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**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2007

Public sitting

held on Friday 9 November 2007, at 10 a.m., at the Peace Palace,

Vice-President Al-Khasawneh, Acting President, presiding

*in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh,
Middle Rocks and South Ledge
(Malaysia/Singapore)*

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le vendredi 9 novembre 2007, à 10 heures, au Palais de la Paix,

*sous la présidence de M. Al-Khasawneh, vice-président,
faisant fonction de président*

*en l'affaire relative à la Souveraineté sur Pedra Branca/Pulau Batu Puteh,
Middle Rocks et South Ledge
(Malaisie/Singapour)*

COMPTE RENDU

Present: Vice-President Al-Khasawneh, Acting President

Judges Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov

Judges *ad hoc* Dugard
Sreenivasa Rao

Registrar Couvreur

Présents : M. Al-Khasawneh, vice-président, faisant fonction de président en l'affaire
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Dugard
Sreenivasa Rao, juges *ad hoc*
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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. Before giving the floor to Mr. Bundy, I should like to bring to your attention that Judge Owada, for reasons duly communicated to me, is unable to sit with us this morning. Mr. Bundy, you have the floor.

Mr. BUNDY: Thank you, Mr. President.

THE STRAITS LIGHTS SYSTEM

12 (a). Mr. President, Members of the Court, before the Court rose for lunch yesterday, I had begun to discuss the Straits Lights System which concerned a number of lighthouses in the region, and my starting point was the legal basis on which each of the lights was established.

12 (b). As I explained yesterday, when the British proposed to build a lighthouse on territory belonging to a local Malay ruler, such as the 1860 lighthouse at Cape Rachado and the 1886 lighthouse at Pulau Pisang, a specific written agreement to this effect was concluded. The agreement and documents covering the Cape Rachado lighthouse may be found at tab 39 of your folders and the written indenture concluded with the Ruler of Johor with respect to the Pulau Pisang lighthouse is at tab 40.

12 (c). In contrast, when lights were established by the British, either on the high seas, as was the case with the One-Fathom Bank light established in 1852, or on territory not belonging to a local Malay ruler, such as the lighthouse on Pedra Branca, there is no such written agreement.

12 (d). I now propose to continue with my chronology of the lights that I started yesterday morning.

13. In 1900, the same year that the indenture was concluded with respect to the Pulau Pisang lighthouse, the Government of the Straits Settlements in Singapore also considered building a lighthouse on the island of Pulau Aur, the location of which can be seen on the screen.

[Slide showing Pulau Aur]

14. To that end, on 20 February 1900 the deputy of the Officer Administering the Government of the Straits Settlements wrote a letter to the Sultan of Johor in which he enquired whether, given the fact that the island of Pulau Aur lay within the territory of Johor, the Sultan

desired to erect a lighthouse on the island himself or, alternatively, whether the Sultan would permit the Government of the Straits Settlements to establish and erect a lighthouse there instead (CMS, Ann. 24).

15. On 25 April 1900, the Sultan of Johor responded to that query. After indicating that Johor did not desire to undertake the erection of the lighthouse on Pulau Aur itself, the Sultan stated that he would be willing to grant to the Government of the Straits Settlements a site for the proposed work. The Sultan's letter went on to suggest that the arrangements for such a light would be the same as those that were made for the lighthouse on Pulau Pisang — namely, a grant of land by the Sultan sufficient for the lighthouse and a roadway leading up to the lighthouse.

16. Now, ultimately, the Government of the Straits Settlements decided not to proceed with that light. Nonetheless, this episode is relevant for a number of reasons. First, it confirmed once more that the practice of the authorities in Singapore was to seek the written permission of a local Malay ruler when they sought to build a lighthouse situated on territory belonging to that ruler. In contrast, as Professor Pellet explained, the British Crown *never* sought the Sultan's permission for the construction of the lighthouse on Pedra Branca. Secondly, with respect to the Pulau Aur lighthouse, the Sultan's response in 1900 was that he was willing to enter into the same kind of detailed arrangements for a light on Pulau Aur as existed with respect to the lighthouse on Pulau Pisang, where there was a written indenture. The fact that the Sultan made no mention at that time of having agreed similar arrangements for the lighthouse at Pedra Branca is further confirmation of the fact that no such arrangements existed for Pedra Branca.

17. In the light of these facts, the difference in legal treatment between the Cape Rachado and Pulau Pisang lighthouses and the proposed light on Pulau Aur, all of which were situated on Malaysian territory and thus subject to written agreements granting to Singapore the right to build and maintain lighthouses located thereon, and the situation with respect to the lighthouse on Pedra Branca, which was not located on Malay territory and which therefore was subject to no such agreement, that contrast, that difference in treatment could not be clearer. In those instances where Singapore built and managed a light located on the territory of Malaysia, an express agreement was concluded to this end. But where, however, the authorities from Singapore built and maintained a

light on territory not under the sovereignty of a Malay ruler, no such agreement was needed and none exists.

18. And it is the complete absence of an agreement for the British activities on Pedra Branca from 1847 to 1851, activities which culminated in the construction of the lighthouse on Pedra Branca, that is a fundamental defect in Malaysia's case. The plain and simple truth is that Malaysia has been unable to produce any written agreement dealing with the lighthouse on Pedra Branca as it did with respect to the lighthouses at Cape Rachado and Pulau Pisang, and as was proposed for the lighthouse on Pulau Aur. The obvious explanation for this glaring gap in Malaysia's case is that neither Malaysia, nor its predecessor Johor, ever considered Pedra Branca to be under its sovereignty.

19. It is this lack of any written agreement concerning the lighthouse on Pedra Branca which also distinguishes the present case from the examples of lighthouse practice elsewhere in the world that Malaysia has sought to rely on in its written pleadings. Malaysia's thesis is that lighthouses are frequently built and maintained by an entity which does not possess sovereignty over the territory on which the light is situated, and that Pedra Branca is simply an example of this practice. But let me examine the authorities that Malaysia has cited and on which it relies to support this proposition.

20. I have already mentioned in my first presentation yesterday that Malaysia itself concedes in its written pleadings that the construction and maintenance of lighthouses is usually a matter for the State on whose territory the light is situated. It is also worth noting that one of the authorities that Malaysia relies on, this is Judge van Eysinga's concurring opinion in the 1937 *Lighthouses* case, emphasized exactly the same point — namely, that “the administration of lighthouses is a service which in most States belongs to their domestic jurisdiction”.

21. It is true that Judge van Eysinga did go on to say in his separate opinion that there were examples where the State possessing sovereignty over a particular territory was not in a position to provide for the administration of a lighthouse on that territory and, as a result, as the judge noted in his opinion:

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“It sometimes happens that the Maritime Powers come to an agreement with the territorial State in regard to the operating of a lighthouse.” (1937, *P.C.I.J., Series A/B, No. 71*, p. 24.)

22. That is precisely what happened with respect to the lighthouses at Cape Rachado and Pulau Pisang and with respect to the proposed light that was never built — but which was proposed in correspondence with Johor — with respect to Pulau Aur. The parties came to an agreement or they foresaw that such an agreement was necessary. It is also what happened in the other examples cited in Malaysia’s written pleadings.

23. Take the situation involving the Cape Spartel lighthouse, which was built and maintained by an international commission on Moroccan territory. Malaysia referred to the Cape Spartel Convention of 31 May 1865 in its written pleadings, but curiously did not actually annex the document and the Convention, which Singapore therefore provided in Annex 18 to its Reply, and which the judges can also find at tab 41 of the judges’ folder. Now, as Singapore pointed out in its Reply, when the provisions of that Convention are examined, it becomes clear that the Sultan of Morocco, on whose territory the light was situated, expressly consented to the construction of the lighthouse by the other contracting parties. Indeed, the Cape Spartel Convention contained the following important proviso in its Article 1:

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“It is well understood that this delegation [in other words, permission to build the lighthouse] does not import any encroachment on the rights proprietary and of sovereignty of the Sultan, whose flag alone shall be hoisted on the tower of the Pharos.” (RS, Ann. 11.)

24. I need scarcely repeat the fact that no agreement of this kind exists with respect to the lighthouse on Pedra Branca. Moreover, I would also recall that it has been the Singapore ensign and flag, not the Malaysian flag, which has openly been flown on Pedra Branca ever since the lighthouse was constructed up to the present. And this is another factor which distinguishes Pedra Branca from the Cape Spartel light and renders the Cape Spartel example of no assistance and of no use to Malaysia.

25. Now, a similar comment can be made about Malaysia’s reference to a lighthouse called the Cape Race lighthouse in Newfoundland. And as Singapore explained in some detail in its Counter-Memorial, not only was this light administered by Britain with the consent of

Newfoundland, it was not an international transaction, in any event, since Newfoundland was already a British colony under British sovereignty at the time the relevant arrangements were entered into.

26. Nor does Malaysia's reliance on the Red Sea lighthouse practice at issue in the *Eritrea/Yemen* arbitration assist its position. As the Arbitral Tribunal very clearly noted in its Award in the first phase of that arbitration, the operation of the Red Sea light was subject to a specific understanding between the relevant colonial Powers at the time — Great Britain and Italy — that was without prejudice to questions of sovereignty. And no such understanding exists with respect to our case.

27. At the end of the day, of course, each case must be assessed on its own facts. In the present case, the record shows that the British authorities sought and obtained permission from local Malay rulers to establish lights on territory belonging to those rulers — such as at Cape Rachado and Pulau Pisang, and with respect to the proposed light at Pulau Aur — but Britain did no such thing when it came to the lighthouse on Pedra Branca, and Malaysia can scarcely find any support for its arguments in these facts.

2. The relevance of various funding proposals for the Straits lights

28. Mr. President, I would now like to turn to the question of how the lighthouses in the region were funded, and the relevance of Malaysia's conduct in this respect.

29. Originally, the lighthouse on Pedra Branca, after it had been commissioned, as well as other lights subsequently put into operation in the region, were financed by the levying of tolls on vessels passing through the Straits of Singapore. And after 1912, these tolls were abolished and the States concerned defrayed the costs of the lights on a co-operative basis. So, up to this point, therefore, the funding alone for lighthouse operations in the region was “sovereignty neutral”.

30. However, there are two important developments that occurred after 1912 relating to funding issues, which show in a really quite striking manner how Malaysia viewed the question of sovereignty in connection with how the lights in the region were to be financed.

31. The first such development occurred in 1913, after tolls had ceased to be levied on ships under the 1854 Act. In July 1913, the Chief Secretary to the Government of the Federated Malay

States tabled a motion before its Federal Council to appropriate some \$20,000 to meet the costs of lighthouse upkeep. What is significant about this episode is that the Chief Secretary's proposal was for these monies to be appropriated to meet a share of the costs of maintaining only the One Fathom Bank light off the coast of Sengalore and the Cape Rachado light located on the Malaysian mainland. The rationale behind this proposal of the Chief Secretary was explained in the following way — this is coming from the Malaysian side:

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“I think it is an international obligation that each country should bear the cost of maintaining all lights considered necessary on its coasts, and I think there can hardly be any question now that we should not be doing our duty if we did not come forward and offer to maintain these two very useful light-houses.” (MM, Ann. 65.)

“these two” lighthouses being One Fathom Bank and Cape Rachado on the Malaysian mainland.

32. Now, clearly, at this point, the Chief Secretary did not consider that the light on Pedra Branca was situated on Malay territory or within its jurisdiction. Hence, the proposal did not suggest that the Federated Malay States should also contribute to the costs of maintaining the lighthouse, or assume the costs of maintaining the lighthouse, on Pedra Branca. The proposal was limited to One Fathom Bank and the Cape Rachado lighthouse.

33. Malaysia is rightly concerned about the adverse implications this funding proposal gives rise to with respect to Malaysia's claim of an historic title over Pedra Branca. Malaysia, in its written pleadings, therefore, tries to explain away the fact that Pedra Branca was not mentioned in the Chief Secretary's proposal of 1913 by asserting that the Horsburgh lighthouse — the one on Pedra Branca — as well as the light on Pulau Pisang, was situated on the territory of Johor and that Johor, at that time, was not one of the Federated Malay States. And then, in its written pleadings, Malaysia goes on to assert that it is not clear whether Johor ever made any separate proposal to contribute to the upkeep of the lighthouse either on Pedra Branca or on Pulau Pisang.

34. But the facts are clear, they are very clear and they have been documented. As Singapore documented in its Memorial in September 1952, the Director of Marine of the Federation of Malaya, which by that time encompassed Johor, wrote to the Master Attendant of Singapore *specifically* offering to assume responsibility for the light on Pulau Pisang, but making no such offer with respect to the Horsburgh lighthouse on Pedra Branca. The relevant part of the

Director of Marine's letter is worth quoting. It also can be found at tab 42 of the judges' folder. In it the Director stated the following — this is the Director of Marine of the Federation of Malaya saying this:

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“I have the honour to raise the subject of maintenance of Pulau Pisang Lighthouse and to say that as it is close to the coast of the Federation it would seem appropriate that it should be a commitment of this Government, and to suggest that responsibility for it should be assumed by us, in the same way we have assumed responsibility for Pulau Merambong.” (MS, Ann. 89.)

[Slide]

Just for reference, the Court will see from the map that is now on the screen the location of Pulau Merambong, which was also clearly in Malaysian territory. So, we have an offer here in 1852 from the relevant authorities on the Malaysian mainland encompassing Johor to fund the lighthouse at Pulau Pisang but not a word about Pedra Branca.

35. And once again, we have a clear pattern of Malaysian conduct showing that Malaysia did not consider itself as possessing sovereignty over Pedra Branca. Because how else can Malaysia explain why it made offers to fund lighthouses on its territory at Cape Rachado and at Pulau Pisang or just off its coast on the One Fathom Bank, and the One Fathom Bank remember was not vested in the British Crown under the 1854 Act; how can Malaysia have made offers to fund those lighthouses but made no similar offer with respect to the lighthouse on Pedra Branca? Malaysia's absence of title over Pedra Branca is further confirmed by the fact that its offer in 1952 to assume responsibility for the lighthouse at Pulau Pisang on its own territory, but once again not on Pedra Branca, came just one year before its official disclaimer of ownership over Pedra Branca that will be discussed by Professor Pellet in a few minutes.

