



INTERNATIONAL COURT OF JUSTICE

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Summary

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Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)

Summary of the Judgment of 23 May 2008

Chronology of the procedure and submissions of the Parties (paras. 1-15)

By joint letter dated 24 July 2003, Malaysia and Singapore notified to the Registrar a Special Agreement between the two States, signed at Putrajaya on 6 February 2003 and having entered into force on 9 May 2003. In that Special Agreement they requested the Court to determine whether sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge belongs to Malaysia or Singapore.

Each of the Parties duly filed a Memorial, Counter-Memorial and Reply within the time-limits fixed by the Court, having regard to the provisions of the Special Agreement concerning written pleadings. The Special Agreement provided for the possible filing of a fourth pleading by each of the Parties. However, by a joint letter dated 23 January 2006, the Parties informed the Court that they had agreed that it was not necessary to exchange Rejoinders.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Malaysia chose Mr. Christopher John Robert Dugard and Singapore Mr. Sreenivasa Rao Pemmaraju.

Prior to her election as President of the Court, Judge Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the case. It therefore fell upon the Vice-President, Judge Al-Khasawneh, to exercise the functions of the presidency for the purposes of the case, in accordance with Article 13, paragraphs 1 and 2, of the Rules of Court.

Public hearings were held from 6 to 23 November 2007.

Geography, general historical background and history of the dispute (paras. 16-36)

Geography (paras. 16-19)

The Court first describes the geographical context of the dispute.

Pedra Branca/Pulau Batu Puteh is a granite island, measuring 137 m long, with an average width of 60 m and covering an area of about 8,560 sq m at low tide. It is situated at the eastern entrance of the Straits of Singapore, at the point where the latter open up into the South China Sea. Pedra Branca/Pulau Batu Puteh is located at 1° 19' 48" N and 104° 24' 27" E. It lies approximately

24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian state of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan. The names Pedra Branca and Batu Puteh mean “white rock” in Portuguese and Malay respectively. On the island stands Horsburgh lighthouse, which was erected in the middle of the nineteenth century.

Middle Rocks and South Ledge are the two maritime features closest to Pedra Branca/Pulau Batu Puteh. Middle Rocks is located 0.6 nautical miles to the south and consists of two clusters of small rocks about 250 m apart that are permanently above water and stand 0.6 to 1.2 m high. South Ledge, at 2.2 nautical miles to the south-south-west of Pedra Branca/Pulau Batu Puteh, is a rock formation only visible at low tide. [See sketch-map No. 2]

General historical background (paras. 20-29)

The Court then gives an overview of the complex historical background of the dispute between the Parties (only parts of which are referred to below).

The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511. By the mid-1600s the Netherlands had wrested control over various regions in the area from Portugal. In 1795, the British established rule over several Dutch possessions in the Malay archipelago, but in 1814 returned the former Dutch possessions in the Malay archipelago to the Netherlands.

In 1819 a British “factory” (trading station) was established on Singapore island (which belonged to Johor) by the East India Company, acting as an agent of the British Government in various British possessions. This exacerbated the tension between the United Kingdom and the Netherlands arising out of their competing colonial ambitions in the region. On 17 March 1824 a treaty was signed between the two colonial Powers. As a consequence of this Treaty, one part of the Sultanate of Johor fell within the British sphere of influence while the other fell within the Dutch sphere of influence.

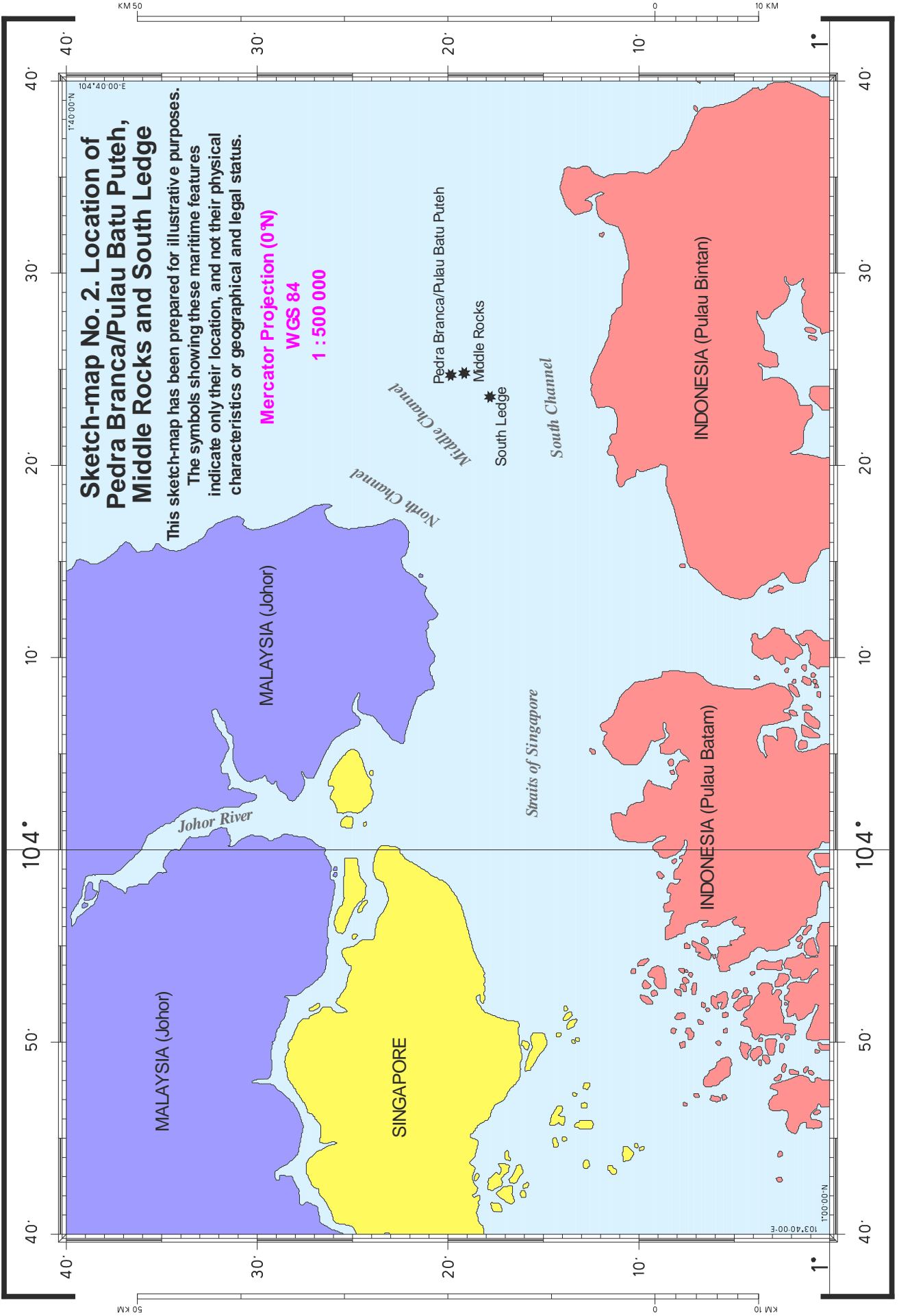
On 2 August 1824 a Treaty of Friendship and Alliance (hereinafter “the Crawfurd Treaty”) was signed between the East India Company and the Sultan of Johor and the Temenggong (a Malay high-ranking official) of Johor, providing for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore.

