INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
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2003

Public sitting

held on Friday, 26 September 2003, at 3.00 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President L. Dolliver M. Nelson presiding

Case concerning Land Reclamation by Singapore in and around the Straits of Johor

(Request for provisional measures)

(Malaysia v. *Singapore)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	L. Dolliver M. Nelson
	Vice-President	Budislav Vukas
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		Thomas A. Mensah
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Tafsir Malick Ndiaye
		José Luis Jesus
		Guangjian Xu
		Jean-Pierre Cot
		Anthony Amos Lucky
	Judges *ad hoc*	Kamal Hossain
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	Registrar	Philippe Gautier

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Mr Haji Mohamad Razali Mahusin, Secretary State of Johor,
Mr Abdul Aziz Abdul Rasol, Assessment Division Director, Department of Environment,
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Mr Yan Hui Loh, Senior Vice President, Engineering, HDB Corp (Surbana) (Project Manager, P. Tekong Reclamation Works), Singapore,
Mr Way Seng Chia, Vice President, Reclamation, HDB Corp (Surbana), Singapore,
Mr Cheng Wee Lee, Deputy Port Master, Maritime Port Authority of Singapore,
Mr Parry Soe Ling Oei, Deputy Hydrographer, Maritime Port Authority of Singapore,
Mr Chee Leong Foong, Head, Pollution Control Department, National Environment Agency,

as Advisers.

CLERK OF THE TRIBUNAL: All rise.

PRESIDENT: Please be seated.

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

MR REISMAN: Mr President and Members of the Tribunal, lest our adversaries minimise the importance of these prerequisites to jurisdiction, I must emphasise the issue here is not one of technicalities. A party agrees to a process of negotiation, secures vital information, then abruptly aborts the negotiation and seeks to move to another forum. Article 300 says:

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

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

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

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

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

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

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

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

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

"4. The requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of Article 290 as regards the moment in which the measures may be prescribed. In particular, there is no 'urgency' under paragraph 5 if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted."

Judge Mensah in the *MOX Plant* case said:

"…in dealing with the possibility of prejudice to rights or serious harm to the marine environment, a court or tribunal operating under paragraph 5…must bear in mind that it is not within its purview to consider, let alone to decide, whether there is the possibility of such prejudice or harm before the final decision is reached on the claims and counterclaims of the parties in the dispute. That court or tribunal is only required and empowered to determine whether, on the evidence adduced before it, it is satisfied that there is a reasonable possibility that a prejudice of rights of the parties (or serious damage to the marine environment) might occur prior to the constitution of the arbitral tribunal to which the substance of the dispute is being submitted."

The applicant must demonstrate then that the urgency is such that it would be impossible for the claimant to wait for the constitution of the Tribunal that will ultimately make the decision. In the present case the Annex VII Tribunal must be

constituted no later than 9 October (less than two weeks from now). Now this has been mocked by Malaysia but the language of UNCLOS and the intentions of the drafters could hardly be clearer. The Virginia Commentary explains:

"Fear was expressed that the Law of the Sea Tribunal might interfere unnecessarily in some cases, asserting its allegedly superior authority over other tribunals."

Professor Crawford yesterday developed scenarios of weeks, indeed months, elapsing before an Annex VII is constituted. Mr President and Members of the Tribunal, those who undertake the task of international arbitrator are not irresponsible and one of the first questions posed to a candidate is whether he or she has the time of the important function about to be entrusted. In any case, the Tribunal as constituted, when it is constituted, is clearly reflected in paragraphs 73, 77 and 81 of your *MOX* decision.

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

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

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

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

"The Court, placing on 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 and work during the pendency of the proceedings."

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

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

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

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

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

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

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

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

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

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

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

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

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

This is not a merits hearing; this is an application that is brought under paragraph 5 of Article 290 of the Convention. The question before the Tribunal now is: is this a case of such urgency risking such serious and irreparable harm that it is necessary

for the ITLOS to order provisional measures now or can Malaysia, on the other hand, wait and go before the Annex VII tribunal?

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

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

Three of those four requests are swiftly dealt with.

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

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

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

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

There is no dispute over these points. The issue is moot. Singapore has offered, in written statements that are before this Tribunal in evidence, to do what Requests 2,

3 and 4 seek, and those written offers stand. There is no need for an order to this effect. The crucial precondition for ordering provisional measures is simply not met.