3. Malaysia's conduct with respect to Pulau Pisang and Pedra Branca

36. Having reviewed the elements of the Straits Lights System which undermine Malaysia's case, I would now like to conclude this part of Singapore's presentation by recalling a number of fundamental differences that exist with respect to the Parties' conduct relating to Pulau Pisang, where Malaysia held title, as compared to the Parties' conduct with respect to Pedra Branca, where title was vested in Singapore. As I trust the Court will appreciate, these differences are very telling.

They all go to show how Malaysia recognized that it possessed no sovereign rights over Pedra Branca.

37. First, we have the clear indenture issued by the local Malay ruler granting Singapore permission to construct and maintain the lighthouse on Malaysian territory at Pulau Pisang. We have no such indenture with respect to Pedra Branca — a fundamental difference.

38. Second, as I discussed yesterday, Malaysia insisted that Singapore lower its flag and ensign on Pulau Pisang because it might give rise to an inference that the island belonged to Singapore. Malaysia made no such request regarding the absolutely identical Singapore ensign flown on Pedra Branca.

39. Third, Singapore exercised continuous control over access to Pedra Branca and even, as I pointed out yesterday, Malaysian officials sought permission from Singapore to visit the island. Singapore exercised no such control over access to Pulau Pisang since it was Malaysian territory and Malaysian nationals could travel there freely.

40. Fourth, Singapore government officials made frequent visits to Pedra Branca in the normal course of business all of which are documented in amongst other sources by the logbook kept with respect to Pedra Branca. In contrast, when Singapore officials visited Pulau Pisang, which they only did on very very rare occasions, they were advised to carry their passports and travel documents with them because they were travelling to Malaysian territory.

41. Fifth, Singapore was the only Party which issued permits for nationals of third States to visit Pedra Branca and to carry out surveys or scientific research on the island and within its territorial waters. Singapore took no such steps with respect to Pulau Pisang because it was not Singapore territory.

42. Sixth, Singapore routinely collected meteorological data on Pedra Branca, but not on Pulau Pisang, and Malaysia's own official meteorological publications described the station on Pedra Branca as being located in Singapore.

43. Seventh, Malaysia issued a whole series of official maps depicting Pedra Branca as belonging to Singapore. As Ms Malintoppi will show later this morning, the same series of Malaysian maps never showed Pulau Pisang as belonging to Singapore even though Singapore maintained the light on Pulau Pisang.

44. Eighth, Singapore installed military communications equipment and other non-lighthouse facilities on Pedra Branca, made full use of the island as you could see from the photograph and undertook various public works on the island. It undertook no similar activities on Pulau Pisang. Singapore also designated a specific naval patrol area in the vicinity of Pedra Branca, while it undertook no such action around Pulau Pisang because Pulau Pisang appertained to Malaysia.

45. Ninth, Singapore investigated shipping incidents and accidental deaths on Pedra Branca and within its territorial waters. It had no jurisdiction over Pulau Pisang and thus carried out no similar activities there.

46. Tenth, Malaysia made offers for the funding and the assumption of the responsibility for the lighthouse on Pulau Pisang. It made no similar offer with respect to the lighthouse on Pedra Branca.

47. Eleventh, and last, Malaysia expressly disclaimed “ownership” over Pedra Branca. Singapore, in contrast, obviously never disclaimed “ownership” over Pedra Branca, and it never claimed sovereignty over Pulau Pisang.

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48. Since this last element — Malaysia’s official disclaimer over Pedra Branca — will be the subject of the next part of Singapore’s presentation, I would ask, Mr. President, if you would now give the floor to Professor Pellet who will address this important aspect of the case. Thank you very much.

The VICE-PRESIDENT, Acting President: Thank you Mr. Bundy for your statement. I now give the floor to Professor Pellet.

M. PELLET : Thank you very much.

**LA RENONCIATION (DISCLAIMER) EXPRESSE DE JOHOR À TOUTE
REVENDECTION SUR PEDRA BRANCA**

1. Monsieur le président, Messieurs les juges, alors que Singapour a présenté de manière approfondie les circonstances dans lesquelles Johor a expressément renoncé, en 1953, à toute prétention sur Pedra Branca¹, la Malaisie s'est montrée d'une grande discrétion sur cet épisode crucial². Crucial, je m'empresse de le préciser, non pas parce que cette renonciation fonderait le titre de Singapour sur l'île, mais parce qu'elle confirme, de manière éclatante, que la Malaisie n'avait aucune revendication sur Pedra Branca. J'indique au passage, notamment à l'attention des interprètes, que le mot anglais «disclaimer» traduit sans doute mieux la réalité juridique de l'épisode en question — mais que malheureusement, il n'a pas d'équivalent exact en français.

2. A vrai dire, si je devais m'en tenir à ce qu'en dit la Partie malaisienne dans sa réplique, cette plaidoirie pourrait être fort brève : mise à part la répétition de ses positions antérieures sous forme de simples affirmations — auxquelles Singapour a d'ores et déjà répondu —, elle se borne à voir une «contradiction flagrante» («a glaring *non sequitur*») entre, d'une part, la base du titre de Singapour sur Pedra Branca — la prise de possession de 1847 suivie de la construction du phare — et, d'autre part, l'invocation des échanges de correspondance de 1953³.

3. Il me semble aller de soi, Monsieur le président, qu'il n'y a aucune contradiction entre les deux argumentations, qui sont différentes mais complémentaires, que fait valoir Singapour.

4. Comme l'a montré M. Brownlie avant-hier, la Grande-Bretagne a acquis le titre auquel Singapour a succédé en prenant possession de Pedra Branca, île inhabitée et sans maître, en 1847 et en y construisant le phare Horsburgh. Elle a, par la suite, constamment administré l'île à titre de souverain, sans la moindre contestation et sans que, pour sa part, la Malaisie puisse faire état du moindre acte d'administration, de quelque nature qu'il soit, de la part de Johor. Ceci suffit

¹ Voir MS, chap. VII, «Johor's Express Disclaimer of Title to Pedra Branca», p. 161-178 ; CMS, chap. VII, «The 1953 Correspondence Confirms Singapore's Title», p. 181-199, et RS, chap. VII, «Malaysia's Formal Disclaimer of Title», p. 221-232.

² Voir MM, chap. 7, sect. C iii), «The 1953 Correspondence», p. 107-110, par. 235-244 ; CMM, chap. 9, sect. C, «The 1953 Correspondence», p. 235-239, par. 503-514, et RM, chap. 5, sect. A vi), «The 1953 Correspondence», p. 172-174, par. 368-370.

³ RM, p. 173-174, par. 370.

amplement à établir la souveraineté de Singapour sur l'île ; et il n'est pas nécessaire de se demander si les effectivités, nombreuses, cohérentes et diversifiées, que nous avons décrites pourraient tenir lieu de titre, alors même qu'elles constituent, à n'en pas douter, «un exercice pacifique et continu de l'autorité»⁴ (*Statut juridique du Groënland oriental, arrêt, C.P.J.I. série A/B n° 53*, p. 45), particulièrement convainquant eu égard en particulier à la petite taille et au caractère inhospitalier de l'île. Elles ne font ici que confirmer le titre de Singapour. Tous ces éléments témoignent, pour reprendre l'expression utilisée à plusieurs reprises par la Cour dans l'affaire *Cameroun c. Nigéria* à propos de l'appartenance de la souveraineté sur Bakassi (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*), *arrêt, C.I.J. Recueil 2002*, p. 409-412, par. 213-217), d'une «communauté de vues entre les Parties» quant à la souveraineté sur Pedra Branca.

5. Il en va, à vrai dire, de même des échanges de correspondance de 1953 : ils participent de cette «communauté de vues». Et il n'est pas vraiment utile de se poser la question de savoir si, en l'absence d'autre titre, cette correspondance — et, en particulier, la lettre du secrétaire d'Etat par intérim de Johor en date du 21 septembre 1953⁵ — pourraient, en elles-mêmes, constituer un titre territorial : ce titre existe indépendamment de ces échanges de correspondance. Elles ne s'y substituent pas mais elles le confirment.

Projection 1 - Lettre n° SSJ.1120/53/6 du 21 septembre 1953 adressée au secrétaire colonial de Singapour par M. Seth Bin Saaid, secrétaire d'Etat par intérim de Johor (MS, vol. 6, annexe 96) (dossier de plaidoiries, onglet n° 43).

Ou, plus exactement, la lettre du secrétaire d'Etat établit l'absence de titre de Johor (et, par suite, de son successeur, la Malaisie) : «le Gouvernement de Johore ne revendique pas la propriété de Pedra Branca» («the Johore Government does not claim ownership of Pedra Branca») et, par la même occasion, cette lettre établit l'existence du titre de Singapour, puisque aucun Etat tiers n'a jamais émis la moindre prétention sur l'île.

6. A vrai dire, la Malaisie ne conteste sérieusement ni le déroulement, ni la portée de cet épisode. Mais il nous paraît suffisamment important et significatif pour mériter tout de même que

⁴ Cf. CPA, *Ile de Palmas*, Max Huber, sentence arbitrale du 4 avril 1928, *RGDIP* 1935, p. 164, 177, 185-186, 197-199 ou 201.

⁵ MS, vol. 6, annexe 96.

l'on s'y attarde à nouveau quelques instants. Un bref rappel des faits d'abord si vous le voulez bien, Monsieur le président.

I. Les échanges de correspondance de 1953

7. Toute l'affaire trouve son point de départ dans une demande adressée le 23 septembre 1952 par le directeur de la marine de la Fédération de Malaya au *Master Attendant* de la colonie de Singapour sur la situation de Pulau Pisang⁶, dont Rodman Bundy vient de longuement parler. La réponse du *Master Attendant*, en date du 29 septembre indique d'une part que le *Land Office* (l'administration des domaines) a été chargé de faire des investigations à ce sujet et, d'autre part, que l'enquête a été étendue à Pedra Branca — qui n'était pas mentionnée dans la lettre du directeur de la marine de la Fédération⁷. Pour sa part, dans une note du 7 octobre 1952 intitulée «Horsburgh Lighthouse» («le phare Horsburgh»), le géomètre en chef (*Chief Surveyor*) fait savoir au commissaire des domaines de la colonie de Singapour que

«[w]hen Singapore Territorial Waters were being discussed in 1937 there seems to have been no mention of Horsburgh but in a minute of 14.7.52 to S.E.A. [that is «the Secretary for Economic Affairs»] in CSO.11293/52, I gave my opinion that Singapore should claim a 3 mile limit round this point»⁸.

8. Quatre mois plus tard, le 6 février 1953, le *Master Attendant* s'inquiétait des suites données à cette proposition dans une lettre au secrétaire colonial. Après avoir cité la note que je viens de lire, il demandait : «In the light of the above, may I please be informed if any decision has been arrived at»⁹. C'est à la suite de cette relance — sur laquelle la Malaisie garde un prudent silence dans le cadre de la présente procédure — que, le 12 juin 1953, le *Master Attendant*, J. D. Higham, s'enquit, au nom du secrétaire colonial, auprès du conseiller britannique de Johor (le *British Adviser*), du statut juridique du «rock some 40 miles from Singapore known as Pedra Branca on which the Horsburgh Lighthouse stands»¹⁰. He stresses — and this is an important indication — that: «The matter is relevant to the determination of the boundaries of the

⁶ MS, vol. 6, annexe 89.

⁷ MS, vol. 6, annexe 90.

⁸ Cité dans MS, vol. 6, annexe 91.

⁹ *Ibid.*

¹⁰ MS, vol. 6, annexe 93.

Colony's territorial waters.» Copie de cette lettre avait été adressée au secrétaire principal de la Fédération de Malaya.

9. Higham estime que le statut juridique de Pulau Pisang — construit sur une autre île bien plus grande que celle qui nous occupe — est «très clair» («quite clear») : elle relève de la souveraineté de Johor. Il s'interroge en revanche sur le statut de Pedra Branca au sujet duquel il donne un certain nombre d'informations inégalement fiables :

— La première est exacte : l'île est située en dehors des limites de la cession consentie à la Compagnie des Indes orientales en 1824 (je souligne que la Malaisie fait grand cas de ce point¹¹, mais que nous ne le contestons en aucune manière).

[Fin de la projection 1.]

Projection 2 — Extrait d'une dépêche du 28/11/1844 adressée au gouverneur général du Bengale par le gouverneur de Singapour (MS, annexe 93, app. B) (dossier de plaidoiries, onglet n° 44)

— La deuxième est fautive : Pedra Branca n'est pas «mentioned in a despatch from the Governor of Singapore on 28th November 1844». L'extrait de la dépêche en question qui est joint à la lettre est rédigé ainsi : «This Rock is part of a territory of the Rajah of Johore who with the Tumunggong has willingly consented to cede it gratuitously to the East India Company.»¹² Il ne comporte pas le nom de Pedra Branca, qui a été rajouté à la main dans des circonstances non élucidées, mais ce rajout est clairement erroné ; le rocher dont il s'agit («this Rock») ne peut être Pedra Branca. Et, d'abord, pour une raison évidente : l'auteur de la dépêche, le gouverneur de Singapour Butterworth, indiquait que celui-ci illustrait la position du «Rock therein alluded» — du rocher dont il parlait — «with reference to Pedra Branca» — par rapport à Pedra Branca ; or, on ne peut positionner un endroit par rapport à lui-même... Si vous m'expliquez comment me rendre au Palais de la Paix en situant celui-ci par rapport au Palais de la Paix, je n'ai aucune chance de le trouver ! Il est vrai que je connais à peu près le chemin... Il est regrettable que le schéma précisant la position du rocher que Butterworth avait joint à sa dépêche semble perdu, mais, de toute façon, comme Singapour l'a montré d'une

¹¹ MM, par. 8, 92, 188, 238 ; CMM, par. 39-42, 158.