Since the death of Sultan Mahmud III of Johor in 1812, his two sons had claimed the succession to the Johor Sultanate. The United Kingdom had recognized as the heir the elder son Hussein (who was based in Singapore), whereas the Netherlands had recognized as the heir the younger son Abdul Rahman (who was based in Riau, present day Pulau Bintan in Indonesia). On 25 June 1825 Sultan Abdul Rahman sent a letter to his elder brother in which he “donated” to him the part of the lands assigned to Sultan Hussein in accordance with the 1824 Anglo-Dutch Treaty.

Between March 1850 and October 1851 a lighthouse was constructed on Pedra Branca/Pulau Batu Puteh.

In 1867 the Straits Settlements, a grouping of East India Company territories established in 1826 consisting, *inter alia*, of Penang, Singapore and Malacca, became a British crown colony. In 1885 the British Government and the State of Johor concluded the Johor Treaty, which gave the United Kingdom overland trade and transit rights through the State of Johor and responsibility for its foreign relations, as well as providing for British protection of its territorial integrity.

The Straits Settlements were dissolved in 1946; that same year the Malayan Union was created, comprising part of the former Straits Settlements (excluding Singapore), the Federated Malay States and five Unfederated Malay States (including Johor). From 1946, Singapore was



administered as a British Crown Colony in its own right. In 1948 the Malayan Union became the Federation of Malaya, a grouping of British colonies and Malay States under the protection of the British. The Federation of Malaya gained independence from Britain in 1957, with Johor as a constituent state of the Federation. In 1958 Singapore became a self-governing colony. In 1963 the Federation of Malaysia was established, formed by the merger of the Federation of Malaya with the former British colonies of Singapore, Sabah and Sarawak. In 1965 Singapore left the Federation and became a sovereign and independent State.

History of the dispute (paras. 30-36)

The Court notes that, on 21 December 1979 Malaysia published a map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia” (hereinafter “the 1979 map”). The map depicted the island of Pedra Branca/Pulau Batu Puteh as lying within Malaysia’s territorial waters. By a diplomatic Note dated 14 February 1980 Singapore rejected Malaysia’s “claim” to Pedra Branca/Pulau Batu Puteh and requested that the 1979 map be corrected. This led to an exchange of correspondence and subsequently to a series of intergovernmental talks in 1993-1994, which did not bring a resolution of the matter. During the first round of talks in February 1993 the question of the appurtenance of Middle Rocks and South Ledge was also raised. In view of the lack of progress in the bilateral negotiations, the Parties agreed to submit the dispute for resolution by the International Court of Justice.

The Court recalls that in the context of a dispute related to sovereignty over land, the date upon which the dispute crystallized is of significance. In the view of the Court, it was on 14 February 1980, the time of Singapore’s protest in response to Malaysia’s publication of the 1979 map, that the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh crystallized. With regard to sovereignty over Middle Rocks and South Ledge, the Court finds that the dispute crystallized on 6 February 1993, when Singapore referred to these maritime features in the context of its claim to Pedra Branca/Pulau Batu Puteh during bilateral discussions between the Parties.

Sovereignty over Pedra Branca/Pulau Batu Puteh (paras. 37-277)

Positions of the Parties (paras. 37-42)

Malaysia states in its written pleadings that it “has an original title to Pulau Batu Puteh of long standing. Pulau Batu Puteh is, and has always been, part of the Malaysian State of Johor. Nothing has happened to displace Malaysia’s sovereignty over it. Singapore’s presence on the island for the sole purpose of constructing and maintaining a lighthouse there — with the permission of the territorial sovereign — is insufficient to vest sovereignty in it.” Malaysia further says that the island “could not at any relevant time be considered as terra nullius and hence susceptible to acquisition through occupation”.

Singapore claims that “the selection of Pedra Branca as the site for building of the lighthouse with the authorization of the British Crown”, a process which started in 1847, “constituted a classic taking of possession à titre de souverain”. According to Singapore, title to the island was acquired by the British Crown in accordance with the legal principles of that time and has since “been maintained by the British Crown and its lawful successor, the Republic of Singapore”. While in Singapore’s Memorial and Counter-Memorial, no reference is made expressly to the status of Pedra Branca/Pulau Batu Puteh as terra nullius, the Court observes that in its Reply Singapore expressly indicated that “[i]t is obvious that the status of Pedra Branca in 1847 was that of terra nullius”.

In light of the foregoing, the Court notes that the issue is reduced to whether Malaysia can establish its original title dating back to the period before Singapore’s activities of 1847 to 1851, and conversely whether Singapore can establish its claim that it took “lawful possession of Pedra

Branca/Pulau Batu Puteh” at some stage from the middle of the nineteenth century when the construction of the lighthouse by agents of the British Crown started.

The question of the burden of proof (paras. 43-45)

On this question, the Court reaffirms that it is a general principle of law, confirmed by its jurisprudence, that a party which advances a point of fact in support of its claim must establish that fact.

Legal status of Pedra Branca/Pulau Batu Puteh before the 1840s (paras. 46-117)

— Original title to Pedra Branca/Pulau Batu Puteh (paras. 46-80)

The Court starts by observing that it is not disputed that the Sultanate of Johor, since it came into existence in 1512, established itself as a sovereign State with a certain territorial domain under its sovereignty in part of south-east Asia. Having examined the arguments of the Parties, the Court notes that, from at least the seventeenth century until early in the nineteenth, it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits — where Pedra Branca/Pulau Batu Puteh is located.

