

CR 2007/20

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2007**

*Public sitting*

*held on Tuesday 6 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)*

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**VERBATIM RECORD**

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**ANNÉE 2007**

*Audience publique*

*tenue le mardi 6 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)*

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**COMPTE RENDU**

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*Present:* Vice-President Al-Khasawneh, Acting President

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

Judges *ad hoc* Dugard  
Sreenivasa Rao

Registrar Couvreur

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*Présents* : M. Al-Khasawneh, vice-président, faisant fonction de président en l'affaire  
MM. Ranjeva  
Shi  
Koroma  
Parra-Aranguren  
Buergenthal  
Owada  
Simma  
Tomka  
Abraham  
Keith  
Sepúlveda-Amor  
Bennouna  
Skotnikov, juges  
MM. Dugard  
Sreenivasa Rao, juges *ad hoc*  
  
M. Couvreur, greffier

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***The Government of Malaysia is represented by:***

H.E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs of Malaysia, Adviser for Foreign Affairs to the Prime Minister,

*as Agent;*

H.E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands,

*as Co-Agent;*

H.E. Dato' Seri Syed Hamid Albar, Minister for Foreign Affairs of Malaysia,

Tan Sri Abdul Gani Patail, Attorney-General of Malaysia,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, member of the Institut de droit international, member of the Permanent Court of Arbitration,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international,

Mr. Nicolaas Jan Schrijver, Professor of Public International Law, Leiden University, associate member of the Institut de droit international,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International Studies, Geneva, associate member of the Institut de droit international,

Ms Penelope Nevill, college lecturer, Downing College, University of Cambridge,

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Ms Suraya Harun, Senior Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,

Mr. Mohd Normusni Mustapa Albakri, Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,

Mr. Faezul Adzra Tan Sri Gani Patail, Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,

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*comme coagent ;*

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M. Tan Sri Abdul Gani Patail, *Attorney-General* de la Malaisie,

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Mr. Raja Aznam Nazrin, Under-Secretary, Adjudication and Arbitration, Ministry of Foreign Affairs of Malaysia,

Capt. Sahak Omar, Director General, Department of Hydrography, Royal Malaysian Navy,

Mr. Tuan Haji Obet bin Tawil, Deputy Director 1, Land and Mines Office of Johor,

Dr. Hajah Samsiah Muhamad, Director of Acquisition, Documentation and Audiovisual Centre, National Archives,

Cdr. Samsuddin Yusoff, State Officer 1, Department of Hydrography, Royal Malaysian Navy,

Mr. Roslee Mat Yusof, Director of Marine, Northern Region, Marine Department Peninsular Malaysia,

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M. Hajah Samsiah Muhamad, directeur des acquisitions, centre de documentation audiovisuel des archives nationales,

Le commandant Samsuddin Yusoff, premier officier d'état-major du service hydrographique de la marine royale malaisienne,

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Mr. Tan Ken Hwee, Senior Assistant Registrar, Supreme Court of Singapore,

Mr. Pang Khang Chau, Deputy Senior State Counsel, Chambers of the Attorney-General of the Republic of Singapore,

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Mr. Philip Ong, Assistant Director, Ministry of Foreign Affairs, Republic of Singapore,

Ms Yvonne Elizabeth Chee, Second Secretary (Political), Embassy of the Republic of Singapore in the Netherlands,

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Mme Foo Chi Hsia, directeur adjoint au ministère des affaires étrangères de la République de Singapour,

M. Philip Ong, sous-directeur au ministère des affaires étrangères de la République de Singapour,

Mme Yvonne Elizabeth Chee, deuxième secrétaire (affaires politiques) à l'ambassade de la République de Singapour aux Pays-Bas,

Mme Wu Ye-Min, chargée de mission au ministère des affaires étrangères de la République de Singapour,

*comme conseillers.*

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open.

The Court now meets to hear the oral arguments of the Parties in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

Let me begin by noting that in September 2003, before her election as President of the Court, Judge Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the present case. It therefore falls to me as Vice-President of the Court, pursuant to Article 13 of the Rules of Court, to exercise the functions of the presidency in this case.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. Malaysia chose Mr. Christopher John Robert Dugard and Singapore, Mr. Sreenivasa Rao Pemmaraju.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding the fact that Mr. Dugard has already served as judge *ad hoc* and has made a solemn declaration in a previous case, Article 8, paragraph 3, of the Rules of Court requires that he make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Christopher Dugard, of South African nationality, is Professor Emeritus at the University of the Witwatersrand, and Honorary Professor at the University of Pretoria and the University of West Cape, and was until recently Professor of Public International Law at Leiden University. He has also acted as Director of the Lauterpacht Research Centre for International Law at the University of Cambridge. In tandem with his outstanding academic achievements, Mr. Dugard has greatly contributed to the work of a number of international fora in the field of international law and human rights. He is a member of the Institut de droit international, a member of the International Law Commission and its Special Rapporteur on Diplomatic Protection. He is also Special Rapporteur of the United Nations Human Rights Council. Mr. Dugard has in addition

and as I just mentioned served as a judge *ad hoc* at this Court in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*.

Mr. Sreenivasa Rao Pemmaraju, of Indian nationality, has held numerous academic appointments, including positions at the Michigan University School of Law and the Woodrow Wilson International Center for Scholars. He was a long-standing member of the International Law Commission, and has held several distinguished appointments in that Commission. Mr. Sreenivasa Rao has in addition enjoyed an eminent career at the Indian Ministry of External Affairs and has served as Legal Adviser to the Permanent Mission of India to the United Nations. Among other illustrious appointments, he has been President of the Asian-African Legal Consultative Organization. Mr. Sreenivasa Rao has also appeared before this Court as counsel to the Indian Government in the case concerning *Aerial Incident of 10 August 1999 (Pakistan v. India)*.

In accordance with the order of precedence established by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Dugard to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

Mr. DUGARD: “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The VICE-PRESIDENT, Acting President: Thank you. I shall now invite Mr. Sreenivasa Rao to make the solemn declaration prescribed by the Statute.

Mr. SREENIVASA RAO: “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.” Thank you.

The VICE-PRESIDENT, Acting President: Thank you both. Please be seated. I take note of the solemn declarations made by Mr. Dugard and Mr. Sreenivasa Rao Pemmaraju and declare

them duly installed as judges *ad hoc* in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

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I shall now recall the principal steps of the procedure so far followed in this case.

The proceedings were instituted on 24 July 2003 through the notification by Malaysia and Singapore of a Special Agreement to submit to the Court a dispute between them concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge.

Pursuant to Article 40, paragraph 3, of the Statute of the Court, all States entitled to appear before the Court were notified of the Special Agreement.

By an Order dated 1 September 2003, the President of the Court, having regard to the provisions of the Special Agreement concerning the written pleadings, fixed 25 March 2004 and 25 January 2005 as the respective time-limits for the filing by each of the Parties of a Memorial and a Counter-Memorial. Those pleadings were duly filed within the time-limits so prescribed.

By an Order dated 1 February 2005, the Court fixed 25 November 2005 as the time-limit for the filing by each of the Parties of a Reply. Those pleadings were duly filed within the time-limit so prescribed.

In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, 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. The Court, having regard to the said letter, decided that no further written pleadings were necessary and that the written proceedings in the case were thus closed.

The question of the order in which the Parties should be heard during the oral proceedings was discussed by the Court at the request of the Parties. By letters dated 22 September 2006, the latter were informed that the Court had decided that Singapore should be heard first, followed by Malaysia, it being understood that the decision did not imply that one Party would be seen as an applicant and the other Party as a respondent, and was without prejudice to any question of the burden of proof.

In accordance with Article 54, paragraph 1, of the Rules of Court, the Court fixed Tuesday 6 November 2007 as the date for the opening of the hearings and adopted a timetable for them. The Registrar informed the Parties accordingly by letters of 2 October 2006.

On 21 August 2007, the Agent of Singapore provided the Registry with a new document which his Government wished to produce under Article 56 of the Rules of Court. The Co-Agent of Malaysia subsequently informed the Court that Malaysia did not object to the production of the new document by Singapore on condition that Malaysia's comments on the document produced by Singapore would also be admitted into the record. The Registrar, on 11 October 2007, informed the Parties that the Court had decided to authorize the production of the document requested by Singapore. In accordance with Article 56, paragraph 3, of the Rules of Court, the document containing the comments of Malaysia on Singapore's new document was equally added to the case file.

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Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website as from today.

I note the presence at the hearing of the Agents, counsel and advocates of both Parties, whom I am pleased to welcome.

In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument. The first round of oral argument will begin today and will close on Friday 16 November 2007. The second round of oral argument will begin on Monday 19 November 2007 and will close on Friday 23 November 2007.

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I shall now give the floor to Professor Tommy Koh, Agent of the Republic of Singapore. Your Excellency, you have the floor.

Mr. KOH:

1. Mr. President and Members of the Court.

2. I have the great honour to appear before you as the Agent of Singapore. Since this is the first case involving Singapore in the International Court of Justice, I would like to begin by saying a few words about my country's policy on international law, on the rule of law and on the peaceful settlement of disputes.

3. Singapore attaches great importance to international law and we have always sought to conduct ourselves in conformity with it. We have worked with other like-minded States to strengthen the rule of law in the world. We believe in the peaceful settlement of disputes. We believe that States should seek to resolve their differences by consultations, negotiations and mediation. When a dispute cannot be resolved by those means, we believe that, instead of allowing the dispute to adversely affect the overall bilateral relationship of the two countries concerned, it is preferable to refer a dispute to a binding third party procedure, namely, to arbitration or adjudication. It is for this reason that Singapore and Malaysia have agreed to submit our dispute to this honourable Court.

4. I would now like to extend my fraternal greetings and my respect to the Agent of Malaysia, Tan Sri Abdul Kadir Mohamed, who is an old friend, to the Co-Agent, the much admired Ambassador Noor Farida Ariffin, to the distinguished Attorney-General, Tan Sri Abdul Gani Patail another friend, and to the other learned members of their team.

5. But now Mr. President, I would now like to introduce the members of my team. They are: my Co-Agent, Ambassador Anil Kumar Nayar; the Deputy Prime Minister and Minister for Law, Professor S. Jayakumar; the Chief Justice of Singapore, Mr. Chan Sek Keong; the Attorney-General, Mr. Chao Hick Tin; Mr. Ian Brownlie, Q.C.; Professor Alain Pellet; Mr. Rodman Bundy; and Ms Loretta Malintoppi. Professor Jayakumar was previously Dean of the Faculty of Law at the National University of Singapore. He has been involved in Singapore's

research on the Pedra Branca issue, ever since 1979, when Malaysia first published a map asserting her claim to the island.

6. I would like now to explain the presence of the Chief Justice of Singapore in our delegation. Mr. Chan Sek Keong was Singapore's Attorney-General for 14 years, a position he relinquished in April last year when he was appointed as the Chief Justice of Singapore. He became involved in this case beginning in 1993, with the first series of bilateral consultations between Singapore and Malaysia. After the Special Agreement was submitted to this Court, Mr. Chan led the legal team in preparing our written pleadings. In view of the pivotal role which he has played in overseeing Singapore's preparations for this case, when he was appointed Chief Justice, the Singapore Parliament was informed that he had agreed, at the Government's request, to continue with this role until the case has been decided by this Court.

#### **The subject-matter of the dispute**

7. Mr. President and Members of the Court, this case concerns sovereignty over three maritime features — a main island called “Pedra Branca” and two subsidiary features called “Middle Rocks” and “South Ledge”. According to Article 2 of the Special Agreement:

“The Court is requested to determine whether sovereignty over:

- (a) Pedra Branca/Pulau Batu Puteh;
- (b) Middle Rocks;
- (c) South Ledge,

belongs to Malaysia or the Republic of Singapore.”

Pedra Branca means “White Rock” in the Portuguese language. The phrase “Pulau Batu Puteh” means “White Rock Island” in the Malay language. The name “Pulau Batu Puteh”, has only recently appeared in maps of the region and is the name by which my Malaysian friends refer to the island today. For the purpose of Singapore's oral presentations, we will be referring to the island as “Pedra Branca”, the name by which it has been known since the Portuguese started mapping the region in the sixteenth century.

8. The location of the three features in dispute can be seen in the map now shown on the screen. This map is No. 2 in the Singapore Memorial, and it can also be found in the judges'

folders at tab 1. It shows the three features lying strategically at the eastern entrance to the Strait of Singapore. About 900 ships daily pass through the Strait of Singapore, making it one of the busiest straits in the world.

9. I would now like to show the Court a photograph of Pedra Branca, with the lighthouse painted in black and white, the helipad and other fixtures on it. This is inserted at tab 2 of the judges' folders. Middle Rocks are in the background. South Ledge cannot be seen in this photograph because it is outside the photograph's frame, and it is located about two nautical miles south-west of Pedra Branca. Moreover, it is entirely submerged at high tide.

10. Mr. President and Members of the Court, it is our submission that sovereignty over Pedra Branca, Middle Rocks and South Ledge belong to Singapore.

— Pedra Branca belongs to Singapore because the British colonial government in Singapore acquired sovereignty over the island, by taking possession of the island more than 150 years ago to build a lighthouse. Over the years, Singapore has consistently maintained its title over Pedra Branca by the continuous, open and effective display of State authority on the island and within its territorial waters.