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

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

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

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

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

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

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

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

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

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

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

We submit that the Point 20 argument gives no support whatever to the Request for an order that Singapore should cease its reclamation works.

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

I should recall at this point Professor Reisman's submissions on the standard of proof. It is necessary that Malaysia prove that it needs provisional measures.

Malaysia does not get even near the most minimal of thresholds of proof in this case.

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

The first point is: Malaysia has failed entirely to put a coherent case before this Tribunal. It is of course for Malaysia to make out its case, but Malaysia simply says, in paragraph 17 of its Request for Provisional Measures, "The Malaysian Reports

annexed to the Statement of Claim, to which the Tribunal is respectfully referred, demonstrate that the reclamation projects are already causing and threaten to cause harm to the marine environment…." But it is not enough to present this Tribunal with a sort of do-it-yourself set of materials from which it might rustle up some sort of case.

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

Let me give you an example. The reports that have been submitted predict various physical impacts upon the marine environment, and they suggest that the responsibility for those impacts is to be laid at Singapore's door. But physical impacts, of course, are not the same as legal harm. It is one thing to protect the marine environment from harm, but it is quite another thing to say that the law requires that there can be no activity whatever that has any impact upon the sea. The latter would obviously rule out practically all industrial activity on land.

Malaysia seems not to draw that distinction. It is as if every environmental impact must *ipso facto* violate international law.

For example, the reports refer to variations in the salinity levels of the order of 0-2 per cent. Does Malaysia regard variations of that order as harm, does it regard them as serious harm – which is the higher threshold required by paragraph 5 of Article 290 – or does it regard them as simply minor variations, smaller in fact than the general scale of seasonal variations in salinity? Is Singapore expected in due course to defend itself on the merits against the accusation that it has caused this change in salinity levels or is this no part of Malaysia's case? We do not know.

To take another example, in the UKM study, Malaysia's annex H, at page ES 9 – that is the Executive Summary at the beginning – the study concludes that "the area is already stressed by high oil and grease levels." If you turn to page 4-28 of that same study, you find it is stated that "the levels of oil and grease found at all stations are generally low." What is Malaysia's case? Is it saying that the levels are high or that the levels are low? How can Singapore prepare a response when the case is not spelt out?

Our submission is that Malaysia needs to explain which of the propositions that are set out in these various scientific reports it adopts as its own, and which of those propositions it puts forward as the basis of its case. As yet it has not done so.

My second general point is this. Time and again yesterday counsel for Malaysia said that they were about to deal with the question of urgency, or that a colleague would deal with it, and time and again they moved towards the door that would open to reveal the damage that would occur if the Order that they have asked for were not granted. But at the end of the day, no-one had dared to grasp the handle.

Professor Crawford's parting advice in his presentation on the question of urgency was to recall what Professor Schrijver and Professor Falconer had said, and to suggest that the Tribunal "are in a position to read the various reports for yourselves." I shall take you to some aspects of those reports shortly, but I would ask you to note now that Malaysia itself has not pinpointed a single example of a specific, imminent risk of serious harm to the environment that is not simply a theoretical possibility or a long-term risk.

Neither Professor Sharifa, nor the UKM report that she presented, nor the DID report, nor the Delft report, nor Professor Falconer pointed to any evidence suggesting a serious risk of the imminent arrival of any dramatic change in the present situation.

You will recall yesterday Professor Sharifa said merely that the reclamation works "risk having a significant adverse impact on the environment and economy of Malaysia's coastal and estuarine waters in and around the Straits of Johor" and that they are predicted to have "an adverse effect" – she did not then say a *significant* adverse effect – on various hydrological and other characteristics.

Singapore does not dispute that. Of course there is a risk of some degree. That is why these projects are subject to planning controls and procedures for determining the nature and the scale of those risks. Singapore has considered the risks. It has taken the steps to design the projects so as to ensure that the risks are acceptable, and it continues to monitor the risks and to take the necessary mitigating measures.