The Court then moves to ascertain whether the original title to Pedra Branca/Pulau Batu Puteh claimed by Malaysia is founded in law.

Of significance is the fact that Pedra Branca/Pulau Batu Puteh had always been known as a navigational hazard in the Straits of Singapore. Therefore the island evidently was not terra incognita. The fact that there is no evidence throughout the entire history of the old Sultanate of Johor that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore is another significant factor.

The Court recalls the pronouncement made by the Permanent Court of International Justice (PCIJ) in the case concerning the Legal Status of Eastern Greenland, on the significance of the absence of rival claims. The PCIJ then noted that, while “[i]n most of the cases involving claims to territorial sovereignty . . . there have been two competing claims to the sovereignty”, in the case before it “up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland”. The PCIJ therefore concluded that, considering the “inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed . . . in 1721 to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area”.

The Court observes that this conclusion also applies to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century. In that context the Court also notes that State authority should not necessarily be displayed “in fact at every moment on every point of a territory”, as shown in the Island of Palmas Case (Netherlands/United States of America).

The Court concludes from the foregoing that the territorial domain of the Sultanate of Johor covered in principle all the islands and islets within the Straits of Singapore, including the island of Pedra Branca/Pulau Batu Puteh. It finds that this possession of the islands by the Sultanate was never challenged by any other Power in the region and can in all the circumstances be seen as satisfying the condition of “continuous and peaceful display of territorial sovereignty”. The Court thus concludes that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh.

Examining the ties of loyalty that existed between the Sultanate of Johor and the Orang Laut (“the people of the sea”), who were engaged in fishing and piratical activities in the Straits of Singapore, the Court finds that the descriptions, in contemporary official reports by British officials, of the nature and the level of relationship between the Sultan of Johor and the Orang Laut confirm the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh.

The Court then turns to the question whether this title was affected by the developments in the period 1824 to 1840.

— The legal significance of the 1824 Anglo-Dutch Treaty (paras. 81-101)

First the Court notes that documentary evidence conclusively shows that the Sultanate of Johor continued to exist as the same sovereign entity throughout the period 1512 to 1824, in spite of changes in the precise geographical scope of its territorial domain and vicissitudes of fortune in the Sultanate through the ages, and that these changes and vicissitudes did not affect the legal situation in relation to the area of the Singapore Straits, which always remained within the territorial domain of the Sultanate of Johor.

Second, the Court observes that it is common ground between the Parties that the 1824 Anglo-Dutch Treaty divided the region into two parts — one belonging to the Dutch sphere of influence (the Riau-Lingga Sultanate under Abdul Rahman) and the other falling under the British sphere of influence (the Sultanate of Johor under Hussein). However, Singapore appears to claim that the Treaty left the entire Straits aside, and that Pedra Branca/Pulau Batu Puteh had remained terra nullius or had become terra nullius as a result of the division of the “old Sultanate of Johor”, thus leaving room for the “lawful possession” of Pedra Branca/Pulau Batu Puteh by the British during the period 1847-1851.

After careful analysis of the text of the 1824 Anglo-Dutch Treaty, the Court concludes that the Treaty was the legal reflection of a political settlement reached between the two colonial Powers to divide the territorial domain of the old Sultanate of Johor into two sultanates to be placed under their respective spheres of influence. Thus in this scheme there was no possibility for any legal vacuum left for freedom of action to take lawful possession of an island in between these two spheres of influence.

The general reference in Article 12 of the Treaty to “the other Islands south of the Straights of Singapore” would suggest that all the islands and islets within the Straits fell within the British sphere of influence. This naturally covered the island of Pedra Branca/Pulau Batu Puteh, which thus remained part of what continued to be called the “Sultanate of Johor” after the division of the old Sultanate.

— The relevance of the 1824 Crawford Treaty (paras. 102-107)

The Court considers the relevance to the dispute of the “Crawford Treaty”, by which the Sultan and Temenggong of Johor ceded the island of Singapore to the East India Company. The Court states that the Treaty cannot be relied on as establishing “British recognition of prior and continuing sovereignty of the Sultanate of Johor over all other islands in and around the Strait of Singapore”, including Pedra Branca/Pulau Batu Puteh, as Malaysia claimed. The Court however notes that this finding does not signify a contrario that the islands in the Straits of Singapore falling outside the scope of Article II of this Treaty were terrae nullius and could be subject to appropriation through “lawful occupation” either. This latter point can only be judged in the context of what legal effect the division of the old Sultanate of Johor had upon the islands in the area of the Straits of Singapore, in particular in light of the 1824 Anglo-Dutch Treaty and in light of the legal relevance, vel non, of the so-called letter “of donation” of 1825 sent from Sultan Abdul Rahman of Riau-Lingga to his brother Sultan Hussein of Johor.

— The legal significance of the letter “of donation” of 1825 (paras. 108-116)

The Court examines whether the letter “of donation” from Sultan Abdul Rahman to his brother Hussein had the legal effect of transferring the title to the territory included in that letter “of donation”. The Court notes that the so-called letter “of donation” from Sultan Abdul Rahman to his brother Hussein merely confirmed the division agreed upon by the 1824 Anglo-Dutch Treaty and therefore was without legal effect.

— Conclusion (para. 117)

The Court concludes that Malaysia has established to its satisfaction that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor.

Legal status of Pedra Branca/Pulau Batu Puteh after the 1840s (paras. 118-272)

The Court observes that in order to determine whether Malaysia has retained sovereignty over Pedra Branca/Pulau Batu Puteh following 1844 or whether sovereignty has since passed to Singapore, it needs to assess the relevant facts — consisting mainly of the conduct of the Parties during that period — by reference to the governing principles and rules of international law.

— Applicable law (paras. 118-125)

It notes that any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty, as with the 1824 Crawford Treaty and the 1927 Agreement referred to earlier. The agreement might instead be tacit and arise from the conduct of the Parties. In this matter international law does not impose any particular form but places its emphasis on the parties’ intentions. Sovereignty over territory might under certain circumstances pass as a result of the failure of the State which has sovereignty to respond to conduct à titre de souverain of the other State or to concrete manifestations of the display of territorial sovereignty by the other State. Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. That is to say, silence may also speak, but only if the conduct of the other State calls for a response. Critical for the Court’s assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties must be manifested clearly and without any doubt by that conduct and the relevant facts.

