PCA CASE Nº 2012-01

IN THE MATTER OF THE RAILWAY LAND ARBITRATION

-before-

A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
A SUBMISSION AGREEMENT
BETWEEN SINGAPORE AND MALAYSIA
DATED 9 JANUARY 2012

-between-

MALAYSIA

-and-

THE REPUBLIC OF SINGAPORE

-under-

THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES
FOR ARBITRATING DISPUTES BETWEEN TWO STATES

AWARD

ARBITRAL TRIBUNAL:

Lord Phillips of Worth Matravers KG, PC (President)
The Honourable Murray Gleeson AC, QC
Judge Bruno Simma

REGISTRY:

Permanent Court of Arbitration

30 October 2014

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GLOSSARY OF DEFINED TERMS

Term	Definition
24 May Joint Statement	Joint Statement on Singapore–Malaysia Leaders' Retreat between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak, 24 May 2010, Singapore (Exhibit S-65)
CIQ	Customs, immigration and quarantine
DC	Development charge, a tax provided for in Singapore's municipal law for written permission to develop land in a manner departing from the zoning or plot ratio set out in Singapore's Master Plan
Differential Premium	Premium amounting to 100% of the enhancement in the value of the land attributable to the lifting, upon application, of restrictive covenants in a lease of State land
IM	Iskandar Malaysia, a special economic zone in South Johor, Malaysia
Jurong Spur	Spur line of the railway in Singapore, running between Bukit Timah and Jurong
Khazanah	Khazanah Nasional Berhad
KTMB	Keretapi Tanah Melayu Berhad
Minister Anifah	Dato' Sri Anifah Aman, Foreign Minister of Malaysia as from April 2009
Minister Daim	Tun Daim Zainuddin, Finance Minister of Malaysia between July 1984 and March 1991
Minister Dhanabalan	Mr Suppiah Dhanabalan, Minister for National Development of Singapore from January 1987 to August 1992
Minister Mah	Mr Mah Bow Tan, Minister for National Development of Singapore from June 1999 to May 2011
Minister Nor	Tan Sri Nor Mohamed Yakcop, Minister in the Prime Minister's Department and Head of the Economic Planning Unit in the Office of the Prime Minister of Malaysia from 10 April 2009 to 5 May 2013
Minister Rais	Datuk Seri Utama Dr Rais Yatim, Foreign Minister of Malaysia between March 2008 and April 2009
Minister Yeo	Mr George Yeo, Foreign Minister of Singapore between August 2004 and May 2011
MOU	Draft Memorandum of Understanding prepared by Singapore in advance of the 12 November 1992 meeting between KTMB and the Ministry of National Development of Singapore (Exhibit S-25)
MRA	Malayan Railway Administration
M-S	M-S Pte Ltd, a private company limited by shares, incorporated in Singapore and owned 60% by Kazanah and 40% by Temasek
Parties	Malaysia and the Republic of Singapore
PCA Optional Rules	The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States
PCA	The Permanent Court of Arbitration
POA	*Points of Agreement on Malayan Railway Land in Singapore* dated 27 November 1990

Prime Minister Abdullah	Tun Abdullah Ahmad Badawi, Prime Minister of Malaysia from October 2003 to April 2009
Prime Minister Najib	Dato' Sri Mohd Najib bin Tun Abdul Razak, Prime Minister of Malaysia as from April 2009
railway lands	Land in Singapore used for the operation of a railway, first by the MRA and later by KTMB
Rule 4	Rule 4 of the Singapore Planning (Development Charges – Exemption) Rules 1996 (Exhibit M-39)
Singapore	The Republic of Singapore
SRTO	Singapore Railway Transfer Ordinance
Submission Question	Question set out in Article 1 of the *Submission Agreement between Singapore and Malaysia* dated 9 January 2012
Temasek	Temasek Holdings (Private) Limited
three Bukit Timah parcels	Three parcels of land at Bukit Timah offered by Singapore in the Letter dated 2 June 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-52)
three POA parcels	Three parcels of land at Keppel, Kranji and Woodlands identified in the annexes to the POA
TPN	Third Party Notes, a form of diplomatic correspondence
URA	Urban Redevelopment Authority of Singapore
valuation footnote	Footnote referencing the need for M-S Pte Ltd to pay "development charges and other applicable charges and levies", included in the valuation attached to the Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-54) and in the valuation attached to the Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (Exhibit S-55)
Vienna Convention	Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332
Woodlands Checkpoint proposal	Written proposals, headed "Woodlands Checkpoint" sent by Malaysia to Singapore in advance of the Prime Ministers' meeting on 18 August 1990 (Exhibit S-13)

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A. THE PARTIES AND THEIR REPRESENTATIVES

1. The Parties to this arbitration are Malaysia and the Republic of Singapore ("**Singapore**") (together, the "**Parties**").

2. The Parties are represented in these proceedings as follows:

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Agent

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Attorney General of Malaysia

Deputy Agent

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Deputy Solicitor General I

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Mr Justin Yeo
Special Assistant to Justice Steven Chong

Ms Shirin Chua
State Counsel, Attorney-General's Chambers

Ms Sarah Shi
State Counsel, Attorney-General's Chambers

B. THE DISPUTE

3. The Parties have agreed to refer to this arbitration for resolution in a "very cordial and friendly manner, and not in any way acrimonious"[1] an issue (the "**Submission Question**") that has arisen in relation to the effect of an agreement concluded between the Parties on 27 November 1990 (the "Points of Agreement on Malayan Railway Land in Singapore", or "**POA**")[2] as subsequently varied. Under the POA Malaysia agreed to return to Singapore lands that it held in Singapore under titles that, for the most part, restricted the use that Malaysia could make of them to the operation of a railway that ran through Singapore (the "**railway lands**"). In exchange, the POA conferred options on Malaysia. One option made provision for the vesting of three parcels of the railway lands by Singapore in a company to be jointly owned by the Parties to be called M-S Pte Ltd ("**M-S**") for the purpose of commercial development. Malaysia did not exercise that option. Instead it opted for the joint company to receive for development some parcels of land reclaimed from the sea by Singapore. The Submission Question is whether, had Malaysia exercised the option for the joint company to receive the railway lands and had the joint company proceeded to develop those lands, the joint company would have

[1] Letter dated 17 September 2010 from Malaysian Prime Minister Najib Razak to Singapore Prime Minister Lee Hsien Loong (**Exhibit S-88/Tab C-118**).

[2] *Points of Agreement on Malayan Railway Land in Singapore between Government of Malaysia and Government of Singapore* dated 27 November 1990 (**Exhibit S-19/Tab C-25**).

been obliged to pay a development charge ("**DC**") in relation to each of these three parcels of land. DC is a tax levied in respect of the increase in value of land consequent upon the grant of planning permission to change the use of the land. Singapore contends that under the terms of the POA M-S would have had to pay DC in the sum of S$1.47 billion as one of the costs of developing the lands imposed under Singapore's municipal law. Malaysia contends that under the terms of the POA no DC fell to be paid by M-S. If Singapore is correct, the Parties are agreed that M-S will be under a liability to pay to Singapore S$1.47 billion, together with interest.

4. The most relevant parts of the Submission Agreement[3] provide as follows:

> *The Government of Malaysia and the Government of the Republic of Singapore* (the "Parties")
>
> *Recalling* the Points of Agreement on Malayan Railway Land in Singapore entered into between the Parties on 27 November 1990 (the "POA");
>
> *Considering* the subsequent events as outlined in the Annex;
>
> *Recognising* that both Parties have different views relating to the development charges payable on the three POA land in Tanjong Pagar, Kranji and Woodlands;
>
> *Desiring* to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration;
>
> *Have agreed as follows:*
>
> *Article 1*
> *Submission of dispute*
>
> 1. The Parties hereby submit the following question to final and binding arbitration under the auspices of the Permanent Court of Arbitration in accordance with this Agreement:
>
> > "Whether in all the circumstances, including the agreed matters set out in the Annex, M-S Pte Ltd would have been liable to pay development charges on the three land parcels referred to below (the amount of which had been determined as S$1.47 billion) if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes of the POA as particularized below:
> >
> > (i) the land at Keppel, the details of which are contained in Annex 1 of the POA;
> >
> > (ii) the land at Kranji, the details of which are contained in Annex 2 of the POA; and
> >
> > (iii) the land at Woodlands, the details of which are contained in Annex 3 of the POA."
>
> 2. If the Arbitral Tribunal answers the question in the affirmative, it shall make a declaration to that effect and issue an award that the said amount of S$1.47 billion is payable and the Parties agree that M-S Pte Ltd shall pay such sum within ninety days of the date of the award or by 1 January 2013 which ever shall be later (in addition to the

[3] Submission Agreement between Singapore and Malaysia dated 9 January 2012 (**Exhibit S-1/Tab B-1**).

development charge of S$362 million on the three additional pieces of land in Bukit Timah, which is not in dispute and which shall be payable in any event by 1 January 2013), such payment to be without prejudice to the consideration by the Singapore authorities of any application for remission which M-S Pte Ltd may make under and in accordance with Singapore law.

Article 2
Applicable law

The Arbitral Tribunal shall decide the dispute in accordance with international treaties, including in particular the POA, and the other sources of international law as set out in Article 38 of the Statute of the International Court of Justice. In deciding the dispute, the Arbitral Tribunal shall also apply municipal law, if and to the extent it is determined by the Arbitral Tribunal to be applicable.

[. . .]

Article 8
Lex Arbitri

[. . .]

2. The Parties agree that the *lex arbitri* shall be public international law and not the domestic laws of the Netherlands or any other country, and nothing in this Agreement shall be construed as a waiver of sovereign immunity from, or a submission to, the jurisdiction of the courts of the Netherlands or any other country on any issue whatsoever, whether substantive or procedural.

5. The Annex referred to in Article 1 reads as follows:

1. On 27 November 1990 the Government of Malaysia and the Government of Singapore (hereinafter "the Parties") entered into an agreement known as the "Points of Agreement on Malayan Railway Land in Singapore between the Government of Malaysia and Government of Singapore" (hereinafter "the POA");

2. The POA provides as follows:

"(1) The station at Keppel will be vacated and moved from Keppel, in the first instance to Lot 76-2 which is next to the Bukit Timah Fire Station along Upper Bukit Timah Road near the junction with Jurong Road. (Please refer to Appendix) This place is shown on a map attached as Plan l. The Government of Singapore will help in the alienation of such lands as may be reasonably necessary for the development of the station, provided that it is not necessary to acquire land which in the opinion of MRA and the Government of Singapore has major permanent structures on it. (When MRA wants to acquire despite Government of Singapore's view that there are major permanent structures then the acquisition will be at market price)

(2) The land at Keppel will be vested in a limited company, (M-S Pte Ltd) to be developed as residential and commercial land in accordance with the plans attached as Annex 1.

(3) When the MRT reaches Woodlands New Town, the MRA may within 5 years, move its station from Lot 76-2 to a site in Woodlands adjacent or close to the MRT station. Then the two pieces of land, one in Kranji and in Woodlands, attached as Annex 2 and 3 respectively will be vested in the limited company M-S Pte Ltd and developed in accordance with plans given.

(4) Singapore's Land Office shall issue freehold land titles to M-S Pte Ltd in respect of lands at Keppel, Kranji and Woodlands.

(5) 60% of shares of the limited company, M-S Pte Ltd, will be owned by a company to be designated by the Government of Malaysia and 40% of shares by a company to be designated by the Government of Singapore. Payment for the development costs of these properties will be similarly shared in the ratio 60:40.

(6) There will be no compensation for the MRA land, instead the three big pieces will be realienated to M-S Pte Ltd at no costs. Whoever takes the land should clear the tracks and also pay for costs of resettlement of squatters. Therefore, the cost of clearing tracks and squatters for the three pieces of land will be on M-S Pte Ltd. For the balance of the MRA lands, the costs of clearance of tracks and squatters will be on the Singapore Government.

(7) In exchange for the MRA land at Keppel, a plot of land of equivalent value in Marina South will be offered to M-S Pte Ltd so that a prestigious building can be developed on this Marina site. M-S Pte Ltd intends to develop and retain a prestigious building as a long term investment. If the land offered to M-S Pte Ltd. is, in the opinion of M-S Pte Ltd. not suitable, then alternative sites in Marina South of equivalent value shall be offered to M-S Pte Ltd. Examples of the kind of prestigious sites of equivalent value to MRA Keppel land are attached in Plan 2 and Plan 3.

3. The implementation of the POA was held in abeyance due to certain differences between the Parties. The Parties resumed discussions on the implementation of the POA in 2008, during which Singapore offered to vest an additional three parcels of land at Bukit Timah in M-S Pte Ltd if Malaysia were to move the railway terminus to Woodlands. Malaysia responded by requesting that, instead of swapping only the Keppel parcel for land in Marina South, M-S Pte Ltd be allowed to swap all six plots of land (i.e., the three POA parcels in Tanjong Pagar, Woodlands and Kranji and the three additional Bukit Timah parcels) for land in Marina South.

4. These discussions culminated in an agreement reached on 24 May 2010 at the Singapore-Malaysia Leaders Retreat in the form of a Joint Statement which provides at paragraph 4 as follows:

> "Both Leaders also discussed issues arising from the Points of Agreement (POA) on Malayan Railway Lands in Singapore and reached an understanding to move the issues forward. In this regard, the POA shall be supplemented by new terms and conditions to maximise the full potentials of the MRA Lands in Singapore. To that effect, both Leaders agreed to undertake the following steps:-
>
> - The Keretapi Tanah Melayu Berhad (KTMB) station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (WTCP) by l July 2011. Malaysia would co-locate its railway CIQ facilities at WTCP. Singapore would facilitate the relocation to the WTCP and ensure bus service connectivity from the KTMB Station at WTCP to a nearby MRT Station for the convenience of train passengers.
>
> - A company known as M-S Pte Ltd will be established as soon as practicable but not later than 31 December 2010 with Malaysia's 60% held by Khazanah Nasional Berhad and Singapore's 40% held by Temasek Holdings Limited.
>
> - The three parcels of land in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah (Lot 76-2 Mk 16, Lot 249 Mk 4 and Lot 32-10 Mk 16) will be vested in M-S Pte Ltd for joint development, which in turn, could be swapped, on the basis of equivalent value for pieces of land in Marina South and/or Ophir-

Rochor. Both sides will conduct their respective valuations and Prime Minister Lee will visit Kuala Lumpur within a month with a proposal for the land swap for Malaysia's consideration.

- The transfer of the said land parcels to M-S Pte Ltd will take effect at the time when KTMB vacates Tanjong Pagar Railway Station (TPRS).

- A rapid transit system link between Tanjung Puteri, Johor Bahru and Singapore aimed at enhancing connectivity between the two countries will be jointly developed. The rapid transit system link will be integrated with public transport services in both Johor Bahru and Singapore. For the convenience of commuters, the rapid transit system link will have a single co-located CIQ facility in Singapore with the exact location to be determined later. It is targeted that the proposed rapid transit system link will be operational by 2018. Thereafter Malaysia may consider to relocate the KTMB Station from Woodlands to Johor."

5. Pursuant to the Joint Statement of 24 May 2010, the Prime Minister of Singapore made an offer dated 17 June 2010 which sets out three options. The first two options set out two different ways of swapping the three POA parcels in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah ("the 3+3 parcels") for land in Marina South and Ophir-Rochor, while the third option provides for M-S Pte Ltd to retain the 3+3 parcels for development, without further swapping them. The offer provides that "All proposed developments will be subject to the usual planning approval and development control process applicable under Singapore law. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels.". For the two options involving land swap, the offer provides that:

> "The Singapore Government will vest the relevant Marina South/Ophir-Rocher parcels directly in M-S Pte Ltd once KTMB vacates Tanjong Pagar Railway Station. There is no need for a two-step process of first vesting the 3+3 parcels in M-S Pre Ltd and then having M-S Pte Ltd surrender them in exchange for the Marina South/Ophir-Rochor parcels."

6. Following a meeting on 22 June 2010 between the Prime Minister of Singapore and the Prime Minister of Malaysia, the Prime Minister of Singapore issued a revised offer dated 28 June 2010 which sets out two options – one option involving land swap (Option A) and one option without land swap (Option B). Under Option A, the revised offer provides that:

> "M-S Pte Ltd shall pay the following amounts to the Singapore Government:
>
> (a) S$1.832 billion, being the development charge amount payable on the 3+3 parcels under Singapore law (fixed at current valuation) to realise their full value based on their potential permissible uses. in order to use this full value to effect the land swap. This amount shall be paid within 18 months after the vesting of the 4+2 parcels in M-S Pte Ltd; and
>
> (b) S$556 million, being an amount to make up the difference in gross value between the 3+3 parcels and the 4+2 parcels so as to effect the land swap on an equivalent value basis. This amount shall be paid upon the vesting of the 4+2 parcels in M-S Pte Ltd."

7. The Prime Minister of Malaysia replied on 17 September 2010 accepting the revised offer in the following terms:

> "I positively accept your offer to swap the 3+3 land parcels for the 4+2 land parcels as per your revised offer in Option A. Secondly, on the payment on the development charge . . . I sought your concurrence for us to arbitrate on the DC for the the original POA parcels in Tanjong Pagar, Kranji and

> Woodlands. Malaysia is, however, prepared for M-S Pte Ltd to pay the DC for the three additional pieces of lands in Bukit Timah (Lot 76-2 Mk 16, Lot 249 Mk 4 and Lot 32-10 Mk 16) as these pieces of land are not subject to the POA."

The Prime Minister of Singapore replied with his agreement on 19 September 2010 in the following terms:

> "I confirm our agreement with your letter of 17 September 2010. I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands."

On 20 September 2010, the Parties issued a Joint Statement providing, among other things, that:

> "Both countries have different views relating to the development charges payable on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands. Both Leaders have agreed to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration. They have further agreed to accept the arbitration award as final and binding."

8. Copies of the documents referred to above are appended to this Annex.

6. The Annex discloses a most unusual feature of this case. Approximately 20 years elapsed between the conclusion of the POA and its implementation in its amended form. At the end of the day, Malaysia elected for a swap option under which M-S received a total of six parcels of land at Marina South and Ophir-Rochor in substitution for the three parcels of land at Keppel, Kranji and Woodlands that were the subject of the original POA (the "**three POA parcels**") plus three additional parcels at Bukit Timah (the "**three Bukit Timah parcels**"). No DC was payable on the Marina South and Ophir-Rochor parcels. The exchange was on the basis that these parcels should be of equivalent value to the value that the three POA parcels and the three Bukit Timah parcels would have had with planning permission for development. It was Singapore's case that, under the terms of the amended POA, if Malaysia had opted for the exchange, M-S would have had to pay DC on the enhanced value that all six parcels would have enjoyed with the benefit of planning permission. Malaysia agreed that M-S should pay DC in relation to the enhanced value that the three Bukit Timah parcels would have had, but challenged its obligation to pay DC in relation to the enhanced value of the three POA parcels. The Parties have agreed that this challenge falls to be resolved by answering the Submission Question. The Parties are also agreed that in answering that question the Tribunal is entitled to have regard to all relevant facts, whether or not they are included in the Annex. Singapore submits that the negotiations between the Parties leading up to the land swap, 20 years after the POA was initially agreed, are important and possibly critical in producing an affirmative answer to the Submission Question.

C. THE JOINT COMPANY

7. Pursuant to the POA, as amended, a private company limited by shares, was incorporated under the Singapore Companies Act on 27 June 2011. Sixty percent of the shares of this company are held by a Malaysian Company, Khazanah Nasional Berhad (“**Khazanah**”), which in turn is wholly owned by Malaysia. Forty percent of the shares are held by a Singapore Company, Temasek Holdings (Private) Limited (“**Temasek**”), which, in turn is wholly owned by Singapore. M-S has been referred to throughout by the Parties as “M-S Pte Ltd”, although it was incorporated under the name M+S Pte Ltd. We shall describe both the proposed company and the company subsequently incorporated as “M-S”.

