INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

MALAYSIA *v.* SINGAPORE

RESPONSE OF SINGAPORE

20 SEPTEMBER 2003

RESPONSE OF SINGAPORE

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PART I – RESPONSE OF SINGAPORE

CHAPTER 1
INTRODUCTION & SUMMARY

1. This submission is made in reply to Malaysia's Request of 5 September 2003 to the International Tribunal for the Law of the Sea ("ITLOS") for provisional measures under Article 290(5) of the United Nations Convention on the Law of the Sea ("the Convention") with respect to Singapore's land reclamation activities at Tuas View Extension and Pulau Tekong. Malaysia had previously submitted, on 4 July 2003, its *Statement of Claim and Grounds on Which it is Based*, pursuant to Article 1 of Annex VII of the Convention (hereafter referred to as the "Statement of Claim").[1] As neither Singapore nor Malaysia has made any choice of dispute settlement procedure pursuant to Article 287 of the Convention, jurisdiction for this dispute is assigned to an Annex VII tribunal under the Convention, in accordance with Article 287(3).

2. ITLOS' function under Article 290(5) of the Convention is confined to deciding whether to exercise its discretion to prescribe provisional measures, pending the constitution of the Annex VII tribunal, if the claimant persuades ITLOS "that the urgency of the situation so requires."

3. The scope of possible measures is set by Article 290(1) of the Convention, which refers to:

> ... any provisional measures which [the Tribunal] considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

4. "Urgency" in the present context, means that the provisional measures are required within, at the most, the next 19 days, *i.e.*, pending constitution of the Annex VII arbitral tribunal upon the appointment of the 3 remaining arbitrators by the President of ITLOS, pursuant to Article 3(e) of Annex VII of the Convention. Those appointments must be made by 9 October 2003.[2]

5. Malaysia requests the prescription of four provisional measures – that Singapore shall:

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

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1 "In the Dispute Concerning Land Reclamation Activities by Singapore Impinging upon Malaysia's Rights in and around the Straits of Johor inclusive of the areas around Point 20, (*Malaysia* v. *Singapore*), Statement of Claim and Grounds on Which it is Based", dated 4 July 2003 (hereafter, "Statement of Claim").

2 *See* Letter from Singapore's Minister of Foreign Affairs, Prof. S. Jayakumar, to the President of ITLOS, 9 September 2003. This letter is at Appendix 42 to Annex 2.

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.[3]

6. As a **matter of jurisdiction**, this Response sets out Singapore's submission that the negotiations between the Parties, which Article 283 of the Convention makes a precondition to the activation of the Part XV compulsory dispute settlement procedures, have not occurred.[4] As a consequence, the Annex VII tribunal and hence ITLOS, acting under Article 290(5) of the Convention, lacks the *prima facie* jurisdiction which is a prerequisite to prescribing provisional measures.

7. As a **matter of admissibility**, Singapore submits that Malaysia's Request fails to "specify... the reasons" for requesting provisional measures, as required by Article 89 of the ITLOS Rules.[5] It also fails to "specify... the possible consequences if [the Order requested by Malaysia] is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment", and fails to indicate the urgency of the situation. These failures, Singapore submits, render the Malaysian Request received on 5 September 2003 inadmissible.

8. As a **substantive matter**, this Response submits that there is no basis for any of the four provisional measures requested by Malaysia. In summary, Singapore's submissions are outlined in the following paragraphs.

9. The **first measure, (a)**, seeks, in the first place, a suspension of works in areas claimed by Malaysia as its territorial waters. As map 4 appended to Malaysia's Statement of Claim makes plain, the only possible area to which this measure could relate is the area around "Point 20",[6] which lies within the Tuas development on the western side of Singapore. There is no possible encroachment upon any territorial waters that might be claimed by Malaysia in the vicinity of Pulau Tekong in the east.

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3 "In the Dispute Concerning Land Reclamation Activities by Singapore Impinging upon Malaysia's Rights in and around the Straits of Johor inclusive of the areas around Point 20, (*Malaysia* v. *Singapore*), Request for Provisional Measures", of 5 September 2003 (hereafter, "Request for Provisional Measures"), at para. 13.

4 *See* Art. 283, the Convention.

5 *International Tribunal for the Law of the Sea: Rules of the Tribunal*, dated 21 September 2001 (Document: ITLOS/8).

6 The Map is attached to the Statement of Claim, *supra* note 1, after p. 7.

10. Singapore submits:

   (a) that Malaysia has not made out an arguable case in support of its claim to "Point 20";

   (b) that in any event provisional measures cannot predetermine questions of title to territory, which must be settled on the merits;

   (c) that only the prevention of irreversible and incompensable harm to a disputed area of territory would warrant the prescription of provisional measures; and

   (d) that no such harm can possibly take place during the period of 19 days pending the constitution of the Annex VII tribunal.[7]

11. As far as reclamation works in other locations are concerned, Malaysia's case must rest upon proof of the probability that the reclamation works will cause serious harm to the marine environment or infringement of Malaysia's rights under the Convention in the period before the Annex VII tribunal is constituted. Malaysia has not proven that probability, and there is no possibility of such damage or infringement during that period.

12. As to the **second measure, (b)**, Singapore submits that the request is inappropriate and unnecessary.

13. The Convention does not require coastal states to notify and consult over each and every project that they enter into, but only those that entail a foreseeable risk of substantial pollution of or significant and harmful changes to the marine environment. Singapore's studies indicate that the reclamation works entail no such risks. Nonetheless, in its Diplomatic Note to Malaysia dated 17 July 2003, Singapore indicated its willingness to provide Malaysia with information on the reclamation works.[8] Singapore has already provided Malaysia with three substantial tranches of information.[9]

14. Singapore has not retracted its offer to provide further information. Malaysia need only take up the offer and identify, by itself or in discussions between the technical experts on the two sides, what further information it should have in accordance with its rights under the Convention. There is no dispute over this issue, and no occasion for the prescription of provisional measures.

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7 As is explained in this Response, "Point 20" has, for 23 months, been reclaimed to above sea level. See *infra*, at Chapter 5, Section II.A.

8 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at pp. 5-6.

9 The first tranche was provided with Singapore's Diplomatic Note dated 17 July 2003 (*see* Appendix 24 of Annex 2); the second tranche was provided at the meeting of the Parties on 13-14 August 2003 (*see* Record of Meeting 13-14 August 2003, *infra* note 67, generally); and the third tranche was provided in response to specific Malaysian requests made at a meeting of the Parties on 13-14 August 2003 via Ambassador Tommy Koh's letter to Tan Sri Ahmad Fuzi, Secretary-General of the Malaysian Ministry of Foreign Affairs, dated 21 August 2003 (*see* Appendix 34 of Annex 2).

15. As to the **third measure requested, (c)**, Singapore stated in its Note dated 17 July 2003 that "the Government of Singapore reaffirms its willingness to afford Malaysia a full opportunity to comment upon the works in question and their potential impacts having regard, *inter alia*, to the information provided" by Singapore to Malaysia.[10] As to a specific concern identified by Malaysia, Singapore stated, in its Note dated 2 September 2003:

> ... The Government of Singapore wishes to reassure the Government of Malaysia that Singapore has always ensured that its reclamation works will not impede navigation through the Straits of Johor, a common navigation channel shared by both Malaysia and Singapore whose status is governed by international law. Accordingly, 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.[11]

Singapore has not withdrawn from those positions. The door is open to Malaysia. There is no dispute over this issue; and there is neither the need nor any legal justification for the prescription of provisional measures.

16. As to the **fourth requested measure, (d),** in its Note of 17 July 2003, Singapore has already stated that it "remains ready and willing to engage in negotiations with the Government of Malaysia regarding any remaining unresolved issues, and to act on any agreements." Singapore also reiterated "its willingness and desire" to proceed to substantive negotiations "in order to reach an amicable agreement with Malaysia on the outstanding issues."[12] That position was affirmed in Singapore's Notes dated 31 July 2003 and 2 September 2003.[13] Malaysia has chosen another route, preferring to put the matters before an international tribunal. Since that tribunal will be bound to decide all the matters put before it in Malaysia's Statement of Claim, it is difficult to understand what Malaysia had in mind when it referred to "any remaining unresolved issues." Whatever Malaysia may have intended, Singapore reaffirms its willingness and readiness to negotiate with Malaysia over any aspect of the reclamation works that may impact upon Malaysia's rights under the Convention. There is accordingly no dispute over this issue; and there is neither the need nor any legal justification for the prescription of provisional measures.

17. Provisional measures may be prescribed under Article 290(5) of the Convention only in cases of **urgency**. Singapore's reclamation works are not recent. Singapore is undertaking no works that have not long been announced and subject to public scrutiny and comment. The reclamation projects have long been known to Malaysia. Nor are the projects

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10 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at p. 6.

11 *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at p. 4.

12 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2.

13 *See* Diplomatic Notes dated 17 July 2003, 31 July 2003 and 2 September 2003 from Singapore to Malaysia, attached as Appendices 24, 27 and 38 to Annex 2.

unregulated. On the contrary, they have been and continue to be subject to an extensive and demanding set of planning and environmental controls and monitoring, which ensure that the reclamation activity respects navigational, environmental and other interests in the waters around Singapore. Malaysia has looked on for some years as the works progressed. It cannot claim now that the circumstances are so urgent that it needs provisional measures to protect its interests, or to protect the environment, in the 19 days until the tribunal will be constituted.

18. Furthermore, suspension of the works at the present stage will produce no significant benefits whatever. The potential adverse effects alleged by Malaysia are based on the final configuration of the reclaimed land, and that configuration has almost been reached as a result of works completed before Malaysia requested arbitration of the dispute. No works in the near future will exacerbate any such effects. The costs of suspension to Singapore, on the other hand, are high and Singapore will be left without a remedy if Malaysia eventually fails to prove its case before the Annex VII tribunal.

19. Accordingly, Singapore submits:–

(a) that there is no evidence whatever that any damage or any irreversible and incompensable damage to Malaysia's rights will occur within the next 19 days;

(b) that there is no evidence whatever that any serious harm to the environment will occur within the next 19 days, as a consequence of Singapore's land reclamation activities;

(c) that there is no urgency in this Request;

(d) that even if, *arguendo*, the elements in subparagraphs (a) to (c) above exist, the burdens and costs to the respondent of having to suspend the challenged acts must be balanced against the cost of a possible occurrence of the harm alleged; and

(e) that Malaysia's Request should therefore be rejected.

20. These submissions are developed in the following chapters of this Response:–

Chapter Two outlines the factual background. It describes the planning process in Singapore, the reclamation projects at Tuas and Pulau Tekong and the steps taken to determine their probable impact and what, if any, actions or works were necessary to avoid any unacceptable impacts. It also describes the steps taken by the Parties to resolve the differences between them.

Chapter Three sets out Singapore's submission that there has been no real effort to resolve this dispute by negotiation, as Article 283 of the Convention requires. Accordingly, the Annex VII tribunal would *prima facie* lack jurisdiction, and the ITLOS is precluded from prescribing provisional measures by virtue of Article 290(5) of the Convention.

Chapter Four sets out in general terms Singapore's submissions regarding the principles that would govern the prescription of provisional measures, if the ITLOS did have jurisdiction to prescribe them.

Chapter Five applies the principles set out in Chapter Four to the specific circumstances of the present case.

Chapter Six summarises Singapore's submissions and sets out its request for relief.

CHAPTER 2
FACTUAL BACKGROUND

I. Reclamation Works around the World.

21. This case involves certain land reclamation activities conducted by Singapore within its territorial waters. Singapore notes from the outset that reclamation works are common and widely practised all over the world. This includes reclamation of inland sites as well as coastal sites for various purposes. Some well-known examples of coastal reclamation projects undertaken by various countries across different regions include:

(a) Kansai International Airport, Osaka, Japan – this project involved the reclamation of up to 1,300 ha of land;

(b) Penny's Bay, Hong Kong – this project involved the construction of 3,500 metres of seawall. The total area of reclaimed land was some 290 ha;

(c) Incheon International Airport, South Korea – this project involved the reclamation of 5,600 ha of land for the Incheon International Airport;

(d) Shannon Estuary, Ireland – this project involved at least 6,500 ha of land, to be enclosed, drained and reclaimed for agriculture and other purposes;

(e) The Palm, Jumeirah, United Arab Emirates – This project involves the creation of the world's two largest man-made islands, and the reclamation of land which will increase Dubai's coastline from the existing 72 km to 120 km;

(f) the IJburg Project, Amsterdam, the Netherlands – This project involved the partial reclamation of several islands, and created 450 ha of surface;

(g) the Oresund Fixed Link, Denmark – This project involves the construction of a 16 km long bridge/tunnel-link connecting Kastrup, Denmark with Lernacken, Sweden, and the creation of an artificial peninsula and an artificial island.[14]

Further details of these reclamation projects are attached to this Response.[15]

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[14] More information on The Palm development project is available at http://www.palmisland.co.ae/enter.html.

[15] *See* Appendix 1 to Annex 1.

22. It is not disputed between the parties that a state has the sovereign right to reclaim land, which is an aspect and corollary of the exercise of the right to development and permanent sovereignty over its natural wealth and resources.[16]

23. Singapore notes that reclamation and dredging works are also currently being undertaken by Malaysia. Diagrams showing the locations of the major reclamation areas in Malaysia are attached.[17]

II. The Position of Singapore

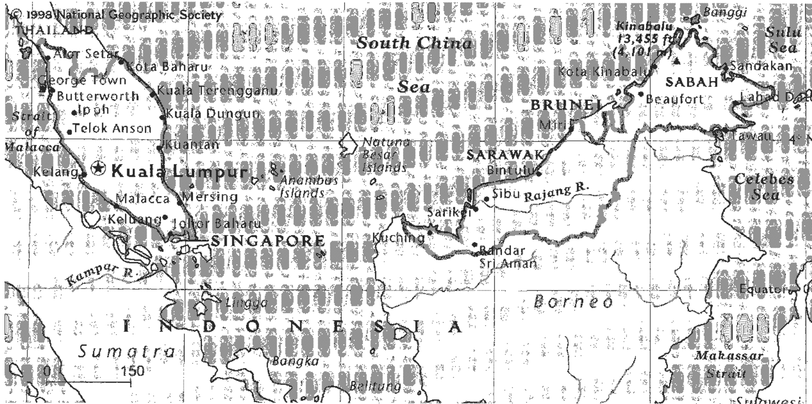
24. Singapore is a small island republic in South-East Asia situated just off the tip of the Malayan peninsula, at the southernmost part of the Asian mainland. It comprises one main island and many smaller islands, and has a total land area of about 680 square kilometres (68,000 ha), which is smaller than the Free and Hanseatic City of Hamburg. It is separated from Malaysia in the North, West and East by the Straits of Johor, and from the Indonesian archipelago in the South by the Straits of Singapore. Singapore is connected to its northern neighbour, Malaysia, via a road and rail causeway ("the Causeway"), built in 1923 and another road link, opened in 1998. Singapore is today a major industrial and financial centre in Asia and has one of the largest ports in the world. For easy reference, a map of Singapore and the surrounding lands and waters,[18] and a close-up showing Singapore, are attached overleaf.[19]

16 This sovereign right is internationally recognised and has been referred to in the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on "Permanent Sovereignty over Natural Resources"; and United Nations General Assembly Resolution 3281 (XXIX) of 12 December 1974 on "Charter of Economic Rights and Duties of States". These General Assembly Resolutions are attached as Appendices 2 and 3 to Annex 1 respectively. The right to develop is also enshrined in Article 193 of the Convention.

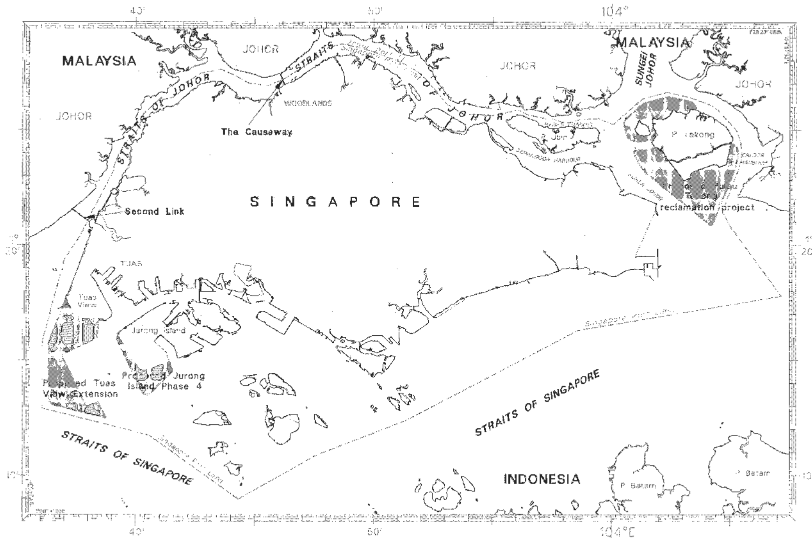
17 *See* Appendix 4 to Annex 1, showing *Major Reclamation Areas in Malaysia*. The locations shown are from public records and are not exhaustive.

