

SEPARATE OPINION OF JUDGE COT

[*Translation*]

1. I subscribe to the operative part of the Order and to the reasons on which it is based. I agree with the view that Malaysia's request for the prescription of provisional measures is admissible and that the Tribunal is competent to entertain that request. I also agree with the Tribunal's view that there is no need to prescribe provisional measures in the western part of the Straits of Johor. It is my opinion that Malaysia has not established the possibility or likelihood of its rights in this area being affected or of serious harm being caused to the marine environment. This finding does not in any way prejudice the merits of the case, in particular the assessment that the Annex VII arbitral tribunal will have to make concerning Malaysia's territorial claim to point 20.

2. Like the Tribunal, I consider that the situation is different in the eastern part of the Straits. It is possible or probable that Malaysia's rights, in particular its rights of navigation and its right to preserve the marine environment falling within its sovereignty, will be affected. It is difficult to deny that land reclamation works in an international waterway up to the boundary of the neighbouring territorial sea may adversely affect the neighbour's rights. In view of the narrowness of the Straits and the proximity of the coastline on either side, the works planned by Singapore will have a drastic affect on the geography and hydrography of the Straits of Johor. If Malaysia were to undertake similar works, the Calder channel would be completely unnavigable. Furthermore, the studies made by the Applicant show that serious harm to the environment in this area is possible. In short, the condition of urgency is satisfied.

3. I believe that in the present case the appropriate measure in order to protect the rights of the Applicant would have been to prescribe the suspension of the infilling works in Area D at Pulau Tekong pending the results of the scientific study requested by the parties. In fact, I believe that this obligation devolves upon Singapore in any case. First, it results from the commitments entered into by the Government of Singapore in its diplomatic notes and in the statements made by its Agent at the hearing, in particular on Saturday, 27 September 2003 (ITLOS/PV.03/05, pp. 37 *et seq.*). Second, it results from the general obligation that parties have to

abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute . . . (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199*).

4. In fact I consider the infilling works in Area D to be an irreparable measure. It is not a question of filling the area with sand which will then be able to be dredged at will, like the sandcastles built by children on the beach that are washed away by the next tide. The advocate for Singapore, Mrs Cheong, explained the land reclamation process very clearly (ITLOS/PV.03/03, pp. 13–19). The infilling to a depth of 15 metres must be of a sufficiently solid composition to serve as a foundation for buildings some twenty to thirty or more metres high, similar to those that appeared in the video she showed.

5. Singapore referred to the cost of suspending the infilling works but was very careful not to put forward a figure or a rough estimate. Remember that we are talking about a suspension limited in time and affecting only one of the areas in question, viz. Area D at Pulau Tekong. I have no idea of the sums involved but I note that Singapore did indeed consider the possibility of suspending the works – the Agent of Singapore even referred to this possibility at the hearing (ITLOS/PV.03/05, p. 38) – if it felt that Malaysia's rights were at stake. The cost is therefore bearable. It should be added that a financial cost is by definition not irreparable and may result in damages.

6. The provisional measures prescribed by the Tribunal go further than and at the same time fall short of the suspension requested by Malaysia. On the one hand, operative paragraph 1(c) prescribes that the parties should consult with a view to reaching a prompt agreement on measures with respect to Area D at Pulau Tekong; the text therefore adds an obligation of immediate cooperation, so that the parties agree on the measures to be taken. However, on the other hand, the Order does not specify to what extent the infilling works must be suspended or slowed down pending the results of the study referred to. On this point there is a certain degree of uncertainty concerning the precise extent of the obligation devolving upon the parties.

7. However, I believe that the application by the parties of the operative part of the Order, in good faith and with a view to the forthcoming arbitration, must enable the rights of the Applicant to be preserved. That is why I have concurred with the text.

(Signed) Jean-Pierre Cot