D. RELIEF REQUESTED

(i) Singapore’s Request

8. In its Memorial and Reply, Singapore requested that the Tribunal adjudge and declare that:

   (a) M-S Pte Ltd would have been liable to pay DC on the Keppel, Kranji and Woodlands parcels (the amount of which had been determined as S$1.47 billion) if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the land in accordance with the proposed land uses set out in the Annexes of the POA;

   (b) M-S Pte Ltd shall pay the said amount of S$1.47 billion to the Government of Singapore within ninety days of the date of the Tribunal’s award (in addition to the DC of S$362 million on the 3 Bukit Timah parcels, which had already been paid on 31 December 2012);

   (c) M-S Pte Ltd shall pay to the Government of Singapore interest on the said amount of S$1.47 billion, calculated from 1 April 2013, at a rate to be determined by the Tribunal; and

   (d) Each Party is to bear its own costs, as agreed in Article 10 of the Submission Agreement.

(ii) Malaysia’s Request

9. In its Counter-Memorial and Rejoinder, Malaysia requested that the Tribunal adjudge and declare that:

   (a) M-S Pte Ltd would not have been liable to pay DC on the Keppel, Kranji and Woodlands parcels if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes of the POA; and

   (b) Each Party is to bear its own costs, as stated in Article 10 of the Submission Agreement.

E. PROCEDURAL HISTORY

10. On 9 January 2012, the Governments of Malaysia and Singapore signed the Submission Agreement to submit the present matter to arbitration. Article 3 of the Submission Agreement provides:

> Article 3. Rules and Administrative Assistance
>
> (1) The Parties agree that the arbitration shall be conducted in accordance with this Agreement and to the extent that they are not inconsistent with the provisions of this Agreement, the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States as in effect on the date of this Agreement (the "**PCA Optional Rules**").
>
> (2) The Parties agree that the International Bureau of the Permanent Court of Arbitration shall act as the registry and shall provide administrative support in accordance with this Agreement and the PCA Optional Rules.

11. Pursuant to Article 5 of the Submission Agreement, the Parties established a timeline for these proceedings:

> Article 5. Commencement of arbitration and period of the arbitration proceedings
>
> (1) The arbitration proceedings shall commence on the date on which this Agreement is signed or, if later, the date the Arbitral Tribunal is constituted.
>
> (2) The Parties and the Arbitral Tribunal shall endeavour to complete the arbitration proceedings in all respects, including the making of an award, on or before 31 December 2012, without prejudice to the Arbitral Tribunal's jurisdiction, and its ability to extend or abridge time periods for good cause.

12. On 23 April 2012, the Parties notified the Permanent Court of Arbitration (the "**PCA**") of their Submission Agreement and their respective appointments of The Honourable Murray Gleeson AC, QC (by Singapore) and Dr Gavan Griffith QC (by Malaysia) to the Tribunal. Paragraph 5 of this letter provides:

> The parties are currently discussing the appointment of a Chairman of the Tribunal. In the first instance, and in accordance with Article 6 of the Submission Agreement, it has been agreed that a shortlist of up to three candidates for Chairman shall be submitted to the co-arbitrators for a final decision. The parties have agreed that the co-arbitrators shall have a period of 28 days from the receipt of this shortlist to decide upon a preferred candidate for Chairman, failing which the Secretary-General of the Permanent Court of Arbitration shall be invited to appoint a Chairman from the said shortlist. The dates set out in Article 6 of the Submission Agreement have been amended by consent to reflect this agreement.

13. On 25 April 2012, the Parties notified the PCA that the co-arbitrators had reached an impasse concerning the selection of the President of the Tribunal. Pursuant to Article 6(3) of the Submission Agreement, the Parties requested the Secretary-General of the PCA to appoint a President from between the Parties' respective candidates, on the basis of written observations to be submitted by each Party.

14. Following consultation with the Parties, the PCA on 10 May 2012 requested the Parties to submit written observations as to their respective candidates by 17 May 2012.

15. On 17 May 2012, the Parties notified the PCA of their agreement to postpone the appointment of the President of the Tribunal pending ongoing negotiations.

16. On 8 June 2012, Malaysia notified the PCA that, with the agreement of Singapore, it intended to appoint a replacement arbitrator.

17. On 6 July 2012, Malaysia notified the PCA that it had appointed Judge Bruno Simma as a replacement arbitrator.

18. On 13 June 2013, Lord Nicholas Phillips of Worth Matravers, KG, PC accepted his appointment as President of the Tribunal, following his selection by the co-arbitrators. Pursuant to Article 5 of the Submission Agreement, the arbitration proceedings therefore commenced on 13 June 2013.

19. On 3 July 2013, the Parties notified the PCA of the constitution of the Tribunal and the commencement of the arbitration proceedings.

20. Pursuant to Article 7(3)(i) of the Submission Agreement, Singapore submitted its **Memorial** on 12 August 2013.

21. On 4 September 2013, the Tribunal circulated draft Terms of Appointment for the Tribunal and a draft Procedural Order Nº 1 to supplement in certain respects the PCA Optional Rules, and invited the Parties' comments.

22. On 8 October 2013, following consultations with the Parties, the Tribunal confirmed that the dates of the hearing would be 14 through 18 July 2014.

23. On 11 October 2013, Malaysia submitted its **Counter-Memorial** pursuant to Article 7(3)(ii) of the Submission Agreement.

24. On 16 October 2013, the Parties provided the Tribunal with their joint comments on the draft Terms of Appointment and draft Procedural Order Nº 1.

25. On 11 November 2013, Singapore submitted its **Reply** pursuant to Article 7(3)(iii) of the Submission Agreement.

26. On 12 November 2013, the Tribunal issued **Procedural Order Nº 1**, which recorded the Parties' agreement that the award of the Tribunal be made public and addressed, *inter alia*, the timetable for the Parties' remaining written pleadings and submissions concerning the

production of documents. On the same day, the Tribunal circulated the final Terms of Appointment for signature. The **Terms of Appointment** were thereafter executed on 8 January 2014.

27. On 11 December 2013, Malaysia submitted its **Rejoinder** pursuant to Article 7(3)(iv) of the Submission Agreement

28. On 9 January 2014, the Parties jointly requested the postponement by 28 days of the timeline for the production of documents set out in paragraph 1.3 of Procedural Order Nº 1.

29. On 21 January 2014, the Tribunal issued **Procedural Order Nº 2**, postponing the procedure for the production of documents as requested by the Parties on 9 January 2014.

30. On 6 February 2014, the Parties jointly requested the Tribunal to "dispense with the document production procedure set out in Article 7(7) of the Submission Agreement and referred to in section 1.3 of the Tribunal's Procedural Order No. 1 and section 1 of the Tribunal's Procedural Order No. 2". The Parties proposed that the deadline for the exchange of further evidence under Article 7(8) of the Submission Agreement be fixed for 10 March 2014. On 7 February 2014, the Tribunal granted this joint request and accepted the Parties' proposal.

31. On 20 February 2014, the Parties jointly requested the Tribunal to postpone the July 2014 hearing by one day. On 21 February 2014, the Tribunal granted this joint request, reserving the dates of 15 through 19 July 2014 for the hearing.

32. On 10 March 2014, the Parties filed their evidentiary submissions pursuant to Article 7(8) of the Submission Agreement. Singapore filed its submissions electronically, while Malaysia remitted its submissions by courier, which the Tribunal received on 11 March 2014. Pursuant to paragraph 2.2.6 of Procedural Order Nº 1, the PCA on 12 March 2014 administered the exchange of evidence between the Parties by courier, which the Parties received on 14 March 2014.

33. On 25 March 2014, the Parties informed the Tribunal of their shared understanding of 14 April 2014 as the date for the Parties to exchange reply evidence, pursuant to Article 7(9) of the Submission Agreement. On 14 April 2014, the Parties exchanged this evidence electronically.

34. On 13 May 2014, the Tribunal provided the Parties with an agenda of procedural issues in relation to the organization of the hearing and invited them to confer and seek agreement to the extent possible.

35. On 14 May 2014, the Parties jointly requested that the Tribunal consider the Annex to the Submission Agreement to "take the place of and be treated as the agreed statement of facts contemplated under Article 7(10) of the Submission Agreement". On 22 May 2014, the Tribunal granted this joint request.

36. On 31 May 2014, the Parties informed the Tribunal of their agreement on a number of organizational matters relating to the hearing and "request[ed] the Tribunal to promulgate a further Procedural Order, in consultation with the Parties, setting out the agreed procedural matters."

37. On 1 June 2014, the Tribunal provided the Parties with a draft Procedural Order Nº 3 in respect of the hearing and invited comments.

38. On 5 July 2014, the Parties provided their joint comments on draft Procedural Order Nº 3. On 6 July 2014, the Tribunal informed the Parties that it approved certain agreed changes and that the order would soon be formally issued.

39. On 10 July 2014, the Tribunal issued **Procedural Order Nº 3**, reflecting the Parties' agreed agenda of procedural items in respect of the hearing.

40. From 15 through 18 July 2014, the Tribunal held a hearing in London, United Kingdom for the examination of witnesses and the presentation of oral argument by the Parties. During the course of the hearing, the following witnesses were presented by the Parties and examined:

    (i) Mr George Yeo; and

    (ii) Tan Sri Nor Mohamed Yakcop.

F. PRINCIPLES OF INTERPRETATION

41. It is common ground that we are concerned with the interpretation of an international treaty between States, the POA as amended, and that this task is governed by rules of international law. However the POA made provision for the establishment of a joint company that would be subject to Singapore municipal law. Article 2 of the Submission Agreement requires us to apply municipal law if and to the extent that we find it to be applicable. It is also common ground that if there is a conflict between the obligations of the Parties under the POA and the requirements of municipal law, the former prevails.

42. Article 38(1) of the Statute of the International Court of Justice, which Article 2 of the Submission Agreement requires us to observe, enumerates the sources of international law to be applied in this case. These include:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

[. . .]

As to (a), the 1969 Vienna Convention on the Law of Treaties[4] (the "**Vienna Convention**" is not directly applicable as Singapore is not a party to it, but it is common ground that Articles 31 and 32 of that Convention state rules of customary international law[5]. These are applicable in the present case. Articles 31 and 32 provide as follows:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

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4 Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332.

5 Malaysia's Counter-Memorial, para 167; Transcript, p 212.

43. In applying these principles it is important not to lose sight of the object of the exercise. This is to identify the common intention of the Parties at the time that the treaty was concluded as to its meaning and effect. We are in this case concerned with a treaty that dealt in part with a commercial activity – the development of land – by a private company, and with the implications of the treaty on tax liability under the municipal law of Singapore. In the course of argument Lord Goldsmith observed that there was no particular difference between the principles governing the interpretation of a treaty and what would be the principles for commercial interpretation, with the possibility that treaty interpretation would actually be more generous about the extraneous materials that can be brought into account. In the context of this case we are inclined to agree, subject to the additional comment that the principle of good faith is an important aspect of the interpretation of a treaty, as recognised by Article 31 of the Vienna Convention.

G. A SUMMARY OF THE ISSUES

44. Singapore submits that the meaning and effect of the POA are clear. The Parties agreed to the creation of a jointly owned Singapore company, M-S, to develop three POA parcels. That company would be subject to the normal incidents of Singapore municipal law when carrying out the developments. These included the need to obtain planning permission. As a precondition to obtaining planning permission, Singapore's municipal law required M-S to pay DC. Nothing in the POA absolved M-S from this obligation. Were there any doubt, this would be resolved in favour of Singapore by the negotiations that preceded the conclusion of the POA and the subsequent conduct of the Parties.

45. As an alternative to this submission, Singapore submits that, in and after 2008, during the negotiations that led to the variation of the POA, Malaysia agreed with, or appeared to agree with, Singapore's assertion that DC would be payable and the variation was agreed on this basis. In these circumstances Malaysia is "estopped or otherwise precluded" from asserting that DC would not be payable[6].

46. Malaysia submits that on true interpretation of the POA no DC would have been payable by M-S. The POA specified in detail the nature of the development that M-S was to undertake once the three parcels of land had been transferred. Singapore agreed that M-S would be entitled to use the land for the purpose of the specified development. Although it would be necessary for M-S to obtain planning permission to carry out the proposed development of the three POA parcels, it was not the grant of planning permission that enhanced the value of the parcels. That

[6] Singapore's Reply, paras 172-174.

enhancement was produced by the obligation that Singapore undertook under the POA to permit the three parcels to be used for the purposes of the developments specified in the POA. Malaysia further submits that, had M-S proceeded to develop the three parcels in accordance with the POA, the company would not have been liable to pay DC under Singapore municipal law. As to the events that led up to the variation of the POA, Malaysia submits that it never agreed that DC would be payable, nor acted in a way that now precludes it from challenging the obligation to pay DC.

H. THE STRUCTURE OF THIS AWARD

47. We propose first to deal with the nature of DC under the municipal law of Singapore. Then we shall set out the relevant facts, supplementing, where appropriate, those set out in the Annex to the Submission Agreement. Then we shall give our interpretation of the POA as at the time of its conclusion in 1990, having regard, insofar as relevant, to events both before and after that time. Finally we shall consider whether the conduct of Malaysia in and after 2008 has estopped or otherwise precluded Malaysia from denying that M-S would have been liable to pay DC on the three POA parcels.

I. DEVELOPMENT CHARGE

(i) The general principles

48. The Tribunal has been provided with a substantial body of documentation dealing with DC in the form of both the relevant Singapore laws and regulations and commentaries on these. These date back to 1964 when DC was first introduced. This summary is based on that material. Provisions for the assessment of DC have varied over the years and can be quite complex, but the principle is simple. Land is scarce in Singapore and the manner in which it may be used has been governed, since before 1964, by a series of Master Plans which prescribe the use to be made of different areas and, *inter alia*, the average residential density. Any land development requires planning permission, whether or not it involves a departure from the relevant Master Plan. This is because planning permission addresses a number of different matters, including building regulations. Where a proposed development involves a departure from the relevant Master Plan, permission for the development may nonetheless be granted. In that event the grant of permission to depart from the Master Plan is likely to result in a rise in the market value of the land. DC is designed to ensure that the State shares in this “wind-fall” appreciation in value. It is a tax on the appreciation in value, the amount of which has varied from time to time between 50% and 70%.

49. DC was introduced by the Planning (Amendment) Act 1964. The following sections of the 1990 version of the Planning Act[7] demonstrate the manner in which the system for the recovery of DC operated:

> 10.—(1) No person shall, without the written permission of the competent authority, develop any land.
>
> (2) Notwithstanding the provisions of any other written law, the permission of the competent authority under this section is a condition precedent to the consideration by a licensing authority of any application for the issue of a licence for any purpose involving development of land.
>
> [. . .]
>
> 32.—(1) There shall be paid to the competent authority a tax (referred to in this Act as a development charge) for written permission, including amendments to the written permission, granted under section 10 (1) which permits development of land in an area —
>
> (a) not in accordance with the purposes for which the area has been zoned in the Master Plan;
>
> (b) in excess of the plot ratio specified in the Master Plan in relation to that area;
>
> (c) in excess of the equivalent plot ratio of that area; or
>
> (d) of such a nature involving any change in the use of the land or any building as may be prescribed, except that a development charge for amendments to a written permission shall not be payable with respect to any floor area for which the development charge has already been paid.
>
> (2) The development charge may, in the discretion of the competent authority, be levied on —
>
> (a) the owner of the land with respect to which written permission is granted; or
>
> (b) the person making the application for the grant of written permission.
>
> (3) Notwithstanding section 10 (11) the competent authority shall not grant written permission until the development charge, if any, has been determined, under section 34 (2), and has been paid or secured to his satisfaction.
>
> [. . .]
>
> 33.—(1) Subject to this section, any development charge payable under section 32 (1) for any written permission to develop any land shall be determined in accordance with a prescribed rate and method of calculation.
>
> (2) Where any person is dissatisfied with the amount of any development charge determined in accordance with subsection (1), the person may, within 14 days of the service of any order under section 34 (2) in respect of the development charge, in writing request the competent authority to determine the development charge in accordance with subsection (3).
>
> (3) Where any person makes a request under subsection (2) in relation to any development charge in respect of any land, the development charge payable for any written permission to develop the land shall be a prescribed percentage of any appreciation in the value of the land arising from the grant of the written permission to develop the land.

[7] Singapore Planning Act (Rev. Ed. 1990) (**Exhibit M-37/Tab F-10**).

> (4) The Minister may limit the application of subsections (2) and (3) to cases where the amount of development charge determined in accordance with subsection (1) exceeds a prescribed sum.
>
> (5) For the purposes of this section, the Chief Valuer or such other person as the Minister may appoint shall determine the amount of appreciation, if any, in the value of the land.
>
> 34.—(1) The competent authority shall, by an order, determine whether a development charge is payable in respect of any development and, if payable, the amount thereof.
>
> (2) The competent authority shall serve a copy of the order on the person liable for the payment of the development charge.
>
> [. . .]
>
> 35. If any development is commenced or carried out without payment of the development charge, the development charge shall be, subject to the rights of the Government, a first charge on the land of any person from whom any money is due under the provisions of this Act.
>
> [. . .]
>
> 40. The Minister may, from time to time by notification in the Gazette, exempt any land or lands either generally or for a specified period from the operation of all or any of the provisions of this Act.

50. While the method of calculating DC has changed from time to time, the overall nature of the scheme has not. Under the revised Planning Act 1998[8], recovery of DC was fully integrated into the application for what had become described as "planning permission". Section 12(1) provided that no person should carry out any development of any land without planning permission. Section 35(1) imposed, subject to the provisions of the Act, an obligation to pay DC in respect of every development of land authorised by any planning permission. Section 37 provided:

> 37.—(1) Subject to subsection (4), the development charge (whether under an interim or final order) may, in the discretion of the competent authority, be levied on —
>
> (a) the owner of the land with respect to which the planning permission or conservation permission is granted; or
>
> (b) the person who applied for the relevant planning permission or conservation permission.
>
> (2) That liability of the person on whom the development charge is levied shall continue notwithstanding any change in ownership of the land.
>
> (3) Notwithstanding section 13(2), the competent authority shall not grant any planning permission or conservation permission until the estimated amount of development charge payable under an interim order under section 38(2) is either paid or secured to the satisfaction of the competent authority.
>
> (4) Any outstanding amount of development charge shall be secured as a first charge against the land to which the relevant permission relates, and shall, subject to any other rights of the Government, prevail over all other estates and interests whenever created

[8] Singapore Planning Act 1998 (including all amendments up to 2010) (**Exhibit S-35/Tab F-12**).

> notwithstanding the provisions of any other written law relating to the registration of any interest or encumbrance over land.

51. From 1980 to 1985, DC was charged at 70% of the increase in value of the land consequent upon the grant of permission to develop. In 1985 this was reduced to 50%. In 2007 it was increased again to 70%.

(ii) Sales of land by the Government

52. The legislation set out above applies where a landowner obtains planning permission for the development of land that he owns. Where, however, the landowner has obtained the land under a sale by the Government that specifies that the land is sold for the development in question, DC is not payable. This arbitration concerns liability to pay DC to the Government after a transfer of title to land by the Government under a transaction that is accepted by both Parties to have been unique in character. A critical issue in this case is whether the principles applicable in the case of a Government sale of land apply equally to the POA. In this part of our award we consider the rule that applied in 1990 to sales of land by the Government, as to which there is some dispute between the Parties, and, more importantly, the principles underlying the rule that applies to Government land sales.

53. In 1996 the Minister for National Development introduced the Planning (Development Charge – Exemption) Rules[9]. These included the following provision in relation to land sold by the Government:

> **Exemption in respect of land sold by Government or statutory board.**
>
> 4.—(1) In respect of written permission or any amendment to such written permission granted under section 10 of the Act, whether before or after 15th July 1996, a person shall be exempted from liability under section 32 of the Act to pay any development charge for any development of land sold —
>
> (a) Whether before or after that date by the Government or by a statutory body on behalf of the Government; or
>
> (b) before 1st January 1983, by the Urban Redevelopment Authority whether on its own behalf or as agent for the Housing and Development Board,
>
> to such extent and in so far as the development is in accordance with the terms and conditions of the sale.

We shall refer to the Rule as "**Rule 4**".

