completed, cover effectively two thirds of the area of water separating Pulau Tekong from Singapore.

Secondly, the increased current velocity will unbalance the relation between tidal inflow and riverine inflow in the Johor estuaries, and more generally affect the tidal range in the Straits. It will also have consequential effects in terms of coastal erosion.

Thirdly, it will also bring about changes in the sedimentation. In particular, due to the increased current around Pulau Tekong, a higher level of material will be deposited in the area of slack water or in the lee of headlands, most likely on the Malaysian side of the Straits.

From this summary of what is happening and will continue to happen to the marine environment unless stopped, I turn to mention the impact of Singapore's activities on Malaysia's rights.

Singapore's activities particularly affect the rights of Malaysia relating to the maintenance of the marine and coastal environment and the preservation of its rights to maritime access to its coastline. The various rights at stake will be presented by Professors Schrijver and Crawford. Essentially, Singapore's conduct violates three types of obligation it owes to Malaysia.

First, as Professor Crawford will show, land reclamation activities conducted around Point 20, at Tuas in the south-west of Singapore, affect territorial waters claimed by Malaysia since 1979. Singapore's conduct therefore is in breach of articles 2 and 15 of UNCLOS.

Secondly, by failing to notify or consult with Malaysia about its current and planned reclamation activities, Singapore has breached its obligation to cooperate with Malaysia under articles 123 and 197 of the Convention. This duty of cooperation is at the heart of the present dispute. As Malaysia has made clear in its request for provisional measures, it has throughout sought "a proper system of consultation, notification and exchange of information" with respect to Singapore's reclamation projects.

Article 123 reflects the geographic reality that States bordering a semi-enclosed sea are under an enhanced duty to cooperate. That the Straits of Johor fall within the definition of article 122 is self-evident. They are an area of sea surrounded by two States consisting entirely of their respective territorial seas and are connected by narrow outlets to the ocean.

Article 197 prescribes a similar duty of cooperation, irrespective of whether particular areas of the sea qualify as semi-enclosed areas.

This duty to cooperate is further elaborated in Part XII of the Convention, dealing with the protection and preservation of the marine environment. Article 1, paragraph 4, of the Convention, which I read to the Tribunal earlier, shows that the concept is to be understood in a broad sense. It covers the maintenance of the marine and coastal environment and the preservation of a State's rights to maritime access to its coastline. And in terms of geographical scope, it expressly refers to "estuaries", such as the mouth of the Johor river. In short, under both articles 123 and 197, Singapore is under an obligation to cooperate with Malaysia.

The duty of cooperation here so clearly laid down is no empty obligation. In the *Lake Lanoux* case the arbitral tribunal observed that France's duty of cooperation with Spain meant that it

> cannot ignore Spanish interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration ... If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme

– and then come the crucial words -

> provided that it takes into consideration in a reasonable manner the interests of the downstream State.

Again, the International Court of Justice, in the 1974 *Fisheries [Jurisdiction]* case, observed that the duty to cooperate required that "[d]ue recognition must be given to the rights of both Parties". Even more to the point, however, are the observations made by this very Tribunal in paragraph 82 of the Order in the *MOX Plant Case*. There the Tribunal said that

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.

Now, Mr President and members of the Tribunal, these observations may now properly be applied to the facts of the present case. Has Singapore complied with the duty of cooperation that it has itself accepted? The answer is no. Singapore's conduct has been dominated by unilateralism. It has not consulted nor notified Malaysia of the land reclamation projects. Before the filing of Malaysia's Statement of Claim, it had not shared its information about the possible impact of the project with Malaysia. It has brushed aside Malaysia's repeated requests for more information and for high-level negotiations to resolve the dispute. When discussions eventually took place, on 13 and 14 August 2003, Singapore once more denied Malaysia's request for a suspension of works at Pulau Tekong, so as to allow both sides to undertake studies and continue negotiations. Instead, precisely in that area, which – as Singapore was well aware – is of the greatest concern to Malaysia, it appears that Singapore has actually accelerated work on the reclamation projects.

There is no need to repeat again here what I have already said about the impairment by Singapore of Malaysia's rights under the terms of Part XII of the Convention. This will, in any case, be developed in detail later by my colleagues.

Some words are necessary now about the requirement that the provisional measures requested by Malaysia are appropriate, and indeed necessary, in view of the urgency of the situation and the risk of irreparable harm that Singapore's projects would cause if it was allowed to pursue them at its will. I will deal with the risk of irreparable harm first.

What would be the result of not prescribing provisional measures and thus allowing Singapore to continue to violate Malaysia's rights? If Singapore completes the projects it is currently engaged in, there will be no return. One need only recall the main features of, for example, the reclamation project currently undertaken at Pulau Tekong to appreciate that, once completed, this land will not be given up again. These projects are not designed to be of a temporary nature. They are intended to be permanent in character and involve a method of construction that is effectively irreversible. They involve the deposit of an estimated 2,000 million tons of sand as part of concrete structures which, for all intents and purposes, simply

cannot be demolished or modified. Given these facts, if Singapore were allowed to continue with its current reclamation projects, it would irreparably harm Malaysia's rights and the marine environment. It is therefore crucial that Singapore suspend its current reclamation activities, as requested by Malaysia, and that it provide Malaysia with full information about these projects and allow Malaysia ample opportunity to comment on these works.

Passing to the question of urgency, Malaysia submits that Singapore's activities must be dealt with urgently. Although some of the work will not be begun for some time yet, Singapore refuses to suspend or even modify its current reclamation works. These continue at full speed, or are even being accelerated. Due to Singapore's refusal to cooperate, Malaysia cannot provide you with exact information about the schedule of works. However, on the basis of its own information, it appears that Singapore intends to reclaim an area of 1,488 hectares of land, in and around Pulau Tekong, by 2005. Assuming that the work is carried on for 365 days a year – which is consistent with the conditions laid down in Singapore's Notice to Mariners – the sea is being reduced by 0.8 hectares – over 2 acres – per day.

The Tribunal will no doubt wish to compare this assessment with the rather guarded terms in which Singapore has expressed the position in paragraph 161 of its Response. Singapore carefully limits its statement to "waters available to shipping", thus leaving out of the discussion the effect of its activities on other waters. But even in relation to the areas to which Singapore refers, it seeks to diminish the significance of what it is doing by saying that it

> consists mainly of continued in-filling ..., completion of sand filling ... and, in limited areas, the final stages of the trench dredging operations. The works will not involve any significant changes to the present reclamation profile which is already very close to the final reclamation profile.

The Tribunal could not ask for any more specific acknowledgement of the intention of Singapore to continue the works without interruption or delay. So urgent action is required.

An additional factor emphasizing the urgency of the request to this Tribunal is that of the delay in the constitution of the Annex VII Arbitral Tribunal that will consider the merits of the case. It is unlikely that this tribunal can be rapidly constituted. Given the time required for the tribunal to agree on the organization of the arbitration and dates for the hearings, there is, in Malaysia's submission, a clear case for this Tribunal to act now, rather than to let further time pass.

This leads me straight into a related question. It is necessary to react to the statement in the Singapore Response that only 19 days are left before the Annex VII Tribunal will be established and that the present Tribunal does not have authority to prescribe measures that extend beyond that period.

The statement that only 19 days remain before the Annex VII Tribunal comes into existence is misconceived. Even if it were accurate – and there is no basis on which one can be sure that it is – it would not mean that the Annex VII Tribunal would immediately be in a position to consider the question of provisional measures. No doubt Singapore would raise before that body the same issues that it has raised before this Tribunal, and re-consideration of these issues is bound to take some time.

As to the assertion that the present Tribunal does not have authority to prescribe measures that extend beyond the constitution of the Annex VII Tribunal, this is both a misinterpretation of article 290, paragraph 5, of UNCLOS, and is inconsistent with the prior practice of this Tribunal.

Obviously, article 290, paragraph 5, does not contemplate the prescription of measures by this Tribunal once the Annex VII Tribunal has been constituted. But there is nothing in article 290, paragraph 5, to suggest that this Tribunal's measures must by limited in time. To the contrary, the indication in the last sentence of article 290, paragraph 5, that the Annex VII tribunal "may modify, revoke or affirm those provisional measures" necessarily implies the continuing effectiveness of the prescribed measures even after the constitution of the Annex VII tribunal. How could that tribunal "modify, revoke or affirm" those measures unless they were still in force?

The *Southern Bluefin Tuna Cases* show how the system actually works. In the operative part of the provisional measures decision of this Tribunal it used the following words: "The Tribunal prescribes, *pending a decision of the arbitral tribunal*, the following measures" [emphasis added]. Then, in the operative part of the Annex VII Tribunal decision itself, the latter, having decided that it was without jurisdiction to rule on the merits, went on to decide "in accordance with Article 290(5) of the United Nations Convention on the Law of the Sea, that provisional measures in force by Order of the International Tribunal for the Law of the Sea … are revoked from the day of the signature of this Award". How could they be revoked if they were not still in force nearly a year after they were prescribed and nearly eight months after the Annex VII Tribunal was constituted?

Mr President, members of the Tribunal, I have reached a point at which I may conclude, by way of a summary, with a rather staccato reply to Singapore's own summary of the provisional measures rules, as given in its Response.

Singapore says, first, that there must be a risk of serious harm. Malaysia says that there is, particularly in relation to the ecosystem, as will be more fully demonstrated by my colleagues later.

Singapore says, secondly, that the harm must be irreversible. Malaysia points out that it is. The reclamation works cannot be undone, and their detrimental effects on the environment cannot be wound back. The situation is comparable to that of a ratchet cog: having moved on a notch, you cannot turn it back.

Thirdly, Singapore says that the harm must be incompensable. Malaysia replies that harm to the marine environment is self-evidently incompensable, as is the continuing damage to Malaysia's own interests. How do you calculate the destruction of mangrove, the erosion of coastline or the pollution of beaches? There is no need to prove that such damage cannot be compensated.

Fourth, Singapore says that the harm must be imminent. Indeed it is; it has already happened in part and will in significant respects continue to do so.

Lastly, Singapore contends that the burdens and costs to itself of having to suspend the challenged acts must be balanced against the cost of a possible occurrence of the harm alleged. Malaysia responds that so far as harm to the marine environment is concerned, there can be no question of assessing the cost of a possible occurrence of harm. Only if Singapore could show that the harm, actual and foreseen, to the marine environment is of a minimal and unimportant extent could any kind of balancing be attempted.

Mr President, it may be that you would wish to break at this point, as I have now come to the end of my contribution. I would therefore respectfully ask you to call upon Professor [Mastura] to continue the presentation of Malaysia's case. I thank the Tribunal.

The President:

Thank you very much.

We started the meeting half an hour late. I think we will take a half-hour break now before calling upon Professor [Mastura]. The sitting is adjourned.

Short adjournment

STATEMENT OF MS MASTURA
TECHNICAL ADVISER OF MALAYSIA
[PV.03/01, E, p. 25–30]

The President:
The next presentation will be made by Professor [Mastura]. Before giving her the floor, I would like to make this statement.

Pursuant to the decisions taken during the consultations held this morning with the Agents of the parties, it was agreed that Professor [Mastura] would first make a statement as a member of the delegation of Malaysia. Thereafter, she would be examined by the Respondent as an expert. For this purpose, before being examined by the Respondent, Professor [Mastura] will make a solemn declaration provided for under article 79(b) of the Rules of the Tribunal.

I now call upon Professor [Mastura].

Ms Mastura:
President, distinguished Judges, good morning. My name is Sharifah Mastura and I am from the Department of Geography at the Universiti Kebangsaan, Malaysia. My field of specialty is geomorphology, which is the study of long-term landform changes.

(Slide presentation)

In my presentation, I shall first introduce Singapore's reclamation projects. I shall then discuss the implications of these projects for Malaysia's coastal and estuarine waters and the risks they present to the aquatic environment.

Malaysia has undertaken a number of environmental impact assessment studies relating to these reclamations, which I will briefly summarize.

From these studies, we have been able to make a preliminary assessment of the impact of the reclamations on the flow, sediment transport and water quality characteristic within our coastal and estuarine waters.

I shall summarize our concerns with some brief conclusions.

Singapore is located south of Peninsula Malaysia, separated by the Straits of Johor. It is linked with Malaysia by a causeway located here. Malaysia's coastline along its southernmost tip surrounds Singapore from the south-westerly corner of Singapore to the easterly tip of the island, by Changi Airport. It is the morphology of this waterway that is of concern to Malaysia.

The major reclamations of concern to Malaysia are the large reclamation at Pulau Tekong and Pulau Ubin, located to the north-east of Singapore, and shown here. It is the eastern sector. Secondly, in the west, there is the extension at Tuas, located at the south-west tip of the island, and shown here

Firstly, we shall consider the reclamation works in the eastern sector. Here you see the original shoreline as configured in 1968, shortly after Singapore became independent from Malaysia. In 1989, Singapore reclaimed a large part of the coastal region to construct its new airport at Changi. In 1997, Singapore almost doubled the size of the reclamation to increase the capacity of the airport.

In 2002, Singapore commenced construction of a major reclamation in much deeper water around Pulau Tekong, almost doubling the planned size of the island. The eastern edge of this reclamation is located less than 0.75 km from the Malaysian naval base at Tanjung Pengelih. Singapore's Concept Plan 2001 also highlights its intention to undertake additional reclamation works to the east of Pulau Ubin.

Secondly, we shall consider the reclamation works in the western sector. Again, here you see the original shoreline as configured in 1968, followed by some minor reclamation works in 1989. In 1997, fairly substantial reclamation works were completed at the south-westerly tip of the island at Tuas and around the Jurong islands, just east of the headland at Tuas.

In 2002, Singapore commenced the construction of a very substantial extension southwards, thereby increasing considerably the surface area of the Tuas reclamation. Tuas will eventually be expanded, as shown here, extending in a solid column 7 km seawards.

To summarize, the reclamation work around Pulau Tekong has already led to an increase in the plan area of 35 km^2, i.e., a 184 per cent increase in the surface area of the Pulau Tekong.

It has already reduced the main shipping channel width from 4.12 km to 2.74 km, i.e., a 33 per cent reduction, with the threat of more to come.

The shortest distance from the Malaysian naval base at Pularek to Singapore has been reduced from 1.8 km to 0.75 km, a reduction of 58 per cent.

Secondly, Singapore has considerably extended the headland at Tuas. In fact, it has been extended 7 km seawards.

These considerable reclamation works threaten the integrity of Malaysia's sensitive coastal and estuarine waters, especially near Pulau Tekong.

Malaysia seeks, as it is entitled to do: to minimize coastal erosion and siltation and morphological change; to protect coastal and estuarine water quality, biodiversity and ecology; to protect the socio-economic aspects of the coastal zone, particularly with regard to fishermen and tourism. Singapore's projects threaten all these aims.

The key issues of concern to Malaysia can be summarized as follows: The sheer scale of these reclamations will undoubtedly lead to significant changes in tidal and flood elevations and particularly water velocities. Significant changes to the shoreline and coastal topography will undoubtedly lead to changes in the wave climate and near-shore response. Changes in the current flow field arising from the reclamations will cause changes in sediment transport rates, the long-term bed level and the shoreline. Changes in the water elevations and the current flow fields threaten to impact on water quality, cause backwater effects in Malaysian rivers and affect fisheries including aquaculture.

There will be impacts on ship and small craft navigation. There is a significant amount of tourism in the region using small craft and this industry is likely to be affected by the larger currents and changing wave climates. Impacts on fisheries and the coastal economy will particularly affect local communities. Some of the poorest people in my country live in this region.

I will now highlight the main impact studies undertaken by Malaysia. Three main studies have been undertaken to assess the hydro-environmental impact of these reclamations on Malaysia's coastal and estuarine waters. Malaysia has filed these with the Tribunal. Let me review these briefly.

The first of these studies was conducted by Delft Hydraulics. The main findings of this preliminary study are as follows:

Increased velocities would arise due to the reduction in the cross-sectional areas of the flow, leading to scouring and erosion.

There will be a reduction in tidal amplitude and a delay in the tidal times of high and low water, caused by increased bed friction in the Straits.

There are threats to water quality and the level of contaminated sediments in the water column, caused partly by an increase in the turbidity levels.

There will be an increase in salinity gradients and retention of pollutants, leading to a decrease in the already critical dissolved oxygen levels.

There will be a large-scale loss of important inter-tidal habitats, leading to a reduction in biomass production and fish nurseries.

There will be increased eutrophication caused by longer residence times, especially in the western sector.

There will be limitations on the manoeuvrability of larger ships.

The reclamation at Pulau Tekong could well generate pronounced tidal eddies – which would pose an increased risk to shipping, particularly at low speeds, as well as leading to pollutant trapping and sediment deposition.

I turn to the second study by the Malaysian Department of Irrigation and Drainage. As to the eastern sector near Pulau Tekong, its findings can be summarized as follows:

A decrease in tides of between 0.1 to 0.2 metres, causing a reduction in the tidal range of 10 per cent.

The maximum tidal current near the Malaysian Naval Base at Pularek will increase from about 0.7 to 1.2 metres per second, an increase in excess of 70 per cent.

Waves will be reflected from the sheet piles at Pulau Tekong towards the Malaysian coastline adjacent to Pularek.

There will be an increase in tidal flushing of about 7 per cent.

There will be an increase of about 2 per cent in salinity levels at the mouth of the Johor River.

There w ill be an overall average increase in suspended sediment concentrations of about 20 per cent.

The channel north of Pulau Ubin and the area north of Pulau Tekong would experience increased siltation of between 10 to 20 cm per year.

The channel near Pularek would undergo erosion of between 10 and 50 cm per year.

As to the western sector near Tuas, the Drainage and Irrigation Department's study findings can be summarized as follows:

There is a reduction in tidal flushing of about 8 to 25 per cent.

There is a 2 per cent decrease in the level of salinity in the region; this may seem small but, in conjunction with other changes occurring at the same time, can be significant.

There is an increase in the concentrations of the suspended sediment plumes of about 7.5 mg per litre.

There is an increase in the overall siltation levels from about 2.5 to 10 cm per year.

The third study was undertaken by my own unit at Universiti Kebangsaan, Malaysia. So far as the eastern sector is concerned, its results can be summarized as follows:

An increase in wave activities and current velocities, a decrease in channel width and an increase in sedimentation have an impact on: fisheries and aquaculture; mangroves; navigation and berthing of vessels; shoreline erosion; seabed scouring; and, to a lesser extent, the stability of jetties.

I want to draw your attention to the erosion and sedimentation in the impacted zone.

As to the western sector at Tuas, our main findings can be summarized as follows: reduction in flushing, reduction in salinity, increases in siltation and suspended sediments, which lead to: degradation of water quality; destruction of corals; and destruction of seagrass.

This is a mangrove forest that is sensitive to process change. These are coral and seagrass beds that are affected by the reclamation works. This is a close-up view of the seagrass bed in the Straits of Johor.

In conclusion, these three technical studies all indicate that the recent large reclamation projects being undertaken by the Government of Singapore risk having a significant adverse impact on the environment and ecology of Malaysia's coastal and estuarine waters in and around the Straits of Johor.

The reclamation works are predicted to have an adverse impact on: coastal hydrodynamics and wave characteristics; sediment fluxes, erosion and siltation rates; tidal flushing, salinity and water quality; hydro-ecology, habitats and fisheries; navigation, moorings and jetty stability; and further consequences on the economy and on coastal villages.

Thank you, Mr President and Judges. Mr President, would you please call on Professor Crawford to continue Malaysia's presentation?

The President:
Professor [Mastura], before leaving, I read in the earlier statement that you are now to make a declaration under article 79(b) of the Rules, and then you will be examined by the Respondents.

Ms Sharifa Mastura sworn in

Examination of Experts

EXAMINATION OF MS SHARIFAH MASTURA SYED ABDULLAH
BY MR REISMAN (SINGAPORE)
[PV.03/01, E, p. 30–32]

Mr Reisman:
Professor [Mastura], on behalf of Singapore, I would like to ask you a few brief questions. It is the ordinary practice to receive a curriculum vitae. Although you were not a witness, yesterday we thought you were to be a witness. Beyond your work as a geomorphologist and as a professor, are you a consultant to your government?

Ms Mastura:
I am not a consultant but I do work for the government.

(Problems with microphones)

Mr Reisman:
I had asked you whether, in addition to your role as a professor of geomorphology, you were a consultant to your government. You had reflected on it and said you do work for your government. Is that correct?

Ms Mastura:
Yes.

Mr Reisman:
And you have attended meetings?

Ms Mastura:
Yes.

Mr Reisman:
Your government is engaged in other land reclamation projects in Malaysia; is that correct?

Ms Mastura:
Can you repeat the question, please?

Mr Reisman:
Yes. The Malaysian Government is engaged in land reclamation projects?

Ms Mastura:
Yes.

Mr Reisman:
Have you been consulted on them?

Ms Mastura:
Most of them, on an expert panel, yes.

Mr Reisman:
To your knowledge, have those projects been communicated to Singapore or has Singapore been invited to consult on any of them?

Ms Mastura:
Can you repeat the question, please?

Mr Reisman:
To your knowledge, has the Government of Malaysia communicated or in any way consulted with the Government of Singapore on the land reclamation projects on which you have been engaged?

Ms Mastura:
I do not know about that one.

Mr Reisman:
You do not know, thank you. Did it occur to you at any point to ask, since you seem to be very sensitive to the notion of a need for consultation for land reclamation projects in an enclosed area, did it occur to you to ask?

Ms Mastura:
No.

Mr Reisman:
You stated that the activities of the Government of Singapore in its land reclamation project risk having a significant and adverse consequence and in the conclusion to the UKM Report, which I believe you were an author of or co-author of, the Report acknowledged that only some of the consequences that you were discussing could be attributed to Singapore. Is that correct? Would you like me to read the conclusion to you?

> Some of this degradation, such as on physical environments, can be clearly linked to the reclamation work carried out by Singapore. However, linking impacts of reclamation work on biological and marine ecosystems are more difficult as these ecosystems are subjected to cumulative impacts contributed both by Singapore reclamation work and various activities carried out on the Malaysian side.

Ms Mastura:
I believe that is why we need the Impact Assessment.

Mr Reisman:
But do you still share that view? This is still the view?

Ms Mastura:
Yes.

Mr Reisman:
In the interests of clarifying precisely what are the relative contributions, I would ask you to look at a brief selection that I will read to you. I will put it on the screen and I will also give

you a copy of it so you can consult it yourself, Professor. I believe the members of the Tribunal will be able to observe this on their screens:

> In the last few decades, the sediment load of rivers has increased tremendously due to the conversion of forest for agriculture, logging, mining, urbanization and other infrastructure development activities. Between 1972 and 1983 4.24 million ha of forest land in Peninsular Malaysia were allocated for development of plantation crops and other facilities under the seven regional land development schemes by the Ministry of Land and Regional Development. Consequently the status of the river water quality in percentage clean for suspended solids showed that almost 90% of the rivers in this country are polluted by silt.
>
> With the exception of Matang mangrove forest reserve, which is well managed, others are managed badly. Some of these mangrove forests have been reclaimed for agriculture, housing, aquaculture and for industrial purposes. As a result, there is a depletion of mangrove forest and this need management as continuous depletion would be disastrous to the ecosystem.
>
> Coastal erosion is another serious problem facing the Malaysian coast. National Coastal Erosion Study reports that coastal erosion affects every state in Malaysia. It occurs along more than 1300 km of Malaysia's 4800 km shoreline. In eroding areas the average rate of shoreline retreat ranges from less than 1 m per year to more than 10 m per year. Along 140 km of shore, coastal erosion seriously threatens important facilities. Along another 240 km it may seriously threaten other important facilities in the foreseeable future.
>
> Fish landings, which increased three folds from 200,000 tons in the early 1960s to 700,000 tons in 1980, show a sharp decline. This situation together with high percentage of trash fish land indicate that the inshore resources are over-exploited.
>
> Pollution is being caused by indiscriminate dumping of non-biodegradable and biodegradable waste from urban areas, industries and other human activities. Pollution from sewage is caused by untreated discharge from refinery industries housing and other development. In Malaysia between 35 to 60% of the faecal coliform counts in the state coastal water are higher than the standard permitted.

Professor [Mastura], you wrote that in 1992 and published it in a peer review book, did you not?

Ms Mastura:
Yes.

Mr Reisman:
Mr President, members of the Tribunal, I have no further questions.

The President:
Thank you, Professor Reisman.

Mr Crawford:
Mr President, I have no questions to ask Professor [Mastura] and so Professor [Mastura] can now sit down in her capacity as a witness or indeed in any capacity.