— Middle Rocks belongs to Singapore because it forms an indivisible group with Pedra Branca. It has never been independently appropriated, and, lying within Pedra Branca's territorial sea, Middle Rocks necessarily belongs to the State which has sovereignty over Pedra Branca.

— South Ledge belongs to Singapore because it is a low-tide elevation located within the territorial sea generated by Pedra Branca and Middle Rocks.

11. The three features lie about 25 nautical miles from Singapore and between seven and eight nautical miles from the Malaysian coast. I should emphasize that during the relevant period, the applicable width of the territorial sea was three miles. Malaysia extended its territorial sea to 12 miles in 1969, long after Singapore had acquired title to the three features.

12. Before 1979, Malaysia had never laid claim to any of these three features. In 1979, for the first time, Malaysia published a map purporting to place Pedra Branca within the Malaysian territorial sea, giving rise to the present dispute. The dispute has been an irritant in the bilateral relations between our two countries. After almost 28 years, we are very pleased that the dispute

will finally be brought to an end. And I am very happy to inform the Court that the two Parties have agreed to accept and to abide by the judgment of this Court.

**The Parties to the dispute**

13. Mr. President and Members of the Court, Singapore and Malaysia are two friendly neighbours in south-east Asia. The map now shown on the screen is a general map of south-east Asia. This map can be found at tab 3 of the judges' folders. You can see that Malaysia comprises two parts: West Malaysia and East Malaysia. East Malaysia occupies the northern part of the island of Borneo, while West Malaysia forms part of the Asian mainland, occupying the Malay Peninsula. Singapore is the island coloured orange — the national colour of the Netherlands! — at the southern tip of the Peninsula. The location of Pedra Branca is shown by a red arrow on this map, at the entrance to the Singapore Strait in the South China Sea. This is the spot where, 160 years ago, the British colonial government decided to build a lighthouse.

14. Mr. President, Members of the Court, Singapore is a former British colony. For the purpose of this case, Singapore is the successor in title to Great Britain. From 1826 to 1946 Singapore was part of a political unit called the "Straits Settlements", which also included Penang and Malacca. The Straits Settlements was, at all times, a British colony. Before 1867, the Straits Settlements was subordinate to the Government of British India which was, in turn, accountable to London. In 1946, the Straits Settlements was dissolved, and Singapore became a Crown colony in its own right. In 1963, Singapore merged with the Federation of Malaya to form the Federation of *Malaysia*. Two years later, Singapore separated from Malaysia and became an independent and sovereign State.

15. I should add here that, although Singapore was part of the Federation of Malaysia for two years, the two Parties' written pleadings agree that nothing turns on this point. It is not disputed that every single piece of territory which Singapore brought into the Federation in 1963 was taken out of the Federation in 1965.

16. Mr. President and Members of the Court, Malaysia is a federation of 13 States. The State nearest to Singapore and to Pedra Branca is the State of Johor. Prior to 1957, Johor was a separate political entity, with its own international legal personality. Although from 1948 to 1957 Johor

was part of a political entity known as the “Federation of Malaya”, this federation was just a grouping, a mixed grouping of colonies and Malay States under the protection of the British. Johor remained a sovereign State until the British granted independence to the Federation of Malaya in 1957. On that date Johor ceased to be an independent sovereign State and became a constituent State of the *independent* Federation of Malaya. As noted previously, the Federation of Malaya became the Federation of *Malaysia* in 1963. For the purpose of this case, Malaysia is the successor to the State of Johor. The last two slides which I have shown, have been enclosed in tab 4 of the judges’ folders.

17. At this point Mr. President, I would like to explain a usage of terminology which applies throughout Singapore’s oral presentations. Although Malaysia was formed only in 1963 and Singapore became an independent State only in 1965, many of the events which we will be discussing in these oral proceedings took place long before those dates. To avoid unnecessary repetition, we will sometimes simply refer to “Malaysia” or to “Singapore” when discussing those past events, even though the conduct in question was undertaken by their respective predecessors.

18. Mr. President and Members of the Court, Singapore and Malaysia are closely linked, not only by geography, but also in terms of history, culture and economics. For a brief period of two years, we were even part of the same country. Today, economic, cultural and family ties remain strong.

19. For example, Malaysia is Singapore’s largest trading partner and Singapore is Malaysia’s second largest trading partner. Cultural ties are strong because the two countries share many commonalities of language, of ethnicity and of religion.

20. These close historical and political ties do not, however, alter the fact that the officials of the two countries have been vigilant in exercising exclusive jurisdiction over areas in which they consider to be under the sovereignty of their respective country. The reason why I emphasize this point is that a key feature of this case is the constant stream of Singapore’s acts of administration in relation to Pedra Branca, contrasted with the complete absence of Malaysian *effectivités* on Pedra Branca or within its territorial waters, and with Malaysia’s silence in the face of all these State activities of Singapore. Such silence on the part of Malaysia is significant, and must be taken to mean that Malaysia never regarded Pedra Branca as her territory.

### **Outline of Singapore's case**

21. Mr. President and Members of the Court, I will now outline the main elements of Singapore's case both on the facts and on the law.

22. Singapore's title to Pedra Branca is based upon the taking of lawful possession of the island by the British authorities in Singapore during the period 1847 to 1851. Malaysia claims that, prior to 1847, Pedra Branca was under the sovereignty of Johor. However, there is absolutely no evidence to support Malaysia's claim. Mr. President, the truth is that, prior to 1847, Pedra Branca was *terra nullius*, and had never been the subject of a prior claim, or any manifestation of sovereignty by any sovereign entity.

23. Mr. President, the lawful taking of possession of Pedra Branca by the British during the period of 1847 to 1851 was effected by a series of official actions. These actions began with the first landing of an agent of the British Crown in 1847 and culminated with the official inauguration of the lighthouse in 1851.

24. The whole pattern of activities and official acts undertaken by agents of the British Crown during this period — 1847 to 1851 — constituted a clear and unequivocal manifestation of the intention to claim sovereignty over Pedra Branca. These actions were peaceful and public, and elicited no opposition from any power.

25. Mr. President, Malaysia claims that the British sought permission from Johor to build the Horsburgh lighthouse, but she has not provided any evidence to support this contention.

26. There was no doubt in the minds of contemporary observers that the British Crown had acquired sovereignty over Pedra Branca during that period. At the foundation stone laying ceremony for the Horsburgh lighthouse, held on 24 May 1850, Pedra Branca was described as a dependency of Singapore in the presence of the Governor of the Straits Settlements — the most senior British official in Singapore — as well as other British and foreign officials. This attribution of sovereignty, which was widely reported in the local newspapers, elicited no response from any quarters. In particular, it elicited no protest from the Johor authorities. Indeed, in November 1850, the Government of the Netherlands East Indies in Batavia expressly recognized British sovereignty over Pedra Branca by referring to the construction of the lighthouse on Pedra Branca as being “on British territory”.

27. After 1851, the United Kingdom and, subsequently, Singapore, confirmed and maintained the title that had been acquired over Pedra Branca by the continuous, open and effective display of State authority on Pedra Branca as a whole and within its territorial waters. These activities were wide ranging, comprising both lighthouse and non-lighthouse activities suitable to the nature of the territory concerned and, most importantly, were undertaken *à titre de souverain*. All of them have been fully documented in Singapore's written pleadings.

28. For over 130 years, from 1847 until 1979, when Malaysia first advanced a claim to the island, Singapore's effective administration and control of Pedra Branca went unopposed by Malaysia or her predecessor in interest, Johor, and was recognized by third States and other nationals.

29. Mr. President, not only did Malaysia not protest the taking of lawful possession of Pedra Branca by the British Crown in 1847-1851, she never objected to any of the official State actions that Singapore undertook on Pedra Branca until well after 1980. In fact, Malaysia has, by her own conduct, recognized Singapore's sovereignty over the island. In 1953, when Johor was still an indisputably sovereign State, Johor officially declared that she did not claim ownership over Pedra Branca. Mr. President, this disclaimer is binding on Malaysia. In addition, the highest national mapping authority of Malaysia published a series of four maps, from 1962 to 1975, specifically attributing Pedra Branca to Singapore.

30. The evidence shows that the two Parties have been remarkably consistent in their conduct in relation to Pedra Branca. On the one hand, Singapore has, for more than 150 years, acted in a manner entirely consistent with her sovereignty over Pedra Branca. On the other hand, prior to Malaysia's claim in 1979, Malaysia never once intimated that she possessed title to Pedra Branca and never once carried out any sovereign act on or in relation to Pedra Branca. Instead, as I have said, Malaysia officially disclaimed ownership over the island in 1953, issued official maps which depicted Pedra Branca as belonging to Singapore, and remained silent in the face of Singapore's continuous administration and control of the island.

31. Mr. President and Members of the Court, with respect to Middle Rocks and South Ledge, both features lie within Pedra Branca's territorial waters. Middle Rocks, lying 0.6 nautical miles from Pedra Branca, is part of the same island group as Pedra Branca, while South Ledge is a

low-tide elevation incapable of independent appropriation. Therefore, sovereignty over both Middle Rocks and South Ledge belongs to Singapore by virtue of Singapore's sovereignty over Pedra Branca.

32. Mr. President and Members of the Court, each of the points which I have made will be elaborated upon by my colleagues over the next four days. To assist the Court in following our subsequent presentations, allow me to outline the sequence of our presentations. You can also find the order immediately after the index in the judges' folders.

33. After my statement, the Attorney-General, Mr. Chao will speak on the geographical setting and the background of the dispute.

34. Following Mr. Chao, Chief Justice Chan, followed by Professor Pellet, will rebut Malaysia's claim of an original historical title.

35. Tomorrow, we will turn our attention to Singapore's positive case, beginning with Professor Pellet who will explain that Singapore's acquisition of Pedra Branca did not involve any form of permission or consent from Johor. He will be followed by Mr. Brownlie who will explain the process by which Singapore acquired title to Pedra Branca. Mr. Bundy will then explain how Singapore has maintained its title through the continuous exercise of State authority on and in relation to Pedra Branca.

36. He will be followed by Ms Malintoppi who will, by contrast, discuss Malaysia's absence of *effectivités*. Professor Pellet will then elaborate on Malaysia's recognition of Singapore's sovereignty over Pedra Branca. After Professor Pellet, Mr. Bundy will discuss the system of lighthouses in the Straits of Malacca and Singapore, also known as the "Straits Lights System".

37. Professor Pellet will then discuss the important exchange of correspondence in 1953 through which the Johor Government expressly and unconditionally disclaimed title to Pedra Branca. Following Professor Pellet's presentation, Ms Malintoppi will speak on the significance of maps and third State recognition. Professor Pellet will then return to deal with Middle Rocks and South Ledge. The Deputy Prime Minister, Professor Jayakumar, will then end Singapore's first round of presentations with a concluding statement.

38. Mr. President and Members of the Court, that brings my presentation to a close. I apologize for my voice. May I respectfully request you now to call upon the Attorney-General of Singapore, Mr. Chao, to continue with Singapore's presentation.

39. Thank you very much.

The VICE-PRESIDENT, Acting President: I thank you, Professor Koh, for your statement and, as you suggested, I call now on the Attorney-General of Singapore, Mr. Chao, to make his statement.

Mr. CHAO:

#### **GEOGRAPHICAL SETTING AND BACKGROUND OF THE DISPUTE**

1. Thank you, Mr. President. My presentation this morning will be in three parts. First, I will describe the physical and geographical setting of Pedra Branca, Middle Rocks and South Ledge. In the second part of my presentation, I will provide an outline of certain key events relevant to the case. And in the final part of my presentation, I will recall the developments leading up to the dispute and its submission before this Court.

#### **The physical and geographical setting**

2. Mr. President and Members of the Court, Pedra Branca is an island with a few rock outcroppings. It is 137 m long, with an average width of about 60 m. As can be seen in the photograph on the screen, the most prominent object on the island is the lighthouse. This lighthouse is named "Horsburgh lighthouse", after the hydrographer to the British East India Company, James Horsburgh. This was the first lighthouse to be built by the British in the region. The lighthouse tower you see in this photograph is the original structure, completed in 1851.

3. Structures ancillary to the lighthouse have existed for as long as the lighthouse itself. This 1851 painting of Pedra Branca just after the completion of the lighthouse shows a jetty also having been built on the island. More structures have been built by the Singapore Government and its predecessors since then. On the island today, the building around the base of the lighthouse is the living quarters for the lighthouse crew. This building includes a kitchen, storerooms, sleeping quarters and a water desalination plant. It was not part of the original construction. It was added in

1948 by the British colonial government in Singapore. The living quarters of the crew were originally located within the lighthouse tower itself. This was to allow the lighthouse crew to better defend themselves against pirate attacks. In the mid-nineteenth century, piracy was rampant in the vicinity.

4. To the left, you can see a helicopter landing pad. This was built by Singapore in 1992. Between the helipad and the lighthouse, there is a radar tower. This was installed by Singapore in 1989. It is used for the Vessel Traffic Information System, operated by the Maritime and Port Authority of Singapore, to keep track of the 900-over ships which traverse the Singapore Strait and pass by Pedra Branca every day.