54. It was common ground that Rule 4 gave formal effect to a long standing practice that had been operative in 1990. Mr Suppiah Dhanabalan, who was Singapore's Minister for National

[9] Singapore Planning (Development Charges – Exemption) Rules 1996 (**Exhibit M-39/Tab F-16**).

Development from 1987 to 1992, described this practice as follows at paragraph 10 of his witness statement:

> It is true that at the time of the POA there was a practice under which no DC would be payable where the State sells land by tender to a developer under the Government Land Sales ("GLS") programme. This was a programme under which the Government cleared land, and then sold it by public tender on terms which exempted DC. As a result, developers would submit bids reflecting the full development potential of the land. The Government would therefore receive the full enhancement value in selling the land in this way, including in effect the DC which would otherwise be payable.

55. This policy of securing for itself the full value of the development potential of its own land was reflected in the Government's practice when dealing with applications by lessees of State land for the lifting of restrictive covenants in their leases. The Government would only agree to this if the lessee agreed to pay a premium amounting to 100% of the enhancement of the value of the land attributable to the lifting of the covenants ("**Differential Premium**")[10].

56. Mr Dhanabalan stated that the exemption from liability to pay DC in respect of Government land sales did not apply to the POA because the land in question was MRA land rather than Singapore Government land, the transaction was not a sale by tender and it was not carried out under the GLS programme. Lord Goldsmith submitted that there was little evidence that rebutted these assertions by Mr Dhanabalan. Professor Crawford did not agree. Nor do we. We accept that the exemption had only been applied in the case of sales of land. We accept that those sales were usually sales under the GLS programme and that they were sales by tender. We do not accept that the exemption from DC was only applicable if the sales were GLS sales or sales by tender. At the end of the day, we do not believe that it matters whether or not Mr Dhanabalan is correct about these issues, save that his evidence tends to obfuscate the principle behind the exemption. However we shall explain why we have not accepted this part of his evidence.

    (i) There is no principled justification for restricting the exemption to GLS sales or sales by tender.

    (ii) Rule 4, which had retroactive effect, was subject to no such limitations.

    (iii) On 16 July 1990 the *Business Times* published a letter from Mr Chang of the State Land Office[11], explaining Differential Premium. This stated:

    > State land is always alienated at a value assessed by the Chief Valuer based on the intended use – for example recreational, educational, industrial or commercial. The applicant pays the "appropriate price" for the land on the basis of its intended use.

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[10] *See* Witness Statement by Mr Suppiah Dhanabalan at para 7.

[11] "Land office explains differential premium", *The Business Times*, Singapore, 16 July 1990 (**Exhibit M-48/Tab C-15**).

The inference is that there was no obligation on the purchaser to pay DC in such circumstances.

57. We have the following observations to make about Rule 4:

(i) Rule 4 did not purport to bring about a change in the law but simply to codify the existing legal position.

(ii) Rule 4 recognised that the Government could, by the terms on which it concluded a contract for the sale of land, exempt the land from liability in respect of DC.

(iii) Rule 4 recognised that stipulations in the contract of a Government sale as to the manner in which the land should be developed including, where appropriate, maximum density or plot ratio, resulted in exemption from the liability to pay DC. No DC had to be paid on an application for planning permission for development that had been expressly specified in the sale contract.

(iv) The commercial principle that explains why DC is not payable in such circumstances is obvious. DC is designed to make the owner of land share with the State any windfall profit that flows from the grant by the State of permission to develop the land. If, however, the State sells the land for the purpose of a specified development, it is in a position to exact a price that reflects the full development value of the land having regard to the specified use. Where it does so there is no need, or indeed room, for the imposition of DC. Were the land to be sold on the basis that DC would have to be paid in order to carry out the development stipulated in the sale contract, the sale price would have to be reduced to reflect that liability. Such a two-stage process would involve unnecessary bureaucracy, complexity and expense for both parties.

(v) Rule 4 is not an exception to the principles that underlie DC. It is the result of the application of those principles. DC is imposed where the grant of planning permission to develop land results in the increase in the value of land. Where the Government sells land for the purpose of a specified development it thereby approves the development. The planning decision is taken by the Government when it decides to sell the land for the specified purpose. Thereafter planning permission for the development will follow automatically. It is thus the sale for the specified purpose that gives the land its enhanced value, not the subsequent grant of planning permission. That is why the sale price reflects the development value of the land.

(vi) Applying these principles, no DC should be payable where the State transfers land for the purpose of a specified development in exchange for consideration that reflects that specified development. A critical issue in this case is whether that was the position under the POA. We consider that issue under the heading "The Nature of the Transaction" below.

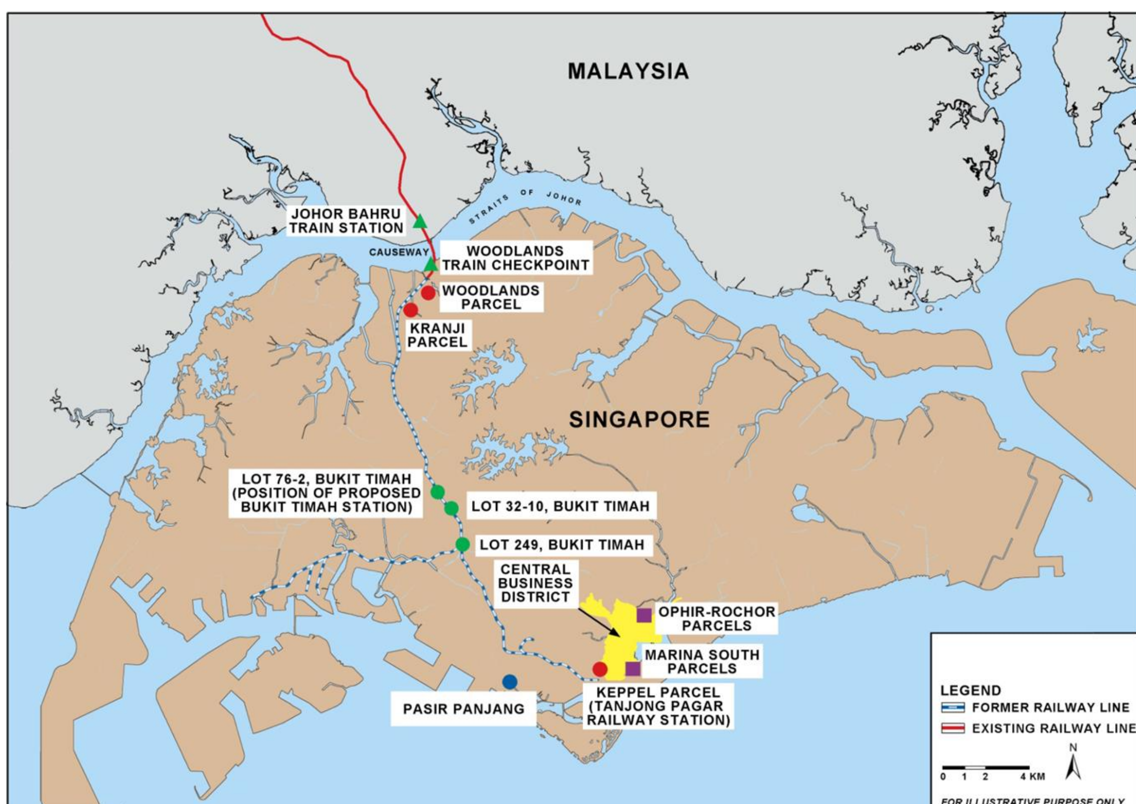
J. BACKGROUND TO THE POA

58. This section of the award is based in large part on those statements in the Memorial and the Counter-Memorial which have not been challenged.

59. Singapore and Malaysia are neighbouring sovereign States, located in South East Asia. The juxtaposition of the two is depicted in the following sketch map taken from Singapore's Memorial:

60. Singapore is an island that lies to the south of Malaysia. The two are linked by a causeway which carries road and rail traffic between the Malaysian State of Johor and Singapore. From 1913 to 1990 Singapore, or its predecessors in title (to whom for simplicity we shall refer

simply as "Singapore") provided to Malaysia, or Malaysia's predecessors in title (to whom for simplicity we shall refer simply as "Malaysia"), lands to enable the operation of a railway from Woodlands, an area in the north of Singapore, to the terminus which, by 1932, had been established in an area known as Keppel, or Tanjong Pagar, in the south of Singapore. This was the final section of a railway that ran throughout the length of the Malayan peninsula. The plan that follows, taken from Singapore's Memorial, shows the railway, crossing into Singapore from Johor Bahru and running southwards to the terminus at Keppel. A spur of the railway runs from Bukit Timah to Jurong (the "**Jurong Spur**"). The various named parcels of land feature prominently in the story.



61. Malaysia had a bewildering and changing variety of titles to the land on which were situated the tracks and facilities of the railway that it operated across Singapore. We shall summarise these for we do not believe that anything turns on the detail.

62. In 1913 Singapore agreed to sell the Singapore railway to Malaysia for a total of Straits dollars 4,136,000 on terms that were subsequently set out in the Singapore Railway Transfer Ordinance ("**SRTO**")[12]. This made provision for Singapore to transfer to Malaysia without charge any additional lands that might be required for the operation of the railway. The SRTO further made provision for railway land that was no longer required for railway purposes to be recovered by

12 Singapore Railway Transfer Ordinance 1918 (**Exhibit S-2/Tab C-1**).

Singapore in exchange for compensation consisting of the payment (if any) made by Malaysia for the land and the value of any buildings erected on the land.

63. By 1935 titles to the railway lands had become confused. In an attempt to simplify the position, all railway lands were returned to Singapore. The lands that were still required by Malaysia for railway purposes were then re-transferred to Malaysia, for the purposes of the Malayan Railway Administration ("**MRA**"), on 999-year leases. Some of the lands not so required were retained by Singapore. Parcels of land that Singapore did not need were returned to Malaysia with freehold titles.

64. By 1980 about 70% of the land was held on 999-year leases from Singapore. A number of parcels were held on 99-year leases from Singapore. The remainder were parcels of freehold land.

65. The 999-year leases were on identical terms. The lands could only be used for the purpose of running the railway. Any lands no longer required for this purpose could be recovered by Singapore on payment of compensation on the bases specified in the leases[13]. Thus if Malaysia had paid for the land, Singapore would pay by way of compensation the value of the land, and of the buildings constructed on the land, as at the date of resumption[14]. If Malaysia had not paid for the land, then compensation would be limited to the value of the buildings erected on the land[15]. So far as the balance of the lands is concerned, these were not subject to title restrictions or to an obligation to return the lands to Singapore if not required for railway use.

66. Correspondence internal to Singapore records that in 1984 an informal approach was made to Singapore by Malaysia[16] under which Malaysia stated that it was considering moving the terminus of its railway from Tanjong Pagar to Woodlands and selling or developing the land thus vacated at Tanjong Pagar. Singapore's equally informal response[17] to this was that Singapore would prefer Malaysia to continue to use the land for railway purposes, but that if Malaysia did not wish to do so, Singapore would take the land back in accordance with the terms of the leases of the various parcels.

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13 Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 1(2) (**Exhibit S-3/Tab C-2**).

14 Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 2(1)(a) (**Exhibit S-3/Tab C-2**).

15 Colony of Singapore, Crown Lease No. 4864 dated 23 March 1949 at clause 2(1)(b) (**Exhibit S-3/Tab C-2**).

16 *See* Letter dated 14 May 1984 from Singapore High Commissioner to Malaysia Maurice Baker to the Singapore 2nd Permanent Secretary for Foreign Affairs Peter Chan (**Exhibit S-6/TabC-7**).

17 *See* Letter dated 29 June 1984 from the 2nd Permanent Secretary for Foreign Affairs Peter Chan to Singapore High Commissioner to Malaysia Maurice Baker (**Exhibit S-7/Tab C-8**).

67. On 21 August 1989 the MRA wrote to the Singapore Government stating its intention to develop for commercial purposes, in partnership with other companies, four specified parcels of railway land. The MRA suggested that this would enhance the physical environment and deal with the problem of squatters[18]. Singapore replied on 23 January 1990 that it was not its current policy to allow any development on disused MRA land[19].

68. Within the year, however, Singapore had cause to reconsider its stance. Those entering Singapore from Malaysia by rail did not carry out customs, immigration and quarantine ("**CIQ**") formalities until the train reached the terminus at Tanjong Pagar. Some passengers managed to leave the train illegally, or to throw parcels of drugs from the train, while in transit from Woodlands to Tanjong Pagar. It was appreciated that these problems would be avoided if passengers were required to perform CIQ formalities on entry to Singapore at Woodlands. This would be facilitated if Malaysia moved the terminus of the railway from Tanjong Pagar to Woodlands, as it had suggested in 1984, or even to Johor.

K. THE NEGOTIATION OF THE POA

69. On 27 June 1990 Mr Lee Kuan Yew, Singapore's Prime Minister, entertained to dinner Malaysia's Finance Minister, Tun Daim Zainuddin ("**Minister Daim**"). The following day Prime Minister Lee Kuan Yew made a note of this meeting[20], which covered a number of topics discussed. These included a suggestion made by Prime Minister Lee Kuan Yew under which Singapore would "rip up" the railway between Tanjong Pagar and Woodlands and Malaysia would be permitted to develop the station at Tanjong Pagar "as a shopping complex or an office block *with special low development charges*".[21] The Parties are not agreed as to the implications of this proposal and we deal with that question below.

70. On 18 August 1990 a meeting took place at Pulau Langkawi, an island off the Malaysian coast, between Prime Minister Lee Kuan Yew and the Malaysian Prime Minister, Dr Mahathir, to discuss the following written proposals, headed "Woodlands Checkpoint" (the "**Woodlands Checkpoint proposal**") that were sent to Malaysia by Singapore in advance of the meeting[22]:

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[18] Letter dated 21 August 1989 from the Malayan Railway Administration to the Singapore Ministry of National Development (**Exhibit S-9/Tab C-11**).

[19] Letter dated 23 January 1990 from the Singapore Ministry of National Development to the Malayan Railway Administration (**Exhibit S-10/Tab C-12**).

[20] Note dated 28 June 1990 from Singapore Prime Minister Lee Kuan Yew (with redactions) (**Exhibit S-12/Tab C-14**).

[21] Emphasis added.

[22] Document titled '*Woodlands Checkpoint*' provided to Malaysia in August 1990 (**Exhibit S-13/Tab C-17**).

(i) Singapore would create a new Checkpoint Complex at Woodlands where CIQ formalities would take place for those entering the country from Malaysia. This would be operational in 4 to 5 years.

(ii) There would be a new MRT line linking the Woodlands MRT station with the Checkpoint Complex.

(iii) The MRA railway would have a new terminus, either at Johor Bahru, the capital of Johor, or at the Woodlands Checkpoint.

(iv) The railway lands in Singapore that were no longer being used for railway purposes would be returned to Singapore.

(v) Compensation for the land returned ("resumption cost") would be paid to Malaysia in accordance with the terms of the SRTO or the leases, whichever were applicable.

(vi) Three large parcels of the land returned to Singapore, being suitable for development, would become the subject of a joint commercial venture between Singapore and Malaysia. These were at Keppel (Tanjong Pagar), Kranji and Woodlands[23] (i.e. the three POA parcels). These would be "realianated" at resumption cost to a joint venture company owned 50:50 by Singapore and Malaysia, for the purpose of development.

71. Three Annexes, one for each parcel, showed the existing use of the parcel, the current market value at present zoning and the proposed uses of the parcel upon realienation. As to the value of each parcel for the proposed use each Annex commented that this could be determined by independent valuation. The Annexes were illustrated by a number of plans, prepared by the Singapore Urban Redevelopment Authority ("**URA**"). These showed the then current zoning of the parcels and, by way of an overlay, the proposed use and intensity upon realienation. The overlay for the Keppel parcel had hatched areas of open land, in respect of which a note stated: "The land area can be used for density calculations in the residential developments but the land is to be vested to state as open space".

72. After the meeting on 18 August 1990 between Prime Minister Lee Kuan Yew and Prime Minister Mahathir, the latter responded to Singapore's proposals in a letter sent by Minister Daim dated 28 August 1990[24]. His response indicated that the Parties had agreed that the new MRA terminus would be, not at Woodlands, but at Bukit Timah, somewhat farther to the

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[23] See the plan that follows paragraph 60 above for the siting of the three parcels.

[24] Letter dated 28 August 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (**Exhibit S-14/Tab C-20**).

South[25]. He went on to contend that Malaysia should have a larger share in the equity of the joint company as Malaysia would be relinquishing rights to land held on 999-year leases in exchange for new leases which would probably only be for 99 years. He further suggested that some of the portions of the railway track might also be suitable for development.

73. Prime Minister Lee Kuan Yew responded on 22 September 1990 asking what share in the equity Prime Minister Mahathir was seeking and stating that, other than the three parcels that had been identified, there were no railway lands that were suitable for independent development.

74. There was then a dormant period during the Malaysian general elections. Then on 23 November, Prime Minister Lee Kuan Yew discussed the joint venture agreement with Minister Daim and on the following day he sent to Minister Daim the agreed terms, as he understood them, in a letter[26], stating that he had prepared them himself. Prime Minister Lee Kuan Yew's draft provided as follows:

> POINTS OF AGREEMENT ON MALAYAN RAILWAY LAND IN SINGAPORE BETWEEN GOVERNMENT OF MALAYSIA AND GOVERNMENT OF SINGAPORE
>
> (1) The station at Keppel will be vacated and moved from Keppel, in the first instance to Lot 76-2 which is next to the Bukit Timah Fire station along Upper Bukit Timah Road near the junction with Jurong Road. (Please refer to Appendix) This place is shown on a map attached as Plan 1. The Government of Singapore will help in the alienation of such lands as may be reasonably necessary for the development of the station, provided that it is not necessary to acquire land with major permanent structures on it.
>
> (2) The land at Keppel will be vested in a limited company, (M-S Pte Ltd) to be developed as residential and commercial land in accordance with the plans attached as Annex 1. The MRA will remove all railway tracks south of this new station at Lot 76-2.
>
> (3) Compensation will be paid to Malayan Railways in accordance with the Singapore Railway Transfer Ordinance (Chapter 380) or land titles issued by Singapore's Land Office to MRA, whichever is applicable for each particular lot of land.
>
> (4) Within 5 years, when the MRT reaches Woodlands New Town, the MRA may remove its station from Lot 76-2 to a site in Woodlands adjacent or close to the MRT station. Then the MRA tracks south of the new Woodlands MRA station will be removed by the MRA. Then the two pieces of land, one in Kranji and in Woodlands, attached as Annex 2 and 3 respectively will be vested in the limited company M-S Pte Ltd and developed in accordance with plans given.
>
> (5) 60% of shares of the limited company, M-S Pte Ltd, will be owned by a company to be designated by the Prime Minister of Malaysia and 40% of shares by a company to be designated by the Prime Minister of Singapore. (Payment for the vesting of the three pieces of land) and development costs of these properties will be similarly shared in the ratio 60:40.

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25 See the plan that follows paragraph 60 above.

26 Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (**Exhibit S-16/Tab C-22**).

(6) In exchange for the MRA land at Keppel, a plot of land of equivalent value in Marina south will be offered to M-S Pte Ltd so that a prestigous building can be developed on this Marina site. This is if M-S Pte Ltd intends to develop and retain a prestigous building as a long term investment. Examples of the kind of prestigous sites of equivalent value to MRA Keppel land are attached in Plan 2 and Plan 3.

Signed for the Government of Malaysia by Dato' Paduka Daim Zainuddin on behalf of Dr Mahathir Mohamed, Prime Minister of Malaysia	Signed for the Government of Singapore by Lee Kuan Yew Prime Minister, Singapore

Appendix

<u>Proposed MRA Station at Upper Bukit Timah Road at Lot 76-2</u>

The station to be built at Upper Bukit Timah Road at Lot 76-2 should be economically built until, in MRA's judgement, Upper Bukit Timah Road is the best long term location for the station. In Singapore's judgement the better long term location of the station for most economic benefits is either in Woodlands or in Johore Bahru. Hence, the proposed MRA station in Upper Bukit Timah Road should be economically built.