The examination-in-chief of Professor Falconer will take perhaps just a little over ten minutes. I am in your hands, Mr President, but I think that there have been some delays this morning it would probably be efficient if I examined Professor Falconer in chief now, and if the cross-examination, I am sure Singapore will not object, the cross-examination can occur after the lunch break.

The President:
Thank you. We are hoping to end this session at 1.30.

Mr Crawford:
In that case, they will have at least some period of cross-examination before the lunch break. We will just have to go and get him.

Mr Roger A. Falconer, sworn in

Examination of Experts (continued)

EXAMINATION OF MR ROGER A. FALCONER
BY MR CRAWFORD (MALAYSIA)
[PV.03/01, E, p. 32–35]

Mr Crawford:
Professor Falconer, you have produced a report reviewing some of the Malaysian reports to which your CV was attached and which was attached to our Statement of Claim. Do you have anything to add either to your CV or to that report?

Mr Falconer:
I have nothing to add specifically to my CV other than perhaps to comment that I have been involved with not far short of about a hundred environmental impact assessment studies worldwide, and many of them are major projects. For example, Po Hi Bay in China which is a major study at the moment I am involved with.

Mr Crawford:
Professor Falconer, briefly, what in your view are the most immediate consequences of Singapore's reclamation activities?

Mr Falconer:
In the context of Malaysia I believe that geographically the Pulau Tekong reclamation is the bigger issue. It is nearer to the Malaysian coast and, more specifically, on the technical front I believe that the issues relate particularly to the velocities and sediment transport rates between Pulau Tekong and Pularek. I think this will have the biggest impact on the Malaysian coastline.

Mr Crawford:
Can you explain to the Tribunal why the increased movement of sediment is important?

Mr Falconer:
In the region between Pularek and the reclamation just to the south of Pulau Tekong, both studies carried out by the Department of Irrigation and Drainage in Malaysia and studies by Singapore have indicated almost exactly that the velocity will increase from about .7 to 1.2 metres per second; a 70 per cent increase in velocity. Sediment transport moves at a much higher rate than velocity. This would result in a threefold increase in mud transport and a 15-fold increase in sand or silt transport using standard international theories.

Mr Crawford:
You were asked to come as an independent consultant by the Department of Irrigation and Drainage to comment on the reports which have since been presented to the court. Are you satisfied with the content of those reports?

Mr Falconer:
Yes. The Department of Irrigation and Drainage have used an internationally recognized computational model to assess the environmental impact aspects around their coast. This is the Danish Hydraulic Institute model (MIK21). They have, in my view, been cautious in their predictions on a number of aspects. May I take sediment transport as one example? They have predicted mud transport only which means that the sediment transport predictions are

threefold bigger as a result of the reclamation south of Pulau Tekong. Had they assumed sand or silt transport then they would have predicted changes of the order of 15 fold. Surveys have indicated that half the area is covered with sand and half is covered with silt and mud. Therefore, their predictions on sediment transport alone are undoubtedly cautious.

Mr Crawford:
What immediate effects in your view are the land reclamations likely to have?

Mr Falconer:
If you look at the flow structure – and you do not need computer simulations to look at this – but if you imagine the flow coming around the headland by Tanjung Pengelih, the current reclamation disrupts the flow. It is not streamlined to match the flow. The narrowing of the channel at Tanjung Pengelih then subsequently leads to eddies downstream which have been predicted in computer simulations both by Malaysia and Singapore. These eddies trap sediments, they redeposit sediments in all probability along the beaches at the edge of the eddy and they will cause deposition. I have seen this myself. I have visited the site and what appears to be a sandy beach in parts is now covered with mud and you get very much a stratified effect. Sand below, and mud on the surface. These eddies caused by the narrowing of the channel at Tanjung Pengelih, in my opinion, have led to this mud in all probability being deposited there. If one were to look more comprehensively at computer model simulations, one could perhaps reduce the effects of these eddies, reduce the effect of sediment deposition and reduce the effects of deposition on the coast. So, in my view, it can be reversed.

Mr Crawford:
Confronted with this situation in which these various forms of sediment transport are occurring, what should the immediate response be in your opinion?

Mr Falconer:
My personal suggestion would be to carry out interim measures in terms of interim computer model simulations using the models that have already been set up and to look at how the shape of the reclamation where the sheet piles are could possibly be modified to minimize the adverse hydro-environmental impact along the coastline.

Mr Crawford:
Is this going to be a very lengthy process in your opinion?

Mr Falconer:
Not if one uses the existing models. It could be done within typically three months from the start of agreeing to go ahead.

Mr Crawford:
Turning to other effects that the reclamation projects may have, other than siltation which we have been discussing, which, in your opinion, are the more important ones?

Mr Falconer:
Three, the tidal range will change upstream of Pularek by typically 20 cm predicted by computer simulations, conservatively predicted by computer simulations. That, in context, is changing very rapidly as a result of the implementation of the reclamation. We in Europe are concerned about arguably a 30 cm sea level rise over the next century so the change in the

tidal range here is of a not dissimilar order of magnitude to what we in Europe are concerned with, a sea level rise occurring over the next century. Therefore, in my view, it is not insignificant. It will affect the flow in the rivers, it will affect the groundwater flow, it will affect salinity intrusion and 20 cm is not small.

Mr Crawford:
You mentioned salinity; a layman would think that, with a major river flowing into this area, and the sea coming from the other direction, there is going to be a rather variable situation in terms of salinity. How can you predict what could happen, and how could such a prediction make any real difference?

Mr Falconer:
Again, I would like to make the point first that I believe the DID Malaysia simulations of salinity are conservative. They predict variations of 2 per cent, which, again, on the surface sounds small, but a 2 per cent change in salinity can be quite significant in many contexts, and one has to look at the aspects in a relative context. This is an area which is highly sensitivity to salinity. I have worked in mangroves, and published papers on mangroves. Mangrove forestation is highly dependent upon salinity. The whole aquatic ecosystem in this region is highly dependent upon salinity, so small changes in salinity could have a major impact on the eco-aquatic system in the area.

Mr Crawford:
You have suggested that computer modelling might be carried out which could modify the form of the land reclamation project. If that is not done, if the land reclamation project maintains its present footprint, what would you regard as the likely long-term effects?

Mr Falconer:
I think it is the long-term effects which are important too because, as far as I am aware, these have not been studied by either country, either by Malaysia or Singapore, and it is the long-term effects which need to be investigated over the longer term. They certainly could not be addressed in the three-month period. In my view, to look at the long-term effects, one needs a much more comprehensive, longer study, probably carried out by an international organization. But the longer-term effects are changes in the bed topography: once a river starts to meander, for example – you can have submerged rivers on the bed topography – you cannot stop it. Therefore, I think it is essential that the long-term morphological processes – in other words, bed level changes – are established. What would be the changes over the next 50 years? What would be the changes over the next 100 years? Also, the sustainability of the aquatic environment: what will be the impact of these reclamations 100 years from now? They are not reversible; once they are put in place, they cannot be removed. There are modelling tools that can be used to make these predictions and in my view they should be used.

Mr Crawford:
Thank you, Professor Falconer. I have no further questions.

The President:
Does the Agent for Singapore want to cross-examine the witness?

Mr Koh:
Mr President, we accept Professor Crawford's earlier suggestion that we break for lunch now. My colleagues and I will look forward with great pleasure to putting some very friendly questions to Professor Falconer after lunch.

Mr Crawford:
Mr President, the offer stands. I thought you had rescinded it. If it would be convenient to the Tribunal, I would be happy now to make the presentation on the maritime delimitation issue, so as to enable Singapore to think about its questions over the lunch break. I anticipate that my next presentation, which we thought would happen after Professor Falconer had been released, would take about 25 minutes. I can go until half past one and we can resume with Professor Falconer at 3 o'clock.

The President:
Would that be agreeable to you?

Mr Koh:
Mr President, I am not sure what is the custom in Australia about lunch time, but in most civilizations I know one would break for lunch at 12 noon or at the latest at 1 o'clock. So we have no objection, we could either cross-examine Professor Falconer now and adjourn for lunch or we could adjourn now and return at a time to be fixed by you, we could come back earlier and have a shorter lunch, and cross-examine Professor Falconer later. We are in your hands, Mr President, you decide whether we cross-examine Professor Falconer now or after the lunch break.

The President:
Since it is a matter of not very great importance, I would suggest that we break now and come back in two hours. That would be at 3.00, wouldn't it?

Mr Crawford:
Sir, if we were going to go until 1.30 and then resume at 3.00,I am concerned that, because of delays that have occurred, we do not keep the Tribunal too late tonight. Clearly we need to finish tonight, and the allocation of four hours, as the one we planned on for our own presentations, we are sticking to.

The President:
Well, I think we will continue until 1.30.

Mr Koh:
Mr President, if we are to go on, we would like to cross-examine Professor Falconer now.

CROSS-EXAMINATION OF MR ROGER A. FALCONER
BY MR LOWE (SINGAPORE)
[PV.03/01, E, p. 35–38]

Mr Lowe:
Professor Falconer, I should thank you on behalf of the Singapore side for coming here to give evidence. The questions will not be long. I apologize for this rather Oscar ceremony-like

configuration between us and I hope we will manage to get the microphones in line. I understand that you trained as an engineer and that your report is only on the hydraulic model study of the Straits of Johor. Do you hold yourself out as having any expertise in fisheries or marine biology?

Mr Falconer:
Yes. I have been involved in fisheries with regard to hydro-environmental studies. My computer models are used by the Irish Government for aquaculture planning along the west Irish coast. We have been concerned here with a number of issues relating to fish waste, for example, etc.

Mr Lowe:
Your CV lists you as an expert adviser to the Department of Irrigation and Drainage of the Malaysian Government. Is that a paid position?

Mr Falconer:
That is with regard to this study. I have not worked with them before, other than this study.

Mr Lowe:
That is a paid position?

Mr Falconer:
I was paid by the Department of Irrigation and Drainage to comment, to give a technical assessment of their report.

Mr Lowe:
Are you still retained in that capacity?

Mr Falconer:
No, not by the Department of Irrigation and Drainage.

Mr Lowe:
The references in your report include the two volumes of the DID Report and five other papers that were written after 1973. Were you asked to assess any other reports on the Straits of Johor?

Mr Falconer:
Not by the DID.

Mr Lowe:
Were you asked to report on volume 3 of the DID Report?

Mr Falconer:
No.

Mr Lowe:
Did you see volume 3 of the DID Report before you wrote your expert review?

Mr Falconer:
No.

Mr Lowe:
Do you know what is in volume 3 of the DID Report?

Mr Falconer:
No.

Mr Lowe:
Did you notice the reference in the DID Report to volume 3?

Mr Falconer:
Volume 3 is just the data.

Mr Lowe:
Do you usually make expert evaluations of reports without seeing the data upon which they are based?

Mr Falconer:
Yes, all the data that was necessary for me to comment on was related to the numerical model. I was asked specifically to comment on the numerical model, the quality of the work undertaken with regard to the numerical modelling. I saw all the data that was necessary to be included in the numerical model, so far as I am aware, and I feel quite confident about commenting on the quality of the work undertaken by DID.

Mr Lowe:
Do you feel that you have been asked to comment on the use to which that data was put, and that was your remit, and you have not been asked to comment on the quality of the data itself?

Mr Falconer:
Some of the data was collected by other organizations, commissioned by the DID. It is virtually impossible for any independent expert witness to comment specifically on such matters as the data with regard to the bed topography, unless you physically take the data yourself. Similarly, with the soil surveys, I was not a party to the organization collecting the soil surveys, so I cannot comment specifically on the accuracy, but I do not think any independent expert could either.

Mr Lowe:
I understand that. So you are not commenting on the data which you did not see, which is fair enough. Can you clarify one point for us: are the statements that are made in the DID Report on the impacts of the reclamation work based on measured impacts, or are they based on mathematical predictions of what the impacts will be?

Mr Falconer:
Most of the predictions in the DID Report are based on mathematical model predictions. They were commissioned to undertake the study. I forget the exact date. I think it was January 2002, with a remit to submit the report by August/September 2002, or whatever. During that time period, it would be impossible to take field measurements to ascertain the impact of the reclamations. It is too short a time period. You would have to take field

measurements over a period of two or three years, typically, to ascertain the impact of reclamations.

Mr Lowe:
You read two of the three volumes of the DID Report, and you looked at the sites from Malaysian territorial waters on, I think, Monday, 7 April this year, and you met DID staff on Tuesday, 8 April. Did you visit the actual sites in Singapore?

Mr Falconer:
No.

Mr Lowe:
Did you try to visit the sites in Singapore?

Mr Falconer:
No, my brief was to comment on the quality of the work undertaken by DID.

Mr Lowe:
Did you visit the Malaysian reclamation works at PTP?

Mr Falconer:
No.

Mr Lowe:
Did you visit the Malaysian project at Tanjung Langsat?

Mr Falconer:
No, that was not part of my brief.

Mr Lowe:
You refer in your paper to a number of hydro-environmental and morphological changes. Again, to adopt Professor Crawford's layman's pose, if I can ask you the question in this way: are the changes that you describe there incremental, in the sense that they proceed gradually over a period of time, or do any of them have a certain critical point at which there is a dramatic change in the way that, for example, an over-exploited fish stock may suddenly collapse?

Mr Falconer:
The main factor which would change significantly and quite suddenly would be sediment transport rates. Sediment transport is highly dependent upon velocity. You change the velocity field in any flow structure, and you may only increase it by a relatively small amount, but you can change the sediment transport rates dramatically. When the sediments are contaminated, this can often have a significant effect on aquatic life.

Mr Lowe:
The transport and the velocity rates would be affected by the configuration of the reclamation works?

Mr Falconer:
They could be.

Mr Lowe:
You said towards the end of your testimony that there would be certain effects that would be felt in 50 or 100 years' time, and that had to be taken seriously. Could you tell us what effects you expect to happen by a week on Thursday?

Mr Falconer:
I did not say that, if I can clarify. I said that no long-term environmental impact assessment or morphological studies had been undertaken. I am sorry.

Mr Lowe:
I am grateful for that clarification. Can you tell us now –

Mr Falconer:
I do not have the power myself to predict what changes will occur in 50 or 100 years, sorry.

Mr Lowe:
Could you have an attempt at the more modest task of predicting what will happen by a week on Thursday?

Mr Falconer:
That could be dramatic. I could take a teacup here now, I could put tea at the bottom of the teacup at a uniform level, I could stir the teacup and in seconds the tea would all pile up at the centre of the teacup. That appears from computer model predictions undertaken by Malaysia and Singapore to have already occurred in the headland in the lee of Tanjung Pengelih, and that has happened over a very short period of time.

Mr Lowe:
Can I pause there, because I think you have misunderstood the question. I am not asking what may have happened already; I am asking, because this is actually the task that is before the Tribunal, what you think, on the basis of the evidence that you have seen, accepting that you have not seen the data, is likely to happen between now and 9 October, so taking the situation now as the base and 9 October as the terminus.

Mr Falconer:
The amount of mud that will pile up on the shoreline south of Tanjung Pengelih could increase quite significantly, even in a relatively short period of time.

Mr Lowe:
Thank you, that's all I've got.

The President:
Thank you very much.

RE-EXAMINATION OF MR ROGER A. FALCONER
BY MR CRAWFORD (MALAYSIA)
[PV.03/01, E, p. 38]

Mr Crawford:
Is mathematical modelling of these sorts of situations a usual way of addressing questions of impact?

Mr Falconer:
Yes. Every environmental impact assessment study that I have been involved with in recent years involves the use of complex mathematical model tools, as we are talking about here, to ascertain both the short-term and the long-term.

Mr Crawford:
Since your initial consultancy with the Department of Irrigation and Drainage and during the period of the preparation for these hearings, have you had access to other Malaysian reports in relation to this situation?

Mr Falconer:
Yes.

Mr Crawford:
The evidence you have given today is based on an assessment of the material you have seen up to date?

Mr Falconer:
Yes.

Mr Crawford:
Thank you.

The President:
Thank you. *(The witness withdraws)* We will adjourn for lunch.

Adjournment at 1.15 p.m.

PUBLIC SITTING HELD ON 25 SEPTEMBER 2003, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

For Malaysia: [See sitting of 25 September 2003, 10.00 a.m.]

For Singapore: [See sitting of 25 September 2003, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 25 SEPTEMBRE 2003, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Pour la Malaisie : [Voir l'audience du 25 septembre 2003, 10 h 00]

Pour Singapour : [Voir l'audience du 25 septembre 2003, 10 h 00]

The President:
I now give the floor to Professor James Crawford.

Argument of Malaysia (continued)

STATEMENT OF MR CRAWFORD
COUNSEL OF MALAYSIA
[PV.03/02, E, p. 7–12]

Mr Crawford:
Mr President, members of the Tribunal, in this presentation I wish to deal with the territorial sea rights of Malaysia which are affected by Singapore's actions. In doing so, I believe I am the first counsel to address you on an issue of maritime delimitation. It is nice to make history, I hope to repeat it.

For a number of years there has been a dispute between the two States as to the delimitation of their respective territorial seas beyond the terminal points fixed in the 1995 Agreement. Neither State has made a declaration under article 298 exempting from compulsory jurisdiction issues of sea boundary delimitation. Accordingly, the merits tribunal has jurisdiction over delimitation, as well as over other aspects of the dispute concerning Singapore's reclamation projects; and this Tribunal has corresponding jurisdiction to protect the claimed rights of Malaysia by appropriate provisional measures, pending the constitution of an arbitral tribunal to hear the merits.

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

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

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

The second preliminary point is obvious enough. Malaysia claims rights to maritime areas at both ends of the existing maritime boundary in the Straits of Johor, and the gaps at both ends of that boundary are in issue in the present dispute submitted to arbitration. However, in the present proceedings for provisional measures, all there is at stake is the maritime boundary in the western sector, where Malaysia's claim and Singapore's land reclamation activities are clearly at odds and create a direct clash of rights and duties. By contrast, at the eastern end of the boundary there is currently no proposal for land reclamation by Singapore which would cut across Malaysia's claim, and even if there were, since nothing is being constructed in the relevant area, there would be no urgency in that sector. Malaysia does not rest its claim to provisional measures in the eastern sector upon any issue of maritime delimitation.

Nonetheless, in order to place the dispute in context I will briefly trace the history of the boundary as a whole.

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

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

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

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

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

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

Now it is well settled that when an international tribunal determines a maritime boundary, it does not share out a previously undivided whole; it does not cut up the whole cake. It acts in a declaratory way with respect to existing rights under international law. Thus if Malaysia's claim to what Singapore deigns to call a sliver of territorial sea west of Point 20 was justified in 1979, then Malaysia's rights were vested rights at that time. Wherever the maritime boundary would have been drawn in 1980, when the dispute crystallized with Singapore's protest, that is where it should be drawn now. There has been no change in the presumption of equidistance so far as delimitation of the territorial sea is concerned; if anything, as I shall briefly show, the presumption is stronger than ever. Thus any subsequent infringement of Malaysia's rights by Singapore could not have produced any effects in law; and of course all such infringements were promptly and continuously protested.

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

I said earlier that Point 20 was determined in 1979 by application of the principle of equidistance from the nearest territory belonging to the parties. The 1927 Agreement did not follow an equidistance line; indeed the terminal sections of the 1927 line followed no discernible principle at all. Malaysia's position was and is that the line should forthwith

revert to the equidistance line after agreed Point 21, and you can see on the screen now, and in tab 28 on your folders, the basis for this calculation. Point 20 is equidistant between Sultan Shoal and Tanjung Teretip on the Singapore side and Pulau Merambong on the Malaysian side.

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

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

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

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

That is the first sentence. The second sentence reads:

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

and I stress those words –

> to delimit the territorial seas of the two States in a way which is at variance therewith.

Three points must be made about article 15.

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

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

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

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

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

Mr President, members of the Tribunal, you may think that, notwithstanding the strict language of article 15, first sentence, the presumption of equidistance in territorial sea delimitation is not so strong as to produce abrupt changes in a delimitation line. But that is not the case, as you can see from tab 32 in your folders. This shows the actual delimitation of the maritime zones of Nigeria and Cameroon effected by the International Court of Justice in its Judgment of 10 October 2002. Point G, which you see on the screen, was determined by agreement between the parties in the Maroua Declaration of 1975, which the Court held was a valid agreement. The Maroua line, as it is called, the line to the north of Point G, was not an equidistance line. It was an agreed line departing from the equidistance line. The Court, however, had to delimit the maritime boundary beyond Point G, there being no agreement. The Court immediately reverted to the equidistance line at a point it called Point X, with a sharp right-angled turn. The agreed line came to a shuddering halt at Point G, and then did a sharp right-hand turn, under the driving guidance of the Court, you might say. I refer to paragraphs 289 and 307 of the Judgment. That is in essence what Malaysia did in determining the location of Points 20 and 23. Malaysia was not bound to follow the direction of the 1995 alignment beyond the last agreed point in that alignment, Point 21, any more than Cameroon was bound to do so beyond the last agreed point of the Maroua line, Point G. It is as simple as that.

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

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

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

But it is not for Singapore to apply it, or for Singapore unilaterally to determine what is reasonable in its eyes. Malaysia's essential point here is a procedural one, or at least one as to the appropriate *process* for the resolution of this dispute. In the give and take of a proper negotiation, the issue concerning Point 20 could have been resolved. But Singapore refused to negotiate, refused to define its position other than by way of negation; and acting unilaterally, Singapore is not a delimitation authority. Singapore's conduct in going ahead with its reclamations without attempting to resolve the delimitation dispute is of a piece with its going ahead with those projects without taking Malaysia's other interests into consideration. Far from the give and take of negotiations, with Singapore, it is always take and no give. Around Point 20 as around Pulau Tekong, what we have witnessed is a land grab at sea, which, whatever its ultimate rationale and its ultimate impact on the environment of the region and on navigation rights, ought not to have been effected unilaterally, without any attempt to negotiate or to take the reasonable claims of its neighbour into account. That is the fundamental underlying issue in this dispute as a whole, and it is in this respect that the Tribunal in dealing with the present request can act as a circuit-breaker, can take a real step towards healing the multiple ruptures in the relationship between these two States that Singapore's unilateral action has produced.

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

The President:

Thank you, Professor Crawford.

I now give the floor to Professor Nico Schrijver.

STATEMENT OF MR SCHRIJVER
COUNSEL OF MALAYSIA
[PV.03/02, E, p. 12–20]

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

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

In the context of the diplomatic correspondence and during the bilateral consultations Malaysia has time and again specified which of its rights are at stake and what their basis in law is. Hence, Malaysia learnt with considerable surprise that Singapore is of the view that, and I quote from paragraph 75 of the Response from Singapore dated 20 September 2003, "Malaysia has grossly failed to meet the specification test" under article 290, paragraph 5, of the Convention and article 89 of the ITLOS Rules and that, consequently, Malaysia's request for provisional measures is inadmissible. Mr President, members of the Tribunal, in Malaysia's view it really would be staggering if after all these exchanges Singapore still fails to appreciate what Malaysia's problems are with the land reclamation works. Indeed, it may be indicative of the very reason for the dispute that Singapore professes to be unable to understand that Malaysia could have genuine concerns about what is happening, that it could have concerns about the total lack of prior consultation and about the potential impact on Malaysia's rights, that it could have concerns as to the likelihood of harm to the marine environment.

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

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

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

Similarly, in the *Encyclopedia of Public International Law* it is provided:

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

One example of relevant State practice, not far away from here, is the Ems-Dollard region between Germany and the Netherlands. Germany wanted to enlarge the harbour of Emden in the 1980s. This involved considerable dredging operations and the raising of a sandbank called the *Geiseplaat* above sea level. The Treaty between the Netherlands and Germany concerning Arrangements for Cooperation 1960 stipulated that land reclamation works could only be carried out after agreement between both parties. Hence, the two States entered into intensive bilateral negotiations. Even though agreement could not be reached on the precise course of the boundary, Germany and the Netherlands cooperated closely in seeking to minimize the effect of environmental damage should the harbour of Emden be expanded. The project was halted, but it is an interesting example of a cooperative approach.

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

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

This principle applies equally in territorial waters, in the exclusive economic zone and on the high seas. It even applies to internal waters and to land-based activities that impact upon the marine environment. Here the rights of a coastal State are qualified and supplemented by the duties to take into account the interests of other States and pay due regard to the marine environment.