It was perhaps Professor Falconer's evidence that was the most striking yesterday. Professor Crawford put to him this question directly. He asked him, "What immediate effects in your view are the land reclamations likely to have?" – the question that we were all waiting for an answer to. Professor Falconer responded by referring to the deposit of mud on Malaysian beaches. Then he was asked, "Confronted with this situation in which these various forms of sediment transport, what should the immediate response be?" He said, "Carry out interim measures in terms of interim computer model simulations…and…look at how the shape of the reclamation where the sheet piles are could possibly be modified."

In the face of this urgent, serious environmental risk, we rush back to the desk and back to our computer modelling – no hint at all that it is necessary to suspend the works, that it is necessary to take any physical action; just look calmly and scientifically at the situation, identify the precise nature of the risks, identify the mitigating measures that best address those risks and then take them. That is, you might think, wise counsel indeed.

What events does Malaysia expect to occur between now and the constitution of the Annex VII tribunal and what is the evidence to support the expectation?

My third general point is that, amid the flurry of statistical analyses of impacts on the marine environment, you may have noticed that there is one calculation that is nowhere performed, and that is the calculation of how much of this predicted impact is attributable to Singapore and how much of the predicted impact is attributable to activities for which Malaysia is responsible?

You heard Professor Sharifa's views on the state of the Malaysian environment in 1992; you have seen the charts of the PTP and Tanjung Langsat reclamations, and the photographs of the sediment plume coming down the Johor River. Yet none of these reports breaks out Malaysia's contribution either to the damage or to the risk of damage that is calculated on the basis of the data that the reports have.

Having made those three general points, let me turn now to the reports themselves.

Professor Sharifa presented conclusions from three of the four reports, and to avoid any possible misconception, let me remind you that, as is evident from the reports themselves, they are not all of the same probative value.

The first is Annex E, the Delft Hydraulics report. That was completed in August 2002, and it was not actually commissioned as a study of Singapore's reclamation works at all. As it explains on page 4, it is a study of the Straits of Johor set in the context of Malaysia's plans to open the causeway which connects Singapore with Malaysia and divides the Straits of Johor into two entirely separate sections. Delft "was assigned to perform an analysis of the impacts of the construction and planning of the causeway and the various other activities that may affect the hydrodynamics, morphology, water quality, navigation and ecology of the Straits of Johor."

It is, moreover, only a "desk study" of likely impacts of the causeway project. It did not involve the collection of any data. This is a reasonable first stage. We would expect it to be followed by the development of more exact mathematical modelling of the expected impacts. We would expect that in turn to be followed by the calibration and the verification of those mathematical models against actual data derived in the field in order to see how closely the mathematical predictions corresponded to reality.

So the conclusions of desk studies of this kind offer a very different level of proof from conclusions that are based on actual data collected in the field. The Delft report is necessarily speculative and, as a reading of it will show, its hypotheses sometimes contradict the practical experience of the people in the field whom the Delft team interviewed during their one-week visit to Malaysia.

I must say that, even as a desk study, it is incomplete. It is striking, for example, that the authors of the report in their table of the works in the area at pages 11-12 seem not even to know or to have obtained information on the actual size of the most major reclamation works, including the Tuas works itself. Their failure to obtain that information – see the blank column on size, which is actually filled in for two or three of the examples later on on the Malaysian side – underlines just how preliminary their report is.

Such hard data as is in the Delft report is taken from reports which haven not been presented by Malaysia to the Tribunal or to Singapore. For the most part, there is no indication of what the actual data is, how or when it was obtained, where it was obtained, what methodology was used, and there has been no opportunity for Singapore to comment upon it.

Even if one overlooks these limitations, the Delft report is of such remarkably little help to Malaysia that one might wonder why Malaysia has submitted it at all. Its overall tone is extraordinarily tentative. If you look at page 23, for example, it is a litany of possibilities, with barely a definite proposition to be found in it.

On the key topic of current velocities, pages 17-18 list the impacts, as they call it. Page 18 summarises the expected impacts of land reclamation. It notes that land reclamation

> "will change the local cross-sectional area of the Straits, inducing increased velocities and ultimately scouring and erosion."

There is scarcely support there for an urgent call to suspend works. But the more startling point is that this report then goes on to refer to the effect of the Tuas operation on this, and says:

> "In the present situation with the causeway in place there are little effects. However, when the causeway is opened the effects can be more significant."