¹² MS, vol. 6, annexe 93, annexe B.

manière qui paraît assez difficilement contestable, il ne pouvait s'agir que de Peak Rock¹³. Et j'ajoute que, curieusement, la Malaisie n'a jamais produit sa copie de la lettre de Higham — c'est fort dommage car la consultation de l'original aurait peut-être permis de mieux comprendre l'origine de la mention manuscrite erronée, qui demeure une énigme.

[Fin de la projection 2 – Retour à la projection 1.]

— En revanche, la troisième et dernière information donnée par Higham dans sa lettre du 12 juin 1953, est indiscutablement exacte, même si la conséquence qu'il en tire est prudemment incertaine : «The lighthouse was built in 1850 by the Colony Government who have maintained it ever since. This by international usage no doubt confers some rights and obligations on the Colony» ; mais cette prudence s'explique par le fait qu'il ne disposait d'aucun document et ne pouvait être sûr qu'il n'en existait pas ; si les archives de Singapour avaient été complètes, cette demande eût été sans objet (comme, d'ailleurs, la démarche même de la colonie).

10. La suite est connue :

— le secrétaire du conseiller britannique à Johor transmet la demande de clarification au secrétaire d'Etat de Johor et précise que celui-ci «will doubtless wish to consult with the Commissioner for Lands and Mines and Chief Surveyor and any existing archives before forwarding the views of the State Government to the Chief Secretary»¹⁴ ;

— c'est donc après une enquête soignée que le secrétaire d'Etat par intérim répondit, le 21 septembre 1953, donc après s'être donné le temps de la réflexion : «I have the honour ... to inform you that the Johore Government does not claim ownership of Pedra Branca»¹⁵ ;

— fort de cette réponse, aussi laconique que dépourvue d'ambiguïté — n'en déplaise à nos amis malaisiens, l'*Attorney-General* de Singapour estima que, sur cette base, «nous pouvons revendiquer Pedra Branca comme faisant partie du territoire de Singapour» («we can claim Pedra Branca as Singapore territory»¹⁶) ; et

¹³ Voir notamment MS, par. 5.40-5.41 ; CMS, par. 5.48-5.50. Voir aussi MS, vol. 2, annexe 13 ou CR 2007/21, p. 31, par. 62 (Pellet).

¹⁴ MS, annexe 95.

¹⁵ MS, annexe 96.

¹⁶ MM, annexe 70.

— et le secrétaire colonial fit connaître cette décision au *Master Attendant* le 13 octobre 1953¹⁷.

[Fin de la projection 1.]

II. La signification juridique de la «renonciation» («disclaimer») de Johor

11. Monsieur le président, la Malaisie souligne que «the letter from the Acting State Secretary, Johor, of 21 September 1953 is not a model of clarity»¹⁸. C'est un moyen commode — mais peu convaincant — de s'en débarrasser car il ne suffit pas qu'un texte ne soit pas conforme à la thèse que soutient la Partie malaisienne pour manquer de clarté. Et celui-ci, au contraire, est limpide : «the Johore Government does not claim ownership of Pedra Branca» («le Gouvernement de Johore ne revendique pas la propriété de Pedra Branca»). Le texte est clair ; les circonstances et le contexte dans lesquels la lettre du secrétaire d'Etat de Johor a été envoyée sont clairs ; sa signification juridique est claire.

a) *Le texte*

12. La Malaisie fait un certain cas du mot «propriété» («ownership») utilisé dans la lettre du 21 septembre 1953¹⁹. Singapour ne conteste nullement que la propriété d'un phare puisse être dissociée de la souveraineté s'exerçant sur le territoire sur lequel il est érigé et ceci découle très clairement de la plaidoirie de M. Bundy. Mais, en l'occurrence, il ne fait aucun doute que le secrétaire d'Etat de Johor visait non pas la propriété du phare mais la souveraineté sur l'île.

13. La «propriété» en question concerne, précisément, l'île elle-même, pas le phare. Et la Malaisie est la première à faire la distinction dans ses écritures²⁰, de façon d'ailleurs souvent discutable²¹. Ici en tout cas, il est tout à fait clair que les autorités de Johor (non seulement le secrétaire d'Etat, mais aussi le commissaire à l'aménagement du territoire et aux mines et le géomètre en chef de Johor, qui ont tous été consultés) ont compris que l'information recherchée par Singapour concernait bien l'île dans son ensemble et pas simplement le phare. Du reste, dans ses écritures, la Malaisie n'hésite pas, elle non plus, à utiliser le mot «propriété» («ownership»), alors

¹⁷ MS, annexe 97.

¹⁸ MM, p. 110, par. 243 ; voir aussi, CMM, p. 239, par. 514.

¹⁹ Voir MM, p. 110, par. 243 ou RM, p. 173, par. 369.

²⁰ Cf. CMM, p. 168, par. 349, p. 196, 401, p. 203, par. 419 ou p. 204-205, par. 424-425.

²¹ Cf. RS, p. 133-135, par. 4.90-4.94, p. 153-154, par. 4.144-4.145 ou RS, p. 154-155, par. 4.146.

qu'elle se réfère indiscutablement à la souveraineté sur l'île en tant que telle²² et vous trouverez des exemples de ceci dans les verbatims.

14. Cette assimilation ne résulte pas seulement du membre de phrase : «the Johore Government does not claim ownership of Pedra Branca» ; elle découle aussi de celui qui précède : «I have the honour to refer to your letter ... dated 12th June 1953 ... on the question of *the status of Pedra Branca Rock* some 40 miles from Singapore». Ce faisant d'ailleurs, le secrétaire d'Etat ne fait que reprendre les termes mêmes qu'avait utilisés Higham au nom du secrétaire colonial de Singapour : «Il y a lieu à présent de clarifier le statut de Pedra Branca» («It is *how* [probably : *now*] desired to clarify the status of Pedra Branca»²³). De Pedra Branca, et non du phare Horsburgh. Et si le moindre doute pouvait encore subsister sur le sens de la question (et, par suite, de la réponse), on peut encore relever qu'Higham avait, si je puis dire, «mis les points sur les 'i'» en indiquant que l'information qu'il recherchait était liée à la détermination des limites de la mer territoriale de Singapour : «La question est d'importance pour la délimitation des eaux territoriales de la colonie» («The matter is relevant to the determination of the boundaries of the Colony's territorial waters»²⁴). Ceci ne laissait aucun doute sur l'objet de l'enquête : la propriété d'un phare ne génère aucune mer territoriale contrairement à la souveraineté sur une île.

15. En d'autres termes :

- en dépit de l'éloignement (le secrétaire d'Etat de Johor reprend la formule : le «rocher Pedra Branca à quelque 40 milles de Singapour» («Pedra Branca Rock 40 miles from Singapore»)), formule qui aurait pu faire hésiter sur l'attribution de la souveraineté sur Pedra Branca ;
- Johor décline formellement celle-ci, il «ne revendique pas la propriété de Pedra Branca» («does not claim ownership of Pedra Branca») ;
- de Pedra Branca, donc de l'ensemble de l'île (et pas simplement du phare qui y est construit) ;
- tout ceci, en réponse à une question qui ne laissait subsister aucun doute sur son objet : il s'agissait de déterminer le statut juridique *de l'île* afin de fixer l'étendue des eaux territoriales

²² Voir, par exemple, RM, p. 46, par. 99 (*in fine*), p. 90, par. 183 (*in fine*) et 185.

²³ MS, annexe 93, par. 3.

²⁴ *Ibid.*, par. 1.

de Singapour, c'est-à-dire de résoudre un problème de pur droit international public et, en aucun cas, contrairement à ce que la Malaisie veut faire accroire, de propriété de droit privé.

b) *Les circonstances et le contexte*

16. Monsieur le président, le contexte dans lequel s'inscrit la réponse de Johor — que j'ai essayé de décrire de manière concise tout à l'heure —, ne laisse aucun doute sur l'évidence de cette interprétation, que l'on considère les épisodes qui l'ont précédée ou ceux qui l'ont suivie.

17. «En amont» (avant la lettre), deux éléments méritent d'être notés :

- 1) la démarche de Singapour s'inscrit dans un souci plus général de détermination des eaux territoriales de la colonie à la suite de l'arrêt de la Cour de céans dans l'affaire des *Pêcheries norvégiennes*²⁵ ; ce souci est, en outre, sans doute également lié à la demande initiale du directeur de la marine de la Fédération de Malaya concernant Pulau Pisang²⁶ ; et
- 2) la lettre du 12 juin 1953, écrite par Higham au nom du secrétaire colonial, témoigne sans doute d'une incertitude (sinon, toute enquête eût été inutile), mais elle ne montre certainement pas, contrairement à ce qu'écrit la Malaisie dans sa réplique, que Singapour «avait conscience que Pulau Batu Puteh faisait partie du Sultanat de Johor» («was aware that PBP was part of the Sultanate of Johor»)²⁷.

18. Certes, le fait même que cette demande eût été formulée établit que Singapour, ou, en tout cas, certaines autorités administratives coloniales, souhaitaient s'assurer que la souveraineté de la colonie sur Pedra Branca n'était pas contestée et que Singapour pouvait revendiquer des eaux territoriales autour de l'île. Dès juillet 1952, le géomètre en chef avait clairement pris position en ce sens et s'était déclaré d'avis que Singapour devrait revendiquer une mer territoriale de 3 milles marins autour de l'île²⁸. Toutefois, en l'absence d'instruments probants dans un sens ou dans l'autre (contrairement à ce qui était le cas pour Pulau Pisang ou Pulau Merambong)²⁹, les autorités coloniales, tout en se déclarant convaincues que la construction et l'entretien du phare depuis 1950

²⁵ Cf. MM, annexe 68, lettre de A. G. B. Colton au secrétaire colonial au commissaire général adjoint pour les affaires coloniales, Singapour, juillet 1953.

²⁶ Voir MS, annexe 89 et plus haut, par. 7.

²⁷ RM, p. 173, par. 369 ; voir aussi MM, p. 108, par. 237.

²⁸ Voir MS, annexe 91 et plus haut, par. 8.

²⁹ Voir MS, annexes 89 et 90.

«par l'usage international, confère[nt] sans doute à la colonie certains droits et obligations» («by international usage no doubt [confer] some rights and obligations on the Colony»)³⁰, estiment que le statut de Pedra Branca devait être confirmé.

19. Elles le font, je viens de le rappeler, sur la base d'une erreur — puisque Higham, se fondant sur une mystérieuse adjonction manuscrite, interprète la dépêche de Butterworth du 28 novembre 1844 comme concernant Pedra Branca alors qu'elle visait Peak Rock. Mais la réponse n'en est que plus révélatrice : malgré cette erreur, qui aurait constitué une «perche» tentante pour une revendication de souveraineté si celle-ci avait eu la moindre vraisemblance, Johor décline : «the Johore Government does not claim ownership of Pedra Branca»... Or, cela mérite d'être également noté, Johor, à cette époque en tout cas, ne se désintéresse nullement de l'extension exacte de sa souveraineté territoriale comme le montre clairement la réaction du conseiller britannique à Johor, qui affirme qu'avant de répondre à la lettre de Higham du 12 juin 1953, «[t]he State Secretary will doubtless wish to consult with the Commissioner for Lands and Mines and Chief Surveyor and any existing archives...»³¹.

20. Que déduire de tout ceci, Monsieur le président ? «[T]hat in June 1953 Singapore did not have any sense that PBP was part of the territory of Singapore»³² comme le prétend la Malaisie ? C'est, sans aucun doute, très excessif. Le géomètre en chef et, apparemment, le *Master Attendant*, c'est-à-dire les deux administrateurs coloniaux les plus au fait des conditions effectives d'administration de l'île, semblaient n'avoir aucun doute quant à la souveraineté de Singapour sur Pedra Branca. De leur côté, les autorités supérieures, soucieuses de ne pas empiéter sur la souveraineté territoriale de Johor, souhaitaient s'entourer de toutes les précautions nécessaires avant de procéder à la délimitation des eaux territoriales de la colonie — dont il ne faut pas oublier qu'une partie des archives avaient été détruites durant la guerre, ce dont ces autorités étaient conscientes. Et il semble que ceci a été fait très systématiquement puisque, s'agissant de Pulau Pisang par exemple, le *Master Attendant* de Singapour ne se rallie aux vues du directeur de la marine de la Fédération de Malaya qu'après que «it has been possible to trace an indenture in the

³⁰ MS annexe 93, par. 1.

³¹ MS, annexe 95.

³² RM, p. 173, par. 369 ; voir aussi MM, p. 108, par. 237.

Johore Registry of Deeds dated 6th October, 1900»³³. Les autorités de la colonie procèdent de la même manière en ce qui concerne Pedra Branca mais avec un résultat inverse puisqu'elles obtiennent confirmation que «the Johore Government does not claim ownership of Pedra Branca».

21. J'ajoute qu'il est pour le moins paradoxal que la Malaisie s'obstine à affirmer que «this correspondence also indicates that the Singapore Colonial Secretary had a clear understanding of the extent of Singapore's sovereignty»³⁴. Sans doute, la lettre de Higham du 12 juin 1953 montre-t-elle qu'il était conscient que Pedra Branca était située en dehors des limites fixées par le traité Crawford de 1824, mais il n'en déduit nullement que l'île n'appartient pas à Singapour : c'est, justement, compte tenu de ce fait, qu'il interroge Johor pour savoir s'il existerait un document quelconque qui permettrait de déterminer son statut juridique. La réponse du secrétaire d'Etat du sultanat montre que tel n'est pas le cas puisque — on ne le répétera jamais trop ! — à la suite des recherches qu'il a effectuées, «the Johore Government does not claim ownership of Pedra Branca».