18 The overview map was obtained from http://www.nationalgeographic.com/xpeditions.

19 *See* Appendix 5 to Annex 1, *Map of Singapore and its Surrounding Lands and Waters*.



Overview of the region, showing Singapore and Malaysia



The main island of Singapore, showing the Tuas View Extension and Pulau Tekong reclamation areas.

25. Singapore has a population of some four million, which is projected to increase to five million in the future. Given the size of its population relative to its land and resource base, Singapore has been constrained from the beginning of its independent existence to engage in intensive and continuous planning to strike a balance between competing needs. Much of Singapore's limited land area has been dedicated to the basic housing needs of its population. Land must also be set aside for the other uses, including transport use, industries, businesses,

nature reserves, recreation, water catchment areas, ports, airports and military training. Land use is optimised through the development of integrated townships, high-rise buildings and underground facilities. The intensification of land use has enabled Singapore to accommodate one of the highest population densities in the world, with over 6,000 people per square kilometre.[20]

26. Singapore is not only constrained by scarce land resources, but also by its limited territorial waters. Most of Singapore's limited territorial waters have been dedicated to support Singapore's port uses. Space is set aside for anchorages, fairways and port approaches.

27. Singapore's port has been the world's busiest since 1986 in terms of shipping tonnage. Located at the crossroads of major shipping routes, Singapore is the focal point of some 400 shipping lines with links to over 700 ports around the world. In 2002, a total of 142,745 vessels called at the port with a shipping tonnage of 972 million gross tons. This works out to an average of 16 vessels arriving every hour, or 1 vessel arriving every 3.75 minutes. Being a major transhipment hub in Asia, Singapore handled a total of 16.9 million twenty-foot equivalent units (TEUs) and 335.1 million tonnes of cargo in 2002. Singapore is also the world's busiest bunkering port, supplying 20.1 million tonnes of bunker in 2002. In addition to the foregoing uses, Singapore is also developing into an important cruise ship gateway for the Asia-Pacific region. There are well-developed passenger terminals, including an international terminal for cruise liners, a regional terminal for ferries to Malaysia and Indonesia and a domestic terminal for ferries to Singapore's offshore islands in the south.[21]

A. Reclamation in Singapore

28. Singapore has a history of reclaiming land for housing, economic and industrial uses for more than 100 years. Recent reclamation projects include those at:

(a) Kallang River in the 1960s for industrial and housing purposes;

(b) Kranji in the 1960s for industrial purposes;

(c) Jurong swamps in the 1960s and the 1970s for industrial purposes (construction of Jurong Industrial Estate);

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20 For more information on Singapore's population statistics as at June 2002, *see* http://www.singstat.gov.sg/keystats/annual/indicators.html. For a comparison of world population densities, *see* Wikipedia, *List of Countries by Population Density*, *available at* http://www.wikipedia.org/wiki/List_of_countries_by_population_density. In contrast, Hamburg has a population density of 2,251 people per square kilometer. *See Hamburg in a nutshell, available at* http://www.hamburg.de/fhh/international/englisch/hamburg_kurz.htm.

21 *See* Singapore Fact Sheet Series (The Port), Ministry of Information and the Arts, July 2001. This document is attached as Appendix 6 to Annex 1. More information on Singapore's maritime activities is available at http://www.singaporemaritimeportal.com

(d) Pasir Panjang in the 1970s for Pasir Panjang Port;

(e) Marine Parade in the 1970s for housing purposes;

(f) Changi Airport in the 1980s for infrastructure purposes;

(g) Jurong Island (joining seven islands in south-western part of Singapore) in the 1990s for industrial purposes;

(h) Seletar in the 1980s for housing purposes;

(i) Changi East in 1994-2002 for the expansion of Changi Airport, development of infrastructure and industrial purposes.[22]

29. The reclamation works carried out over the last 30 years have enabled Singapore to increase its land area from 580 to 680 square kilometers (58,000 ha to 68,000 ha). Malaysia has itself acknowledged that Singapore's earlier land reclamation activities occasioned no grave concern on the part of Malaysia.[23]

B. Current Schemes and Proposals in Malaysia with Possible Impact on Singapore

30. Malaysia, too, engages in developments which may impact on navigation and the marine environment in the waters around Singapore and Malaysia. Examples of projects known to the Government of Singapore from publicly available records include:

(a) reclamation and construction works at the Port of Tanjung Pelepas at the southern tip of West Malaysia, approximately 12 km to the west of Singapore. The entire development, according to its Master Plan, will create a new hyper port which appears to require about 2100 ha of reclamation. A composite diagram showing the Master Plan for the Port of Tanjung Pelepas and the adjacent waters is attached to this Response;[24]

(b) the proposed unilateral[25] demolition of Malaysia's half of the Causeway connecting Malaysia to Singapore, and its replacement by a bridge spanning

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22 *See* Appendix 7 to Annex 1, Maps showing Areas of Land Reclaimed by Singapore from the 1960s to 2003.

23 *See* Statement of Claim, *supra* note 1, at para. 8.

24 *See* Appendix 8 to Annex 1, *Map Showing Malaysia's Proposed Expansion of the Port of Tanjung Pelepas*. The estimated area of reclamation is based on the chart presented in Malaysia's UKM Report, *infra*, note 132. For more information on the Port of Tanjung Pelepas, *see* http://www.ptp.com.my and http://members.tripod.com/~mcleon/pelepas/pelepas.htm.

25 Singapore discussed Malaysia's proposal for the demolition of the Causeway and its replacement with a bridge spanning the entire Straits of Johore in the context of overall negotiations on various outstanding issues between Singapore and Malaysia. These negotiations were terminated by Malaysia.

only half of the Straits of Johore.[26] Malaysia's own technical reports have predicted that the opening of the Causeway may cause potential negative effects on the surrounding waters;[27]

(c) the proposed Tanjung Bin Power Station, which will be a 2,100 MW capacity coal-fired power plant;[28]

(d) the development of Tanjung Langsat Industrial Area (TLIA), at the mouth of the Sungei Johor in the East Johor Straits, to the north of Pulau Tekong. TLIA covers 1,910 ha and appears to focus on the development of heavy, sea-related, petrochemical, steel production and offshore industries;[29]

(e) the development of the Pasir Gudang Port (also known as Johore Port) and industrial area on the southern coast of Johor, to the east of the Causeway. The industrial area includes both heavy and light industries including petrochemical, oil palm processing, chemical production, shipbuilding, ship-repairing and port facilities. The township, with an estimated population of 54,000, is projected to grow to 155,000 in the year 2020;[30] and

(f) reclamation at Puteri Lagoon and Lido beach (east of Sungei Skudai) as part of the ongoing Danga Bay project involving four phases and a total of 640 ha.[31] The project includes commercial, residential and recreational developments.

Malaysia subsequently declared that it would proceed with the unilateral demolition of its half of the Causeway.

26 *See* http://thestar.com.my/services/printerfriendly.asp?file=/2003/8/2/nation/5974753.asp; http://domino.kln.gov.my/KLN/press.nsf/0/3cad0882fb54b62f48256d7f00293025?OpenDocument

27 Malaysia's own consultants have pointed out that "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" and that "in opening of causeway flow velocities up to 3.5 knots at spring tide. This could be a problem for smaller vessels going up stream. These velocities could also pose a serious threat to larger ships…" *See* A. van der Weck, J. Smits et al, WL | Delft Hydraulics, "*Hydraulic and Environmental Impact Assessment for the Straits of Johor*" (hereafter, "DH Report"), at pp. 18 and 24 respectively. This Document is attached as Annex E to the Request for Provisional Measures, *supra* note 3.

28 Datuk Pian Sukro, *A Memorable Year Indeed*, Business Times (19 July 2003), *available at* http://yquake.nst.com.my/Current_News/BTimes/Monday/Supplement/20021230002114/Article/.

29 More information on the Tanjung Langsat Industrial Area is available at http://www.pbtpasirgudang.gov.my/PasirGudang-e/Kawasan/kawasan_tadbiran_baru.htm.

30 More information on the Pasir Gudang Port is available at http://www.johorport.com.my.

31 Joanna Sze, *A Vision Big Enough to Share*, Malaysian Business, 1 April 2003, *available at* LEXIS, News Group File, Most Recent Two Years, CURNWS.

The approximate locations of the various projects listed above are plotted on a map, and attached to this Response.[32]

C. The Planning Process for Reclamation Projects in Singapore

31. Singapore has put in place a structured planning process which ensures a balanced and systematic approach to land development and usage. An integral part of the process involves public consultations and reviews prior to and during the formulation of land use policies.

32. At the apex of the planning and development process in Singapore is the *Concept Plan*, which maps out the broad, long-term direction for Singapore's physical development over 40 to 50 years. The Concept Plan, first developed in 1971 and reviewed once every ten years, guides Singapore's strategic development plans to meet its land demands.

33. The latest review began in 1998 and was completed in 2001. It included an extensive public consultation exercise through, *inter alia*, focus groups, which comprised professionals, interest groups, industrialists, businessmen, academics, grassroots leaders and students. A public exhibition was also mounted, and the draft Concept Plan was made available, and the Concept Plan that was adopted remains available on the Internet for access by the general public.[33] Much public feedback was also received through the Internet and through public dialogue to discuss the draft Concept Plan. This feedback is taken into consideration in the planning process.

34. The broad visions of the Concept Plan are then translated into a detailed *Master Plan* which is developed through an open consultative process. Whilst the Concept Plan establishes land use policies in broad strokes, the Master Plan sets out short to medium term plans in greater detail. In considering any application for permission to carry out development works, Singapore's planning authority is bound by legislation to act in conformity with the provisions of the Master Plan.[34]

35. The Master Plan review is carried out at least once every five years. Under Singapore legislation, amendments to the Master Plan arising from the review must be notified to the public by way of advertisement specifying the place where the revised plan is available for public inspection. Members of the public may make objections to and representations concerning the revised plan within a stipulated period, and many do so.[35]

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32 Appendix 9 to Annex 1, *Map of Locations of Major Development Projects (Current and Proposed) in Malaysia.*

33 For more information on the Concept Plan 2001, *see* http://www.ura.gov.sg/conceptplan2001.

34 *See* Planning Act (Cap 232, 1998 Revised Edition), at ss. 13, 14. This piece of legislation is at Appendix 10 to Annex 1.

35 *See* Planning Act, *supra* note 34, at s. 10(2); Planning (Master Plan) Rules (Cap 232, Rule 1, 2000 Edition), at r. 4. This piece of legislation is at Appendix 11 to Annex 1.

36. In addition, for large infrastructural projects undertaken by the Singapore Government, an intricate and complex multi-agency process operates. In the case of reclamation projects, the lead Ministry responsible for the particular project will appoint an agency with technical expertise to coordinate the planning and oversee the execution of the reclamation works on behalf of the Government (that agency is referred to as "the *Reclamation Agency*"). Reclamation Agencies must obtain specific approvals from various other government agencies before they can proceed with proposed works. They must also address concerns set out by these government agencies.

37. The national agency for land use and development planning in Singapore is the Urban Redevelopment Authority. The *Master Plan Committee*, chaired by the Chief Planner, provides an avenue for relevant government agencies to provide inputs and comments on major development proposals, including reclamation projects. The Master Plan Committee comprises senior representatives from various government agencies, which have an interest in these major development proposals. The National Environment Agency and the National Parks Board are two of the agencies involved in the Master Plan Committee and they specifically address environmental concerns.

38. As applied to reclamation projects, this process also involves the *Maritime and Port Authority of Singapore* ("Maritime and Port Authority") as one of the technical approving agencies which work with the Urban Redevelopment Authority.

39. The consent of the Maritime and Port Authority is also separately required for projects involving construction at sea or on the foreshore.[36] The Authority's Committee for Marine Projects evaluates and grants approvals for the construction of marine projects. The Committee ensures that the existing designed depths of fairways and channels are not changed by marine projects so that navigational safety is not compromised.[37] The applicant agency must carry out pre- and post-construction bathymetric and side scan sonar surveys, using a hydrographic surveyor approved by the Authority. The Authority also ensures that the contractor does not cause obstruction and siltation, which could endanger the safety of ships. For instance, the Authority has stipulated that the proposed reclamation must be well clear of the navigation channel. In addition, the movements and operations of the dredgers for reclamation projects must be coordinated and approved by the *Port Master's Department* of the Authority to ensure minimal impact on the safe navigation in fairways and shipping channels.

40. Further details as to the planning process, as applied to land reclamation projects, have been summarised by Haskoning Nederland BV Maritime in two Summary Reports of

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[36] *See* Maritime and Port Authority of Singapore Act (Cap.170A, 1997 Revised Edition) ss 79, 110. This piece of legislation is at Appendix 12 to Annex 1.

[37] This covers construction of wharves, jetties, ramps, pontoons, floating docks, marinas, floating restaurants, submarine pipelines and cables, reclamation works, lease of waterfront areas, marine soil investigations, dredging and disposal of dredged materials at sea and consultation with the Urban Redevelopment Authority on development plans.

reclamation at Pulau Ubin and Pulau Tekong as well as at Tuas View Extension and Jurong Island Phase 4, attached as Annexes 3 and 4 respectively.[38, 39]

III. The Pulau Tekong and Pulau Ubin Reclamation Project

41. As noted above, Singapore is compelled by its limited land resources to implement detailed strategic land use planning to ensure that there is sufficient land for long-term development needs. Projected increases in population and the growth of industry require the intensification of land usage. Pulau Tekong and Pulau Ubin have been identified as reclamation sites to meet some of these needs.

42. The Pulau Tekong and Pulau Ubin reclamation project, comprising a total of 3,310 ha of reclaimed land, is being executed in phases. The initial plans for the reclamation were published in the 1991 Concept Plan.[40] After carrying out various studies, physical construction on the site began about three years ago with works starting on 9 November 2000. The project covers various areas off the coast of the two islands, identified as Areas A, B, C, D, and Y.[41]

43. The *Ministry of National Development* is the Ministry in charge of this project. It has in turn appointed the *Housing and Development Board*, a government statutory board,[42] as the Reclamation Agency for the project.[43]

44. In developing specific reclamation plans, the Reclamation Agency must undertake a number of studies, as well as consult with and obtain the approvals of other agencies which would each review the proposal separately. A wide range of factors is addressed, including navigational, environmental and ecological considerations. Studies, including a hydraulic model study, were commissioned and carried out.[44] The entire planning process for the Pulau

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38 H. Altink, A.J. Blick *et al*, Haskoning Nederland BV Maritime, *Summary Report of Reclamation at Pulau Ubin and Pulau Tekong*, 15 July 2003, at para. 3.2. This Report is hereafter referred to as *"Summary Report (Tekong)"*. This is attached as Annex 3.

39 H. Altink, A.J. Bliek *et al*, Haskoning Nederland BV Maritime, *Summary Report of Reclamation at Tuas View Extension and Jurong Island Phase 4*, 15 July 2003, para. 3.2. This Report is hereafter referred to as *"Summary Report (Tuas)"*. This is attached as Annex 4.

40 *See* Appendix 13 to Annex 1, *Singapore Concept Plan 1991*.

41 *See* Appendix 14 to Annex 1, *Approved Reclamation Profile of Pulau Tekong and Pulau Ubin*.

42 This refers to a governmental entity which possesses a separate juridical personality under Singapore law.

43 *See Summary Report (Tekong)*, *supra* note 38, at para. 4.3.

44 *See generally, Summary Report (Tekong)*, *supra* note 38, at Chapters 3 and 5; *Summary Report (Tuas)*, *supra* note 39, at Chapters 3 and 5.