The report says that the Tuas effects are "little" and that there is a possibility of "significant" effects resulting not from Tuas but from Malaysia's own activities in opening up the causeway.

As far as Tekong is concerned, on page 18 the report is its usual cautious self. The expansion of Pulau Tekong "might influence the Johor Straits and Johor River systems significantly." This, it says, influences local current velocities and possibly the distribution of discharges and these changes

> "might result in changes in tidal phasing and tidal amplitude….[and] effects in Calder Harbour (increased velocities) might become more significant when the western part of the proposed land reclamation is finished."

These speculative possibilities about future developments appear as certainties in the Delft report's table of conclusions at pages 18-19. But even then there is nothing in that report that suggests the likelihood of significant imminent harm in the near future. It is of no help at all on the key question of the urgency of the need for provisional measures.

Let me turn to the DID report, Annex F. That is a six-month hydraulic study, begun in March 2002 and completed in early September 2002. It is based upon mathematically modelled simulations, and the models were calibrated against data relating to a two-week period in October and November 1999, and verified against data collected in a two-week period in April and May 2002. That data was not presented to the Tribunal or to Singapore. It seems to be in the elusive Volume III of the DID report. Access to that report may or may not answer some of the questions that hang over the DID report. For instance, no matter how good the mathematical modelling might be, predictions can only be as good as the initial data that is input. As computer people say: garbage in, garbage out.

Take the case of erosion. Plainly, erosion rates vary dramatically: rock erodes more slowly than sand; harder clay more slowly than soft clay. The seabed around Tekong, for example, is highly varied. Some of it is soft clay overlying hard clay; other areas are harder clay bed and some areas are rock bed. We need to know what assumptions DID made about the proportions of these different kinds of seabed, and the distribution of these different kinds of seabed, and the thicknesses of the layers of the soft clay, in order to have some sensible evaluation of their estimates of erosion. These factors would have a dramatic effect upon the predicted erosion rates.

That very information is among the information sought by Singapore at the meeting on 13 and 14 August this year, and we have yet to receive the clarification that we asked for on these matters.

To take another example, peak velocities: peak water velocities are predicted in the report, but that is not a very helpful statistic. How long do the peak velocities persist? There is a world of difference between a current that is constantly flowing fast and a current that may, under certain circumstances, flow fast for a very short time but generally flows slowly. Yet both may have the same peak velocity.

What does Malaysia think is significant about the peak velocity? If we take the velocity that the DID report predicts, it is roughly that that exists in the approaches to Rotterdam and New Orleans, and if the world's largest port can cope with access velocities of that kind, why does Malaysia think that it should be a problem in the accesses around Tekong?

The DID Report may contain a good deal of computation, but it does not tell us the answers to the questions that are actually at the heart of this case. In particular, it is entirely silent on the really important question: what is the impact of these works, and what changes in the present situation may be expected in the short time between now and the constitution of the Annex VII Tribunal?

Professor Falconer's report (Annex G), that, as he explained, is not a report on environmental impact of the reclamation works at all. It is a report on the DID Report, which is itself largely based upon reports made some years earlier. As Professor Falconer told you, he was asked to review the mathematical modelling. He was not asked to review the data in volume 3 of the report. He said that he does not know what is in volume 3. It is, he said, "just the data" and so we could not cross-examine him on it.

We do not deny the value of mathematical modelling, but we do dispute the suggestion that it is appropriate for this Tribunal to suspend Singapore's reclamation works on the strength of predictions based on data that neither the Tribunal nor Singapore, nor even the expert validating Malaysia's study has ever set eyes upon.

Annex H, UKM report, this is the fourth report and this, in its own terms, set out, and I quote:

"…to establish a baseline *[a baseline of scientific data and not a maritime baseline]* for the existing environment of the areas which are in close vicinity to Singapore's reclamation projects, in particular within Malaysia's territory."

That is significant. It suggests that no satisfactory baseline data existed before the UKM Report dated May 2003 was prepared. One wonders what was the evidence behind Malaysia's accusations of environmental harm that were made before that date, for example, in Malaysia's Note dated 30 April 2002.

It should also be noted that Malaysia's concerns for the marine environment were not so urgent that it could not wait for more than two years after the reclamation works had begun before organising this baseline study.