The Convention incorporates both substantive and procedural rights. These are not two distinct categories of rights as Singapore now suggests in its Response (paragraphs 145–146), but interrelated rights in the Convention. Indeed Professor Lowe eloquently pointed this out to you in the *MOX Plant* hearings, as you will no doubt remember (see ITLOS/PV.01/07/Rev.1 of 19 November 2001). The substantive right of a coastal State to use its territorial waters pursuant to its own developmental and environmental policies and in accordance with its duty to protect the marine environment is qualified by the procedural right of its neighbouring State to prior notification, consultation and monitoring should serious transboundary environmental harm be likely to occur. Similarly, the substantive right of a coastal State to have unimpeded maritime access to its ports is accompanied by its right to be consulted on plans for artificial alterations which may impact on common navigation channels and safety of navigation. The

interrelationship of and interaction between substantive and procedural rights contribute to the integrated approach envisaged by the 1982 Convention.

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

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

Some of the limitations on the exercise of sovereignty over the territorial sea are listed in the Convention itself. It is a classic and widely accepted doctrine that ships of all States enjoy innocent passage through the territorial sea. This right of innocent passage, and the balancing between coastal and flag State interests in general, have been recorded in Section 3 of Part II on the territorial sea. No doubt these are matters primarily to be addressed at the stage of the merits. However, in Malaysia's view, it is self-evident that the land reclamation works of Singapore, in particular those in the vicinity of Pulau Tekong, result in or at least risk creating an unreasonable interference with Malaysia's right to maritime access to Malaysian ports and its right to manage its marine ecosystem and its marine resources.

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

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

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

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

It is of course a matter of geographical reality and common sense that States sharing such seas have to cooperate. Article 122 defines semi-enclosed seas as

> a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

This definition of semi-enclosed sea fits the Straits of Johor well, as Sir Elihu Lauterpacht has already shown. For they consist of the two territorial seas of Malaysia and Singapore and are an area of sea surrounded by two States, with a narrow outlet to another sea. We have included a sketch map of the sea area under tab 33 of your folder, the map which you can currently see on your screens.

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

- to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; and
- to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment (see *The MOX Plant Case*, Order of 3 December 2001.)

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

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

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

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

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

What does it mean? As stated in the *Virginia Commentary*:

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

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

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

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

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

Consistently with these developments, Section 4 deals with Monitoring and Environmental Assessment. Article 204, paragraph 2, provides:

> … States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

These articles 194 and 204 of the Convention in effect require the application of what we now call the "precautionary approach", or the "precautionary principle", which has now crystallized and been consolidated in contemporary international law. It is widely agreed that the core of the principle and the consensus thereon is well reflected in Principle 15 of the Rio Declaration on Environment and Development (text in *ILM* (1992), p. 874), which provides:

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

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

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

Mr President, Singapore is certainly among the States with the capability of conducting a fully-fledged environmental impact assessment. Such an assessment must also take into account the interests of Malaysia and of the marine environment in the Straits of Johor as a whole. But Singapore has produced nothing qualifying as an EIA of these major projects; rather, it has produced two summary reports, dated 15 July 2003, which focus almost entirely on effects on Singapore, and then only to a limited degree.

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

Mr President, members of the Tribunal, the application of Malaysia firmly rests on a number of fundamental and, if you like, overarching principles of the international law of the sea as recognized by the Law of the Sea Convention.

In paragraph 23 of its Response, Singapore invokes the principle of sovereignty over the territorial sea and its natural resources as well as Singapore's rights to development. Malaysia fully endorses the right of each coastal State to determine freely the management of its territorial sea for its own development, but within the limits of international law. As pointed out as early as in the 1928 decision in the *Island of Palmas* case, every State has an obligation "to protect within its territory the rights of other States". This is reaffirmed in article 2, paragraph 3, of the Convention by reference to the general obligation to exercise sovereignty over the territorial sea in accordance with the Convention and other rules of international law.

Similarly, coastal State sovereignty is qualified in articles 123 and 193 by the duty to protect and preserve the marine environment. States do not have unlimited sovereignty with

regard to shared natural resources. A semi-enclosed sea and its adjacent coastal waters are to be viewed as shared natural resources. Indeed, the resource sovereignty on which Singapore places so much emphasis gives rise under the law of the sea to a series of duties as well as rights, most notably the duty to take into account the rights of other States, the duty of sustainable use of natural resources, protection of biological diversity and elimination or reduction of the effects of over-exploitation and pollution. On the evidence available it is clear that Singapore has failed to attend to these duties from the perspective of the rights of Malaysia as its neighbouring State.

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

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

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

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

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

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

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.

Lastly, Malaysia's case rests on the precautionary principle. A precautionary approach is central to a sustainable use of a territorial sea in that it commits a State to avoid human

activity which may cause significant harm to the natural resources and the ecosystem and/or serious infringement of the rights of other States.

At the root of the precautionary principle, as Birnie and Boyl*e* state in *International Law and the Environment*, is the obligation of diligent prevention and control. Hence, precautionary measures should be adopted and based on up-to-date and independent scientific judgment. These measures should be transparent and be made available to all interested parties. The precautionary approach requires that, when there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures. In Malaysia's view the precautionary approach is reflected in various articles of the Convention, notably articles 194, 204 and 206, as well as in the definition of pollution – through the phrase "likely to result" – in article 1 of the Convention. In the *Southern Bluefin Tuna Cases*, your Tribunal relied on scientific uncertainty surrounding the conservation of tuna stocks to justify the award of provisional measures to protect the stock from further depletion pending the resolution of the dispute (see Order of 27 August 1999). An independent environmental impact assessment is a central tool of the international law of the precautionary principle. Such an EIA should have been conducted by Singapore, but was not – or at least was not made available to Malaysia.

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

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

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

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

The President:
Thank you very much, Professor Schrijver.

We will now have a 15-minute break. I think we should resume the session at 4.25. Thank you.

Short adjournment

The President:
I now give the floor to Professor James Crawford.

STATEMENT OF MR CRAWFORD
COUNSEL OF MALAYSIA
[PV.03/02, E, p. 20–33]

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

An initial question concerns your role in provisional measures under article 290. It raises a fundamental question of principle; but it also raises questions concerning Singapore's conduct, and in particular its attempt to confront Malaysia, and the merits tribunal, with an irreversible *fait accompli*.

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

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

An initial point about this argument – and I hope I have not parodied it too much – is one of fact. It concerns the precise time at which a merits tribunal is constituted.
[…][1]

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

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

[1] Passage deleted, see page 89 of the present minutes.

That brings me to my second point. The reason we are nineteen days or whatever it is away from the deadline for constituting the merits tribunal – a deadline Singapore refuses to extend notwithstanding, Sir, our reasonable request for a short extention – the reason is this: Ever since 4 July, Singapore has engaged in a masterly exercise of delay. The details are set out in the Request and can be traced in the correspondence; I will not go in to them here. In effect, having held out the possibility of constructive discussions, that is only after 4 July, Singapore refused to make the slightest gesture that would have facilitated a negotiated interim solution. When it got around to replying to the Statement of Claim, it called for a meeting. You have already heard the Attorney-General on the change in Singapore's attitude to meetings. Even after the meeting of 13 and 14 August, Malaysia – after considerable internal debate, I might say – made one last, modified and moderate proposal for an interim solution. Singapore waited literally to the last moment to reply, and then it said "no": no counter-proposal, no suggestion for some compromise, just no, *nyet*, *nie*, *nein*, *non*. That is about as far as my vocabulary extends. It must have known immediately on receipt of Malaysia's note of 22 August that the answer would be *non*, *nein*, *nyet*, *nie*, etc., it must have known that, but it deliberately delayed.

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

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

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

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

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

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

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

On the question of irreparability, the position seems about as clear as it could be. Singapore is working hard to establish a *fait accompli*. It is obvious that this reclamation has a permanent character, and that once its footprint, its contours, are established, it will be impossible to alter them even in minor respects. We do not complain about their engineering. On a rough calculation, up to a hectare a day is being reclaimed and earlier datelines for the project, such as 2010, have been revised to bring them forward.

In the *Gabčíkovo-Nagymaros Project* case, Slovakia insisted on excluding resort to provisional measures by the terms of the Special Agreement, so that by the time the International Court [of Justice] had to deal with the case, Variant C – that is the unilaterally constructed upstream diversion project and dam – was complete, or at least effectively complete. The Court did not need to decide, for the purposes of its discussion of countermeasures, whether Variant C was reversible, but no one who saw it – and the Court saw it – could think it was reversible. It was an engineering *fait accompli* by that time, and that fact underlies the Judgment of the Court. That is what Singapore is trying to create now,

and what your jurisdiction to award provisional measures, which no State could exclude, exists to avoid.

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

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

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

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

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

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

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

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

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

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

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

And as soon as Singapore fills in this section, this southern triangle, the die is cast. At one stage Singapore said that the southern section, the "offshore filling site" as it calls it, was a distant prospect and obviously the sheet piles themselves can be removed. They were put up in a week or so and they can be taken down. But now it says, apparently, that it is going to build a rock revetment outside, that is, to the east of, the sheet piles, which will further constrict the channel and aggravate the impacts that would be caused. And however it may be presented, as a form of mitigation of wave effects, this is not a charitable act; it is an attempt to convert the temporary line of sheet piles into a permanent rock wall – yet again to create a

fait accompli. In short, the reclamation projects are actively under way. There are indications that the schedule is being accelerated in crucial sectors. Once constructed, the whole project is patently irreversible. If ever there was a case, in the context of a major engineering project, as distinct from a death sentence on a pirate, of combined urgency and irreversibility, this is it.

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

Now let us assume that Singapore had no intention of seeking to consolidate the southern triangle of the Greater Tekong area; it could have said that. It could have given information and assurances of its intentions which, in the context, could have substituted for a formal commitment not to engage in any irreversible act in this vital area. Did it do anything of the sort? It did not. The activity on the ground – more properly on the water – stands in stark contrast with Singapore's silence in the context of the attempted negotiations. It could have offered some comfort; it offered none. The appropriate conclusion should be drawn; Singapore is trying to create a *fait accompli* with respect to the project as a whole and it is doing so in the least completed segment of the project and the segment which causes potentially and actually the most harm to Malaysia. That in itself satisfies the requirement of urgency.

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

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

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

To summarize on this point, Malaysia seeks to preserve the *status quo ante*, Singapore seeks to create a new status quo; we will call it the *status quo post* – I think that is a new phrase – a *status quo post* the commencement of proceedings. Provisional measures exist to protect the *status quo ante* and to preclude the creation of a new and incompatible *status quo post* by unilateral action. If provisional measures are ordered and the merits tribunal holds that Singapore is right, the reclamations can be completed. If provisional measures are

refused and the merits tribunal holds that Malaysia is right, it will be an empty victory because the work will have been completed. Malaysia will have rights, but nothing else. Provided we can show that Malaysia might be right, that fact alone establishes the case for provisional measures. In conjunction with the scientific material put forward, Professor Schrijver has shown that Malaysian rights are engaged.

Mr President, members of the Tribunal, what I have just said on Singapore's argument about prejudgment goes to answer its further argument that suspension of work would not produce significant benefits for Malaysia. Indeed for Singapore to make that argument, as it does, increases our concern in a number of ways.

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

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

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

Now it is true, and we accept, that Malaysia does not have a veto over Singapore's activities in Singapore's territories, in the sense that if, after compliance with the procedural requirements of the Convention, Singapore is convinced on reasonable grounds that there will be no harm to the marine environment or to the rights of Malaysia, then it does not have to defer to a contrary [Malaysian] view. On the other hand, it is still obliged not to harm the marine environment or cause serious damage to the neighbouring State by pollution, broadly defined. If Singapore turns out to be wrong in its assessment – and I have to say that the reports it has presented so far were not even designed to consider harm to the Malaysian environment; they focused on the Singapore side only – then it will be in breach of the Convention and Malaysia will be entitled to reparation. But the emphasis in the Convention is on the prevention of harm; issues of reparation are secondary, and the purpose of article 290

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

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

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

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

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

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

position. In the context of rapidly proceeding and irreversible work on the reclamations, Malaysia is entitled to measures that will effectively preserve its rights pending a decision on the merits.

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

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

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

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

I have already dealt with the bulk of Singapore's objections to the suspension of works request, and I will not repeat myself, at least not unduly. I would simply note that, consistent with the moderate position it has taken throughout, Malaysia does not demand a stoppage of all reclamation work whatever. Its request is formulated in the following terms:

> that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas).

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

The second request relates to provision of information and it starts with the words "to the extent it has not already done so". It is true that some information has already been provided, in particular, two reports by Professor Cheong's group and the Danish Hydrological Institute. These were provided in August and you will find references to them in annex 3 of Singapore's Response, page 46, reference 5, and in annex 4 of Singapore's

Response, page 49, references 1 and 2. It was agreed this morning, at Singapore's request, that no reference would be made to the content of those reports, but of course, they are referred to in other documents, and they were in fact received by Malaysia. The fact that they were received is known. Singapore has asked that we not refer to the content of those reports, and we will not do so. I cannot refer to the content of those reports, but they were given and they led to a modification in this request.

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

Moreover, for Singapore to assert as it does that this request is "without point" is rather unhappy having regard to the earlier, and I would suggest manifest, lack of compliance by Singapore with its procedural obligations under the Convention. It must be rare in relation to a project this size, having evidently transboundary effects, that the neighbouring State has to carry out its own EIA on the project because the proponent State has not done so and refuses to make information available. Yet that is what happened here. Such exchange of information is the very minimum that can be required, flowing as it does from the general obligation of cooperation which you stressed in your *MOX* Order.

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

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

and fourthly, "agree to negotiate with Malaysia concerning any remaining unresolved issues".

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

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

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

Let me put it this way: ask yourself whether, if this application were to be dismissed – perhaps with costs – Singapore would regard itself as having a mandate to complete the reclamations with their total footprint as soon as possible, and certainly before the merits

tribunal could reach a conclusion. Ask yourself a further question: would anyone seeing this – the areas in yellow on the screen – think there was no potential threat to the marine environment? The combination of the size and intrusiveness of these reclamations – 5,000 or so hectares – and their proximity to Malaysia, mean that it is obvious – elementary – that Malaysia should have been consulted and alternatives examined.

If this Law of the Sea Tribunal were to leave Singapore to proceed with its current policy of unilateral action, would you be discharging your obligation to the protection of the marine environment, and to the maintenance of the public order of the oceans which the Convention was intended to advance? You know how important estuaries are. You know how important procedural obligations, including the obligation to cooperate, are in the effective balancing of rights and duties under the Convention. You know how important prevention is, more particularly in a case where there is absolutely no certainty that there is any cure. We would ask that your Order reflect that awareness.

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

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

The President:
Thank you, Professor Crawford. We have just heard the last speaker for the Applicant. We will hear speakers for the Respondent tomorrow. The sitting is now closed.

Adjournment at 5.25 p.m.

PUBLIC SITTING HELD ON 26 SEPTEMBER 2003, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

For Malaysia: [See sitting of 25 September 2003, 10.00 a.m.]

For Singapore: [See sitting of 25 September 2003, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 26 SEPTEMBRE 2003, 10 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Pour la Malaisie : [Voir l'audience du 25 septembre 2003, 10 h 00]

Pour Singapour : [Voir l'audience du 25 septembre 2003, 10 h 00]

The President:
Today, we will hear the Respondent.
I now give the floor to the Agent of Singapore.

Argument of Singapore

STATEMENT OF MR KOH
AGENT OF SINGAPORE
[PV.03/03, E, p. 7]

Mr Koh:
Mr President, Mr Vice-President, distinguished Judges, my learned friends who represent Malaysia, ladies and gentlemen, before Singapore presents its response to Malaysia's application, I would like to make a brief statement concerning three points in the statement made yesterday afternoon by counsel for Malaysia, Professor Crawford. I refer to the [Uncorrected] Verbatim Record of the meeting contained in document ITLOS/PV.03/02[2].

First, I refer to page 21, paragraphs 4, 5 and 6, in which Professor Crawford committed a gross violation of confidentiality by revealing a matter which is being discussed between you, Mr President and the two agents.

Second, I refer to page 22, paragraph 3, in which Professor Crawford committed another breach of confidentiality in his ruthless attempt to bolster his case.

Third, I refer to page 31, last paragraph, and page 32, paragraphs 1 and 2, in which Professor Crawford insinuated that Singapore had requested Malaysia not to refer to certain reports. This is outrageous. The truth is that those reports were submitted out of time. Their current status is based upon an understanding arrived at during consultations between the President and the two agents.

Thank you, Mr President.

The President:
Thank you.

I now give the floor to Mr Chan Sek Keong, Attorney-General of Singapore.

[2] The statement referred to by the Counsel for Singapore was subsequently modified following consultations with the parties, see page 89 of the present minutes.

STATEMENT OF MR CHAN
COUNSEL OF SINGAPORE
[PV.03/03, E, p. 7–12]

Mr Chan:
Mr President, Mr Vice-President, members of this Tribunal, it is indeed an honour for me, as the Attorney-General of Singapore, to appear before this Tribunal to introduce Singapore's case in these proceedings.

Malaysia claims that Singapore, in carrying out its reclamation works, has disregarded Malaysia's rights under international law. This is simply not true. Malaysia is Singapore's closest neighbour. Both countries share a common history going back more than 500 years. Singapore was a component state of Malaysia from 1963 to 1965. Singapore values good relations with Malaysia. State and people relations remain strong. Kinship ties among many Singaporean and Malaysian families remain inseparable. Singapore hosts many thousands of Malaysian workers. Malaysia is Singapore's largest trading partner, while Singapore is Malaysia's second largest trading partner. These strong trading ties are crucial to each country's economic development, even as they find it necessary to compete with each other in some sectors, such as maritime transportation.

Singapore is therefore disappointed that Malaysia has brought these proceedings against Singapore and has brought them in the manner it did. Malaysia filed its Statement of Claim suddenly without first having given Singapore the opportunity to understand and address its specific concerns. Singapore was also given an ultimatum to stop its reclamation works or face an application for provisional measures. When Malaysia was brought to the negotiating table, Malaysia broke off negotiations abruptly after only one meeting and applied for provisional measures.

Mr President and members of this Tribunal, let me quickly summarize the three key points in Singapore's response to Malaysia's request for provisional measures.

Firstly, Malaysia's application is neither admissible nor within the jurisdiction of this Tribunal on the ground that Malaysia has failed to fulfil the pre-conditions required by the Law of the Sea Convention for commencement of arbitration.

Secondly, Malaysia has failed to produce sufficient evidence of a real risk of harm to Malaysia or 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 when such measures would cause great harm to the State against which they are directed, as is the case here. This burden is entirely appropriate and Malaysia has not discharged it.

Thirdly, Malaysia cannot demonstrate the urgency for provisional measures. Malaysia has delayed its own case far too long to make its claim of urgency credible. Singapore's reclamation works are at a very advanced stage. In any case, the Annex VII Tribunal will be constituted by 9 October 2003 at the latest, less than two weeks from now. No irreparable prejudice to Malaysia's rights can result from any additional work scheduled to take place in the short time before the Annex VII Tribunal takes over. In fact, no works are scheduled to take place in the Point 20 "sliver" during this period.

Mr President, the application before you today is only the third time that this Tribunal is seized of a case under paragraph 5 of article 290. It is an important proceeding both for this Tribunal and for States Parties in that it provides this Tribunal another opportunity to reaffirm the established principles governing this exceptional remedy. The remedy is exceptional, not least because it is also a remedy which could be devastating to a State that is subjected to it. From Singapore's perspective, I can say that Malaysia's application, if granted, would have

far-reaching, serious and immediate consequences and implications on Singapore's right to development as a nation.

Let me explain. Land is scarce in Singapore. Singapore's total land area is about 680 km², slightly smaller than the City of Hamburg. In comparison, Malaysia is about 500 times the size of Singapore but has a population only about eight times that of Singapore. Malaysia's land area is larger than that of Italy and only slightly smaller than that of Germany. Since this case involves land reclamation, I might also add that Malaysia's coastline, about 4,600 km, is almost 25 times longer than Singapore's, which is about 193 km, but only 2 per cent of Malaysia's coastline abuts the Straits of Johor, in sharp contrast to nearly 50 per cent of Singapore's coastline. Malaysia's claims are substantially concerned with the marine environment in this small and narrow body of shared waters.

Four million people are squeezed tightly into Singapore's 680 km². Singapore has a population density of more than 6,000 persons per square kilometre, making it one of the most densely populated countries in the world. Land reclamation to create more living and working space has been and continues to be critical to Singapore's needs for housing, social development and economic growth.

Mr President, let me emphasize that Singapore's position is not that the right to development trumps the protection of the environment, as suggested by Professor Schrijver yesterday. Far from it, Singapore has always sought to balance its developmental rights with the need to protect the environment. All our reclamation works, including the two projects in this case, have to go through an elaborate planning process. Mrs Cheong Koon Hean will explain the process shortly. Singapore's record on environmental protection and conservation of whatever little nature resources it has is exemplary. Despite its need for land for housing and industry, Singapore has preserved a significant number of nature areas, both inland as well as coastal. In fact, the land area devoted to nature reserves, parks and greenery accounts for about 9 per cent of Singapore's total land area. We have even preserved two areas of primary forests on the main island that are more than a million years old.

But Malaysia says that Singapore is only looking after its own environmental interests but not those of Malaysia. This is also not true. For example, we have sewered up the whole island to ensure that no sewage, treated or untreated, flows into Singapore's adjacent waters, in contrast to the amount of untreated waste coming down from Malaysia's coasts and rivers.

Mr President, yesterday this Tribunal had the benefit of reading a passage from one of Professor [Mastura]'s articles, written in 1992, lamenting the environmental damage done by Malaysia's own developmental works to its coastal regions that included coastal erosion, depletion of mangrove forest, decline in fish landings, and various types of pollution. So, it is astonishing that Malaysia has come to this Tribunal and alleged that Singapore's reclamation works have damaged the marine environment when Malaysia's own evidence suggests a real likelihood of Malaysia having caused the environmental effects for which it had faulted Singapore. I refer this Tribunal to Malaysia's UKM Report, which has attributed some of these impacts to Malaysia's own developmental works.

Malaysia's presentation yesterday made much of Singapore's alleged refusal to cooperate with Malaysia. We reject this accusation. In April 2002, the Prime Minister of Singapore, after learning about Malaysia's unhappiness with Singapore's reclamation works at Tuas, made this public statement:

> If a note comes from them [Malaysia] spelling specifically the areas which they have been hurt by our land reclamation, we surely must look into that seriously and look at the evidence. And if they're right, we have to rectify what we have done because what we do must not have adverse, negative effects on our neighbours.

This has been Singapore's consistent position and remains so. I refer this Tribunal to Singapore's diplomatic note of 2 September 2003. In this note Singapore gave the following assurance to Malaysia:

> If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, to deal with any adverse effects.

Despite this assurance, Malaysia, after asking for and receiving substantial information from Singapore, unilaterally and abruptly broke off negotiations three days later and filed the present application. Yesterday Professor Crawford chose to ignore this assurance when he accused Singapore of refusing to even consider suspending its works under any circumstances. That is one of the careless statements made in Malaysia's presentation.

Another instance of a careless assertion against Singapore is that Singapore has been accelerating its reclamation works to ensure a *fait accompli*. There is absolutely no factual basis for this assertion. Yesterday in Professor Crawford's presentation, a photograph of Singapore's ongoing works was shown. It purported to show dredgers working at the east of Pulau Tekong, an area, he says, of significant impact. In fact, the dredgers were working at the west of Pulau Tekong, far from the Malaysian coast. If the Tribunal would look at the photograph, you will see an antenna on the right. From the antenna you can calculate the position of the dredgers, and we show that in the next slide. That is where the dredgers are. Furthermore, Singapore had in fact given a categorical assurance on 2 September 2003 that it has not accelerated the reclamation works at Pulau Tekong.

Mr President, Malaysia's allegation of Singapore's refusal to cooperate and consult rings hollow when you consider Malaysia's attitude in relation to its territorial claim to the so-called "Point 20". This claim was made in 1979 through the unilateral publication of a map. Singapore objected to it on the ground that it had no legal basis. Malaysia failed to clarify its claim, but continued to assert it without providing any clarification. Twenty-four years later, at the 13 and 14 August 2003 meeting, Singapore again sought to understand this claim, but Malaysia simply referred to the Geneva Convention on the Continental Shelf 1958, without providing details. There was no basis on which Singapore could start any talks with Malaysia on its claim to Point 20 unless we were told the specifics of the claim. In fact, it was only yesterday that we were presented with a detailed explanation of how this claim was constructed in 1979.