Tekong and Pulau Ubin reclamation project included a complex series of activities involving a number of stakeholders and authorities, over more than ten years since 1991.[45]

45. In the design, approval and implementation of the Pulau Ubin and Pulau Tekong Reclamation Project, the impacts of the works on the environment were and continue to be carefully considered and addressed. In summary, the measures taken include:

(a) requiring good general practices on the part of the contractor awarded the contract for the reclamation works to eliminate possible siltation and pollution of waters in the Straits of Johor, and environmentally sensitive areas;

(b) the imposition and enforcement of regulatory controls;

(c) the imposition of requirements to monitor environmental parameters, *e.g.*, water quality, mangroves, silt, water currents, and waves;

(d) measures to ensure the protection of waterways and to safeguard navigation; and

(e) the installation of silt barricades to minimise the egress of silt and suspended sediment into the surrounding estuarine waters.

A fuller account of the contract management and good construction practices is set out in Chapter 7 of the Summary Report (Tekong).[46]

46. Following generally accepted international best practices, continuous monitoring of the reclamation works takes place, and where necessary, adjustments are made to minimise or remove the impacts. For instance, in January 2002, the reclamation plans for area Y at Pulau Ubin were revised in order to accommodate environmental interests in the biodiversity of the an area of mudflats known as "Chek Jawa" at Pulau Ubin.

47. The contract sum for contracts awarded thus far for the reclamation project amounts to about S$1,758 million.[47] The works are now at an advanced stage and practically the full geographical extent of the outer boundary of the reclamation areas has already been delineated by physical structures on the site. Most of the remaining work involves in-filling. This can be clearly observed from the site plan for the Pulau Tekong works as of 31 August 2003.[48]

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[45] A fuller account of the planning and approval process for the Pulau Tekong and Pulau Ubin reclamation project is set out in the "*Summary Report (Tekong)*", *supra* note 38, at Chapter 5. *See in particular*, Table 5.1.

[46] *See Summary Report (Tekong)*, *supra* note 38, at para. 7.

[47] This is approximately equivalent to € 888 million, based on an exchange rate of S$ 1 = € 0.505. See http://www.ft.com, as of 13 September 2003.

[48] *See* Appendix 15 to Annex 1, *Site Plan for Pulau Tekong Works as at 31st August 2003.*

IV. The Tuas View Extension Project

48. As mentioned above at paragraph 25, land must also be set aside for infrastructural uses. The projected shortfall of industrial land in Singapore led to plans to expand the land available at Tuas for industrial uses.

49. The Tuas View Extension reclamation project comprises a total of 1,908 ha of reclaimed land. The project began about three years ago with works starting in June 2000. The contract sum for the Tuas View Extension project amounts to about S$ 4,000 million.[49] The works are projected to be fully completed by 2005. The approved reclamation profile is attached to this Response.[50]

50. The *Ministry of Trade and Industry* is the Ministry in charge of the project. It has in turn appointed the *Jurong Town Corporation*, a government statutory board, as the Reclamation Agency for the project.[51]

51. As with the reclamation at Pulau Tekong and Pulau Ubin, the approval processes for Tuas View Extension were complex and extensive. The Government of Singapore and its various statutory bodies carried out or commissioned studies, and granted approvals, as detailed in the Summary Report (Tuas).[52]

52. The various studies that were commissioned prior to the commencement of the Tuas View Extension reclamation resulted in adjustments to accommodate specific interests or concerns. These included adjustments to the reclamation plans, as well as adjustments to the reclamation methodology, including the introduction of problem-mitigating measures.[53]

53. After the start of reclamation works, close monitoring of environmental indices is continuously carried out. The Singapore Government continues to pay close attention to the effects of reclamation, and readily makes adjustments in response to ongoing studies, or newly identified or discovered effects.

54. The Tuas bund running in the north-south direction is an example in point. The Tuas View Extension project consists of two parts – a northern portion ("Tuas A") and a southern portion ("Tuas B"). The original plan called for the reclamation of the bund for "Tuas A" to be carried out separately from the bund for "Tuas B". However, consultation between agencies and technical experts resulted in the decision to build the entire Tuas bund as a single continuous bund starting from the north and extending southwards. This was to reduce

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[49] This is approximately equivalent to € 2,020 million, based on an exchange rate of S$ 1 = € 0.505. See http://www.ft.com, as of 13 September 2003.

[50] *See* Appendix 16 to Annex 1, *Approved Reclamation Profile of Tuas View Extension.*

[51] *See Summary Report (Tuas), supra* note 39, at para. 4.3.

[52] *See Summary Report (Tuas), supra* note 39, at Table 5.1.

[53] *See Summary Report (Tuas), supra* note 39, at Table 5.2.

adverse environmental effects which might have manifested themselves if the Tuas bund was constructed in two parts as originally intended.[54]

V. The Dispute

55. The issues raised by Malaysia in its Statement of Claim relate to the following:

(a) alleged encroachment into what are claimed to be Malaysia's territorial waters in the vicinity of Malaysia's unilaterally designated "Point 20";

(b) the alleged impact on Malaysia of Singapore's reclamation works at:

(i) Tuas View Extension; and

(ii) Pulau Tekong and Pulau Ubin.

56. Malaysia did not protest against the Tuas View Extension reclamation until January 2002, and then only in respect of the alleged encroachment into its territorial waters.[55] At that point in time, the Tuas View Extension reclamation project had already been in progress for more than one and a half years. No mention was made by Malaysia of any geophysical and hydrographical impacts arising from the Tuas View Extension reclamation until 2 April 2002. On 30 April 2002, Malaysia raised objections for the first time concerning the alleged environmental impact and narrowing of the waterway in Kuala Johor as a result of the Pulau Tekong reclamation works. Despite repeated requests from Singapore and repeated public assurances from Malaysia that the material would be forthcoming, no particulars or details were provided by Malaysia of the alleged environmental and other impacts that were of concern to it until Malaysia's Note of 4 July 2003, more than a year later.[56]

A. The "Point 20" Sliver

57. In 1979, Malaysia unilaterally proclaimed its territorial sea and continental shelf, by publishing a small-scale map. "Point 20", which lies within the current Tuas View Extension reclamation profile, was claimed by Malaysia to be within its waters. Since 1979, Singapore has consistently rejected Malaysia's claim and has reiterated its sovereign rights over "Point 20" and the "Point 20" sliver, an area bounded by Points 19, 20, 21 on the 1979 Malaysia Map. Malaysia's "Point 20" and the "Point 20" sliver are best seen in the maps below.[57]

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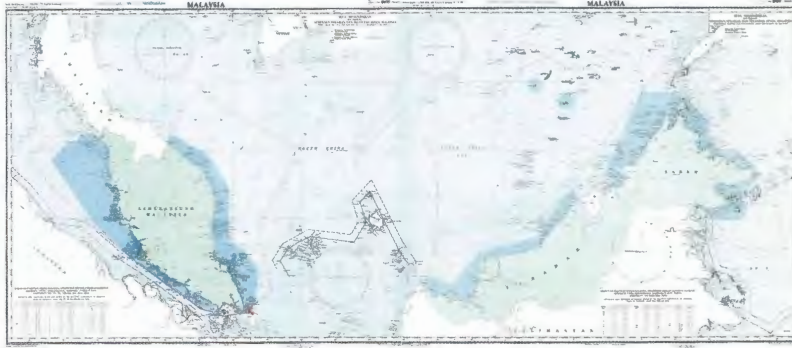
[54] *See* Appendix 17 to Annex 1, *Diagram Showing the Tuas Bund.*

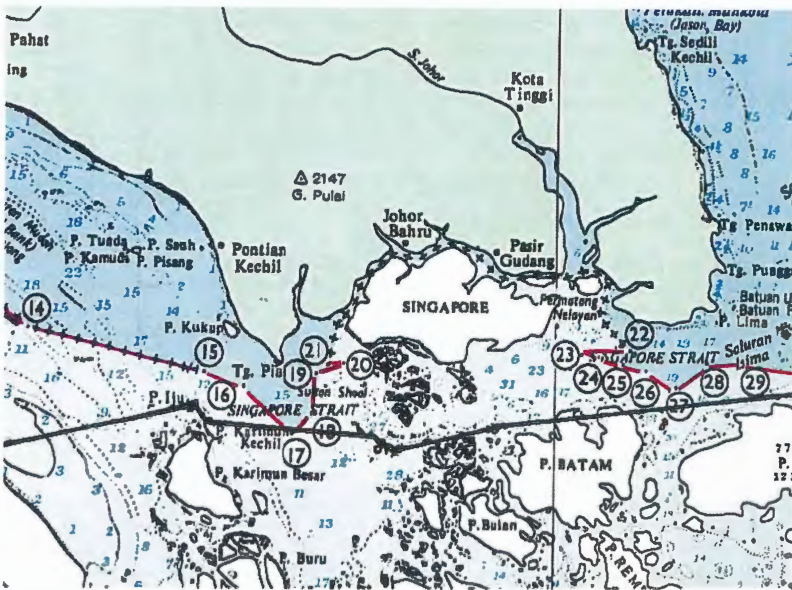
[55] *See* generally, *Annex 2: Chronologies and Diplomatic Exchanges.*

[56] *See infra*, at note 190.

[57] *See also*, Appendix 18 to Annex 1, *Map Showing Malaysia's "Point 20", the "Point 20" Sliver and Malaysia's 1979 Unilaterally Proclaimed Boundary Limits and the 1995 Agreed Boundary Limits between Malaysia and Singapore.*



1979 Territorial Waters and Continental Shelf Boundaries of Malaysia



Close up of area Around Singapore from Malaysia's 1979 Territorial Waters and Continental Shelf Boundaries of Malaysia

58. A full chronology of the dispute over "Point 20" has been prepared and is attached to this Response.[58] It will be noted that not only did Singapore consistently object to Malaysia's unilateral designation of its "Point 20", but Singapore and Malaysia *subsequently* concluded a maritime delimitation agreement, on 7 August 1995, which fixed, by geographical

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[58] *See Chronology of the Dispute over "Point 20"*, attached as Appendix 1 to Annex 2,

coordinates, the territorial waters boundary between Singapore and Malaysia in the Straits of Johor.[59]

B. Alleged Impacts of Singapore's Reclamation Activities

59. In early 2002, Malaysia first suggested that Singapore's reclamation activities were encroaching into the "Point 20" sliver.[60] Later, Malaysia also complained in general terms about Singapore's land reclamation activities at and around Pulau Tekong.[61] Malaysia's media reports however referred to different concerns at different times, some of which were inconsistent with each other.[62] Singapore accordingly requested more information about Malaysia's complaints so that its specific concerns could be addressed through bilateral meetings and discussions.[63] These requests were made in the form of Diplomatic Notes as well as other statements made by the Government of Singapore.

60. Malaysia undertook, on many occasions, to provide such information in the form of reports and studies detailing its specific concerns.[64] However, Malaysia did not provide any reports (which were already in their possession), or indeed any details about its specific concerns, before it initiated arbitration under Annex VII of the Convention on 4 July 2003.[65]

C. Meeting between Singapore and Malaysia

61. Following the receipt of the details of Malaysia's concerns for the first time on Friday 4 July 2003 (which is more than a year after Malaysia had raised its concerns), Singapore responded promptly on 17 July 2003 by providing reports and documents relating to the reclamation works to Malaysia, and also inviting Malaysia to meet as soon as possible to

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59 *See infra*, at para. 118.

60 *See* Diplomatic Note dated 28 January 2002 from Malaysia to Singapore, attached as Appendix 11 to Annex 2.

61 *See* Diplomatic Note dated 30 April 2002 from Malaysia to Singapore, attached as Appendix 15 to Annex 2.

62 *See* Singapore's Ministry of Foreign Affairs' Spokesman's Comments, dated 9 March 2002. *See generally, Selected News Articles and Releases*, attached as Appendix 19 to Annex 1.

63 *See* Diplomatic Notes dated 11 April 2002, 14 May 2002 and 28 August 2002, attached as Appendices 14, 16 and 19 to Annex 2 respectively.

64 *See Chronology of Events Relating to Land Reclamation Activities*, attached as Appendix 2 to Annex 2. *See also*, Annex 2, generally for relevant Diplomatic Notes between Singapore and Malaysia.

65 *See* Diplomatic Note dated 4 July 2003 from Malaysia to Singapore, attached as Appendix 23 to Annex 2.

discuss the issues with a view to resolving Malaysia's concerns amicably.[66] At Singapore's suggestion, a meeting was held on 13 and 14 August 2003 in Singapore between the officials of both sides. At that meeting, the parties began the process of identifying the issues at hand. Singapore gave detailed presentations on the two reclamation projects and provided oral and written responses to Malaysia's queries. Singapore also posed questions to Malaysia pertaining to the technical reports the latter had attached to its Statement of Claim. Both sides noted the need to close the gap between their respective experts.[67] In view of the highly technical and complex nature of the subject, Singapore proposed that Malaysia host a second meeting and that the parties consider the formation of technical working groups to discuss the technical data.[68]

62. The meeting was regarded as a good and constructive one, from the letters which the leaders of the two delegations exchanged in the week which followed. Malaysia's Head of Delegation wrote to his Singapore counterpart on 15 August 2003:

> I am sure that you would agree that the complexities of the issues that we had to deal with at Singapore recently 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, auguring well for further progress in our bilateral relations in the years ahead.[69]

63. The sentiments were reciprocated by Singapore's Head of Delegation who, in his reply of 21 August 2003, described the meeting as "a good start to the process".[70]

64. A week after the meeting on 13-14 August 2003, both parties exchanged further technical reports in response to queries each side had raised during the meeting.[71] Malaysia, however, abruptly broke off the negotiation process by insisting, in its Note dated 22 August 2003, on, *inter alia*, the immediate stoppage of reclamation works as a precondition to further

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66 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2.

67 See *e.g.*, Confidential Record of the Meeting between Singapore and Malaysia Senior Officials on Reclamation, Singapore, 13-14 Aug 2003 (hereafter, "Record of Meeting 13-14 August 2003"), at para. 17 of its Annex K. This Record is provided in Malaysia's Request for Provisional Measures as its Annex D. Singapore however provides a copy, in color, as Annex 5 for better clarity of the photographs and graphics contained within.

68 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at para. 18 of its Annex K, attached as Annex 5 to this Response.

69 *See* Diplomatic Note dated 15 August 2003 from Malaysia to Singapore, attached as Appendix 33 to Annex 2, at pp. 3-4.

70 *See* correspondence dated 21 August 2003, attached as Appendix 34 to Annex 2 respectively.

71 *See* correspondence dated 21 August 2003 and 28 August 2003, attached as Appendices 34 and 37 to Annex 2 respectively.

talks.[72] In its reply dated 2 September 2003, Singapore reiterated that its studies and reports had demonstrated that the current and planned reclamation works had not caused and would not cause any significant impact on any of Malaysia's concerns and that the conclusions of these studies had been confirmed by ongoing monitoring studies.[73] In fact, at the 13-14 August 2003 meeting, in response to Malaysia's comment that monitoring was carried out only on the Singapore side but not on Malaysia's side, Singapore offered to extend monitoring into Malaysia's waters and asked Malaysia who it could contact to facilitate this.[74] There has been no response by Malaysia to this offer. In its Note of 2 September 2003, Singapore also reassured Malaysia that it had always ensured that its reclamation works would not impede navigation through the Straits of Johor. Singapore further undertook to notify and consult Malaysia before it proceeded to construct transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore if such links could affect Malaysia's passage rights.[75]

65. Malaysia responded on 5 September 2003 by lodging the Request to ITLOS for provisional measures.

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72 *See* Diplomatic Note dated 22 August 2003 from Malaysia to Singapore, attached as Appendix 35 to Annex 2, at pp. 3-4.

73 *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at pp. 2-3.

74 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at para. 9 of its Annex J, attached as Annex 5 to this Response.

75 *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at p. 4.

CHAPTER 3
JURISDICTION AND ADMISSIBILITY

I. Jurisdiction

66. In actions under Article 290(5) of the Convention, there are two dimensions of jurisdiction. The first, mentioned explicitly in that provision, is the assurance of *prima facie* jurisdiction of the Annex VII tribunal. This is a prerequisite for ITLOS to proceed to consider exercising its contingent provisional measures jurisdiction. The second dimension relates to the question of whether the party seeking provisional measures has fulfilled prior obligations, the fulfilment of which is a condition of the exercise of that *prima facie* jurisdiction.