2 MRA may conclude that it is better to move the station in the first instance to Woodlands. When the MRT extends from Woodlands to Johore Bahru, the MRA station can obtain economic benefits by moving to Johore Bahru.

It is common ground that the "payment for the vesting of the three pieces of land" would have been at the resumption cost of those pieces. The Annexes referred to were those that had accompanied the Woodlands Checkpoint proposal – see paragraph 70 above. In addition there were two plans showing plots at Marina South, where significant development on land reclaimed from the sea was taking place.

75. Minister Daim responded by letter on 26 November 1990[27]. He suggested a number of amendments to the POA, which he discussed with Prime Minister Lee Kuan Yew by telephone on the following day. Of those amendments that were accepted the following are significant:

(i) The provision in point 3 for payment of compensation to the MRA for the railway lands that would revert to Singapore was removed.

(ii) The provision in point 5 for M-S to pay for the 3 parcels of land that would vest in them was removed.

(iii) Provision was made for the Singapore Land Office to issue freehold titles to M-S in respect of the three parcels of land.

76. Minister Daim explained these amendments by stating:

[27] Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (**Exhibit S-17/Tab C-23**).

there is no need to raise the issue of the compensation to the MRA as we are talking about the exchange of land.

77. These amendments were duly incorporated in the POA dated 27 November 1990, which we have set out as part of the Annex to the Submission to Arbitration at paragraph 5 above. The POA included the three Annexes that set out the current zoning and proposed land use for each of the three parcels, which had remained unchanged since first sent to Malaysia with the Woodlands Checkpoint proposal.

L. INITIAL STEPS TOWARDS THE IMPLEMENTATION OF THE POA

78. Between 1990 and 1993 officials from Singapore and Malaysia held a series of meetings to discuss the implementation of the POA. In the course of these, Malaysia transferred its railway operations from the MRA to Keretapi Tanah Melayu Berhad ("**KTMB**"), a limited liability company wholly owned by Malaysia, and nominated this company to hold Malaysia's 60% shareholding in M-S. In the course of the meetings a number of issues were identified[28]. Malaysia wanted to incorporate a commercial complex into the terminus that it was to build at Bukit Timah and Singapore would not agree to this. And Malaysia contended that it would retain ownership of the Jurong Spur after the terminus was built at Bukit Timah whereas Singapore contended that, under the terms of the POA, this would revert to Singapore at that point.

79. On 12 November 1992 a meeting took place in Singapore between representatives of the newly formed KTMB and of the Ministry of National Development of Singapore. In preparation for this the Ministry prepared a draft Memorandum of Understanding ("**MOU**") between KTMB and a company to be incorporated by Singapore to hold Singapore's 40% interest[29]. This set out the manner in which M-S would receive and develop the three initial parcels of land covered by the POA. In relation to each parcel the MOU provided that it would be surrendered by MRA to the Singapore Government in exchange for the Singapore Government alienating it to M-S without cost. It further provided that M-S would pay any cost "including stamp duties and survey fees" incurred in the transfer to M-S. The MOU provided that Singapore should take the lead in the development of the three initial parcels and that "all construction and development costs and professional fees" should be born by M-S.

[28] Singapore's Memorial, paras 43, 44.

[29] Memorandum of Understanding, enclosed with Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (**Exhibit S-25/Tab C-34**).

80. The MOU made the following provision in relation to the option to exchange the Keppel parcel for land at Marina South[30]:

> 5. Option to exchange Keppel Parcel for Marina South land
>
> 5.1 M-S Pte Ltd may wish to exchange the Keppel Parcel for a plot of land in Marina South of equivalent land value to be offered by the Government of Singapore so that a prestigious building can be developed and retained as a long term investment.
>
> 5.2 If the land offered to M-S Pte Ltd is, in the opinion of M-S Pte Ltd, not suitable then alternative sites in Marina South of equivalent land value shall be offered to M-S Pte Ltd by the Singapore Government in accordance with the Points of Agreement. Examples of the kind of prestigious sites of equivalent value to Keppel Parcel are attached in Plan 2 and Plan 3 of the Points of Agreement.
>
> 5.3 In view of the rising costs of construction, the potential loss of opportunity in terms of holding cost of vacant land and the loss of lead time required to carry our the development on the Keppel Parcel or the alternative Marina South plot, if any, the parties recognise that it is in their best interest to achieve an early decision on which of the Keppel Parcel or the alternative Marina South plot will be developed.
>
> 5.4 The parties will meet at least once a month, if necessary, in reaching this decision and if parties could not come to any conclusive decision within six months from the signing of this Memorandum, then the original plan to develop the Keppel Parcel shall be adopted by the parties. In that event, the parties shall procure M-S Pte Ltd to adopt and ratify such development plans agreed to.

81. On 21 December 1993 Minister Daim wrote to Senior Minister Lee Kuan Yew[31], passing on a proposal from Prime Minister Mahathir. Malaysia would move its terminus directly to Woodlands if Singapore would agree that the land thus liberated at Bukit Timah be shared on a 60:40 basis between the two countries. This invitation was declined. In responding on 8 January 1994[32], Senior Minister Lee Kuan Yew commented in relation to the terms of the POA:

> . . . we had agreed on strong incentives for the station to move to Woodlands. At the time of the agreement in November 2009, I knew that KTM would sooner or later have to move to Woodlands. The old Bukit Timah trunk road was being replaced by a new island-wide network of expressways. The Bukit Timah area has no MRT and is becoming a low rise residential area.

M. IMPASSE

82. There followed a period of inertia. On 10 February 1996 the MRT reached Woodlands[33] so that the option given by the POA for Malaysia to move its terminus to Woodlands began to run. Malaysia then advanced the contention that the POA would only come into effect "if and when

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[30] Memorandum of Understanding at s. 5, enclosed with Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (**Exhibit S-25/Tab C-34**).

[31] Letter dated 21 December 1993 from Daim Zainuddin to Singapore Senior Minister Lee Kuan Yew (**Exhibit S-28/Tab C-37**).

[32] Letter dated 8 January 1994 from Prime Minister Lee Kuan Yew to Finance Minister Daim, 8 January 1994 (**Exhibit M-13/Tab C-38**).

[33] Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-55/Tab C-74**).

KTM should decide to vacate Tanjong Pagar station" – see the assertion made by the Malaysian Minister for Foreign Affairs to his opposite number on 11 June 1997[34]. The latter replied on 2 July 1997[35], asserting that the POA became operative on 27 November 1990, the day that it was signed. He suggested that, ideally, the difference of view should be resolved within the framework of wider cooperation between the two countries. Failing this, the dispute should be referred to arbitration or to the International Court of Justice.

83. Between 1999 and 2002 package negotiations took place between Malaysia and Singapore of which, while the status of the POA was one element, greater significance was attached to the terms on which Malaysia should supply water to Singapore. These negotiations ended in failure. On 10 February 2001 the option under the POA to move the terminus to Woodlands expired. This meant that the only course open to Malaysia under the POA was to move the terminus to Bukit Timah, a location that would be convenient neither for Malaysia nor Singapore.

84. At the end of 2003 Prime Minister Mahathir was replaced as Prime Minister of Malaysia by Tun Abdullah Ahmad Badawi ("**Prime Minister Abdullah**"). Prime Minister Abdullah set about attempting to repair relations between his country and Singapore, but no progress was made towards implementing the POA until 2008.

N. THE POA REVIVED AND REVISED AS SET OUT IN THE JOINT STATEMENT OF 24 MAY 2010

85. On 17 April 2008 the newly appointed Malaysian Foreign Minister, Dr Rais Yatim ("**Minister Rais**"), called on Prime Minister Lee Hsien Loong, who had succeeded Prime Minister Lee Kuan Yew as Prime Minister of Singapore. In the course of this meeting he acknowledged that the POA was valid and binding. After the meeting, Singapore's Foreign Minister, Mr George Yeo ("**Minister Yeo**"), wrote to Minister Rais[36] offering "without prejudice" to reinstate the option in the POA that had lapsed in 2001, namely that KTMB could move the terminus to Woodlands, instead of Bukit Timah, in which case Singapore would make available the parcels of land at Kranji and Woodlands, in addition to the Keppel parcel, for joint development. All three parcels of land were "now much more valuable than before".

86. In 2006 Malaysia had set up a special economic zone in South Johor, initially named Iskandar Development Region but renamed Iskandar Malaysia ("**IM**"). In 2008 Malaysia sought

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[34] Letter dated 11 June 1997 from Malaysian Minister of Foreign Affairs Abdullah Badawi to Singapore Minister for Foreign Affairs S Jayakumar (**Exhibit S-33/Tab C-48**).

[35] Letter dated 2 July 1997 from Singapore Minister for Foreign Affairs S Jayakumar to Malaysian Minister of Foreign Affairs Abdullah Badawi (**Exhibit S-34/Tab C-49**).

[36] Letter dated 5 May 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-50/Tab C-66**).

Singapore's cooperation in encouraging investment in IM. On 8 May 2008 Prime Minister Lee Hsien Loong wrote to Prime Minister Abdullah[37], pledging support for IM, but stating that for cooperation to be credible it was essential that they should clear the implementation of the POA, which was 17 years old and an item that "you and I inherited from our predecessors". He added that the delay in implementing the POA was holding up development projects in Singapore. He proposed that the two Foreign Ministers should work together to bring the matter to a speedy conclusion.

87. On 2 June 2008 Minister Yeo wrote a letter to Minister Rais[38] in which he repeated the "without prejudice" offer to let KTMB move the terminus to Woodlands. He added that the Prime Minister had asked him to be generous in negotiations and instructed him to include some pieces of land at Bukit Timah occupied by KTMB for joint development by M-S if the terminus was relocated to Woodlands. This offer was repeated in a letter from Prime Minister Lee Hsien Loong to Prime Minister Abdullah on 3 October 2008. In this letter he emphasised that the POA had "dealt comprehensively with the issue of the railway lands in Singapore" and stated Singapore's intention, pursuant to the POA, to resume possession of the Jurong Spur by 1 July 2009 and of the remaining railway lands by 1 July 2011.

88. At the request of Minister Rais, Minister Yeo wrote on 20 November 2008[39] attaching an updated valuation of the three initial parcels of land as follows:

Keppel	$2,311m
Kranji	$166m
Woodlands	$269m
Total	$2,764m

These figures were followed by a note (the "**valuation footnote**") which stated:

> Based on May 2008 valuation. This is the estimated value of the land parcels based on their full development potential. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies before the land parcels can be developed to their full development potential.

89. Mr Yeo was called to give oral evidence on behalf of Singapore. He stated that his letters were written on the advice of lawyers[40]. He had discussed with his lawyers whether the original POA

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37 Letter dated 8 May 2008 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Abdullah Badawi (**Exhibit S-51/Tab C-67**).

38 Letter dated 2 June 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-52/Tab C-68**).

39 Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-54/Tab C-73**).

40 Transcript, p 312.

excluded the obligation to pay DC, and they had no doubt that it did not[41]. This was the settled Cabinet position. The matter was raised on one occasion in 2008 or 2009 and Minister Mentor Lee Kuan Yew said "[o]f course it is payable and Tun Daim knows it."[42] Mr Yeo said that he wrote the valuation footnote himself because he wanted his opposite number to be very clear as to the basis of the valuation[43].

90. On 19 December 2008, following a meeting in Bali, Minister Yeo wrote to Minister Rais[44]. He suggested a relocation of the terminus at Woodlands to the site of the Woodlands Checkpoint, thereby freeing up a larger parcel for development by M-S. He repeated the without prejudice offer, emphasising that it was contingent on the KTMB Terminus being moved to Woodlands by 1 July 2011. A valuation was provided of the three additional parcels of land at Bukit Timah that were offered "without prejudice", totalling S$562 million. This included a "valuation footnote" in essentially identical terms to that set out at paragraph 88 above.

91. In 2009 there was an exchange of formal diplomatic "Third Party Notes" ("**TPN**"). The first[45] sent by Singapore on 5 January 2009 emphasised the urgency of Malaysia returning the Jurong spur, and some other railway lands the subject of the POA, because of Singapore's development plans. Once again the "without-prejudice" offer was repeated. The second TPN[46] sent by Malaysia on 19 March 2009 sought further information about the valuation of the six parcels of land. The third TPN[47] sent by Singapore on 18 May 2009 provided this information but urged Malaysia to carry out its own valuation. A guide to DC published by the URA accompanied the note. This guide dealt with DC in general in terms that were not very easy to understand. It did not state that a special rule applied in relation to sales of land by the Government. The TPN included the following information in relation to land at Marina South:

> As the Government of Malaysia is aware, development works at Marina South are ongoing and land parcels in Marina South are regularly sold and allocated by the Government of Singapore. If and when the Government of Malaysia indicates a firm intention to exchange the railway land at Tanjong Pagar (Keppel) for a plot of land in Marina South, the Government of Singapore will propose, from such land stock as are still available in Marina South at that time, a plot of land of equivalent value to the railway land at Tanjong Pagar (Keppel) for exchange.

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[41] Transcript, p 342.

[42] Transcript, p. 343.

[43] Transcript, p 345.

[44] Letter dated 19 December 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-55/Tab C-74**).

[45] Note dated 5 January 2009 from the Singapore Ministry of Foreign Affairs to the High Commission of Malaysia in Singapore (**Exhibit M-20/Tab C-76**).

[46] Third Person Note dated 19 March 2009 from Malaysia to Singapore (**Exhibit S-57/Tab C-77**).

[47] Third Person Note dated 18 May 2009 from Singapore to Malaysia (**Exhibit S-58/Tab C-78**).

92. Meanwhile in April 2009 there had been a cabinet reshuffle in Malaysia. Dato' Sri Mohd Najib bin Tun Abdul Razak ("**Prime Minister Najib**") took over as Malaysia's Prime Minister while Dato' Sri Anifah Aman ("**Minister Anifah**") took over as Malaysia's Foreign Minister.

93. On 23 June 2009 Minister Yeo met with Minister Anifah in Singapore. Singapore kept a note of the meeting[48]. This records that Minister Anifah said that Malaysia knew and accepted "the legalities of the issue". He was anxious, however that the people of Malaysia should not feel that their government had sold out their interests. He was looking for a "political win-win outcome". Minister Yeo replied that the "without prejudice" offer was still on the table, at which Minister Anifah seemed relieved. Minister Yeo stated that the three additional pieces of land at Bukit Timah were worth S$562 million – more than the Kranji and Woodlands POA parcels, which were worth about S$400 million. Minister Anifah then asked about the possibility of swapping all the POA lands for land at Marina South and Minister Yeo said that this was a good idea. M-S could then be involved in two joint development projects, one at IM and one at Marina South.

94. On 29 June 2009 the URA briefed a Malaysian delegation on various plots of land that might be available for such an exchange. On 20 July 2009 Singapore sent Malaysia a TPN[49] providing information designed to assist Malaysia to decide whether to accept the "without prejudice" offer. There were two Annexes to this. Annex A gave details of the three initial parcels and plans and details of the three Bukit Timah parcels (collectively "the 3+3 parcels"). Annex B gave plans and details of four parcels of land at Marina South and one at Ophir-Rochor that might be available for exchange "at equivalent value". In each Annex the details were qualified by a "valuation footnote" in the same terms as those set out in paragraph 88 above.

95. There was then a further period of inertia, broken by a letter from Minister Yeo dated 22 January 2010[50] suggesting a meeting of the two Foreign Ministers, to be followed by a meeting of the two Prime Ministers. The former meeting took place in Kuala Lumpur on 15 May 2010. What there transpired was summarised by Minister Anifah to Minister Yeo in a letter written five days later[51]. Minister Anifah referred to Singapore's "without prejudice" offer as POA+ and countered with a "without prejudice offer" that he described as POA++. This was as follows:

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48 Notes of Restricted Meeting between Malaysia Foreign Minister Dato' Anifah Aman and Minister for Foreign Affairs George Yeo on 23 June 2009, 0900 hrs at Wisma Putra, Putrajaya' (**Exhibit SR-04/Tab C-79**).

49 Third Person Note dated 20 July 2009 from Singapore to Malaysia (**Exhibit S-60/Tab C-82**).

50 Letter dated 22 January 2010 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Anifah Aman (**Exhibit S-61/Tab C-84**).

51 Letter dated 20 May 2010 from Malaysian Minister of Foreign Affairs Anifah Aman to Singapore Minister for Foreign Affairs George Yeo (**Exhibit S-63/Tab C-86**).

(i) The KTMB station would be relocated from Tanjong Pagar to Woodlands Train Checkpoint by 2011.

(ii) The 3+3 parcels would be vested in M-S for joint development, but could be swapped for the four parcels at Marina South and the parcel in Ophir-Rochor.

(iii) When the MRT link between Johor Bahru and Singapore was completed by 2018 Malaysia could consider moving the terminus from Woodlands to Kempas, Johor.

96. On 21 May 2010 Minister Yeo wrote to Minister Anifah[52] agreeing to POA++. His letter included the following paragraph:

> 3 For the land swap, as mentioned in our offer of 20 July 2009, "M-S Pte Ltd could consider exchanging the six plots (3 POA parcels and 3 Bukit Timah lots) entirely for land in Marina South or exchanging the six plots partly for land in Marina South and partly for land in Ophir-Rochor. As the land swap is to be undertaken on an equivalent value basis, the exact amount of land which would be offered under each option in exchange for the six plots would depend on the relative land valuation at the time when M-S Pte Ltd seeks to effect the exchange." Both my earlier letter of November 2008 to Dato' Seri Rais Yatim and Singapore's TPN to Wisma Putra in July 2009 had stated that "M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels." In May 2009, in response to a specific question by Wisma Putra on development charges, we provided a "guide for the computation of development charges in Singapore" and suggested that "the Government of Malaysia should engage a qualified professional to advise on the actual computation of development charges, if necessary".

97. The two Prime Ministers met at the Singapore–Malaysia Leaders' Retreat in Singapore on 23 and 24 May 2010. In a letter[53] to Minister Tan Sri Nor Mohamed Yakcop ("**Minister Nor**"), who led the Economic Planning Unit of the Malaysian Prime Minister's office, Mr. Mah Bow Tan, the Singapore Minister for National Development, ("**Minister Mah**") recorded that Prime Minister Lee Hsieng Loong had briefed him that at the Retreat he had personally explained the DC requirement to Prime Minister Najib. The result of the meeting was set out in a formal written Joint Statement dated 24 May 2010[54] (the "**24 May Joint Statement**"). Paragraph 3 of this set out an agreement about increased cross-border connectivity. Paragraph 9 dealt with "bilateral cooperation in the joint iconic project in Iskandar Malaysia". The following paragraphs dealt with issues arising from the POA as follows:

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52 Letter dated 21 May 2010 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Anifah Aman (**Exhibit S-64/Tab C-87**).

53 Letter dated 18 June 2010 from Singapore Minister for National Development Mah Bow Tan to Malaysian Minister in the Prime Minister's Department Nor Mohamed Yakcop (**Exhibit S-81/Tab C-106**).

54 Joint Statement on Singapore-Malaysia Leaders' Retreat between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak, 24 May 2010, Singapore (**Exhibit S-65/Tab C-88**).

4 Both Leaders also discussed issues arising from the Points of Agreement (POA) on Malayan Railway Lands in Singapore and reached an understanding to move the issues forward. In this regard, the POA shall be supplemented by new terms and conditions to maximise the full potentials of the MRA Lands in Singapore. To that effect, both Leaders agreed to undertake the following steps:-

- The Keretapi Tanah Melayu Berhad (KTMB) station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (WTCP) by 1 July 2011. Malaysia would co-locate its railway CIQ facilities at WTCP. Singapore would facilitate the relocation to the WTCP and ensure bus service connectivity from the KTMB Station at WTCP to a nearby MRT Station for the convenience of train passengers.

- A company known as M-S Pte Ltd will be established as soon as practicable but not later than 31 December 2010 with Malaysia's 60% held by Khazanah Nasional Berhad and Singapore's 40% held by Temasek Holdings Limited.