22. Voici, Monsieur le président, l'interprétation raisonnable que l'on doit donner de ce qui s'est passé «en amont» de la réponse de Johor du 21 septembre 1953. Et cela confirme en tous points les enseignements que l'on peut tirer du texte même de cette lettre. Il en va de même des «circonstances d'aval», c'est-à-dire des suites qui ont été données à celles-ci, même s'il y a moins de choses à en dire.

23. Il est clair que la réponse du secrétaire d'Etat de Johor a levé toutes les incertitudes. Dès lors que le sultanat n'a pas de revendication sur Pedra Branca, les autorités de Singapour en tirent les conséquences et, comme le fait savoir aussitôt l'*Attorney-General*, «on the strength of [the answer from Johor] we can claim Pedra Branca as Singapore territory»³⁵. Il va de soi que cette conclusion ne confirme nullement, comme le prétend la Malaisie, «that it was not, even at that point, Singapore's view that PBP was at that time already a part of Singapore's territory»³⁶. Elle montre simplement que les scrupules de certains fonctionnaires coloniaux consciencieux — et

³³ MS, annexe 93 ; voir aussi MS, annexe 91.

³⁴ RM, p. 173, par. 369 ; voir aussi MM, p. 108-109, par. 238-239.

³⁵ Cf. MM, annexe 70.

³⁶ RM, p. 173, par. 369 ; voir aussi MM, p. 109, par. 241

conscients du caractère incomplet des archives sauvées de la destruction pendant la guerre — sont claires : Singapour, en l'absence de toute revendication de Johor, exerce bien sa souveraineté sur l'île.

24. C'est aussi ainsi que l'entend le secrétaire colonial qui, dans sa réponse finale, en date du 13 octobre 1953, à la question du *Master Attendant* du 6 février³⁷, se réfère à la réponse de Johor et transmet la conclusion que l'*Attorney-General* en a tirée³⁸. En outre, cette note confirme, elle aussi, ce que je disais il y a quelques instants au sujet de la signification du mot «ownership» qui figure dans la lettre du secrétaire d'Etat de Johor du 21 septembre : «the State Secretary, Johore, states that the Johore Government does not claim the ownership of Pedra Branca Rock *on which the Horsburgh Lighthouse stands*» (les italiques sont de nous). C'est bien de l'île qu'il s'agit ; pas du phare.

c) La portée juridique des échanges de correspondance de 1953

25. Jusqu'à présent, Monsieur le président, ma démonstration a été «analytique» et je me suis efforcé d'étudier la portée de chacun des documents dont nous disposons pris isolément. Avant d'en terminer avec cet important épisode, je voudrais, avec votre permission, rappeler, de façon plus synthétique, la portée juridique globale qu'il convient de lui attribuer — ne fût-ce que parce que, «lorsque l'on apprécie l'effet de ces notes, il convient de ne pas attacher trop d'importance à telle ou telle expression employée. La correspondance doit être jugée comme un tout...» (*Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53, p. 54 ; voir aussi p. 60.*)

26. En réfléchissant à cet aspect de notre affaire, on ne peut qu'être frappé par les similitudes qu'elle présente avec celle du *Groënland oriental*, tranchée par la Cour permanente. Dans son arrêt du 5 avril 1933, celle-ci reconnaît le titre danois sur le territoire contesté du fait de l'exercice pacifique et continu de l'autorité étatique exercé par ce pays (*ibid.*, notamment p. 51, 54 ou 64), mais ceci n'empêche pas la Cour de s'interroger sur la portée juridique de «certains engagements [norvégiens] portant reconnaissance de la souveraineté danoise sur l'ensemble du Groënland»

³⁷ MS, annexe 91.

³⁸ MS, annexe 97.

(*ibid.*, p. 64). Parmi ceux-ci, la fameuse «déclaration Ihlen» qui est intéressante pour nous à plus d'un titre.

27. Aux termes de celle-ci, Ihlen, ministre des affaires étrangères de la Norvège, avait dit «au ministre du Danemark que le Gouvernement norvégien ne ferait pas de difficultés au règlement de cette affaire», c'est-à-dire qu'il ne s'opposerait pas «à ce que le Gouvernement danois étendît à l'ensemble du Groënland ses intérêts politiques et économiques» (*ibid.*, p. 70). Sans qu'il soit besoin de trancher la question — qui passionne la doctrine — de savoir si la Norvège était en l'espèce liée par un accord verbal avec le Danemark ou par un acte unilatéral, la Cour a considéré «comme incontestable qu'une telle réponse à une démarche diplomatique d'une puissance étrangère, faite par le ministre des affaires étrangères au nom du gouvernement, dans une affaire qui est de son ressort, lie le pays dont il est le ministre» (*ibid.*, p. 71 ; voir aussi *Essais nucléaires (Australie c. France) (Nouvelle-Zélande c. France)*, arrêt, C.I.J. Recueil 1974, p. 267, par. 43 ; p. 472, par. 46 ou *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda)*, arrêt, C.I.J. Recueil 2006, p. 28, par. 49-50).

28. *Mutatis mutandis*, il en va de même en l'espèce : un organe compétent de la Colonie de Singapour saisit le Gouvernement de l'Etat voisin et l'interroge sur le statut juridique d'un territoire. La réponse est sans ambiguïté («the Government does not claim ownership of Pedra Branca»). Il est tout aussi incontestable que, sans qu'il y ait lieu de s'attarder sur la qualité particulière de l'auteur de la réponse dès lors que celui-ci avait incontestablement qualité pour engager l'Etat (*ibid.*, p. 27-28, par. 47-48), une telle réponse lie Johor : son auteur n'est rien moins, selon la Constitution de Johor de 1948, que «le plus haut fonctionnaire en charge des affaires administratives de l'Etat» («the principal officer in charge of the administrative affairs of the State») (MS, annexe 88, art. VI (1)).

29. La comparaison peut d'ailleurs être poussée plus loin. Il est certain que, pas plus que la déclaration Ihlen ne constituait «une reconnaissance formelle de la souveraineté danoise» sur l'ensemble du Groënland (*C.P.J.I.*, Série A/B, n° 53, p. 69), la lettre du secrétaire d'Etat de Johor ne reconnaît expressément la souveraineté de Singapour sur Pedra Branca — ce que nous ne prétendons pas et ce que n'avait d'ailleurs pas demandé Higham. En revanche, de même qu'à raison de l'engagement impliqué dans la déclaration Ihlen de 1919, la Norvège se trouvait dans

l'obligation de ne pas contester la souveraineté danoise sur l'ensemble du Groënland (*Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53, p. 73*), de même la Malaisie, successeur de Johor, ne peut opposer, aujourd'hui, à Singapour un titre territorial — que le secrétaire d'Etat de Johor a reconnu ne pas exister en 1953.

30. En effet, et cela va plus loin que la déclaration Ihlen, le secrétaire d'Etat de Johor ne fait pas part d'une simple déclaration d'intention face à un projet, il énonce un fait : «the Johore Government does not claim ownership of Pedra Branca». Il s'agit là d'une constatation, qui se suffisait à elle-même et n'appelait aucune réaction de la part de Singapour. Pour reprendre la formule de la Cour dans les affaires des *Essais nucléaires*, «[d]ans ces conditions, aucune contrepartie n'est nécessaire pour que la déclaration prenne effet, non plus qu'une acceptation ultérieure ni même une réplique ou une réaction d'autres Etats» (*Essais nucléaires (Australie c. France) (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974, p. 267, par. 43 ; p. 472, par. 46*). Et je ne peux m'empêcher, Monsieur le président, de citer à nouveau, la célèbre opinion individuelle jointe par le vice-président Alfaro à l'arrêt de la Cour dans l'affaire du *Temple de Préah Vihear (Cambodge c. Thaïlande)* : peu importe la dénomination technique de ce principe, son

«effet juridique ... est toujours le même : la partie qui par sa reconnaissance, sa représentation, sa déclaration, sa conduite ou son silence, a maintenu une attitude manifestement contraire au droit qu'elle prétend revendiquer devant un tribunal international est irrecevable à réclamer ce droit (*venire contra factum proprium non valet*)» (*fond, arrêt, C.I.J. Recueil 1962, p. 40*).

31. En d'autres termes, Monsieur le président, je reconnais bien volontiers que la lettre de Johor du 21 septembre 1953 ne prouve pas, positivement, que c'est Singapour qui bénéficie du titre territorial sur Pedra Branca. Mais elle exclut absolument que la souveraineté sur l'île appartienne à la Malaisie. En l'absence de toute contestation de la part d'un Etat tiers, ceci ne peut que vous conduire, Messieurs les juges, à constater la souveraineté de Singapour sur Pedra Branca.

Messieurs les juges, je vous remercie beaucoup de votre attention, et je vous prie, Monsieur le président, de bien vouloir donner la parole à M^e Loretta Malintoppi.

Le VICE-PRESIDENT : Je vous remercie pour votre plaidoirie. I now give the floor to Ms Malintoppi.

Ms MALINTOPPI: Thank you, Mr President.

THE SIGNIFICANCE OF MAPS AND THIRD STATE RECOGNITION IN THE PRESENT CASE

Mr. President, Members of the Court, this presentation will address two separate issues: first, I will deal briefly with the cartographic evidence and its significance for the present case and, second, I will address the recognition by third States of Singapore's sovereignty over Pedra Branca, Middle Rocks and South Ledge.

1. The cartographic evidence

1. Generally speaking, and depending on their accuracy, maps are the graphic representation of certain geographic facts and — when it comes to providing evidence for the attribution of sovereign title — they cannot by themselves establish that title, save in exceptional circumstances, such as when they are attached to or otherwise form part of a delimitation boundary agreement (see *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54). Singapore and Malaysia agree that there are no maps in this case that have this kind of legal force, as described by the Court in the *Frontier Dispute* case (RM, p. 176, para. 376) and reaffirmed most recently by this Court in the *Nicaragua v. Honduras* Judgment where the Court underscored the “extremely limited scope of maps as a source of sovereign title” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, para. 215).

2. In the present case, the evidence of Singapore's sovereignty lies elsewhere. As my colleagues have explained, Singapore's title results from the lawful possession of Pedra Branca by Singapore's predecessor in title, Great Britain, in the period 1847-1851. That title was thereafter maintained by the continuous exercise of exclusive authority over Pedra Branca and the other disputed features by Singapore up to the present.

3. Nevertheless, the cartographic evidence still has a role to play in this case in two main ways: first and foremost, as evidence that the official view held by the Malaysian Government itself prior to the emergence of the dispute was that Pedra Branca was under Singapore's sovereignty and, second, as corroborative evidence confirming the existence of Singapore's title

over the disputed islands, a title which Malaysia has tacitly accepted until the emergence of this dispute.

2. The Malaysian maps as admissions against interest

4. I shall address first Malaysia's own official maps which recognize that Pedra Branca belongs to Singapore. Malaysia, understandably, adopts a very defensive attitude with respect to these maps. The issue has been debated at length in the Parties' written pleadings, and so I shall not dwell on it, except to reiterate a few points.

5. The six maps in question, which are all different editions of Sheet 135 of Series L 7010 (maps 12, 13, 14 and 15 of Singapore's Memorial; and 38 and 41 of the atlas submitted by Malaysia with its Memorial), are reproduced in the judges' folders, at tab 45. I call the Court's attention in particular to the four maps submitted by Singapore with its Memorial. All these maps are entitled "Pengerang", from the region they depict. The first map which is now on the screen is map 12, was published in 1962 by the Surveyor General of the Federation of Malaya, which is the highest authority on maps in the Federation of Malaya. The map is on the screen. If we now zoom onto the relevant portion, which shows Pedra Branca with the Malaysian translation, Pulau Batu Puteh, we can see underneath it, in parentheses, first the word "Horsburgh" and further down, also in parentheses but in capital letters, the word "Singapore".

6. The attributions on the relevant portions of the other three maps — which are now on the screen — are very similar, if not identical. The second map, which is map 13, is a second edition of the first map, also published by the Surveyor General of the Federation of Malaya in 1962. The third map (map 14) was published in 1965 by the Director of National Mapping in Malaysia, the official cartographic authority in Malaysia, and the fourth map, also by the Director of National Mapping of Malaysia, was published in 1974. The other two Malaysian maps reproduced in Malaysia's map atlas, published in 1970 and 1975, have the same annotations and were also issued by the Director of National Mapping of Malaysia.

7. All these maps are entitled to significant probative weight: they represent statements by the Malaysian official cartographic authority over a period of 14 years, prior to the time when the dispute arose, depicting Pedra Branca as belonging to Singapore. These cartographic statements

are fundamentally inconsistent with the claim now advanced by Malaysia. To borrow the words of the Arbitral Tribunal in the *Beagle Channel* arbitration, which are particularly apposite in the present situation:

“[T]he cumulative impact of a large number of maps, relevant for a particular case, that tell the same story — *especially when some of them emanate from the opposite party*, or from third countries — cannot but be considerable, either as indications of general or at least widespread repute, or belief, or else as confirmatory of conclusions reached independently of the maps.” (*Beagle Channel Arbitration (Argentina v. Chile)*, Award of 18 February 1977, 52 *ILR* 97, pp. 203-204, para. 139.)

8. This is precisely what happened here. These official Malaysian maps individually and cumulatively tell the same story. They mean what they say and they say what they mean: Pedra Branca was regarded by Malaysia as belonging to Singapore. Nevertheless, Malaysia attempts to dismiss these maps as “equivocal” and states that “it does not accept that the maps can be characterized as admissions against interest on its part” (RM, p. 187, para. 398). Whether Malaysia likes it or not, it is difficult to see what is equivocal about these maps or how they could be characterized as anything other than admissions against Malaysia’s own interests and admissions that Pedra Branca belongs to Singapore.