5. All the buildings and facilities on the island were built and operated by the Singapore Government, without seeking approval from any other powers.

6. As the photographs show, Singapore has made very full use of the island, adding various structures to it over the years. From time to time, suggestions to reclaim additional land around the island to increase the usable space were made by Singapore officials. The documentary record shows that this idea was mooted in 1972, was given serious consideration in 1973 and 1974 and was discussed again in 1978<sup>1</sup> when a public tender was called by the Singapore Government for reclamation works on the island and three bids were received<sup>2</sup>.

7. In stark contrast to the crowded, built-up island you see in the previous photograph, this was what Pedra Branca looked like before the British. It was a barren island with no inhabitants, no buildings and no vegetation. Access to the island was greatly restricted for almost half the year because of the north-east monsoon. There is no evidence that the island had ever been occupied or claimed by anyone before the arrival of the British.

8. At this point, I would like to introduce the Court to an important British Admiralty chart. This is Admiralty chart 2403. The chart is entitled “Singapore Strait”, but it also covers an additional area beyond either end of the Strait. This is the chart reproduced by Malaysia in large format and folded into the back pocket of her Counter-Memorial. Malaysia explained that she did so because she anticipates that the chart will be useful to the Court as a general orientation map of

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<sup>1</sup>RS, pp. 168-169, para. 4.180.

<sup>2</sup>MS, Ann. 135.

Pedra Branca and its surrounding area<sup>3</sup>. For the same reason, we have included a copy of this chart in the front pocket of the judges' folder.

9. As the chart shows, Pedra Branca, Middle Rocks and South Ledge are located at the eastern entrance of the Singapore Strait. I will speak more about the geography of the eastern entrance in a moment. For now, I would like to use this chart to introduce the position of Middle Rocks. Like Pedra Branca, Middle Rocks are also made of granite. Besides being located only 0.6 nautical miles from each other, Pedra Branca and Middle Rocks are also located on a single raised section of the sea-bed. This is evident from the extract of British Admiralty chart 2403 shown on the screen. Pedra Branca and Middle Rocks are both located on the same blue-tinted section of the chart, surrounded by a dotted line. In hydrographic charts, this dotted line is known as a "danger line". It means that the area enclosed within the dotted line is hazardous, and ships should avoid sailing into or across that area.

10. This close physical relationship between Pedra Branca and Middle Rocks is confirmed by the United Kingdom Hydrographic Office sailing directions which describe Middle Rocks as lying "*on the south-western edge of the bank on which Pedra Branca lies*"<sup>4</sup>. Pedra Branca and Middle Rocks have also been collectively referred to as the "Horsburgh Group" by Commander Kennedy in a famous study on international straits which he prepared for the purposes of the 1958 United Nations Conference on the Law of the Sea<sup>5</sup>.

11. Before taking the Admiralty Chart off the screen, I would like to point out that there are two recognized navigational channels in the vicinity of Pedra Branca, Middle Rocks and South Ledge. One is called South Channel and it separates the three features from Indonesia. The other is called Middle Channel and it separates them from Malaysia. The main shipping channel in this vicinity is Middle Channel.

12. I turn now to South Ledge, which lies 2.1 nautical miles to the south of Pedra Branca. This is a photograph of South Ledge, taken at low tide. In the photograph, you can see the

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<sup>3</sup>CMM, p. 98, para. 200.

<sup>4</sup>MS, Ann. 79.

<sup>5</sup>CMS, Ann. 37.

wreckage of a vessel which ran aground on the feature in 1996<sup>6</sup>. The photograph shows two persons on South Ledge, which allows us to gauge the size of the feature. South Ledge is also formed of granite. Malaysia and Singapore both agree that South Ledge is a low-tide elevation.

13. Let me now move away from the physical description of the three features to examine the general geographical setting. Displayed on the screen is the general map of south-east Asia referred to earlier by our Agent. The position of Pedra Branca is shown on the map. Pedra Branca lies at the eastern entrance of the Singapore Strait, at the point where the strait opens up into the South China Sea.

14. Since the earliest days of European contact with the region, the Straits of Malacca and Singapore has been the most important shipping route linking the Far East to Europe. Almost all vessels heading from the west towards China, Japan and other parts of east Asia, and vice versa, will pass through the Straits of Malacca and Singapore. Today, the Straits of Malacca and Singapore remains one of the busiest shipping routes in the world and the most important in the region.

15. As this larger scale sketch-map shows, Pedra Branca lies right in the middle of the eastern entrance of the Singapore Strait, and is not associated with either mainland. It is 7.6 nautical miles from the Indonesian island of Bintan and 7.7 nautical miles from the Malaysian mainland. The nearest Malaysian island is 6.8 nautical miles away. This island is called Pulau Mungging. It is part of the Romania group of islands, a group which also includes Peak Rock, a feature which Professor Pellet and Mr. Brownlie will refer to in their presentations tomorrow. As the map shows, the Romania islands are all clustered around Point Romania, with none of them lying more than 2 nautical miles from the mainland. Pedra Branca is not part of the Romania group of islands and has never been regarded as part of the group. References in historical documents to the "Romania Islands" do not include Pedra Branca.

16. Mr. President and Members of the Court, before I proceed to the second part of my presentation, I would like at this juncture to conclude this survey of the geographical setting with four observations:

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<sup>6</sup>MS, p. 121, para. 6.82 (d).

- *Firstly*, Pedra Branca is a small island which has been made use of by Singapore in a wide variety of ways. From an empty barren island in 1847, Singapore has built up Pedra Branca as its exclusive domain, with various Singapore-constructed structures gradually taking up all usable space on the island over the course of 160 years of Singapore's administration.
- *Secondly*, Pedra Branca, Middle Rocks and South Ledge all lie within 3 nautical miles of each other. The three features are located more than 6 nautical miles away from the nearest Malaysian territory.
- *Thirdly*, Pedra Branca, Middle Rocks and South Ledge are isolated features lying in the middle of the eastern entrance of the Singapore Straits. They are not associated with either the Malaysian coast or the Indonesian coast.
- *Fourthly*, the Parties are in agreement that Middle Rocks are islands while South Ledge is a low-tide elevation. Middle Rocks and Pedra Branca are part of a single rock formation, connected by a submerged bank. Middle Rocks and Pedra Branca have been treated and described as a group in the relevant literature.

#### **Chronology of key events relevant to the case**

17. Mr. President and Members of the Court, I come now to the second part of my presentation. In this section, I will relate some of the events relevant to the case. The purpose is not to list every significant event. Instead, I will highlight certain key milestones in the political history of the parties and key developments which are pertinent to the case, paying particular attention to those involving express statements made by either Party. This chronology will provide the background and context for the next few days' presentations. A summary of it can be found at tab 5 in the judges' folder, together with some of the documents I will be referring to shortly.

18. The story began 160 years ago, when the British colonial government in Singapore decided to build a lighthouse on Pedra Branca. The British Government took possession of the island in 1847 and actual construction of the lighthouse began in 1850. The lighthouse, together with its ancillary structures, was completed the following year. There is no doubt that, by the time the lighthouse was completed, Britain had acquired sovereignty over Pedra Branca.

19. As mentioned by our Agent, Pedra Branca was already described as a dependency of Singapore at the lighthouse foundation stone ceremony held in May 1850 in the presence of the British Governor<sup>7</sup>. In November that year, Pedra Branca was again described, this time in official Dutch correspondence, as “British territory”<sup>8</sup>.

20. The lighthouse was inaugurated in October 1851. Two months later, in 1852, the Government of India passed a law which vested the lighthouse and its appurtenances in the East India Company<sup>9</sup>. In 1854, the 1852 legislation was replaced by another piece of legislation which reiterated the vesting of the property in the East India Company<sup>10</sup>. As Mr. Bundy will explain later, the laws of 1852 and 1854 could only be passed if the Government of India considered Pedra Branca as British territory.

21. After acquiring sovereignty over Pedra Branca, the Singapore Government undertook a full range of administrative activities on the island and in its waters. These activities are documented in Singapore’s written pleadings and will be dealt with by Mr. Bundy.

22. In 1861, about 10 years after the completion of the Horsburgh lighthouse, an exchange of correspondence took place between the Singapore Government and Johor Government over some conflicts between Singapore fishermen and Johor fishermen. This series of correspondence showed that Singapore Government officials as well as private individuals had the clear understanding that Johor did not have jurisdiction and authority over Pedra Branca and its waters<sup>11</sup>.

23. In 1886, the Singapore Government constructed a lighthouse on an island called “Pulau Pisang”. That island belonged to Johor and, consequently, the lighthouse was constructed with Johor’s permission. The position of Pulau Pisang is now shown on the map on the screen. It is located along the Straits of Malacca, off the west coast of Johor. It is the only lighthouse operated by the Singapore Government on Malaysian territory. As Mr. Bundy will explain in his presentation on the “Straits Lights System”, the contrast between Malaysia’s treatment of Pulau

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<sup>7</sup>MS, Ann. 45.

<sup>8</sup>RS, Ann. 8.

<sup>9</sup>MS, Ann. 59.

<sup>10</sup>MS, Ann. 62.

<sup>11</sup>CMS, pp. 70-71, paras. 4.61-4.62. This correspondence is fully discussed in Appendix B of the Reply of Singapore.

Pisang and Pedra Branca shows very clearly that Malaysia had never regarded Pedra Branca as Malaysian territory.

24. In 1900, Johor regularized the arrangement for Pulau Pisang lighthouse by issuing a formal grant of the land for the lighthouse to Singapore<sup>12</sup>. In contrast, no attempt has ever been made by Johor to issue a formal grant for the lighthouse on Pedra Branca.

25. In 1927, Singapore and Johor entered into an agreement to draw a territorial sea boundary in the Johor Strait<sup>13</sup>. This is the stretch of water which separates Johor from the main island of Singapore. The agreed boundary followed the deep water channel within the Johor Strait. The 1927 Agreement was supplemented in 1995 by an agreement between Singapore and Malaysia to fix the boundary in the Johor Strait by reference to a set of geographical co-ordinates. Neither the 1927 Agreement nor the 1995 Agreement concerned Pedra Branca.

26. In 1948, Singapore created a regular naval force called the “Malayan Naval Force”, which the Singapore Government renamed the “Royal Malayan Navy” in 1952<sup>14</sup>. In that same year, the Chief Surveyor of Singapore expressed the opinion in internal correspondence that Singapore was entitled to claim a 3-mile territorial sea around Pedra Branca<sup>15</sup>.

27. In 1953, in response to an enquiry from Singapore, the Johor Government stated unequivocally that “the Johore Government does not claim ownership of Pedra Branca”<sup>16</sup>. This letter will be the subject of Professor Pellet’s subsequent presentation.

28. In 1957, the Federation of Malaya became an independent nation. In 1958, the Singapore Government transferred control of the Royal Malayan Navy to the Federation of Malaya. After the transfer, the Royal Malayan Navy continued to provide for the joint naval defence of Singapore and the Federation and its vessels continued to be based in Singapore until 1997. Singapore also continued to maintain its own naval volunteer reserve, while Britain continued to base its Pacific Fleet in Singapore until the 1970s<sup>17</sup>.

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<sup>12</sup>MM, Ann. 89.

<sup>13</sup>MM, Ann. 12.

<sup>14</sup>RS, pp. 175-176, para. 5.11.

<sup>15</sup>MS, Ann. 91.

<sup>16</sup>RS, Ann. 96.

<sup>17</sup>RS, pp. 177-180, paras. 5.11-5.13; CMM, p. 249, para. 536.

29. In 1958, the Singapore Master Attendant, who was the head of the Singapore Marine Department, stated in a memorandum discussing proposals to amend the Light Dues Ordinance that Pedra Branca was Singapore territory<sup>18</sup>.

30. In 1962, the Federation of Malaya published two official maps which attributed Pedra Branca to Singapore<sup>19</sup>. This will be discussed by Ms Malintoppi on Friday.

31. In 1963, Singapore, together with two other British territories, merged with the Federation of Malaya to form the Federation of *Malaysia*. In 1965, Singapore left the Federation. In the same year, Malaysia published another official map attributing Pedra Branca to Singapore<sup>20</sup>.

32. In 1966, the Director of the Singapore Government's Marine Department published a book on the history of the Horsburgh lighthouse entitled "First Pharos of the Eastern Sea"<sup>21</sup>. In the following year, the Marine Department stated in an official memorandum to the Singapore Ministry of Foreign Affairs that the waters within 3 miles of Pedra Branca may be considered Singapore territorial waters<sup>22</sup>.

33. In 1968, Malaysia protested against the flying of the Singapore flag on Pulau Pisang. Singapore promptly removed the flag from Pulau Pisang. In contrast, Malaysia did not protest against the flying of the Singapore flag on Pedra Branca<sup>23</sup>.

34. In 1969, Malaysia extended her territorial sea from 3 miles to 12 miles<sup>24</sup>. In that same year, Malaysia and Indonesia signed a continental shelf boundary treaty<sup>25</sup>. Significantly, Malaysia did not use Pedra Branca as a base point for the purpose of this treaty. On the contrary, the boundary line in this treaty carefully avoided any intrusion into Pedra Branca's territorial waters<sup>26</sup>.