- The three parcels of land in Tanjong Pagar, Kranji and Woodlands and three additional pieces of land in Bukit Timah (Lot 76-2 Mk 16, Lot 249 Mk 4 and Lot 32-10 Mk 16) will be vested in M-S Pte Ltd for joint development, which in turn, could be swapped, on the basis of equivalent value for pieces of land in Marina South and/or Ophir-Rochor. Both sides will conduct their respective valuations and Prime Minister Lee will visit Kuala Lumpur within a month with a proposal for the land swap for Malaysia's consideration.

- The transfer of the said land parcels to M-S Pte Ltd will take effect at the time when KTMB vacates Tanjong Pagar Railway Station (TPRS).

- A rapid transit system link between Tanjung Puteri, Johor Bahru and Singapore aimed at enhancing connectivity between the two countries will be jointly developed. The rapid transit system link will be integrated with public transport services in both Johor Bahru and Singapore. For the convenience of commuters, the rapid transit system link will have a single co-located CIQ facility in Singapore with the exact location to be determined later. It is targeted that the proposed rapid transit system link will be operational by 2018. Thereafter Malaysia may consider to relocate the KTMB Station from Woodlands to Johor.

5 Both Leaders agreed to task a joint implementation team, to be led by the Secretary General of the Ministry of Foreign Affairs, Malaysia and the Permanent Secretary of the Ministry of Foreign Affairs, Singapore to further discuss the implementation details, which among others, would include as follows:-

- establishment and the framework governing the M-S Pte Ltd;

- rapid transit system connectivity between Johor Bahru and Singapore; and

- co-located CIQ in Woodlands Train Checkpoint.

6 The joint implementation team will complete its works by 31 December 2010.

7 The outcome reached by the joint implementation team on the matters discussed should be reflected in a written instrument to be signed by both countries upon approval from their respective Governments.

[. . .]

11 Prime Minister Lee and Prime Minister Najib Razak expressed satisfaction that the arrangements relating to the POA would facilitate resolution of the issue which has been outstanding for more than 19 years. Both Prime Ministers reaffirmed their commitment towards further strengthening bilateral relations and mutual collaboration in various areas.

O. EVENTS AFTER 24 MAY 2010

98. It was only after 24 May 2010 that the issue in relation to DC emerged. For this period, and this period alone, Malaysia has disclosed a series of internal notes prepared by Minister Nor.

99. On 17 June 2010 Prime Minister Lee Hsien Loong wrote to Prime Minister Najib stating that, as set out in the 24 May Joint Statement, Singapore and Malaysia had agreed on all aspects of the implementation of the POA with the exception of the land swap[55]. As to this he set out in an Annex three options. The first two involved exchanging the 3+3 parcels for different parcels of land at Marina South and Ophir-Rochor. The third provided for M-S to retain the 3+3 parcels without any exchange. Paragraph 2 of the Annex stated:

> As previously indicated, a development charge is payable to realise the potential permissible uses of the 3+3 parcels

Paragraph 4 of the Annex stated:

> All proposed developments will be subject to the usual planning approval and development control process applicable under Singapore law. M-S Pte Ltd will need to bear the development charges and other applicable charges and levies related to the development of the land parcels. The mechanism for vesting of the land parcels and payment of the development charge is set out in Appendix 3.

Appendix 1(a) to the Annex tabled the values of the 3+3 parcels "based on Potential Permissible Use" and the DC payable in respect of each parcel. Appendix 1(a) also set out the values of the Marina South and Ophir-Rochor parcels. For these, no DC was mentioned. Appendix 3 provided:

> 1. Under Option 1 and Option 2:
>
> a. The Singapore Government will vest the relevant Marina South/Ophir-Rochor parcels directly in M-S Pte Ltd once KTMB vacates Tanjong Pagar Railway Station. There is no need for a two-step process of first vesting the 3+3 parcels in M-S Pte Ltd and then having M-S Pte Ltd surrender them in exchange for the Marina South/Ophir-Rochor parcels.
>
> b. The development charge amount will be locked down at the present amount of **S$1.832 billion**. This will provide certainty and finality to both sides as to what the swap deal comprises, and make the deal independent of future changes in development charge or property values. The amount of **S$1.832 billion** is payable on the vesting of the Marina South/Ophir-Rochor parcels in M-S Pte Ltd.
>
> 2. Under Option 3:
>
> a. Singapore will not require upfront payment of the development charge at the time of vesting of the 3+3 parcels, nor will the development charge be locked down at the present amount.

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[55] Letter dated 17 June 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysia Prime Minister Najib Razak (Original Land Swap Offer) (**Exhibit S-78/Tab C-102**).

> b. Instead, M-S Pte Ltd will pay the development charge, based on the prevailing rates at the time of the provisional permission, when the written permission is granted for the development of the land.
>
> [. . .]

100. The letter of 17 June 2010 was delivered personally by Minister Mah to Minister Nor at a meeting between delegations from the two countries in Malaysia on 17 June, in anticipation of a meeting between the two Prime Ministers on 22 June. Those present included Tan Sri Abdul Gani Patail, Malaysia's Attorney General and Tan Sri Dato' Azman Mokhtar, the Managing Director of Khazanah. Singapore's note of this meeting[56] records the following discussion under the heading "Development Charge":

> 9. Gani Patail asked if the development charge was mandatory and if there was any room to vary the charges. He took the line that the land swap was not a land sale but in the context of a "sovereign agreement". In this context, he asked if there were any leeway, if the parcels were seen as a "granting", that discretion could be given to exempt the parcels from certain charges or taxes. Minister explained that development charge was a tax on the enhancement in land value which was the difference between the baseline land use value and the permissible use value. This tax was currently set at 70%. This was a gazetted requirement, and it was calculated based on a clear formula that was transparent. The development charge was also stated and explained in our past TPNs.
>
> 10. Azman commented that the development charge was a well established and transparent requirement in Singapore. However the question was whether the land parcels to be vested were seen as a "granting" or a "sale" and we had to view this within the context of the POA. He highlighted that the POA mentioned "development costs" related to development but not the development charge.
>
> 11. Yakcop summarized the view that the land swap was not like a sale of land because it started on the basis of Malaysia giving up 500 acres of land and exchanging it for 3+3. Including the development charge made things "hazy" and was like "double counting". However he agreed with Minister that it was stated in past correspondences that the development charge was payable. The Malaysian side just had to study the development charge as it was "very big".
>
> 12. Gani Patail recognised that DC was a statutory requirement; but questioned whether the amount of DC was fixed, citing that in some jurisdictions, the percentage varied depending on the land use. He wanted to know if the charges could be varied and asked for information on the relevant laws to be provided after the meeting.

101. Minister Nor wrote an internal note on 18 June making recommendations in relation to the forthcoming meeting between Prime Ministers. The note argued, *inter alia*, that as neither the POA nor the 24 May Joint Statement mentioned DC, this should be construed as a new term. The note continued:

> We challenge the basis of the various without prejudice letters. Further, there is clearly discretion on the part of the Singapore Government whether to impose development charges and encumbrances. It is not mandatory. As is the case for Marina South lands, the Singapore Government itself converted the land use, not triggering development charge, before putting such lots up for sale to third parties.

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[56] Delegation Report for Minister (ND)'s Meeting with Tan Sri Nor Mohamed Yakcop on Singapore's Land Swap Offer, 17 June 2010, Shangri-La Hotel, Putrajaya (with redactions) (**Exhibit S-79/Tab C-103**).

The note recommended that Malaysia should not commit itself in relation to DC at the meeting on 22 June.

102. Minister Nor mentioned Malaysia's reservations about DC in a telephone conversation with Minister Mah on 18 June[57]. This provoked a letter from Minister Mah[58] written the same evening emphasising that the obligation to pay DC had been made clear in prior correspondence and in discussion between the two Prime Ministers. The letter continued:

> As I explained to you yesterday, and during our conversation today, DC is a tax payable on all lands whose value is enhanced as a result of government approving a higher value development proposal. The quantum of the DC is determined by law, as is the process for such determination. As Sri Azman Mokhtar said yesterday, this is a well known and transparent process.
>
> As such, I am afraid the payment of DC is not a matter which can be subject to negotiation.

103. Minister Nor's two internal notes of 21 June[59] record that Malaysia did not believe that the POA imposed an obligation to pay DC and that the best negotiating tactics were to attempt to keep that issue on ice while focusing on other aspects of the implementation of the POA. In the latter note he complained that Singapore was clearly aware of the quantum of DC during the meeting of 24 May 2010 but had chosen not to disclose it. The note summarised the position as follows:

> - Singapore takes the position that when the 3+3 land is vested into M-S Pte Ltd, it is still for railway use. Hence, the act of converting it to commercial and residential use attracts the development charge (tax),
> - Malaysia's reading of the PoA is that it clearly sets out that the PoA related lands **are vested into M-S Pte Ltd based on a specified use** (commercial and residential) **at no costs,** as consideration for Malaysia surrendering KTM's lease.

104. This was repeated in a lengthy note dated 22 June[60] by way of a position paper ahead of the Prime Ministers' meeting. The note added:

> . . . Malaysia would concede that the additional 3 Bukit Timah land offered by Singapore is not explicitly mentioned in the POA and thus can compromise if Singapore imposes development charges on these parcels.

In setting out Malaysia's position Minister Nor compared the allocation of lands to M-S under the POA with the allocation by Singapore of lands at Marina South:

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[57] Filenote of Call from YB Tan Sri Nor Mohd Yakcop, Minister of Prime Minister's Department, Malaysia to Minister Mah Bow Tan on Friday, 18 June 2010 at 6P.M. (**Exhibit S-80/Tab C-105**).

[58] Letter dated 18 June 2010 from Singapore Minister for National Development Mah Bow Tan to Malaysian Minister in the Prime Minister's Department Nor Mohamed Yakcop (**Exhibit S-81/Tab C-106**).

[59] Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*Meeting with Minister Mah*', dated 21 June 2010 (**Exhibit NMY-2/Tab C-107**); Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*Points of Agreement*', dated 21 June 2010 (**Exhibit NMY-3/Tab C-108**) (emphasis in original).

[60] Note prepared by Tan Sri Nor Mohamed Yakcop titled, '*PoA Meeting 22 June 2010*', dated 22 June 2010 (**Exhibit NMY-4/Tab C-110**).

> When Singapore sells lands, such as Marina South, its use is converted by Government and thus, purchasers are not imposed a development charge. Under the POA Singapore was to vest the land to M-S Pte approved for use, as specified in the POA.

Singapore's note of the Prime Ministers' meeting[61] recorded:

> 6 On DC, Najib had claimed that Malaysia's understanding was that there was no development charge (DC) payable on the three POA parcels based on the original POA document. Najib had offered to pay DC for the plus 3 Bukit Timah land parcels. PM replied that the DC has been there all along. It has been our practice since 1965. Although the POA had not explicitly referred to DC, the POA had referred to "development costs" which included many things, one of which was the DC. This was what MM had clearly conveyed to Daim Zainuddin when they had negotiated the POA. However, Najib had remarked to PM that both Daim and then-PM Mahathir would not have signed off on the POA if they had known how large the DC would have been. PM replied to Najib that Daim was a lawyer, and knew what he was doing. PM had also noted to Najib that the DC was also something that most commercial developers would know about. Thus far the DC has never been waived. PM had also told Najib that both sides did not need to take cognisance of this matter at the political level. It would be a commercial matter for M-S Pte Ltd and there need not be any political signature. However, if Malaysia had any doubt about whether the DC was payable on the POA lands, the issue could be settled in the courts, or by international arbitration at the Permanent Court of Arbitration. Najib immediately declined, saying that that was the last thing he wanted to do. PM concurred with Najib, pointing out that that would focus great public attention on the DC issue.
>
> 7 PM pointed out that we had referred to the DC more than once in the letters and notes we had sent Malaysia before the 24 May retreat. He himself had been concerned that the Malaysians should be conscious of this requirement, and had made a point of highlighting it, including to Najib when they had met. Najib acknowledged this but said that they had not reacted at the time as they did not realise the amount involved. PM had also reiterated to Najib that where we could exercise discretion we would. For example, we were calculating the DC based on spot valuations, and not on the published DC tables, which would have been higher. However, we could not waive the DC. PM now suggested an additional concession to be flexible: we would allow the DC amount to be paid 12 to 18 months after the lands had been vested in M-S Pte Ltd if it would help to manage the visibility of the DC issue, or the cash flow of the company. Najib said he took note of PM's offer, and would study it. PM said that the project was "completely bankable". He explained to Najib in that the company could borrow against the land to pay the DC, and borrow against the future proceeds from the development to pay for the construction costs. There was no need for the shareholders to put in any more money to pay the DC.

Prime Minister Lee Hsien Loong repeated Singapore's position in a letter[62] to Prime Minister Najib on 28 June.

105. These discussions about DC were conducted in parallel with discussions about the land swap options. At the meeting on 22 June Prime Minister Najib asked whether it would be possible to swap the 3+3 parcels for four parcels at Marina South and two at Ophir-Rochor (4+2 parcels). Prime Minister Lee Hsien Loong offered to agree to this provided that M-S paid the difference in value between the 3+3 and the 4+2 parcels. Prime Minister Najib agreed to consider this. In

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[61] Notes of PM's Debrief of PM's Four-Eye Meeting with Malaysian Prime Minister Najib Razak at Putrajaya, Malaysia on 22 June 2010 at 5.30pm (with redactions) (**Exhibit S-83/Tab C-111**).

[62] Letter dated 28 June 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (Revised Land Swap Offer) (**Exhibit S-84/Tab C-114**).

his letter of 28 June Prime Minister Lee Hsieng Loong remarked that this was a significant concession as:

> . . . the Government's standard practice is to sell land by public tender, which often results in higher bids than the Chief Valuer's valuation. If M-S Pte had to bid for the extra land it might well cost them more.

106. In a telephone conversation on 15 September 2010[63] the Prime Ministers agreed a way ahead. Prime Minister Najib accepted the proposal set out above in relation to an exchange of the 3+3 parcels for the 4+2 parcels. He said, however, that Malaysia would have difficulty in accepting this offer if DC applied. Malaysia had sought "legal opinion from rather eminent lawyers" and it appeared that there was some basis to seek legal clarification on the DC. He suggested that the issue of whether DC was payable on the initial three parcels under the POA should be submitted to arbitration which would "be conducted in a cordial and friendly manner and would not be acrimonious". He accepted that it would be fair for Malaysia to pay DC on the three additional Bukit Timah parcels. Prime Minister Lee Hsieng Loong agreed to these proposals.

107. This agreement was confirmed in an exchange of letters on 17[64] and 19[65] September 2010. In the latter Prime Minister Lee Hsieng Loong wrote:

> 2. I confirm our agreement with your letter of 17 September 2010. I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the three parcels of POA lands in Tanjong Pagar, Kranji and Woodlands. I share fully your wish to resolve this issue in a cordial and friendly manner, which will help to set the tone for our bilateral cooperation in many other fields.

108. The agreement was the subject of a Joint Statement[66] made on 20 September 2010. It was subsequently incorporated in a formal Agreement between the two Governments dated 27 June 2011. On the same day Khazanah and Temasek executed a Shareholders' Agreement relating to M-S and incorporated M-S as a private company limited by shares under the Singapore Companies Act[67].

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63 See Filenote of Telephone Conversation between Prime Minister Lee Hsien Loong and Malaysian Prime Minister Dato' Seri Najib Tun Razak, 1220 hrs, 15 September 2010, PM's Office, Istana (with redactions) (**Exhibit S-87/Tab C-117**).

64 Letter dated 17 September 2010 from Malaysian Prime Minister Najib Razak to Singapore Prime Minister Lee Hsien Loong (**Exhibit S-88/Tab C-118**).

65 Letter dated 19 September 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (**Exhibit S-89/Tab C-119**).

66 Joint Statement on Meeting between Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak on the Implementation of the Points of Agreement on Malayan Railway Land in Singapore (POA), 20 September 2010, Singapore (**Exhibit S-90/Tab C-120**).

67 Extracts from the Memorandum and Articles of Association of M+S Pte Ltd dated 27 June 2011 (**Exhibit S-94/Tab C-124**).

109. On 1 July 2011 Malaysia moved the KTMB railway terminus to Woodlands and ceased operations at Keppel. On the same day Singapore vested the 4+2 parcels in M-S and all other railway lands south of Woodlands were vested in Singapore. The Submission Agreement[68] was entered into on 9 January 2012.

P. THE CORRECT INTERPRETATION OF THE POA AT THE TIME OF ITS CONCLUSION

110. After this summary of the factual evidence we turn to consider the correct interpretation of the POA at the time of its conclusion in 1990, applying the principles set out in Section F above. As Article 31 of the Vienna Convention records, the ordinary meaning of the terms of the POA, in their context and in the light of the object and purpose of the POA, is of primary importance. Account is to be taken of any subsequent agreement, or practice establishing such agreement, regarding the interpretation of the POA. Where an interpretation would leave the meaning ambiguous or obscure, or lead to a manifestly absurd or unreasonable result, recourse may be had to the preparatory work of the treaty as a supplementary means of interpretation. We propose to approach this section of the award under the following headings:

(i) Singapore's submissions in outline;

(ii) Malaysia's submissions in outline;

(iii) The value to the Parties of the railway lands;

(iv) Prime Minister Lee Kuan Yew's dinner;

(v) The nature of the transaction;

(vi) Singapore municipal law;

(vii) The natural meaning of the terms of the POA;

(viii) The subjective belief of the parties;

(ix) The subsequent conduct of the parties;

(x) Conclusions.

(i) Singapore's submissions in outline

111. The railway lands had little value to Malaysia. The lands were held by Malaysia on terms that restricted their use to the operation of the MRA railway. That railway was, however, operating at a loss in Singapore. It made economic sense to close down the railway and restore the railway

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[68] Submission Agreement between Singapore and Malaysia dated 9 January 2012 (**Exhibit S-1/Tab B-1**).

lands to Singapore. Singapore for its part had shown itself quite content that Malaysia should continue to operate the railway if that was Malaysia's wish. Singapore had no urgent need to recover the railway lands. It had, however, become necessary for the purposes of regulation of those entering Singapore from Malaysia that the checkpoint for CIQ formalities should be moved to the entry point into Singapore and this made it convenient for the terminus of the MRA railway to be moved to the north.

112. To encourage Malaysia to agree to moving the MRA terminus to the north, Prime Minister Lee Kuan Yew, at the dinner on 27 June 1990, offered Malaysia the chance of developing the railway lands at Keppel that would be vacated. He made it plain at that meeting that this would involve Malaysia paying DC.

113. Prime Minister Lee Kuan Yew's proposal was developed in the Woodlands Checkpoint proposal and his letter of 24 November 1990[69]. The essence of the POA was not changed thereafter. The amendments made at the suggestion of Minister Daim[70] were merely by way of simplification and did not alter the nature of the transaction. The object and purpose of the POA was to jointly develop the three parcels in exchange for the surrender of the MRA lands by Malaysia, so as to strengthen bilateral relationships and give Malaysia a long term stake in Singapore. The essence of the agreement was as follows.

114. MRA would move its terminus to the north, vacating the lands to the south. These would revert to Malaysia, subject to a transaction in relation to three parcels of land that would be governed by Singapore municipal law. Under that transaction Singapore would transfer the three parcels to a joint venture company, M-S. The use of the lands so transferred would, initially, be restricted by the Master Plan zoning to railway use. Singapore would, however, be obliged under the POA to make sure that M-S received the necessary planning permission to use the lands for the purposes detailed in the annexes to the POA. In order to obtain that planning permission M-S would, in accordance with Singapore municipal law, have to pay DC. Were there any doubt about this obligation such doubt was resolved by the express term that Malaysia and Singapore would share the "development costs". The obligation to pay DC thus accorded with the ordinary meaning of the POA. Furthermore, at all times Malaysia shared Singapore's belief that DC would be payable in respect of the three parcels of land.

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69 Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (**Exhibit S-16/Tab C-22**).

70 Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (**Exhibit S-17/Tab C-23**).