— The process for the selection of the site for Horsburgh lighthouse (paras. 126-148)

In 1836 merchants and mariners expressed the wish to build one or more lighthouses in memory of James Horsburgh, a hydrographer to the East Indies Company. In November 1836 “Pedra Branca” was identified as a preferred location. In a letter sent to the Governor of Singapore on 1 March 1842 “Pedra Branca” was the only locality specifically mentioned. The Court notes that, in this first formal communication, the private commercial interests recognized that the British Government would have to carry the proposal into effect and provide the further funds.

In the ensuing correspondence between the subscribers and the British authorities several alternative locations were envisaged. By October 1844, the island of Peak Rock was identified as the most eligible site. In late November W. J. Butterworth, who had become Governor of the Straits Settlements in 1843, received replies to letters which he had written to the Sultan and Temenggong of Johor. Notwithstanding the Parties’ extensive research, the Governor’s letters have not been found, but the Parties did provide to the Court copies of the translations of the

replies, both dated 25 November 1844, in which the Sultan and the Temenggong consented to the construction of a lighthouse in the Straits of Singapore, without mentioning the exact location.

Examining whether Johor ceded sovereignty over the particular piece of territory which the United Kingdom would select for the construction and operation of the lighthouse for the stated purpose or granted permission only to that construction and operation, the Court finds that the correspondence is not conclusive.

Given the lack of any written agreement relating to the modalities of the maintenance of the lighthouse and the island on which it was to be constructed, the Court considers that it is not in a position to resolve the issue about the content of any possible agreement reached in November 1844.

— The construction and commissioning of Horsburgh lighthouse, 1850-1851 (paras. 149-163)

The Court notes that the planning for the construction and the construction itself were in the hands of the Government Surveyor of Singapore, John Thomson, who was appointed as Architect of the project by Governor Butterworth. In December 1849 the Government Surveyor began organizing the construction. On 24 May 1850 the foundation stone was laid. The Court takes note of the fact that no Johor authorities were present at the ceremony. There is no indication that they were even invited by the Governor to attend. That might suggest that the British and Singapore authorities did not consider it necessary to apprise Johor of their activities on Pedra Branca/Pulau Batu Puteh. The Temenggong of Johor visited the rock only once, nine days after the laying of the foundation stone, accompanied by 30 of his followers.

After describing the modalities of the construction and commissioning of the lighthouse, the Court notes that it cannot draw any conclusions with regard to sovereignty. Rather it sees those events as bearing on the issue of the evolving views of the authorities in Johor and in Singapore about sovereignty over Pedra Branca/Pulau Batu Puteh.

— The conduct of the Parties, 1852-1952 (paras. 164-191)

The Court first considers the Straits lights system and related British and Singapore legislation. It notes that as a matter of law, a lighthouse may be built on the territory of one State and administered by another State -- with the consent of the first State. A central element in Malaysia's argument is that because Horsburgh lighthouse was built on an island over which Johor was sovereign all the actions of the British authorities and, following them, the Singaporean authorities, are simply actions pursued in the normal course of the operation of the lighthouse. Singapore, by contrast, says that some of the actions are not matters simply of the operation of the lighthouse but are, in whole or part, acts à titre de souverain. Singapore refers to legislation enacted by itself and its predecessors in title, which regulated the defraying of costs of establishing and operating the lighthouse, vesting control of it under various governmental bodies, and regulating the activities of persons residing, visiting and working on Pedra Branca/Pulau Batu Puteh. In the Court's view however the provisions invoked by Singapore do not as such demonstrate British sovereignty over the areas to which they apply, because they applied equally to lighthouses which are undoubtedly on Johor territory as well as to that on Pedra Branca/Pulau Batu Puteh and, moreover, say nothing expressly about sovereignty.

Turning to the various constitutional developments invoked by Malaysia, including the 1927 Straits Settlement and Johor Territorial Waters Agreement, the Court considers that they do not help resolve the question of sovereignty over Pedra Branca/Pulau Batu Puteh. It observes that the purpose of the Agreement was to "retrocede" to Johor certain areas that had been ceded by Johor to the East India Company in 1824 and were all within 10 miles of the main island of Singapore. They could not have included Pedra Branca/Pulau Batu Puteh, as the island was not within the scope of the Agreement.

With respect to Malaysia's contention that the Temenggong continued to control fishing in the neighbourhood of Pedra Branca/Pulau Batu Puteh after the construction of the lighthouse, as shown by an exchange of correspondence between Johor and the British authorities in Singapore in 1861, the Court observes that the letters relate to events occurring within 10 miles of the island of Singapore. Therefore nothing can be made of the fact that the Singapore authorities did not in that context refer to jurisdiction over the waters of Pedra Branca/Pulau Batu Puteh.

— The 1953 correspondence (paras. 192-230)

The Court notes that on 12 June 1953 the Colonial Secretary of Singapore wrote to the British Adviser to the Sultan of Johor, that he was "directed to ask for information about the rock some 40 miles from Singapore known as Pedra Branca" in the context of "the determination of the boundaries of the Colony's territorial waters". Acknowledging that in the case of Pulau Pisang, an island "which is also outside the Treaty limits of the colony" it was "clear that there was no abrogation of the sovereignty of Johore", the Secretary asked to be informed of "any document showing a lease or grant of the rock or whether it ha[d] been ceded by the Government of the State of Johore or in any other way disposed of". Later in that month the Secretary to the British Adviser to the Sultan of Johor advised the Colonial Secretary that he had passed the letter to the State Secretary of Johor, who would "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". In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that "the Johore Government [did] not claim ownership of Pedra Branca".

The Court considers that this correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court notes that the Singapore letter of 12 June 1953 seeks information about "the rock" as a whole and not simply about the lighthouse in light of the determination of the Colony's territorial waters, a matter which is dependent on sovereignty over the island. The Court notes that the letter had the effect of putting the Johor authorities on notice that in 1953 the Singapore authorities understood that their predecessors thought that Pedra Branca/Pulau Batu Puteh had been ceded "gratuitously" by the Sultan and the Temenggong to the East India Company. The Court reads the letter as showing that the Singapore authorities were not clear about events occurring over a century earlier and that they were not sure that their records were complete.