I might also add that Professor Crawford took advantage of this 24-year lapse in cooperation to advance to this Tribunal the absurd proposition that if country A makes a territorial claim against country B, however ill-founded that claim may be, country B is forever denied the right to develop that territory until country A takes steps to have the claim adjudicated. Perhaps Professor Crawford has forgotten that in the case of Sipadan and Ligitan, Malaysia, whom he represented as counsel, did not stop developing Sipadan as a diving resort, despite Indonesia's many protests. Indeed, Malaysia claimed that it had the right to do so. It is also worth remembering that Malaysia's 1979 map also claimed sovereignty to Pedra Branca, which has been in Singapore's possession since about 1847. This claim was referred to the International Court of Justice in 2002 at the suggestion of Singapore, first made in 1989. We may ask why Malaysia did not suggest that its claim to Point 20 be referred to third-party adjudication for more than 20 years. Instead, it is now taking advantage of this neglect as a basis for asking for provisional measures in this case. This Tribunal will not miss the point that, without reviving its claim to Point 20, Malaysia has

absolutely no case for provisional measures in respect of Singapore's reclamation works at Tuas.

I come back now to Malaysia's arguments on cooperation and consultation. The record shows that Singapore has consistently sought to understand and address Malaysia's concerns. It had repeatedly sought particulars of Malaysia's complaints and Malaysia had repeatedly stated that it would provide Singapore with the details of its complaints. However, Malaysia did not do so for more than a year. When it did so, how did Malaysia do it? By serving on Singapore a Statement of Claim invoking arbitration under Annex VII, accompanied by a note threatening Singapore with provisional measures unless Singapore stopped its reclamation works immediately. Singapore responded to the belated provision of details by immediately inviting Malaysia to discuss its concerns and sending substantial reports and documents on the matters Malaysia had raised. After Malaysia met with Singapore for this purpose on 13 and 14 August 2003, Malaysia unilaterally and abruptly abandoned further consultations, despite having given Singapore the clear impression, both during that meeting and in Malaysia's letter of 15 August 2003, that the discussions would continue. Yesterday Professor Schrijver claimed that Singapore lacks the quality of neighbourliness. Singapore could say the same about Malaysia.

However, trading accusations will not help this Tribunal to address the substance of Malaysia's application for provisional measures. Let us look at the facts. Malaysia initiated Annex VII arbitration on the ground that the time for talking had passed when in fact no talks had started at all. When talks started, Malaysia decided to abandon them. In my submission, Malaysia was wrong on both occasions. Its actions were unjustified, and in regard to the unilateral termination of the talks, wholly inexplicable. We had proposed a joint study, and Professor Falconer confirmed that a long-term study was necessary to determine the long-term effects of Singapore's reclamation works.

But, Mr President and members of the Tribunal, the proceedings before the Tribunal are for provisional measures. I wish to ask, and this Tribunal may wish to ponder, the following questions:

1. If Malaysia genuinely believes that provisional measures are needed urgently, why did not Malaysia give Singapore the particulars of its concerns earlier? Singapore had repeatedly asked for them for more than a year and Malaysia had repeatedly said it would do so.
2. If Malaysia genuinely believes that provisional measures are needed urgently, why did Malaysia wait almost a year after receiving the first set of scientific reports it is relying on before forwarding them to Singapore?
3. Why did Malaysia suddenly rush to this Tribunal for provisional measures almost two years after it had full knowledge of the progress of Singapore's reclamation works? Why now and not two years ago? What is the urgency now that was not urgent before?
4. If Malaysia genuinely believes that provisional measures are needed urgently with respect to Point 20, why did Malaysia wait until almost two years after Singapore had reclaimed Point 20 in full view of Malaysia?

Malaysia's application is even more perplexing when seen in the light of its own reclamation works at Tanjung Pelepas. This is a massive reclamation project located directly opposite to Singapore's coast. Its pursuit of provisional measures against Singapore may be described as an audacious attempt to prevent Singapore from doing what Malaysia has also been doing close to Singapore waters, and without notifying or consulting Singapore. This point bears repeating as Professor Schrijver spent a lot of time on this issue yesterday.

Mr President, the Law of the Sea Convention is a carefully crafted and calibrated instrument that took more than 10 years to negotiate. The rights and obligations set out in the Convention represent a very sensible and practical balance of the navigational, environmental, economic and developmental interests of all nations. The Convention provides a practical adjudicative process to resolve disputes between States with respect to such interests in two phases: the merits phase and the provisional phase. Malaysia's substantive case is that Singapore's reclamation works have caused and will cause significant harm to itself and to the marine environment. Singapore denies these allegations, but they are for the merits phase. The question for this Tribunal – and it is the only question that this Tribunal has to consider – is whether any reclamation works that Singapore may do in the very short time before the Annex VII Tribunal takes over will cause irreparable prejudice to Malaysia's rights or irreversible harm to the marine environment. The only logical answer is that it will not.

The principles governing the prescription of the exceptional remedy of provisional measures are well established. These principles tell us that Malaysia's application for provisional measures cannot succeed. Singapore urges this Tribunal to apply these principles rigorously and make the appropriate order.

Mr President, members of the Tribunal, this concludes my introductory statement. I thank you for your attention and request that you call upon Mrs Cheong to continue Singapore’s presentation.

The President:
Thank you.

Now I give the floor to Mrs Cheong Koon Hean.

STATEMENT OF MS CHEONG
ADVOCATE OF SINGAPORE
[PV.03/03, E, p. 12–21]

Ms Cheong:
Good morning, Mr President, members of the Tribunal, I am honoured to be given the opportunity to present before the Tribunal a brief overview of Singapore as well as to describe the manner in which the reclamation projects have been carried out at Pulau Tekong and Tuas.

My presentation will be in two segments. For the first segment, I will screen a short six-minute video clip which provides an introduction to Singapore's land constraints and will explain why Singapore needs to reclaim land. The video also explains Singapore's systematic and integrated approach to land development and environmental protection. May I now invite the members of the Tribunal to view the video?

(Video shown)

> Singapore, one of the smallest countries in the world, lies on the tip of the Malaysian peninsula, in South-east Asia. In land area, Malaysia, which is Singapore's closest neighbour, is nearly 500 times Singapore's size. Singapore's land area covers 680 km², which makes the country smaller than the state of Hamburg. Yet some 4 million people live on the island, compared with 1.7 million in Hamburg.
>
> With limited space and no natural resources, Singapore has learned to make the most of what is has. Even back in the 1960s, town planners were keenly aware they had to strike a delicate balance. They had to build factories for jobs, house the people and at the same time care for the environment. In today's terms, "sustainable development".
>
> With over 6,000 people per km², Singapore is one of the most densely populated places in the world. Yet planners have found creative ways to deal with the lack of space. At this school, for instance, the children don't get a regular playing field. Instead, they have a rooftop which doubles up as an assembly area and the place for the physical education lessons. Every nook and cranny is well utilized.
>
> Apartments like these are what 80 per cent of Singaporeans call home. In the years ahead, several hundred thousand more homes will be needed. That's because with its open economy and booming talent policy, Singapore expects to host a population of 5.5 million in the future. So future homes will be built in blocks that reach up to 50 stories high.
>
> At the same time, efforts have been made to keep the island from becoming a concrete jungle, preserve essential water catch materials and pockets of green, like this nature reserve. It is home to primary forests which host rare native plants and […], with more species than in the whole of North America. Protecting such green areas is one aspect of the concept plan on Singapore's long-term land use. Made known to all since the 70s, it is reviewed every ten years, with inputs from every sector of society.
>
> The publicly-known plan also covers reclamation works, the latest being in Tuas and the island of Tekong. Reclamation, which has been carried out for over 100 years, is one way for Singapore to meet its need for land. All the works are carried out within Singapore's waters.

> When this island, Pulau Semakau, was reclaimed to create Singapore's only landfill, some 13 hectares of mangroves were under threat. 400,000 saplings covering 13 hectares were carefully replanted and today, the mangroves, which support over 2,000 species of flora and fauna, have regenerated and are thriving.
>
> Land reclamation continues to be carried out sensitively. Technical studies are done, and the works are monitored closely to ensure that the impact on the environment is minimized. Changi Airport, a symbol of Singapore's open economy and progress, was built on land which was once the sea. The greenery surrounding the airport and all the expressway leading from the airport are reminders why Singapore is called "the garden city".
>
> Along the same stretch of reclaimed coast, Singapore also built housing. This 30-year-old estate, aptly called "Marine Parade", stands on reclaimed land. It also improved on the nearby reclaimed beach which is popular with families. So the coast now is a mix of leisure and commercial activities.
>
> The sea has always been a lifeline for Singapore. As one of the world's busiest ports, much of Singapore's waters are set aside for navigation. It has to make sure that ships don't have a problem passing through its waters, even with reclamation.
>
> There was little to start with, but whatever little space Singapore planners have, they have put to good use. The planners take a long-term view, mindful of the needs of all, from nature to man to the economy, creating a vibrant and thriving city, a place that all Singaporeans today and tomorrow can call home.

Mr President, members of the Tribunal, segment two of my presentation essentially summarizes the detailed briefing that was given to our Malaysian counterparts at our meeting on 13 and 14 August this year as recorded in annex 5 of Singapore's Response. I will be explaining the planning and approval process in Singapore and how the reclamation works have been carefully planned and executed.

As mentioned, Singapore is a small city state with one of the highest population densities in the world. In view of its limited land resources, detailed and continuous planning is critical in ensuring that there is sufficient land to meet our needs.

Planning is done at two levels; the Concept Plan and the Master Plan level. The Concept Plan, prepared once in ten years, is a long-term land use and transportation plan which guides the physical development of Singapore. The Concept Plan was first prepared in 1971. It is reviewed every ten years. The Concept Plan indicates land that may need to be reclaimed to meet our future land needs. All reclamation areas are within Singapore's territorial waters. The Pulau Tekong and the Tuas reclamation areas are shown in the 2001 Concept Plan and, in fact, the Pulau Tekong reclamation has been shown since the 1991 Concept Plan.

The Master Plan translates the visions of the Concept Plan into detailed land uses and intensity controls and the approval of any application for development must be guided by the Master Plan. In the preparation of the Concept Plan and the Master Plan much effort is made by planners to balance urbanization with the protection of nature areas.

Land use planning in Singapore is an open and consultative process. The Concept and Master Plans are made public, through publications, exhibitions and the internet. Extensive

public consultations are done to gather feedback and we do get thousands of responses which we consider before we finalize the plan.

At a more detailed level, each large development project, such as a reclamation project, is subject to a stringent approval process. The Reclamation Agency must first undertake a number of studies before preparing a reclamation proposal. Many technical Government agencies are consulted to obtain their comments and requirements. The reclamation proposal is then refined to address the requirements of the agencies. It is then submitted to a multi-agency committee for evaluation and planning approval. The project is evaluated carefully by each of the agencies before planning approval is granted and the approval may be given, subject to certain conditions to be complied with or additional studies to be done. This process ensures that all reclamation projects have considered comprehensively the potential effects.

Relevant agencies are consulted on land use, navigation safety, pollution, water quality, protection of parks, nature and marine areas and so on. The final step is Parliamentary approval.

Let me now brief you on the details of the reclamation at Pulau Tekong. To the north of Singapore is Johor, the southernmost state of West Malaysia. Both Singapore and Malaysia share a common waterway called the Straits of Johor. Note that the catchment area of the Johor river, also known as Sungai Johor, and its tributaries are easily more than double the size of Singapore. Developments and activities on both sides of the Straits would have effects on the environment of the Straits of Johor.

I would like to show you some satellite photographs taken before reclamation commenced at Pulau Tekong. These photographs would show that land-based activities have long affected the quality of the water in Sungai Johor, the Straits of Johor and the areas around Pulau Tekong. Let me just explain the colours shown on this image. The red colour depicts the land mass. The white colour depicts puffs of clouds. The blue water denotes the cleaner waters and the cloudy water denotes silty or muddy waters.

This slide is a close-up shot of the estuarine environment near Pulau Tekong taken in October 1998, before reclamation. Notice the silty waters discharging from Sungai Johor and its tributaries southwards towards Pulau Tekong and the Straits of Johor. The area in white shows land clearance activities such as those at Tanjung Langsat in Malaysia.

This next slide is another close-up shot of land clearance activities at the eastern end of Tanjung Langsat in Malaysia. We see silty waters being discharged into Sungai Johor. Land clearance activities in Malaysia appear to contribute to discharge of silt in the Straits of Johor. In addition, Malaysia's own report by Delft Hydraulics called "The Hydraulic and Environmental Impact Assessment for the Straits of Johor" highlighted that untreated waste water is being discharged by Malaysia into the rivers and the Straits of Johor. This slide shows a perturbed environment in the waters in Sungai Johor and around Pulau Tekong in April 2000, before reclamation took place.

Hence, it can be seen that the waters around Pulau Tekong and the rivers in Malaysia are generally turbid all year round. This was the situation even before reclamation works at Pulau Tekong started in early 2001.

The proposal for Pulau Tekong was first publicized, as I mentioned, more than ten years ago, in the 1991 Singapore Concept Plan. The reclamation profile then underwent a few revisions before the final profile was granted approval in 1999. The project was subject to stringent approval procedures, which I mentioned earlier on, with all conditions imposed by Government agencies taken into consideration and incorporated into the final scheme.

Extensive studies were carried out before reclamation commenced. Hydrodynamic studies were done to study the changes in current flow and the resultant impacts on navigation and flooding. The erosion and sedimentation patterns were also studied.

Ecology studies and water quality studies were also carried out. The reclamation commenced only after the studies concluded that there would be no significant impacts. Studies and monitoring of effects continue to be carried out.

The Pulau Tekong project calls for some 3,300 hectares of land to be reclaimed and to be carried out in three phases. Phase 1 is planned to be completed by around 2005. The Offshore Containment Site which you see on the plan is an area where dredging materials are placed.

The reclamation was deliberately planned to be carried out in three phases, so as to allow us to monitor the hydrodynamic regime at each phase. Critical areas, such as the channel between Pulau Ubin and Pulau Tekong, Kuala Johor and Calder Harbour, are closely monitored. In the event that the monitoring programme shows up any negative effects, prompt action will be taken to mitigate the impacts. If necessary, we will modify the profile of the reclamation area.

To illustrate, a significant modification was made to phase 1 in early 2002 when we received new information on the rich biodiversity at Chek Jawa in the vicinity of Area Y. We decided to defer the reclamation in this area to preserve the mud flats there. This is the biodiversity at Chek Jawa, which we have decided to safeguard.

Phase 2 comprises the reclamation of Area C and the last phase would comprise the completion of Area D. Presently, there is a sheet pile in place at Area D. This is to stop the dredged materials from silting the surrounding water. It will eventually be replaced by a sloping stone revetment wall but this will be done by around 2008, in the last phase, and not immediately.

Today, ships travel to Malaysia's Pasir Gudang Port and the Tanjung Langsat Jetty, as well as to Singapore's own Sembawang Shipyard through Kuala Johor and the Serangoon Harbour. A very limited number of boats go through Calder Harbour, in view of its shallower depth.

Note that even when the reclamation is fully completed, the existing widths of the navigation channels will remain unchanged and fully accessible to ships and small boats.

The width and design of the navigation channels used by ships conform to and even exceed internationally accepted standards. The width of the shipping channels in Kuala Johor, at about 715 m, in fact exceeds the existing width of 600 m at Serangoon Harbour, and this 600 m is naturally determined by the distance between the island of Pulau Ubin and mainland Singapore. In addition, there are two 100 m channels on either side of the main navigational channel set aside for small boats.

This is a picture of the channel to Teufelsbrück, along the Elbe river, that you will see when you drive from where we are here now towards the centre of Hamburg. It has a width of about 570 m and clearly large vessels can pass through. In comparison, the channel widths all around Pulau Tekong are far wider than this.

This slide shows the channel width between Pularek Jetty and the sheet pile at Pulau Tekong, a point which was raised by Malaysia yesterday.

Contrary to concerns expressed yesterday, the channel width is very wide, as you can see, at 900 m, more than ample for large ships to sail through, even though shipping traffic here is actually very low at the moment.

This is a slide of the cruise ship *Megastar Aries*, a Malaysian ship, which recently started to sail up and down this channel.

On approval, international public tenders were called for the reclamation project and it was awarded to international joint venture companies.

Reclamation works are now at an advanced stage. Allow me to explain the colours shown on the plan. It is quite a busy-looking plan. The yellow colour refers to areas where sand is already filled above water. The red areas are the sand bunds which form the outline of

the reclamation profile. These are all almost above water. The blue areas are areas where dredging of soft marine clay is being carried out in preparation for the construction of the sand bunds. The orange area is where sand or clay is being deposited. The pink line is where a sheet pile has been constructed, as I have mentioned, as part of the Offshore Containment Site, to keep the dredged materials within Area D.

Note that the full extent of the final profile has practically been delineated. Any additional work to be done in the next few months should not increase the effects observed now.

I think we have already seen this slide. Yesterday, Malaysia's counsel referred to this picture and said that it showed reclamation work under way east of Pulau Tekong. As the Attorney-General has pointed out, this is incorrect, and no works have actually been carried out east of Pulau Tekong.

Let me take a few minutes to walk you through how we reclaim land. I will highlight the careful precautions and mitigating measures taken during the execution of the works to minimize any adverse impact on the surrounding waters.

First, before works commence, we do a pre-survey of the seabed level. Tide gauge, silt and current meters are then installed for monitoring purposes. A sand key needs to be formed to prepare a firm foundation for the construction of the shore protection stone wall. The stone wall would form the outermost boundary of the reclamation area.

Stage 1. In this stage a sand mat is first laid. Containment bunds are formed on either side. The grab dredgers would dredge the softer seabed material to form a "sandkey trench", which will later be filled with sand for greater stability. The dredged material is placed between the containment bunds within the reclamation area. This reduces any siltation from the softer dredged soil material moving beyond the reclamation area.

Stage 2. Large hopper barges would then fill the sand key trench with sand to form a firmer foundation. Sand is filled to 8m below the water level. As the water depth is reduced, small hopper barges are now used to fill in sand to 2 m below the water level. Subsequently, a special type of dredger would pump in sand. Sand continues to be delivered until the final level is reached. At the same time, shore protection works are carried out.

Finally, shore protection works and sand filling works are completed. This slide shows the shore protection stone wall. It is intended to stop any sand from being washed away to the surrounding waters.

In the course of construction, several good construction practices have been adopted. The contractor is required to minimize and control any siltation, pollution and colouration of the sea. Silt barricades are installed for the Pulau Tekong project to mitigate siltation of the surrounding waters and navigation channels.

This slide shows a silt barricade being lowered into the sea. The silt barricade comprises a fine mesh placed underwater, which essentially acts as a filter to minimize silt particles leaving the reclamation site. The silt barricade is placed around the perimeter of the work site. This slide shows dredgers working behind the silt barricade.

An additional mitigating measure is to use a box frame silt screen during dredging work in the more sensitive areas, such as when we are working very close to nature areas or mangroves. Silt particles are kept within the box frame, even as dredging progresses.

Another mitigating measure is to build an 8.2 km perimeter bund around the Offshore Containment Site, as shown in this slide. In this way, the dredged materials will be prevented from dispersing into the surrounding waters. The perimeter bund at the moment is constructed out of sheet piles, which we saw yesterday, but it will eventually be removed and replaced by a sloping stone revetment wall, which we have just seen, and this is planned to be done by 2008.

Audits are also carried out to ensure that the reclamation work areas are properly marked out to ensure navigation safety and that sand with very low silt content is used. The silt content in the sand is tested to ensure that it does not exceed permissible levels.

This shows samples of sand being taken aboard a vessel. The samples will be sent to a laboratory to check the silt content. The silt content used for the Pulau Tekong project is less than 1 per cent. This level of silt is very low and, together with the silt barricade, will minimize the silt flowing out of the reclamation area into the surrounding water.

Contractors are also required to comply fully with the requirements of various agencies, such as: the National Environment Agency, which may require measures to be taken to control water pollution and to monitor water quality; the Maritime Port Authority, which may specify requirements to ensure navigation safety, proper monitoring of currents, as well as to prevent any siltation and pollution in the port waters.

The works are carefully monitored. Contractors take regular photographic records; they conduct hydrographic surveys before, during and after completion of reclamation works. Sample materials ensure that the compliance with specifications. Contractors carry out regular silt, current, wave and water quality measurements. The contractors are also required to ensure that the nearby mangroves are surveyed regularly by independent experts to check on their health.

A very comprehensive water quality and current measurement programme has been implemented. These stretch from the west of Pulau Ubin towards the Straits of Singapore. Currents, silt, water quality and waves are all monitored. The changes in the hydrodynamic regime and the water quality aspects are closely tracked as the land configuration changes. Any adverse impact would be easily detected and mitigating measures taken, if necessary.

At the meeting with Malaysia on 13 and 14 August, Singapore had offered to carry out additional monitoring in Malaysian waters to allay Malaysia's concerns, even though we are confident that there is no reason for concern. Unfortunately, Malaysia has yet to respond to this offer.

Vast quantities of monitoring data have been collected. They correlate well with predicted values and show there is no major effect on the environment. The current velocities measured so far indicate that they will pose no difficulty for navigation, and silt levels measured meet water quality guidelines.

If you will allow me, I will go into some technical specifics. Let us look in greater detail at the current and silt monitoring data near Tanjung Pengelih, since Malaysia has expressed particular concern over this area.

Here you have a lot of squiggly lines, but this slide shows the recent current velocity near Tanjung Pengelih, as measured by the real-time current meters placed there. These measurements are taken over a typical, regular, two-week period. The horizontal axis shows the dates of the readings, from 12 to 28 June this year. The vertical axis shows the current speeds in meters per second.

It can be seen that the highest velocities occur for only three out of fourteen days, during the spring tide and for only a few hours each day. Even then, the maximum recorded current velocity of 1 m per second will not affect safe navigation at all. Quoting any percentage increases in the velocity of currents is in itself meaningless. It is the absolute figure which is critical and so a 1 m per second current velocity will not affect safe navigation.

The next chart shows the recent monthly silt concentrations, and again it will be seen that silt concentrations are far below what has been set as an acceptable level by the Malaysian-Singapore Joint Committee on the Environment.

We have done a lot of other monitoring and it shows no significant adverse impacts. There is no major change in fish yields from nearby fish farms and mangroves adjacent to reclamation works are thriving, as we can see in this slide.

As we can see in the presentation, Singapore has followed an exemplary planning and supervisory procedure in the execution of works at Pulau Tekong.

Let me now move on to reclamation at Tuas. Tuas is located at the western end of Singapore. This is the western Johor Straits. To the north is Malaysia's Port of Tanjung Pelepas, where reclamation works are being carried out for the phase 2 extension of the port.

The Tuas project in Pulau Tekong complied with stringent approval procedures with all conditions of Government agencies incorporated in the final scheme. Planning approval was granted in 1999. As in Pulau Tekong, extensive studies have been conducted to assess the impact of the reclamation works.

The findings of the studies do not indicate any adverse impact to navigation or any major impact on the environment. Again, international public tenders were called. The contract was to be carried out in two parts by two groups of international joint venture companies

What is the status of the reclamation works at Tuas now? The yellow areas indicate areas where sand has been filled above sea level. The orange areas have been filled with some 15 to 20 metres of sand. Reclamation is at an advanced stage, with most areas already substantially filled. Almost the full geographic extent of the final profile has been delineated, and again, any additional work to be done in the next few months should not increase the effects observed now.

As in Pulau Tekong, the Tuas reclamation project has adopted good international construction practices. The contractor must comply with all regulatory controls and put in place a monitoring programme as well as audit checks.

As you can see on the slide, various monitoring points have been placed all around the reclamation area. With this, we will be alerted if there are negative impacts which require prompt mitigating actions to be taken. Water quality, silt, currents and waves are all monitored. The ongoing monitoring shows that the current changes pose no problems for navigation. Siltation effects are not significant, and there is no adverse impact on water quality.

Audit checks are carried out, and very good quality sand is used. The average silt content here is only 0.45 per cent, which is very clean. There will be very little pollution of the surrounding waters from the sand filling works.

The mitigating measures selected for individual projects must be appropriate to the site conditions. While the construction method at Tuas is similar to that of Pulau Tekong, the Tuas project has adopted the use of sand bunds shaped in a special profile to control both the dispersion of fine silt as well as dredged materials.