(ii) Malaysia's submissions in outline

115. The railway lands were of considerable political, economic and practical importance to Malaysia. At the same time they were a source of controversy and inconvenience to Singapore. The railway cut Singapore in half and was an impediment to development. The object and purpose of the POA was to resolve this situation by providing an inducement to Malaysia to give up the MRA lands. Had M-S been required to pay DC the inducement would have been inadequate.

116. Prime Minister Lee Kuan Yew's reference to development charges at the dinner on 27 June 1990 had no relevance to the very different agreement that was subsequently embodied in the POA.

117. The POA specified in detail the use that was to be made of the three parcels of land once they had been realienated by Singapore. Singapore's obligation under the POA was to enable the parcels to be used for those purposes. It was thus the POA itself which conferred permission on M-S to use the parcels for the purposes set out in the annexes to the POA. It would have been contrary to Singapore's obligations under the POA to impose a municipal law obligation on M-S to pay DC as a precondition to obtaining permission to use the parcels in this way. However, no such obligation would have arisen at municipal law. The value of the three parcels would have been enhanced by the agreement of Singapore that they could be developed in accordance with the annexes to the POA, not by the subsequent grant of planning permission, so there would have been no basis for imposing DC. Alternatively M-S would have been exempt from the obligation to pay DC under the practice that applied to land sales by the Singapore Government on terms that the land would be used for a specified purpose.

(iii) The value to the Parties of the railway lands

118. The value to the Parties of the railway lands is an important aspect of the context of the POA. This is because, as we explain below, the return of the railway lands to Singapore without charge was the consideration provided by Malaysia for the obligations undertaken by Singapore under the POA.

119. Malaysia did not persuade us that the operation of that part of the MRA railway that ran through Singapore had significant economic benefit to Malaysia. It is common ground that the railway as a whole, including the greater section that ran the length of Malaysia, was running at a loss. Malaysia sought to deal with this at paragraphs 69 to 72 of its Counter-Memorial. It relied on a press statement by the Malaysian Transport Minister on 23 April 1991 that the railway was "invaluable" because it "facilitated the transport of goods and passengers", contributing "much-

needed revenue". But the Counter-Memorial went on to concede the overall unprofitability of the railway, commenting that Singapore had adduced no evidence on the operation of the Singapore line, considered separately. It went on to state, however, that financial performance was not necessarily the primary rationale for "the construction and maintenance of national railway systems". Passenger and freight railway networks were "strategic assets" that had "inherent economic, social and political value, independent of the commercial performance of the railway operators".

120. We can understand a State operating a railway at a loss within its own borders for social reasons, but not on the territory of another State. There were, however, clearly political considerations in play. Evidence was adduced of the public reaction to the POA that made it clear that the Malaysian public considered the railway lands Malaysian property, not to be lightly handed over to Singapore, notwithstanding the restricted use that Malaysia was permitted to make of most of the lands.

121. Thus, in the eyes of Malaysia the railway lands had a much greater value than the amount of the payments to which Malaysia would be entitled if it relinquished the lands to Singapore. As to this, Malaysia devoted paragraphs 56 to 68 of its Counter-Memorial to an analysis of the different titles and restrictions on the railway lands in support of the submission that it was not right to suggest that all the lands held by the MRA in Singapore were held under titles that restricted their use to railway purposes. Malaysia's counsel were, however, unable to provide us with even a "ballpark" figure of the compensation to which Malaysia would have been entitled had it handed back all the railway lands to Singapore – sometimes described as "resumption cost". Lord Goldsmith for Singapore submitted that it would have been less than the then current land value on the basis of railway usage and this was not challenged. That is not to say that the resumption cost can be treated as having been insignificant.

122. So far as the value to Singapore of the railway lands that were to be returned under the POA is concerned, Malaysia regaled us with a slide show that seemed designed to show us just how attractive some of the lands appeared. Singapore asserted at the time of the negotiation of the POA that the only parcels of railway land that would be capable of independent development were the three parcels that were to be realienated to M-S, although Malaysia challenged this. And Singapore submitted that it was quite wrong to speak of the railway "cutting Singapore in half" as Malaysia had described it. Nonetheless, we have no doubt that recovery of the railway lands had an attraction to Singapore that went beyond facilitating the move of the CIQ checkpoint to Woodlands. If the railway lands were only to be used for amenity purposes, their recovery would have been an attractive prospect. In the event, by the time that the POA was ultimately implemented, Singapore had urgent need of at least the land of the Jurong Spur "in

order to proceed with critical business park and residential development projects"[71] and other railway lands were required to facilitate road development.

123. Malaysia and Singapore were seeking to reach an agreement that could be described as a "win-win" situation, that is one that would leave each party better off than before. The evidence of the value that the railway lands had for each party does not enable us to conclude that the achievement of a win-win situation depended on whether or not DC had to be paid by M-S. On either footing the POA had attractions for both parties. As Tan Sri Nor conceded to Lord Goldsmith, even if DC was payable the POA was "a sweet deal" for Malaysia[72]. Equally we believe that the deal will have proved advantageous for Singapore even if we conclude that DC is not payable.

(iv) Prime Minister Lee Kuan Yew's dinner

124. Prime Minister Lee Kuan Yew's dinner with Minister Daim on 27 June 1990 is relevant inasmuch as it was the starting point of the negotiations that led up to the POA. His note of this dinner[73] begins by recording that the meeting lasted from 7.05 to 8.15. The note records that a lot of different matters were discussed in this period, including some that have been redacted from the note. Paragraph 8 relates to the railway lands. It reads as follows:

> 8. I then made him an attractive proposition which I said was thinking aloud. The Sultan of Johor had suggested during the Asian Aerospace show in February that our MRT should go into Johor Bahru. The Sultan probably had a piece of land in mind and was not thinking of Johor Bahru Railway Station. But this could be adjusted and a deal beneficial for all could be arranged. The station at Tanjong Pagar, we could allow them to redevelop as a shopping complex or an office block with special low development charges. This would give them a long term stake in Singapore which yields returns every month. Then we can rip up the railway line but we use the line from Woodlands to Johor Bahru for the MRT. This meant that Johor will become even more of an extension of Singapore and vice versa. It would be convenient for Singapore people here to buy second homes in Johor and commute to Singapore. Johoreans can come to Singapore easily and cheaply. The two will become even more closely linked. Was he prepared for that? He said there was no trouble allowing Johor to work closely together with us, but he would have to think it over this proposition about railway land.

125. Singapore placed in evidence a witness statement of Mr Lee Kuan Yew dated 24 June 2013. In this he gave the following explanation of his use of the phrase "special low development charges":

> 8. When I used the phrase "special low" to describe the development charges, I had in mind that development charges (calculated at 50% of enhancement in land value resulting

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[71] Note dated 5 January 2009 from the Singapore Ministry of Foreign Affairs to the High Commission of Malaysia in Singapore (**Exhibit M-20/Tab C-76**).

[72] Transcript p. 352.

[73] Note dated 28 June 1990 from Singapore Prime Minister Lee Kuan Yew (with redactions) (**Exhibit S-12/Tab C-14**).

> from a proposed development) would be much lower than differential land premium (which would be calculated at 100% of the value enhancement). Differential land premium is a premium which the State is entitled to charge as a condition for waiving or varying restrictive covenants contained in State leases. I saw the offer to levy development charges instead of differential land premium as a concession which the Singapore Government could be prepared to grant to MRA.

126. This account accords with the evidence of Mr Suppiah Dhanabalan, who was then the Minister for National Development ("**Minister Dhanabalan**"), in the following paragraphs from his statement:

> 11. I recall that one of the issues we had to consider was whether to impose Differential Premium or DC on the POA land parcels. A conscious decision was made that DC rather than Differential Premium would be imposed as this would be an attractive incentive to Malaysia given the more favourable rate that was applicable to the former than the latter (see above at [7]). But at no stage was it ever suggested or considered that DC would not be payable in respect of the POA land parcels which would be redeveloped.
>
> [. . .]
>
> 14. I have reviewed the witness statement affirmed by Mr Lee on 24 June 2013, and his explanation of the phrase "special low" being a reference to DC rather than Differential Premium accords with my recollection of how I understood it at the time. The imposition of DC (calculated at 50% of the land value enhancement) was a "special low" concession when compared to the imposition of Differential Premium (calculated at 100% of the land value enhancement), which would otherwise have been imposed for the removal of the restrictive covenants in the leases for these railway lands. As I have noted above, this was something that we discussed at that time and decided that we would accord Malaysia the concession of imposing DC rather than Differential Premium. I can also confirm that at no time throughout these discussions was any other concessionary rate ever discussed by Singapore.

A month after the dinner Minister Dhanabalan sent Prime Minister Lee Kuan Yew a note which detailed the various parcels proposed for redevelopment with, in each case, a) the market value in 1989 based on its present zoning and use, b) its potential value based on its proposed development use and c) the DC payable on its enhancement in value, i.e. the difference between a) and b).

127. Malaysia put in evidence a witness statement from Tun Daim Zainuddin. Not surprisingly this states at paragraph 4 that Tun Daim did not remember very much about this discussion, which took place nearly 25 years ago. Prime Minister Lee Kuan Yew made a number of different proposals. According to Tun Daim: "We may have talked about the railway land, but we also discussed a wide range of other topics". Tun Daim's statement goes on to make the point that Prime Minister Lee Kuan Yew was discussing a very different proposal from the deal that was finally concluded under the POA.

128. It is Singapore's case that Prime Minister Lee Kuan Yew's reference to "special low development charges" was the first indication to Malaysia that DC would be payable. Singapore's Memorial states, however, that "the phrase '*special low development charges*'

requires some clarification" and proceeds to give the explanation proffered by Mr Lee Kuan Yew[74]. Malaysia in its Counter-Memorial at paragraph 77 suggest that this "clarification" does not make sense and that, *inter alia*, it is unclear how Singapore could have collected DC from Malaysia in place of Differential Premium.

129. The following questions arise in relation to the statements of Mr Lee Kuan Yew and Mr Dhanabalan as to what the former intended to convey by his use of the phrase "special low development charges":

(i) Is this evidence admissible as to the meaning of those words?

(ii) If so, should those words have led Malaysia to understand that M-S would have to pay DC under the terms of the POA?

130. As to admissibility, Professor Lowe submitted[75]:

> If I may in passing respond briefly to the question about subjective intentions, I'm afraid international law is not terribly refined as far as rules of evidence come, and it generally tends to admit practically everything. Our position in international law in the absence of a rule excluding it – and there is no evidence of a rule excluding it – it is admissible. And it is then for the Tribunal to attach to it what weight they see fit.

131. We accept this submission as to admissibility. It is, however, far from clear that the words used by Prime Minister Lee Kuan Yew would have conveyed the meaning he intended them to bear.

132. Assume, however, that Prime Minister Lee Kuan Yew's words bore the meaning that he intended. We agree with Tun Daim's comment that the scheme of the POA was very different from that which Prime Minister Lee Kuan Yew intended to propose at the dinner. This proposal was that Malaysia should be permitted to develop for its own benefit the railway land at Keppel but that, instead of having to pay Differential Premium in the amount of 100% of the land's enhancement in value, Malaysia would only have to pay DC in the amount of 50% of this sum. Mr Dhanabalan confirms that the intention was to allow Malaysia to pay DC at 50% rather than Differential Premium at 100%[76]. Subsequently Prime Minister Lee Kuan Yew made a very different proposal. This was a joint venture under which, through their equal shareholdings in M-S, Malaysia and Singapore would share the benefit of the enhancement in value of the land. It would not have been compatible with Prime Minister Lee Kuan Yew's stated intention that Malaysia should enjoy 50% of the increase in value of the railway land at Keppel (i) to make Malaysia share that benefit with Singapore under the joint venture on a 50/50 basis but (ii) also

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74 Singapore's Memorial, para 31.

75 Transcript, p 749.

76 *See* Witness Statement by Mr Suppiah Dhanabalan at para 14.

to impose a 50% tax on the joint venture in respect of the increase in value. The natural inference to draw was that Prime Minister Lee Kuan Yew had decided that Singapore and Malaysia should share 50/50 the benefit of the increase in value of the railway land at Keppel through the medium of a joint venture company.

133. For these reasons we do not consider that Prime Minister Lee Kuan Yew's reference to "special low development charges" in the very different context in which it was made should have led Malaysia to understand that M-S would have to pay DC under the terms of the POA.

(v) The nature of the transaction

134. The Parties are fundamentally, and in our view critically, at odds as to the true nature of the transaction that was the subject of the POA. It is Singapore's case that the POA, as originating in the Woodlands Checkpoint proposal and refined in the draft POA sent to Minister Daim on 24 November 1990, embraced two separate transactions. Under the first, the MRA was to return to Singapore all the railway lands for which Singapore was to pay full compensation "on the terms stipulated in the law and titles". This meant that the return of the railway lands would be "financially neutral" for Malaysia. It would receive the compensation to which it was entitled under the law. Lord Goldsmith described as Singapore's "key proposition" that Malaysia would be fully compensated by payment of the resumption costs for the return of the railway lands[77]. The second transaction was one in which M-S would purchase from Singapore the three parcels of land "at resumption cost", i.e. for the same amount as the compensation paid for those land parcels by the Singapore Government[78]. "This would at most be existing-use value of the land parcels . . . a consistent feature of the deal was that payment by the recipient company for the vesting of the Keppel, Kranji and Woodland parcels would be at existing-use value and not the full development value"[79]. The surrender of the remainder of the railway lands was not part of the consideration given for the vesting of the three parcels, because that had been paid for in full under the first transaction. Thus Singapore submits that the very modest consideration to be paid by M-S was only consistent with M-S receiving land whose value was restricted because it could only be used for railway purposes.

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[77] Transcript, p 156

[78] Transcript, pp 76-78.

[79] Singapore's Memorial, paras 153, 154; transcript, pp 76-79.

135. Singapore then asserts "[Finance] Minister Daim's merging of the two parts of the deal on 26 November into an exchange of land had nothing to do with DC and did not affect the requirement to pay DC"[80].

136. Malaysia's case has always been that the governing obligations lay in the terms of the POA, which was a treaty, the interpretation of which was governed by international law. The treaty obliged Singapore to transfer the three parcels to M-S to be developed in accordance with the Annexes to the POA. The consideration given by Malaysia for this obligation was the return to Singapore of all the other railway lands. There was only one transaction, which was an exchange of land.

137. We are in no doubt that Malaysia's interpretation of the nature of the transaction is to be preferred to that of Singapore. There are two linked fallacies in Singapore's submissions. The first is that the compensation that Malaysia would have received had the POA proceeded in accordance with the draft sent by Prime Minister Lee Kuan Yew under cover of his letter of 24 November 1990[81] would have been adequate compensation for the surrender of the railway lands. As Professor Crawford put it in his closing submissions[82]:

> . . . Malaysia would not have been prepared simply to terminate the railway, surrender the lands held under leases, and take the compensation available. It would have been free to do so at any time and Singapore would have rejoiced.

138. The second fallacy is that the "resumption cost" to be paid by M-S for the three parcels equated with the value of the lands in question for the pre-existing railway use, thus demonstrating that M-S received the lands subject to that restriction. In fact, as Lord Goldsmith accepted in discussion with the Tribunal, the resumption cost did not represent the value of the land for railway use[83]. Singapore's proposal that M-S would pay the resumption costs for the three parcels would appear to have been designed simply to ensure that the transfer of these lands first to Singapore and then on to M-S would not involve any cost to Singapore.

139. It was Singapore's case that the amendment proposed by Minister Daim[84] and accepted by Prime Minister Lee Kuan Yew "did not alter the nature of the deal"[85]. We agree, but this was only because neither the compensation payable to Malaysia by way of resumption cost nor the

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80 Singapore's Memorial, para 154.

81 Letter dated 24 November 1990 from Singapore Prime Minister Lee Kuan Yew to Malaysian Finance Minister Daim Zainuddin (**Exhibit S-16/Tab C-22**).

82 Transcript, p 532.

83 Transcript, pp 77, 650.

84 Letter dated 26 November 1990 from Malaysian Finance Minister Daim Zainuddin to Singapore Prime Minister Lee Kuan Yew (**Exhibit S-17/Tab C-23**).

85 Singapore's Reply, para 113; Singapore's Skeleton Opening, para 34.

payment by M-S to Singapore of that part of the resumption cost that related to the three parcels of land realienated to M-S was treated by the Parties as significant. As Minister Daim stated, the transaction was "an exchange of lands". Lord Goldsmith's submission that the consideration to be given for the transfer of the three POA parcels to M-S reflected no more than their value as railway lands is not tenable.

(vi) Singapore's municipal law

140. Before turning to the interpretation of the POA, it is convenient to address the issue between the Parties as to the requirements of Singapore's municipal law.

141. It is Singapore's case that, had M-S opted to receive from Singapore the initial three parcels of land and proceeded to develop these, M-S would have had to pay DC as a condition of obtaining planning permission. This was what the provisions of Singapore municipal law specifically required. M-S would have received the lands from Singapore subject to the restriction that they could only be used for railway purposes. Under municipal law, planning permission was required in order to lift this restriction, and DC was payable in respect of the enhancement in value of the land that would result from the grant of planning permission.

142. It is Malaysia's case that M-S would have been under no obligation under municipal law to pay DC had it opted to receive and develop the three POA parcels. This was because the POA satisfied the conditions for exemption from the obligation to pay DC recognised by Rule 4 or alternatively because Rule 4 applied by analogy.

143. The express exemption conferred by Rule 4 of the 1996 Planning (Development Charge – Exemption) Rules applied in respect of: "any development land . . . *sold* . . . by the Government." The Woodlands Checkpoint proposal initially made by Prime Minister Lee Kuan Yew would have involved a sale by Singapore to M-S of the relevant lands. Thus it would have brought the transactions within the letter of the exemption provisions. However, as we have found above, the true nature of the transaction proposed was not a simple sale by Singapore to M-S. It was not even a simple land swap. It was a transfer of land to M-S pursuant to an inter-State treaty, and the consideration for the transfer was not provided by M-S but by Malaysia. It has always been common ground that the POA was a unique transaction. For this reason the *alienation* by Singapore of the three POA parcels to M-S would not have brought them fairly and squarely within the exemption for which Rule 4 of the 1996 Rules provided nor within the pre-existing practice to which Rule 4 gave effect. Indeed Mr Chapman for Malaysia accepted that the transaction "falls outside the usual structures of municipal law"[86].

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[86] Transcript, p 579.

144. Malaysia's submission that the Rule 4 exemption would have applied by analogy merits more detailed examination. The argument underlying that submission is, as we see it, as follows. Rule 4 recognises that DC will not fall to be paid when land has been transferred by the Singapore Government pursuant to a contract under which the development for which the land is sold is specified and the price paid represents the full development value of the land. In such circumstances it is an implicit term of the contract that DC will not be payable. The POA was not a contract but a treaty. Under that treaty the three POA parcels were to be transferred to M-S for the purpose of specified developments. Under that treaty Malaysia was to provide full consideration for the development values of those parcels. In these circumstances it was an implicit term of the treaty that DC would not be payable. Under municipal law effect should be given to the treaty and DC should not be charged.

145. This argument presupposes that Malaysia's interpretation of the treaty is correct. In that event the position under domestic law will become irrelevant. This is because the Parties are agreed that if, on true interpretation of the POA, DC would not fall to be paid, the Submission Question falls to be answered in the negative regardless of the position under Singapore municipal law. We are inclined to think, however, that the "competent authority" should give effect to Singapore's obligations under international law when ruling whether or not DC falls to be paid on an application for planning permission. Whether we are correct about this is, however, academic. The crucial question remains whether, under the terms of the POA, DC would have fallen to be paid by M-S, had the company received the three POA parcels and proceeded to develop these. We turn to consider that question.

(vii) The ordinary meaning of the terms of the POA

146. Neither the context nor the object and purpose of the POA afford assistance in resolving the issue that has arisen between the Parties as to its interpretation. The Parties have identified the object of the POA in different terms, but both recognise that it involved the grant to Malaysia of an interest in a joint venture with Singapore in exchange for the release by Malaysia to Singapore of the remaining railway lands. The value of the joint venture depends upon whether or not DC was payable by the joint venture company, M-S. The object of the POA affords no assistance in resolving that issue. The issue falls to be resolved by giving the terms of the POA the interpretation that both accords with the ordinary meaning of the words used and produces a result that is commercially sensible.