Though it is described as a baseline study, the report makes some predictions about future impacts. Those estimates are based in considerable part upon simulations, for example, on suspended sediments, but there is also some analysis of previously collected data, and some collection of new data.

When we get to the merits phase, we will doubtless look at this closely but it is instructive, even now, to see how that report handles one issue that has been emphasised by Malaysia.

The report notes (and you will find this at page 17 of the Executive's Summary in the folder) that 800 Malaysian fishermen were interviewed and that most of them perceived that the reclamation works have adversely affected their fish catch. One can only speculate on the question that was actually put to the fishermen that the impression is given that this is further evidence that the reclamation works are responsible for a decline in the fish catch.

Figure 7.2.1 in the report charts the annual trend in fish landings in west and east Johor. The boundary running across the page left to right is the sequence of years, the vertical scale is the fish catch. You will notice that the decline in the west Johor fishery, in fact, began in 1996, three years before the Tuas project started, and that the catch in east Johor, which was declining in the early 1990s in line with the comments in Professor Sharifa's 1992 article, actually rose from 1998 onwards. One cannot help but feel that the evidence in the UKM Report – and there is more to the same effect in Appendix 7.2.2, including specific evidence on the prawn, shrimp and crab fisheries to which reference was made yesterday - does not entirely support the conclusion that the authors wish to draw from it.

Malaysia has lodged a Request for provisional measures and it is said that the proof of its case lies in these Reports. Singapore submits that Malaysia cannot simply lob four volumes of graphs and tables at the Tribunal and assert that somewhere in them there is some pretty powerful scientific evidence to back up their case. It must plead its case properly. It must identify the material that it relies on, it must identify the propositions that it adopts as its own, and it must show how that evidence proves it is urgent for provisional measures and this it has not done.

Let me now turn, Sir, to some more specific points, and I turn to those that are identified by Malaysia in paragraph 17 of its Request for provisional measures. It refers there to certain kinds of environmental consequences:

"Major changes to the flow regime, changes in sedimentation…and consequential effects on coastal erosion… Impacts will also be felt in terms of navigation, the stability of jetties and other structures, especially at the Malaysia naval base of Pularek."

We note that paragraph 17 claims only "harm" and not "serious harm", as would be required if provisional measures were to be prescribed in order to prevent serious harm to the marine environment, and Malaysia may wish to address that point tomorrow.

We also note that Malaysia's environmental concerns are focused on Pulau Tekong and that it is not immediately and urgently concerned with Tuas except, as I said earlier, in the context of the alleged invasion of Malaysia sovereignty.

Let me begin with some remarks about the flow regime. There are several aspects of the flow regime which are relevant. There is the question of velocities and the volume of current flows which underlie other effects such as the impact on navigation, erosion, siltation, salinity and so on.

On Malaysia's own submissions that is not a problem in respect of Tuas.

The DID Report was written by an agency of the Malaysia Government and, I suppose, we can take its views as representing the views of Malaysia in this case. That report states at page 8.4 that:

"The medium grid model at Tanjung Piai indicated that there were no appreciable changes to the speed and water levels as a result of the reclamation works".

The works at Tuas are not a problem. On Pulau Tekong, in contrast, Malaysia expects 'appreciable changes'.

Singapore's first point is that whatever problems there may be at Pulau Tekong, they are already being lived with. The narrowing of the channel has already been largely realised through the installation of the temporary sheet pile which was, as Mrs Cheong explained to you this morning, itself a measure to contain the sediment and prevent pollution. The shape of the reclamation will not change substantially. What is the basis for expecting any further change beyond that with which we now exist?

The DID Report on page 9.2 states that:

"The current velocity around Pulau Tekong has increased. The maximum increase occurs near Pularek, ie, from 0.7 m/s to 1.19 m/s (70% increase) for Case 2 and 1.2 m/s (85% increase) for Case 3."

I should explain that only Case 2 is relevant. The difference between Case 2 and Case 3 is that Case 3 is the model they constructed on the supposition that Singapore would proceed to a further extension south of Pulau Tekong, around Changi Airport but there are, as yet, not even plans for that development and so it is entirely irrelevant to these proceedings.