Turning to the reply from the Acting State Secretary of Johor, the Court dismisses the Malaysian contention that, under the provisions of the Johor Agreement between the British Crown and the Sultan of Johor and the Federation of Malaya Agreement between the British Crown and nine Malay states (including Johor), the Acting State Secretary "was definitely not authorized" and did not have "the legal capacity to write the 1953 letter, or to renounce, disclaim, or confirm title of any part of the territories of Johore".

The Court considers that the Johor Agreement is not relevant since the correspondence was initiated by a representative of Her Britannic Majesty's Government which at that time was not to be seen as a foreign State; further, it was the British Adviser to the Sultan of Johor who passed the initial letter on to the Secretary of State of the Sultanate. The Court is also of the view that the Federation of Malaya Agreement does not assist the Malaysian argument because the action of responding to a request for information is not an "exercise" of "executive authority". Moreover, the failure of Malaysia to invoke this argument, both throughout the whole period of bilateral negotiations with Singapore and in the proceedings until late in the oral phase, lends support to the presumption of regularity invoked by Singapore.

Examining the 1953 letter's content, the Court expresses the view that the Johor reply is clear in its meaning: Johor does not claim ownership over Pedra Branca/Pulau Batu Puteh. That response relates to the island as a whole and not simply to the lighthouse. When the Johor letter is read in the context of the request by Singapore for elements of information bearing on the status of Pedra Branca/Pulau Batu Puteh, as discussed above, it becomes evident that the letter addresses the issue of sovereignty over the island. The Court accordingly concludes that Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.

The steps taken by the Singapore authorities in reaction to the final response were not known to the Johor authorities and have limited significance for the Court's assessment of any evolving understanding shared by the Parties. The case file shows that, on receipt of the Johor reply, the Colonial Secretary of Singapore sent an internal memorandum to the Attorney-General saying that he thought that "[o]n the strength of [the reply], we can claim Pedra Branca . . ." The Attorney-General stated that he agreed. The Singapore authorities, so far as the case file shows, took no further action. They had already received related communications from London, to which the Court now turns.

— The conduct of the Parties after 1953 (paras. 231-272)

The Court first takes into consideration Singapore's contention that it and its predecessors have exercised sovereign authority over Pedra Branca/Pulau Batu Puteh by investigating shipwrecks within the island's territorial waters. Concluding that this conduct gives significant support to the Singapore case, the Court also recalls that it was only in June 2003, after the Special Agreement submitting the dispute to the Court had come into force, that Malaysia protested against this category of Singapore conduct.

After examining the argument of Singapore's exercise of exclusive control over visits to Pedra Branca/Pulau Batu Puteh and the use of the island by officials from Singapore as well as from other States, including Malaysia, the Court states that many of the visits by Singaporean personnel related to the maintenance and operation of the lighthouse and are not significant in the case. However it finds that the conduct of Singapore with respect to permissions granted or not granted to Malaysian officials in the context of a survey of the waters surrounding the island in 1978 is to be seen as conduct à titre de souverain and does give significant support to Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh..

Both Parties contend that their naval patrols and exercises around Pedra Branca/Pulau Batu Puteh since the formation of their respective navies constitute displays of their sovereign rights over the island. The Court does not see this activity as significant on one side or the other. It observes that naval vessels operating from Singapore harbour would as a matter of geographical necessity often have to pass near Pedra Branca/Pulau Batu Puteh.

As for Singapore's claim that the flying of the British and Singapore ensigns from Horsburgh lighthouse from the time of its commissioning to this day is also a clear display of sovereignty, the Court states that the flying of an ensign is not in the usual case a manifestation of sovereignty. It considers that some weight may nevertheless be given to the fact that Malaysia did not protest against the ensign flying at Horsburgh lighthouse.

The Court then looks into the installation of a relay station by the Singapore Navy, in May 1977, for a military rebroadcast station on Pedra Branca/Pulau Batu Puteh. Singapore contends that the installation was carried out openly. Malaysia asserts that the installation was undertaken secretly and that it became aware of it only on receipt of Singapore's Memorial. The

Court is not able to assess the strength of the assertions made on the two sides about Malaysia's knowledge of the installation. The conduct is inconsistent with Singapore recognizing any limit on its freedom of action.

As for the plans to reclaim areas around Pedra Branca/Pulau Batu Puteh, which had been considered on various occasions in the 1970s by the Port of Singapore Authority, the Court observes that while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was public and attracted replies. Further the proposed action, as advertised, did go beyond the maintenance and operation of the lighthouse. It is conduct which supports Singapore's case.

In 1968 the Government of Malaysia and the Continental Oil Company of Malaysia concluded an agreement authorizing petroleum exploration in the whole of the area of the continental shelf off the east coast of West Malaysia. Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight can be given to the concession.

By legislation of 1969 Malaysia extended its territorial waters from 3 to 12 nautical miles. Malaysia contends that the legislation "extended Malaysian territorial waters to and beyond Pulau Batu Puteh". The Court notes however that the said legislation does not identify the areas to which it is to apply except in the most general sense: it says only that it applies "throughout Malaysia".

Malaysia invokes several territorial agreements to support its claim to sovereignty over Pedra Branca/Pulau Batu Puteh: the Indonesia Malaysia Continental Shelf Agreement of 1969, the Territorial Sea Agreement of 1970 and the Indonesia Singapore Territorial Sea Agreement of 1973. The Court does not consider that those agreements can be given any weight in respect of sovereignty over Pedra Branca/Pulau Batu Puteh, since they did not cover this issue. The Court similarly does not see as significant for the purposes of the proceedings the co-operation in the Straits of Malacca and Singapore adopted in 1971 by Indonesia, Malaysia and Singapore, which was invoked by Singapore.

The Court also dismisses as non-authoritative and essentially descriptive certain official publications of the Government of Singapore describing its territory, which in the view of Malaysia are notable for their absence of any reference to Pedra Branca/Pulau Batu Puteh among the approximately 60 islands that are included in those descriptions.

Finally, the Court turns to nearly a hundred official maps submitted by the Parties. Malaysia emphasizes that of all the maps before the Court only one published by the Singapore Government included Pedra Branca/Pulau Batu Puteh as within its territory and that map was not published until 1995. The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.

Conclusion (paras. 273-277)

The Court is of the opinion that the relevant facts, including the conduct of the Parties, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors à titre de souverain, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.

For the foregoing reasons, the Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore.