147. Dealing first with the words used, Singapore submits that the POA dealt specifically with the obligation to pay DC. Both in its original draft and in its amended form, the POA provided that "payment for the development costs" of the properties would be shared in the ratio 60:40. It is

Singapore's case that this phrase could not have been referring simply to the costs of construction. It would have gone without saying that the Parties would have been obliged to share these. "Development costs" must have encompassed something broader. DC was one of the significant costs associated with the development of the land and had been raised in the negotiations[87]. It was one of the "development costs" to which clause 5 of the POA referred.

148. The reference to "the negotiations" is a reference to Prime Minister Lee Kuan Yew's dinner. We have already explained why his reference at this dinner to "low development charges" lends no support to Singapore's case on the interpretation of the POA. Nor does the phrase "development costs" in clause 5 of the POA throw any light on whether or not M-S would have to pay DC. As we see it, clause 5 imposed an express duty on the Parties to provide M-S with the capital necessary to pay whatever costs were involved in the development of the initial three parcels. The phrase "development costs" in clause 5 was capable of embracing DC but it did not necessarily do so.

149. For these reasons, we reject Singapore's submission that the wording of the POA made express provision for the payment by M-S of DC. The issue is whether it was implicit from the provisions of the POA that M-S would have to pay DC, or implicit that M-S would not.

150. Singapore's case is that it followed inexorably from the terms of the POA that M-S would have to pay DC. This was because the POA made provision for M-S to carry out the developments specified in the Annexes to the POA and, in order to carry out those developments, M-S would have to obtain planning permission. Under municipal law, M-S would have to pay DC as a precondition to obtaining planning permission. In its Memorial[88] Singapore set out a long list of costs that M-S in fact bore in relation to the development of the lands ultimately received at Marina South and Ophir-Rochor. These included Goods and Services Tax, stamp duty and monthly property taxes, all imposed under Singapore's municipal law. These exemplified, in Singapore's submission, the principle that M-S was subject to all the normal incidents of municipal law, including the obligation to pay DC.

151. Malaysia's case is that the express provision for carrying out the developments specified in the POA was inconsistent with a requirement that M-S should pay DC. The provision in the treaty between Singapore and Malaysia obliged Singapore to permit M-S to carry out the specified developments. This was not a right that M-S could be required to pay for. It was a right to which it was entitled by the terms of the POA. If M-S exercised the option to receive and develop the initial three parcels it would receive lands that had the benefit of Singapore's obligations under

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87 Singapore's Memorial, para 162.

88 Singapore's Memorial, para 147 and Annex B.

the POA. The lands that it received would already have the value attributable to the right to carry out the specified developments. The formal grant of planning permission would not enhance the value of the lands. Hence, there could be no obligation to pay DC as a condition of obtaining planning permission.

152. We have concluded that Malaysia's submissions are to be preferred to those of Singapore. DC is not to be compared to the other taxes and charges that M-S had to pay to develop the lands ultimately received at Marina South and Ophir-Rochor. DC is not a tax simply designed to raise revenue. It is a special tax designed to ensure that the State shares in the increase in value that flows from the grant of planning permission when the grant releases land from prior restraints. DC is not payable when the State sells land for the purpose of development specified in the contract of sale. The State receives the benefit of the increase in value at the point of sale and not as a result of the subsequent grant of planning permission.

153. The reasons that underlie the exemption from liability to DC recognised by Rule 4 apply equally in our view to the unique transaction that was the subject of the POA. There is a close analogy between the POA and a sale by Singapore of land for a specified development. Under a sale of land by Singapore for a specified development the price reflects the value of the land with permission to develop it for that purpose. Under the POA Singapore agreed to alienate lands to M-S for specified developments. Under the POA Singapore agreed that Malaysia should have a 60% interest in M-S. The consideration that Malaysia provided for this interest was the release to Singapore of the remaining railway lands. Just as in a sale of land for a specified development, under the POA Singapore agreed with Malaysia that the lands could be used for the specified developments. Indeed, under the POA the Parties agreed not merely that the lands *could* be used for the specified developments. They agreed that they *should* be used for them. Clause 5 of the POA required the Parties jointly to fund the developments. The natural meaning of the POA, together with its Annexes, was that Malaysia by releasing the balance of the railway lands to Singapore was providing consideration both for the receipt by M-S of the lands and for the permission to develop them. The terms of the POA unlocked the development value of the lands.

154. Before the POA was agreed, Malaysia held the railway lands on terms that prohibited their use for other than railway purposes. Furthermore, as noted in paragraph 67 above, Singapore informed Malaysia in January 1990 that it was not its current policy to allow any development on disused MRA land. Lord Goldsmith[89] said in argument that by entering into the POA Singapore agreed to abandon that policy which, so long as it subsisted, blocked development of

[89] Transcript, pp 633-636.

the railway lands. So far as it goes, that proposition is correct. The corollary is that for planning permission to have been withheld on the basis of that policy would have been inconsistent with Singapore's obligations under the POA. However, in the POA Singapore agreed to more than that. It agreed to undertake, in joint venture with Malaysia, through a corporate vehicle, development of the lands for certain purposes and in accordance with certain plans attached to the POA. The corollary is that for permission for development for such purposes and in accordance with such plans to have been withheld would also have been inconsistent with Singapore's obligations under the POA.

155. Under the POA Malaysia was to return all the railway lands, including the initial three parcels, to Singapore. Singapore was then to transfer freehold title in the initial parcels to M-S for the purpose of the specified developments, which Singapore and Malaysia had agreed to fund. Singapore was not agreeing to lift an embargo on the development of lands held by Malaysia. It was agreeing to transfer lands that it would own to M-S for the purpose of specified developments. On Singapore's case the Government would have vested the lands in M-S for the purpose of the specified developments but on terms that they could only be used for railway purposes unless and until M-S obtained the Government's permission to carry out the specified developments. This makes no sense. Had Singapore sold the three initial parcels to a company unconnected with Malaysia and Singapore for the purpose of specified development, that company would have obtained planning permission without being required to pay DC. The practice recognised by Rule 4 would have applied. It seems to us that the principles underlying Rule 4 would have applied *a fortiori* when the lands were being transferred to a company jointly owned by Malaysia and Singapore for the purpose of a joint venture that Malaysia and Singapore had agreed to underwrite.

156. One reason why DC does not apply where Singapore sells land for a specified development is because, as vendor, Singapore is in a position to ensure that the purchaser pays for the value that the specified development gives to the land. As a party to the POA Singapore was equally in a position to negotiate terms that balanced the benefit that Singapore would obtain from the return of the majority of the railway lands against the benefit that Malaysia would receive, through M-S, in the value that the specified developments would give to the parcels that were to be vested in M-S. This could be done by adjusting the size or numbers of the parcels, of by adjusting the relative shareholdings of the two Parties in M-S. The natural inference was that the POA did just this.

157. Ultimately the natural meaning of the POA turns upon the nature of the transaction, which we have analysed above. The transaction was a single exchange of lands in which the release of the railway lands by Malaysia was full consideration for the right of M-S to receive and develop the

three POA parcels. The POA required the Parties to fund the developments that it provided that M-S should carry out. In these circumstances it went without saying that M-S would not have to pay DC in order to obtain permission to carry out these very developments.

158. Professor Crawford reinforced Malaysia's case by two further arguments, raised for the first time on the third day of the hearing[90], but none the worse for that. Under Singapore's interpretation of the POA, had M-S opted to receive the initial three parcels, their value would have been relatively modest. That is because the use of the lands would have been restricted to use for railway purposes. Before the land could be developed DC would have had to be paid[91]. Under Malaysia's interpretation of the POA if M-S had opted to receive the three POA parcels their value would have reflected the fact that they could be developed without payment of DC. Article 7 of the POA provided:

> in exchange for the MRA land at Keppel, a plot of land ***of equivalent value*** in Marina South will be offered to M-S Pte Ltd so that a prestigious building can be developed on the Marina site. . . . If the land offered to M-S Pte Ltd is, in the opinion of M-S Pte Ltd not suitable, then alternative sites in Marina South ***of equivalent value*** shall be offered to M-S Pte Ltd. Examples of the kind of prestigious site ***of equivalent value*** to MRA Keppel land are attached in Plan 2 and Plan 3 (our emphasis).

159. It is common ground that the examples of land "of equivalent value" at Marina South in Plans 2 and 3 were lands of equivalent value to the Keppel parcel with full development rights for the use proposed in Annex 1. Professor Crawford submitted[92] that this clearly indicated that under the POA the Keppel land would have vested in M-S with full development rights. Lord Goldsmith's answer to this was that in order to be able to exercise the swap option M-S would first have had to obtain planning permission to develop the Keppel parcel, paying DC in order to do so, or to agree contractually to pay the equivalent of DC in order to exercise the swap option[93].

160. Lord Goldsmith's interpretation requires the implication of a significant proviso to the swap option in the POA. We can see no warrant for this. The swap option was clearly based on the premise that the Keppel land would have full development value. We consider that Professor Crawford was correct to submit that the swap option was "flatly inconsistent with Singapore's argument that the POA lands were to be vested in M-S at their existing use so that DC would have to be paid".

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90 Transcript, pp 538-543.

91 Transcript, p 167.

92 Transcript, p 542.

93 Transcript, pp 80, 81, 607.

161. Professor Crawford's second submission also related to a swap option. Ultimately Malaysia opted for M-S to receive lands in Marina South and Ophir-Rochor rather than the railway lands. It obtained planning permission for the lands it received without payment of DC. Lord Goldsmith submitted, on instructions, that this was because those lands were reclaimed from the sea, so that they were not subject to any zoning restriction[94]. Professor Crawford submitted[95] that this should have resulted in DC being payable on the full value of the lands. He suggested that the reason why no DC had been payable was because the policy underlying Rule 4 had been treated as applicable to a swap transaction. We think that there is force in this submission. The Singapore Government was selling off plots of land at Marina South that had been reclaimed from the sea in the same way that it had sold off plots of land cleared of vegetation under the GLS programme. The purchasers in each case paid the full development value of the land and for this reason were not required to pay DC. M-S was treated in the same way.

162. For these reasons, we have reached the conclusion that, on the ordinary meaning of the POA, if M-S had opted to receive the three initial parcels, it would have been entitled to carry out the developments specified in the Annexes to the POA without payment of DC.

(viii) The subjective intention of the Parties

163. There is no doubt that under international law evidence of a common intention or understanding of the Parties to a treaty can assist in its interpretation. Malaysia in its Counter-Memorial at paragraph 194 cited the following statement of the International Law Commission on the draft Articles on the Law of Treaties[96]:

> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.

Evidence of practice that demonstrates a common understanding of the Parties to a treaty contrasts with evidence of conflicting understanding or intention of those involved in its negotiation. The latter does not assist in the interpretation of the treaty. For this reason we have derived no assistance from the evidence of Mr Lee Kuan Yew and Tun Daim as to their understandings when negotiating the POA. The former stated[97]:

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[94] Transcript, p 624.

[95] Transcript, p 544.

[96] Draft Articles on the Law of Treaties, Introductory Commentary to draft Articles 27 and 28, paragraph 15; in International Law Commission's 1966 Commentary to the Draft Articles on the law of Treaties "Report of the ILC on the second part of its seventeenth session and on its eighteenth session", reproduced in *Yearbook of the ILC 1966*, vol. II(1), p 169, at p 221.

[97] Witness Statement by Mr Lee Kuan Yew, para 5.

> I never doubted that development charge would be payable for the development of the land parcels under the agreement. The parcels were in Singapore and their development would necessarily be subject to Singapore law.

The latter stated[98]:

> The question of DC did not arise on this arrangement. The whole point of the POA was to transfer land to M-S Pte Ltd which could be developed for commercial purposes. Provided that M-S Pte Ltd did not exceed the prescribed use and plot ratios set out in the POA, it would not pay DC.

This conflict of evidence underlines, rather than assists, the issue of interpretation that we have to resolve.

(ix) The subsequent conduct of the Parties

164. In Appendix 1 to its Counter-Memorial[99] Malaysia submitted that it was revealing that no mention was made of DC in the negotiations that took place after the conclusion of the POA between representatives of Singapore and Malaysia with a view to the implementation of the POA. These included the drawing up by Singapore of a draft MOU[100] setting out the steps to be taken to implement the POA, including financing requirements. Neither in the draft MOU nor in any other document was there any reference to the need to fund the payment of DC, or indeed any reference to DC at all. We agree with Malaysia that if it was the common understanding that the POA imposed an obligation on M-S to pay DC in order to proceed with the proposed developments it is surprising that no reference was made to DC by those responsible for implementing the POA.

165. Singapore contended that, in accordance with the principles of treaty interpretation, the conduct of the Parties in and after 2008 provides "valuable evidence of the Parties' intention and understanding"[101] in relation to the POA. In support of this submission Singapore invoked the decision of the Court of Arbitration in the *Beagle Channel* Arbitration[102].

166. Malaysia denies that the subsequent conduct of the Parties constituted "any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its

98 Witness Statement of Tun Daim Zainuddin, para 5(b).

99 Malaysia's Counter-Memorial, Appendix 1, paras 14-16.

100 Letter dated 9 November 1992 from the Singapore Ministry of National Development to Keretapi Tanah Melayu Berhad (**Exhibit S-25/Tab C-34**).

101 Singapore's Reply, para 159.

102 *Beagle Channel Arbitration (Argentina v. Chile)* (1977) 52 ILR 93 (**Authority ML-19/Tab G-5**).

provisions" or "practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation"[103].

167. It is important to recognise that this part of the debate is about drawing inferences from the conduct of the Parties as to the interpretation of an earlier treaty. Thus Article 31 of the Vienna Convention states that there shall be "taken into account" when interpreting a treaty "any subsequent agreement between the parties" regarding its interpretation. The agreement referred to is consensus, not a formal agreement that itself has the status of a treaty. Such an agreement would plainly be conclusive.

168. The *Beagle Channel* arbitration involved a territorial dispute in relation to which there were relevant acts exercising jurisdiction over 150 years. Those acts bore little relation to the conduct relied upon by Singapore in the present case, which we are about to consider in detail. However, in the course of its lengthy award the Court of Arbitration made some comments about "the temporal or chronological factor" in relation to the significance of maps illustrating a territorial settlement or disputed boundary that are of relevance in the present case[104]:

> Where there is controversy, the implications of any given map can be correctly assessed only if account is taken of the date of its publication, —and also of the circumstances of the time. Thus, maps appearing contemporaneously with the territorial settlement or within a relatively short period after it will, other things being equal, have greater probative value than those produced later when the mists of time have obscured the landscape and the original participants have left it.

Those involved on both sides in the negotiations in and after 2008 were dealing with the implementation of a treaty of a commercial nature, concluded nearly 20 years earlier, in which they had had no involvement. True it is that Singapore's stance on the meaning of the POA was informed by a comment made by Minister Mentor Lee Kuan Yew as to the effect of the POA. But having considered the evidence of the conduct of the Malaysian representatives in and after 2008 we do not find that this carries any probative inference as to the intentions of those representing Malaysia when the POA was concluded in 1990. They had not been involved in the conclusion of the POA. The original participants had "left the landscape". For the reasons that we shall give when analysing events in and after 2008, the actions and reactions of the Malaysian participants carried no inferences as to the intention of those who concluded the POA in 1990.

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103 Malaysia's Rejoinder, paras 126-149.

104 *Beagle Channel Arbitration (Argentina v. Chile)* (1977) 52 ILR 93 at 206, para 142(3) (**Authority ML-19/Tab G-5**).

169. It is for these reasons that we have found the subsequent conduct of the Parties in and after 2008 of no assistance in relation to the interpretation of the POA as at the time that it was concluded in 1990.

(x) Conclusions

170. Applying the ordinary meaning of the POA, as originally agreed, in its context and having regard to its object and purpose, M-S would not have been liable to pay DC had it obtained and developed the three POA parcels. The nature of the transaction was analogous in principle to a sale by Singapore of land for a specified development. Consideration would have been provided for the full development values of the parcels as specified in the Annexes to the POA. The POA anticipated and required that these developments should be carried out by M-S. It would have been contrary to the POA for M-S to have been required to pay DC for permission to carry out those developments. It is significant that in the negotiations that followed Prime Minister Lee Kuan Yew's dinner and led to the conclusion of the POA, and in the steps taken to implement it after its conclusion, the requirement to pay DC was never once mentioned. This is in marked contrast to the negotiations that led to the amendment of the POA, to which we now turn.

Q. THE EFFECT OF THE CONDUCT OF MALAYSIA IN AND AFTER 2008

171. In the course of the negotiations leading up to the 24 May Joint Statement, correspondence from Singapore asserted repeatedly that M-S would have to pay DC if it opted to develop the three POA parcels. Malaysia did not challenge these assertions. It is Singapore's case that Malaysia's failure to do so now precludes Malaysia from successfully challenging the obligation on the part of M-S to pay DC had M-S opted to develop the three initial parcels. This part of Singapore's case is not presaged by the terms of the Submission Agreement and its Annex nor by Singapore's Memorial, though the seeds of it are to be found in the latter's paragraphs 178 and 184:

> 178. Although M-S Pte Ltd's liability to pay DC is not dependent on the state of Malaysia's knowledge, it is clear from the chronology recited in Chapter II above that Malaysia was, in any event, aware of M-S Pte Ltd's liability to pay DC throughout the entire span of time from 1990 to the point when the issue was agreed to be referred to arbitration.
>
> [. . .]
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> 184. Finally, the fact that DC would have to be paid was also specifically highlighted to Malaysia, and acknowledged by it, on various occasions prior to the conclusion of the 24 May 2010 Agreement and even beyond that. Malaysia even made specific enquires to Singapore concerning DC. These occasions include meetings between the officials of both countries, meetings between the Ministers and Prime Ministers of both countries, and even the sending of official Third Person Notes between the two Governments – as detailed at paragraphs 77 to 113 of this Memorial. Malaysia was thus, in all the circumstances, fully aware that DC would have to be paid for the

development of the Keppel, Kranji and Woodlands parcels, as part of the agreement struck between the two countries.

172. This part of Singapore's case was first advanced in little over a page of Singapore's Reply, in the following terms:

> **(II) The 24 May 2010 Agreement was similarly concluded on the basis that DC was payable**
>
> 172. From the above paragraphs, it is clear that in the lead-up to the 24 May 2010 Agreement, there were numerous opportunities for Malaysia to object to the payment of DC. However, Malaysia did not at any time before 24 May 2010 object to any of these letters and Third Person Notes sent by Singapore (even though it had clearly studied them, and therefore knew that DC was payable). During that period, Malaysia had been careful to object to the assertions of Singapore with which it did not agree. It also knew, or would reasonably have known, of the quantum of DC involved.
>
> 173. Instead of objecting, Malaysia relied on the proposals contained in these letters and Third Person Notes (which included the statements that DC was payable) and built on them to advance its own interests in the negotiations leading up to the 24 May 2010 Agreement. In particular, it should be noted that Singapore had expressly stated in November 2008 that DC was payable for the Keppel, Kranji and Woodlands parcels, which Malaysia did not dispute.
>
> 174. Three conclusions are apposite. First, this chain of correspondence clearly indicates that both the Parties believed that DC was payable under the terms of the POA. Secondly, the chain of correspondence above constitutes a clear basis on which the 24 May 2010 Agreement was concluded (as stated in the Memorial of Singapore at paragraph 166, which Malaysia has not denied). In other words, this confirms the understanding that DC was payable under the POA deal, and in any case constituted an agreement to do so in 2010. Thirdly, this chain of correspondence reflects an unambiguous, agreed basis upon which the 24 May 2010 Agreement was concluded, and upon which Malaysia secured from Singapore significant additional benefits. To this end, Malaysia is now estopped and/or otherwise precluded from asserting that no DC is payable.