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<sup>18</sup>RS, Ann. 24.

<sup>19</sup>CMS, maps 26 and 27.

<sup>20</sup>CMS, map 28.

<sup>21</sup>MM, Ann. 111.

<sup>22</sup>CMS, Ann. 42.

<sup>23</sup>MS, p. 109, para. 6.53.

<sup>24</sup>MM, p. 123, para. 279.

<sup>25</sup>MM, Ann. 16.

<sup>26</sup>CMS, p. 173, paras. 6.93-6.94.

35. In 1970, Malaysia and Indonesia concluded a territorial sea boundary treaty<sup>27</sup>. This treaty covered only the Strait of Malacca. There was no attempt by Malaysia and Indonesia to agree on a territorial sea boundary in the vicinity of Pedra Branca. In 1973, Singapore and Indonesia concluded a territorial sea boundary treaty<sup>28</sup>. This partial delimitation did not concern Pedra Branca.

36. In 1974, the Singapore Marine Department stated in official internal correspondence that Pedra Branca was Singapore territory and was entitled to a territorial sea<sup>29</sup>.

37. In that same year, Malaysia once again published an official map attributing Pedra Branca to Singapore<sup>30</sup>.

38. In 1975, there were three significant events. Firstly, the last British naval units withdrew from Singapore in September and, in the same month, the Singapore navy formally established a patrol sector in the vicinity of Pedra Branca<sup>31</sup>. Secondly, in a briefing Note prepared for the Singapore Minister of State for Communications, the Hydrographer of the Port of Singapore Authority stated that Pedra Branca was entitled to its own territorial waters. He also noted that “territorial waters in its vicinity has not yet been agreed upon between Indonesia, Malaysia and Singapore”<sup>32</sup>. Thirdly, Malaysia, on its part, published yet another official map attributing Pedra Branca to Singapore<sup>33</sup>.

39. In 1978, two Malaysian surveyors attempted to land on Pedra Branca. They left the island when directed by the lighthouse keeper to do so<sup>34</sup>. The Malaysian Ministry of Foreign Affairs took this matter up in passing with the Singapore High Commission to Malaysia at a meeting in April 1978. At that meeting, the Malaysian official also claimed that Pedra Branca

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<sup>27</sup>MM, Ann. 17.

<sup>28</sup>MM, Ann. 18.

<sup>29</sup>RS, Ann. 44.

<sup>30</sup>CMS, map 30.

<sup>31</sup>MS, pp. 115-116, para. 6.70.

<sup>32</sup>RS, Ann. 46.

<sup>33</sup>MM, map 41.

<sup>34</sup>MS, p. 112, para. 6.63.

belonged to Malaysia. The Singapore official at the meeting responded unequivocally that Pedra Branca belonged to Singapore<sup>35</sup>.

### **Emergence of Malaysia's claim**

40. Mr. President and Members of the Court, as the foregoing narrative shows, from 1847 right up till 1978 — a period of more than 130 years — the conduct of the Parties was remarkably consistent. Singapore consistently performed various acts of State authority in relation to Pedra Branca, and Singapore officials consistently expressed the view, on many occasions, that Pedra Branca was under Singapore's sovereignty. Malaysian officials were, on the other hand, equally consistent in acknowledging and recognizing Singapore's title to Pedra Branca. It was not until 1978 that we begin to see Malaysia taking the first tentative steps towards making a claim to Pedra Branca. And it was only in 1979 that Malaysia made a formal claim to the island through the publication of its map entitled *Territorial Waters and Continental Shelf Boundaries of Malaysia*<sup>36</sup>.

41. On the day the map was published, the Singapore High Commissioner to Malaysia was summoned to meet with a senior official of the Ministry of Foreign Affairs at Kuala Lumpur. At that meeting, the Malaysian official read out a typewritten official statement concerning the publication of the 1979 map. He did not extend a copy of the statement to the Singapore High Commissioner. He did not even provide the High Commissioner with a copy of the 1979 map. Instead, the High Commissioner was told to buy his own copy of the map from the Map Sales Office. Nor did the Malaysian official come straight to the point about Pedra Branca. It was only after he had put aside his typewritten statement and answered a few questions from the High Commissioner that he admitted that, in the case of Singapore, Pedra Branca was affected by the map<sup>37</sup>.

42. Singapore was, of course, quite surprised by Malaysia's attempt to claim Pedra Branca, given Singapore's long-standing, unopposed title, Johor's unconditional disclaimer of title in 1953 and Malaysia's repeated publication of official maps attributing Pedra Branca to Singapore. Singapore studied the Malaysian map carefully. As it turned out, Malaysia had also made

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<sup>35</sup>RS, pp. 154-155, para. 4.146; RS, Ann. 51.

<sup>36</sup>MM, map 44.

<sup>37</sup>MS, pp. 22-24, para. 4.5

unjustified territorial sea claims against Singapore at the two ends of the Johor Strait. These claims were marked as point 20 and point 23 in the extract of the 1979 map now shown on screen. These two points created sharp slivers cutting into Singapore's territorial sea at the eastern and western ends of the Johor Strait, departing markedly from the general direction of the agreed boundary between the two countries in the Johor Strait. In February 1980, Singapore issued a diplomatic Note which protested against not only Malaysia's claim to Pedra Branca, but also Malaysia's claim in relation to point 20 and point 23<sup>38</sup>. This diplomatic Note of protest may be found at tab 6 in the judges' folder.

43. Three months later, in May 1980, there was a meeting between the Prime Ministers of Malaysia and Singapore. At the end of the meeting, the two Prime Ministers held a joint press conference. At the press conference, the Malaysian Prime Minister answered some questions concerning Malaysia's claim to Pedra Branca. An audio recording of the Malaysian Prime Minister's answer, in the form of a compact disc, has been included in the back pocket of Singapore's Reply. With the Court's permission, I would like to play this three-and-half-minute recording for the Court. The transcript of the recording can be found at tab 7 in the judges' folder<sup>39</sup>. The person answering the question in the recording is the Malaysian Prime Minister.

[Recording Starts]

Q: Mr. Prime Minister, my name is McHill with the *Asian Wall Street Journal*.

A: Which one? Are you referring to the Singapore Prime Minister?

Q: I will take either one with this question. (*Laughter in background*) One of the things which is obviously not mentioned in the joint statement is the current discussions about the possession of a series of islands that Malaysia has claimed on a recently produced map. I was wondering if there was any discussion of that between you two and if so, what was the import of that discussion?

A: Well, as we have explained . . . I think . . . when the map was published . . . and I think this is normal practice in the countries publishing the maps . . . and this does not mean to say that countries affected or countries which have got claims on the islands or areas which are included in the map published by Malaysia . . . (*pause*) . . . should not bring any to the attention of Malaysia. But we have always taken the stand . . . and, of course, this is unilateral action on the part of Malaysia in publishing the map and you don't solve problems and claim . . . and take possession of islands, areas

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<sup>38</sup>MS, Ann. 144.

<sup>39</sup>RS, Ann. 54.

which are included in the map when other countries say that they equally have a claim to the area.

As regards Singapore, I think this is especially in connection with the Batu Puteh . . . *(pause)* . . . Pulau Batu Puteh . . . Branca . . . *(pause)* . . . Pedra Branca, on which there is the lighthouse by the name of Horsburgh, and I have mentioned this to Mr. Lee Kuan Yew, saying that we have received your note with regard to the island and let's talk. And this is the question of producing . . . I think Mr. Lee Kuan Yew is aware . . . this is a question of going back into whatever documents there are, to prove who, to which nation, to which country this island really belong in the light of whatever documents may be available. And I think Mr. Lee Kuan Yew says . . . *(pause)* . . . he has got . . . *(pause)* . . . some documents. We are also looking into the question because this is not very clear to us with regard to this island and we include that in the . . . *(sudden pause)* . . . If there are any evidences to that effect, we are willing and prepared to settle this thing peacefully, amicably.

Q: It has been claimed in some circles that the purpose of claiming the Horsburgh Lighthouse was to give you a bargaining card to allow you to throw that away and wind up with possession of the other group of islands. Is this part of the Malaysian strategy?

A: We don't work that way. *(Laughter in background)*

Q: Mr. Prime Minister, everybody works that way.

A: *(Pause)* . . . I . . . I don't work that way. *(Laughter in background)*

Q: O.K.

[Recording ends]

44. As we will have heard, at the end of his long answer, the Malaysian Prime Minister said: "We are also looking into the question because this is not very clear to us with regard to this island . . ." He then started to explain why Malaysia included Pedra Branca in the map, but stopped himself abruptly in mid-sentence. Regardless of what it was that he stopped himself from saying, it is clear that the Malaysian Prime Minister had publicly admitted that the question of sovereignty over Pedra Branca was "not very clear" to Malaysia<sup>40</sup>. Coming so soon after the publication of the 1979 map and Singapore's protest, a statement of this nature is surely significant.

45. The position in 1980 was therefore as follows. Malaysia had staked a very late claim to Pedra Branca in the face of more than 130 years of Singapore sovereignty over the island, which Malaysia had never previously opposed but had, on the contrary, recognized on several occasions. And even at that late hour, the Malaysian Government was still unsure of its claim.

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<sup>40</sup>RS, pp. 183-184, para. 5.21; RS Ann. 54.

46. Mr. President and Members of the Court, the rest, as they say, is history. In December 1981, the Prime Ministers of the two countries agreed that the dispute should be resolved through consultations on the basis of a formal exchange of documents. After repeated reminders from Singapore, the exchange finally took place in 1992. This was followed by bilateral consultations between officials in 1993 and 1994. When it became clear that the dispute could not be resolved through consultations, Singapore proposed that the dispute be submitted to the International Court of Justice, and Malaysia agreed. The Parties began negotiating the Special Agreement, the text of which was finalized by 1998. The Special Agreement was signed in 2003 and notified to this Court later that year<sup>41</sup>.

47. That concludes my presentation. I would like to thank you for your patience and attention. Mr. President, unless you find it convenient to take a break at this point, may I ask you to call upon Mr. Chan to continue with Singapore's presentation. Thank you.

The VICE-PRESIDENT, Acting President: I thank you, Mr. Chao. Indeed, this is a convenient time to break for ten minutes. Upon resuming, we will listen to Mr. Chan.

*The Court adjourned from 11.35 to 11.50 a.m.*

The VICE-PRESIDENT, Acting President: Please be seated. I now call on Mr. Chan. You have the floor.

Mr. CHAN:

## **HISTORICAL SETTING**

### **Introduction**

1. Mr. President and Members of the Court, for the rest of this morning, Professor Pellet and I will address Malaysia's claim that Johor had an original title to Pedra Branca. The purpose of my presentation is to describe the historical setting and to explain why the historical context, when properly understood, in no way supports Malaysia's claim. Professor Pellet will also, *inter alia*,

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<sup>41</sup>MS, pp. 25-26, paras. 4.8-4.10.

examine the documents that Malaysia has produced and show that none of them supports Malaysia's claim.

2. I wish to begin by clarifying the name "Johor" which has been used extensively by the Parties in their pleadings. I would like to point out that in the period relevant to Malaysia's claim, there were two different political entities in the region that were called "Johor". The historian, Carl Trocki, has explained the difference in his book entitled *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore*. In writing this book, Trocki was given full access to the Johor royal archives<sup>42</sup>. Malaysia accepts Professor Trocki's study as an authoritative work on the history of Johor<sup>43</sup>. An extract from this book is in the judges' folder at tab 8. In this extract, Professor Trocki writes:

"The term 'Johor' is used by historians to refer to *two different states* — an old one and a new one. *Old Johor* was the maritime Malay empire that succeeded Malacca. *It began in 1512* when the defeated Sultan of Malacca established a capital on the Johor River, and gradually disintegrated in the eighteenth century . . . *Modern Johor* occupies the southern tip of the Malay Peninsula and is one of the eleven states of the Federation of Malaysia. *It dates from the mid-nineteenth century . . .*"<sup>44</sup>  
(Emphasis added.)

3. It is important to bear in mind, as noted by Professor Trocki, that "Old Johor" began in 1512 and disintegrated in the eighteenth century, and "modern Johor" dates from the mid-nineteenth century. Old Johor has been referred to by other names, such as, "Johor-Riau-Lingga Sultanate", "Riau-Johor", "Sultanate of Johor" and "Kingdom of Johor". Singapore's written pleadings refer to old Johor as the "Johor-Riau-Lingga Sultanate", but for the purpose of my presentation, I will simply use the term old Johor or the Johor Sultanate. I will also refer to the later entity as modern Johor — or new Johor — or the State of Johor. However, Malaysia has in her pleadings referred to old Johor and new Johor by the same name, namely, "Sultanate of Johor".

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<sup>42</sup>See Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), pp. xiv, 242-243.

<sup>43</sup>See RM, p. 35, note 146.

<sup>44</sup>Trocki C., *supra* note 1, p. 1.

### **Part I. Overview of Malaysia's claim to original title over Pedra Branca**

4. Allow me to begin by giving an overview of Malaysia's claim to Pedra Branca. Malaysia's claim is based on two main propositions. The first is that Pedra Branca belonged to old Johor. The second is that Pedra Branca became part of new Johor. The first proposition is not supported by any evidence. The second proposition is therefore irrelevant, but nevertheless I will show that Pedra Branca did not become part of new Johor by transmission or in any other manner.