67. Article 283(1) of the Convention provides:

> Where 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 obligation to "proceed expeditiously to an exchange of views regarding its settlement by negotiation" is consistent with general international law which seeks to secure peaceful settlement of disputes by negotiation and accommodation before proceeding to third-party adjudication.

68. Article 283(1) 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 the relevant dispute settlement body, that the possibilities of reaching agreement have been exhausted, whereupon it may go to the appropriate form of third party mechanism under the Convention;
>
> *fourth*, the relevant dispute settlement body determines whether the requirements of Article 283(1) have been met, and if it determines that they have not, it orders the parties to pursue further their obligations under the provision and does not permit the proceedings to continue, pending demonstration that the obligation of exchange of views has been fulfilled.

69. In this respect, Article 283 is entirely consistent with general international law. In *Savoy and Gex* the Permanent Court of International Justice said:

> ... and although, the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decisions on considerations of pure expediency, nevertheless, there is nothing to prevent it, having regard to the advantages which a [negotiated] solution of this kind might present, to offer the Parties, who alone can bring it about, a further opportunity for achieving this end.[76]

70. But the obligation to pursue negotiations under Article 283(1) is not interminable. In *Southern Bluefin Tuna*, ITLOS held that:

> ... A State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted.[77]

In that case, ITLOS found that "*negotiations and consultations* have taken place between the parties..." *(emphasis added).*[78] Similarly, in the *MOX Plant* case, there had been extensive exchanges of correspondence between Ireland and the United Kingdom with respect to different aspects of the operations at Sellafield. Ireland had also participated in various internal United Kingdom procedures. Ireland could therefore plausibly contend that there had been further exchanges of correspondence up to the submission of the dispute to the Annex VII tribunal.[79] In these circumstances, ITLOS concluded that "the possibilities of reaching agreement have been exhausted."[80]

71. A determination by an international tribunal of the extent to which obligations under Article 283(1) have been fulfilled is, perforce, fact-sensitive and by its nature judgmental. The critical questions are:

(a) whether a real effort has been mounted by the party claiming to initiate third-party decision to exchange views and reach a settlement of the dispute;

(b) whether the putative defendant has been responsive to the initiatives; and

(c) whether there is a plausible chance for a successful composition of some or all of the differences of the party at that stage.

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76 *See Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, P.C.I.J., Series A, No. 24, at p. 15. This is attached as Appendix 20 to Annex 1.

77 *Southern Bluefin Tuna Cases, (New Zealand* v. *Japan; Australia* v. *Japan),* Provisional Measures, Order of 27 August 1999, at para. 60.

78 *Southern Bluefin Tuna Case, supra* note 77, at para. 57, emphasis added.

79 *The MOX Plant Case, (Ireland* v. *United Kingdom), Provisional Measures*, Order of 3 December 2001, at para. 58.

80 *The MOX Plant Case, (Ireland* v. *United Kingdom), supra* note 79, at para. 60.

72. In the instant case, the procedure required by Article 283(1) would have been notification of the existence of a dispute and a submission of views by Malaysia, which would have been followed by a coordinate submission of views by Singapore and negotiations. Prior to the delivery of the Diplomatic Note and Statement of Claim of 4 July 2003, Malaysia effectively acknowledged the requirement to follow this procedure by promising on multiple occasions to provide the details upon which its concerns were based. Singapore, for its part, consistently replied that as soon as the concerns were specified, Singapore was prepared to negotiate them. In response to those assurances, Malaysia reiterated that it would be submitting its precise concerns. But when Malaysia finally presented its views on 4 July 2003, it simultaneously proceeded to initiate an action under the Convention without allowing Singapore to present its views and to proceed to a joint examination of the views of the two states with the objective of seeking a solution. The manner in which Malaysia notified Singapore of the existence of the dispute was therefore through a Diplomatic Note accompanied by its Statement of Claim. Singapore, for its part, promptly responded to Malaysia's concerns with substantial documentation relevant to Malaysia's expressed concerns, providing a comprehensive picture of its work projects and summaries of analyses. Singapore also indicated its willingness to meet and negotiate over all the outstanding matters that Malaysia had raised.[81]

73. In its Statement of Claim, Malaysia contends that the correspondence between it and Singapore:

> ... demonstrates that the exchange of views embodied in this correspondence has not produced and cannot be expected to produce a settlement by negotiation. Indeed, Singapore refuses even to discuss the issues at stake.[82]

As is apparent from the documentary record, this is a misstatement of the exchanges between Singapore and Malaysia. The first opportunity for Singapore to engage in an exchange was Malaysia's belated submission of the detailed particulars of its concerns on 4 July 2003, at which time Singapore responded fully and fairly. Singapore has had no opportunity to respond to Malaysia's detailed concerns before the dispute was submitted to arbitration. Indeed, the dispute was only defined at the moment that it was submitted to arbitration, and then only partly. The detailed reports submitted with the Statement of Claim set out a wide range of facts and analyses, not always consistent with one another, and Malaysia has not yet made clear which contentions made or referred to by the various authors of those reports it adopts as its own for the purposes of this case.

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[81] The chronology of these exchanges is attached to this Response. *See Chronology of Events Relating to Land Reclamation Activities*, attached as Appendix 2 to Annex 2.

[82] *See* Statement of Claim, *supra* note 1, at para. 20.

74. Singapore submits that Malaysia has failed to fulfil its obligations under Article 283(1) of the Convention. If Malaysia's actions here are deemed to be an adequate discharge of its obligations under Article 283(1), then that provision has become a dead letter. Singapore considers that the exercise of jurisdiction under the Convention is premature. **Singapore therefore requests that ITLOS find that:**

(a) **Malaysia has not fulfilled its obligations under Article 283(1);**

(b) **ITLOS jurisdiction may not be exercised until those obligations have been fulfilled; and**

(c) **accordingly, Malaysia be directed to proceed promptly to the implementation of its obligations under Article 283(1).**

II. Admissibility

75. Article 89 of the ITLOS Rules[83] requires that a party requesting provisional measures "specify… the reasons therefor and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment." The "specification" requirement must, under Article 290(5) of the Convention, demonstrate that the "possible consequences" will occur before "the constitution of an arbitral tribunal to which a dispute is being submitted." Singapore will demonstrate in the following sections of this Response that Malaysia has grossly failed to meet the specification test. Accordingly, Singapore submits that Malaysia's claim is inadmissible.

[83] *International Tribunal for the Law of the Sea: Rules of the Tribunal*, dated 21 September 2001 (Document: ITLOS/8).

CHAPTER 4
THE REQUIREMENTS FOR PROVISIONAL MEASURES

I. Introduction

76. It is hardly necessary to elaborate to ITLOS the law of provisional measures. Nonetheless, for completeness of this response, Singapore believes that a brief synopsis of those legal requirements for prescribing provisional measures under Article 290(5) of the Convention directly relevant to this case may be useful. Singapore reserves its right to develop any of the points of law with respect to provisional measures in the hearing before ITLOS.

77. Article 89 of the ITLOS Rules provides:

> 1. A party may submit a request for the prescription of provisional measures under article 290, paragraph 1, of the Convention at any time during the course of the proceedings in a dispute submitted to the Tribunal.
>
> 2. Pending the constitution of an arbitral tribunal to which a dispute is being submitted, a party may submit a request for the prescription of provisional measures under article 290, paragraph 5, of the Convention:
>
>   (a) at any time if the parties have so agreed;
>
>   (b) at any time after two weeks from the notification to the other party of a request for provisional measures if the parties have not agreed that such measures may be prescribed by another court or tribunal.
>
> 3. The request shall be in writing and specify the measures requested, the reasons therefor and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment.
>
> 4. A request for the prescription of provisional measures under article 290, paragraph 5, of the Convention shall also indicate the legal grounds upon which the arbitral tribunal which is to be constituted would have jurisdiction and the urgency of the situation. A certified copy of the notification or of any other document instituting the proceedings before the arbitral tribunal shall be Annexed to the request.
>
> 5. When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure.

78. Article 290 of the Convention provides:

1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

79. Article 293(1) of the Convention provides that "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."[84]

80. Article 290(1) sets out two grounds for provisional measures: first, "to preserve the respective rights of the parties to the dispute… pending the final decision"; and second, "to prevent serious harm to the marine environment, pending the final decision." Attention is drawn to the adjective "serious" in the second ground.

81. The legal regime in the Convention governing the conditions for the exceptional remedy of provisional measures prescribes stringent conditions that states must meet before the Tribunal will find such measures justified in a particular case. It also incorporates,

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[84] *See* Art. 293(1), the Convention.

insofar as "not incompatible" with the Convention, other rules of international law with respect to provisional measures or their analogues. Judge Mensah concisely summarized the relevant jurisprudence:

> ... 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 condition 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 second condition is that the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained of, or that the infraction "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form." (Case concerning the Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J. Series A, No. 8, p. 7)[85]

The *ratio legis* here is plain. Before a claimant has proven its case and before the respondent has had an opportunity to defend its case, a serious and potentially expensive and damaging limitation on the exercise of the respondent's rights may be imposed only if the claimant has established clearly that it has fulfilled the strict conditions precedent to their issuance.

82. While the regimes of all international tribunals impose stringent conditions for the prescription of provisional measures, such conditions are uniquely stringent in circumstances where the claimant requests that ITLOS prescribe such measures under Article 290(5) of the Convention. Other international tribunals will issue provisional measures to protect (allegedly) particularly serious rights pending a final judgment or award, which may not be rendered for some time. Under Article 290(5), by contrast, the claimant asks ITLOS to issue provisional measures to protect alleged rights, which the claimant further alleges will be irreparably harmed in the absence of such measures, only until the proper tribunal under Annex VII has been constituted — that is, within no more than 104 days from the time the Annex VII proceedings are initiated. In this case, the time period is, at most, 19 days. This matter will be considered in more detail below.

II. The Legal Requirements for Provisional Measures

83. In the *MOX Plant* case, ITLOS explained that:

> ... provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either

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85 *The MOX Plant Case, (Ireland v. United Kingdom), supra* note 79. See Separate Opinion of Judge Mensah, at p. 1.

party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal.[86]

84. Indeed, a demonstration of urgency is one of the paramount requirements under all international legal regimes that authorize provisional measures. The International Court of Justice ("ICJ") has repeatedly emphasized that provisional measures will only be issued if the state seeking them establishes urgency.[87] In *Passage through the Great Belt*, the Court said:

> ... [Because] provisional measures under Article 41 of the Statute are indicated "pending the final decision" of the Court on the merits of the case, [they] are... only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given...[88]

Other international tribunals with provisional measures regimes require a similar threshold.[89]

85. Urgency, as the *Great Belt* formulation makes clear, means that in the absence of an order of provisional measures, "action prejudicial to the rights of either party is likely to be taken before [a] final decision."[90] For that reason, in *Certain Criminal Proceedings in France*, the ICJ found provisional measures unwarranted, observing that the alleged adverse publicity, damage to the "honour and reputation" of Congolese officials, minor interference with "the traditional links of Franco-Congolese friendship," and France's application of the principle of universal jurisdiction in alleged violation of international law, could not be deemed matters of urgency. It noted that:

> ... the Court is not now called upon to determine the compatibility with the rights claimed by the Congo of the procedure so far followed in France, but only the risk or otherwise of the French criminal proceedings causing irreparable prejudice to such claimed rights;
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> ... [It] appears to the Court, on the information before it, that as regards President Sassou Nguesso, there is at the present time no risk of irreparable

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[86] *The MOX Plant Case, (Ireland v. United Kingdom), supra* note 79, at para. 64.

[87] *Certain Criminal Proceedings in France* (*Republic of the Congo* v. *France*), Provisional Measures, Order of 17 June 2003, I.C.J. General List No. 129, at para. 30 (first question for the Court is whether circumstances "require, as a matter of urgency, the indication of provisional measures"); *LaGrand* (*Germany* v. *United States of America*), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, at pp. 9, 15 (provisional "measures are only justified if there is urgency"); *Vienna Convention on Consular Relations* (*Paraguay* v. *United States of America*), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, at pp. 248, 257.

[88] *Passage through the Great Belt,* (*Finland* v. *Denmark*), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, at pp. 12, 17.

[89] *See generally, Interim Measures Indicated by International Courts* (Rudolf Bernhardt ed., 1994).

[90] *Passage through the Great Belt, supra* note 88.

> prejudice, so as to justify the indication of provisional measures as a matter of urgency...[91]

The question of urgency, that is, will inevitably be linked to and informed by the question whether the matters under review, on the facts proffered by the claimant, present a real and serious risk of "irreparable prejudice".

86. By contrast to *Certain Criminal Proceedings in France*, the ICJ has had little difficulty concluding that the imminent threat that a foreign national's execution will be carried out before a state's case asserting rights with respect to that national can be decided on the merits satisfies the requirement of urgency.[92]

87. In *Nuclear Tests*, the Court indicated only limited provisional measures despite Australia's contentions "that there is an immediate possibility of a further atmospheric nuclear test being carried out by France in the Pacific", "that the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory", "that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable", and that "any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages."[93] Even under those circumstances, the Court limited the operative paragraph of its order to a direction that France avoid those "nuclear tests causing the deposit of radio-active fall-out on Australian territory."[94] Finally, 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, *inter alia*, the deaths of persons in the disputed area — threatened to "aggravate or extend the dispute," to destroy evidence, and to compromise the Court's ability to render an impartial decision on the merits.[95]

88. These cases provide a clear indication of both the level of urgency and the nature of the harm — above all, it must be *irreparable* — that a state must show in order to make out a *prima facie* case that would justify provisional measures. Indeed, the essential condition for

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91 *Certain Criminal Proceedings in France* (*Republic of the Congo* v. *France*), *supra* note 87, at paras. 26, 34-35.

92 *Avena and Other Mexican Nationals* (*Mexico* v. *United States*), Provisional Measures, Order of 5 February 2003, I.C.J. General List No. 128; *LaGrand* (*Germany* v. *United States of America*), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, at p. 9; *Vienna Convention on Consular Relations* (*Paraguay* v. *United States of America*), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, at p. 248.

93 *Nuclear Tests* (*Australia* v. *France*), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, at p. 99, 104.

94 *Nuclear Tests* (*Australia* v. *France*), *supra* note 93, at p. 106.

95 *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996, at pp. 13, 23.

provisional measures "presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings."[96]

89. Even where a state makes that showing, the Court will proceed to balance the respective rights of the opposing party and the potential burdens that an order of provisional measures would impose, for "the possibility of such a prejudice [to the rights of the 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 of protection."[97]

90. The position under Article 290(5) of the Convention, however, is different in one crucial respect. Article 290(5) heightens the urgency requirement further because of the different contingencies for provisional measures contemplated by paragraphs 1 and 5, respectively, of Article 290. Article 290(1) vests the primary court or tribunal — *i.e.*, the agreed forum, which has *prima facie* jurisdiction under Parts XV and XI of the Convention — with competence to prescribe provisional measures pending its final decision if that tribunal "considers [such measures] appropriate."[98] Article 290(5), by contrast, assigns a default competence to ITLOS to issue provisional measures pending the constitution of the agreed forum and incorporates the stringent conditions for granting the exceptional relief authorised by paragraph 1, but it adds, as a further condition, that "the urgency of the situation so require[]." In short, the circumstances must reveal not only an issue of urgency relative to the amount of time before the agreed tribunal can realistically be expected to render a decision on the merits. They must also reveal a matter of such urgency that it would be impossible for the claimant to wait until the tribunal that will ultimately make that decision on the merits can be constituted.

91. Judge Mensah elaborated these critical differences in the *MOX Plant* case:

> ...in dealing with the possibility of prejudice to rights or serious harm to the marine environment, a court or tribunal operating under paragraph 5 of article 290 of the Convention 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 the 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.* This difference in the temporal dimension of the competence of the tribunal imposes a measure of constraint on a court or tribunal dealing

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[96] *Aegean Sea Continental Shelf Case,* Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, at p. 3, 11.

[97] *Aegean Sea Continental Shelf Case, supra* note 96, at p. 11.