173. In its Rejoinder[105] Malaysia asserted that its silence in the period up to the 24 May Joint Statement did not amount to agreement that DC was payable. Malaysia went on[106] to describe Singapore's plea of estoppel as "inchoate" and "half-hearted".

174. It was not until Singapore's oral submissions[107] in reply, after some discussion with the Tribunal, that Singapore clarified its case on estoppel:

> the representation, whether expressly or by their conduct, was that Malaysia honestly believed that M-S Pte Ltd would pay DC for the 3+3 plots and that that would be the condition for calibrating equivalent value in the event of a swap.

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105 Malaysia's Rejoinder, paras 138-149.

106 Malaysia's Rejoinder, paras 150-154.

107 Transcript, p 739-740.

175. By this stage of the hearing the issues between the Parties in relation to Malaysia's conduct in the period up to the 24 May Joint Statement had become clearer. Singapore's case was as follows:

(i) Singapore at all times believed that DC would be payable under the POA[108].

(ii) Malaysia at all times up to the 24 May Joint Statement also believed that DC would be payable under the POA. Tan Sri Nor's evidence to the contrary was not to be accepted[109].

(iii) Alternatively, Malaysia is estopped from denying that it believed that DC would be payable under the POA.

(iv) The agreement of both Parties that DC would be payable, manifested in the course of negotiations, was evidence of the intention of the Parties at the time that the POA was originally agreed.

(v) The 24 May Joint Statement constituted a binding agreement between Malaysia and Singapore a term of which was that DC would be payable on the three POA parcels.

(vi) That agreement requires the Submission Question to be answered in the affirmative.

176. Malaysia's answer to this case is as follows:

(i) Singapore had reservations as to whether DC was payable under the POA[110].

(ii) At no time did Malaysia believe that DC would be payable under the POA.

(iii) No estoppel arises from Malaysia's conduct in the course of the negotiations.

(iv) The manner in which the Parties negotiated in 2008 did not evidence the common intention of the Parties at the time that the POA was originally negotiated.

(v) The 24 May Joint Statement constituted an agreement between the parties, but not an agreement that DC would be payable. It was one of a series of agreements made in the course of implementing the POA.

(vi) The true interpretation of the POA, both in its original and amended form, requires the Submission Question to be answered in the negative.

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[108] Transcript, pp 675-676.

[109] Transcript, pp 435, 684-697.

[110] Transcript, p 462.

We shall deal first of all with the issues of fact in relation to the beliefs of the Parties as to whether POA would be payable under the POA.

177. While a significant part of this award has been devoted to an analysis of the POA in its original form, we have reached a firm conclusion that on its true interpretation it did not require M-S to pay DC if it opted to receive the three POA parcels of land. In these circumstances the evidence that Singapore's representatives, with the benefit of legal advice, had formed a firm contrary view is perhaps surprising. However, Mr Yeo's evidence to this effect was not challenged and it accords with the stance taken by Singapore. We accept that in the negotiations that led to the 24 May Joint Statement Singapore's representatives at all times believed that the POA, in its original form, required M-S to pay DC if it opted to develop the three POA parcels.

178. At paragraph 7 of his witness statement, Tan Sri Nor said:

> . . . until Singapore first raised the issue in the negotiations [ie, the negotiations in relation to the land swap], we had not considered that this tax would be payable on POA lands. During the course of our discussions, therefore, we were simply trying to find out more information from Singapore as to why they considered the tax to be applicable and how it was calculated.

In his oral evidence he went further than this. He said that during the period up to the 24 May Joint Statement he, and other representatives of Malaysia, had considered that DC was not payable under the terms of the POA[111]. The reason that he did not communicate this view to Singapore was that things were moving fast and that Malaysia was concerned with "the big picture" and thought that DC was a lesser matter that could be dealt with later. Because Singapore did not say that liability to DC should be part of the Joint Statement they thought that the matter had been resolved[112].

179. We consider that Singapore was justified in challenging this evidence. It is not compatible with the contemporary documents, which paint a clear picture that we find more reliable. Our analysis of events up to and after the 24 May Joint Statement is as follows:

180. At about the time that negotiations in relation to the implementation of the POA were reopened by the "without prejudice" offer of 2 June 2008, the Singapore Cabinet considered, in the presence of Minister Mentor Lee Kuan Yew, whether under the POA M-S would be liable to pay DC. The Cabinet formed the firm view that M-S would be so liable.

181. We have no reason to think that before the matter was raised by Singapore, the Malaysian representatives had given any thought to DC. In 1990, negotiations on behalf of Malaysia had

[111] Transcript, pp 367-374.

[112] Transcript, p 385.

been conducted by Minister Daim. He was an experienced property developer who knew all about DC and Differential Premium but, quite reasonably, it had not occurred to him that DC would be payable under the POA[113]. The evidence shows a lack of understanding about DC on the part of Prime Minister Abdullah, Minister Anifah and Minister Nor in the latter part of the negotiations that led up to the 24 May Joint Statement and there is no reason to think that Prime Minister Najib and Minister Rais knew any more about it before they were replaced.

182. On 20 November 2008 Minister Yeo appended to the valuations of the three initial parcels the valuation footnote. This stated that M-S would need to bear the DC in respect of the three POA parcels. This assertion was made in good faith and represented the understanding of the Singapore Cabinet, but unfortunately, as we have found, it was wrong in law. The valuation footnote led Malaysia, in the TPN of 19 March to seek information about, *inter alia*, the determination of DC. Singapore sent a "Quick Guide" to DC under cover of a TPN dated 18 May 2009. This was not an easy document to follow and the TPN advised Malaysia to "engage a qualified professional to advise on the actual computation of development charges, if necessary."

183. On 22 December 2008 Prime Minister Lee Hsieng Loong wrote to Prime Minister Abdullah[114] referring to the "without-prejudice offers". He commented that Singapore had made these offers to make the implementation of the POA "politically easier for Malaysia" and that they gave Malaysia "substantially more than it would receive under the POA". There is no reason to believe that either Prime Minister doubted the accuracy of this comment.

184. It is not clear from the evidence what advice Malaysia took in relation to DC or when, but we are satisfied that at this stage Malaysia accepted the accuracy of Singapore's assertion that DC would fall to be paid under the POA. Equally, it is plain that, by the meetings that preceded the 24 May Joint Statement, Malaysia had not appreciated the fact that DC would account for 70% of the value that the development potential added to the three POA parcels. It was the discovery of this that first caused Malaysia to question Singapore's assertion that the POA required M-S to pay DC on these parcels. Up to that point Singapore was justified in concluding that Malaysia accepted that DC would be payable under the terms of the POA.

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[113] Witness Statement of Tun Daim Zainuddin, paras 5-6.

[114] Letter dated 22 December 2008 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Abdullah Badawi (**Exhibit S-56/Tab C-75**).

185. Singapore's note of the meeting between delegations from the two countries on 17 June 2010[115] records that a degree of ignorance as to the nature of the obligation to pay DC remained on the Malaysian side. As we read that note, Tan Sri Dato' Azman Mokhtar, the Managing Director of Khazanah, was himself questioning whether DC fell to be paid under the terms of the POA.

186. Minister Nor's internal notes of 21 and 22 June 2010 are the first record of Malaysia beginning to focus on the issues in relation to DC that have been canvased before us. In particular Minister Nor was asking why, if purchasers of land for development at Marina South did not have to pay DC, M-S should be under a liability to pay DC under the POA. There is no suggestion at this point, however, that Malaysia had taken legal advice. This was to come in the telephone conversation between the Prime Ministers on 15 September 2010.

187. In the light of these findings of fact, we turn to the issues of law.

(i) Did the 24 May Joint Statement, and the negotiations leading up to it, constitute an agreement that evidenced the intention of the Parties at the time the POA was negotiated in 1990?

188. We have already explained why we have not found the negotiations leading up to the 24 May Joint Statement of any assistance in interpreting the POA, as agreed in 1990.

(ii) What was the nature of the agreement contained in the 24 May Joint Statement?

189. The Parties were agreed that the 24 May Joint Statement constituted an agreement between Singapore and Malaysia. In the course of his final submissions[116] Lord Goldsmith developed an interesting argument that Mr Landau had advanced in opening[117]. The 24 May Joint Statement could be treated as a separate free-standing agreement. It was possible to base the answer to the Submission Question on the 24 May Joint Statement without considering the meaning of the POA at all. The Submission Question did not mention the POA, save through the Annex. The POA had to be referred to in order to identify the parcels of land and the proposed land uses to which the Submission Question referred, but not otherwise. We understood this submission to mean that we should interpret the 24 May Joint Statement on the basis of the negotiations that led up to it and ignore any findings that we might make as to the meaning of the original POA.

190. We reject this submission. The 24 May Joint Statement was not a separate free-standing agreement. Clause 4 makes it plain that the agreement (i) set out new terms and conditions that

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115 Delegation Report for Minister (ND)'s Meeting with Tan Sri Nor Mohamed Yakcop on Singapore's Land Swap Offer, 17 June 2010, Shangri-La Hotel, Putrajaya (with redactions) (**Exhibit S-79/Tab C-103**).

116 Transcript, pp 609-612.

117 Transcript, p 93.

supplemented the POA in order to maximise the potential of the MRA lands in Singapore and (ii) set out the steps that would be taken to move the POA, as supplemented, forward. The agreement set out in the 24 May Joint Statement was an amendment of the 1990 POA. In interpreting the terms of the 24 May Joint Statement the starting point must be the 1990 POA itself.

(iii) What is the true interpretation of the 24 May Joint Statement?

191. The task of interpreting the 24 May Joint Statement involves the same principles of interpretation that we have identified at F. above. Both the purpose and an important part of the context of the 24 May Joint Statement are summarised in paragraph 190 above.

192. The relevant terms of the 24 May Joint Statement echoed those of the 1990 POA. The 1990 POA provided in paragraphs 1, 2 and 3 for the vesting of the three POA parcels in M-S if the railway terminus were moved to Woodlands. The 24 May Joint Statement provided for the railway terminus to be moved to Woodlands and the three POA parcels, together with three additional parcels at Bukit Timah to vest in M-S. The POA provided in paragraph 7 that M-S would have the option to exchange the Keppel parcel for a parcel "of equivalent value". The 24 May Joint Statement gave a similar swap option. In neither agreement is any mention made of liability to pay DC. We have held that, on true interpretation of the 1990 POA, M-S would have been under no obligation to pay DC had it developed the three POA parcels. Singapore's case must be that the 24 May Joint Statement amended the 1990 POA so as to make DC payable on the three POA parcels.

193. We have found that in the negotiations leading up to the 24 May Joint Statement Singapore repeatedly stated that under the proposed agreement M-S would have to pay DC on the three POA parcels and that Malaysia accepted that M-S would have to do so. The critical issue is whether this consensus constituted a binding agreement that amended the POA, so as to make DC payable on the three POA parcels.

194. The starting point is that when Minister Yeo added the valuation footnote to the valuations attached to his letter of 20 November 2008 he was not purporting, nor intending, to propose an amendment to the POA, or indeed to propose a contractual condition at all. He was simply stating what he believed to be the effect of the POA. The subsequent repetitions of the valuation footnote, and the other occasions on which it was stated to Malaysian representatives that DC would be payable on the three POA parcels, were all on the basis that this was the position under the 1990 POA. Were this not the case it could not have been represented to the Malaysian

representatives that the proposed amendments to the POA would result in a substantially better deal for Malaysia.

195. Unhappily Minister Yeo and other representatives of Singapore unwittingly misrepresented the effect of the POA. When Malaysia sought details of the liability to pay DC it was not, so far as we are aware, informed that a special regime prevailed in respect of Government sales of land under which, if the land was sold for a specified development, DC was not payable. No doubt this was because the Singapore representatives did not appreciate that this was relevant.

196. The Malaysian representatives made no comment prior to the 24 May Joint Statement in relation to Singapore's repeated statements that DC would be payable. They did not *agree* that these statements were correct but they did not challenge them. This would reasonably have led the Singapore representatives to believe that Malaysia accepted that Singapore had correctly stated the position, as indeed we have found was the case.

197. In these circumstances it cannot be said that there was any *agreement* between Singapore and Malaysia, either before the conclusion of the 24 May Joint Statement or in the 24 May Joint Statement that DC would be payable under the terms of the POA, as amended by the Joint Statement. The POA had been amended under a common mistake as to its effect both in its original form and in its amended form. That mistake had been induced by an inaccurate statement by Singapore that DC would be payable under the POA which Malaysia had not questioned.

198. For these reasons we reject Singapore's submission that the 24 May Joint Statement amended the POA so as to make DC payable when it had not been before. We turn to consider the question of estoppel.

(iv) Estoppel

199. Singapore's pleadings did not spell out the particulars of the alleged estoppel and Singapore's counsel had some difficulty in formulating this plea. Estoppel involves a representation that is relied upon to the detriment of the party relying upon it. We have already set out Mr Landau's formulation of the representation[118]:

> Malaysia honestly believed that M-S Pte would pay DC for the 3+3 plots and that that would be the condition for calibrating equivalent value in the event of a swap.

[118] Transcript, pp 739-740.

Mr Landau went on to submit that that was a representation of fact as to belief and intention. Professor Lowe in his final submissions[119] added little in relation to estoppel under international law other than to submit that the principle applied and that it involved representation, reliance and detriment.

200. We have a little difficulty in following Mr Landau's formulation of the representation and it may be that the transcription that we have quoted is not entirely accurate. The essence of the representation is, however, that Malaysia believed that DC would be payable under the POA.

201. We turn to the allegations of reliance and detriment. In his statement[120] Mr Yeo stated:

> In a number of my letters to Malaysia, I pointed out that DC was applicable. This point was not disputed by the Malaysians in my meetings with them. The additional concessions to Malaysia were premised, as with the original POA terms, upon DC being payable. Since Malaysia had made no objections to the payability of DC, and even asked Singapore how DC was to be calculated, Singapore proceeded to grant the additional concessions. Had Malaysia disputed the payability of DC, Singapore would not have made the same concessions.

202. Mr Yeo's evidence as to what would have happened had Malaysia disputed the "payability" of DC is necessarily conjectural. He was not challenged as to this, but it is right that we should say that we have reservations about his conclusions. The concessions to which he referred were (i) the revival of the option in respect of the Kranji and Woodlands parcels and (ii) the offer of the additional three Bukit Timah parcels. As to the former, these parcels were offered as an incentive to persuade Malaysia to move the terminal to Woodlands, which is what Singapore had always wanted and Prime Minister Lee Kuan Yew had intended would come about. The estimated values of the Kranji and Woodlands parcels were S$166 million and S$269 million respectively[121]. Singapore would receive the benefit of 40% of this value through its shareholding in M-S. It seems unlikely that Singapore would not have been prepared to offer this option regardless of the position in relation to DC.

203. The estimated value of the three Bukit Timah parcels totalled S$562 million. Once again Singapore would benefit to the extent of 40% of this through its shareholding in M-S. Mr Yeo may well have been correct to conclude that Singapore would not have been prepared to offer this additional concession had Malaysia challenged the obligation to pay DC under the POA. This might have depended upon whether Singapore concluded that this inducement was necessary to persuade Malaysia to proceed with the implementation of the POA. We consider that the most likely outcome had Malaysia challenged the obligation to pay DC would have

[119] Transcript, pp 749-50.

[120] Witness Statement by Mr George Yong-Boon Yeo, para 34.

[121] Letter dated 20 November 2008 from Singapore Minister for Foreign Affairs George Yeo to Malaysian Minister of Foreign Affairs Dr. Rais Yatim (**Exhibit S-54/Tab C-73**).

been that which in fact occurred. The DC issue would have been put aside to be resolved by arbitration and the implementation of the amended POA would have proceeded.

204. We have set out these conclusions by way of completeness, but they are not critical to the resolution of the estoppel issue. The inference from Malaysia's silence in the face of Singapore's assertions that DC would be payable under the POA was that Malaysia accepted this to be the case. But we have found that this was in fact the position. What follows from this? At the time of the delivery of the 24 May Joint Statement the Parties shared a misapprehension that DC would be payable under its terms. Malaysia was not responsible for that misapprehension. Singapore had expressed an erroneous view of the effect of the POA and Malaysia had not challenged that view. It would be inequitable if the consequence of this shared misapprehension was that the POA should be treated as amended so as to impose an obligation on M-S to pay DC in respect of all the parcels. The detriment to M-S of such an amendment to the POA, the sum of S$1.47 billion at stake in this arbitration, would far have outweighed the benefit of the additional concessions made by Singapore. Happily, there is no legal principle that requires the amended POA to be interpreted in this way.

205. At the same time, it would not seem fair that Singapore should not have received DC in respect of the three Bukit Timah parcels, when these had been added to the bargain under Singapore's expressed understanding that DC would be payable under the POA. It might have been possible, on the basis that treaties must be interpreted in good faith, for us to have interpreted the amended POA as requiring DC to be paid in respect of these three parcels. Consistently with the equities of the situation, however, Malaysia conceded that DC should be payable in respect of the three Bukit Timah parcels.

206. For these reasons we find that the amendments made to the POA by the 24 May Joint Statement did not include the imposition of an obligation to pay DC in respect of the three POA parcels. The dominant factor in our analysis has been the true interpretation of the 1990 POA. We believe that our approach accords with what the Parties envisaged when they agreed to this arbitration. At no stage before that agreement did Singapore suggest that the 24 May Joint Statement was the critical agreement. The basic bone of contention had been the interpretation of the original POA. We believe that this is what Prime Minister Lee Hsieng Loong had in mind when, on 19 September 2010, he wrote to Prime Minister Najib[122]:

> I also agree to submit, for final and binding arbitration under the auspices of the Permanent Court of Arbitration, the question of whether, under the terms of the Points of Agreement (POA), M-S Pte Ltd has been exempted from payment of development charge (DC) on the

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[122] Letter dated 19 September 2010 from Singapore Prime Minister Lee Hsien Loong to Malaysian Prime Minister Najib Razak (**Exhibit S-89/Tab C-119**).

> three parcels of POA lands in Tanjong Pagar, Kranji and Woodlands. I share fully your wish to resolve this issue in a cordial and friendly manner, which will help to set the tone for our bilateral cooperation in many other fields.

207. Counsel for Malaysia accepted that the terms of the Submission Question left it open to Singapore to rely on principles of estoppel, or even a free standing agreement if it could establish one. The industry and ingenuity of counsel for Singapore have required us to resolve issues that the respective Prime Ministers are unlikely to have envisaged when they agreed to this arbitration. The arbitration has been conducted in the cordial and friendly manner that the Prime Ministers intended, and we hope that its resolution will be a chapter in the continued fruitful cooperation between the two countries involved.

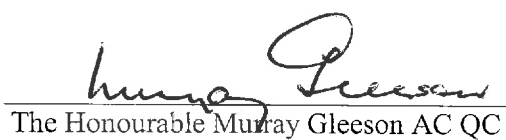
R. DECISION

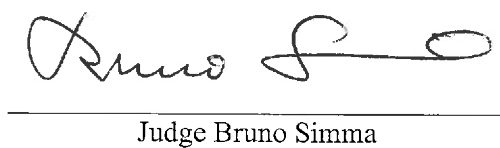
FOR THE REASONS THAT WE HAVE GIVEN WE ADJUDGE AND DECLARE THAT:

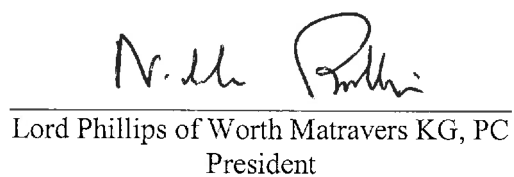
(a) M-S Pte Ltd would not have been liable to pay DC on the Keppel, Kranji and Woodland parcels if the said parcels had been vested in M-S Pte Ltd and if M-S Pte Ltd had actually developed the lands in accordance with the proposed land uses set out in the Annexes to the POA; and

(b) Each party is to bear its own costs, as stated in Article 10 of the Submission Agreement.

Done this 30th day of October 2014,


The Honourable Murray Gleeson AC QC


Judge Bruno Simma


Lord Phillips of Worth Matravers KG, PC
President

Mr Garth L Schofield
Registrar