Sovereignty over Middle Rocks and South Ledge (paras. 278-299)

Arguments of the Parties (paras. 278-287)

The Court notes that Singapore's position is that sovereignty in respect of Middle Rocks and South Ledge goes together with sovereignty over Pedra Branca/Pulau Batu Puteh. Thus, according to Singapore, whoever owns Pedra Branca/Pulau Batu Puteh owns Middle Rocks and South Ledge, which, it claims, are dependencies of the island of Pedra Branca/Pulau Batu Puteh and form with the latter a single group of maritime features. Malaysia on the other hand argues that these three features do not constitute one identifiable group of islands in historical or geomorphological terms, and adds that they have always been considered as features falling within Johor/Malaysian jurisdiction.

Legal status of Middle Rocks (paras. 288-290)

The Court first observes that the issue of the legal status of Middle Rocks is to be assessed in the context of its reasoning on the principal issue in the case. It recalls that it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the case. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct of the Parties reviewed in the previous part of the Judgment has any application to the case of Middle Rocks.

The Court therefore finds that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.

Legal status of South Ledge (paras. 291-299)

With regard to South Ledge, the Court however notes that there are special problems to be considered, inasmuch as South Ledge presents a special geographical feature as a low-tide elevation.

The Court recalls Article 13 of the United Nations Convention on the Law of the Sea and considers its previous jurisprudence, the arguments of the Parties, as well as the evidence presented before it.

The Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. It recalls that in the Special Agreement and in the final submissions it has been specifically asked by the Parties to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court observes that it has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.

In these circumstances, the Court concludes that sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.

Operative clause (para. 300)

“For these reasons,

THE COURT,

(1) By twelve votes to four,

Finds that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to the Republic of Singapore;

IN FAVOUR: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Sreenivasa Rao;

AGAINST: Judges Parra-Aranguren, Simma, Abraham; Judge ad hoc Dugard;

(2) By fifteen votes to one,

Finds that sovereignty over Middle Rocks belongs to Malaysia;

IN FAVOUR: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Dugard;

AGAINST: Judge ad hoc Sreenivasa Rao;

(3) By fifteen votes to one,

Finds that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.

IN FAVOUR: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges ad hoc Dugard, Sreenivasa Rao;

AGAINST: Judge Parra-Aranguren.

*

Judge Ranjeva appends a declaration to the Judgment of the Court; Judge Parra-Aranguren appends a separate opinion to the Judgment of the Court; Judges Simma and Abraham append a joint dissenting opinion to the Judgment of the Court; Judge Bennouna appends a declaration to the Judgment of the Court; Judge ad hoc Dugard appends a separate opinion to the Judgment of the Court; Judge ad hoc Sreenivasa Rao appends a separate opinion to the Judgment of the Court.

Declaration of Judge Ranjeva

Judge Ranjeva considers that no substantive objection can be raised to the present Judgment, in so far as Malaysia's immemorial historical title to Pedra Branca/Pulau Batu Puteh is established, even though Singapore's sovereignty over this feature at the date of the Court's decision cannot reasonably be contested. That however is not the case for the Court's reasoning in respect of the transfer of Johor's sovereignty to Singapore. Judge Ranjeva thus points out that the purpose of his declaration is to suggest an alternative basis on which the Court could have relied.

In the present Judgment, the Court infers acquiescence on the part of Johor to the transfer of its title of sovereignty over Pedra Branca/Pulau Batu Puteh. In Judge Ranjeva's view, there are only two events from which a transfer of sovereignty can result: either an equivalent act occurs (the possibility referred to in paragraph #120 of the Judgment), or a superior legal title intervenes. In the absence of the latter situation, Judge Ranjeva wonders how Johor's title could have been extinguished without Johor's consent. For lack of evidence, the Judgment relies on presumptive consent to reach the conclusion that sovereignty was transferred; this is open to criticism as being out of keeping with the facts.

Judge Ranjeva believes that the Judgment came to this conclusion through a failure to take account of the historical criticism approach in interpreting the facts in their contemporary political and legal context. While relations between sovereign colonial Powers fell within the ambit of international law, it is difficult to argue that dealings between the United Kingdom and the Sultanate of Johor were based on relations between sovereign, equal subjects of international law. Thus, the sovereignty acknowledged to indigenous authorities was inoperative vis-à-vis colonial Powers, the authorities' sole obligation being to submit to the will of the Powers. Under these circumstances, the Sultan of Johor could not broach the slightest opposition to a decision by the British. Judge Ranjeva thus considers that the present case cannot be seen as involving an international transfer of title by the operation of acquiescence, when, under the rules and practice of the colonial Powers, what was involved was the exercise of a colonial territorial title. Johor's silence through the colonial period cannot therefore be held against it. The situation changed however with the Parties' accession to independence: Malaysia may no longer rely on its silence in response to conduct pointing towards Singapore's sovereignty over Pedra Branca/Pulau Batu Puteh. In conclusion, Singapore has sovereignty over the island.

Separate opinion of Judge Parra-Aranguren

I

1. Judge Parra-Aranguren considers that the findings made by the Court in its Judgment demonstrate that juridical reasons can always be found to support any conclusion.

II

2. Judge Parra-Aranguren voted against paragraph 300 (1) of the Judgment because it is based mainly on the interpretation of the 1953 correspondence made in section 5.4.5, which he cannot accept.

3. On 12 June 1953 Singapore asked Johor for information in an attempt to clarify the status of Pedra Branca/Pulau Batu Puteh owing to the island's relevance to the determination of Singapore's territorial waters; it asked in particular whether there was any document showing a

lease or grant, or whether the island had been ceded by Johor or in any other way disposed of. The Acting State Secretary of Johor replied on 21 September 1953, informing Singapore that “the Johore Government does not claim ownership of Pedra Branca” (paras. 192 and 196 of the Judgment).

4. Singapore maintained that, “by declaring that Johor did not claim Pedra Branca, the [Johor State Secretary’s] letter had the effect of confirming Singapore’s title to Pedra Branca and of confirming that Johor had no title, historic or otherwise, to the island”. Moreover, Singapore stressed that its argument was not “that Johor abandoned or relinquished title to Pedra Branca in 1953” and that the effect of Johor’s 1953 letter was “to pronounce explicitly that Johor did not have a claim to ownership of Pedra Branca”.