[98] *See* Art. 290(1), the Convention.

with a request for provisional measures under article 290, paragraph 5, of the Convention.[99] *(emphasis added)*

92. This additional threshold of urgency is understandable, as ITLOS, under these circumstances, does not constitute the primary, agreed forum to which the parties elected to submit their dispute. It is vested with the limited competence to order provisional measures in those extraordinary circumstances in which the claimant establishes an absolutely imminent need for them. Its role is to preserve the position until the primary forum is constituted and can take over the case. If ITLOS exercises this limited jurisdiction, any provisional measures ordered will be subject to modification or termination once the primary forum is constituted and assumes jurisdiction.

93. In any event an order of provisional measures represents exceptional relief, which should be reserved solely for situations of true urgency. And, as emphasized, under Article 290(5), it represents doubly exceptional relief, with a reinforced threshold of urgency. Hence, provisional measures that the primary tribunal might, as a matter of its discretion, deem appropriate on balance, should not and could not be awarded by ITLOS under Article 290(5) unless the quotient of urgency was such that provisional measures had to be prescribed prior to the establishment of the primary tribunal, "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment."[100]

94. The claimant bears the burden of showing the required level of urgency. That burden is extremely high because, in effect, the claimant requests that ITLOS issue what amounts to a provisional judgment without allowing the respondent, whose rights may well be suspended at considerable expense as a result of the provisional order, without a full hearing on the merits. In short, as Judge Wolfrum wrote, "such urgency must exist and the party requesting such provisional measure must establish such existence."[101]

95. Case law — and the explicit language of Article 290(5) — indicates that urgency, as that term has been used with respect to provisional measures in international law, connotes a number of imperative dimensions. Among the most critical is the temporal dimension, *i.e.*, whatever harm is allegedly threatened by the respondent's actions (its required magnitude and probability will be considered below) must be visited upon the party praying for provisional measures before the Annex VII tribunal is constituted, which means within, at most, 104 days of that party's submission of the notice of dispute.[102] Under the rules set out in Article 3 of Annex VII of the Convention, either party may ensure that the tribunal is constituted within a maximum of 104 days from the date of the notification of the institution

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[99] *The MOX Plant Case, (Ireland v. United Kingdom), supra* note 79. See the Separate Opinion of Judge Mensah, at p. 3.

[100] *See* Art. 290(1), the Convention.

[101] *See* Wolfrum, "Provisional Measures of the International Tribunal for the Law of the Sea" in *The International Tribunal for the Law of the Sea: Law and Practice* (P. Chandrasekhara Rao and Rahmatullah Khan, editors), at pp. 173, 182, citing with approval distinctions drawn by Judge Laing in his Separate Opinion in the M/V "Saiga" (No. 2) case between substantive and procedural urgency. This article is attached as Appendix 21 to Annex 1.

[102] Annex VII, Art. 3, the Convention.

of the proceedings. The provision in Article 290(5) for the award of provisional measures by ITLOS is set in a context where the longest period that a state requesting the measures can have to wait is 104 days, even if it applies to ITLOS at the earliest possible moment. The measures are specifically designed for such a time-scale. If, because the Applicant has delayed until late in the 104 days period before requesting ITLOS to prescribe provisional measures, that means that the Applicant must prove an urgency measured in days or hours, rather than weeks, that is the inevitable and intended consequence of the scheme of Article 290. The Applicant is in no way disadvantaged because the 104 day period will very shortly come to an end and it can seek provisional measures from the Annex VII tribunal.

96. 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. 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, should "estop" such belated assertions of urgency.

97. Indeed, even within the 104-day period, an Applicant must also act promptly to secure the constitution of the tribunal, since the application is premised upon extreme urgency pending its constitution. An Applicant who has been dilatory in doing so should not be permitted to rely upon delays of its own making.

98. In psychology, urgency may be a subjective state of mind. In the international law of provisional measures, it is not. To claim urgency, the claimant must identify a specific event, the occurrence of which is so imminent and the consequences of which, within the prescribed time period, have been shown to be so destructive to the claimant or the marine environment, that provisional measures suspending its occurrence are warranted. Whether it is the fact of a nuclear detonation[103] or the fishing of a dangerously low fish stock,[104] the claimant must identify a particular event. Failure to meet that burden precludes provisional measures.

99. Even when a claimant identifies the requisite event and establishes that it will be likely to occur within the limited period described above, the claimant must demonstrate a real risk of *irreparable* harm. The action in question must threaten to precipitate not simply harm, which by its nature can be repaired through ordinary remedies, but significant and irreparable harm.[105] Moreover, the risk of irreparable harm must be highly probable, not merely speculative. Thus, in the *Nuclear Tests* case, where Australia and New Zealand could not demonstrate sufficiently the reality of the risk of certain alleged harms, the ICJ refused to prescribe interim measures suspending the disputed nuclear tests. It simply instructed France to conduct them in a way that did not cause nuclear fallout on Australian territory: "[T]he French Government should avoid nuclear tests causing the deposit of radio-active fall-out on

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103 *Nuclear Tests Case, (Australia* v. *France), supra* note 93.

104 *Southern Bluefin Tuna Case, supra* note 77

105 *Aegean Sea Continental Shelf Case, supra* note 96.

Australian territory."[106] In *Passage through the Great Belt*, the ICJ found that "proof of the damage alleged has not been supplied" and therefore refused to indicate interim measures.[107] In short, if the claimant fails to demonstrate adequately a real risk of serious and irreparable harm that will inevitably occur within the designated period, provisional measures should not be prescribed.

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

> ... [T]he Court, placing on the 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.[108]

101. But, more significantly in this context, the ICJ went out of its way to emphasize that its refusal to order provisional measures in no way prejudged the merits of the right asserted by Finland. Hence, while Denmark could proceed with its construction works in the Great Belt, it did so at the risk that the ICJ might ultimately find in favour of Finland — raising the possibility of a judicial finding on the merits "that such works must not be continued or must be modified or dismantled."[109] The ICJ cautioned that "Denmark, which is informed of the nature of Finland's claim," should "consider the impact which a judgment upholding it could have upon the implementation of the Great Belt project, and [should] decide whether or to what extent it should accordingly delay or modify that project."[110] Because the works could be dismantled, however, albeit likely at great cost to Denmark, the ICJ did not find the requisite irreparable and irremediable harm necessary to justify provisional measures. Equally, even if the claimant establishes that the actions it seeks to suspend will cause harm within the limited period prescribed by Article 290(5) of the Convention, provisional measures remain inappropriate if that harm can be compensated. As the Permanent Court of International Justice affirmed, "irreparable" means that the alleged harm cannot "be made good simply by the payment of an indemnity or by compensation or restitution in some other material form."[111]

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106 *Nuclear Tests Case, (Australia v. France), supra* note 93, at 106.

107 *Passage through the Great Belt, supra* note 88, at 19.

108 *Passage through the Great Belt, supra* note 88, at 18.

109 *Passage through the Great Belt, supra* note 88, at 19.

110 *Passage through the Great Belt, supra* note 88, at 19.

111 *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, Orders of 8 January, 15 February and 18 June 1927, P.C.I.J., Series A, No. 8, at p. 7. This is attached at Appendix 22 to Annex 1.

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102. Every request for provisional measures implicates the rights and obligations of two parties. Because the prescription of provisional measures has elements of an equitable action, international courts and tribunals from whom the measures are sought should 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(1) therefore speaks of measures "to preserve the respective rights of the parties to the dispute." Under customary international law, this requires taking account of the balance of convenience and inconvenience, and the balance of interests, between the two states. It also requires consideration of whether the alleged urgency is nonetheless reversible, compensable or both. This is necessarily a process of judgment whereby the tribunal seized of the case assesses, against the likelihood and possible magnitude of a prospective harm, the aggregate costs that would be incurred in suspending the activity.

103. All of the conditions considered above apply, *mutatis mutandis*, to requests for measures "to prevent serious harm to the marine environment, pending the final decision."[112] The threshold that must be met to justify provisional measures is high, as the introduction of the adjective "serious" to distinguish the criterion from the simple proof of "harm" imports and the order in *Southern Bluefin Tuna* case demonstrates.[113] There, as noted above, the parties agreed that the stock of Southern Bluefin Tuna had been depleted and then adduced scientific evidence to demonstrate that the Japanese experimental fishing program "could endanger the existence of the stock."[114]

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112 *See* Art. 290(5), the Convention.

113 *Southern Bluefin Tuna Case, supra* note 77.

114 *Southern Bluefin Tuna Case, supra* note 77, at para. 74.

III. Summary of Provisional Measures Rules

104. Hence, with respect to provisional measures sought from ITLOS to preserve the respective rights of the parties in circumstances in which an Annex VII tribunal will shortly be invited to assume jurisdiction, Singapore submits that the following rules govern:

(a) there must be a real risk of serious harm;

(b) that harm must be irreversible;

(c) that harm must be incompensable;

(d) that harm must be imminent, *i.e.*, it must be shown that it will occur within 104 days of the initiation of the claim or, if part of that period has already elapsed, within such time as remains before the constitution of the Annex VII tribunal (and in the present case, the remaining period, as of the date of this Response, is at most 19 days); and

(e) the burdens and costs to the respondent of having to suspend the challenged acts must be balanced against the cost of a possible occurrence of the harm alleged.

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CHAPTER 5
MALAYSIA'S REQUEST FOR PROVISIONAL MEASURES

I. Introduction

105. In this Chapter Singapore develops its submissions on the manner in which the principles governing the prescription of provisional measures apply to the facts in the present case.

106. There are two points of broad application that Singapore wishes to make at the outset.

107. The first point is that Malaysia's Request does not "specify… the possible consequences… for the preservation of the respective rights of the parties or for the preservation of serious harm to the marine environment", as required by Article 89(3) of the ITLOS Rules. Nor does it identify "the urgency of the situation" as required by Article 89(4) of the ITLOS Rules. Accordingly, Malaysia's Request is inadmissible.

108. The account of the consequences in paragraphs 17 and 18 of the Request for Provisional Measures is no more than a list of headings under which consequences might have been classified. To say that the reports annexed to Malaysia's Request "demonstrate" the harm is not enough. The various authors of the four Reports have put forward many hypotheses and predictions, by no means all consistent with one another, and it is impossible to determine which of them Malaysia adopts as its own or which it considers to be evidence of "serious harm to the marine environment" or to prejudice its rights.

109. As far as urgency is concerned, Malaysia makes no attempt whatever to demonstrate any consequence that will arise before the constitution of the Annex VII tribunal.

110. Secondly, Singapore observes that the Request does not distinguish between the reclamation works at Tuas in the west and the works at Pulau Tekong in the east. This is remarkable, given that the technical evidence adduced by Malaysia rightly treats the two sites separately, recognising that they have different characteristics. Malaysia's Request, however, merely states that "the reclamation projects are already causing and threaten to cause harm to the marine environment, producing major changes to the flow regime, changes in sedimentation… and consequential effects in terms of coastal erosion. Impacts will also be felt in terms of navigation, the stability of jetties and other structures…".[115] It does not identify which of the effects apply to the Tuas View Extension and which to Pulau Tekong, or to what extent, even though the conditions at the two distinct locations are different. The evidence cannot simply be bundled together to produce a composite case equally applicable to either site.

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[115] See Request for Provisional Measures, at para. 17.

111. Singapore submits that Malaysia's Request is fundamentally misconceived because it fails to demonstrate the likelihood of any significant harm at all within the timeframe of an order of provisional measures caused by the reclamation works at either side, thus failing either to establish urgency or to establish any substantive need for the relief sought.

112. In its Request of 5 September 2003, Malaysia asks that the Tribunal prescribe provisional measures ordering that Singapore shall:

> Request 1 - pending the decision of the Annex VII 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);
>
> Request 2 – 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);
>
> Request 3 - afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and
>
> Request 4 - agree to negotiate with Malaysia concerning any unresolved issues.

113. The requested relief will be addressed paragraph by paragraph.

II. Request 1 is Inappropriate and Not Called for by the Situation at Hand

114. Malaysia's first Request is that the Tribunal order that pending the constitution of the Annex VII Tribunal, "Singapore shall, ... 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)."[116]

115. There are three categories of argument that Malaysia appears to put forward, albeit in the briefest of terms, in support of this Request:

(a) that the activities are occurring in areas of Malaysian territorial sea;

(b) that the activities will cause serious harm to the marine environment; and

(c) that the activities will infringe Malaysia's rights.

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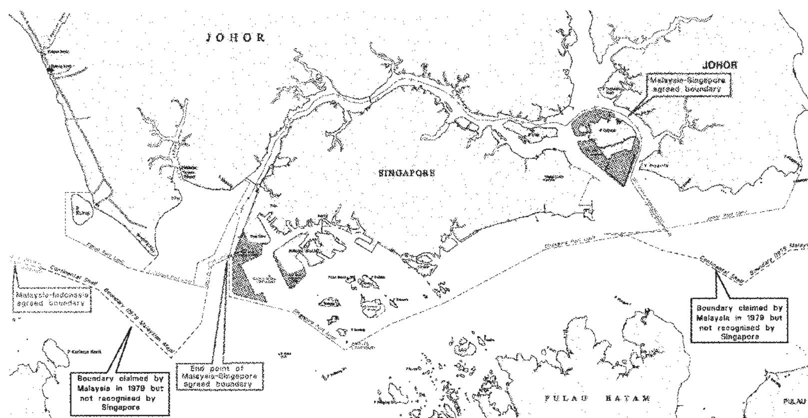
[116] *See* Request for Provisional Measures, *supra* note 3, at para. 13(a).

RESPONSE OF SINGAPORE – 20 SEPTEMBER 2003

A. Territorial rights

116. Malaysia alleges that the reclamation works encroach upon its territory. Reclamation works "in the vicinity of the maritime boundary" are relevant under this heading only insofar as they take place in an area claimed by Malaysia. Reclamation works in other areas "in the vicinity of the maritime boundary" take place within Singapore's internal waters or territorial sea, and any Malaysian objection to them must be based on some ground other than an alleged encroachment upon its territory.

117. The Malaysian Note dated 24 March 1998 refers to two maritime areas in which Malaysia disputes Singapore's territorial title.[117] The first refers to an area to the west of the main island of Singapore, and the second to an area to the east of the main island of Singapore. The area to the east lies well south of any reclamation works. It cannot form any part of this Request. The two areas are illustrated on the Map shown below.[118]



118. The only area in dispute that is relevant for present purposes appears therefore to be that which arises from the claim by Malaysia to use "Point 20" as a co-ordinate for the boundary between Singapore and Malaysia.[119] That claim has never been accepted by Singapore. It was explicitly rejected on many occasions, from the Note dated 14 February

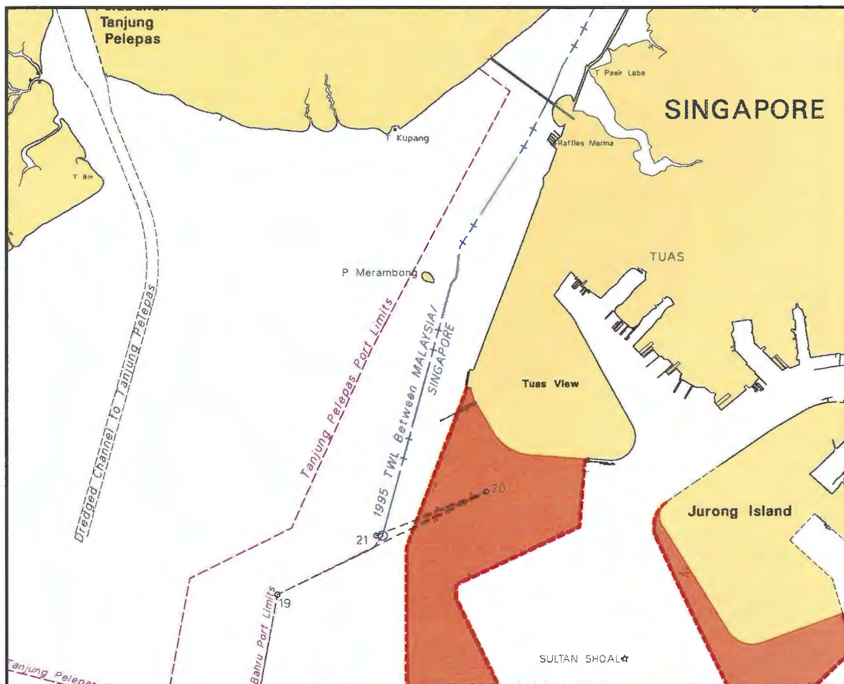
117 *See* Diplomatic Note dated 24 March 1998 from Malaysia to Singapore, attached as Appendix 7 to Annex 2.