5. Malaysia has attempted to establish the first proposition by relying on geography, that is to say, location and proximity. She argues that Pedra Branca is situated in "the centre of the region that constituted the Sultanate of Johor"<sup>45</sup> and has pointed out that it is possible to see Pedra Branca from the Johor coast<sup>46</sup>. Except for these vague assertions, she has produced no evidence whatever that the Johor Sultanate ever claimed or exercised any acts of sovereignty over Pedra Branca.

6. Malaysia has produced a few historical documents as evidence. Professor Pellet will show later that they are not relevant, and that whatever indirect inferences Malaysia attempts to draw from these documents are totally misconceived. Malaysia also relies on unspecified private acts of fishing and piracy in the area near Pedra Branca, at unknown times, by people who were not necessarily subjects of Johor. Professor Pellet will also explain later that these activities cannot constitute evidence of title.

7. Pedra Branca was a barren, rocky and uninhabited island. The fact is, until the British took possession of Pedra Branca to build Horsburgh lighthouse, no one else, including local rulers, had any interest in claiming it as territory. It is therefore not surprising that, across the period spanning more than 300 years from 1512, there is not a shred of evidence that the Johor Sultanate had claimed ownership of the island or that it had been attributed to the Sultanate. In the end, Malaysia is reduced to asserting that "from time immemorial Pedra Branca was under the sovereignty of the Sultanate of Johor"<sup>47</sup> and that "Johor held sovereignty over Pulau Batu Puteh in the context of its title to a wider range of islands"<sup>48</sup>. These vague and barren assertions only serve to show that Malaysia really has no evidence that Pedra Branca was ever part of the Sultanate.

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<sup>45</sup>CMM, p. 11, para. 19.

<sup>46</sup>RM, p. 198, para. 420.

<sup>47</sup>CMM, p.13, para. 21.

<sup>48</sup>MM, p.37, para. 75.

8. Malaysia has, furthermore, glossed over two inconvenient facts which undermine her claim to an original title. The first fact is that the Sultanate's territorial extent was largely unstable and uncertain during the Sultanate's existence. Sir Richard Winstedt, an acknowledged expert on the history of Johor, has summarized this point in his book *A History of Johore* in these words: "From her foundation down to the XIXth century the kingdom of Johor was in a precarious state."<sup>49</sup>

Contrary to this historical fact, Malaysia has attempted to portray the Johor Sultanate as a stable kingdom whose territorial extent remained the same throughout all phases of its history.

9. The second fact that Malaysia has glossed over is that a traditional Malay sultanate, such as old Johor, had a different conception of sovereignty from that of a modern territorial State. In a Malay sultanate, sovereignty was based on the allegiance of subjects and not on the control of land. It was only at the end of the nineteenth century that this concept began to evolve into the modern concept of territorial sovereignty. For this reason, old Johor did not and could not have clear boundaries. This fact presents a very serious obstacle in the way of Malaysia's attempt to prove that Pedra Branca was part of old Johor. Malaysia has not surmounted it.

## **Part II. History of the Johor Sultanate 1512-1824**

10. Mr. President and Members of the Court, allow me now to provide a brief account of the relevant historical setting and show how the first inconvenient fact undermines Malaysia's first proposition that Pedra Branca was part of old Johor. As Singapore has given a full account of the history of the Johor Sultanate in her written pleadings<sup>50</sup>, I will only focus on the key facts relevant to Malaysia's claim.

11. The Johor Sultanate began in 1512 with the fall of the Malacca Sultanate to the Portuguese. The defeated Sultan, Mahmud I, fled from Malacca and established a new capital along the Johor River, from which the sultanate took its name. The capital of the sultanate would later shift to Riau and then finally to Lingga, thus giving rise to the name "Johor-Riau-Lingga Sultanate".

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<sup>49</sup>Winstedt R. O., *A History of Johore* (1932, reprinted 1992), p. 1.

<sup>50</sup>See CMS, App. A.

### **The first period: 1512 to 1641**

12. For the purpose of my presentation, the history of the Johor Sultanate can be divided, roughly, into four periods. The first period, is from 1512 to 1641. During this period old Johor was constantly harried by the Portuguese and the Kingdom of Aceh (a Malay kingdom in northern Sumatra)<sup>51</sup>. Malaysia's history consultant, Professor Andaya, recorded that Johor's capital was sacked 15 times between 1518 and 1623<sup>52</sup>. There is no evidence that the Sultanate claimed or exercised authority over Pedra Branca during the first period.

### **The second period: 1641 to 1699**

13. The second period, from 1641 to 1699, began when, in 1641, the Dutch, in alliance with Johor, drove the Portuguese out of Malacca. This alliance changed its political fortunes and this period was one when the power and influence of Johor was at its height. Yet, there is also no evidence that the Sultanate claimed or exercised any authority over Pedra Branca during this second period. In any event, the Sultanate was soon weakened by internal conflicts and began to decline rapidly during the final years of the reign of Sultan Mahmud II (1685-1699). Concerning these years, Professor Andaya has written: *"In just two years [1697 to 1699] Johor had changed from the acknowledged leading entrepot in the Malay world to a small backwater port."*<sup>53</sup>

### **The third period: 1699 to 1784**

14. In 1699 Sultan Mahmud II was assassinated by his leading nobles. This marked the beginning of the third period, lasting from 1699 to 1784. The death of Sultan Mahmud II without an heir led to a period of internal strife and instability, during which many vassals broke away from the Johor Sultanate. Stability within the Sultanate was only regained more than 20 years later, when it began to prosper again. However, the prosperity was short-lived. By 1784, the Sultan, having been defeated by the Dutch, had to sign a treaty making himself a vassal of the Dutch<sup>54</sup>. Concerning this treaty, Winstedt has written in his book *A History of Johore*: *"The Sultan and chiefs acknowledged that the kingdom and port had become by right of war the property of the*

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<sup>51</sup>CMS, p. 244, App. A, para. 3.

<sup>52</sup>See Andaya L., *The Kingdom of Johor, 1641-1728* (1975), p. 23.

<sup>53</sup>*Ibid.*, p. 184.

<sup>54</sup>Winstedt R. O., *supra* note 8, p. 74.

*Dutch, which the Malays would hold as a fief under certain conditions.*”<sup>55</sup> (Emphasis in original.)

Winstedt also wrote: “Naturally during all these years the old mainland kingdom of Johor had sunk into insignificance.”<sup>56</sup>

There is also no evidence that the Sultanate claimed or exercised sovereignty over Pedra Branca during this third period.

#### **The fourth period: 1784 to 1824**

15. The 1784 Treaty marked the beginning of the fourth and final period in the history of the Johor Sultanate. In 1787, the Sultan drove the Dutch out of his capital, Riau, but he himself was driven out later that year. He was not allowed to return to Riau until 1795. Commenting on this period, Andaya wrote: “The catastrophic events of these years, when the Malay ruler exercised little authority and the economy was moribund, ended any hopes that Riau might once again assume its former position in the Malay world.”<sup>57</sup> Singapore has referred to similar opinions of other reputable historians in her written pleadings<sup>58</sup>. Even the official 1949 Annual Report published by the Government of the State of Johor noted that by the beginning of the nineteenth century “the old empire was in a state of dissolution”<sup>59</sup>. This was the political condition of the Sultanate in 1819 when the British arrived in Singapore, and on the eve of the signing of the Anglo-Dutch Treaty of 1824.

#### **Malaysia’s treatment of the historical setting**

16. Mr. President and Members of the Court, allow me now to highlight Malaysia’s treatment of the historical setting in her written pleadings.

17. First, Malaysia’s historical account has simply ignored the political condition of the Johor Sultanate during the greater part of the 300 years of its existence. Malaysia has focused on the second period from 1641 to 1699 and has highlighted two Dutch internal letters<sup>60</sup> from that

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<sup>55</sup>*Ibid.*

<sup>56</sup>Winstedt R. O., *supra* note 8, p. 75.

<sup>57</sup>Andaya B. W. and Andaya L., *A History of Malaysia* (2nd ed., 2001), p. 109.

<sup>58</sup>See Turnbull C. M., *A History of Singapore, 1819-1975* (1977), p. 9, reproduced at MS, p. 15, para. 3.3.

<sup>59</sup>See *State of Johore Annual Report for 1949* (written by Dato Wan Idris bin Ibrahim, Ag. Menteri Besar [i.e., Chief Minister], Johore, printed by the Government Printing Department, Johore), p. 57. (CMS, Vol. 3, Ann. 32.)

<sup>60</sup>MM, pp. 38-39, paras. 78-79.

period to show the extent of the Sultanate in the seventeenth century. From these two letters, Malaysia takes a big leap in logic by asserting that “[t]he general extent of the Sultanate of Johor was much the same at the beginning of the nineteenth century”<sup>61</sup>. These two letters were not concerned with territory but with trade<sup>62</sup>. Hence, they do not prove the territorial extent of the Sultanate in the seventeenth century, much less at the beginning of the nineteenth century.

18. Malaysia has ignored the first and third periods and most of the fourth period of the history of the Sultanate. She has ignored the last 150 years of the Sultanate’s history leading to its dissolution. She has wrongly portrayed the Sultanate as powerful and unchanging throughout its existence when the historical evidence shows the contrary.

19. Secondly, Malaysia’s exorbitant conclusion from two irrelevant events in the seventeenth century shows the profound weakness in her claim that the Johor Sultanate ever had an original title to Pedra Branca. By the time she filed her Counter-Memorial, Malaysia realized she was staring into an evidentiary void, and this caused her to advance an argument that Pedra Branca was part of the Sultanate from time immemorial<sup>63</sup>. This is no more than clutching at straws. The burden remains at all times on Malaysia to produce specific proof that old Johor had sovereignty over Pedra Branca and carried out acts of a sovereign nature on or over the island. Malaysia has produced no evidence whatever in this regard. Mr. President and Members of the Court, Malaysia cannot avoid this burden of proof by simply asserting immemorial possession.

### **Part III. Malaysia’s failure to consider the traditional Malay concept of sovereignty**

20. Allow me now to elaborate on the second inconvenient fact that Malaysia has glossed over, namely the traditional Malay concept of sovereignty. This concept undermines Malaysia’s claim to an original title. It is based mainly on control over people, and not control over territory. Traditional Malay sovereignty is people-centric and not territory-centric. This is authoritatively stated by Professor Anthony Milner of the Australian National University in his book entitled *Kerajaan: Malay Political Culture on the Eve of Colonial Rule*. I will read out an extract from the book, which I have included in the judges’ folder at tab 10:

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<sup>61</sup>MM, p. 39, para. 80.

<sup>62</sup>See CMS, p. 47, para. 4.18.

<sup>63</sup>CMM, pp. 12-13, para. 21.

“*Just as the Malay state* lacked governmental or legal structures, so it differed from Western states in its geographical definition. *Territorial borders were often unknown*: a Sultan of Trengganu, for instance, admitted to an English enquirer in 1875 that it was not known ‘where the Trengganu boundary ran’. *The actual location of the Malay state, in fact, appears to have been a matter of relatively little importance.*”<sup>64</sup> (Emphasis in original.)

21. Similarly, Professor Nicholas Tarling, an expert on south-east Asian history, has also written:

“The idea that the ambit of a state was geographically fixed was rarely accepted. What counted in Southeast Asia, sparse in population, *was allegiance. Whom, rather than what, did the state comprise? . . . What concerned a ruler was the people not the place.*”<sup>65</sup> (Emphasis added.)

Singapore has, in her Counter-Memorial, referred to these quotations and similar views of other experts on Malay history and political culture<sup>66</sup>. They are unanimous on this point.

22. Malaysia is fully aware of this concept. She relied on it in the *Sipadan/Ligitan* case. There, she filed a study by Professor Vincent Houben on the Malay sultanate of Bulungan, in which he quoted Milner’s passage with approval. After Singapore had pointed this out in her Counter-Memorial<sup>67</sup>, Malaysia filed a new opinion from Professor Houben to make, basically, two points:

- *first*, Malay sultanates did exercise control over territory — but Singapore has never denied this and has in fact said so in her pleadings, and
- *secondly*, Bulungan could not be equated with old Johor in terms of power and territorial reach<sup>68</sup> — but Singapore has never asserted that it could be.

More importantly, Professor Houben did not dispute that the traditional Malay concept of sovereignty was people-centric and not territory-centric<sup>69</sup>.

23. In her Reply, Malaysia has also put in a report by Professor Andaya<sup>70</sup>, who, of course, accepts the nature of the traditional Malay sovereignty<sup>71</sup>. In fact, Professor Andaya has also written in 2001 as follows:

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<sup>64</sup>Milner, A. C., *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (1982), p. 8.

<sup>65</sup>Tarling N., *Nation and States in Southeast Asia* (1998), p. 47.

<sup>66</sup>CMS, pp. 18-21, paras. 3.4-3.8.

<sup>67</sup>CMS, p. 20, para. 3.6.

<sup>68</sup>RM, p. 222-223 ; App. II, paras. 7-8.