Please allow me to elaborate on this a little bit. The slide shows the current velocities around the Tuas area. The red and yellow colours show the faster currents while the blue and green colours show slower and moderate current velocities. We can see that when the currents flow from the east to the west, the faster currents are confined largely within Singapore waters to the south – the colours red and yellow. Similarly, when currents flow from the west to the east, the faster currents remain to the south of Singapore, away from the Tuas area.

So the area south of Tuas View is a moderately low-current velocity zone. North-south currents hug the west coast. Any spread of silt from the sand fill will be confined to the west coast of Singapore and the waters to the east. To minimize any dispersion of silt, a sand bund is first constructed from the north to the south.

The Tuas bund will serve to cut off the dispersive effects of currents. It will contain the dredged materials within the reclamation areas, and will prevent the dispersion of any pollutants between the waters to the east and west of the reclamation. Bays are then created on both sides of the Tuas bund using sand fill, as indicated in yellow. The bays serve to provide sheltered waters for reclamation by cutting off the dispersive effects of currents. It will also contain the dredged materials, keeping them within the reclamation area.

The predominantly north-south current which hugs the west coast of Tuas would further restrict the movement of fine particles away from the west coast of Tuas.

Let us look at the satellite image taken on 24 May 2003. It shows the currents moving from the west to the east. This is Malaysia's Port of Tanjeung Pelepas at the mouth of Sungai Pulai. Reclamation is now being carried out for its phase 2 extension. We understand from Malaysia's UKM Report that the Port of Tanjeung Pelepas will eventually be expanded from 75 to 90 berths.

This (*indicating slide*) is an enlargement of the same image. Please note that any siltation from the Tuas reclamation is confined within Singapore waters. The slight siltation just south of the bund for the Tuas reclamation will disappear once the stone shore protection wall is built. Interestingly, note that the currents would carry any siltation and pollution from the north into Singapore waters. This is the silt plume coming down from the north into Singapore waters.

This slide shows the currents moving from the east to the west. We can see that the bays which have been formed have been successful in keeping the silt within the reclamation area and preventing it from dispersing. The north-south currents here have also kept the siltation close to the western shore of the reclamation area.

Mr President, members of the Tribunal, this presentation has demonstrated that for both the Pulau Tekong and the Tuas reclamation projects, Singapore has carried out a careful planning and supervisory process at every stage, which conforms to international standards. Extensive studies were done before carrying out reclamation works. These studies showed that there would be no significant adverse effects. There is ongoing monitoring of the works and the monitoring also indicates no significant adverse impacts. Monitoring will continue during and after the completion of these projects and, if necessary, any adjustments or mitigating actions will be taken by us.

That ends my presentation. Thank you for your time.

The President:
Thank you very much.

I now give the floor to Professor Koh.

Mr Koh:
Mr President, it is now 11.30. I would like to respectfully suggest to the Tribunal that we take a 20-minute recess, and I will speak immediately after the recess.

The President:
If that is acceptable?

We will take a 20-minute break now.

Short adjournment

The President:

Before beginning this session, I would like to take this opportunity of noting the presence of the Minister for Law and Minister for Foreign Affairs of Singapore, H.E. Professor Jayakumar.

This morning a statement was made by the Agent of Singapore at the beginning of the hearing. Further to consultations with the Agents of both parties, which occurred earlier this morning, it has been agreed that the verbatim record to be found in ITLOS/PV.03/02[3] of the hearing of yesterday afternoon will be modified accordingly.

I now give the floor to Professor Koh.

[3] See page 63 of the present minutes.

STATEMENT OF MR KOH
AGENT OF SINGAPORE
[PV.03/03, E, p. 21–27]

Mr Koh:
Mr President, Mr Vice-President, distinguished Judges, my learned friends, I would like to accompany the Tribunal through the diplomatic history of the present dispute. I will show that Malaysia's conduct has been inconsistent, dilatory and unreasonable. I will also show that Malaysia was never interested in finding an amicable solution to its concerns through consultation and negotiation. Instead, Malaysia's objective was adjudication. This is why Malaysia aborted the negotiating process after only one meeting.

I will then demonstrate to the court why there is no basis for Malaysia's claim to Point 20.

I turn to the diplomatic history. First, as my colleague and friend Mrs Cheong has just explained, Singapore's reclamation works are not a secret but have been in the public domain for a long time. Therefore, they would not have come as a surprise to Malaysia. Second, it was in January 2002, roughly 20 months after the reclamation works had started, that Malaysia raised for the first time questions about our reclamation activities.

May I request the members of the Tribunal to refer to folio 1 in your folder. When Malaysia did so, what it did was not to raise issues concerning navigation and the environment, but to revive a long-standing territorial claim to what Malaysia calls Point 20. It was only three months later, in April 2002, that Malaysia for the first time officially made allegations about the alleged adverse impact of Singapore's reclamation work on Malaysia's environment and navigation. This was also the first time that Malaysia protested Singapore's reclamation work at Pulau Tekong.

Third, I want to comment in some detail on Malaysia's note of 30 April 2002, because in her oral presentation yesterday Malaysia made great play of Singapore's refusal to consult in the face of our knowledge about the specific nature of the alleged harm that our reclamation works had caused to Malaysia.

I now invite the members of the Tribunal to turn to folio 2 in your folder. I ask you to look in particular at paragraphs 2 and 3. There, Malaysia makes unspecified allegations ranging from sedimentation to flood flow to degradation of flora and fauna to navigation, without saying what exactly the problem was, where it was taking place, and how Singapore's reclamation had caused these problems. Faced with this laundry list of vague allegations, covering virtually everything under the sun, Singapore naturally had no choice but to ask for details. How else was Singapore to respond? Statements by Malaysian leaders and senior officials did not shed any light on Malaysia's concerns, as they were also vague, often confusing and sometimes even contradictory.

Fourth, Mr President, contrary to what we heard yesterday, Singapore has always been prepared to address Malaysia's concerns seriously. As early as 21 April 2002, the Prime Minister of Singapore, Mr Goh Chok Tong, said:

> If a note comes from them [Malaysia] spelling specifically the areas which they have been hurt by our land reclamation, we surely must look into that seriously and look at the evidence.
>
> And if they're right, we have to rectify what we have done because what we do must not have adverse, negative effects on our neighbours.

We repeatedly asked Malaysia to provide us with information about its complaints. I refer you to folios 3 and 4 in your folder. During an official visit to Malaysia in March 2002,

Singapore's Deputy Prime Minister, Mr Lee Hsien Loong, said that if Malaysia had concerns, it could send us a note which should include specific facts and details to help Singapore understand Malaysia's concerns. On his part, the Deputy Prime Minister of Malaysia, Datuk Seri Abdullah Ahmad Badawi, said:

> It is their [Singapore's] right to continue with the reclamation works as they have been doing all this while. … what is important is that between them and us [us meaning Malaysia; between Deputy Prime Minister Lee and myself, there is an understanding.

What is this understanding? According to Deputy Prime Minister Badawi the understanding was that Singapore was willing to accept a report from Malaysia.

Fifth, despite this political understanding by our leaders and although Malaysia had promised to provide detailed reports and studies relating to its concerns as early as March 2002 they did not do so until more than one year later, on 4 July this year. Over the course of last year, 2002, the Malaysian Government had taken the stand that the studies and reports were still being prepared and would be submitted to Singapore on 2 April 2002, the Prime Minister of Malaysia said, and I quote his exact words, "Malaysia would submit a memorandum to Singapore to explain matters pertaining to land reclamation". On 16 November 2002 the Foreign Minister of Malaysia, Datuk Seri Syed Hamid Albar, said, "The findings are yet to be submitted to the Cabinet for review, let alone to the Singapore Government". On 29 June 2003, just five days before Malaysia's note of 4 July, the Foreign Minister of Malaysia said:

> Malaysia would engage the services of international maritime experts to study the impact of sea reclamation in Pulau Tekong, Singapore, before coming up with a concrete report. The appropriate thing to do now is to submit a concrete report … to Singapore.

In other words, Malaysia had, from the highest level of its Government, repeatedly assured Singapore that as soon as it had completed its studies it would provide Singapore with a report. Singapore waited for over a year and we are very disappointed that all this time Malaysia had in its possession some of the reports of its technical studies. On 4 July when the reports were finally given to Singapore, it was accompanied by a summons to court.

Sixth, Singapore has never ruled out negotiations with Malaysia. Contrary to what the distinguished Attorney-General of Malaysia said yesterday, Singapore has never informed Malaysia or taken the position that for a meeting of senior officials of both countries to take place, Malaysia must first prove its contentions to the satisfaction of the Republic of Singapore. These allegations are fiction. Singapore never said them. What Singapore had repeatedly requested was information and details relating to Malaysia's concerns. Without such details, there would not be a basis for constructive consultation and negotiation.

Seventh, when Malaysia finally handed over its reports on 4 July this year, Malaysia also gave notice that it was initiating arbitration under Annex VII of UNCLOS. Instead of negotiations, Malaysia gave Singapore a 14-day ultimatum that, unless Singapore complied with a list of its demands, including the immediate suspension of works, it would apply to ITLOS for the prescription of provisional measures.

Eighth, Singapore replied to Malaysia on 17 July stating that Malaysia's initiation of arbitration proceedings was premature because the two Governments should first attempt to find an amicable resolution of their differences through negotiation. We do not understand how Malaysia had come to the conclusion in its note of 4 July 2003 – "the dispute cannot be

settled by negotiation and that there is no basis for a further exchange of views" – when there had been no negotiations prior to 4 July 2003.

In addition, Singapore provided to Malaysia tender documents for the reclamation works at both Pulau Tekong and Tuas and a summary report for each of those two reclamation works. These summary reports are found in annexes 3 and 4 to our Response. They were commissioned by Singapore to provide an overview of the many studies which had been undertaken and of the controls which had been put in place by Singapore for the reclamation projects. Singapore also undertook to make available additional material to Malaysia and to afford Malaysia a full opportunity to comment on the works in question. Singapore noted that Malaysia's reports had provided, for the first time, a basis for the two sides to discuss Malaysia's concerns and we invited Malaysia to meet us as soon as possible. Finally, Singapore respectfully pointed out to Malaysia that both countries are obliged, under article 283 of UNCLOS, to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".

Ninth, Malaysia accepted Singapore's offer to meet. The two countries had a good meeting in Singapore on the 13 and 14 August this year. Singapore gave three very detailed technical presentations on how we planned and implemented our reclamation works, including the precautions we took and the ongoing monitoring studies. The materials contained in the records of that meeting are contained in annex 5.

On the first day of the Singapore meeting, the two sides sought clarifications on each other's reports. Singapore provided, on the second day, responses to such clarifications as it could. It indicated that other clarifications would be offered in additional reports which it would and did provide shortly thereafter. In response to a complaint by Malaysia that the continuous monitoring was carried out only on the Singapore side of the Straits of Johor. Singapore offered to carry out monitoring in Malaysian waters. While I agree with Professor Schrijver that the sovereignty of a coastal State within its territorial sea is not absolute, I am confident he will agree with me that Singapore cannot carry out monitoring in Malaysia's territorial sea without her consent. Malaysia never responded to our offer and I wish today, in this Tribunal, to repeat this offer, to monitor in Malaysia waters.

The Singapore meeting made a promising start in identifying the issues of concern to Malaysia and the areas of disagreement between us. Singapore proposed that the two countries should meet again soon, this time in Malaysia, in order to enter into substantive negotiations. Singapore also proposed that further information be shared expeditiously and that technical working groups be established to narrow the gap between our technical experts. Pursuant to the requests that both sides made at the Singapore meeting for additional information, Singapore and Malaysia did, in fact, exchange such additional information after the Singapore meeting.

At the Singapore meeting, Malaysia reiterated its demand that Singapore suspend its reclamation works. We explained carefully to Malaysia that the suspension of works was a very serious matter for Singapore and that it would be justified only if there is clear evidence of serious and imminent damage. Singapore had hoped that after Malaysia has had an opportunity to study the reports provided by us, Malaysia would share our view that no purpose would be served by suspending the works at this stage.

Mr President, the two countries are in agreement that the Straits of Johor is a shared water body and because it is a shared water body, each country has a part to play in preserving the health of this common waterway. Just as Singapore is obliged to protect the marine environment of the Straits of Johor, Malaysia too has an equal obligation to ensure that the manner in which it conducts its activities at Tanjung Langsat (where forest had been cleared for an industrial estate), at Pasir Gudang (or sometimes called the "Port of Johor"), at the Port of Tanjung Pelepas (the discharge of untreated domestic and industrial wastes into

the Straits and the opening of the causeway, a land link joining Singapore and Malaysia) do not adversely impact the Straits.

Tenth, Singapore was glad that Malaysia appeared to be willing to work with Singapore to find a negotiated settlement. A day after the Singapore meeting, I received a kind letter from the Head of the Malaysian delegation, my good friend Tan Sri Ahmad Fuzi, dated 15 August 2003. I wish to quote one paragraph from that letter:

> I am sure that you would agree that the complexities of the issues that we had to deal with at Singapore … were not easy to resolve. Regardless, it is encouraging that we had agreed to seek an amicable solution to this issue. Hopefully, the end result would be one that is mutually acceptable to both Malaysia and Singapore …

I was overjoyed when I received this letter from my good friend and replied to him on 21 August 2003 stating that Singapore was "pleased that we had the opportunity … at the … talks, to exchange views and begin the process [of negotiation] … It was a good start to the process".

I also reiterated in my letter Singapore's willingness to have her experts clarify or explain our reports at our next meeting, which I had proposed that Malaysia should host in its new beautiful capital of Putrajaya. Everything, Mr President, had pointed towards a commitment by both parties to resolve this matter amicably through negotiations.

Eleventh, however, Malaysia suddenly shifted its position and closed the door to further negotiation. One day after sending Singapore's technical reports to Malaysia, we received a note from Malaysia dated 22 August which repeated the demand, among other things, that Singapore immediately suspend its reclamation works, failing which Malaysia would call off the negotiations and apply to have provisional measures prescribed against her. Surprisingly, Malaysia's note made no mention of the technical reports which Singapore had sent to Malaysia just one day before. Singapore replied on 2 September 2003 that it was disappointed that Malaysia had claimed "that 'the absence of a cooperative approach up to this time arises from the unilateral conduct of Singapore'". Singapore urged Malaysia to carefully consider the materials that we had provided her with and we stated, and I think this is a very important paragraph from our note:

> If, having considered the material, Malaysia believes that Singapore has 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, to deal with the adverse effect in question.

Singapore reminded Malaysia that both countries shared the Straits of Johor, and that while Singapore had conducted its reclamation works in a scrupulous manner, Malaysia's own reclamation and other activities have already observed transboundary impacts.

I draw the Tribunal's attention to a satellite photograph which Mrs Cheong earlier showed to you, showing a plume of silt stretching from the Malaysian port of Tanjung Pelepas into Singapore's territorial waters. Singapore sought an assurance from Malaysia that its activities would not cause any significant harm to the environment of the

Straits or to Singapore's legitimate interests. I regret to say that to date Malaysia has not yet responded to our request.

The purpose of the Singapore meeting was to help Malaysia inform Singapore of the substance of her complaints so that we would be able to asses them and to respond to them appropriately. Accordingly, Singapore asked for information with respect to some of Malaysia's complaints; for example, alleged navigational and berthing difficulties at Malaysia's naval base at Pularek and the conditions of her mangrove, seagrass, corals and other flora and fauna. We did all this in order to enable us to determine whether our activities had contributed to the problems and, if so, to take the appropriate steps to mitigate them. Malaysia did not respond, notwithstanding the fact that it had relevant experts in its delegation at the meeting, and Malaysia has not responded since.

It is clear from the facts I have recited that Malaysia was only interested in seeking provisional measures and had no intention to carry out good faith negotiations. Singapore has come to the regrettable conclusion that Malaysia agreed to meet Singapore on 13 and 14 August in order to go through the motions of complying with article 283 of UNCLOS. This impression is reinforced by Malaysia's abrupt decision to abort the negotiations. These are not the actions of a party that has a genuine interest in seeking an amicable solution through consultation and negotiation.

Mr President, I now ask the Tribunal's permission to address a different issue, and that is Malaysia's territorial claim to a sliver formed by Points 19, 20 and 21. Singapore's position on this claim is simple. Point 20 is within our territorial waters. It is within our territorial waters not because Singapore says so but because it lies within Singapore's side of the sea boundary as defined by two international treaties binding on Malaysia.

As the Tribunal can see from the diagram, Point 20 and Points 19 and 21 are three geographical coordinates and form a sliver that intrudes into Singapore's territorial sea. These geographical coordinates were contained in a map published unilaterally by Malaysia in 1979 purporting to define Malaysia's territorial waters and continental shelf.

Singapore has prepared a chronology of the key events regarding Point 20. I request the Tribunal to look at folio 12 in your folders. I would like to highlight four points.

First, this is a long-standing dispute between Malaysia and Singapore dating back to 1979. Singapore has consistently rejected Malaysia's unilateral claims contained in that map.

Second, in 1927, the Straits Settlements and the Sultanate of Johor concluded a territorial waters agreement that defined an agreed boundary in the Straits of Johor. This treaty is binding on Malaysia and Singapore, as successor States of the Straits Settlements in the case of Singapore, and of Johor, in the case of Malaysia. Point 20 in the 1979 map is clearly within Singapore's territorial waters under this 1927 treaty.

Third, even if there were some basis for Malaysia's claim to Point 20, which we submit there is not, Malaysia's claim was superseded by a new boundary agreement which was signed and ratified by the two countries in 1995. The 1995 agreement was intended to replace the 1927 agreement. The two countries held a total of seven meetings over a period of fourteen years before they concluded this agreement. Throughout this long period of negotiations, Malaysia never raised its claim to Point 20.

Fourth, the diagram on your screens shows the 1995 agreed boundary in the Straits of Johor. Points 19, 20 and 21 have been superimposed on this map. As you can see, the area around Point 20 is well to the north and east of the western end-point of the 1995 agreement; in other words, inside Singapore's territorial waters under this agreement, which is binding on Malaysia.

In conclusion, Mr President, Singapore's response to Malaysia on her claim to Point 20 is very simple. First, Malaysia's claim is a claim to territory. It is a claim that raises an issue which is irrelevant to an application for provisional measures. Second, Malaysia's

claim is inconsistent with the agreed sea boundaries between Malaysia and Singapore contained not just in one but in two binding treaties, the treaties of 1927 and 1995. Third, nothing in UNCLOS, certainly not articles 15, 74 and 83, can confer any rights on Malaysia's spurious claim. There is nothing in UNCLOS which requires a coastal State to stop its development on the basis of any and every spurious claim. The case of Nigeria and Cameroon is based upon its particular facts and has no relevance here.

Yesterday, Malaysia's counsel described Singapore's land reclamation around Point 20 as a "land grab" by Singapore. I beg to disagree. I would say, on the contrary, that Malaysia's claim to the sliver formed by Points 19, 20 and 21 is an attempt by Malaysia to steal a part of Singapore.

Thank you, Mr President.

The President:
Thank you.

I now give the floor to Professor Reisman.

STATEMENT OF MR REISMAN
COUNSEL OF SINGAPORE
[PV.03/03, E, p. 27–36]

Mr Reisman:
Mr President, members of the Tribunal, it is a privilege to address this distinguished Tribunal on behalf of Singapore in a case of such importance to international law.

If I speak to you today without great emotion, I hope you will appreciate that it is because of respect for this Tribunal and the importance and seriousness of the issue and it does not reflect in any way a lack of conviction on my part,

My first assignment today is to address issues of jurisdiction and admissibility. Yesterday, you were urged to ignore the limitations which UNCLOS established as part of your regime, for reasons familiar to anyone who has ever sat on an arbitration tribunal, and for some rather innovative reasons as well, like the contention that you should not make this Tribunal subordinate or a cub reporter or, in the curious words of the Agent for Malaysia, a back-stop to an Annex VII tribunal.

We all know that it is not a question of being subordinate or superordinate. Each international tribunal is created by States and has its own competence and jurisdiction. Those who are elected to the tribunals have a legal duty and a debt of personal honour to respect the limits that have been set on their jurisdiction. Singapore has every confidence that ITLOS, as the guardian of the integrity of the disputes settlements procedures of the Law of the Sea Convention, will itself be deeply concerned about jurisdiction and admissibility, issues that go to the essential legitimacy and the future of international adjudication.

Singapore believes that, on the merits, Malaysia's request for provisional measures should be dismissed, but I hope to show that ITLOS should not reach that question but should, instead, reject at the very threshold of the dispute Malaysia's request for provisional measures on the grounds of lack of jurisdiction and inadmissibility as well as because of exploitation and violation by Malaysia of fundamental prescribed procedures.

Pending the constitution of the tribunal selected by the parties, ITLOS "may prescribe … provisional measures … if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction". That is article 290, paragraph 5.

There is no question that Singapore and Malaysia have, by virtue of adhering to UNCLOS, consented to the jurisdiction of an Annex VII tribunal, but under the Convention, the maturation of that jurisdiction is contingent upon the fulfilment of certain legal requirements. Until those requirements, those prerequisites, have been fulfilled, the latent jurisdiction of an Annex VII tribunal, and derivatively of ITLOS in this procedure, has not matured. If those prerequisites have not been fulfilled, then the Annex VII tribunal cannot be considered to have *prima facie* jurisdiction and accordingly ITLOS cannot issue provisional measures.

May I turn to two of the most important of those prescribed prerequisites with which Malaysia has not complied?

Article 283, whose title is "Obligation to exchange views", provides in its first paragraph that

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

This is, as the title says, an obligation, which is confirmed by the imperative verb the drafters selected – the parties "shall".

Our colleagues from Malaysia have dealt with this provision rather lightly. Analytically, the provision contemplates four stages: first, a dispute must arise; second, the parties must proceed expeditiously to an exchange of views; third, at a certain point, a party is entitled to determine, subject to review by ITLOS, that the possibilities for reaching agreement have been exhausted; and fourth, ITLOS determines whether the requirements of article 283 have been met. If it determines that they have not, it orders the parties to fulfil their obligations under the provision. The proceedings are terminated pending demonstration that the obligation of exchange of views has been fulfilled. This is simply a textual deconstruction, or unpacking if you will, of article 283.

In making this last determination, a tribunal would address three critical questions: first, whether a real effort has been mounted by the party seeking to initiate a third-party decision to exchange views and reach a settlement; second, whether the defendant has been responsive to the initiatives; and third, whether there is a plausible chance for a successful settlement of some or all of the differences.

When does the obligation under article 283 begin? The article says "when a dispute arises", which unfortunately does not tell us anything particularly meaningful. If the obligation to exchange views comes into operation when a party has started an arbitration or adjudication, the article would add nothing and would not have been included in the Convention. If the obligation to exchange views is to mean anything, it must come into operation some time before then.

Yesterday, it became clear that a key jurisdictional question is precisely when it does. Some enlightenment as to the moment when this occurs may be gained from looking at other sections of UNCLOS that impose a duty to provide certain information to other stages: Article 198, for example, dealing with "Notification of imminent or actual damage", or article 206.

Here, as elsewhere in the Convention, the obligation to share information only commences when a State in whose territory an activity is being planned has "reasonable grounds" for believing that the activity is going to harm the marine environment of another State. The normative system is that as long as a State has taken appropriate steps to establish that planned activities within its jurisdiction or control will not be injurious to other States or the marine environment, it has no obligation *vis-à-vis* other States to provide information, unless another State itself provides credible information that the planned activities could be injurious.

The burden on the party seeking suspension of a lawful activity in another State is great. In the Convention on the Non-Navigational Uses of International Watercourses, which many members of this bench participated in negotiating and seeing through the diplomatic conference, article 18 deals with a situation in which a watercourse State is aware that measures are being planned by another State and believes that they may have a significant adverse impact upon it, and it provides for the application of the protective regime of article 12 – a very stringent regime, which includes suspension. In your folder at tab 14, you will find the critical paragraph in the International Law Commission's commentary. With your permission, I would like to take you to it. The commentary says:

> The words 'apply the provisions of article 12' should not be taken as suggesting that the State planning the measures has necessarily failed to comply with its obligations under article 12. In other words, that State may have made an assessment of the potential of the planned measures for causing significant adverse effects upon other watercourse States and

> concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a watercourse State to request that the State planning measures take a 'second look' at its assessment and conclusion, and does not prejudge the question whether the planning State initially complied with its obligations under article 12.

Now this is critical:

> In order for the first State to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State must have 'serious reason to believe' that measures are being planned which may have a significant adverse effect upon it. The second is that the requesting State must provide a 'documented explanation setting forth its reasons'. These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. 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.