118 For a larger and color version of this Map, *see* Appendix 23 to Annex 1, *Map Showing the Disputed Areas*.

119 *See* Statement of Claim, *supra* note 1, at para. 18.

1980 to the more recent Notes dated 20 February 2002, 11 April 2002, and 14 May 2002.[120] The claim is, moreover, incompatible with the boundary that Malaysia and Singapore agreed on in 1927,[121] as well as the boundary that the two countries ratified in 1995 – 16 years *after* 1979.[122]

119. "Point 20" is illustrated on Map 4 in the Statement of Claim. Another map showing "Point 20" juxtaposed against the relevant boundaries in the area is also attached to this Response.[123] A smaller version appears below.



The area near to Malaysia's unilaterally declared "Point 20" juxtaposed with other boundaries.

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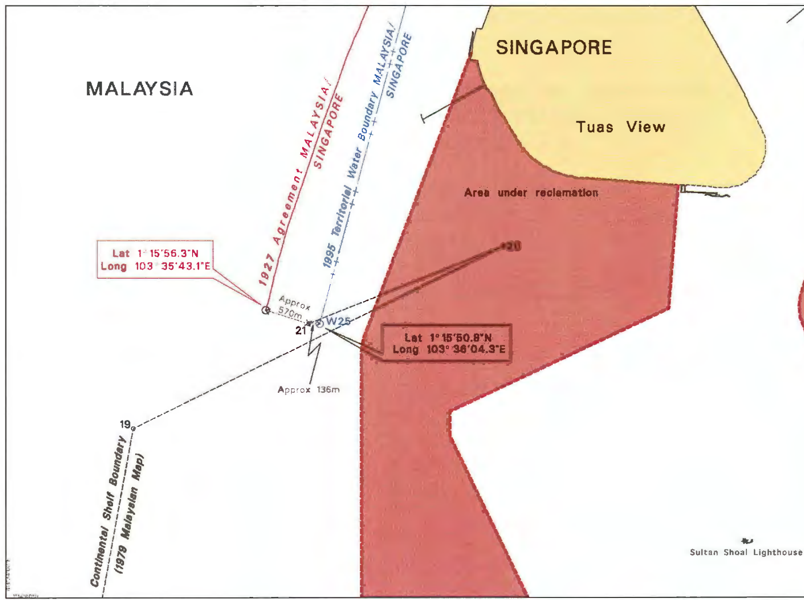
120 *See* Diplomatic Notes dated 14 February 1980, 20 February 2002, 11 April 2002, 14 May 2002 from Singapore to Malaysia, attached as Appendices 3, 12, 14, and 16 to Annex 2, respectively. *See also, the Chronology of the Dispute over "Point 20"*, attached as Appendix 1 to Annex 2.

121 1927 Agreement with respect to the Boundary between the Territorial Waters of the Settlement of Singapore and those of the State and Territory of Johore, attached as Appendix 24 to Annex 1.

122 *See Statement of Claim, supra* note 1, at Annex 2.

123 See Appendix 18 to Annex 1, *Map Showing Malaysia's "Point 20", the "Point 20" Sliver and Malaysia's 1979 Unilaterally Proclaimed Boundary Limits and the 1995 Agreed Boundary Limits between Malaysia and Singapore.*

120. Those maps show the 1995 agreed boundary between Singapore and Malaysia proceeding from the north to approximately Malaysia's Point 21 south-west of Tuas View. The Map at Appendix 18 to Annex 1 shows the Port of Tanjung Pelepas Port Limit, west of that territorial waters boundary, and the 1979 Malaysian Continental Shelf claim, which proceeds up to Malaysia's Point 19. It will be observed that a line joining Point 19 and Point 21 would create a natural continuation of the Malaysian continental shelf boundary claimed in 1979. Yet "Point 20" is entirely dislocated from this general direction of Malaysia's claimed boundary.



Detailed Map around "Point 20"

121. A close-up map of the area around "Point 20" is shown above.[124] It shows Point W25, which is the south-westerly terminus of the 1995 agreed territorial waters boundary. That lies 136 metres east of Point 21 of Malaysia's claimed continental shelf. Between Points 21 and 19 Malaysia claims a sliver of territorial sea striking out almost perpendicularly to the general direction of its agreed territorial sea boundary, deep into Singapore's territory. It forms an extremely acute triangle of claimed seabed.

122. The "Point 20" sliver is plainly incompatible with the equidistance principle. It is not possible to construct *any* coastal configuration that would generate such an extraordinary feature by the application of the equidistance principle.

124 A larger version of the Map is attached to this Response. *See Detailed Map of Area around "Point 20"*, attached as Appendix 25 to Annex 1.

123. The "Point 20" sliver is also incompatible with the approach adopted and accepted by Malaysia in the 1995 agreed boundary. As can be seen clearly on at the map above,[125] "Point 20" lies at a point that backtracks abruptly north-east of Point W25, which is the agreed terminus of the 1995 boundary. The Point also backtracks from the western end-point of the 1927 Straits Settlements and Johor Territorial Waters Agreement. Malaysia could not have agreed to Point W25 in 1995 if it had intended to maintain its claim to "Point 20".

124. Although Singapore requested an explanation from Malaysia as to the precise basis of its claim, and the manner in which it applied the principles of maritime delimitation to the area around "Point 20",[126] Malaysia has at no point offered any comprehensible explanation beyond saying that:

> the 1979 Malaysian territorial waters and continental shelf claim lines were drawn in accordance with the principles of the Geneva Convention on the Continental Shelf, 1958, and customary international law.[127]

125. This element of Malaysia's claim describes a territorial dispute. Territorial disputes are not a matter for resolution in provisional measures hearings. They lack the necessary urgency. Even if they were, Singapore submits that the claim dependent upon "Point 20" has no *prima facie* validity. On the contrary: its *prima facie* invalidity is patent. No claims dependent upon the validity of Malaysia's claim to "Point 20" can appropriately form the basis of any provisional measures.

126. Further, even if there were an arguable case in support of Malaysia's claim to "Point 20", Malaysia could not now seek to have reclamation works around that point suspended. "Point 20" was reclaimed 23 months ago and there are no works scheduled for the next 30 days that will have any material effect at all upon either the extent or the permanence of the reclaimed area in this vicinity. Suspension of the works would impose a heavy burden on Singapore but produce no benefit whatsoever for Malaysia.

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125 *See Detailed Map of Area around "Point 20"*, attached as Appendix 25 to Annex 1.

126 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at para. 14 of its Annex K, attached as Annex 5 to this Response.

127 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at para. 2 of its Annex N, attached as Annex 5 to this Response.

127. Moreover, Malaysia's failure to raise the issue before "Point 20" was reclaimed has two further implications. First, it is inconsistent with a claim that provisional measures are urgently required now. Any urgency that there might have been would have arisen many months ago when, in full sight of Malaysia, Singapore first began to implement its published plans to reclaim the Tuas View Extension area. Secondly, Malaysia's silence at that time raises questions of acquiescence and estoppel, which may have to be considered by an Annex VII tribunal.

B. Serious Harm to the Marine Environment

128. Malaysia also alleges that the reclamation works will cause serious harm to the marine environment.

129. As was noted above, the power to prescribe provisional measures under Article 290(5) exists only where ITLOS is satisfied that "the urgency of the situation so requires". In order to succeed on this ground in its Request under Article 290(5), Malaysia will have to show:

(a) there must be a real risk of serious harm to the marine environment;

(b) that harm must be irreversible;

(c) that harm must be incompensable;

(d) that harm must be imminent, *i.e.*, it must be shown that it will occur within 104 days of the initiation of the claim or, if part of that period has already elapsed, within such time as remains before the constitution of the Annex VII tribunal (and in the present case, the remaining period, as of the date of this Response, is at most 19 days); and

(e) the burdens and costs to Singapore of having to suspend the challenged acts must be balanced against the cost of a possible occurrence of the harm alleged.

130. Malaysia's Request of 5 September 2003 offers almost no argument in support of its request for an order suspending works, and the few arguments that are advanced are misconceived.

131. Malaysia says that the reclamation works have a permanent character that makes their construction effectively irreversible and implies that this constitutes serious harm to the

marine environment.[128] To this there are two answers. The first is that it is inconsistent with Malaysia's own position as expressed in its Note dated 10 July 2002, in which it demanded that the "geophysical and hydrographical nature of the said area be restored to its original state prior to the reclamation work."[129]

132. The second answer is that there are in fact no scheduled works within the next 19 days which will have any material effect upon the marine environment.

133. Malaysia also alleges that:

> ...the reclamation projects are already causing and threaten to cause harm to the marine environment, producing major changes to the flow regime, changes in sedimentation, which especially in the eastern sectors are much more likely to impact on Malaysia than on Singapore, and consequential effects in terms of coastal erosion. Impacts will also be felt in terms of navigation, the stability of jetties and other structures, especially at the Malaysian naval base of Pularek.[130]

134. Malaysia refers to the technical reports annexed to its Statement of Claim in support of its claim of adverse effects upon flow, sedimentation and erosion patterns. The four Reports do not in fact support the allegations in Malaysia's Statement of Claim. A full study and critique of the four reports is not a matter for a provisional measures hearing but rather for a hearing on the merits. For present purposes it is sufficient to make a number of broad points:

(a) it is not at all clear which of the points made in the four reports are espoused by Malaysia. The reports are technical appraisals and are rife with speculations. They purport to identify physical impacts, some of them (such as certain sedimentation rates) on a scale below the threshold of practical measurability, and some of them expected to operate over a long time-scale. For instance, the Department of Irrigation and Drainage Report ("DID Report") describes the erosion rates in the Tg Piai area as being "too small for concern"[131]; the UKM Pakarunding Sdn Bhd report ("UKM Report") describes the change in salinity as a "slight increase" which can have a "long-

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128 *See* Request for Provisional Measures, *supra* note 3, at para. 15.

129 *See* Diplomatic Note dated 10 July 2002 from Malaysia to Singapore, attached as Appendix 18 to Annex 2.

130 *See* Request for Provisional Measures, *supra* note 3, at para. 17.

131 Department of Irrigation and Drainage, *"Coastal Hydraulic Study At The Straits Of Johor To Determine The Impacts Of Land Reclamation Activities By The Singapore Government"* (hereafter referred to as "*DID Report*"), at p. 9-5. This Document is attached as Annex F to the Request for Provisional Measures, *supra* note 3.

term effect on the coastal ecosystem".[132] It is not clear which among the probable or possible or conceivable impacts are regarded by Malaysia as underlying its Request for provisional measures;

(b) the reports are largely based upon *projected* impacts generated largely by hypothetical desk-top studies and simulated hydraulic model studies. There is no proof of harm on the basis of a comprehensive collection of data obtained in the field. At the meeting on 13-14 August, Singapore showed the Malaysian delegation actual monitoring results (as opposed to projections from computer modeling) which demonstrate that the reality on the ground is that the effects (water velocity, siltation, etc.) are in line with the predictions and modelling carried out by Singapore before the commencement of works.[133] In some situations, the actual monitoring results show even more attenuated effects than were predicted. Malaysia has not provided any assessment or critique of the presentations made by Singapore, nor of the reports and technical data previously shared by Singapore with Malaysia. Nor has Malaysia expressed any interest in access to the actual monitoring results about which Singapore informed it at the 13-14 August meeting;

(c) the predictions of the Malaysian experts are at variance with those of Singapore's experts. (This is, of course, the very problem that Singapore had hoped to resolve by meetings between the two sets of experts and a joint study.) While Singapore remains ready to correct its assessment and take any necessary remedial action, if its analyses and predictions are proved to be wrong, no such proof has been adduced by Malaysia. Malaysia's claims are, therefore, at best founded upon preliminary views by experts who had not had the opportunity to review Singapore's own detailed studies and monitoring data;

(d) none of the studies details any harm that might be expected within the short time-span that is the concern of ITLOS under Article 290(5);

(e) none of the reports analyses the question of the causal link between Singapore's reclamation activities and any observations on the marine environment. Given the contribution to, for example, sedimentation made by various Malaysian activities, there is a plain need to address this issue. No attempt is made to identify what part of the impacts is attributable to Malaysia's own activities;

(f) aspects of the methodology used in the reports are controversial and put in doubt the validity of the conclusions drawn in them. This is a matter for detailed elaboration at the merits phase.

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132 UKM Pakarunding Sdn Bhd, *"Environmental Impact Assessment of the Land Reclamation Activities by the Singapore Government"* (hereafter referred to as "*UKM Report*"), at p. ES-22. This Document is attached as Annex H to the Request for Provisional Measures, *supra* note 3.

133 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at its Annexes H and I, attached to Annex 5 of this Response.

135. Bearing in mind the nature of requests before this Tribunal and the exceptional character of provisional measures, Singapore submits that the tentative and preliminary nature of the reports submitted by Malaysia is not a sufficient basis to found Malaysia's allegations of imminent, irreversible damage. Indeed, it was acknowledged in the Statement of Claim that the four reports tendered with the Statement "do not purport to be definitive" but merely that when "read together, they support Malaysia's concerns as to the impacts of the land reclamation activities."[134] The threshold for a provisional measures request is evidence of actual or imminent adverse effect either upon Malaysia's rights or upon the marine environment, causing serious harm. It is submitted that the preliminary assessments and anecdotal references do not meet that requisite threshold.

136. Moreover, while this is properly a matter for a hearing on the merits and not for a provisional measures hearing, Singapore wishes to emphasize that it conducted its own thorough and extensive studies of the environmental aspects of the reclamation works, as befits multi-billion dollar construction projects. Singapore has every bit as much interest in the navigability and the quality of the waters around its coasts, and in erosion and sedimentation of the seabed, as does Malaysia.

137. Singapore also wishes to emphasize that it does not insist dogmatically upon adhering to its position. In its Note dated 2 September 2003, Singapore explained that based on the current information, it saw no reason to suspend works. Singapore expressed the hope that "after Malaysia has had the opportunity to study the information and reports which Singapore has provided, it will share Singapore's view that no purpose would be served by suspending works at this stage" but, as was noted above, Singapore also explicitly stated that:

> 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 any adverse effects* (*emphasis added*).[135]

This remains Singapore's position.

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[134] *See Statement of Claim, supra* note 1, at para. 10.

[135] *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at para. 7.

C. Infringement of Malaysia's rights

1. The Precautionary Principle

138. Malaysia relies upon an anticipated infringement of its own rights under the Convention as a further ground for the prescription of provisional measures. In this context Malaysia has invoked the precautionary principle.[136] The Convention does not itself refer to the precautionary principle, and Malaysia does not specify what it understands the principle to entail or its status to be in relation to the Convention. Singapore makes two points in relation to the principle.

139. First, if understood as a principle that requires states not to use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent environmental degradation in situations where there are threats of serious or irreversible damage – the precautionary principle has no application in circumstances where studies indicate that no serious harm is foreseeable. That is the position here. Singapore's studies indicate that the reclamation works do not entail a risk of serious harm. Malaysia's Request does not identify any evidence from which the foreseeability of serious or irreversible harm can be inferred.

140. Second, the precautionary principle must operate within the limitations of the exceptional nature of provisional measures. As Judge Wolfrum stated in the *MOX Plant case*, even if that principle were to be accepted as part of customary international law, the basic limitations on the prescription of provisional measures, which "finds its justification in the exceptional nature of provisional measures", cannot be overruled by invoking the precautionary principle. To hold otherwise would mean 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.[137]

141. Here there is no evident serious harm anticipated. Malaysia does not seek to point to any such specific harm, such as the imminent opening of a factory about to pour toxic wastes into the sea or the imminent dumping of toxic cargoes at sea. Malaysia's complaint is of incremental cumulative increases in hydrological effects, which may or may not occur and which may or may not be caused by Singapore's reclamation works or by Malaysia's reclamation works or other coastal and inland activities. The Tribunal is asked by Malaysia

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136 *See* Request for Provisional Measures, *supra* note 3, at para. 18.