On Malaysia's own figures that increase to 1.10 m/sec produces a velocity which translates into 2.3 knots. But what does that mean in practice?

Basic physics dictates that water flowing through a channel flows faster in the centre of a channel than at the sides. At the centre of the route between Pulau Tekong and Malaysia – the Calder Harbour route as it is known – are the Guillemard Rocks and the Merlin Rocks. Ships do not navigate there, so that part of the channel where the increase is likely to be fastest is not that part of the channel where navigation is going to be affected. The question is, what is the velocity where the ships go, and for how long and how often does that velocity increase?

But even suppose that the peak velocity were reached in every part of the channel and at every moment, what then? What does the estimated peak of 2.3 knots mean? The estimated peak, according to Malaysia charts and to another Malaysia report (and you will find it in the Delft Report, page 23) 2.3 knots is the speed which existed at Tanjung Pengelih before the reclamation works began. It is same speed.

If that was not a problem then, why does it become a problem now? There have been no reported problems there. The Delft study itself interviewed the Head of the Marine Department at Johor and it quotes him as saying:

"No difficulties are encountered and are also not foreseen due to the future reclamation works. Also the reclamation works over the last decades have not resulted in any navigation problems for the port."

There is no mention in the report of any difficulties anywhere around Pulau Tekong. Given that ports such as Rotterdam and New Orleans cope perfectly happily with these velocities, you may think that that is no surprise.

Where is the urgency? Where is the need? The only evidence of any difficulties that is put before the Tribunal comes not from the pilots or the captains who work in the waters around Singapore but from the study conducted a hemisphere away on the desks of Dutch engineers and that appears to contradict the evidence that they themselves collected from the people on the ground.

I should put this point in the proper perspective. It has to be remembered that Singapore itself has shipyards on the north of the island. This is not an attempt by Singapore to wall in the Straits. Singapore has the same interest as Malaysia in ensuring the safety and the preservation of access for navigation through to the Straits of Johor.

The passages around Pulau Tekong are safe enough and wide enough. As we noted in our Response, the shipping channels around the islands exceed international standards. A 750m channel is perfectly adequate. It is one and half

times the size of the Rotterdam waterway, and the Delft study recognises this. You will find at pages 22 and 23 a statement that the channel widths are adequate.

It is obvious that the channels are being used by ships even now. You have seen the photographs of the area off Pengelih Jetty. That is the channel that is bisected by the Merlin Rocks and you will see on the screen the buoy that marks the position of the Merlin Rocks in the middle of that channel, and also see the jetty itself indicated. The next picture that we have is of one of the ships that regularly travels up that route without difficulty at all. As Mrs Cheong said, if you want a rather more graphic example you have only to look to the waters of the Elbe as you leave this place later on to see a busy port served by a waterway that is very significantly narrower than the channels left around Pulau Tekong. The Malaysia argument fails at every step.

Much the same argument can be made about waves. Malaysia has modelled waves of up to 1.6 metres. Again, the significant questions remain unanswered. How is that height – which I must say is much higher than Singapore's observed measurements of waves – calculated? How often is the peak height expected to recur and how long do the peak conditions last? How easy is it for a ship to cope with these peak conditions? And from Malaysia there is simply no answer.

Take flushing as a phenomenon, on flushing Malaysia expects only minor changes. On the Tekong side the expected changes are positive – greater flushing of wastes out of the waters is expected so that is not a problem.

On Pulau Tekong Malaysia says (DID Report, page 834) there will be a "slight increase in the flushing characteristics for Case 2 and Case 3 compared to Case 1". On Tuas the DID Report says at page 849 that there is a "slight decrease in the flushing characteristics". Again, are these 'slight' variations put forward as sufficiently serious to warrant provisional measures? Is there evidence that the situation will change in the next few weeks? What is the Malaysia argument, and where is the evidence that some material change is expected?

Salinity I have dealt with. Do we know whether the 0 to 2 per cent change is regarded as part of Malaysia's case in these submissions? We simply do not know.

Suspended sediment from tuas itself is not a problem in Malaysia's view. Professor Falconer's report says (page 213):

"The suspended sediment plume model predictions show no appreciable changes arising from the current reclamations. This is to be expected, except in the immediate vicinity of the lee of the reclamation. No further simulations are recommended on this front."