The burden here, as in our case, is very heavy.

Any departure from the regime that was established in UNCLOS or in cognate regimes would create a situation of international gridlock, in which third States, on the basis of no more than the flimsiest assertions and unsubstantiated apprehensions, could simply require a State to open its archives and even stop or suspend an activity within its jurisdiction or control which that State had responsibly assessed and concluded would not harm others, just on the basis of an unsubstantiated apprehension. Governments would not be able to function.

The obligation of article 283 commences for a State when a third State provides sufficient information, which is specific, which it has collected and analyzed, that substantiates its apprehension that activities within the other State may precipitate harm to it.

I turn now to the third stage of article 283, and that is when a State may lawfully conclude that the exchange of views can no longer reasonably lead to settlement. Here again, treaty interpretation, no less than respect for those who drafted those words, requires us to attribute some meaning to this.

The provision would be meaningless if all that was required was a pharisaical and formalistic single exchange of views, after which the State that believed that its interests would be better served by third party decision could then proceed directly to arbitration or adjudication. Similarly, the provision would be frustrated, indeed, rendered entirely meaningless, if one State could surreptitiously use the obligation to exchange views as a way of rigidly holding to its own position while securing the surrender of information by the other State, all the time intending to go directly to third party decision as soon as the inconvenient obligation in article 283 could be disposed of. This would constitute bad faith and abuse of rights, and would certainly violate article 300 of UNCLOS. If such a gambit were permitted, it would deter States in the future from participating in good faith in the procedures contemplated by article 283.

Obviously, this process can also be conducted in bad faith by an obdurate party which wished simply to delay and drag things on. So a legal regime requires that there be a moment of termination. A point may come beyond which no purpose is served by further exchange of views. In the *Southern Bluefin Tuna Cases* you held that "a State Party is not obliged to pursue procedures under Part XV … when it concludes that the possibilities of settlement have been exhausted". This is, by its nature, a determination ultimately made by ITLOS.

Ambassador Koh has recited the history of this case up to this point. The reclamation plans, as Mrs Cheong has explained, have long been matters of public notice and there was, by any standard, a rigorous internal review. Sir Eli contended yesterday that the environmental assessment which a State must make must be public, but that is not a requirement, nor is there any implication that an assessment that is conducted rigorously, and certainly not secretly, violates UNCLOS. The Sellafield case within the United Kingdom, which he cited, does not help Malaysia, for that was not a procedure designed for Ireland; Ireland simply took advantage of it and sent a 50-page memorandum, something which Malaysia could have done all during this period but did not.

The actual works commenced in 2000, and could hardly have been more public. Our colleagues from Malaysia have dwelt at length on how geographically close the States are in this area. Only beginning on 28 January 2002 did Malaysia begin to issue a series of third party notes invoking initially the Point 20 issue, and then, as they warmed to the task, that in the most general terms, the reclamation works breached international law, were not preceded by environmental impact assessments and that the activities "were likely to cause injury, if not already injurious to Malaysia." On 30 April 2002, what Ambassador Koh has called a "laundry list" of allegations at Pulau Tekong was sent.

Mr President, members of the Tribunal, I regret that some very misleading statements were made yesterday about the degree of substantiation of Malaysia's various communications during this period. I have reviewed all the notes which ITLOS has in documents submitted by Singapore, and I can state that there was absolutely nothing other than the allegations I have just referred to. Nothing.

As for the claim about Point 20, I cannot say that I have seen every note since 1979, but I have seen quite a few, and it was only yesterday, when we all listened in fascination to Professor Crawford's ingenious explanation of why, treaties notwithstanding, Malaysia has a reasonable claim to that tiny sliver piercing deeply into Singapore's territorial waters, that we heard any effort at substantiation of a claim that, with respect, I still view as quite absurd.

None of the notes provided any substantiation whatsoever.

On 14 May 2002, Singapore confirmed in a note its understanding that Malaysia would soon send another note, containing details of its concerns over the reclamation activities. As late as 29 June 2003, Malaysia's Foreign Minister was quoted as saying that the appropriate thing to do now was to submit to Singapore a concrete report on such incidents, but none of the notes included or attached a single study or other report or anything substantiating Malaysia's allegations.

Singapore, for its part, responded to each of these notes, asking Malaysia to provide details and stating, in a note of 28 August 2002, that the details that Malaysia had promised "should provide specific facts and details to enable the former [Singapore] to study any such concerns".

Mr President, members of the Tribunal, words are cheap, and allegations are comprised of words. Anyone can make allegations, and a party repeating its allegations again and again can become more and more convinced of their veracity with each reiteration, and angrier and angrier that the party against whom the allegations are made tells it that it will not treat them until there is some substantiation. It is not difficult to imagine people in the Malaysian Foreign Ministry fuming that Singapore is, as we were told yesterday, behaving arrogantly.

Was Singapore behaving arrogantly? Do entirely unsubstantiated allegations about an activity undertaken within another State's jurisdiction – especially one that has been carefully examined beforehand for its possible effects – create an obligation on the part of that other State to drop everything, provide information, let alone to suspend the works?

Is the threshold so low in international law that the most general and unsubstantiated allegations can activate such an obligation? Malaysia had to submit a concrete report. Mr Syed Hamid, Malaysia's Foreign Minister, got it entirely right on 29 June 2003. Malaysia had to submit a concrete report. It was, as he said, the appropriate thing to do. His counsel, Professor Crawford, yesterday got it entirely wrong in his attempt to justify Malaysia's demand with respect to Point 20. Since when can a State publish a map claiming an area held by another State, and on the basis of the map – and nothing else – insist that it has a claim that requires the other State to stop using or otherwise developing its territory? I know of no case in which a court took such an argument seriously.

Malaysia itself, as the Attorney-General observed, used exactly the opposite argument, with success, in the International Court of Justice in *Pulau Ligitan and Pulau Sipadan.*

All during this period Malaysia did not even try to meet the obligation of article 283. Only when Malaysia presented Singapore with an Annex VII arbitration Statement of Claim did it finally provide what it claimed to be "reports" in which were set out some details upon which its allegations purported to rely. When Malaysia finally provided these reports, it was more than ten months after Malaysia first received them from its consultants, and more than fourteen months after it first raised its concerns with Singapore. So it is particularly puzzling that Malaysia did not present them to Singapore earlier, or that Malaysia's Foreign Minister, as late as 29 July 2003, did not even know of their existence, and it was only yesterday that Malaysia made an effort to explain its claim to Point 20, which means that on 4 July 2003 the obligation of article 283 came into effect and jurisdiction could not have matured as of that date. It was only on that date that Malaysia identified its precise concerns and provided the information that finally enabled Singapore to respond under article 283.

Mr President, members of the Tribunal, has Malaysia now complied with the obligation of article 283? Ambassador Koh has just shown that Singapore began the requisite process under article 283 by sending material to Malaysia responding directly to its concerns and inviting a meeting. That meeting took place on 13 and 14 August. The record of the meeting has been submitted to you. At that meeting Singapore provided detailed explanations responsive to Malaysia's allegations, and in response to questions that arose at that meeting, additional material was provided.

In terms of the law analyzed, Singapore submits that Malaysia's extended failure to provide data substantiating its allegations and its refusal to exchange views, especially after it had solicited more information from Singapore, but then refused to respond to it, constitute a failure to comply with the obligations of article 283 of the Convention. As a result, the jurisdiction of an Annex VII tribunal still has not matured and derivatively, ITLOS should not prescribe provisional measures.

Mr President, I noticed that it is one o'clock, we started at 10.15. In fifteen minutes I could conclude another section of the material that I had hoped to present.

The President:
Please go ahead.

Mr Reisman:
I would like to turn to Malaysia's failure to comply with article 281 and its consequences for jurisdiction. There are specific situations in which a customary international law obligation to negotiate is imperative. One of them, which is particularly relevant to the case at bar, concerns situations in which two States both allege different and potentially incompatible rights in the same resource. In *Fisheries Jurisdiction* the International Court [of Justice] found that Iceland had certain "preferential fishing rights" but the United Kingdom had

> traditional fishing rights" in the same area. Neither of those rights, according to the Court, was absolute. The Court found the obligation to negotiate "flowing from the very nature of the respective rights of the parties.

A scholar has synthesized this as a matter of customary international law, and I believe you have it in front of you. I will not read it. I submit it to you as an appropriate synthesis of the reasoning of the Court and the obligation to negotiate in circumstances in which there are two legal rights and it is difficult to determine which one is appropriate in the context. I do not believe that one could find a more appropriate confrontation of alleged incompatible rights than in the case we are considering.

After Singapore's invitation to Malaysia to resolve the differences which Malaysia had raised in its Statement of Claim was accepted by Malaysia and meetings took place in Singaporet, a consensual process of negotiation had commenced. Article 281, paragraph 1, of the Convention provides:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

Singapore participated in the process that was commenced in the utmost good faith and provided a substantial amount of information, some of which Malaysia had explicitly requested. After the meetings, which representatives of both States acknowledged were promising, as Ambassador Koh told us this morning, Singapore provided substantial additional information which Malaysia had asked for. As a legal consequence, both States had embarked upon a course of negotiation under article 281 in an effort to arrive at an amicable solution of the dispute between them.

Now, Singapore does not contend that once negotiations are undertaken there is an international legal obligation to agree on a composition of differences. The Permanent Court [of International Justice] in *Railway Traffic* said, "an obligation to negotiate does not imply an obligation to reach an agreement". But there is an obligation to pursue negotiations until it is clear that they cannot succeed. As the Permanent Court [of International Justice] said in the same case, the parties have a duty, "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements".

Negotiation imports minimal open-mindedness. The commentary to the Law of the Sea Convention, the *Virginia Commentary*, observes very wisely:

> A party should make reasonable proposals for the settlement of a dispute. It should not, however, present ultimatums to the other party, or demand that it unconditionally surrender its point of view.

In *North Sea Continental Shelf*, the International Court [of Justice] stated the customary law as follows:

> The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a

> certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

In *North Sea Continental Shelf*, negotiations had gone on for two years, 1965 and 1966, and the Court concluded that the requirement of negotiation had been fulfilled. In the *MOX Plant Case*, Ireland made requests for information from 1994 to June 2001, and in its letter of 30 July 1999 drew the United Kingdom's attention to the dispute under UNCLOS. In the present case, one set of negotiations took place on 13 and 14 August. Malaysia arrived with ultimatums and continued to present them. Singapore indicated its position and after the meeting provided the specific information which Malaysia had requested. Even on the very difficult issue of suspension of reclamation works Singapore in a subsequent third party note, which the Attorney-General and Ambassador Koh have read to you, showed the maximum flexibility required by international law in stating that if Malaysian data – which was yet to be presented and even now not presented – indicated a necessity for suspension, Singapore would suspend. Contrast that with the *MOX Plant Case* where ITLOS held that the possibilities of settlement were exhausted when, among other things, the UK refused to indicate willingness to suspend authorization that would prevent the operation of the MOX plant pending resolution of the dispute.

At the meetings in Singapore, it became clear that much of the dispute turned on complex scientific data and its interpretation and differences in the scientific advice being given to each of the parties. Singapore proposed that the scientific experts that each party had consulted meet to determine if they could submit a common position or, at least, indicate where they differed but, at the end of the first phase of negotiations, without even studying the material that had been presented, the head of the Malaysian delegation said in virtually the precise words that he had come into the meeting with: "Singapore needs to temporarily suspend its reclamation activities, in particular the activities involving the extension or completion of reclamation in the eastern sector of the Straits of Johor." This was hardly open-mindedness and flexibility as required by international law. Moreover, Malaysia, shortly after receiving the additional information which it had requested, abruptly abandoned the negotiations and brought this action.

From a legal standpoint, Malaysia commenced a process of negotiation under article 281. Singapore, as part of the negotiations, made materials available it would not otherwise have had to. Malaysia took the material and then disrupted the negotiations before there was a sufficient opportunity to explore whether those negotiations, if conducted in good faith, could produce an amicable settlement of differences, including resolving the question of the suspension of works. Having selected a mode of dispute resolution, Malaysia could not unilaterally terminate it without the consent of Singapore before the negotiations had an opportunity to achieve a settlement.

I want to emphasize that negotiations do not necessarily preclude a request for suspension of activities that are the subject of the negotiation while the negotiation is proceeding, but when one party, in this instance Malaysia, has agreed to negotiation and the other party, in this instance Singapore, has agreed that it will suspend the activities if Malaysian data show that the activities in question will cause it injury, the forum for making such a determination has been selected and it is negotiation. Malaysia cannot then unilaterally withdraw from the negotiations on, in particular, the issue of suspension until there has been a reasonable opportunity to resolve the issue of whether the facts require a suspension. In the *MOX Plant Case*, as will be recalled, ITLOS held that the possibilities of settlement were exhausted when the United Kingdom refused to do exactly what Singapore was offering.

Singapore submits that Malaysia's actions in violation of article 281 and general principles of good faith negotiation mean that the *prima facie* jurisdiction required for the prescription of provisional measures has not matured. Accordingly, ITLOS should reject Malaysia's request for provisional measures and direct Malaysia to resume the negotiations it abruptly aborted.

Mr President, this would be a convenient place for me to stop and I thank you for the extended time.

The President:
Thank you, Professor Reisman, very much.

We will now take a break for lunch and we will resume the session at 3 this afternoon. Then we will hear further from the speaker from Singapore. The meeting is adjourned.

Adjournment at 1.10 p.m.

PUBLIC SITTING HELD ON 26 SEPTEMBER 2003, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

For Malaysia: [See sitting of 25 September 2003, 10.00 a.m.]

For Singapore: [See sitting of 25 September 2003, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 26 SEPTEMBRE 2003, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Pour la Malaisie : [Voir l'audience du 25 septembre 2003, 10 h 00]

Pour Singapour : [Voir l'audience du 25 septembre 2003, 10 h 00]

The President:
I now give the floor to Professor Reisman. Please continue.

Argument of Singapore (continued)

STATEMENT OF MR REISMAN
COUNSEL OF SINGAPORE
[PV.03/04, E, p. 7–11]

Mr Reisman:
Thank you, Mr President and members of the Tribunal. Before I read the issues of article 281 and 283, I would like to simply emphasize that the issue here is not one of technicalities. A party agrees to a process of negotiation, secures vital information, then abruptly aborts the negotiation and seeks to move to another forum. Article 300 says:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

Nor are the issues here negligible. Negotiation is a primary mode of peaceful resolution of disputes. If a State is permitted to abuse the process in this fashion other States will be deterred from resorting to negotiation and participating in it, so there is much at stake here that goes beyond this particular case.

Mr President and members of the Tribunal, Singapore submits that ITLOS should reject the request for provisional measures on grounds of lack of *prima facie* jurisdiction and inadmissibility for lack of specificity under ITLOS Rule 89 but Singapore has no doubt that the requested provisional measures should be rejected on the merits as well and we will demonstrate that shortly.

I would like to take a few brief minutes to turn to a consideration of the law of provisional measures before yielding to Professor Lowe. Singapore understands the law of provisional measures as follows: the claimant must demonstrate by the best measures available that the respondent's current or impending actions threaten harm to itself or serious harm to the marine environment. The claimant must, moreover, demonstrate cumulatively the urgency, irreparability, and incompensability of that projected harm, specifically that the harm will occur before a final judgment or award or, as in the present case, before the constitution of an arbitration tribunal seized of this case, that the harm if it occurs is irreparable and that the harm, if it occurs, is incompensable. If the claimant demonstrates these cumulative elements the Tribunal may, in its discretion, prescribe provisional measures unless the respondent demonstrates that the provisional measures that have been requested will cause greater harm to it than the possible harm that its activities, if continued, would cause to the claimant.

If the claimant does not demonstrate these cumulative elements of the harm, then the Tribunal will not prescribe the provisional measures requested but may, in its discretion, prescribe measures directing the respondent to conduct its activity in ways that do not harm the claimant and/or the marine environment in ways violative of international law.

I would like to elaborate briefly on some of these principles as they relate to this case. A demonstration of urgency, of course, is one of the paramount requirements. Judge Wolfrum has written, "Such urgency must exist and the party requesting such provisional measures must establish such existence", and the International Court [of Justice] has repeatedly emphasized that measures will only be issued if the State seeking them establishes urgency.

The International Court [of Justice] has said in the *Aegean [Sea Continental Shelf]* case that the essential condition for provisional measures "presupposes that the circumstances

of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings". In cases in which death penalties are imminent, the urgency requirement has been deemed fulfilled because the action in question, capital punishment, was irreparable. The prospect of armed conflict is treated similarly. In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court found provisional measures justified because, in their absence, former and continuing armed activities – which caused the deaths of persons in the disputed area – threatened to aggravate or extend the dispute. But the provisional measures in a case like the *Arrest Warrant* did not win the support of the Court for provisional measures. The Court said:

> It has … not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures.

Article 290, paragraph 5, heightens the urgency requirement further because of the different contingencies for provisional measures contemplated by paragraphs 1 and 5, respectively. Judge Treves, in the *Southern Bluefin Tuna Cases*, said:

> The requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of article 290 as regards the moment in which the measures may be prescribed. In particular, 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.

Judge Mensah in the *MOX Plant Case* said:

> … in dealing with the possibility of prejudice to rights or serious harm to the marine environment, a court or tribunal operating under paragraph 5 … must bear in mind that it is not within its purview to consider, let alone to decide, whether there is the possibility of such prejudice or harm 'before a final decision' is reached on the claims and counter-claims of the parties in the dispute. That 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*."

The applicant must demonstrate then that the urgency is such that it would be impossible for the claimant to wait for the constitution of the tribunal that will ultimately make the decision. In the present case the Annex VII tribunal must be constituted no later than 9 October – less than two weeks from now. Now this has been mocked by Malaysia but the language of UNCLOS and the intentions of the drafters could hardly be clearer. The *Virginia Commentary* explains: "Fear was expressed that the Law of the Sea Tribunal might interfere unnecessarily in some cases, asserting its allegedly superior authority over other tribunals."

Professor Crawford yesterday developed scenarios of weeks, indeed months, elapsing before an Annex VII tribunal is constituted. Mr President and members of the Tribunal, those who undertake the task of international arbitrator are not irresponsible and one of the first questions posed to a candidate is whether he or she has the time for the important function

about to be entrusted. In any case, the tribunal as constituted, when it is constituted, is clearly reflected in paragraphs 73, 77 and 81 of your decision in the *MOX Plant Case*.

Because the elements of urgency and irreparability are often speculative, it is important to assess the credibility of the party seeking provisional measures. A number of indicators are available and some would appear to be highly relevant to the case at hand. Urgency – and the credibility of a claim of urgency – imports prompt action by the party claiming it. A claimant is hardly in a position to assert that it seeks "urgent relief" if that claimant has had access to the facts of which it complains but has elected, for whatever reason, not to act for an extended period of time. If the matter is truly one of urgency, did the claimant bring its claim promptly or did it postpone the matter for weeks, for months, for years? The longer the postponement, the less credible the claims of urgency.

Singapore submits that as a corollary where a claimant could have applied for provisional measures within an extended period of time but has delayed seeking that relief to the point where hypothetical provisional measures would be even more burdensome and costly for the respondent, the request should be denied. The claimant's delay in the face of full knowledge, in an equitable proceeding such as this, should estop such belated assertions of urgency.

Even when a claimant identifies the requisite event and establishes that it will be likely to eventuate within the limited time period described, the claimant must demonstrate a real risk of irreparable harm. The action in question must threaten to precipitate not simply harm, which is by its nature reparable through ordinary remedies, but significant and irreparable harm and it must be highly probable and not merely speculative. In *Passage through the Great Belt*, the International Court [of Justice] found that proof of the damage alleged had not been supplied and, therefore, refused to indicate interim measures.

Even if the actions which the claimant seeks to suspend are found likely to cause harm within the prescribed period, provisional measures will not be prescribed if the harm is reversible. In *Great Belt* the ICJ declined to issue provisional measures sought by Finland in part because Finland failed to establish urgency. Consider the words of the Court:

> The Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings.

I would remind you that Singapore has given comparable assurances with respect to navigation rights.

Malaysia has contended that Singapore is acting in bad faith by continuing its land reclamation project. Professor Crawford, and the Attorney-General if I remember correctly, asserted that Singapore is "accelerating" the project. I do not know who told Professor Crawford that but Professor Crawford's source is seriously misinformed or lying.

As Ambassador Koh stated this morning, it is certainly not true. What is true is that Singapore's contractors are continuing to perform their contracts, and why should they not? Singapore believes that its actions are perfectly lawful and there is no provisional measures order of suspension. Is that bad faith?

Because in *Great Belt* the works could be dismantled, albeit likely at great cost to Denmark, the ICJ did not find the requisite irreparable and irremediable harm necessary to justify provisional measures.

Professor Crawford has contended that, in the absence of a provisional measures order suspending Singapore's work at Pulau Tekong, the situation would be irreversible because so much sand and rock will have been put in place that it will constitute a *fait accompli*. In fact, Malaysia's own Statement of Claim itself proposes the remedy of removal. But that major problem aside, the serious problem with this argument is that it is misplaced. The area around Pulau Tekong is Singapore waters, so Singapore's actions are not invading Malaysian territory in taking it away permanently. Malaysia has no rights in that area other than passage which, as Mrs Cheong demonstrated vividly this morning, is entirely unimpeded and consistent with international legal standards. What Malaysia has to demonstrate is injury to one of its rights that is so imminent, irreversible and incompensable that the only remedy is immediate suspension. As for its rights in Singapore waters, they are not rights to range all over those waters; they are passage rights which have been vouchsafed for big as well as small boats, as Mrs Cheong showed. Simply to state that there would be increases in flow velocities does not demonstrate injury, unless the velocities exceed international standards, and they do not.

Equally, even if the claimant establishes that the actions it seeks to suspend will cause harm within the limited period described, provisional measures remain inappropriate if the harm can be compensated. The Permanent Court [of International Justice] in the *Denunciation of the Treaty of 2 November 1865* said that irreparable means alleged harm cannot "be made good simply by the payment of an indemnity or by compensation or restitution in some other material form". Singapore denies that Malaysia has demonstrated a harm that it will suffer, but even if some of its assertions are correct, they are compensable. Malaysia's own reports acknowledge this.

Every application for provisional measures implicates the rights and obligations of two parties. Because the prescription of provisional measures is essentially an equitable action, the courts balance the prospective harm likely to be caused by the challenged actions against the burdens and costs to the respondent of suspending those actions, which may yet be deemed lawful. Article 290, paragraph 1, speaks of measures "to preserve the respective rights of the parties to the dispute", indicating that it is not only the prospective consequences for the claimant. So, where a State makes that showing, a tribunal will proceed to balance the respective rights of the opposing party and the potential burdens that an order of provisional measures would impose, for, as the International Court [of Justice] said in the *Aegean* Sea case, "the possibility of such a prejudice [to the rights of a claimant] does not, by itself, suffice to justify recourse to [the Court's] exceptional power under Article 41 of the Statute to indicate interim measures".

Where a licit action might cause harm to another State or the marine environment, but the probability has not been established, the only provisional measures that can be prescribed are to direct the respondent to conduct itself and the activity so as not to cause harm in violation of the rights of the applicant. In *Nuclear Tests*, Australia contended "that there is an immediate possibility of a further atmospheric nuclear test being carried out …", that it would have "wide-spread radio-active fallout on Australian territory", that it might be "deposited on Australian territory and be potentially dangerous to Australia and its people and that it would be irreparable"; and that "any effects of the French nuclear tests upon the resources of the seas or the conditions of the environment can never be undone and would be irremediable by any payment of damages". These are serious allegations.

The Court limited the operative paragraph of its Order to a direction that France avoid those "nuclear tests causing the deposit of radio-active fallout on Australian territory". In other words, it directed France not to conduct the tests in ways that might cause nuclear fallout.

Mr President, members of the Tribunal, I have completed my presentation. I thank you for your attention and would now ask you to call Professor Lowe, who will apply these principles to the case at bar.

The President:
Thank you.

I now give the floor to Professor Vaughan Lowe.

STATEMENT OF MR LOWE
COUNSEL OF SINGAPORE
[PV.03/04, E, p. 11–27]

Mr Lowe:
Mr President, members of the Tribunal, it is a privilege for me to be pleading before you again and an honour to have been entrusted with the presentation of this part of Singapore's case.