137 *The MOX Plant Case, (Ireland v. United Kingdom), supra* note 79, Separate Opinion of Judge Wolfrum, at p. 5.

to characterize the various alleged changes to the hydrodynamics allegedly caused by Singapore's reclamation works as being deleterious without being able to assess the evidence about the situation prevailing in the Straits of Johore. Moreover, ITLOS is asked to assume that this allegedly irreparable damage will occur within at most the next 19 days. In the present situation therefore, Singapore submits that there is no room for applying the precautionary principle for the prescription of provisional measures. The principle may stipulate how states should approach the taking of decisions after they have evaluated all the evidence. It does not entitle Malaysia to require Singapore to suspend its reclamation works on the basis of no evidence of serious or irreversible damage.

2. Malaysia's Rights under the Convention

142. The rights that Malaysia says are infringed are set out in Articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206, and 210 of the 1982 Convention.[138] The Request also mentions Article 300, but only 'in relation to' other Articles – it is not put forward as the basis of any distinct right.

143. Articles 2 and 15 concern the alleged territorial encroachment around "Point 20" which was addressed above.

144. Articles 192 and 194 concern the duty to prevent, reduce and control pollution of the marine environment. The submissions above in respect of the allegation of serious harm to the marine environment are also pertinent to this point. Malaysia has not demonstrated that any harm to the marine environment is likely or imminent, so as to warrant an Order as a matter of urgency.

145. Articles 123, 198, 200, 204, 205, and 206 are all concerned with co-operation, notification, consultation, the monitoring of pollution, and the assessment of the potential environmental impact of projects. These are essentially procedural rights.

146. Alleged breaches of procedural rights are, by their nature, inappropriate for the prescription of provisional measures and suspension of the reclamation works at this stage can have no bearing upon any rights of notification and consultation. In the *MOX Plant Case*, Judge Mensah opined that:

> ... none of the violations of the procedural rights arising from the duty to co-operate or to consult or to undertake appropriate environmental assessments are "irreversible" in the sense that they cannot effectively be enforced against the United Kingdom by decision of the Annex VII arbitral tribunal, if the arbitral tribunal were to conclude that any such violations have in fact

138 *See* Request for Provisional Measures, *supra* note 3, at para. 18.

> occurred. .... [violations of such procedural rights] are capable of being made good by reparations that the arbitral tribunal may consider appropriate.[139]

Thus, even if the alleged violations are substantiated, these would be past violations, and provisional measures are intended to *prevent* harm, not to remedy past violations.

147. In any event, the issue in respect of these rights is moot. In its Notes of 17 July 2003 and 2 September 2003, Singapore has provided assurances which meet Malaysia's Request for information, notification and consultations:

(a) Singapore agreed to "... provide the Government of Malaysia with the relevant information it has of the current and projected works, including information on their proposed extent, construction methods, materials used, and designs for coastal protection and mitigating and remedial action taken or proposed (if any)";[140] and

(b) Singapore stated that it "... 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."[141]

Singapore has in fact already provided Malaysia with reports and other documents.[142] Malaysia's rights of notification and consultation are plainly not in jeopardy, and there is no need whatever for any provisional measures to safeguard such rights.

148. As Singapore explained to Malaysia at the meeting on 13-14 August 2003, it has monitored and is continuing to monitor the effects of the reclamation works. Indeed, Singapore has even offered to monitor conditions within Malaysia's territorial waters.[143] No provisional measures are necessary to ensure that monitoring continues.

149. Article 210 of the Convention concerns dumping. Land reclamation activities do not constitute "dumping" within the meaning of Article 210, because Article 1(1)(5)(b) 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." Land reclamation is not contrary to the aims of the Convention, as is evident from the provisions of Article 11 on permanent harbour works and artificial islands, and

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139 *The MOX Plant Case, (Ireland v. United Kingdom), supra* note 79, Separate Opinion of Judge Mensah, at p. 7.

140 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at p. 5.

141 *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at p. 4.

142 *See* Letter dated 21 August 2003 from Ambassador Tommy Koh, on behalf of Singapore to Malaysia, attached as Appendix 34 to Annex 2.

143 *See above*, at text accompanying note 74.

Articles 56, 60, 79, 80, 87, 208, 214, 246 on artificial islands, all of which involve reclamation.

3. Navigation

150. Malaysia has not alleged any infringement of its rights of passage and navigation, secured by Part II Section 3 of the Convention. Nor has it invoked any of the Articles in that Section in its Request or its Statement of Claim. It is right not to do so, because Singapore has taken care not to infringe any rights of passage through the waters around its coasts.

151. With respect to the Tuas View Extension reclamation, it suffices to note that Malaysia's consultants have concluded that although the reclamation would lead to changes to routes and deep water current conditions for ships to and from the West Johor Straits, Malaysia's consultants concluded that no impact is expected on navigation inside the West Johor Straits.[144] In fact, the UKM report assesses that the changes *improve* navigation to the Port of Tanjung Pelepas.[145] There will no doubt be further changes to water current conditions arising from Malaysia's own works on the Port of Tanjung Pelepas extension.[146]

152. The authors of some of the reports attached to Malaysia's Statement of Claim have referred to some possible effects on navigation arising from the works at Pulau Tekong. These are summarised on pages ES-20 – ES-21 and discussed at pages 7-11 to 7-13 of the UKM report.[147] More specifically, the alleged possible effects are increased difficulty of berthing at Pularek jetty, Tanjung Pengelih jetty, Tanjung Langsat jetty and other passenger ferry jetties;[148] congestion to shipping because of the narrowing of the navigation channels; and increased difficulty of navigation because of increases in water velocities.[149] These matters are dealt with below.

a. Berthing

153. There is no evidence of any serious difficulty actually being encountered in berthing, apart from a brief reference in the Annex of the DH report[150] to a meeting where "it was confirmed that the [Malaysian] navy filed a general complaint about the present situation at their jetty". At the 13-14 August 2003 meeting, Singapore asked Malaysia for details on

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144 *See DH Report, supra* note 27, at p. 22.

145 *See UKM Report, supra* note 132, at p. ES-24.

146 *See Map Showing Malaysia's Proposed Expansion of the Port of Tanjung Pelepas, supra* note 24.

147 *See UKM Report, supra* note 132.

148 *See UKM Report, supra* note 132, at p. 7-11; *DID Report, supra* note 131, at p. 15.

149 *See DH Report, supra* note 27, at p. 23.

150 *See DH Report, supra* note 27, at p. A-5.

"how ships are affected when navigating and berthing at PULAREK".[151] Malaysia has not responded to this request.

b. Congestion

154. As far as congestion is concerned, the planning and execution of Singapore's reclamation plans have taken navigational needs fully into account, as might be expected from a major port state. The navigational channels in the reclamation areas remain clear for shipping. They all conform to internationally accepted standards for port approach channels laid down by relevant international bodies, such as the Permanent International Association of Navigational Congresses (PIANC)[152] and the International Association of Ports and Harbors (IAPH).[153] The International Maritime Pilots Association (IMPA)[154] and the International Association of Lighthouse Authorities (IALA)[155] also participate in setting these standards. A map showing the location and dimensions of the relevant channels in the proximity of Pulau Tekong is attached to this Response.[156]

155. Malaysia's experts appear to accept this. The DH Report states that the Tuas reclamation works are expected to have "no impact... on the navigation in the West Johor Straits".[157] In the east, the same report records that notwithstanding the reclamation works at

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151 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at section A, item 6 in "Information Request made to Malaysia on 13 Aug 03" attached to Annex K, attached to Annex 5 of this Response.

152 The PIANC is a worldwide organisation of private individuals, corporations and national governments. They have members extending to 64 countries, including 35 government members, about 520 corporate members (private companies, harbour agencies, firms, laboratories, chambers of commerce etc) and about 2050 individual members. Included among the 35 governmental members are leading maritime countries such as USA, UK, Belgium, Denmark, France, Germany, Italy, Spain, Netherlands and Norway. Asian member countries include China, Japan and Korea. The PIANC guidelines, last revised in 1997, take full account of factors such as the depth and width of channels, ship manoeuvrability, winds and water currents, the radius of any bends, passing distances, cargo hazards and so on. These guidelines are said to represent good modern practice and channels designed to this method should result in an adequate level of navigational safety. PIANC is now called the International Navigation Association. *See generally*, http://www.pianc-aipcn.org/.

153 The IAPH is an association of ports and harbours comprising members from leading ports in 84 countries and economies, who are public port authorities, private port operators and government agencies. The Maritime and Port Authority of Singapore is a member of the IAPH.

154 The IMPA is a professional, non-profit making body concerned with promoting the standards of pilotage worldwide. It has 7,000 members in well over 40 countries.

155 The IALA is non-profit making international technical association. It is a gathering of authorities in charge of marine or harbour aids to navigation, manufacturers and consultants from all over the world. Singapore is a member of IALA. IALA has been renamed to be the International Association of Marine Aids to Navigation and Lighthouse Authorities.

156 *See* Appendix 26 to Annex 1, *Navigational Channels around Pulau Tekong and Pulau Ubin.*

157 *See DH Report*, *supra* note 27, at p. 22.

Pulau Tekong, the width of the Kuala Johor fairway, "is still ample for two way traffic of panamax sized vessels."[158] Furthermore, pilotage is currently compulsory in Kuala Johor. Vessels proceeding to Johor Port are piloted by pilots licensed by Johore Port Authority. Passage through the channels under the guidance of a pilot - whether now or after the completion of reclamation works – is very safe. As far as the waterway at Tanjong Pengelih is concerned, Malaysia's report accepts that after reclamation, "the remaining width is still ample for relevant ship sizes."[159]

c. Water Velocities and Waves

156. One of Malaysia's reports, the DH Report, deals with the issue of navigational impacts due to changes in water velocities. It is a desk-top study which considered that "increased flow velocities may cause problems for small vessels going into the flow".[160]. This is however contradicted by the Head of the Marine Department of Johor Port who is reported by Malaysia's own technical consultants as having said that "no difficulties in navigation are encountered and are also not foreseen due to the future reclamation works."[161] There is, in fact, no actual evidence of ships encountering difficulties, and the Maritime and Port Authority of Singapore, which is responsible for the waters most immediately affected by the reclamation works, has received no complaints concerning the navigability of the channels.

4. Siltation and Erosion

157. The authors of Malaysia's reports also refer to siltation and erosion as possible adverse effects of the reclamation works. Plainly, the rate at which siltation and erosion take place is such as to put them beyond the scope of a provisional measures order whose justification must lie in an urgency measured in a matter of days. Even Malaysia's reports speak of the need to monitor and evaluate the *yearly* rate of erosion[162]on the east coast and of the "minimal" siltation on the west.[163]

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158 *See DH Report, supra* note 27, at p. 23. After reclamation, the fairway allows for 28 times the panamax beam whereas the minimum would be in the order of ten times a ship's beam. A panamax ship is a ship of the largest possible size that can transit the Panama Canal.

159 *See DH Report, supra* note 27, at p. 22.

160 *See DH Report, supra* note 27, at p. 23.

161 *See DH Report, supra* note 27, at p. A-5.

162 *See UKM Report, supra* note 132, at p. 7-20.

163 *See UKM Report, supra* note 132, at p. 7-33.

5. Water quality

158. Malaysia's reports also refer to water quality. It is unclear whether Malaysia seeks to make a point of this in its Request. It is clear, however, that its consultants consider that:

(a) there is no specific information with respect to the emission of pollutants into the Straits of Johor. It is assumed that emissions mainly have domestic sources, as well as industrial sources in Johor Bahru, untreated wastewater by Malaysia, and agricultural sources.[164] The Report does not identify Singapore's land reclamation works as being a source of such pollutants;

(b) the flushing of pollutants will, in any event, be *improved* in the east Johor Straits;[165] and

(c) probable variations in salinity at both Pulau Tekong and Tuas will be "small".[166]

Malaysia's technical consultants assess that the impact of the "slight increase in salinity" on the coastal ecosystem is of a "long-term" nature.[167] There are differences between the technical assessments made for Malaysia and those made for Singapore. However, even on Malaysia's extreme predictions there is no case on this basis to order suspension to avert imminent damage.

6. No Imminent Harm will be Prevented by an Order to Suspend Works

159. Singapore makes the foregoing points in order to put the Malaysian claims into perspective. In fact, there is a simple answer to them all. Even if all of Malaysia's allegations were accepted, there is no imminent harm that would be prevented by an order to suspend works.

160. The works at Pulau Tekong have progressed considerably. Extensive reclamation has taken place at areas A and B. At area C, dredging works are nearing completion behind the temporary silt screen. As for area D, the temporary sheet piles surrounding most of the area have been in place for over one year. The approximate perimeter of the reclamation profile is already in place, as shown in a site plan.[168] This is similarly the case for the reclamation

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164 *See DH Report, supra* note 27, at p. 27

165 *See UKM Report, supra* note 132, at p. 7-23; *DID Report, supra* note 131, at p. 11.

166 *See UKM Report, supra* note 132, at p. 7-23; *DID Report, supra* note 131, at pp. 11, 13.

167 *See UKM Report, supra* note 132, at p. ES-22

168 *See Site Plan for Pulau Tekong Works as at 31st August 2003, supra*, note 48.

works at Tuas View Extension where the reclamation profile has been largely established.[169] Even if Malaysia is correct, the hydrodynamic effects which it alleges to arise from the works would already have materialised – either completely or to a large extent. Other changes affecting, for example, morphology, which Malaysia alleges to arise from the reclamation, occur on a time scale of decades rather than years. A suspension of works at this juncture will serve no purpose.

161. Projected reclamation works that will take place between the present date and the constitution of the Annex VII tribunal involve no encroachment whatever upon the waters currently available to shipping in the area. The projected works will all take place within the boundaries of the existing demarcated work area, and consist mainly of continued in-filling of the reclamation profile, completion of sand filling and construction of sand-bunds 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.

162. In fact, continuation of the works will, to the extent that causation is established (which is not admitted), alleviate certain impacts alleged by Malaysia.
For example, Malaysia has alleged that reflected waves from the sheet piles at area D at Pulau Tekong damage the shore installations at the Tanjung Pengelih area. Singapore disagrees with the quantitative assessment as to the strength of such reflected waves. In any event, the temporary sheet pile will in due course be replaced by a sloping stone revetment. The sloping stone revetment will absorb and dissipate wave action. Where Tuas is concerned, Malaysia's own technical consultants have assessed that the Tuas reclamation project will actually lead to a positive impact viz. improvement in navigability to the west of Singapore.[170]

III. Request 2 is Without Point

163. The Convention does not require coastal states to notify and consult over each and every project that they enter into. The test is one of the relevant impact of a project. If there are reasonable grounds for supposing that a project will result in substantial pollution of or significant and harmful changes to the marine environment, there is a duty to assess those foreseeable impacts.[171] In such a case, Singapore accepts that certain duties of notification and consultation may then arise. But if, after responsible scientific investigation, it is clear that there is no reason for supposing that any such effects will follow from a project, there is no such duty. In the present case, Singapore's studies and assessments indicated that there would be no such effects and Singapore's continuous monitoring indicates no likelihood of injury.

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[169] *See* Appendix 27 to Annex 1, *Site Plan for Tuas View Extension as at 6 September 2003.*

[170] *See UKM Report*, *supra* note 132, at p. ES-24.

[171] *See* Art. 206, the Convention.

164. This is borne out in practice. States commonly assess the foreseeable impact of their plans and proceed without prior consultation if they are convinced that their plans do not infringe the rights of other states. For example, Malaysia began work in 1997 on the Port of Tanjung Pelepas[172] – a project which when fully completed involves reclamation on a scale similar to the Tuas extension – without prior notification or consultation with Singapore.[173] The Port of Tanjung Pelepas commenced operations in 2000 and was officially opened on 13 March 2000.[174]

165. When Malaysia had made clear that it had specific concerns about the reclamation works, Singapore offered in its Note dated 17 July 2003 to provide Malaysia with reports, data and information on the projects despite its own assessment of the impact of the works and its conviction that they entailed no damage to Malaysia. Singapore had not been unwilling to provide such information before that date, but as the Note made clear, Singapore was waiting for Malaysia to provide details of its concerns over the reclamation works, which would have enabled Singapore to identify what documents and information were relevant to Malaysia's concerns.