9. Malaysia even goes as far as questioning the attribution of Pedra Branca to Singapore specified on the maps, and it states that “it is not at all clear what the notation [Singapore] is intended to indicate” (RM, p. 189, para. 403). But what else could the map makers have intended to indicate by the notation in capital letters “Singapore” other than the island belonged to Singapore? Does Malaysia seriously contend that the annotations on the maps were intended to specify that only the *lighthouse* on the island belonged to Singapore and not the island itself? Such a proposition not only flies in the face of logic, but it is also belied by the maps themselves.

10. In order to illustrate the point, I would like to return to the first map of Malaysia’s series L 7010 compendium dating from 1962, which was on the screen earlier (MS, map 12, also reproduced as map 32 of the Malaysian map atlas). [On the screen] This is only one example, although exactly the same comments can be made about the other official Malaysian maps published between 1962 and 1975.

11. As I have noted, Pedra Branca is clearly labelled “Singapore” on the map in capital letters and in parentheses. If the Court now shifts its attention to another island depicted on the

map — labelled “Pulau Tekong Besar” — it will see that the same word — exactly in the same way — appears in parentheses with respect to this territory, “Singapore”. It is undisputed that Pulau Tekong Besar is under Singapore’s sovereignty. What is as significant as it is obvious from the maps is that Pedra Branca is labelled “Singapore” in exactly the same way as the Singapore island of Pulau Tekong Besar is. Clearly, both islands were regarded as belonging to Singapore. There was no lighthouse on Pulau Tekong Besar, and thus there would have been no reason for the Malaysian cartographic agency to use the word “Singapore” simply to designate who operated the lighthouse, as Malaysia has suggested in an attempt to dispose and explain away the maps in question.

12. This point is further confirmed by drawing a comparison with the island of Pulau Pisang which, as Mr. Bundy has explained, belongs to Malaysia, but on which stands a lighthouse operated by Singapore.

13. The map which is now on the screen [CMS, map 25] is also at tab 47 of your folders, and is from the same Malaysian series: it shows the island of Pulau Pisang in the bottom left corner. If we enlarge the map to focus on this island, the Court would see that the word “Singapore” does not appear on the island despite Singapore’s maintenance of the lighthouse there and the indication of the lighthouse on the map. Contrary to Malaysia’s argument, this shows that the word “Singapore” was not used on Malaysia’s maps simply to label a lighthouse operated by Singapore on Malaysian territory. When Malaysia used the word “Singapore” on its maps, this clearly referred to the relevant holder of title over the territory.

14. Having disposed of Malaysia’s first argument, I’d like to turn to Malaysia’s next point: its assertion that the maps cannot be considered as admissions against interest because they carry disclaimers. What Malaysia fails to point out is that these disclaimers state that the maps are not authoritative *for the delimitation of international or other boundaries*. Thus, these disclaimers have nothing to do with the attribution of territory, but rather concern the delimitation of boundaries. This is an important distinction, because any deviation in the course of a boundary (which may be due to cartographic inaccuracy or to limitations caused in the scale of the maps) is of a fundamentally different character from the outright attribution of territory to a given country by an unequivocal label.

15. Even assuming, *quod non*, that the disclaimers also extended to attribution of territory, however, this does not detract from the maps' legal value as admissions against the interests of Malaysia. As the Boundary Commission in the *Eritrea/Ethiopia* case has observed, a disclaimer does not relieve a State "adversely affected by a map" of the implication that the map gives rise to, because, as the Commission noted:

"The map still stands as a statement of a geographical fact, especially when the State adversely affected itself produced and disseminated it, even against its own interest." (Decision of 13 April 2002, reprinted in 41 *International Legal Materials* 1057 (2002), p. 28, para. 3.27.)

16. The publication of maps is a form of State conduct. When a government, as Malaysia has done in this case, has published over a period of many years a series of maps consistently showing an attribution of territory supporting the claim put forward by another State, that must be relevant in representing the considered views of the government at the time as to where sovereignty over the territory lay. The fact that Malaysia's own official cartography is fully consistent with Singapore's position is a further fundamental defect in its case.

Mr. President, this could be a convenient time for me to stop and resume after the coffee break if you so wish.

The VICE-PRESIDENT, Acting President: Thank you so much. I think we will take our customary break now for ten minutes.

The Court adjourned from 11.20 to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. Please continue.

Ms MALINTOPPI: Thank you, Mr. President.

3. The early maps

17. Before the coffee break I described the official maps issued by the Malaysian mapping authorities, which attribute Pedra Branca to Singapore. Malaysia seeks to minimize the relevance of these maps. However, while downplaying the importance of its own official maps when they do not suit its interests, Malaysia at the same time puts great stock in other elements of the cartographic evidence. It has dealt with this issue extensively in its written pleadings: it has

produced a map atlas and reproduced numerous maps and charts in its pleadings. Malaysia's arguments in respect of maps are based on two main strands: first, that early maps support its claim to an original title based on immemorial possession, as they allegedly show a connection between Pedra Branca and Johor or depict Pedra Branca within the British sphere of influence. These maps, in other words, are said to illustrate the view of third States that the island once was part of Johor's dominions.

18. The second strand of Malaysia's arguments is based on two negative inferences: first, that the maps *do not* show Singapore's maritime boundaries in the area around Pedra Branca (CMM, p. 264, para. 557), and second, that the existing maps *do not* suggest that Pedra Branca and related features *are not* part of Malaysia (RM, p 176, para. 376). Naturally, Malaysia conveniently forgets to mention or explain its own official maps, which show precisely the opposite of what Malaysia contends.

19. The early cartography can be disposed of quickly. I refer the Court to the six maps from the seventeenth to the mid-nineteenth centuries which were reproduced by Malaysia with its Memorial (map atlas, maps 1-6). These maps are highly generalized, inconsistent and inaccurate: even Malaysia admits, at paragraph 282 of its Reply, that the scale in the early maps is not accurate. Consequently, they are of no relevance for purposes of indicating sovereignty. Moreover, none of them shows any specific attribution of Pedra Branca to Johor and can in no way support Malaysia's claim to sovereignty over Pedra Branca.

20. As for the alleged "close connection" between Pedra Branca and Johor, this is not shown by these maps and remains unproven. As Singapore demonstrated in its Counter-Memorial, other contemporary maps exist which show Pedra Branca as having no connection whatsoever with the Johor mainland and some, like two maps of Johor and dependencies issued in 1887 and 1893, which do not depict Pedra Branca at all (maps Nos. 9 and 10 of Singapore's atlas). These two maps are particularly significant. I will show on the screen now the 1887 map, which was the first official map of Johor published under the authority of the Sultan and was drawn up by a senior Johor official — as you can see in the legend — known as "Dato Bintara Luar" — which I am told means Minister for Foreign Affairs in Malay — after an extensive survey. The Sultan of Johor officially presented this map to the Government of South Australia in 1887.

21. The 1893 map of Johor, which also does not include Pedra Branca, was drawn by a surveyor in the service of the Johor Government and published in 1894 in the *Geographical Journal* of the Royal Geographic Society: and it will serve to illustrate a paper entitled “Johore”. Upon presentation of the paper at a gathering of the Royal Geographic Society on 12 February 1894, the Secretary of the Sultan of Johor noted that this map may be “considered the map of the day” (*The Geographical Journal*, Vol. III, No. 4, p. 298).

22. By contrast to these official Johor maps that do not depict Pedra Branca, the maps relied on by Malaysia provide no evidence, and none is adduced, that any of the local rulers ever commissioned or authorized their production. In the light of these considerations, no conclusion can be drawn from these maps with regard to the perceptions as to sovereignty over Pedra Branca and related features at the time. As stated by the Arbitral Tribunal in the Award in the first phase in the *Eritrea/Yemen* case with respect to maps produced during the nineteenth century, “Conclusions based on this material would be tenuous at best.” (Award of 9 October 1998, p. 95, para. 370.)

23. A similar reasoning applies to the post-1824 maps showing a division between British and Dutch spheres of influence. These maps are said to be significant because they were issued subsequently to the 1824 Anglo-Dutch Treaty and they do not — Malaysia argues — attribute Pedra Branca to the Dutch sphere of influence. Now quite aside from the fact that so-called “spheres of influence” are not the same as sovereign title, these maps show no attribution of Pedra Branca to any particular sovereign.

24. In the present case, title was firmly established when the British authorities in Singapore took possession of Pedra Branca in the period 1847-1851. This is also confirmed by the Dutch recognition of British sovereignty over Pedra Branca which took place in 1850 and to which I will refer later in my intervention.

4. The twentieth century maps

25. I now turn to maps produced during the twentieth century. Malaysia argues that, since certain charts and maps dating from this period *do not* show boundary lines in the area around Pedra Branca, they must necessarily reflect the perception that the island was not within

Singapore's maritime boundaries. In other words, Malaysia's position is that the maps do not support Singapore's claim of title to the island and its related features.

26. Malaysia's argument, however, is simply ineffectual when compared with Singapore's taking of possession and its impressive record of acting *à titre de souverain* on and around Pedra Branca for over 150 years. Any negative inferences that might be drawn and which Malaysia seeks to draw from these nautical charts and highly generalized maps are ultimately irrelevant and do not advance its case. Whatever the maps may or may not show, they do not even begin to contradict the pattern of activities and official visits to Pedra Branca in 1847-1851, the various manifestations of Great Britain's intention and will to act as sovereign and the maintenance of this title through a variety of acts of peaceful and continuous administration carried out since 1851. And they certainly cannot negate the express disclaimer of ownership over Pedra Branca made by the State of Johor in 1953.

27. Malaysia also argues that, if Singapore has sovereignty over Pedra Branca, Middle Rocks and South Ledge, it should have included these features in its maps. There is an obvious answer to that argument and that is provided by the physical distance between Pedra Branca and the Singapore mainland. After all, the fact that the maps of France do not include Martinique or Guadeloupe does not make these islands less French.

28. Malaysia then relies on certain maps showing lines at sea which it contends show Pedra Branca as falling within the territorial waters of Malaysia or its predecessors (maps 26-29 and 35-36 in Malaysia's map atlas, and maps 7-15 in CMM, pp. 286-297).

29. Singapore has already responded in detail to Malaysia's arguments for each one of these maps in its Counter-Memorial and Reply, but still some remarks are warranted in light of the extensive discussion contained in Malaysia's Reply (pp. 183-187, paras. 389-398).

30. Maps 27, 28 and 29 of Malaysia's atlas all contain similar dotted lines at sea. The map shown on the screen as an example is map 28. On either side of the line depicted on this map are the annotations: "Federation of Malaya" and "Republic of Indonesia", the other maps contain similar lines and similar annotations, such as "British Malaya", "Netherlands East Indies". Map 27 was published by the British War Office in 1944, while maps 28 and 29 were reprinted from map 27 in 1950.

31. For Malaysia, the significance of these charts lies in the fact that they show dotted lines at sea as international boundary lines between Federation of Malaya and Republic of Indonesia or British Malaya and the Netherlands East Indies which allegedly place Pedra Branca and related features in Johor waters. Malaysia also argues that, since none of these maps draws a line in the area of Pedra Branca indicating its appurtenance to Singapore “the authors did not consider that PBP fell in the Singapore (Malaya) province” (RM, p. 184, para. 391).

32. However, these charts contain no indication as to the attribution of sovereignty, and the arguments advanced in Malaysia’s Reply do not change this state of things. All three maps depict Pedra Branca and Middle Rocks as a lighthouse symbol surrounded by a cluster of rocks, and identified by the label “Pedra Branca Horsburgh (Middle Rock)”. South Ledge is depicted as a black dot with the label “Rock”, located about two miles south-west of Pedra Branca. The dotted lines appearing in all three maps place South Ledge on the “Indonesian side” of the line. Maps 28 and 29 contain disclaimers and in map 27 the dotted line is labelled “British Malaya”, a term which, at the time the map was produced, encompassed both Johor and Singapore. Thus, the line represented on this chart provides no assistance in showing whether Pedra Branca appertained to Singapore or Johor.

33. In sum, no conclusions on matters of sovereignty can be drawn from these military charts. This is further confirmed by the arbitrary nature of the dotted lines depicted on them and the disclaimers they carry.

34. Likewise, maps 35 and 37 of Malaysia’s Memorial map atlas are similarly inconclusive, and both contain a disclaimer stating that they are not an authority for boundaries. Malaysia’s interpretation, i.e., that they are inconsistent with Singapore’s sovereignty over Pedra Branca, is thus based on pure wishful thinking.

35. Before I leave the subject of maps, I wish to discuss map 30 of Malaysia’s Memorial map atlas, which can be seen on the screen. This is a compilation sheet of Johor, it is sheet No. 135 issued in 1957. Malaysia finds the map significant because it contains no specific attribution of Pedra Branca to Singapore. In its Counter-Memorial, Singapore made four points in response to Malaysia’s statement that this map “was evidently carefully drawn and checked” (MM, p. 148, para. 319):

- first, there was no indication in the compilation sheet that Pedra Branca was attributed to Johor or Malaysia (a point which is acknowledged by Malaysia in its Memorial (p. 148, para. 319) and in the Reply (p. 186, para. 397));
- second, in any event, inclusion of a prominent feature like Pedra Branca in a compilation sheet of this nature carries no implications for matters of sovereignty;
- third, it would have been possible to draw a compilation sheet without actually conducting a field survey on Pedra Branca;
- last, and most important, the 1957 compilation sheet formed the basis on which the subsequent map in which Malaysia expressly and unequivocally attributed Pedra Branca to Singapore was compiled and published in 1962. We recall that this was sheet No. 135 of series L 7010.

36. In its Reply, Malaysia asserted that Pedra Branca was “key” to this survey of Johor and stated that Malaysian surveyors had travelled to Pedra Branca and taken observations from this island (RM, p. 186, para. 397). However, the temporal sequence of Malaysia’s arguments does not make sense: the survey on which Malaysia relies was carried out in 1959 and the compilation sheet was issued in 1957. How could a survey conducted in 1959 have had any impact on a compilation sheet drawn two years earlier?