<sup>69</sup>RM, p. 224; App. II, para. 13.

<sup>70</sup>RM, App. I.

*“While Malays conceived of a ruler’s authority in terms of his control over people and resources, the British related it to control over land. As Malay rulers were progressively drawn under the British umbrella, there was normally a period of sometimes painful negotiation by which colonial administrators established the territorial boundaries between neighbouring states.”*<sup>72</sup> (Emphasis added,)

It was only in the late nineteenth century when the Malay States progressively came under British administration that the traditional Malay concept of sovereignty gradually evolved into the modern concept of territorial sovereignty.

### **Implications of the traditional Malay concept of sovereignty for Malaysia’s case**

24. Mr. President and Members of the Court, allow me to make clear that it is not Singapore’s case that the traditional Malay concept of sovereignty means that a Malay sultanate had no territory. What it means is that the only reliable way to determine whether a particular territory belonged to a ruler is to find out whether the inhabitants pledged allegiance to that ruler. In her Counter-Memorial, Singapore has referred to two such instances directly applicable to Johor. The first is a letter written to the Government of India by the Resident of Singapore, John Crawfurd, regarding the claim of the Temenggong, the local ruler of mainland Johor, to certain islands. Even though other rulers did not dispute the Temenggong’s claim, Crawfurd explained that the claim was “more satisfactorily ascertained by the voluntary and cheerful allegiance yielded to him by the inhabitants”<sup>73</sup>. In 1849, a British official called Thomson — the same Thomson who supervised the construction of Horsburgh lighthouse — undertook a survey of the east coast of Pahang, Johor and adjacent islands. He found that the ownership of some of these islands was uncertain, and that he was only able to determine whether they belonged to Pahang or Johor by asking the inhabitants whom they owed allegiance to<sup>74</sup>.

25. Secondly, the concept also means that it was difficult to determine with accuracy the territorial extent of the Johor Sultanate at any time. In this connection, I wish to point out that during the drafting of the Anglo-Dutch Treaty, the negotiators decided to replace the phrase “any of

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<sup>71</sup>RM, pp. 209 – 210; App. I, paras. B2 – B6. See also Andaya L., *Writing a History of Brunei* in Barrington B. (ed.), *Empires, Imperialism and Southeast Asia: Essays in Honour of Nicholas Tarling* (1997), p. 201, reproduced at CMS p. 18, para 3.4.

<sup>72</sup>Andaya B. W. & Andaya L., *supra* note 16, p. 204.

<sup>73</sup>CMS, p. 22, para. 3.9 (a).

<sup>74</sup>CMS, p. 22, para. 3.9 (b).

the remaining of the islands belonging to the ancient kingdom of Johor” with the phrase “any of the other islands South of the Straights of Singapore”<sup>75</sup>. The reason for the change was that the negotiators agreed that: “no one could claim to be able to define the limits of the ancient Sultanate of Johore with any degree of certainty”<sup>76</sup>.

26. This would certainly be the case with regard to barren, isolated and uninhabited islands, such as Pedra Branca. Therefore, unless Malaysia can produce clear evidence of a direct claim to or the actual exercise of sovereign authority over Pedra Branca, any attempt to argue that the island belonged to old Johor is totally devoid of merit. It is not enough for Malaysia to plead geography or immemorial possession to prove original title. Malaysia must produce concrete evidence of specific acts of sovereign authority by old Johor on or over Pedra Branca. Malaysia has provided no such evidence. In contrast, Singapore has adduced sufficient evidence to show that no one, including the Malay rulers, thought that Pedra Branca belonged to old Johor.

27. To conclude my submission on Malaysia’s first proposition, Malaysia has not proved, nor is there any evidence that Pedra Branca ever belonged to old Johor.

#### **Part IV. The effect of the Anglo-Dutch Treaty of 1824**

28. Let me now turn to Malaysia’s second proposition — that Pedra Branca became part of new Johor. Malaysia tries to prove this proposition by arguing that the effect of the Anglo-Dutch Treaty was to split the Johor Sultanate into two parts and to place Pedra Branca in the northern part within the British sphere of influence, thus allocating it to new Johor. This is a misinterpretation of the Treaty.

#### **Origins and context of the Anglo-Dutch Treaty of 1824**

29. To make good Singapore’s point, it is necessary to discuss the origins of the Anglo-Dutch Treaty. The origins can be traced back to two events — the French conquest of the Netherlands in 1795, and the death of Sultan Mahmud III of Johor in 1812, leaving a succession dispute between his two sons, Hussein and Abdul Rahman. In 1795, Britain took control of the

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<sup>75</sup>Irwin G., *Nineteenth Century Borneo: A Study in Diplomatic Rivalry* (1955), p. 66. (CMS, Vol. 3, Ann. 36, p. 344).

<sup>76</sup>*Ibid.*, p. 67, citing a note from Major Elout, adviser to the Dutch Colonial Minister.

Dutch colonial possessions in the east to deny them to the French. When war ended in 1814, Britain agreed to return these possessions to the Dutch. A number of disputes arose between the British and the Dutch regarding the British occupation of these possessions. These disputes led to the negotiations which culminated in the signing of the Anglo-Dutch Treaty.

30. In 1818, the Dutch resumed control of Malacca and Riau, the two most important ports in the region. Britain needed to establish another trading station along the Straits of Malacca and Singapore. The British official assigned to do this, Sir Thomas Raffles, landed in Singapore in January 1819. He met the local chief, called the “Temenggong”, who explained that, as an official of the Johor Sultanate, he needed his Sultan’s approval for Raffles to establish a trading station. But as the Sultan, Abdul Rahman, was under Dutch control, Raffles could not get his consent. However, Raffles knew that the Johor throne was disputed by his elder brother, Hussein. Raffles enticed Hussein to come to Singapore with a promise to install him as Sultan. When Hussein arrived in Singapore in February 1819, Raffles installed him as Sultan of Johor. On the same day, Hussein signed an agreement to allow Britain to set up a trading station in Singapore.

31. Raffles’s action resulted in the Johor Sultanate having two nominal rulers, one living in Lingga under Dutch protection, and the other living in Singapore under British protection. The Dutch disputed the legitimacy of the British presence in Singapore. This dispute was also resolved by the Anglo-Dutch Treaty, with the Dutch withdrawing their objections.

32. The Treaty settled the parties’ territorial disputes by providing for a mutual exchange of possessions north and south of the Straits of Malacca and Singapore. This resulted in British possessions being concentrated to the north of the Straits, and the Dutch possessions concentrated to the south. The Treaty also prohibited the British from establishing themselves south of the Straits and the Dutch from establishing themselves on the Malay Peninsula. This was done to avoid future commercial conflicts between their respective subjects. These provisions effectively divided the region into two spheres of influence.

### **Malaysia's arguments concerning the Anglo-Dutch Treaty of 1824**

33. I will now address Malaysia's arguments on the effect of the Anglo-Dutch Treaty. On screen now is Insert 6 of Malaysia's Memorial<sup>77</sup>. Malaysia proceeds by imagining that the Treaty drew "a line of demarcation" — these are Malaysia's words — in the Singapore Strait from "Carimon . . . to Bintan" and placed Pedra Branca north of this line in the British sphere of influence<sup>78</sup>. When this line is traced along the areas imaginatively shaded by Malaysia, you will see that it conveniently places Pedra Branca, Middle Rocks and South Ledge north of the line. That is Malaysia's argument. With respect, all that Malaysia has done is to imagine a non-existent line in order to show an imaginary transmission of an imaginary original title.

34. Mr. President and Members of the Court, if there were such a demarcation line running through the Singapore Strait, the line would have run north, as shown on screen, instead of south of Pedra Branca for two reasons: first, Pedra Branca where it lies is not associated with either Johor or Bintan, and second, the island is nearer to the coast of Bintan than to the coast of Johor. That would have been the logical and natural way to draw the line. This shows the artificial and self-serving nature of Malaysia's imaginary line. No less an authority than Winstedt has written that the Anglo-Dutch Treaty "allotted to Great Britain the Malay peninsula and to Holland all the islands lying to starboard of East Indiamen voyaging to China . . ." <sup>79</sup>. The expression "starboard" means "the right-hand side". As Pedra Branca, Middle Rocks and South Ledge are starboard of vessels sailing towards China, they all lie south, rather than north, of Malaysia's imaginary line.

35. The fact is that the Anglo-Dutch Treaty did not contemplate any demarcation line. This is clear from the negotiating history of the Treaty. An earlier draft of the Treaty inserted an article providing for a demarcation line. But this article was omitted when the text of the Treaty was finalized<sup>80</sup>.

36. The text of the Anglo-Dutch Treaty also confirms that there is no line. On screen now are the texts of Articles X and XII of the Treaty<sup>81</sup>. Article X excludes the Dutch from "any part of

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<sup>77</sup>MM, p. 23, Insert 6.

<sup>78</sup>CMM, p. 22, para. 35.

<sup>79</sup>Winstedt R.O., *Malaya and Its History* (4th ed., 1956), pp. 62.

<sup>80</sup>Irwin G., *supra* note 34, pp. 62–63.

<sup>81</sup>*Treaty between His Britannick Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies*, dated 17 Mar 1824, Arts. X and XII (MM, Vol. 2, Ann. 5).

the Peninsula of Malacca”, that is the Malay Peninsula, while Article XII excludes the British from “any of the islands South of the Straights of Singapore”. There is no provision excluding either State from any part of the straits or any islands *within* the Strait. In other words, the Treaty did not divide up the Strait between the two Powers. The width of the entire Strait was left open for access by both States, as was intended.

37. The understanding of the Dutch is very clear. So is that of the British, as I will explain shortly. In an internal Note of the Dutch Ministry of Colonies dated 15 October 1858, it was explained that: “The definitive article 12 evidently reflects this concern, as this is adopted into the treaty, with reference to *the Straits of Singapore as the dividing line.*”<sup>82</sup> (Emphasis added.) This Note expressly describes the whole of the Straits of Singapore as the dividing line.

38. The disposition of the islets lying within the Straits was not specifically addressed by the Treaty, but was worked out subsequently over the years as a matter of State practice. This point is clearly illustrated in the correspondence dated 1 October 1824 and 4 March 1825 between the Resident of Singapore, John Crawfurd, and the Government of India where they both agreed that the cession of all the islands within ten miles from the coast of Singapore did not breach the terms of the Treaty<sup>83</sup>. Copies of these two letters are found in the judges’ folder at tab 12. The Treaty did not divide up the waters of the Straits of Malacca and Singapore. It was not until 1969 that the maritime boundary was agreed between Malaysia and Indonesia in the Straits of Malacca, and not until 1973 that a boundary in the Singapore Strait was agreed between Singapore and Indonesia.

39. In addition to using an artificial demarcation line to prove succession of title, Malaysia has also misinterpreted the effect of the Anglo-Dutch Treaty in the breaking up of the Johor Sultanate. Malaysia’s Memorial describes the division of the Sultanate as follows:

“For the effect of the Anglo-Dutch Treaty was to split ‘the ancient kingdom of Johore’ into two parts. One, the Sultanate of Johor, remained based in the southern part of Malay Peninsula and came within the British sphere. The other, the Sultanate of Riau-Lingga, was within the Dutch sphere of influence and was to the south of Singapore Strait.”<sup>84</sup>

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<sup>82</sup>CMS, Vol. 2, Ann. 18.

<sup>83</sup>See letter from Crawfurd J. (Resident of Singapore) to Swinton G. (Secretary to Government in India) dated 1 October 1824, CMS, Vol. 2, Ann. 4, and letter from Government of India to Crawfurd J. dated 4 March 1825, RM, Vol. 2, Ann. 3.

<sup>84</sup>MM, p. 24, para. 51.

In this passage, Malaysia claims that new Johor, and not Riau-Lingga, was the continuator of the Johor Sultanate.

40. Singapore disagrees. Malaysia's claim is contradicted by no less an authority than Sir Richard Winstedt, who wrote in his book, *Malaya and Its History*:

*“To the Johore Sultanate was left only the Riau archipelago, while the two greatest Malay chiefs of the broken empire were cut off at Pahang and Johore from the overlord in the Riau area, and soon made themselves independent Sultans.”*<sup>85</sup>  
(Emphasis added.)

Winstedt makes it clear that the Riau archipelago, that is, Riau-Lingga, was the continuator of the Johor Sultanate, and not new Johor. Winstedt further explains that the Johor Sultanate was split into three parts, not two. On the Malay Peninsula, two new States emerged — Pahang and new Johor.

41. Malaysia hopes that, by presenting new Johor as the continuator of old Johor, she can avoid the burden of showing how old Johor's alleged title to Pedra Branca was transmitted to Malaysia. Since new Johor was a breakaway fragment, and not the continuator of old Johor, it is incumbent on Malaysia to produce clear evidence not only to show when and how title to Pedra Branca first came to be vested in old Johor, but also to show how the island came to be transmitted to new Johor. It is respectfully submitted that Malaysia has failed to do both.