5. In this respect Judge Parra-Aranguren recalls that in earlier sections of the Judgment the Court concluded that prior to 1953 Pedra Branca/Pulau Batu Puteh belonged to Malaysia and for this reason, in his opinion, the Johor’s 1953 letter could not have had the effect of confirming either that Singapore held title to Pedra Branca/Pulau Batu Puteh or that Johor had no title to Pedra Branca/Pulau Batu Puteh, as maintained by Singapore.

6. Singapore did not maintain that the 1953 letter should be understood as Johor’s renunciation, abandonment or relinquishment of its title to Pedra Branca/Pulau Batu Puteh and, accordingly, Judge Parra-Aranguren believes that this argument should not have been analysed and relied upon to conclude that Singapore holds title to Pedra Branca/Pulau Batu Puteh.

7. As paragraph 196 of the Judgment states: “No further correspondence followed and the Singapore authorities took no public action.”

8. In the opinion of Judge Parra-Aranguren, it is surprising that “[n]o further correspondence followed”, because Johor had not furnished the information requested by Singapore and the basic practice in international relations whenever a question remains unanswered is to repeat the request in writing and to insist that the information be provided. Singapore chose not to proceed in this way and did not explain to the Court why it abstained from acting.

9. Furthermore, the 1953 letter from Johor answered a completely different question from the one asked by Singapore, merely stating that “the Johor Government does not claim ownership of Pedra Branca”. Paragraph 222 of the Judgment acknowledges that “ownership” is in principle distinct from “sovereignty”, but that “[i]n international litigation ‘ownership’ over territory has sometimes been used as equivalent to ‘sovereignty’”. It is a fact that Johor used the term “ownership”, not “sovereignty”. Therefore, in Judge Parra-Aranguren’s view, if Singapore understood the 1953 letter to mean in reality that Johor did “not claim sovereignty over Pedra Branca”, it should at the very least, have requested the explanation from Malaysia necessary to “clarify the status of Pedra Branca”, which was Singapore’s main objective in sending the letter of 12 June 1953.

10. The lack of “public action” by Singapore’s authorities is more difficult to understand than the “lack of further correspondence”.

11. In the opinion of Judge Parra-Aranguren, if Singapore did in fact consider that its sovereignty over Pedra Branca/Pulau Batu Puteh had been acknowledged, notwithstanding the

ambiguous terms of Johor's 1953 letter, elementary principles of good faith required Singapore to assert a formal claim of sovereignty over Pedra Branca/Pulau Batu Puteh, especially in the light of the facts mentioned in paragraphs 196 and 224 of the Judgment. However, Singapore failed to do so and, as a result of its inaction, the status of Pedra Branca/Pulau Batu Puteh, far from being "clarified", remained obscure.

12. Additionally, it may be observed that, while information about Pedra Branca/Pulau Batu Puteh was sought because it was "relevant to the determination of the boundaries of the Colony's territorial waters", no action was taken, as acknowledged in paragraph 225 of the Judgment.

III

13. Judge Parra-Aranguren also voted against paragraph 300 (1) of the Judgment because he does not agree with the examination of "[t]he conduct of the Parties after 1953" made in section 5.4.6.

14. In this section the Court states that the United Kingdom and Singapore acted as operator of Horsburgh Lighthouse, but "that was not the case in all respects"; also, "[w]ithout being exhaustive", the Court recalls actions to have been performed by Singapore à titre de souverain. However "the bulk of them" took place after 1953, as stated in paragraph 274 of the Judgment, and the Court has already determined in its Judgment dated 10 October 2002, that a period of some 20 years is "far too short" (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 352, para. 65). In the present case the Court finds in paragraph 34 of the Judgment that 14 February 1980 is the critical date for the purposes of the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh. Therefore, even assuming that the actions mentioned in section 5.4.6 of the Judgment were performed by Singapore à titre de souverain, the period concerned is "far too short" and for this reason, in Judge Parra-Aranguren's opinion, they are not sufficient to undermine Johor's historical title to Pedra Branca/Pulau Batu Puteh. Singapore's effectivités do not correspond to the law, and, as the Court has reiterated more than once, "[w]here the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title" (Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 587, para. 63).

15. Paragraph 275 of the Judgment states that "the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more". Similar statements are also found in a number of other paragraphs of the Judgment and were made repeatedly by Singapore in the present proceedings. However, in the opinion of Judge Parra-Aranguren, the Johor authorities and their successors were under no international obligation to undertake any action at all, because Johor had historical title to Pedra Branca/Pulau Batu Puteh, as recognized in the Judgment. On the contrary, clarification of the status of the island was a matter of prime importance to Great Britain, because Great Britain had made a substantial investment in the construction and maintenance of Horsburgh lighthouse. However, Great Britain remained silent over the years and the status of Pedra Branca/Pulau Batu Puteh was still unclear in 1953, as evidenced in Mr. J. D. Higham's letter.

IV

16. Paragraph 297 of the Judgment states that the Court "will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to

Malaysia”; and “that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks”. The Court adds in paragraph 298 that “in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features”, but at the same time observes that it “has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question”. Consequently in paragraph 300 (3) of the Judgment the Court “[f]inds that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.”

17. As explained above, Judge Parra-Aranguren considers that Pedra Branca/Pulau Batu Puteh belongs to Malaysia and he agrees that Middle Rocks is under the sovereignty of Malaysia, as found in paragraph 300 (2) of the Judgment. Therefore, in his opinion South Ledge is located within the territorial waters of Malaysia and for this reason it belongs to Malaysia. Consequently, he voted against paragraph 300 (3) of the Judgment.

V

18. On 23 November 2007 the Court informed Malaysia and Singapore that it was retiring for deliberation. Public hearings on the merits in the case brought by Djibouti against France commenced on 21 January 2008 and the Court retired eight days later for deliberation, which is ongoing. Public hearings on the Preliminary Objections in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro), to be held from 26 to 30 May 2008, require careful examination beforehand of the written arguments and of some requests made by the Parties.

19. Judge Parra-Aranguren therefore wishes to emphasize that constraints arising from the time-limits fixed by the Court for the preparation of this separate opinion have prevented him from setting out a thorough explanation of his disagreement with subparagraphs (1) and (3) of paragraph 300 and that he has for this reason only described some of the main reasons why he has voted against them.

Joint dissenting opinion of Judges Simma and Abraham

Judges Simma and Abraham express their disagreement with the first point of the operative clause of the Judgment which attributes the island of Pedra Branca/Pulau Batu Puteh to Singapore.