37. As for the crucial point I mentioned, i.e., that the 1957 compilation sheet formed the basis of Malaysia’s 1962 “admission against interest map”, Malaysia’s only defence is that “it is not known whether this was in fact the case” (RM, p. 187, para. 398). However, this was indeed the case as can be seen from materials on the record.

38. The short answer to Malaysia is that the 1957 compilation sheet is marked “Sheet 135”, in other words it bears the same sheet number as the two 1962 “admission against interest” maps. As explained by Singapore in its Counter-Memorial, further documentary proof of the fact that the 1957 compilation sheet formed the basis of the 1962 official maps can be found in the Annual Reports of the Federation of Malaya Survey Department, and I refer the Court to Singapore’s Counter-Memorial, paragraph 9.29 (pp. 229-230) and footnote 582, at page 230, and also to Annex 35 to Singapore’s Counter-Memorial.

5. Third States' recognition of Singapore's sovereignty over Pedra Branca

39. I will now move to the final topic of my presentation: the recognition by third States of Singapore's sovereignty over Pedra Branca.

40. As is the case with the map evidence, third State recognition alone is not sufficient to establish territorial title. Nevertheless, the fact that third States acknowledge the existence of a title belonging to a particular State attests to its notoriety and may thus serve as confirmation of its existence or represent evidence of general repute.

41. The various episodes that constitute the pattern of third-party recognition throughout the years that Pedra Branca was under the sovereignty of Singapore have been extensively discussed by Singapore in its written pleadings. Allow me to recall them briefly once again.

42. On 27 November 1850, only six months after the Horsburgh lighthouse foundation stone ceremony at which — as Mr. Brownlie recalled — Pedra Branca was described as a dependency of Singapore, the Dutch General Secretary in Batavia expressly referred to “the construction of a lighthouse *at Pedra Branca on British territory*”. This was done in a letter to the Dutch Resident in Riau. The letter concerned the payment of gratuities to the commanders of Dutch gunboats who had assisted Thomson in patrolling the waters between Riau and Singapore during the construction of the lighthouse. The relevant passage is reproduced at tab 48 of the judges' folder and it deserves to be quoted in full. It is on the screen now:

[Place on screen]

“As commissioned, I have the honour of informing Your Excellency that the government has found no grounds for granting gratuities to the commanders of the cruisers stationed at Riau, as proposed in your despatch of 1 November 1850, number 649, on account of their shown dedication in patrolling the waterway between Riau and Singapore, *lending assistance to the construction of a lighthouse at Pedra Branca on British territory*. And they deserve it so much the less because the cruiser crews have failed to perform their actual duties which is to cruise against pirates whose brutalities have been repeatedly complained of in the vicinity of Lingga.” (RS, Ann. 8, emphasis added.)

43. It should be emphasized that the Dutch General Secretary in Batavia was the highest ranking civil servant in the Netherlands East Indies and — as secretary to the Governor-General of the Netherlands East Indies — his letters carried the authority of the Governor-General. In particular, the author of this letter, Mr. Visscher, had occupied the position of General Secretary since 1841. He thus held this job for nine years when he wrote this letter. Quite aside from the

authority of his position, Mr. Visscher was clearly very experienced and knowledgeable in the affairs of the region. His contemporary opinion that Pedra Branca fell under British sovereignty must therefore be entitled to considerable weight.

44. The second episode I wish to recall concerns a meeting among technical experts from Singapore, Malaysia and Indonesia, which occurred in May 1983. At the meeting, Singapore reported on two wrecks in the vicinity of Pedra Branca and informed the delegates that Singapore had issued Notices to Mariners notifying the position of the wrecks (MS, Vol. 7, Ann. 156).

45. No objection was raised at the meeting by any of the delegates as to Singapore's conduct, and yet — thanks to the Notices to Mariners issued by Singapore — there could be no question as to the exact location where the incidents took place. Clearly, there was also no question in the participants' minds that the incidents occurred in Singapore's waters.

46. As Mr. Bundy has already explained, in at least two instances Singapore granted permission to nationals of third States to carry out activities on Pedra Branca and its territorial waters: the first concerned a 1972 request by a member of the American Piscatorial Society to study the migratory habits of certain fish species, and the second a 1981 request by a British firm, Regis Ltd., to the Hydrographic Department of the Port of Singapore, to conduct a scanner of undersea areas six to ten nautical miles north-east of Pedra Branca in connection with salvage operations. In both cases, the requests were addressed to and granted by Singapore authorities.

47. Malaysia dismisses the first episode because the application was made by a private individual and was addressed to the Chairman of the Singapore Light Dues Board, i.e., to the entity responsible for the lighthouse. However, Malaysia's objections are misplaced: the opinion of a private individual, although it may not *per se* be determinative of the question of title, is nevertheless evidence that a certain state of affairs was a matter of public knowledge. In the present instance, Singapore's conduct was consistent with that of the holder of the legal title over territory and the conduct of the Applicant is evidence of the notoriety of a state of affairs. Furthermore, Malaysia's comment does not detract from the significance of the fact that this particular individual wrote to an agency of the Government of Singapore in order to obtain permission to visit Pedra Branca, not to Malaysia, and that a Singapore government agency granted

the request. This was an official act of a sovereign nature, and it attests to the fact that it was a matter of public knowledge that Singapore possessed sovereignty over the island.

48. The last, and most recent, episode took place on 4 June 2005 in connection with a collision between two ships, the *Uni Concord* and the *Everise Glory*, in the vicinity of Pedra Branca.

49. I would simply recall here that the press releases issued by the Philippines Department of Foreign Affairs to comment on the death of a Filipino crew member, which resulted from the incident, stated that the collision occurred: “at sea, off Pedra Branca, Singapore”. You can also, at your leisure, look at Singapore’s Reply, Annex 61 and Annexes 59 to 66 for the relevant diplomatic correspondence on this incident. Coming from a neighbouring State of Singapore and Malaysia, which is presumably well informed of the state of affairs regarding sovereignty in the region, the Philippines recognition merits particular attention and significance.

50. Finally, the map, which has been reproduced by Malaysia as map Annex 5 of the Reply, a copy of which is also contained at tab 49 of the judges’ folders.

51. Malaysia introduces this map in an attempt to discredit the fact that the United States *Gazetteer* has been listing Pedra Branca as belonging to Singapore since 1970 (CMS, p. 233, para. 9.32). Malaysia describes this map as a “recently declassified United States Department of State map of the area” (RM, p. 188, para. 400).

52. However, as admitted by Malaysia itself at footnote 575, page 188 of its Reply, this is not a map drawn and published by the United States State Department, but a digital copy, stored in the United States State Department database, of the Joint Operations Graphic issued by the United Kingdom Ministry of Defence and sent to the Singapore Government in draft form in 1993 for the Singapore Government’s comments. As the Court will recall, Singapore formally protested this map with the United Kingdom Government because the word “Malaysia” appeared and was added under the legend “Pulau Batu Puteh (Horsburgh)”. Following Singapore’s protest of what appeared to be a political attribution of Pedra Branca to Malaysia, the first and only time that this was done in this series of maps, the United Kingdom withdrew the map and never published it (see CMS, pp. 234-235, paras. 9.35-9.36).

53. It is not clear how Malaysia's case could be advanced by a copy of an English map kept in a United States digital database, not widely distributed or easily accessible. This map can hardly be considered evidence of the opinion of the United States and even less of general repute. Moreover, since the original map on which this copy is based had already been protested by Singapore, neither the original English map, nor, *a fortiori*, its United States copy can have any legal value in this respect. By contrast, it is clear from the 1970 *Gazetteer* that the United States Board of Geographic Names, which is a federal entity composed of representatives from several branches of the United States Government, attributed Pedra Branca to Singapore. In the "Malaysia" section of the same *Gazetteer*, no entries can be found for Pedra Branca not even under its Malay name, "Pulau Batu Puteh".

54. In conclusion, none of the episodes, none of the arguments raised by Malaysia in an attempt to belittle the significance of these episodes of third State recognition of Singapore's sovereignty over Pedra Branca has any merit. The fact of the matter is that all these episodes, whether initiated by private individuals or emanating from States or State entities, testify to a general recognition that Pedra Branca falls under Singapore's sovereignty and that Singapore has responsibility for activities conducted on and around the island. By contrast, and despite all of its attempts, Malaysia has *nothing* to show regarding recognition of its presumed title over Pedra Branca, Middle Rocks and South Ledge.

Thank you for your attention, Mr. President, Members of the Court. If I may ask you now to give the floor to Professor Pellet to continue with Singapore's presentation.

The VICE-PRESIDENT, Acting President: I thank you, Ms Malintoppi, for your pleadings. I give the floor to Professor Pellet.

M. PELLET : Merci beaucoup, Monsieur le président. Monsieur le président, Messieurs les juges, j'ai deux bonne nouvelles à vous donner. La première c'est que ceci est ma dernière plaidoirie pour ce premier tour de Singapour et la seconde c'est qu'elle sera brève.

MIDDLE ROCKS ET SOUTH LEDGE

1. Au paragraphe 419 de sa réplique, la Malaisie fait valoir que «[l]a présente affaire ne se limite pas à la souveraineté sur Pulau Batu Puteh» («This case is not simply about sovereignty over PBP»). Il est tout à fait exact que, l'article 2 du compromis prie la Cour

«de déterminer si la souveraineté sur

a) Pedra Blanca/Pulau Batu Puteh ;

b) Middle Rocks ;

c) South Ledge ;

appartient à la Malaisie ou à la République de Singapour».

2. Mais il n'en résulte pas que le sort de ces trois formations soit distinct. Certes, il pourrait en aller ainsi si des éléments du dossier faisaient apparaître qu'elles avaient fait l'objet d'un traitement différent soit en droit, soit même en fait. Mais tel n'est pas le cas : comme la Malaisie l'avait prudemment indiqué dès son mémoire : «It is true that as minor features not much separate attention was paid to them»³⁹. C'est à vrai dire un «understatement», Monsieur le président : ni Middle Rocks ni South Ledge n'ont jamais, sous quelque angle que ce soit, fait l'objet d'un traitement distinct de celui de Pedra Branca. La Malaisie n'a pu invoquer *aucun* acte antérieur à la date critique qui soit spécifiquement lié à l'une ou à l'autre de ces formations. Et si, pour sa part, Singapour a pu en mentionner quelques-uns⁴⁰, il est clair qu'ils sont liés à sa souveraineté territoriale sur Pedra Branca et, par voie de conséquence, sur les eaux adjacentes dans lesquelles se trouvent Middle Rocks et South Ledge et qu'ils ne présentent aucune spécificité.

3. Il est du reste significatif que, dans toutes ses écritures, la Malaisie ait constamment utilisé les arguments qu'elle invoquait à l'appui de ses prétentions sur Pedra Branca pour tenter de justifier celles qu'elle a sur Middle Rocks et South Ledge. Lorsque ses conseils ont rédigé sa réplique, ils ont sans aucun doute réalisé qu'ils manquaient tout particulièrement d'arguments à cet égard puisque l'expression : «PBP, Middle Rocks and/or South Ledge» y apparaît plus de quatre-vingts fois (j'ai compté avec l'aide des touches CTRL-F de mon ordinateur) dans la

³⁹ MM, p. 132, par. 294.

⁴⁰ Cf. CMS, p. 212-213, par. 8.18-8.20.

réplique ! La Partie malaisienne peut bien contester que ces trois formations constituent un groupe, elle ne les traite pas moins comme tel tout au long de ses plaidoiries.

4. Au bénéfice de cette remarque préliminaire, je me propose, Monsieur le président, de réfuter dans un premier temps les deux arguments que la Malaisie fait encore faiblement valoir en sens contraire dans sa réplique. Puis je rappellerai, très brièvement, la position de Singapour en ce qui concerne la souveraineté sur Middle Rocks et South Ledge.

5. Quoique de façon assourdie, la réplique de la Malaisie réitère sa thèse selon laquelle Pedra Branca, Middle Rocks et South Ledge présenteraient des caractères distincts. Bien qu'elle y consacre douze pages, elle ne fait valoir que deux arguments en ce sens, dont je dirai successivement quelques mots :

- 1) les trois formations seraient séparées les unes des autres par des chenaux navigables ; et
- 2) South Ledge — dont les Parties s'accordent à considérer qu'elle n'est pas susceptible d'appropriation de manière autonome —, se trouverait dans les eaux territoriales de Middle Rocks et pas de Pedra Branca.

1. La question des chenaux navigables

6. La Malaisie se donne beaucoup de mal pour tenter d'établir que des chenaux navigables séparent Pedra Branca de Middle Rocks, d'une part, et ces derniers de South Ledge, d'autre part. Outre que cette affirmation témoigne d'une conception assez singulière de ce qu'est un chenal navigable, je vois mal, Monsieur le président, en quoi ceci avance la thèse malaisienne.

7. Pour étayer son affirmation quant à l'existence de chenaux «navigables», la Malaisie s'appuie sur un «rapport» (que l'on peut considérer comme un affidavit), du capitaine Goh Siew Chong, qui est annexé à sa réplique⁴¹. Il en ressort que Pedra Branca est séparée de Middle Rocks par un chenal profond d'au moins 10,1 mètres, et Middle Rocks de South Ledge par un autre chenal dont la profondeur minimale est de 18,3 mètres⁴². C'est à peu près exactement ce qu'avait indiqué Singapour dans son mémoire sur la base d'une étude effectuée en 2003 par la Maritime and Port Authority⁴³.

⁴¹ RM, appendice III, p. 235-245.

⁴² *Ibid.*, p. 243, par. 5.5 et 5.6 ou RS, p. 195-196, par. 413.