#### **Sultan Abdul Rahman's donation of 1825**

42. Mr. President and Members of the Court, allow me now to direct your attention to another piece of evidence that also undermines completely Malaysia's theory of title transmission. The practical effect of the Treaty on the Johor Sultanate was that Sultan Abdul Rahman could no longer exert any power over his mainland territory of Johor and Pahang. On the advice of the Dutch, he accepted the political reality and, in 1825, formalized the division by donating mainland Johor and Pahang to his brother, Sultan Hussein<sup>86</sup>.

43. The terms of the donation are highly significant. They specified how much and which parts of the Sultanate's territory were being donated by Sultan Abdul Rahman to Sultan Hussein.

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<sup>85</sup>Winstedt R.O., *supra* note 38, pp. 62–63.

<sup>86</sup>CMS, p. 34, paras. 3.31-3.32.

A copy of the translated text of the letter is in the judges' folder at tab 13. I will read out the extract shown on screen:

“Your Brother [Abdul Rahman] sends you [Hussein] this letter . . . to give you notice of the conclusion of a treaty between His Majesty the King of the Netherlands and His Majesty the King of Great Britain, whereby the division of the lands of Johor, Pahang, Riau and Lingga is stipulated. The parts of the lands assigned to you, My Brother, I donate to you with complete satisfaction, and sincere affection . . .

You are already familiar with the borders of our respective empires. But in order to make the matter clear and transparent, Your Brother wishes through this friendly letter to provide a detailed description.

Your territory, thus, extends over Johor and Pahang on the mainland or on the Malay Peninsula. The territory of Your Brother [Abdul Rahman] extends out over the islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands. Whatsoever may be in the sea, this is the territory of Your Brother, and whatever is situated on the mainland is yours. On the basis of these premises, I earnestly beseech you that your notables, the Bendahara of Pahang and Temenggong . . . will not in the slightest concern themselves with the islands that belong to your Brother.”<sup>87</sup>

It is clear from this letter that “[w]hatsoever may be in the sea” is the territory of Sultan Abdul Rahman, and “whatever is situated on the mainland” is the territory of Sultan Hussein. The donation letter shows that Malaysia’s theory that Pedra Branca was allocated to Sultan Hussein as a result of the Anglo-Dutch Treaty is plainly wrong.

#### **Part V. Developments in peninsular Johor after 1824**

44. I come now to the last part of my presentation, which concerns political developments after 1825 in peninsular Johor, which was under the control of the Temenggong. Professor Houben, in his report, has described the Temenggong’s territorial domains as consisting of “a ring of islands in the northwestern part of the Riau Archipelago and included Singapore and a portion of the Johor coastline”<sup>88</sup>. Professor Houben’s source of information is Carl Trocki’s 1975 doctoral thesis on the Temenggongs of Johor. Trocki’s thesis contains a map which shows the domains of the Temenggongs between 1818 and 1823. This same map is reproduced in Trocki’s book, *The Prince of Pirates*, which I referred to earlier. This map, now shown on screen, and

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<sup>87</sup>Letter from Sultan Abdul Rahman to Sultan Hussein dated 25 June 1825 (CMS, Vol. 2, Ann. 5).

<sup>88</sup>RM, pp. 227-228, App. II, para. 28.

found in the judges' folder at tab 14, shows that Pedra Branca did not fall within the Temenggong's domains<sup>89</sup>.

45. Sultan Hussein, the nominal ruler of peninsular Johor, died in 1835, leaving a ten-year-old son, Ali, as his heir. For political reasons, the British refused to recognize Ali as Sultan. In 1855, the British brokered a settlement between Ali and the Temenggong, by which the Temenggong recognized Ali as Sultan and agreed to pay him a certain sum of money, in return for which Ali, as Sultan, signed a Treaty of Friendship and Alliance and ceded to the Temenggong "full sovereignty and absolute property" over "the whole of the territory of Johore *within the Malayan Peninsula and its dependencies*, with the exception of the Kassang territory"<sup>90</sup>. This Treaty marked the formal establishment of modern Johor or the State of Johor, which later became part of Malaysia.

46. I ask the Court to note the terms of the treaty. Pedra Branca is certainly not "within the Malayan Peninsula". It is an isolated feature in the sea 7.7 nautical miles from the Johor mainland. Furthermore, in 1855, Pedra Branca could not have been a dependency of mainland Johor since Sultan Abdul Rahman had omitted all islands in the sea from his donation to Sultan Hussein. It follows that whether or not Pedra Branca ever belonged to the Johor Sultanate, it never became part of the State of Johor. What Hussein did not have, his heir, Ali, could not give — *nemo dat quod non habet*.

47. Finally, let me complete this part of my presentation by referring to an incident that occurred in 1861, six years after the signing of the 1855 Treaty. The Governor of Singapore had sought an explanation from the Temenggong on a complaint made by some fishermen from Singapore that they had been harassed by subjects of Johor while fishing near Pedra Branca. The Governor requested that the offenders be punished. The Temenggong did not assert that he had jurisdiction or authority over Pedra Branca or its waters. Instead, he replied to the Governor to

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<sup>89</sup>See Trocki C., *The Temenggongs of Johor, 1784-1885* (1975), Ph.D. thesis, Cornell University, p. 71; Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), *supra* note 1, p. 46, reproduced as CMS, Insert 4.

<sup>90</sup>*Treaty of Friendship and Alliance between His Highness Sultan Alli Iskander Shah bin Sultan Hussain Mahomed Shah and His Highness Datu Tumungong Daing Ibrahim bin Abdul Rahman Sri Maharajah* dated 10 March 1855, Art. I. (MM, Vol. 2, Ann. 7).

explain that the incident happened somewhere else, within three miles off Johor. This episode is fully analysed in Appendix B in Singapore's Reply.

### **Conclusion**

48. Mr. President and Members of the Court, allow me now to end my presentation with the following remarks. In a Malay sultanate — the Johor Sultanate included — sovereignty was based on control of people rather than control of territory. This means that the Johor Sultanate did not have clearly defined boundaries and it was difficult to determine with accuracy the territorial extent of the Sultanate at any time. Since Malaysia has claimed an original title to Pedra Branca, she must produce clear evidence of such a title. Malaysia has not done so. There is no evidence that Pedra Branca belonged to the Johor Sultanate at any point in its history and certainly not at the beginning of the nineteenth century. Furthermore, for reasons I have mentioned, Pedra Branca did not become part of new Johor after 1824, and therefore never became part of Malaysia.

I wish to thank you for your attention. May I now invite you to call on Professor Pellet to continue with Singapore's presentations in the first round.

The VICE-PRESIDENT, Acting President: I thank the Chief Justice of Singapore, Mr. Chan for the statement and call on Professor Pellet.

M. PELLET : Merci beaucoup, Monsieur le président.

### **JOHOR N'AVAIT AUCUN TITRE SUR PEDRA BRANCA ET N'A PAS DONNÉ SA PERMISSION À LA CONSTRUCTION DU PHARE**

1. Monsieur le président, Messieurs les juges, on a coutume de dire que la preuve d'un fait négatif, d'un «non-événement», est tellement difficile qu'elle en est «diabolique» — *probatio diabolica*. C'est une double preuve négative qu'il m'appartient d'administrer ce matin ou cet après-midi, puisque je suis appelé à montrer

— d'une part, qu'au moment où la Grande-Bretagne a pris possession de Pedra Branca, Johor n'avait aucun titre sur cette île ;

— d'autre part, et ceci découle de cela, que le temenggong de Johor n'a pas donné à cette prise de possession la moindre autorisation.

2. Sans forfanterie, il me semble, Monsieur le président, que la mission est moins impossible qu'il peut penser. En ce qui concerne le premier de ces éléments, la Malaisie semble oublier que «la charge de ... prouver [les faits et allégations qui fondent les prétentions respectives des Parties] incombe évidemment à la Partie qui les affirme ou les avance» (*Temple de Préah Vihéar (Cambodge c. Thaïlande)*, fond, arrêt, C.I.J. Recueil 1962, p. 16) ; c'est donc à la Malaisie de montrer que Johor pouvait faire état d'un titre quelconque sur Pedra Branca, or elle n'a rien fait de tel. Quant à la «permission» (et je mets le mot entre guillemets), la construction malaisienne est tellement artificielle qu'elle en est presque risible. Monsieur le président, bien entendu, je ne prononcerai pas toute cette longue plaidoirie aujourd'hui, je pense que comme demain nous serons relativement larges en temps, je pourrais raisonnablement m'arrêter assez vite autour de 13 heures.

### **I. L'ABSENCE DE TITRE DE JOHOR SUR PEDRA BRANCA**

3. Monsieur le président, nos amis malaisiens ont une conception assez singulière de la charge de la preuve en droit international ou général, et devant votre haute juridiction en particulier... Je ne caricature pas en disant que, selon eux, c'est à Singapour seule qu'il appartiendrait de démontrer que Johor n'avait pas de titre sur Pedra Branca au moment de la prise de possession de l'île par la Grande-Bretagne. Pour leur part — et M. Chan Sek Keong y a insisté tout à l'heure —, ils se bornent à affirmer une «possession immémoriale»<sup>91</sup> dont ils ne donnent aucune preuve, ni même aucun commencement, aucune amorce de preuve. Ils n'invoquent *aucun* texte, *aucun* acte, *aucun* comportement qui établirait un tel titre ou y ferait allusion ; ils semblent poser une sorte de présomption d'appartenance que ne conforment ni les règles du droit international général applicables ni la conception de la souveraineté territoriale qui prévalait dans la région à l'époque. Au demeurant, je le souligne d'emblée en paraphrasant la Cour dans l'affaire des *Minquiers et Ecréhous*, «[c]e qui ... a une importance décisive, ce ne sont pas des présomptions indirectes déduites d'événements du moyen âge, mais les preuves se rapportant directement à la possession» (*Minquiers et Ecréhous (France/Royaume-Uni)*, arrêt, C.I.J. Recueil 1953, p. 57) de Pedra Branca.

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<sup>91</sup> Cf. Contre-mémoire de la Malaisie (CMM), p. 12-13, par. 21.

4. Je reviendrai demain sur ce point après avoir passé en revue les quelques documents dont la Partie malaisienne croit pouvoir déduire la reconnaissance de son prétendu titre originel.

#### **A. L'absence de document probant établissant l'existence d'un titre originel de Johor sur Pedra Branca**

5. Monsieur le président, mis à part ceux relatifs à la «permission» qu'auraient donnée le sultan et le temenggong de Johor à la construction du phare — sur laquelle je reviendrai aussi — la Malaisie a mentionné dans ses écritures quelques documents hétéroclites qui établiraient l'existence du titre originel sur Pedra Branca dont elle se prévaut. Trois (trois seulement) d'entre eux, que j'examinerai d'abord, la mentionnent expressément et un seul (un seulement), fort peu probant, fait état de la souveraineté de Johor, tandis que la Partie malaisienne fait dire à tous les autres (qui ne sont d'ailleurs pas nombreux) des choses qu'ils ne disent en aucune manière. Il en va de même des prétendues «confirmations subséquentes» qu'invoque également la Malaisie.

6. Je reviendrai brièvement sur chacun de ces quelques documents, moins pour en montrer l'absence de valeur probante si on les considère individuellement — Singapour a déjà établie dans ses écritures largement que cette valeur est extrêmement limitée — que pour confirmer que, globalement, ils ne donnent, à l'évidence, pas même l'illusion d'un commencement de preuve d'un titre historique quelconque.

#### **1. Les documents qui mentionneraient expressément Pedra Branca**

7. Après des années de recherches, que l'on peut penser soigneuses et opiniâtres, la Malaisie a exhumé UN document — un seul Monsieur le président — qui paraît tenir pour acquis la souveraineté de Johor — du Johor «moderne» — sur Pedra Branca. Il s'agit d'un article du *Singapore Free Press* daté du 25 mai 1843<sup>92</sup>. Cet article sans titre (pompeusement appelé «rapport» (report) par la Malaisie<sup>93</sup> — appellation sur laquelle je reviendrai dans un instant) porte sur des actes de piraterie dans les environs immédiats de Singapour («Acts of piracy in the immediate neighbourhood of Singapore»). Il y est indiqué que les pirates trouvent refuge dans des endroits comme «Pulo Tinghie, Batu Puteh, Point Romania, etc.» en droit qui «are all within the

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<sup>92</sup> Mémoire de la Malaisie (MM), vol. 3, annexe 40.

<sup>93</sup> Cf. MM, p. 47, par. 95.

territories of our beloved ally and pensionary, the Sultan of Johore, or rather the Tomungong of Johore, for he is the real Sovereign».

8. La Malaisie affirme que le *Singapore Free Press* est un journal sérieux et digne de foi<sup>94</sup>. C'est sans doute le cas lorsqu'il s'agit d'informations factuelles ; mais, en l'espèce, nous sommes en présence non pas d'une telle information factuelle, mais d'un simple commentaire qui ne rapporte pas un fait, mais qui fait état de l'opinion subjective de son auteur. Il est du reste plus que douteux que l'auteur anonyme d'un article, portant en outre sur un sujet tout différent, fût une autorité très fiable en matière d'attribution de souveraineté. Cela est d'autant plus improbable que l'erreur faite sur Pedra Branca est répétée en ce qui concerne «Pulo Tinghie» qui, à l'époque, ne relevait certainement pas du temenggong de Johor comme Singapour l'a montré de façon précise dans son contre-mémoire<sup>95</sup>.