They endorse the conclusion reached by the Court at the end of the first part of its reasoning, whereby in 1844, on the eve of the construction of the Horsburgh lighthouse, the island was under the sovereignty of the Sultanate of Johor.

However, they dissociate themselves from the Judgment when it indicates that, between 1844 and 1980, sovereignty passed to Singapore, as a result of conduct of the Parties reflecting a convergent evolution of their positions as regards the status of the island.

Firstly, Judges Simma and Abraham note that the Court refrains from indicating clearly on which legal basis it relies to justify such a change in the holder of sovereignty, in the absence of any express agreement between the States concerned. In the abstract presentation that it gives of the applicable law, the Judgment refers to the possibility of a “tacit agreement” or of “acquiescence” by the original sovereign, but it makes no choice between these in the concrete conclusion that it draws from an examination of the conduct of the Parties, nor does it indicate if and how it might be possible for them to be combined. Further, the Judgment makes no mention of the notion of “acquisitive prescription”, which appears capable of accounting for the process

whereby a State acquires sovereignty over a territory that did not originally belong to it and without the express consent of the original sovereign.

Judges Simma and Abraham nonetheless take the view that, in substance, the Judgment draws on the criteria which they hold to be legally correct in order to assess the conduct of the Parties, even if it does not refer clearly enough to the relevant legal categories, which is not the most important point.

However, Judges Simma and Abraham disagree with the way in which the Judgment applies those criteria to the present case, and, consequently, with the conclusions that it draws from them.

Indeed, the facts do not demonstrate a sufficiently clear, consistent and public exercise of State sovereignty over the island by Singapore and its predecessor Great Britain, so that no acquiescence of any kind to the transfer of sovereignty can be deduced from the lack of reaction by Malaysia and its predecessor Johor.

According to Judges Simma and Abraham, there are thus at least two conditions lacking for the application of acquisitive prescription — or of tacit agreement, or acquiescence, since those legal categories are not hermetically separated from one another — namely, on the one hand, the effective exercise of the attributes of sovereignty by the State relying on them (Singapore in this case) combined with the intention to act as sovereign and, on the other hand, the visibility of this exercise of sovereignty, making it possible to establish the acceptance, through its lack of reaction, of the original sovereign (Malaysia in this case).

The acts taken into consideration by the Court as manifestations of sovereignty by Singapore are minor and sporadic, and their meaning was far from clear from the perspective of Johor and Malaysia. The Court should therefore not have concluded that sovereignty over the island had passed to Singapore. It should have attributed it to Malaysia, as the undisputed successor of the Sultanate of Johor.

Declaration of Judge Bennouna

Judge Bennouna, who voted in favour of the operative clause in the Judgment, is nevertheless not convinced by all of the reasoning adopted by the Court in justifying it. After reviewing the doubts entertained by the Court whenever it has looked to colonial law in its past decisions, Judge Bennouna expresses his view that the Court should have relied in the present case essentially on the practice of the two States after Singapore gained independence in 1965 further to its withdrawal from the Federation of Malaysia, which had been established in 1963. In Judge Bennouna's opinion, the Court would thus have avoided deciding on the basis of colonial practices resulting by and large from the rivalry between two European Powers seeking to secure their hegemony in the region.

Dissenting opinion of Judge ad hoc Dugard

Judge Dugard dissents on the question of sovereignty over Pedra Branca/Pulau Batu Puteh, but concurs with the Court in respect of its finding that Malaysia has territorial title to Middle Rocks and that South Ledge is to be disposed of in accordance with the law governing maritime territorial delimitation.

Judge Dugard agrees with the Court that Malaysia had original title to Pedra Branca/Pulau Batu Puteh and finds that neither the conduct of Malaysia nor that of Singapore between 1850 and 1980 has disturbed this title. In particular, he finds that the 1953 correspondence between Johor and Singapore did not result in, or contribute to, the passing of sovereignty from Johor to

Singapore. Judge Dugard argues that the conduct of both Parties between 1953 and 1980 is equivocal and cannot be interpreted to indicate that Malaysia had abandoned title to Pedra Branca/Pulau Batu Puteh or acquiesced in Singapore's assertion of title over the island.

Judge Dugard is critical of the legal reasons advanced by the Court to support its finding that sovereignty passed from Johor/Malaysia to Singapore. He finds that notions of tacit agreement, arising from the conduct of the Parties, developing understanding between the Parties and acquiescence are not supported by the facts and do not provide an acceptable legal foundation upon which to base the passing of sovereignty over Pedra Branca/Pulau Batu Puteh from Johor/Malaysia to Singapore.

Separate opinion of Judge ad hoc Sreenivasa Rao

Judge ad hoc Sreenivasa Rao, partially dissenting, explained his reasons for finding that sovereignty over Middle Rocks should also have been attributed to Singapore. In his view, Malaysia failed to meet the burden of proof incumbent upon it to establish that Johor had original title over Pedra Branca/Pulau Batu Puteh and the other two maritime features, Middle Rocks and South Ledge. In his view, the general historical description of the Malay Kingdom cannot be taken as certain and convincing evidence that Johor ever considered these maritime features as its possessions. Any claim of immemorial possession, to succeed, must first establish effective uninterrupted and uncontested possession. In the absence of evidence in favour of such possession, Johor at best could be held to have had an inchoate title based on discovery which it did not, however, perfect. For this, it required to display peaceful and continuous State authority commensurate with the nature of the territory involved. Activities of the Orang Laut, in so far as they are accepted as subjects of Johor, are private and do not account for display of Johor's State authority. The Orang Laut's piratical activities are even more inadmissible as evidence for the purpose of establishing the original title of Johor.

He further noted that Singapore, in contrast, exercised various State functions with respect to Pedra Branca/Pulau Batu Puteh and exercised control over waters around it for over 130 years, after it took over possession of the same in 1847. Accordingly, even though at the time Britain took possession of Pedra Branca/Pulau Batu Puteh it was not terra nullius, by virtue of the exhibition of superior effectivités for over a period of 130 years Britain/Singapore could be held to have manifested sovereignty over it and the waters around it. Accordingly, Singapore acquired title which it maintained without interruption and contest. Johor's reply to Singapore in 1953 stating that it did not claim any ownership over the rock confirms this. By virtue of such sovereignty over Pedra Branca/Pulau Batu Puteh and the waters around it, Singapore also has sovereignty over Middle Rocks and South Ledge as these maritime features fall within the limits of the territorial waters of Singapore.