And Singapore agrees with that assessment. It is the very result that its construction measures are designed to achieve.

As far as Pulau Tekong is concerned, Malaysia does expect some impact. Professor Falconer notes simulations putting it at around 0 to 10 mg/litre. Is that good or bad? In this case we do have a ready answer. Last November, the ASEAN Ministers

adopted criteria on water quality applicable in the region, and water quality in the Straits of Johor is the subject of guidelines bilaterally agreed between Malaysia and Singapore. My learned friends may wish to explain to the Tribunal tomorrow how the predicted levels compare with these regional criteria.

Having seen the satellite photographs of the sediment drifting down the Johor river, the Tribunal may also think that Malaysia should begin by addressing the question of where the sediment is coming from but I will not pursue that interesting question of causation any further at this stage.

Let me turn to erosion, Malaysia sees no problem with erosion at Tuas. The DID Report says (page 9.5), "Erosion rates are too small for concern".

The DID Report says (page 9.3) that at Pulau Tekong:

"The seabed of the channel near Pularek will undergo erosion from 10 cm/year to about 50 cm/year. The shoreline adjacent to Pularek will also undergo erosion."

As I have said, the seabed in the Straits is far from uniform and there is no evidence that DID reflected the real seabed conditions in its mathematical model. Singapore does not accept Malaysia's figures on erosion and Singapore's own figures indicate significantly less erosion. But suppose that Singapore were correct in its predictions, what would the consequences be of an extra 40 cm a year of erosion? By October 9 that amounts to less than 1½ cm which is a little bit less than the thickness of a judicial pencil.

To put that in perspective, compare it with the International Hydrographic Organization's International Hydrographic Standards for Hydrographic Surveys Special Publication No. 44. This is the international instrument that sets the standards of accuracy for mapping the depth of the sea bed. For its highest category of accuracy Special Order category waters, the accuracy required is +/- 25 cm. The best multi-beam echo sounders which measure the depth have an accuracy of +/- 5 cm, 10 cm range. Malaysia is having its demand that you issue an order to suspend a multi-billion dollar project on its calculation that there is a risk of erosion that is under one-tenth of the margin of error that is permissible in the most rigorous international requirements for seabed mapping, and that is below the limits of what is even technologically measurable.

Our point is not that it is impossible to determine whether or not the forecast erosion will have taken place. The point is that the possibility of a degree of erosion that is so tiny can hardly be said to be an urgent threat necessitating provisional measures of any sort, let alone urgent measures under Article 290(5).

Is it an urgent problem? Even Malaysia appears to think not. Malaysia's concerns seem to be, from the notes and indeed from their request to you, to be particularly focused on the effect of erosion on the Pularek jetty, although Professor Sharifah, listing the effects predicted by the DID report, put the stability of jetties last, as affected to what as called "a lesser extent". You will find that in yesterday's transcript. The concern with stability is understandable. Generally, states are keen

to dredge the approaches to their ports and are not concerned by erosion of the seabed but they may well be concerned by coastal erosion.

How urgent is the situation at Pularek? The Malaysian Government's DID report itself considered what should be done about the threat to Pularek and it says; "Stability of jetty at Pularek has to be studied in detail. It is thus recommended that an assessment of this jetty be carried out in order to ascertain the stability of this structure and to carry out any rehabilitation works that may be required". Set up a study group; draft a report; in due course we will fix the jetty if necessary. Is that a sign of an urgent problem? If it were urgent, Malaysia would be taking action now to do something about the stability of the jetty, but as far as we are aware, it is not engaged in any works at all at Pularek that are attributable to the effects of increased erosion.

Is this an irreparable problem? Sir Eli Lauterpacht said yesterday that the reclamation works were designed to be permanent. I am sure that will reassure those whose homes and workplaces are likely to be built on the reclaimed land, but the truth is that, like all man-made structures of this kind, the works are reversible. The problem is not technology; the problem is cost. Large civil engineering projects are expensive to undertake; they are expensive to reverse; and they are expensive to suspend. But the reversibility point was made very clearly by two other people who addressed you on behalf of Malaysia yesterday.

Tan Sri Fuzi himself made the point that the works at Pulau Tekong are not irreversible. He said at page 11 of the transcript, lines 28-29: "at the moment, the sheet piling can still be removed; it is not yet permanent. The project behind it can still be reconfigured".