9. En tout état de cause, comme la Cour l'a rappelé dans l'affaire *Nicaragua*, elle est tenue d'accueillir de tels articles «avec beaucoup de prudence, même quand ils paraiss[ent] répondre à une norme d'objectivité élevée. Elle [la Cour] les considère non pas comme la preuve des faits [ou des titres], mais comme des éléments qui peuvent contribuer, dans certaines conditions, à corroborer leur existence, à titre d'indices venant s'ajouter à d'autres moyens de preuve» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt, C.I.J. Recueil 1986, p. 40, par. 62.). Les informations puisées dans la presse ne peuvent donc être prises en considération que si — et c'est un élément d'une importance cruciale pour l'évaluation de leur force probante — elles se révèlent «d'une cohérence et d'une concordance totales en ce qui concerne les principaux faits et circonstances de l'affaire (*Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, arrêt, C.I.J. Recueil 1980, p. 10, par. 13)» (*Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, arrêt, C.I.J. Recueil 2005, p. 204, par. 68). Le document invoqué par la Malaisie ne satisfait évidemment aucunement à ces exigences et ne pèse pas lourd face à l'ensemble des éléments qui permettent d'affirmer avec certitude que Pedra Branca ne relevait pas de la souveraineté de Johor au moment où les Britanniques en ont pris possession :

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<sup>94</sup> Cf. réplique de la Malaisie (RM), p. 46-47, par. 100.

<sup>95</sup> Contre-mémoire de Singapour (CMS), p. 59-60, par. 4.39 et note 132.

- en premier lieu, sa valeur probante est fort douteuse étant donné qu'il n'indique ni la source de l'information ni même le nom de son auteur (*ibid.* ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, *fond, arrêt, C.I.J. Recueil 1986*, p. 40, par. 62) ;
- en second lieu et surtout, il s'agit de l'*unique* document, toutes catégories confondues (traités, actes officiels, décisions de justice, œuvres doctrinales, articles de presse), l'*unique* document qui pourrait apporter un semblant d'appui à la thèse à la Malaisie parmi tous ceux sur lesquels celle-ci tente de s'appuyer.

10. Il est vrai que la Malaisie a aussi invoqué deux autres documents qui mentionnent Pedra Branca et qu'elle en déduit, contre toute raison, qu'ils confirmeraient l'existence de ce titre «immémorial».

**Projection 1 — Traduction anglaise produite par la Malaisie et traduction anglaise avec corrections de la lettre du 1<sup>er</sup> avril 1655 adressée au gouverneur général et au conseil de la Compagnie néerlandaise des Indes orientales à Batavia par le gouverneur Thijssen de Melaka, VOC 1209 (MM, annexe 22) (dossier des plaidoiries, onglet n° 15)**

11. Tel serait le cas d'une lettre du gouverneur néerlandais de Malacca au conseil de la Compagnie néerlandaise des Indes orientales à Batavia, en date du 1<sup>er</sup> avril 1655. Selon la traduction anglaise de cette lettre fournie par la Partie malaisienne, celle-ci se lirait ainsi :

«in the future, at least two yachts must cruise to the south of Singapore Straits under the Hook of Barbukit and in the vicinity of Pedra Branca (in order that they [the Chinese junks] do not enter [the Johor River]) and therefore make certain that they are brought here [Melaka] or to Batavia. As we have seen often, unless the Johor ruler is greatly attracted to this idea, *without his command* we dare not put this into effect. We therefore faithfully await your order and command as to how far we should pursue this...»<sup>96</sup>

Je me permets, Messieurs les juges, d'attirer votre attention tout spécialement sur l'expression «without *his* command» — «sans *son* ordre» — que la Malaisie a jugé bon d'introduire dans la traduction anglaise préparée par ses soins. Le pronom «son» («his») donne à penser que les Hollandais n'auraient pas osé prendre la mesure envisagée sans que le souverain de l'ancien Johor donne un ordre en ce sens. Mais ceci ne fait aucun sens ! Pourquoi diable le souverain du Johor donnerait-il aux Hollandais l'ordre d'éloigner des bateaux de commerce de son pays ?

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<sup>96</sup> Voir MM, vol. 3, annexe 22 (traduction du texte original néerlandais par la Malaisie) ; les italiques sont de nous.

12. Pour tenter de résoudre cette énigme, nous avons décidé de regarder de plus près le texte néerlandais original afin de résoudre ce mystère. Je ne parle pas le néerlandais, Monsieur le président, mais les locuteurs néerlandophones que nous avons consultés sont catégoriques : le texte original dit en néerlandais «*buyten expres bevel*» ; il doit être traduit par «en l'absence d'ordre exprès» ou «en l'absence d'un ordre exprès» («without express command» or «without an express command»), mais en tout cas pas «sans son ordre exprès». Le pronom «son» (*his*) très opportunément ajouté par la Malaisie ne figure pas dans le texte original. Ce pronom possessif, s'il devait se rapporter au souverain de l'ancien Johor, serait d'ailleurs totalement incongru dans cet extrait compte tenu du contexte. Et, en particulier, de la phrase suivante, dans laquelle le gouverneur ajoute : «Nous attendons donc loyalement vos ordres et instructions, pour savoir quelles suites donner à cette affaire...» — «vos ordres et instructions», «your order and command», Monsieur le président, c'est-à-dire les ordres du conseil de la Compagnie néerlandaise des Indes orientales, pas ceux du souverain de l'ancien Johor !

[Fin de la projection 1.]

13. Selon l'expert consulté par la Partie malaisienne, le professeur Andaya, historien de son état, cet incident (et un autre, qui date, lui, de 1662)<sup>97</sup> prouveraient «that VOC [i.e. the Netherlands East India Company] recognized the waters in the Singapore Straits as belonging to Johor»<sup>98</sup>. Pour sa part, la Malaisie interprète ces phrases comme montrant que «Johor's concern was ... the maintenance of its sovereign rights in its own maritime territories, which included the waters and islands mentioned in the Governor's letter, i.e. «the Hook of Barbukit and in the vicinity of Pedra Branca»...»<sup>99</sup>. C'est aller un peu vite en besogne. Que, à cette époque, l'ancien Johor fût une puissance maritime avec laquelle les Hollandais devaient composer ou voulaient composer est une chose ; mais que l'on puisse en déduire que le détroit de Singapour lui «appartenait» ou qu'il avait des «droits souverains» sur ces eaux et ces îles en est une autre.

14. D'abord, les textes en question ne disent rien de tel : ils reflètent la rivalité commerciale entre Johor et les Hollandais, mais ne concernent nullement l'étendue territoriale de Johor.

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<sup>97</sup> Voir MM, annexe 21.

<sup>98</sup> RM, appendice I, opinion du professeur Leonard Andaya, p. 210, par. B.7.

<sup>99</sup> RM, p. 32, par. 70.

Ensuite, il est assez extraordinaire d'interpréter cette correspondance interne à la Compagnie néerlandaise des Indes orientales comme reconnaissant la souveraineté de l'ancien Johor sur les mers du sud. Surtout lorsque l'on sait que, précisément à cette époque, cette même Compagnie des Indes néerlandaise contestait véhémentement, par Grotius interposé<sup>100</sup>, la *mare clausum* dont Selden s'était fait le champion au nom de l'Angleterre<sup>101</sup>. A vrai dire, tout ce que l'on peut déduire de ces épisodes est que le gouverneur hollandais de Malacca était conscient des vœux de Batavia d'entretenir des relations amicales avec Johor et de le ménager en tant qu'allié. Il se montrait donc soucieux de ne pas agir au détriment des intérêts de Johor sans l'aval exprès de sa hiérarchie, qui se trouvait à Batavia. Mais l'on ne peut pas en tirer la conclusion que les îles inhabitées de la région appartenaient toutes à Johor ; pas davantage que l'on ne pourrait déduire de la maîtrise des mers européennes — avant — que tous les espaces maritimes et les îles inhabitées qui s'y trouvaient relevaient de cette puissance. Et je ne peux m'empêcher de penser, Monsieur le président, à cet égard, au passage de votre récent arrêt dans l'affaire *Nicaragua c. Honduras* dans lequel vous avez relevé que :

«A la différence du territoire terrestre, pour lequel les limites administratives entre les différentes provinces [de l'Empire colonial espagnol] étaient plus ou moins clairement démarquées, il est manifeste qu'il n'existait aucune délimitation nette s'agissant des îles en général. Il semble d'autant plus en avoir été ainsi pour les îles en question, lesquelles devaient être très peu peuplées, voire pas du tout, et ne possédaient pour ainsi dire pas de ressources naturelles en dehors des ressources halieutiques de la zone maritime alentour.» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 162.)

**Projection 2 — Dessins montrant Pedra Branca (1. Peinture de Pedra Branca, in J. T. Thomson, *Account of the Horsburgh Light-house* (MS, vol. 4, annexe 61, p. 503) (dossier de plaidoiries, onglet n° 16) ; 2. 4<sup>e</sup> de couverture, J. Hall-Jones, *The Horsburgh Lighthouse, 1995* ; 3. Peinture de J. T. Thomson représentant Pedra Branca (1850) (MS, image 13)**

15. Le troisième *et dernier* document qu'invoque la Malaisie à l'appui de son soi-disant titre originel, et qui mentionnerait nommément Pedra Branca est l'in vraisemblable compte rendu de 1833 d'un mystérieux envoyé vietnamien à Batavia dont la savoureuse (prétendue) description de notre île mérite d'être citée. Sous le titre «Le port de Pedra Branca», il écrit :

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<sup>100</sup> *Mare liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio*, Lugduni Batavorum, ex officina Ludovici Elzevirii, 1609 et reproduction par Carnegie Endowment for International Peace, New York, 1951, p. 68.

<sup>101</sup> *Mare clausum seu de dominio maris libri duo*, Leiden, 1636.

«Le port de Pedra Branca, ou de la «Pierre blanche» (*Bach Thach Cang*), est entouré de montagnes. Un grand rocher blanc émerge au milieu des flots. De loin, il apparaît scintillant, d'où le nom donné au port. De chaque côté, les pentes sont couvertes de forêts et les habitations se succèdent jusqu'au chenal de Singapour. Les huttes faites de roseaux, de nipa (*duyên*) et de bambou apparaissent sur les falaises sombres, dans la verdure des arbres. C'est un paysage apaisant.»<sup>102</sup>

16. Comme vous pouvez le constater en regardant les photographies projetées derrière moi, Messieurs les juges, la description de Phan Huy Le — c'est le nom de l'auteur — n'a strictement rien à voir avec «notre» «pierre blanche», un nom fort répandu dans la région comme Singapour l'a montré dans sa réplique<sup>103</sup> : pas de port, pas de pentes, pas de forêt, pas de bambou et, à vrai dire, pas le moindre arbre ; et j'ai du mal à voir dans cette petite île battue par les flots et le vent un «paysage apaisant»... En réalité, le texte vietnamien n'utilise nullement l'appellation «Pedra Branca». Il emploie le nom vietnamien «*Bach Thach Cang*» qui signifie littéralement «port de la pierre blanche». C'est l'auteur de la version française de 1994 qui a traduit ceci par «Pedra Branca». Au surplus — et Singapour l'a aussi expliqué<sup>104</sup> —, la Malaisie a, opportunément, traduit le mot «est» qui figure dans la traduction française et l'original sino-vietnamien<sup>105</sup> par «sud» qui, sans doute, sert mieux sa thèse...

[Fin de la projection 2.]

17. On comprend, Monsieur le président, que la Malaisie se soit gardée de revenir sur cette «preuve» de son titre dans sa réplique. Mais le simple fait qu'elle en ait fait grand cas dans son contre-mémoire montre à quel point elle est en peine de trouver la moindre trace du titre dont elle se prévaut. Faute de documents mentionnant Pedra Branca par son nom, force lui est de se rabattre sur d'autres qui concernent la région dans son ensemble et d'échafauder une théorie de la souveraineté territoriale qui ne cadre ni avec la conception que s'en faisaient les habitants malais avant l'arrivée des Européens, ni avec les principes élémentaires du droit international général.

Monsieur le président, je souhaitais initialement présenter maintenant ces autres documents invoqués par la Malaisie, mais il me faudrait pour cela un bon quart d'heure. Je pense que vous

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<sup>102</sup> Claudine Salmon et Ta Trong Hiep (éd.), *Phan Huy Le — Un émissaire vietnamien à Batavia, récit sommaire d'un voyage en mer*, Paris, Association Archipel, 1994, p. 46 ; CMM, vol. 3, annexe 9, p. 46 (note de bas de page omise).

<sup>103</sup> Voir réplique de Singapour (RS), p.20, par. 2.30-2.31.

<sup>104</sup> *Ibid.*, p. 21, par. 2.32.

<sup>105</sup> Voir CMM, vol. 3, annexe 9, p. 46.

préférer un déjeuner bien mérité plutôt que de me subir pendant tout ce temps. Je pense donc sage de m'arrêter là. Je vous remercie en vous souhaitant un bon appétit.

The VICE-PRESIDENT, Acting President: Thank you very much. We will stop here and resume tomorrow at 10 o'clock.

*The Court rose at 1.05 p.m.*

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