⁴³ Voir MS, vol. 7, annexe 201 et p. 204, par. 8.6.

Projection 1 - Extrait de la carte n° 2403 de l'Amirauté britannique (dépliant inclus au dos du CMM) (dossier des plaidoiries, onglet 51)

8. En résulte-t-il que l'on peut parler de chenal navigable ? Oui, en ce sens que de petits bateaux intrépides peuvent s'y aventurer à leurs risques et périls. Mais ceci ne présente qu'un intérêt plus que limité pour la navigation compte tenu du tirant d'eau relativement faible des navires auxquels ces chenaux sont ouverts. L'extrait de la carte de l'Amirauté britannique qui est projetée derrière moi le montre on ne peut plus clairement : Pedra Branca et Middle Rocks sont entourés, *ensemble*, par une seule ligne en pointillés signalant *un* danger pour la navigation et indiquant une profondeur de moins de 10 brasses (c'est la forme en blanc qui ressemble un peu à Snoopy). De plus, de part et d'autre du groupe constitué par nos trois formations, on trouve des chenaux autrement «plus navigables», comme le montrent le schéma et les cartes marines qui figurent sous les onglets 50, 52 et 53 dans le dossier des juges. Du reste, aucune carte ne mentionne l'existence d'un chenal navigable entre Pedra Branca et Middle Rocks, y compris — et cela mérite d'être noté — la carte de l'Amirauté britannique 3831, dont le capitaine Goh indique qu'elle a été établie pour l'essentiel sur la base des données recueillies par le HMS *Dampier* lors de la campagne de 1967⁴⁴. La Malaisie ne peut pas davantage faire état du moindre guide ou de la moindre instruction nautiques signalant l'existence d'un chenal navigable à cet emplacement : il n'existe que dans l'imagination, quelque peu orientée, du capitaine Goh.

[Fin de la projection 1.]

9. Tout le but de l'exercice semble être pour la Malaisie de montrer que Pedra Branca, Middle Rocks et South Ledge ne constituent pas un «groupe». Il s'agit là, à vrai dire, d'une notion toute relative comme le note expressément le capitaine Goh dans son affidavit : «From a hydrographic point of view there are no specific factors determining whether a cluster of islands are a group of islands or otherwise.»⁴⁵ Dira-t-on que puisque de petits bateaux peuvent naviguer entre les trois formations celles-ci ne forment pas un groupe ? Ou considèrera-t-on, au contraire, que puisqu'elles sont enserrées entre deux chenaux autrement plus profonds, autrement plus navigables, qui permettent de les contourner, elles en constituent un ? Je ne pense pas que la

⁴⁴ RM, appendice III, p. 242, par. 5.2.

⁴⁵ RM, appendice III, p. 242, par. 5.1.

question puisse recevoir une réponse indiscutable au point de vue juridique. Mais, surtout, je pense que ceci n'a guère d'importance.

10. «Groupe» ou pas, le fait est, comme je l'ai rappelé il y a quelques instants, que les trois formations ont toujours été considérées comme un tout et traitées comme tel. Et l'on pense dès lors inévitablement à un passage de la sentence de Max Huber dans l'affaire de l'*Ile de Palmas* que j'ai cité il y a deux jours à propos de l'introuvable titre de Johor sur Pedra Branca⁴⁶, passage dans lequel l'illustre arbitre, après avoir exclu l'application de la contiguïté en tant que principe de règlement des litiges territoriaux, ajoute cependant :

«Pour ce qui est des groupes d'îles, il est possible qu'un archipel puisse, dans certains cas, être regardé en droit comme une unité, et que le sort de la partie principale décide du reste. Ici cependant il y a lieu de distinguer entre l'acte de prise de possession initiale d'une part, qui peut difficilement s'étendre à toutes les parties du territoire, et l'exercice de la souveraineté d'autre part qui, étant une manifestation continue et prolongée, doit se déployer à travers tout le territoire.»⁴⁷

11. C'est très exactement ce qui se produit en l'espèce : la prise de possession initiale de Pedra Branca par la Grande-Bretagne a fondé le titre de Singapour sur l'île principale. Et, par la suite, la colonie des détroits puis Singapour ont exercé leur souveraineté sur les petites formations marines voisines dans la mesure où celles-ci, évidemment inhabitées et peu accessibles, s'y prêtaient.

2. L'inclusion de South Ledge dans les eaux territoriales de Pedra Branca et de Middle Rocks

12. Monsieur le président, les deux Parties s'accordent pour considérer que, contrairement à Middle Rocks, South Ledge constitue un haut-fond découvrant⁴⁸ qui, en tant que tel, n'est pas susceptible d'appropriation autonome (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*, fond, arrêt, C.I.J. Recueil 2001, p. 102, par. 207 ; voir aussi *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 141). En conséquence, dans son contre-mémoire, la Malaisie avait fait valoir que «South Ledge se rattacherait donc à Middle

⁴⁶ Voir CR 2007/21, p. 26, par. 48.

⁴⁷ CPA, sentence arbitrale du 4 avril 1928, *RGDIP*, 1935, p. 183 (texte anglais in *RSANU*, vol. II, p. 855) ; voir aussi sir Gerald Fitzmaurice, «The Law and Procedure of the International Court of Justice, 1951-4, Points of Substantive Law — Part II», *BYBIL* 1955-1956, p. 73.

⁴⁸ Cf. MS, p. 11, par. 2.11, p. 179, par. 9.4, p. 191, par. 9.37 ; MM, p. 131, par. 289 ; CMS, p. 202, par. 8.4 ; CMM, p. 81, par. 161 ; RS, p. 264, par. 10.3 ; RM, p. 191, par. 406.

Rocks, et non à Pulau Batu Puteh» («South Ledge would attach to Middle Rocks rather than to PBP»⁴⁹). Elle a développé ce thème dans sa réplique, dans laquelle elle explique que :

«It is unarguable that South Ledge is closer to Middle Rocks than it is to PBP. Middle Rocks are just as capable in law of generating a territorial sea as is PBP. To say that Middle Rocks and South Ledge lie within the territorial sea of Pedra Branca is thus to say nothing at all. If the Court accepts Malaysia's contention that PBP and Middle Rocks are distinct features, it would follow that South Ledge would lie within the territorial sea generated by Middle Rocks, not by PBP.»⁵⁰

13. Singapour accepte volontiers que Middle Rocks génère, pour sa part, une mer territoriale et il est, dès lors, exact que l'on peut considérer que, *si* Middle Rocks ne constitue pas un groupe unique avec Pedra Branca, ou *si* ils relèvent d'un souverain différent, il serait plus exact de dire que South Ledge se trouve inclus dans la mer territoriale de ceux-ci et non dans celle de Pedra Branca. Le problème pour la Malaisie est qu'aucun de ces deux «si» n'est avéré. Pour les raisons que je viens de rappeler — et qui ne font pas appel à la notion juridique de mer territoriale —, l'«archipel» que forment Pedra Branca et Middle Rocks constitue une unité et, dès lors, South Ledge se trouve dans leur mer territoriale commune.

14. Au surplus, le raisonnement de la Partie malaisienne est très artificiel et formaliste. Les rares actes accomplis par Singapour sur les deux formations (je rappelle que la Malaisie n'en a aucun à son actif) l'ont été parce que ces formations se trouvent à proximité immédiate de Pedra Branca et dans les limites de ses eaux territoriales.

3. Bref rappel de la position de Singapour

15. Cette situation est d'ailleurs, Monsieur le président, la considération de simple bon sens qui est à la base de la position de Singapour. Le sort de Pedra Branca d'une part, et de ses minuscules dépendances que sont Middle Rocks et South Ledge d'autre part, est forcément lié. Si la souveraineté sur Pedra Branca appartient à Singapour — et c'est le cas — la souveraineté sur l'une comme sur l'autre de ces formations maritimes appartient aussi, inévitablement, à Singapour, alors même qu'elles présentent, en fait et en droit, des caractéristiques en partie distinctes : South Ledge est un haut-fond découvrant, non susceptible d'appropriation autonome, alors que les rochers qui forment Middle Rocks sont, juridiquement, des îles au sens de l'article 121 de la

⁴⁹ CMM, p. 82, par. 162.

⁵⁰ RM, p. 197, par. 418.

convention sur le droit de la mer. Mais ces îles sont tellement petites, tellement inhospitalières, tellement proches de Pedra Branca aussi, qu'il existe pour le moins, «une forte présomption» (pour reprendre une expression figurant dans la sentence de 1998 dans l'affaire *Erythrée/Yémen*)⁵¹ en faveur de leur rattachement à l'île principale. Ceci en tout cas en l'absence de «meilleur titre» (de *better title*)⁵²— un meilleur titre, dont la Malaisie n'a pas apporté, ne fût-ce que l'esquisse d'un début de commencement de preuve.

16. Il ne me paraît pas utile de reprendre ici tous les éléments qui concourent à cette conclusion ; leur simple énumération suffit ; il s'agit

- de la proximité des trois formations les unes des autres⁵³ ;
- de la géomorphologie⁵⁴ ;
- de la toponymie (South Ledge est définie par sa position par rapport à Pedra Branca ; Middle Rocks — les «rochers du milieu» — le sont par leur position intermédiaire)⁵⁵ ;
- de la situation des trois formations entre Middle Channel et South Channel⁵⁶ (alors que, je le rappelle, il n'existe pas, entre elles, de chenal navigable digne de ce nom) ;
- de la cartographie⁵⁷ ;
- du traitement commun dont ces formations sont l'objet dans les guides et instructions nautiques⁵⁸ ; et
- de l'impossibilité de distinguer les actes de souveraineté accomplis sur South Ledge et Middle Rocks, de ceux qui ont concerné Pedra Branca — étant rappelé que si Singapour a pu faire état de quelques actes de ce genre ; la Malaisie ne l'a pas pu (et que les quatre «effectivités» qu'elle

⁵¹ Sentence sur la première phase du différend, 9 octobre 1998, *RSANU*, vol. XXII, p. 317, par. 474.

⁵² *Ibid.*, p. 313, par. 458.

⁵³ MS, p. 183, par. 9.14 ; RS, p. 267-268, par. 10.10

⁵⁴ MS, p. 183, par. 9.16, p. 195-196, par. 9.46-9.47 ; CMS, p. 203-205, par. 8.6-8.7 ; RS, p. 270, par. 10.13

⁵⁵ CMS, p. 208, par. 8.9 *d*).

⁵⁶ MS, p. 183, par. 9.15 ; CMS, p. 205-206, par. 8.8 ; RS, p. 270, par. 10.13.

⁵⁷ CMS, p. 208, par. 8.9 *c*) ; RS, p. 269-270, par. 10.12.

⁵⁸ MS, p. 196-198, par. 9.48-9.49 ; CMS, p. 207, par. 8.8 *a*).

invoque à cet égard⁵⁹ — et qui n'en sont point — sont précisément les mêmes quatre (et uniques) faits dont elle se prévaut à l'appui de sa revendication sur Pedra Branca)⁶⁰.

17. Cette énumération se suffit à elle-même, je crois, Monsieur le président : la souveraineté sur Middle Rocks et South Ledge appartient à Singapour, au même titre que la souveraineté sur Pedra Branca.

Messieurs les juges, je vous remercie très vivement de votre attention renouvelée ; et je vous prie, Monsieur le président, de bien vouloir donner la parole au vice-premier ministre de Singapour, M. Jayakumar, qui résumera brièvement notre argumentation à l'appui de cette conclusion.

The VICE-PRESIDENT, Acting President: Je vous remercie, Monsieur le professeur pour votre plaidoirie. I shall now give the floor to Professor Jayakumar. You have the floor, Sir.

Mr. JAYAKUMAR:

Conclusion

1. Mr. President and Members of the Court, over these past four days, you have heard my colleagues on the Singapore team explain Singapore's case in detail. I now have the honour to make some concluding remarks to sum up the main elements of Singapore's case, and to emphasize the key points made by my colleagues on the Singapore team.

Johor had no original title to Pedra Branca

2. The first issue which we have dealt with is Malaysia's claim that Johor had an "original title" to Pedra Branca since time immemorial. Malaysia asserts that Pedra Branca was not *terra nullius*. Malaysia is wrong. Singapore has shown that Johor never had title to Pedra Branca. Pedra Branca, being an uninhabited island which had never been the subject of any prior claim or acts of ownership by any sovereign entity, was *terra nullius*.

⁵⁹ CMS, p. 210, par. 8.13 ; RS, p. 271-272, par. 10.16.

⁶⁰ CMS, p. 210-211, par. 8.14-8.16 ; RS, p. 272, par. 10.16.

3. Malaysia's claim for an original title amounts to no more than saying that Pedra Branca must belong to Johor because Johor was at one time an important Power in the region and Pedra Branca is located near Johor. The *non sequitur* is clear.

4. Malaysia has not produced even one iota of evidence which attributed Pedra Branca to Johor or which showed any sovereign activities by Johor on the island. It is for this reason that Malaysia has been forced to rely mainly on an anonymous newspaper item, which Professor Pellet has shown to be unreliable and of no probative value at all.

5. As Singapore's pleadings have documented, Johor had been engaged in diplomatic correspondence with European Powers since the seventeenth century. In addition, the Temenggong's system of administration and record keeping in the nineteenth century was so impressive that historian Carl Trocki, who was given access to the Johor Royal Archives, was able to write a comprehensive history of nineteenth century Johor using those documents⁶¹. Yet, not a single document could be found and adduced before this Court which attributed Pedra Branca to Johor.

6. Malaysia's claim is also contradicted by her own subsequent conduct. If Johor indeed had original title, one might ask: why is it that Johor did not seek to issue a formal grant for the lighthouse on Pedra Branca when it consciously made a point of doing so for Pulau Pisang in 1900? If Johor had original title, why are there no Malaysian records attributing Pedra Branca to Johor? And why is it that the relevant Malaysian records attribute Pedra Branca instead to Singapore?