Professor Falconer, at page 33 of the transcript says in relation to the deposition of the sediment on the coast, "in my view it can be reversed".

I will move quickly through the remaining headings. Siltation is the obverse of erosion. It is proceeding in the normal geological time scale. There is no suggestion from anywhere on the Malaysian side that there is an avalanche of silt about to descend into the estuary or into these waters. As Professor Falconer said, the siltation rate is not necessarily small over the long term. I think that captures perfectly the scale of the threat that siltation presents.

Water levels and flooding: Professor Falconer said that there are no appreciable changes expected, and there is no Malaysian allegation of any difficulty under that heading.

The final category of points that I have to make concerns not the environmental impacts as such but what I suppose is the separate allegation made by Malaysia that these provisional measures are justified because of an impending infringement of their rights under the 1982 Convention. Malaysia says that the rights that are infringed are set out in Articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the 1982 Convention. Professor Schrijver identified the rights and said that they were in danger, but he did not explain, let alone prove, how they are in danger.

Malaysia must prove under this heading, too, that the threat is urgent and of a scale and nature that warrants a step as dramatic and as serious as closing down the reclamation works.

Let us go through them. Article 2 and 15 concern the alleged territorial encroachment around the Point 20 anomaly. There is, as we have explained, no purpose whatever in prescribing suspension on that ground,.

Article 194 concerns the duty to prevent, reduce and control pollution of the marine environment. One can see the need for the Tribunal to step in and swiftly prescribe provisional measures if, for example, a neighbouring state is about to turn on the taps of a chemical factory that is proposing to pipe waste into the sea, but that is nothing like the position here.

Singapore has taken, and is taking, all the necessary steps to protect the environment. Malaysia's experts suggest a risk of long-term harm that Singapore's experts think is unsupported by the evidence and is simply wrong, but even Malaysia's experts do not point to any shred of evidence to indicate any significant threat to the marine environment within the coming weeks.

This is not a case that simply fails to meet the high burden of proof that, as Professor Reisman explained, is appropriate in provisional measures applications. It comes nowhere near the basic level of plausibility.

Articles 123, 198, 200, 204, 205 and 206 are all concerned with cooperation, notification, consultation, the monitoring of pollution, and the assessment of the potential impact of projects on the environment.

These are all essentially procedural rights. Malaysia is asking you to order the suspension of the reclamation works because of a risk that it will be denied its procedural rights, because of a risk that it will not be notified or consulted over works in the period between now and the constitution of the Annex VII tribunal. There is no such risk. Singapore has reaffirmed yet again today before this Tribunal its intention, set out explicitly in formal diplomatic notes sent to Malaysia, that it will cooperate, notify and consult with Malaysia as required by the Convention.

Because of the starkly misleading impression that the Tribunal may have gained from statements that Singapore has never said that it would agree to suspend or mitigate its works, let me remind you yet again of the statement that Singapore made in its note dated 2 September 2003 that Singapore "would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, to deal with any adverse effects."

Finally, Article 210 concerns dumping. Land reclamation activities do not constitute dumping within the meaning of Article 210 because they fall outside the definition of dumping in Article 1(1)(5)(b) of the Convention, which stipulates that dumping does not include "placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention".

Sir Eli Lauterpacht referred yesterday to certain other Articles of the Convention, including Articles 193, 195 and 208. Those Articles are not part of Malaysia's Statement of Claim or of its written request for provisional measures that it has filed here. They appear to represent a rather different case. If Malaysia wishes to plead them, we assume that it will apply in the normal way to the Annex VII tribunal to amend its pleadings, and if and when it does, we will address those points.

Those are the rights which Malaysia has claimed are in imminent danger of serious infringement.

Mr President, members of the Tribunal, Malaysia needs to prove an urgent need for provisional measures. It has not done so and its case does not stand up to inspection.

Unless I can be of any further assistance to the Tribunal, Sir, that completes my submission.

THE PRESIDENT: Thank you. We have just heard the last speaker for the Respondent today.

We shall resume the oral pleadings tomorrow at 9.30 in the morning. The sitting is now closed.

(The hearing adjourned at 4.27 p.m.)