166. Four sets of papers were sent to Malaysia together with Singapore's Note of 17 July 2003, and Singapore indicated in the same Note that it:

> ... will make available to Malaysia any additional material as the negotiations proceed and as they become relevant, including more definitive and updated reports as it is in the nature of reclamation works that they require ongoing monitoring and studies and the making of adjustments to such works if necessary.[175]

167. Singapore provided three further technical reports on 21 August 2003 in the light of detailed questions raised by Malaysia at the meeting between the Parties on 13-14 August 2003. The letter that accompanied them stated that:

> ... [t]hese reports form the starting point from which our experts have predicted the likely effects of our reclamation works, as well as the basis for on-going follow up studies ..... I appreciate the fact that all these reports are highly technical in nature and may not be self-explanatory. We would be happy to have our experts clarify or explain our reports at our next meeting, which I had proposed that Malaysia could host in Putrajaya. We could also explore then the possibility of having the technical experts meet among themselves and to further exchange information, if necessary.[176]

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172 *See* http://www.portsworld.com/news/nst6dec3.htm

173 *See Map Showing Malaysia's Proposed Expansion of the Port of Tanjung Pelepas, supra* note 24.

174 See http://www.ptp.com.my/ptp_aboutus.asp

175 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at p. 6.

176 *See* letter dated 21 August 2003 from Ambassador Tommy Koh, on behalf of Singapore to Malaysia, attached as Appendix 34 to Annex 2.

168. As described above, upon Singapore's suggestion, consultations between both countries were held on 13-14 August 2003, in Singapore. Singapore gave detailed presentations explaining the planning processes in Singapore, the reclamation plans, and progress of the works at Pulau Tekong and at Tuas View Extension. Details of impact assessment methodologies and impact mitigation techniques, including measures to prevent the egress of silt and shore protection methodology, were given. The presentation slides used at this meeting were also provided to Malaysia.[177] At the end of the consultations, the leader of the Malaysian delegation expressed his appreciation for the detailed presentations provided by Singapore.

169. Moreover, Singapore made it clear in its Note of 2 September 2003 that the ongoing consultations with Malaysia were real and substantive, and that Singapore was prepared to revise its plans as a result of them. It said that:

> ... 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. (emphasis added) [178]

170. Malaysia has, however, made no comment on those reports, or on the other technical reports that were sent to Malaysia on 17 July 2003, in advance of the meeting of 13-14 August 2003. Nor has it sought elucidation of the reports.

171. As far as future projects are concerned, Singapore understands that while no specific provisional measure is sought in this regard, Malaysia has a particular interest in the question of possible bridges between the main island of Singapore and Pulau Tekong and Pulau Ubin. There are no current projects of that kind for bridges, tunnels or any other form of fixed link. While Singapore's Concept Plan 2001 does envisage the creation of transport links between the islands, the Singapore Government does not have any firm plans for the construction of the links. Indeed, no decision has been made on the nature of any such links. Fixed links are not an issue within the time-frame of this Request for provisional measures. Nonetheless, Singapore has already, in its Note dated 3 September 2003, given Malaysia an undertaking "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."[179]

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[177] These are reproduced with the Record of Meeting 13-14 August 2003, *supra* note 67, attached as Annex 5 of this Response, at its Annex G (Presentation on Land Use Planning in Singapore); its Annex H (Presentation on Reclamation at Pulau Ubin and Pulau Tekong); and its Annex I (Presentation on Reclamation Works at Tuas View Extension and Jurong Island Phase 4).

[178] *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at p. 3.

[179] *See* Diplomatic Note dated 2 September 2003 from Singapore to Malaysia, attached as Appendix 38 to Annex 2, at p. 4.

172. It is therefore abundantly evident that the information to which Malaysia is entitled was available to it. It is unclear why Malaysia has felt the need to incorporate this demand among its requests for provisional measures.

IV. Request 3 is Without Point

173. There is no basis for Request 3 since, in its Note of 17 July 2003 Singapore has already specifically reaffirmed to Malaysia:

> … its willingness to afford Malaysia a full opportunity to comment upon the works in question and their potential impacts having regard, *inter alia*, to the information provided [by Singapore].[180]

174. Singapore also accepts that it is bound to consider Malaysia's comments in formulating and executing its plans.

175. Singapore considers that the burden lies upon Malaysia to make its comments known in a timely manner, and to present them with a degree of precision and technical detail that enables the comments to be given proper consideration. It is not enough for Malaysia to make generalised allegations of "increased sedimentation" or "erosion" without indicating where those effects are thought to have occurred and the evidence that gives rise to the concerns. Singapore has studied the potential environmental impacts of its reclamation works and, on the basis of the scientific and technical information and advice available, it believes that the works will result in no significant adverse effects. If Malaysia can indicate that particular analyses are faulty, or that actual scientific data suggest that predictions may be incorrect, Singapore will re-examine those analyses and data. However, Singapore cannot be expected to reject its expert technical advice because of a wholly unparticularised concern on the part of Malaysia.

176. It was not until July 2003 that Malaysia gave any detailed indication whatsoever of its concerns. When Malaysia provided its technical reports to Singapore on 4 July 2003 – more than ten months after Malaysia first received these reports from its consultants and more than 14 months after first raising its concerns – Singapore promptly studied the Malaysian reports in detail, to reconcile them with reports produced at the request of the Singapore government.[181] The meeting held on 13-14 August 2003 was a positive start to what Singapore had intended to be an extensive exchange of information, with a view to identifying precisely what the roots of the differences were between the technical experts advising the two sides, and resolving those differences. In this connection, Singapore, in addition to responding to queries from the Malaysian delegation, either immediately or through correspondence soon thereafter, also requested information relating to technical

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180 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at p. 6.

181 Malaysia's DH Report is dated 16 August 2002. Its DID Report is dated September 2002. The "Expert Review Report of Hydraulic Model Study of the Straits of Johor" is dated April 2003. Its UKM Report is dated May 2003.

matters and data of pre-existing conditions within the knowledge of the Malaysian authorities.[182] This was to ensure that Singapore could better understand any differences in analysis and interpretation from studies conducted on behalf of the Malaysian Government, and similar studies conducted on behalf of the Singapore Government. If Singapore's plans are proceeding on the basis of incorrect data or analyses, Singapore has as much interest as Malaysia in knowing this. At present, however, Singapore is satisfied with the technical advice which it has received.

177. It is clear that Singapore has afforded, and has expressed a clear intention to continue to afford, Malaysia every opportunity to comment upon the works and their potential impacts. This has been Singapore's consistent position. When the Malaysian reports were provided on 4 July 2003, Singapore initiated a process, whose first steps were taken with the exchanges of detailed information in July and August 2003 and at the meeting on 13-14 August 2003, which still has the potential to resolve the technical issues that divide the parties.

V. Request 4 is Without Point

178. Singapore does not understand Request 4. The matters to which it refers must, of necessity, be matters within the scope of its Statement of Claim, but it is not clear whether Malaysia is referring to:

(a) "any remaining unresolved issues" that remained unresolved as at the date of Malaysia's Request of 5 September 2003, or perhaps any that will remain unresolved at the date of any ITLOS order, *or*

(b) any that will remain unresolved after the Annex VII arbitration.

179. If it is the first, it is difficult to see why Malaysia could not specify what those issues are so as to assist the Tribunal in its deliberations. In its present vague terms, it would not be possible to know what is expected of Singapore, or whether or not the parties were complying with an order drafted in those terms.

180. It is also difficult to see why Malaysia is seeking an order to continue negotiations on matters that it submitted for adjudication on 4 July 2003. That suggests that Malaysia considers that the scope for negotiations has not been exhausted – a view that Singapore shares. In that case, it is difficult to see why Malaysia is not proposing to participate in the further meetings that were envisaged at the meeting of 13-14 August.

181. If it is the second, it is not a matter for ITLOS. The Annex VII tribunal will be bound to decide all the matters that Malaysia has referred to it that are admissible and within its jurisdiction, and there should be no 'unresolved matters'. Even if there were, that is something with which an award of the Annex VII tribunal should deal.

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182 *See* Record of Meeting 13-14 August 2003, *supra* note 67, at its Annex K, attached as Annex 5 of this Response; *See also* letter dated 21 August 2003 from Ambassador Tommy Koh, on behalf of Singapore to Malaysia, attached as Appendix 34 to Annex 2.

182. In any event, in its Note of 17 July 2003, Singapore has already stated that it "remains ready and willing to engage in negotiations with the Government of Malaysia regarding any remaining unresolved issues, and to act on any agreements."[183] Hence, whatever Request 4 might be intended to mean, Singapore reiterates its readiness and willingness to negotiate with Malaysia over issues arising from the reclamation works. Singapore has given a clear and explicit undertaking in this respect and there is no need for an Order to that effect.

VI. Urgency

183. Urgency is of the essence in provisional measures but Malaysia's conduct shows that it does not regard this dispute as a matter of urgency.

184. In the case of Pulau Tekong, it has already been noted that for more than a decade after the first publication of the plans for the reclamation works that it now seeks to suspend, Malaysia did nothing. The plans for the reclamation were made public in Singapore's 1991 Concept Plan. Works started at Pulau Tekong in November 2000. Malaysia made no protest until 30 April 2002.[184]

185. The plans for the Tuas View Extension project were made public in 1999. Malaysia made no protest until 28 January 2002, when it sent its Note.[185] By that time Singapore had already publicly invited tenders for the project and, within clear sight of the Malaysian mainland, surveyed, dredged, and then reclaimed extensive areas, including the areas around "Point 20".

186. When Malaysia began to express its concerns, it did so in two ways. The first way was not concerned with any physical or environmental consequences of the works. Instead, Malaysia objected to Singapore's encroachment upon Malaysia's claim to "Point 20".[186] Singapore did not and does not understand how any application of the equidistance principle can generate an entitlement to an anomalous sliver such as the "Point 20" sliver, and Malaysia has never offered any explanation. Malaysia took no action to protect its rights when the area around "Point 20" was actually reclaimed in 2000. If Malaysia's claim to "Point 20" was not of a nature that demanded urgent action then, it is difficult to see why it demands such urgent action now.

187. The second way in which Malaysia expressed its concerns was by alleging that the reclamation works entailed environmental harm. It is striking that as late as 2 April 2002, in

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183 *See* Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2, at p. 7.

184 *See* Diplomatic Note dated 30 April 2002 from Malaysia to Singapore, attached as Appendix 15 to Annex 2.

185 *See* Diplomatic Note dated 28 January 2002 from Malaysia to Singapore, attached as Appendix 11 to Annex 2.

186 *See* Diplomatic Note dated 28 January 2002 from Malaysia to Singapore, attached as Appendix 11 to Annex 2.

its Note, Malaysia was not asserting that any such injury had already occurred. It wrote in that Note that:

> ...The Government of Malaysia strongly urges the Government of Singapore to strictly observe the duties and principles of state responsibility under international law and practice which imposes the basic duty upon a state not to carry out any activity that would injure directly or indirectly the rights and interests of neighbouring states.[187]

That statement is directed solely at the future conduct of Singapore. Neither that statement, nor anything else in the Note, indicates that Malaysia considered that Singapore had violated the Convention before 2 April 2002.

188. It was only through its Note of 30 April 2002 that Malaysia, for the first time, alleged that the works had already caused:

> ...serious environmental degradation as indicated in increased sedimentation, erosion, siltation, decreased flushing, hindrance to flood flow and changes in flood pattern with the consequent degradation of marine species of fauna and flora, marine habitats and their ecosystems.[188]

The protest Note read as if it was based upon precise scientific data, and Singapore asked for specific facts and details.[189] Malaysia supplied none.

189. Despite repeated requests from Singapore and repeated public assurances from Malaysia[190] that the material would be forthcoming, no details of its precise concerns over the alleged "serious environmental degradation" were given until 4 July 2003, when it sent Singapore the four reports that accompanied its Statement of Claim. It is notable that one of the reports is dated August 2002, and it appears that Malaysia had the specific data and analyses long before it passed on the information to Singapore as part of its first move in this litigation.

190. Even after Malaysia initiated the arbitration under the Convention, it has dragged its feet. Malaysia and Singapore both appointed their respective arbitrators, in accordance with the Convention, by 29 July 2003. Singapore raised the question of the appointment of the remaining arbitrators at the meeting on 14 August 2003, and again in a letter dated 28 August 2003. The letter specifically drew attention to the fact that:

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187 *See* Diplomatic Note dated 2 April 2002 from Malaysia to Singapore, attached as Appendix 13 to Annex 2.

188 *See* Diplomatic Note dated 30 April 2002 from Malaysia to Singapore, attached as Appendix 15 to Annex 2.

189 *See* Diplomatic Note dated 14 May 2002 from Singapore to Malaysia, attached as Appendix 16 to Annex 2.

190 *See* the Annexes A and B attached to the Diplomatic Note dated 17 July 2003 from Singapore to Malaysia, attached as Appendix 24 to Annex 2.

> … because Malaysia's notice of arbitration served on Singapore on 4 July 2003 triggered off certain timelines under the 1982 UN Convention on the Law of the Sea (UNCLOS), we are obliged under UNCLOS to consider this procedural matter of the establishment of the Annex VII tribunal. In this regard, UNCLOS provides for both parties to reach agreement on the appointment of the remaining three arbitrators. We will also have to agree on the chairman of the tribunal from among the three arbitrators. Our deadline for both tasks is 2 September 2003.[191]

191. Malaysia did not address this issue before the deadline passed. Instead of following through with the procedure which it had chosen when it initiated the Annex VII arbitration, Malaysia suggested switching the arbitration to ITLOS. It offered to continue negotiations, but only if Singapore agreed to preconditions including the suspension of works around Pulau Tekong.[192] On 3 September 2003, Malaysia reiterated its proposals, and said that it believed that, "in these circumstances… [it was] premature to discuss modalities for the appointment of the Annex VII Tribunal."[193]

192. Eventually, it fell to Singapore to expedite matters by asking the President of ITLOS to exercise his power under the Convention to appoint the remaining arbitrators.[194]

193. Singapore submits that these are not the actions of a state for which the suspension of the works is a matter of such grave urgency that it cannot afford to wait until the constitution of the Annex VII tribunal, which will occur by 9 October 2003 at the latest.

VII. Balance of Interests

194. Even if there were any significant injury to Malaysia or prejudice to its rights or interests (which there is not), that would not automatically entitle Malaysia to provisional measures. ITLOS is empowered but not obliged to prescribe provisional measures. As was shown in Chapter 4 above, it must be satisfied that the balance of interests lies in favour of the ordering of Provisional Measures. It is Singapore's submission that this is not the case.

195. Singapore's works are all located within its own territory. States, including Singapore, have the right to exploit their natural resources,[195] and the right to develop their

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191 *See* letter dated 28 August 2003 from Ambassador Tommy Koh, on behalf of Singapore, to Malaysia, attached as Appendix 36 to Annex 2.

192 *See* Diplomatic Note dated 22 August 2003 from Malaysia to Singapore, attached as Appendix 35 to Annex 2, at pp. 3-4.

193 *See* Diplomatic Note dated 3 September 2003 from Malaysia to Singapore, attached as Appendix 39 to Annex 2, at p. 2.

194 *See* letter dated 9 September 2003 from Singapore's Minister for Foreign Affairs, on behalf of Singapore, to the President of ITLOS, attached as Appendix 42 to Annex 2.

195 *See* Art. 193, the Convention.

territory. Singapore's reclamation works are well advanced and are on a complex schedule, as is necessarily the case in large construction projects. Delay at this stage will entail serious repercussions, both pecuniary and non-pecuniary, and even if Malaysia's arguments were accepted in full, provisional measures would, given the timeframe, secure immeasurably small advantages – if any – for Malaysia.

196. A stoppage of the reclamation works at Pulau Tekong and/or at Tuas View Extension, until such time as the Annex VII tribunal is constituted, or until such time that the substantive phase of the proceedings is heard, will result in very considerable losses for the contractors or the Singapore Government, or both, in the order of tens of millions of dollars. In respect of such losses, Singapore will be left without a remedy if Malaysia eventually fails to prove its case before the Annex VII tribunal.

197. Singapore therefore submits that any advantage to Malaysia from the prescription of the provisional measures sought by Malaysia is clearly outweighed by the detriment suffered by Singapore.

VIII. Conclusion

198. Singapore submits that Malaysia's Request is misconceived. In part, it asks the Tribunal to order Singapore to do things that 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. Perhaps the most telling point of all in Malaysia's Request is that it fails to identify a single instance of a risk that would be averted or a benefit that would be conferred by the making of the Order that it seeks.

CHAPTER 6
SUBMISSIONS

199. For the reasons given in this *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.

PROF TOMMY KOH
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AGENT FOR THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE

20 September 2003