During the proceedings yesterday, the members of the Tribunal may have wondered if they had not slipped into a time-warp of some sort. Malaysia made an eloquent and forceful presentation of its case, but it was, as Cole Porter once said, the wrong time and the wrong place.

This is not a merits hearing; this is an application that is brought under paragraph 5 of article 290 of the Convention. The question before the Tribunal now is: is this a case of such urgency, risking such serious and irreparable harm that it is necessary for ITLOS to order provisional measures now; or can Malaysia, on the other hand, wait and go before the Annex VII Tribunal?

Malaysia said at various points yesterday that a quick glance at the papers or a reference to the scientific reports would reveal the force of its case and that there is no need to go into detail. But if the Tribunal does go to the original documents, it will see that Malaysia's case falls apart. There is no such urgency.

Malaysia has requested an order that Singapore: first, pending the decision of the Annex VII Tribunal, suspend its current land reclamation activities; second, that it provide Malaysia with full information – and I am paraphrasing now –; third, that it afford Malaysia a full opportunity to comment on the works and their potential impacts; and fourth, that Singapore agree to negotiate with Malaysia concerning any unresolved issues.

Three of those four requests are swiftly dealt with. As Singapore has explained in its Response, request 2 has already been met. Singapore has already given an explicit offer to share the information that Malaysia requests in reliance on its rights under the Convention. The offer, which was described by Ambassador Koh, is repeated in Singapore's note dated 17 July 2003 and its letter of 21 August 2003. You will find those set out at tabs 18 and 19 of your bundle.

Malaysia can have all the information that is relevant to its case. The only thing that we would hold back is commercially confidential information on the contracts for the supply of the materials, but that is of no possible relevance to the possible effects of the reclamation works.

Similarly, Singapore has expressly stated that it will give Malaysia a full opportunity to comment on the works and their potential impacts, and that it will notify and consult Malaysia before it proceeds to construct any transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore if such links could affect Malaysia's passage rights. That was reaffirmed in Singapore's note dated 17 July 2003 and we have quoted that in paragraph 173 of the Response. It was reaffirmed in the note dated 2 September 2003. You will find that quoted in paragraph 171 of the Response. The documents are at tabs 18 and 20 of your bundle.

As we explained in paragraph 178 of the Response, request 4 is muddled. It is not at all clear what Malaysia has in mind, whether it is seeking an order to negotiate issues that remain unresolved now or which will remain unresolved when the tribunal that will hear the merits is constituted or when that tribunal renders its award. Professor Crawford skipped nimbly over that point yesterday, and we are none the wiser now. He may come back to it to explain it tomorrow. But I may be able to cut short this analysis by saying that Singapore has,

in any event, expressly stated its readiness and its willingness to enter into negotiations and it remains ready and willing to do so, and so request 4 is met.

There is no dispute over these points. The issue is moot. Singapore has offered, in written statements that are before this Tribunal in evidence, to do what requests 2, 3 and 4 seek, and those written offers stand. There is no need for an order to this effect. The crucial precondition for ordering provisional measures is simply not met.

Furthermore, given Singapore's repeated offer, it would be inappropriate to make any such order. Indeed, according to a principle deployed in the International Court [of Justice] in the *Northern Cameroons* and the *Nuclear Tests* cases, international tribunals should not rule on purely theoretical issues that are not in reality in dispute between the parties. Malaysia cannot ask this Tribunal to prescribe provisional measures as if Singapore had refused to do what Malaysia asks, when that is quite patently not the case.

What does Malaysia say to this? They say, in essence, that Singapore cannot be trusted. Professor Crawford said that one offer was made "only on paper". That is a rather pejorative way of saying that Singapore set out its offer expressly and in writing, delivered by a formal diplomatic note, with all the seriousness that that entails. I have to say that we are saddened by Malaysia's remarks and, as for their content, we are confident that the record of the evidence will speak for itself.

My first submission is that this Tribunal cannot properly base a decision to make an order on the supposition, based on what may be no more than an insinuation made in the exuberance of pleading, that one party will in future act in bad faith. The offers on requests 2, 3 and 4, as set out in Singapore's notes, still stand, and they obviate the need for orders to that effect.

My colleagues have already explained other objections. Requests 2, 3 and 4 are not timely; they are not urgent; and they are not made in circumstances where there is any reason to believe that any rights that Malaysia may have are in any doubt or jeopardy.

That leaves request 1, Malaysia's request to close down Singapore's reclamation works. That request is premised upon the alleged impact of Singapore's actions over the short period between today and the constitution of the Annex VII Tribunal, which will be by 9 October at the latest.

There are two kinds of argument that Malaysia invokes in support of this request. There are arguments which are based on principle – the alleged violation of its sovereignty – and there are arguments that are based on the alleged impacts on the marine environment. Those two grounds are of different natures, but before I deal with them, let me make one important point.

Malaysia has presented its case skilfully, saying that it will "focus" for a particular part of its presentation on one or other of the two sites, Tuas in the west and Tekong in the east. The Tribunal might be tempted to suppose that what is said of one site can be applied in broad terms to the other site. That is emphatically not true. Malaysia's case regarding Pulau Tekong rests entirely upon environmental impacts; there is no territorial claim involved there whatever. Its claim regarding Tuas, on the other hand, rests almost entirely on the sovereignty claim to the Point 20 sliver. Its evidence indicates that environmental concerns around Tuas are of a very low order indeed. Malaysia is advancing different arguments in respect of the two different sites.

Let me turn first to the sovereignty argument and the Point 20 "sliver" question. That argument requires Malaysia to make out a case that Singapore is about to engage in some actions in the area bounded by Points 19, 20 and 21 that Malaysia announced unilaterally in 1979, and that there is an urgent need to prevent those actions by the making of an order.

There is much that might be said about the interesting claim to Point 20, but I shall deal with the issue briefly.

I can assure the Tribunal that there are no further works extending the reclamation within the Point 19-20-21 sliver scheduled in the next 30 days. By then, the Annex VII Tribunal will have been constituted for some time. That, we submit, is sufficient to dispose of this point. The boundary dispute itself of course is a matter for the merits phase.

I should, however, add this. No order in respect of Point 20 can possibly be said to be needed urgently when, in full sight of Malaysia – you can actually see the Tuas extension from the Malaysian coast, as you have seen in the photographs –, Singapore surveyed, it dredged and then 23 months ago it reclaimed as dry land Point 20 itself. Throughout that time, Malaysia never once sought provisional measures. At no time during the past two years has it sought provisional measures. How can Malaysia possibly claim that it is an urgent necessity today? Where is the sudden urgency that impelled Malaysia to ask that the Judges of this Tribunal be roused from their beds and summoned to Hamburg in order to protect Malaysia's rights in Point 20? We submit that the Point 20 argument gives no support whatever to the request for an order that Singapore should cease its reclamation works.

Let me turn to the second set of Malaysian arguments, those which concern environmental impacts. These depend upon Malaysia making out a case that Singapore's actions will, during the period to which the provisional measures relate, cause detrimental effects on the marine environment of a severity that makes it necessary to prescribe provisional measures. The basic problem here, in short, is that Malaysia says that its experts advise that there are such risks, but Singapore has been consistently advised by its experts that there are no such risks and it is now advised that the scientific analyses that Malaysia has produced, very belatedly and very recently, do not substantiate Malaysia's claim.

I should recall at this point Professor Reisman's submissions on the standard of proof. It is necessary that Malaysia prove that it needs provisional measures. Malaysia does not get even near the most minimal of thresholds of proof in this case.

Before I turn to look at the details of that case, let me make three general points concerning Malaysia's scientific evidence.

The first point is this: Malaysia has failed entirely to put a coherent case before this Tribunal. It is of course for Malaysia to make out its case. But Malaysia simply says, in paragraph 17 of its Request for Provisional Measures, "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 …". But it is not enough to present this Tribunal with a sort of do-it-yourself set of materials from which it might rustle up some sort of case.

Singapore submits that Malaysia's case is inadmissible under article 89 of the ITLOS Rules. We make this point in all seriousness. It is not simply a technical violation of the Tribunal's Rules; it is a question of basic procedural propriety and of justice. How can a respondent State enter a proper defence in a case of the utmost seriousness to it when the Applicant does not spell out its complaint?

Let me give you an example. The reports that have been submitted predict various physical impacts upon the marine environment, and they suggest that the responsibility for those impacts is to be laid at Singapore's door. But physical impacts, of course, are not the same as legal harm. It is one thing to protect the marine environment from harm, but it is quite another thing to say that the law requires that there can be no activity whatever that has any impact upon the sea. The latter would obviously rule out practically all industrial activity on land.

Malaysia seems not to draw that distinction. It is as if every environmental impact must *ipso facto* violate international law. For example, the reports refer to variations in the salinity levels of the order of 0 to 2 per cent. Does Malaysia regard variations of that order as

harm, does it regard them as serious harm – which is the higher threshold required by paragraph 5 of article 290 – or does it regard them as simply minor variations, smaller in fact than the general scale of seasonal variations in salinity? Is Singapore expected in due course to defend itself on the merits against the accusation that it has caused this change in salinity levels, or is this no part of Malaysia's case? We do not know.

To take another example, in the UKM study, Malaysia's annex H, at page ES 9 – that is the Executive Summary at the beginning – the study concludes that "the area is already stressed by high O&G [oil and grease] levels". If you turn to page 4-28 of that same study, you find it is stated that "the levels of … O&G [oil and grease] found at all stations are generally low". What is Malaysia's case? Is it saying that the levels are high or that the levels are low? How can Singapore prepare a response when the case is not spelt out?

Our submission is that Malaysia needs to explain which of the propositions that are set out in these various scientific reports it adopts as its own, and which of those propositions it puts forward as the basis of its case. As yet it has not done so.

My second general point is this. Time and again yesterday counsel for Malaysia said that they were about to deal with the question of urgency, or that a colleague would deal with it, and time and again they moved towards the door that would open to reveal the damage that would occur if the order that they have asked for were not granted. But at the end of the day, no-one had dared to grasp the handle.

Professor Crawford's parting advice in his presentation on the question of urgency was to recall what Professor Schrijver and Professor Falconer had said, and to suggest that you, the Tribunal, "are in a position to read the various reports for yourselves." I shall take you to some aspects of those reports shortly, but I would ask you to note now that Malaysia itself has not pinpointed a single example of a specific, imminent risk of serious harm to the environment that is not simply a theoretical possibility or a long-term risk.

Neither Professor [Mastura], nor the UKM Report that she presented, nor the DID Report, nor the Delft Report, nor Professor Falconer pointed to any evidence suggesting a serious risk of the imminent arrival of any dramatic change in the present situation.

You will recall yesterday Professor [Mastura] said merely that the reclamation works "risk having a significant adverse impact on the environment and ecology of Malaysia's coastal and estuarine waters in and around the Straits of Johor" and that they are predicted to have an adverse effect – she did not then say a *significant* adverse effect – on various hydrological and other characteristics.

Singapore does not dispute that. Of course there is a risk of some degree. That is why these projects are subject to planning controls and procedures for determining the nature and the scale of those risks. Singapore has considered the risks. It has taken the steps to design the projects so as to ensure that the risks are acceptable, and it continues to monitor the risks and to take the necessary mitigating measures.

It was perhaps Professor Falconer's evidence that was the most striking yesterday. Professor Crawford put to him this question directly. He asked him, "What immediate effects in your view are the land reclamations likely to have?" – the question that we were all waiting for an answer to. Professor Falconer responded by referring to the deposit of mud on Malaysian beaches. Then he was asked, "Confronted with this situation in which these various forms of sediment transport are occurring, what should the immediate response be?" He said, "Carry out interim measures in terms of interim computer model simulations … and … look at how the shape of the reclamation where the sheet piles are could possibly be modified".

In the face of this urgent, serious environmental risk, we rush back to the desk and back to our computer modelling – no hint at all that it is necessary to suspend the works, that it is necessary to take any physical action; just look calmly and scientifically at the situation,

identify the precise nature of the risks, identify the mitigating measures that best address those risks and then take them. That is, you might think, wise counsel indeed.

What events does Malaysia expect to occur between now and the constitution of the Annex VII Tribunal and what is their evidence to support the expectation?

My third general point is that, amid the flurry of statistical analyses of impacts on the marine environment, you may have noticed that there is one calculation that is nowhere performed, and that is the calculation of how much of this predicted impact is attributable to Singapore and how much of the predicted impact is attributable to activities for which Malaysia is responsible?

You heard Professor [Mastura]'s views on the state of the Malaysian environment in 1992; you have seen the charts of the PTP and Tanjung Langsat reclamations, and the photographs of the sediment plume coming down the Johor River. Yet none of these reports breaks out Malaysia's contribution either to the damage or to the risk of damage that is calculated on the basis of the data that the reports have.

Having made those three general points, let me turn now to the reports themselves.

Professor [Mastura] presented conclusions from three of the four reports, and to avoid any possible misconception, let me remind you that, as is evident from the reports themselves, they are not all of the same probative value.

The first is annex E, the Delft Hydraulics Report. That was completed in August 2002, and it was not actually commissioned as a study of Singapore's reclamation works at all. As it explains on page 4, it is a study of the Straits of Johor set in the context of Malaysia's plans to open the causeway which connects Singapore with Malaysia and divides the Straits of Johor into two entirely separate sections. Delft

> was assigned to perform an analysis of the impacts of the construction and opening of the causeway and the various other activities that may affect the hydrodynamics, morphology, water quality, navigation and ecology of the Straits of Johor.

It is, moreover, only a "desk study" of likely impacts of the causeway project. It did not involve the collection of any data. This is a reasonable first stage. We would expect it to be followed by the development of more exact mathematical modelling of the expected impacts. We would expect that in turn to be followed by the calibration and the verification of those mathematical models against actual data derived in the field in order to see how closely the mathematical predictions corresponded to reality.

So the conclusions of desk studies of this kind offer a very different level of proof from conclusions that are based on actual data collected in the field. The Delft Report is necessarily speculative and, as a reading of it will show, its hypotheses sometimes contradict the practical experience of the people in the field whom the Delft team interviewed during their one-week visit to Malaysia.

I must say that, even as a desk study, it is incomplete. It is striking, for example, that the authors of the report in their table of the works in the area at pages 11 to 12 seem not even to know or to have obtained information on the actual size of the most major reclamation works, including the Tuas works itself. Their failure to obtain that information – see the blank column on size, which is actually filled in for two or three of the examples later on on the Malaysian side – underlines just how preliminary their report is.

Such hard data as is in the Delft Report is taken from reports which have not been presented by Malaysia to this Tribunal or to Singapore. For the most part, there is no indication of what the actual data is, how or when it was obtained, where it was obtained,

what methodology was used, and there has been no opportunity for Singapore to comment upon it.

Even if one overlooks these limitations, the Delft Report is of such remarkably little help to Malaysia that one might wonder why Malaysia has submitted it at all. Its overall tone is extraordinarily tentative. If you look at page 23, for example, it is a litany of possibilities, with barely a definite proposition to be found in it.

On the key topic of current velocities, pages 17 to 18 list the "impacts", as they call it. Page 18 summarizes the expected impacts of land reclamation. It notes that land reclamation "will change the local cross-sectional area of the Straits, inducing increasing current velocities and ultimately scouring and erosion."

There is scarcely support there for an urgent call to suspend works. But the more startling point is that this report then goes on to refer to the effect of the Tuas operation on this, and says: "In the present situation with the causeway in place, there are little effects. However, when the causeway is opened the effects can be more significant." The report says that the Tuas effects are "little" and that there is a possibility of "significant" effects resulting not from Tuas but from Malaysia's own activities in opening up the causeway.

As far as Tekong is concerned, on page 18 the report is its usual cautious self. The expansion of Pulau Tekong "might influence the Johor Straits and Johor River systems significantly." This, it says, influences local current velocities and possibly the distribution of discharges and then these changes

> might result in changes in tidal phasing and tidal amplitude … The effects in Calder Harbour (increased velocities) might become more significant when the western part of the proposed land reclamation is finished.

These speculative possibilities about future developments appear as certainties in the Delft Report's table of conclusions at pages 18 to 19. But even then there is nothing in that report that suggests the likelihood of significant imminent harm in the near future. It is of no help at all on the key question of the urgency of the need for provisional measures.

Let me turn to the DID Report, annex F. That is a six-month hydraulic study, begun in March 2002 and completed in early September 2002. It is based upon mathematically modelled simulations, and the models were calibrated against data relating to a two-week period in October and November 1999, and verified against data collected in a two-week period in April and May 2002. That data was not presented to the Tribunal or to Singapore. It seems to be in the elusive volume 3 of the DID Report. Access to that report may or may not answer some of the questions that hang over the DID Report. For instance, no matter how good the mathematical modelling might be, predictions can only be as good as the initial data that is input. As computer people say: garbage in, garbage out.

Take the case of erosion. Plainly, erosion rates vary dramatically: rock erodes more slowly than sand; harder clay more slowly than soft clay. The seabed around Tekong is highly varied. Some of it is soft clay overlying hard clay; other areas are harder clay bed and some areas are rock bed. We need to know what assumptions DID made about the proportions of these different kinds of seabed, and the distribution of these different kinds of seabed, and the thicknesses of the layers of the soft clay, in order to have some sensible evaluation of their estimates of erosion. These factors would have a dramatic effect upon the predicted erosion rates.

That very information is among the information sought by Singapore at the meeting on 13 and 14 August this year, and we have yet to receive the clarification that we asked for on these matters.

To take another example, peak velocities. Peak water velocities are predicted in the report but that is not a very helpful statistic. How long do the peak velocities persist? There is a world of difference between a current that is constantly flowing fast and a current that may, under certain circumstances, flow fast for a very short time but generally flows slowly. Yet both may have the same peak velocity.

What does Malaysia think is significant about the peak velocity? If we take the velocity that the DID Report predicts, it is roughly that that exists in the approaches to Rotterdam and New Orleans, and if the world's largest port can cope with access velocities of that kind, why does Malaysia think that it should be a problem in the accesses around Tekong?

The DID Report may contain a good deal of computation, but it does not tell us the answers to the questions that are actually at the heart of this case. In particular, it is entirely silent on the really important question: what is the impact of these works, and what changes in the present situation may be expected in the short time between now and the constitution of the Annex VII Tribunal?

Professor Falconer's report, annex G, that, as he explained, is not a report on environmental impact of the reclamation works at all. It is a report on the DID Report, which is itself largely based upon reports made some years earlier. As Professor Falconer told you, he was asked to review the mathematical modelling. He was not asked to review the data in volume 3 of the report. He said that he does not know what is in volume 3. It is, he said, "just the data". Thus we could not cross-examine him on it.

We do not deny the value of mathematical modelling, but we do dispute the suggestion that it is appropriate for this Tribunal to suspend Singapore's reclamation works on the strength of predictions based on data that neither the Tribunal nor Singapore, nor even the expert validating Malaysia's study has ever set eyes upon.

Annex H, UKM Report, this is the fourth report and this, in its own terms, set out:

> to establish the baseline [a baseline of scientific data and not a maritime baseline] for the existing environment of the areas which are in close vicinity to … Singapore's reclamation projects, in particular within Malaysia's territory.

That is significant. It suggests that no satisfactory baseline data existed before the UKM Report dated May 2003 was prepared. One wonders what was the evidence behind Malaysia's accusations of environmental harm that were made before that date, for example, in Malaysia's note dated 30 April 2002.

It should also be noted that Malaysia's concerns for the marine environment were not so urgent that it could not wait for more than two years after the reclamation works had begun before organizing this baseline study.

Though it is described as a baseline study, the report makes some predictions about future impacts. Those estimates are based in considerable part upon simulations, for example, on suspended sediments, but there is also some analysis of previously collected data, and some collection of new data.

When we get to the merits phase, we will doubtless look at this closely but it is instructive, even now, to see how that report handles one issue that has been emphasized by Malaysia.

The report notes – and you will find this at page 17 of the Executive Summary in the folder – that 800 Malaysian fishermen were interviewed and that most of them perceived that the reclamation works have adversely affected their fish catch. One can only speculate on the

question that was actually put to the fishermen but the impression is given that this is further evidence that the reclamation works are responsible for a decline in the fish catch.

Figure 7.2.1 in the report charts the annual trend in fish landings in west and east Johor. The boundary running across the page left to right is the sequence of years, the vertical scale is the fish catch. You will notice that the decline in the west Johor fishery, in fact, began in 1996, three years before the Tuas project started, and that the catch in east Johor, which was declining in the early 1990s in line with the comments in Professor [Mastura]'s 1992 article, actually rose from 1998 onwards. One cannot help but feel that the evidence in the UKM Report – and there is more to the same effect in appendix 7.2.2, including specific evidence on the prawn, shrimp and crab fisheries to which references were made yesterday – does not entirely support the conclusion that the authors wish to draw from it.

Malaysia has lodged a Request for provisional measures and it has said that the proof of its case lies in these reports. Singapore submits that Malaysia cannot simply lob four volumes of graphs and tables at the Tribunal and assert that somewhere in them there is some pretty powerful scientific evidence to back up their case. It must plead its case properly. It must identify the material that it relies on, it must identify the propositions that it adopts as its own and it must show how that evidence proves its urgent need for provisional measures and this it has not done.

Let me now turn, Sir, to some more specific points and I turn to those that are identified by Malaysia in paragraph 17 of its Request for provisional measures. It refers there to certain kinds of environmental consequences:

> … major changes to the flow regime, changes in sedimentation … 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 Malaysia naval base of Pularek.

We note that paragraph 17 claims only "harm" and not "serious harm", as would be required if provisional measures were to be prescribed in order to prevent serious harm to the marine environment, and Malaysia may wish to address that point tomorrow.

We also note that Malaysia's environmental concerns are focused on Pulau Tekong and that it is not immediately and urgently concerned with Tuas except, as I said earlier, in the context of the alleged invasion of Malaysia sovereignty.

Let me begin with some remarks about the flow regime. There are several aspects of the flow regime which are relevant. There is the question of velocities and the volume of current flows which underlie other effects such as the impact on navigation, erosion, siltation, salinity and so on.

On Malaysia's own submissions that is not a problem in respect of Tuas. The DID Report was written by an agency of the Malaysian Government and, I suppose, we can take its views as representing the views of Malaysia in this case. That report states at page 8-4 that "the medium grid model at [Tanjung] Piai had indicated that there were no appreciable changes to the speed and water levels as a result of the reclamation works". The works at Tuas are not a problem.

On Pulau Tekong, in contrast, Malaysia expects "appreciable changes". Singapore's first point is that whatever problems there may be at Pulau Tekong, they are already being lived with. The narrowing of the channel has already been largely realized through the installation of the temporary sheet pile which was, as Mrs Cheong explained to you this morning, itself a measure to contain the sediment and prevent pollution. The shape of the reclamation will not change substantially. What is the basis for expecting any further change beyond that with which we now exist?

The DID Report on page 9-2 states that:

> The current velocity around Pulau Tekong has increased. The maximum increase occurs near PULAREK, i.e. from 0.7 m/s to 1.19 m/s (70 % increase) for Case 2 and 1.3 m/s (85 % increase) for Case 3.

I should explain that only Case 2 is relevant. The difference between Case 2 and Case 3 is that Case 3 is the model they constructed on the supposition that Singapore would proceed to a further extension south of Pulau Tekong, around Changi Airport but there are, as yet, not even plans for that development and so it is entirely irrelevant to these proceedings.

On Malaysia's own figures that increase to 1.19 m/s produces a velocity which translates into 2.3 knots. But what does that mean in practice?

Basic physics dictates that water flowing through a channel flows faster in the centre of a channel than at the sides. At the centre of the route between Pulau Tekong and Malaysia – the Calder Harbour route as it is known – are the Guillemard Rocks and the Merlin Rocks. Ships do not navigate there, so that part of the channel where the increase is likely to be fastest is not that part of the channel where navigation is going to be affected. The question is, what is the velocity where the ships go, and for how long and how often does that velocity increase?

But even suppose that the peak velocity were reached in every part of the channel and at every moment, what then? What would the estimated peak of 2.3 knots mean? The estimated peak, according to Malaysian charts and to another Malaysian report – and you will find it in the Delft Report at page 23 –, 2.3 knots, is the speed which existed at Tanjung Pengelih before the reclamation works began. It is the same speed.

If that was not a problem then, why does it become a problem now? There have been no reported problems there. The Delft study itself interviewed the Head of the Marine Department at Johor and it quotes him as saying:

> No difficulties with navigation are encountered and are also not foreseen due to the future reclamation works. Also the reclamation works over the last decades have not resulted in any navigation problems for the port.