7. Faced with these insurmountable difficulties, Malaysia has resorted to supplementing its arguments with reports from two historians, but neither of whom was willing to state, even tentatively, that Pedra Branca belonged to Johor. When all is said and done, it is clear that no one had ever regarded Pedra Branca as belonging to Johor — not the British officials of the nineteenth century, and certainly not the Johor rulers and the Johor officials. The original title is but a mirage conjured up by Malaysia, and it continues to be a mirage.

⁶¹Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979).

No permission was granted by Johor

8. I now turn to the questions of permission and Malaysia's inexplicable silence in the face of Singapore's conduct on Pedra Branca. As Professor Pellet has explained, the British did not seek permission from Johor or any other Power for their activities on Pedra Branca. Malaysia, on the other hand, claims that permission *was* given by Johor to the British in relation to Pedra Branca. Malaysia uses this alleged permission as a panacea for explaining away *all* of Malaysia's embarrassing silence and inaction since 1847, when the British first landed on Pedra Branca. Whenever Singapore highlights Malaysia's acquiescence in Singapore's exercise of sovereign authority on Pedra Branca, Malaysia can only reply by saying that there was no need to protest because Johor had already given permission for the use of this island.

9. But, where is there even a shred of evidence of this all-encompassing permission entitling Malaysia to remain silent for 130 years in the face of the vast range and number of administrative acts undertaken by Singapore on Pedra Branca? The only document which Malaysia has produced is a letter which makes no reference at all to Pedra Branca. This letter, written on 25 November 1844 by the Johor ruler, only refers to a location "near Point Romania . . . or any spot deemed eligible". As Professor Pellet has explained, this letter is a reply to a request from the British Governor of the Straits Settlements. Although no copy of the Governor's request can be found, it is obvious from the surrounding context that the request and the permission relate to Peak Rock, not Pedra Branca. Malaysia has not produced a single document from British or other sources which states or implies that Johor's permission was needed in relation to Pedra Branca.

10. Malaysia then tries to argue that the 1844 letter is also applicable to Pedra Branca because it was enclosed with voluminous documents sent along in subsequent correspondence relating to Pedra Branca. However, in none of the subsequent correspondence did any British official make even a passing reference to the 1844 letter.

11. Without a doubt, the British officials of the day did not think that Britain required Johor's permission for its activities on Pedra Branca.

Johor expressly disclaimed title to Pedra Branca in 1953

12. Mr. President, Members of the Court, in 1953, Johor made an express disclaimer of title. Singapore expressly informed Johor that the purpose of the enquiry was to determine the

boundaries of Singapore's territorial waters, determine the boundaries of Singapore's territorial waters. It was a very serious matter. Johor took time to consider the matter. They did not come to the conclusion which Malaysia now urges upon the Court. Instead, they replied to Singapore that "the Johore Government does not claim ownership of Pedra Branca". Such a reply is totally inconsistent with Malaysia's theory that Johor officials believed that Pedra Branca belonged to Johor. Instead, it is completely consistent with Singapore's position, that Johor never regarded Pedra Branca as belonging to it.

13. In her Reply, Malaysia claims: "Neither Malaysia nor Johor had occasion to question or seek confirmation of the original position."⁶² But surely, surely the request from Singapore that elicited the 1953 disclaimer provided an excellent occasion, indeed an irresistible occasion, for Johor to confirm her alleged original title, if indeed she had one. Instead, the State of Johor confirmed the exact opposite of what Malaysia now maintains. Singapore, in her written pleadings, also referred to many other occasions where Malaysia could have taken the opportunity, to use her own words, "to question or seek confirmation of the original position". Malaysia did not act on those occasions because it did not regard Pedra Branca as belonging to it. Malaysia's conspicuous silence in the face of Singapore's activities must show that everything done by Singapore did not come within the scope of Johor's permission. Malaysia's silence in the face of Singapore's activities is clear and unequivocal evidence that Malaysia has never regarded itself as having title over Pedra Branca.

14. Mr. President, understandably, Malaysia is clearly embarrassed by the 1953 disclaimer of title by Johor. Malaysia tries hard to discredit the disclaimer by arguing that "it is not a model of clarity"⁶³. Not "a model of clarity"? What can be clearer than these ten words: "the Johore Government does not claim ownership of Pedra Branca"?

15. At the very minimum, this letter constitutes clear, incontrovertible evidence that Johor never had title to Pedra Branca and that Johor officials never regarded Pedra Branca as belonging to Johor. But this letter is more than evidence of a fact or evidence of a state of mind. It is a

⁶²RM, p. 21, para. 44.

⁶³MM, p. 110, para. 243; CMM, p. 239, para. 514.

disclaimer of title given by the Johor Government. It is also a declaration that Johor would not, in future, assert any claim on Pedra Branca. It is binding on Malaysia.

Britain acquired title to Pedra Branca in 1847-1851

16. On the second day, you heard Mr. Brownlie explain how the British Crown acquired sovereignty over Pedra Branca. Malaysia's written pleadings seek to discredit Singapore's case on three fronts.

17. First, Malaysia argues that "the mere construction and operation of a lighthouse does not establish the sovereignty of the lighthouse operator"⁶⁴. As a proposition of law, this statement is unexceptional. However, Singapore would also note that this Court has repeatedly stated that the "construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands"⁶⁵. The acquisition of sovereignty requires the confluence of an intention to act as sovereign and actual display of State authority. Thus, the proposition put forth by Malaysia does not assist her. The truth of the matter is, Singapore's activities on Pedra Branca satisfy both criteria and, in any event, involve much more than the "mere construction and operation of a lighthouse".

18. Malaysia's second line of attack is to argue that Britain did not have the intention to acquire sovereignty. Malaysia says that there could be no intention to acquire sovereignty because there was no flag-raising ceremony or proclamation of sovereignty. Malaysia seeks to support this by pointing to some examples of acquisition of sovereignty which involved such acts. But, as Mr. Brownlie has explained, these formalities are not a prerequisite, according to the authorities which he cited.

19. Malaysia's third line of attack is to criticize Singapore for relying on a series of acts spanning from 1847 to 1851. Malaysia's Counter-Memorial has this exclamation:

"This is the first time in the history of territorial litigation that a taking of possession of an island is presented as a complex act lasting at least four years and without a single manifestation during that period of the intention to acquire sovereignty."⁶⁶

⁶⁴RM, p. 21, para. 44.

⁶⁵*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, I.C.J. Reports 2001*, p. 100, para. 197; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 685, para. 147.

⁶⁶CMM, p. 32, para. 61.

However, it is well established that both under international law and that as a matter of British practice that title may be acquired through a series of acts spanning several years. For the position at international law, Mr. Brownlie has referred to the *Clipperton Island* case. For the relevant British practice, Singapore's written pleadings referred to a number of authoritative works on the subject and Mr. Brownlie drew the Court's attention to a recent judgment of a British court — the Pitcairn Island Court of Appeal — which stated unequivocally that it is not necessary to define with accuracy the time at which the island became a British possession, nor is a formal act of acquisition required⁶⁷. It is the *intention* of the Crown, gathered from its own acts and surrounding circumstances, that determines whether a territory has been acquired.

20. Reduced to its essence, Malaysia argues that all acquisitions must comply with a Malaysian-conceived format or procedure, and that because the acquisition of Pedra Branca does not neatly fall within her preconceived format, Singapore's acquisition of title must necessarily be flawed. But this argument itself is flawed. Facts differ from case to case, but whatever the factual permutations, the task before this Court is the same. It is the application of legal principles to the facts.

21. In the case of Pedra Branca, the relevant British officials exercised exclusive control of the island from the outset. The East India Company, as the official organ of the British Crown, made the decision to build the lighthouse. The entire process of planning, construction, naming and commissioning the lighthouse was in the exclusive control of representatives of the British Crown. Not only that, the British maintained public order and cut rain channels, made official visits, and displayed the British marine ensign. Their acts of sovereignty, appropriate and sufficient to acquire title, were deliberate, manifesting their intention to do so.

Singapore has openly and continuously displayed State authority over Pedra Branca after 1851

22. Let me turn to Singapore's administration of Pedra Branca after the acquisition of sovereignty, 1847-1851. Malaysia's position at the close of the written pleadings that "the only

⁶⁷*The Queen v. Seven Named Accused*, judgment of Pitcairn Island Court of Appeal of 5 August 2004, 127 *ILR*, pp. 232, 284.

thing that Britain or Singapore ever did in relation to the island was operate the lighthouse”⁶⁸ is wholly erroneous. Mr. Bundy has explained that Singapore undertook a full range of State activities on Pedra Branca and within its territorial waters. They included both lighthouse and non-lighthouse activities. And they included: controlling access to the island, and regular visits to the island by civil and military officials, regular naval patrols around the island, and naval enforcement action in Pedra Branca waters, enacting legislation for the island, investigating accidental deaths and shipping incidents in Pedra Branca waters, flying the British and later the Singapore marine ensign. Throughout this period, Singapore vetted applications for visits by Malaysian officials in the same manner as for officials of other States, and granted permission for Malaysian officials to undertake scientific surveys. All these activities, undertaken by Singapore officials, represented more than 150 years of continuous, open and effective display of State authority.

23. Malaysia’s bold claim that the only thing which Singapore ever did was to operate the lighthouse therefore does not bear scrutiny. In contrast, Ms Malintoppi has shown, Malaysia performed no sovereign acts and made no claim on title, repeatedly recognized Singapore’s title over Pedra Branca, and consistently attributed Pedra Branca to Singapore in maps and meteorological studies.

24. Malaysia’s written pleadings repeatedly attempt to minimize the significance of Singapore’s activities after 1851, claiming at various places, that they were merely peripheral. Far from being peripheral, the post-1851 State activities form an important and integral part of this case. They demonstrate the extent and intensity of Singapore’s activities in confirmation and maintenance of its title. They provide overwhelming confirmatory evidence of Singapore’s title to Pedra Branca.

Singapore was already in possession of Sovereignty over Pedra Branca by the time Malaysia published its 1979 map

25. Mr. President, Members of the Court, the central question in this case is: who was in possession of sovereignty over Pedra Branca when the dispute arose? Both Singapore and

⁶⁸RM, p. 205, para. 436 (*d*).

Malaysia agree that the dispute was triggered by Malaysia's controversial map of 1979. Did Malaysia have title to Pedra Branca at the time when the 1979 map was issued? Or did Singapore already have title to Pedra Branca when the 1979 map was published?

26. Up to that point, Malaysia's actions — and inaction — were consistent with those of a party which believed it had no claim to Pedra Branca, and of a party which had not the slightest intention to claim it. In fact, as late as 1975 — that is well after both Malaysia and Singapore had become separate countries — Malaysia published a map attributing Pedra Branca to Singapore. Then, all of a sudden, there is sprung this Malaysian map for the first time in the form of the 1979 map. This came after: 130 years of silence; after 130 years of failure to assert Malaysian sovereignty; after 130 years of conduct and admissions against its own interest, including an express and unequivocal acknowledgment of Singapore's title.

27. Let us also recall that Singapore's Attorney-General drew our attention to the joint press conference of May 1980 chaired by the Prime Ministers of Singapore and Malaysia. This was just three months after Singapore sent a formal Note protesting Malaysia's claim to Pedra Branca. A journalist from the *Asian Wall Street Journal* asked whether the claims in Malaysia's recently published map had been discussed by the Prime Ministers. Here is a press conference where we have journalists from the international media and media from Malaysia and Singapore. We would expect the head of government of a country, which has just published a map claiming for the first time an island as belonging to it, to give a clear and robust statement in support of his country's claim. Instead, he hedged and ambivalently said: "We are also looking into the question because this is not very clear to us with regard to this island . . ." Not very clear to us!

28. Certainly, it is very clear. Both before and after the publication of the 1979 map, Malaysia had no title to Pedra Branca. Indeed, there is no doubt that Singapore was in possession of sovereignty over Pedra Branca. As for Middle Rocks and South Ledge, as you have just heard from Professor Pellet, sovereignty over Middle Rocks and South Ledge must necessarily go together with sovereignty over Pedra Branca.

29. Mr. President and Members of the Court, this is a straightforward case. Pedra Branca was *terra nullius*. The British did not need permission to acquire it, nor did they ask for it at any time. From 1847, they simply took possession and control of the island and displayed continuous

State authority, with clear intent to exercise sovereignty. In 1850, Pedra Branca was described as a dependency of Singapore at the official ceremony for the laying of the lighthouse foundation stone. Ownership was so notorious that in November that year — that is 1850 — even the Dutch official correspondence described Pedra Branca as British territory. By 1851, there was no doubt that Pedra Branca had become British territory. After 1851, State authority was openly and continuously displayed. In stark contrast, Malaysia performed *no* sovereign acts. Indeed, Malaysia recognized Singapore's jurisdiction in seeking permission for access to Pedra Branca. Malaysia *attributed* Pedra Branca to Singapore in maps and meteorological reports. In 1953, Johor made an *express disclaimer* of title. In the light of all these facts that I have recalled, Malaysia's sudden publication of the map in 1979 in an attempt to claim Pedra Branca, was, to say the least, extraordinary. This map could not alter the fact that Singapore has sovereignty over Pedra Branca, Middle Rocks and South Ledge.

30. With that, Mr. President and Members of the Court, I have the honour to close Singapore's first round of presentations. My colleagues and I thank you for your patient attention.

The VICE-PRESIDENT, Acting President: I thank you Professor Jayakumar for your arguments.

This marks the end of today's sitting. It also brings to an end the first round of oral argument of Singapore. The Court will meet again, starting on Tuesday 13 November 2007, from 10 a.m. to 1 p.m., in order to hear the first round of oral argument of Malaysia. Malaysia will then conclude its first round of oral arguments on Friday 16 November 2007, from 10 a.m. to 1 p.m.

With this the Court rises. Thank you.

The Court rose at 12.50 p.m.