There is no mention in the report of any difficulties anywhere around Pulau Tekong. Given that ports such as Rotterdam and New Orleans cope perfectly happily with these velocities, you may think that that is no surprise.

Where is the urgency? Where is the need? The only evidence of any difficulties that is put before the Tribunal comes not from the pilots or the captains who work in the waters around Singapore but from the study conducted a hemisphere away on the desks of Dutch engineers and that appears to contradict the evidence that they themselves collected from the people on the ground.

I should put this point in the proper perspective. It has to be remembered that Singapore itself has shipyards on the north of the island. This is not an attempt by Singapore to wall in the Straits. Singapore has the same interest as Malaysia in ensuring the safety and the preservation of access for navigation through to the Straits of Johor.

The passages around Pulau Tekong are safe enough and wide enough. As we noted in our Response, the shipping channels around the islands exceed international standards. A 750 m channel is perfectly adequate. It is one and a half times the size of the Rotterdam waterway, and the Delft study recognizes this. You will find at pages 22 and 23 a statement that the channel widths are adequate.

It is obvious that the channels are being used by ships even now. You have seen the photographs of the area off Pengelih jetty. That is the channel that is bisected by the Merlin Rocks and you will see on the screen the buoy that marks the position of the Merlin Rocks in the middle of that channel, and also see the jetty itself indicated. The next picture that we have is of one of the ships that regularly travels up that route without difficulty at all. As Mrs Cheong said, if you want a rather more graphic example you have only to look to the waters of the Elbe as you leave this place later on to see a busy port served by a waterway that is very significantly narrower than the channels left around Pulau Tekong. The Malaysia argument fails at every step.

Much the same argument can be made about waves. Malaysia has modelled waves of up to 1.6 metres. Again, the significant questions remain unanswered. How is that height – which I must say is much higher than Singapore's observed measurements of waves – calculated? How often is the peak height expected to recur and how long do the peak conditions last? How easy is it for a ship to cope with these peak conditions? And from Malaysia there is simply no answer.

Take flushing as a phenomenon. On flushing Malaysia expects only minor changes. On the Tekong side the expected changes are positive – greater flushing of wastes out of the waters is expected. So that is not a problem.

On Pulau Tekong Malaysia says (DID Report, page 8-34) there will be a "slight increase in the flushing characteristics for Case 2 and Case 3 compared to Case 1". On Tuas the DID Report says at page 8-50 that there is a "slight decrease in the flushing characteristics". Again, are these "slight" variations put forward as sufficiently serious to warrant provisional measures? Is there evidence that the situation will change in the next few weeks? What is the Malaysian argument, and where is the evidence that some material change is expected?

Salinity I have dealt with. Do we know whether the 0 to 2 per cent change is regarded as part of Malaysia's case in these submissions? We simply do not know.

Suspended sediment from Tuas itself is not a problem in Malaysia's view. Professor Falconer's report says at page 2-13:

> The suspended sediment plume model predictions show no appreciable changes arising from the current reclamations. This is to be expected, except in the immediate vicinity of the lee of the reclamation. No further simulations are recommended on this front.

And Singapore agrees with that assessment. It is the very result that its construction measures are designed to achieve.

As far as Pulau Tekong is concerned, Malaysia does expect some impact. Professor Falconer notes simulations putting it at around 0 to 10 mg per litre. Is that good or bad? In this case we do have a ready answer. Last November, the ASEAN Ministers adopted criteria on water quality applicable in the region, and water quality in the Straits of Johor is the subject of guidelines bilaterally agreed between Malaysia and Singapore. My learned friends may wish to explain to the Tribunal tomorrow how the predicted levels compare with these regional criteria.

Having seen the satellite photographs of the sediment drifting down the Johor river, the Tribunal may also think that Malaysia should begin by addressing the question of where the sediment is coming from but I will not pursue that interesting question of causation any further at this stage.

Let me turn to erosion. Malaysia sees no problem with erosion at Tuas. The DID Report says at page 9-5 "Erosion rates are too small for concern". The DID Report says at

page 9-3 that at Pulau Tekong "the sea bed of the channel near PULAREK will undergo erosion from 10 cm/year to about 50 cm/year. The shoreline adjacent to PULAREK will also undergo erosion."

As I have said, the seabed in the Straits is far from uniform and there is no evidence that DID reflected the real seabed conditions in its mathematical model. Singapore does not accept Malaysia's figures on erosion and Singapore's own figures indicate significantly less erosion. But suppose that Malaysia were correct in its predictions. What would the consequences be of an extra 40 cm a year of erosion? By 9 October that amounts to less than 1½ cm which is a little bit less than the thickness of a judicial pencil.

To put that in perspective, compare it with the International Hydrographic Organization's *International Hydrographic Standards for Hydrographic Surveys Special Publication No. 44*. This is the international instrument that sets the standards of accuracy for mapping the depth of the seabed. For its highest category of accuracy – Special Order category waters –, the accuracy required is +/- 25 cm. The best multi-beam echo sounders which measure the depth have an accuracy of +/- 5 cm, a 10 cm range. Malaysia is basing its demand that you issue an order to suspend a multi-billion dollar project on its calculation that there is a risk of erosion that is under one-tenth of the margin of error that is permissible in the most rigorous international requirements for seabed mapping, and that is below the limits of what is even technologically measurable.

Our point is not that it is impossible to determine whether or not the forecast erosion will have taken place. The point is that the possibility of a degree of erosion that is so tiny can hardly be said to be an urgent threat necessitating provisional measures of any sort, let alone urgent measures under article 290, paragraph 5.

Is it an urgent problem? Even Malaysia appears to think not. Malaysia's concerns seem to be, from the notes and indeed from their request to you, to be particularly focused on the effect of erosion on the Pularek jetty, although Professor [Mastura], listing the effects predicted by the DID Report, put the stability of jetties last, as affected to what was called "a lesser extent". You will find that in yesterday's transcript. The concern with stability is understandable. Generally, States are keen to dredge the approaches to their ports and are not concerned by erosion of the seabed but they may well be concerned by coastal erosion.

How urgent is the situation at Pularek? The Malaysian Government's DID Report itself considered what should be done about the threat to Pularek and it says the stability of jetty at Pularek has to be studied in detail: "It is thus recommended that an assessment of this jetty be carried out in order to ascertain the stability of this structure and to carry out any rehabilitation works that may be required". Set up a study group; draft a report; in due course we will fix the jetty if necessary. Is that a sign of an urgent problem? If it were urgent, Malaysia would be taking action now to do something about the stability of the jetty, but as far as we are aware, it is not engaged in any works at all at Pularek that are attributable to the effects of increased erosion.

Is this an irreparable problem? Sir Eli Lauterpacht said yesterday that the reclamation works were designed to be permanent. I am sure that will reassure those whose homes and workplaces are likely to be built on the reclaimed land. But the truth is that, like all man-made structures of this kind, the works are reversible. The problem is not technology; the problem is cost. Large civil engineering projects are expensive to undertake; they are expensive to reverse; and they are expensive to suspend. But the reversibility point was made very clearly by two other people who addressed you on behalf of Malaysia yesterday. Tan Sri Fuzi himself made the point that the works at Pulau Tekong are not irreversible. He said at page 11 of the transcript, lines 28-29: "at the moment, the sheet piling can still be removed; it is not yet permanent. The project behind it can still be reconfigured". Professor Falconer, at

page 33 of the transcript, says in relation to the deposition of the sediment on the coast, "in my view, it can be reversed".

I will move quickly through the remaining headings. Siltation is the obverse of erosion. It is proceeding in the normal geological time scale. There is no suggestion from anywhere on the Malaysian side that there is an avalanche of silt about to descend into the estuary or into these waters. As Professor Falconer said, the siltation rate is not necessarily small over the long term. I think that captures perfectly the scale of the threat that siltation presents.

Water levels and flooding: Professor Falconer said that there are no appreciable changes expected, and there is no Malaysian allegation of any difficulty under that heading.

The final category of points that I have to make concerns not the environmental impacts as such but what I suppose is the separate allegation made by Malaysia that these provisional measures are justified because of an impending infringement of their rights under the 1982 Convention. Malaysia says that the rights that are infringed are set out in articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the 1982 Convention. Professor Schrijver identified the rights and said that they were in danger, but he did not explain, let alone prove, how they are in danger.

Malaysia must prove under this heading, too, that the threat is urgent and of a scale and nature that warrants a step as dramatic and as serious as closing down the reclamation works.

Let us go through them. Articles 2 and 15 concern the alleged territorial encroachment around the Point 20 anomaly. There is, as we have explained, no purpose whatever in prescribing suspension on that ground.

Article 194 concerns the duty to prevent, reduce and control pollution of the marine environment. One can see the need for the Tribunal to step in and swiftly prescribe provisional measures if, for example, a neighbouring State is about to turn on the taps of a chemical factory that is proposing to pipe waste into the sea. But that is nothing like the position here.

Singapore has taken, and is taking, all the necessary steps to protect the environment. Malaysia's experts suggest a risk of long-term harm that Singapore's experts think is unsupported by the evidence and is simply wrong, but even Malaysia's experts do not point to any shred of evidence to indicate any significant threat to the marine environment within the coming weeks.

This is not a case that simply fails to meet the high burden of proof that, as Professor Reisman explained, is appropriate in provisional measures applications. It comes nowhere near the basic level of plausibility.

Articles 123, 198, 200, 204, 205 and 206 are all concerned with cooperation, notification, consultation, the monitoring of pollution, and the assessment of the potential impact of projects on the environment. These are all essentially procedural rights. Malaysia is asking you to order the suspension of the reclamation works because of a risk that it will be denied its procedural rights, because of a risk that it will not be notified or consulted over works in the period between now and the constitution of the Annex VII Tribunal. There is no such risk. Singapore has reaffirmed yet again today before this Tribunal its intention, set out explicitly in formal diplomatic notes sent to Malaysia, to cooperate, notify and consult with Malaysia as required by the Convention.

Because of the starkly misleading impression that the Tribunal may have gained from statements that Singapore has never said that it would agree to suspend or mitigate its works, let me remind you yet again of the statement that Singapore made in its note dated 2 September 2003 that Singapore "would seriously re-examine its works and consider taking

such steps as are necessary and proper, including a suspension, to deal with [any] adverse effect".

Finally, article 210 concerns dumping. Land reclamation activities do not constitute dumping within the meaning of article 210 because they fall outside the definition of dumping in article 1, paragraph 1(5)(b) of the Convention, which stipulates that dumping does not include "placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention".

Sir Eli Lauterpacht referred yesterday to certain other articles of the Convention, including articles 193, 195 and 208. Those articles are not part of Malaysia's Statement of Claim or of its written Request for provisional measures that it has filed here. They appear to represent a rather different case. If Malaysia wishes to plead them, we assume that it will apply in the normal way to the Annex VII Tribunal for permission to amend its pleadings and, if and when it does, we will address those points.

Those are the rights which Malaysia has claimed are in imminent danger of serious infringement.

Mr President, members of the Tribunal, Malaysia needs to prove an urgent need for provisional measures. It has not done so and its case does not stand up to inspection.

Unless I can be of any further assistance to the Tribunal, Sir, that completes my submission.

The President:
Thank you.

We have just heard the last speaker for the Respondent today. We shall resume the oral pleadings tomorrow at 9.30 in the morning. The sitting is now closed.

Adjournment at 4.27 p.m.

PUBLIC SITTING HELD ON 27 SEPTEMBER 2003, 9.30 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

For Malaysia: [See sitting of 25 September 2003, 10.00 a.m.]

For Singapore: [See sitting of 25 September 2003, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 27 SEPTEMBRE 2003, 9 H 30

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Pour la Malaisie : [Voir l'audience du 25 septembre 2003, 10 h 00]

Pour Singapour : [Voir l'audience du 25 septembre 2003, 10 h 00]

The President:
I give the floor to Professor Schrijver.

Reply of Malaysia

STATEMENT OF MR SCHRIJVER
COUNSEL OF MALAYSIA
[PV.03/05, E, p. 7–13]

Mr Schrijver:
Good morning, Mr President, members of the Tribunal.

My task this morning is to emphasize 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 apologize 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 and 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 on the land reclamations 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 … 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". In the same letter, Malaysia urged that "a meeting of senior officials … be held … to discuss the concerns of each party".

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, by now a rather magic number which proves to have been with us in an early stage. Opening a third round of diplomatic exchanges, in a 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 will not read the full quote as it is on your screens, but I believe it is worthwhile to read a part of it:

> 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 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, in that letter, 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's waters 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 characterization 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" (*emphasis added*) and that "Singapore has never ruled out negotiations with Malaysia"?

Moving to the fourth round of expressions of serious concern, I quote from a 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 repeated 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 just stated that such a meeting will only be useful if Malaysia could provide "specific new facts or argument to prove its contentions", a phrase which we see in almost every letter.

Mr President, members of the Tribunal, there is no need to recall in great 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 and 14 August 2003. While Singapore shifted in words towards the language of cooperation, its actual behaviour remained consistent with its 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 a 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 2[2] 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 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.

Thus at the last Malaysia made it very 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, our distinguished colleague 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 the MOX Plant Case 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 the MOX Plant Case, 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 concludes that the possibilities of reaching agreement have been exhausted" (paragraph 60, Order, MOX Plant Case).

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 the parties, conciliation, etc, in other words: it embodies 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 and it 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, criticizes 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 and 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 would like 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, paragraph 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, a "special urgency" test should be read into the provision. Professor Crawford has referred to the Southern Bluefin Tuna Cases 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, paragraph 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, paragraph 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, pursues the path of exchanging views and negotiations first –, it would likely come to ITLOS only after say 15 to 20 days of those 60 days. 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, paragraph 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 how the provision reads, and this is also not what is intended.

Second, if Singapore's 19-days argument were correct, the Convention would penalize 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-days, or in this case 19-days arguments, as we heard yesterday. This would run counter to the purpose of dispute resolution, which the Convention seeks to promote.

Third, if article 290, paragraph 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, paragraph 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 becoming 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, if we are well informed. 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 issue is also one of time. Repeatedly, Malaysia has been criticized 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 Gabčíkovo case, it is of limited relevance in "cases involving environmental damage of a far-reaching and irreversible [nature]". 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 Gabčíkovo 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.

STATEMENT OF MR CRAWFORD
COUNSEL OF MALAYSIA
[PV.03/05, E, p. 13–20]

Mr 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 area 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 laws 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 there may well be 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; they have of course not been approved under Malaysian law; 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 will depend 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 authorized 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 much more about the tidal and other circumstances before reaching any conclusion. 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 make 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 the article written by Professor [Mastura] 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 does show that Professor [Mastura] is capable of public criticism in Malaysia; I must say, having worked with her now for some time, she is capable of public and private criticism of almost anything, but it is criticism with a smile. This only establishes her independence.

Evidently, as the Tribunal 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 and its laws to match the increasing state of its development. This is not a trial of Malaysia's 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 [Mastura]'s statement was a call, more than a decade ago, for further progress to be made in a variety 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 I should call it "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 km 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 authorized 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 [uncorrected] transcript:

> The proposal for Pulau Tekong was first publicized … in the 1991 Singapore Concept Plan. The reclamation profile then underwent a few revisions before *the final profile* [I stress those words] was granted approval in 1999.[4]

Let us look at this famous 1991 Concept Plan, as it covered the decade 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 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 eyes, 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, as we are now told, in 2000. It is clear that there was no time between the "few revisions" of 1999 and the start of the 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 realized 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 [Mastura] 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

[4] See page 83 of the present minutes.

nonetheless pay tribute, is that Greater Tekong had no, or only trivial, impact on the environment. According to Singapore, it has been possible to plonk down a "final profile" of over 3,000 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, seagrass 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 note 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 from 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 I was with respect to the 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 can go to are the two summary reports of 15 July 2003. In the absence of anything else, these have to be taken to be an accurate summary of the referenced reports; the Tribunal cannot check. 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 it 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 in South-East Asia situated 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 page 46 of the report. These are the reports summarized 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 is 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. Ignoring this earlier failure to share their monitoring data possibly relevant to Malaysia, counsel for Singapore then made a sort of takeover bid. Three times they said that Singapore had offered to monitor on the Malaysian side as well 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.

Actually, 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 19 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 can 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 any 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 *Pulau Ligitan and Pulau Sipadan* 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 and 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 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 on 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 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 the 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.

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.

STATEMENT OF MR LAUTERPACHT
COUNSEL OF MALAYSIA
[PV.03/05, E, p. 20–24]

Mr 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 the welter of detailed facts presented so beguilingly by 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, paragraph 5. Nor did he advert to the authoritative precedent set by this Tribunal in the *Southern Bluefin Tuna Cases*, 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 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 clear and express 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:

> 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 these provisions appear 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 there is no basis on which this Tribunal may introduce them as general elements relevant to any matter whatsoever before 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, as Singapore would have the Tribunal believe, 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? What conditions are there relevant to suspension in those contracts? 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 the 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 cannot be used to describe 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 be properly 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 a rather 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 "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:

> 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 legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.
>
> Let no nation put asunder this landmark achievement of the international community.

These remarks are particularly appropriate here. 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.

STATEMENT OF MR RAZAK
AGENT OF MALAYSIA
[PV.03/05, E, p. 20–28]

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 and 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 and 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 quite 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 and 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:

Firstly, 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.

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.

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's 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 before 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 Tribunal that no effort would be made to infill Area D pending the decision of the merits tribunal, and if these undertakings were likewise made a matter of formal judicial record, Malaysia's concerns would be significantly reduced. 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 States Parties to a regional fisheries agreement in the *Southern Bluefin Tuna Cases*; 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. Thank you.

The President:

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

We will now take a half hour break and resume at 11 45.

[Ambassador Koh?]

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 could 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. Thank you very much.

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.

Thank you. The meeting is adjourned.

Short adjournment

The President:
I now give the floor to Singapore. This is Professor Reisman. Thank you.

Reply of Singapore

STATEMENT OF MR REISMAN
COUNSEL OF SINGAPORE
[PV.03/05, E, p. 28–33]

Mr Reisman:
Thank you very much. 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, paragraph 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 283 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 law of the non-navigational uses of international watercourses, circumstances in which one State asks another State to stop doing something that is lawfully conducted within its territory require the other State to do more than simply say "stop", to do 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 30 April. 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 the said land reclamation activities have caused serious environmental degradation as indicated in increased sedimentation, erosion, siltation, 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 30 April. 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 the 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 25 May, a note said that in effect injuries from 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 a 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 13 and 14 August meeting, the leader of the Malaysian delegation indicated that both parties were in negotiating mode. But he said:

> This should not however be interpreted as the weakening of Malaysia's resolve to continue to request Singapore to suspend land reclamation activities for as long as meetings between the 2 countries … are ongoing.

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, paragraph 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 suspended 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 either one or other of the parties might be prejudiced without the prescription of such measures, i.e. 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 [of Justice], 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 Tribunal and say, "Ecology is endangered. Please issue provisional measures to protect the ecology." This is not correct. Judge Wolfrum in the *MOX Plant Case* dealt explicitly with this. I would like to read his words to you. He said:

> … provisional measures should not anticipate a judgment on the merits. This basic limitation on 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 for result that the granting of provisional measures becomes automatic when an 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 competences, 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*:

> That 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 [in the *Southern Bluefin Tuna Cases*]:

> 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.

STATEMENT OF MR LOWE
COUNSEL OF SINGAPORE
[PV.03/05, E, p. 33–36]

Mr Lowe:
Thank you, Sir. 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, which 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 9 October; 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 at 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 advance 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 were 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 Plant 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 Plant 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 – 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 Elihu Lauterpacht ended by quoting the words of one great international lawyer, I shall end by quoting the words of another great international lawyer, Sir Elihu himself, who said, "As yet it has not. And it is now too late to do so".

The President:

Thank you Professor Lowe.

I now give the floor to the Agent of Singapore.

STATEMENT OF MR KOH
AGENT OF SINGAPORE
[PV.03/05, E, p. 36–39]

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 stage. 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 uncooperative 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, 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 emphasize that*], to deal with the adverse effect in question.

Mr President, those of you who have had the pleasure of visiting Singapore will know that 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 wastes 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 Pelepas, 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 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 practices 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 tried 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.

Closure of the Oral Proceedings
[PV.03/05, E, p. 39–40]

The President:
Thank you very much.

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:
Thank you, Mr President. 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 request. 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 sitting closes at 1.26 p.m.

PUBLIC SITTING HELD ON 8 OCTOBER 2003, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Judges* ad hoc HOSSAIN and OXMAN; *Registrar* GAUTIER.

For Malaysia:

Mr Kamal Ismaun,
Ambassador, Embassy of Malaysia, Berlin, Germany,

as Co-Agent;

and

Mr Abdul Gani Patail,
Attorney-General,

Mr James Crawford S.C., F.B.A.,
Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,

Mr Nico Schrijver,
Professor of International Law, Free University Amsterdam and Institute of Social Studies, The Hague, Netherlands,

as Counsel and Advocates;

Mr Christian J. Tams, LL.M (Cantab),
Gonville & Caius College, Cambridge, United Kingdom,

as Counsel;

Ms Wan Napsiah Salleh,
Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mrs Azailiza Mohd Ahad,
Deputy Head, International Affairs Division, Attorney-General's Chamber,

Mr Mohamad Razdan Jamil,
First Secretary, Embassy of Malaysia, Berlin, Germany,

as Adviser.

For Singapore:

Mr Tommy Koh,
Ambassador-at-Large, Ministry of Foreign Affairs,

as Agent:

Mr A. Selverajah,
Ambassador, Embassy of the Republic of Singapore, Berlin, Germany,

as Co-Agent;

and

Mr Ken Hwee Tan,
State Counsel, International Affairs Division, Attorney-General's Chambers,

Ms Li Peng Kok,
Ministry of Foreign Affairs,

as Advisers.

AUDIENCE PUBLIQUE DU 8 OCTOBRE 2003, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Pour la Malaisie :

M. Kamal Ismaun,
Ambassadeur, ambassade de Malaisie, Berlin, Allemagne,

comme co-agent;

et

M. Abdul Gani Patail,
Procureur général,

M. James Crawford S.C., F.B.A.,
Professeur titulaire de la chaire Whewell de droit international, Université de Cambridge, Cambridge, Royaume-Uni,

M. Nico Schrijver,
Professeur de droit international, Université libre d'Amsterdam et Institut d'études sociales, La Haye, Pays-Bas,

comme conseils et avocats;

M. Christian J. Tams, maîtrise de droit (Cambridge),
Collège Gonville & Caius, Cambridge, Royaume-Uni,

comme conseil;

Mme Wan Napsiah Salleh,
Sous-Secrétaire, Division des affaires territoriales et maritimes, Ministère des affaires étrangères,

Mme Azailiza Mohd Ahad,
Chef adjoint de la Division des affaires internationales, Cabinet du Procureur général,

M. Mohamad Razdan Jamil,
Premier Secrétaire, ambassade de Malaisie, Berlin, Allemagne,

comme conseillers.

Pour Singapour :

M. Tommy Koh,
Ambassadeur extraordinaire, Ministère des affaires étrangères,

comme agent:

M. A. Selverajah,
Ambassadeur, Ambassade de la République de Singapour, Berlin, Allemagne,

comme co-agent;

et

M. Ken Hwee Tan,
Conseiller d'Etat, Division des affaires internationales, Cabinet du Procureur général,

Mme Li Peng Kok,
Ministère des affaires étrangères,

comme conseillers.

Reading of the Order
[PV.03/06, E, p. 4]

The Registrar:
The Tribunal will today deliver its Order in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, Request for provisional measures, Case No. 12 on the List of cases, Malaysia, Applicant, and Singapore, Respondent. The Tribunal heard oral statements from the parties at five public sittings on 25, 26 and 27 September 2003.

Mr President.

The President:
I now call on Mr Kamal Ismaun, Co-Agent of Malaysia, to note the representation of Malaysia.

Mr Ismaun:
[*transmits a message from the Agent of Malaysia and introduces the delegation of Malaysia*]

The President:
Thank you.

I now call on Mr Tommy Koh, Agent of Singapore, to note the representation of Singapore.

Mr Koh:
[*introduces the delegation of Singapore*]

The President:
Thank you.

I will now read relevant extracts from the Order in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*. (*The President reads the extracts.)* The sitting is now closed.

The Tribunal rises.

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour), mesures conservatoires.*

Le 16 janvier 2009
16 January 2009

Signé/Signed
_____
Le Président
José Luís Jesus
President

Signé/Signed
_____
Le Greffier
Philippe Gautier
Registrar