

CR 2007/24

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2007

Public sitting

held on Tuesday 13 November 2007, at 10 a.m., at the Peace Palace,

Vice-President Al-Khasawneh, Acting President, presiding

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le mardi 13 novembre 2007, à 10 heures, au Palais de la Paix,

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

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

COMPTE RENDU

Present: Vice-President Al-Khasawneh, Acting President

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

Judges *ad hoc* Dugard
Sreenivasa Rao

Registrar Couvreur

Présents : M. Al-Khasawneh, vice-président, faisant fonction de président en l'affaire
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
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 VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of Malaysia. Let me recall that Malaysia will conclude its first round of oral argument on Friday 16 November, from 10 a.m. to 1 p.m. I shall now give the floor to His Excellency Tan Sri Abdul Kadir Mohamad. You have the floor, Sir.

Mr. KADIR:

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you, and to take this opportunity to explain why sovereignty over Pulau Batu Puteh, Middle Rocks and South Ledge belongs to Malaysia.

2. Mr. President, please allow me to thank the Agent of Singapore for his kind greetings to my colleagues on the Malaysian team and to me personally on the opening day of these proceedings. These greetings are fully reciprocated. Indeed, both of us have known each other for a long time, as members of the diplomatic service of our respective countries.

3. Mr. President, Malaysia and Singapore are two neighbouring countries in south-east Asia, which have mutually agreed to appear before this honourable Court to settle a dispute over the three features, located at the eastern entrance of the Singapore Straits, off the Malaysian peninsula, as illustrated on the map that is now being displayed on the screen before the Court. You may also see it in tab 1 of your folder.

4. Pulau Batu Puteh and the two other features form part of the State of Johor, now part of Malaysia. The State of Johor has its origins in the ancient Sultanate of Johor. The current Sultan of Johor, Sultan Iskandar Ibni Al-Marhum Sultan Ismail, is a direct descendant of one of the signatories to the Treaty of Friendship and Alliance between Johor and Great Britain of 2 August 1824, also known as the Crawford Treaty, in which part of the territory of the Sultanate was ceded to create Singapore. Singapore Island is nestled in the bottom of peninsular Malaysia. At its closest point Singapore is only 600 m from the Johor mainland. It is now shown on the screen and can be found in tab 2 in the judges' folder.

5. Singapore and Malaysia, together with Indonesia, today share the waters and management of the Malacca and Singapore Straits, which link the Indian Ocean to the South China Sea. Because of this geography, their genealogy and British colonial history, Singapore and Malaysia

share much in common. The graphic now on the screen shows the Malacca and Singapore Straits. This will also be found in tab 3 of the judges' folder. This is a current navigational chart, which is readily available in the public domain.

6. The details of how this dispute arose and the efforts of the Parties to settle it will be described to you by the Attorney-General of Malaysia later this morning.

7. But before looking at how, the Court may wonder why: why would two responsible States be in such an acute and extended disagreement about sovereignty over such small maritime features?

8. Last week, the Court heard many arguments advanced in many ways by Singapore to support its claim of sovereignty over Pulau Batu Puteh, Middle Rocks and South Ledge. But, all these cannot hide the fact that Singapore is seeking to subvert the arrangements reached between Johor and Great Britain over 150 years ago and maintained throughout the whole period of British rule. In its written pleadings, Malaysia has provided evidence that Johor had given permission that Great Britain could build and operate a lighthouse on one of Johor's islands. Pulau Batu Puteh was selected as the site. Great Britain and then Singapore have operated the lighthouse ever since. Singapore is now present on the island, as was Great Britain before it, with Johor's consent. Therefore, it matters a great deal to Malaysia when Singapore claims sovereignty over Pulau Batu Puteh simply because it has been running a lighthouse on it with our consent.

9. Singapore's claim also ignores the territorial agreements in the area reached in 1824, namely, the Anglo-Dutch Treaty between Britain and the Netherlands of 17 March 1824, and the treaty which created the colony of Singapore, the Crawford Treaty of 2 August 1824.

10. Despite their extremely small size, the issue of sovereignty of Pulau Batu Puteh and the other two maritime features is important. Not only does it have implications for the territorial and maritime stability of the Straits but the long-established arrangement is important to the continued co-operative management of navigational aids, marine environmental protection and safety matters in the Straits.

11. Mr. President, distinguished Members of the Court, Malaysia's case is clear and finds full support in the evidence.

12. As Malaysia has shown in her written submissions, Pulau Batu Puteh was not *terra nullius* in 1847. It was not *terra nullius* in 1851, when the East India Company completed the construction of Horsburgh lighthouse on the island. Pulau Batu Puteh was part of the ancient Sultanate of Johor, and when the Sultanate divided in two, after the Anglo-Dutch Treaty of 1824, it remained part of the Sultanate of Johor rather than that of Riau-Lingga.

13. The Anglo-Dutch Treaty established that the division between the British and Dutch spheres of influence would run to the south of the Straits of Singapore. This placed Pulau Batu Puteh in the British sphere of influence and in that part of Johor which continued to be known as the Sultanate of Johor. The division between the British and Dutch spheres is now illustrated on the screen, as well as in tab 4 in the judges' folder. Last week, Singapore sought to present a new interpretation of the dividing line. Tomorrow, Professor Schrijver will explain why the new Singapore interpretation is wrong.

14. In the Crawford Treaty of 1824, Johor transferred sovereignty over Singapore Island to the East India Company together with islets and rocks within 10 geographical miles of Singapore. Pulau Batu Puteh is 25.5 nautical miles away from Singapore.

15. In 1851, with the permission of Johor, the Horsburgh lighthouse was built on Pulau Batu Puteh by the East India Company. Permission was given by the Temenggong and Sultan of Johor on 25 November 1844 for the building and operation of a lighthouse "near Point Romania" or "any spot deemed eligible". As you can see on the graphic that is now displayed on the screen, and in tab 5 of your folder, Pulau Batu Puteh is near Point Romania.

16. Pulau Batu Puteh was certainly an "eligible spot" because of the difficulties of navigating the waters at the eastern entrance to the Straits. In fact, Pulau Batu Puteh was the location of choice of the merchant subscribers when they began collecting funds for a lighthouse in 1836.

17. It is on the basis of the consent of the Temenggong and Sultan of Johor that Great Britain built and then operated the Horsburgh lighthouse on Pulau Batu Puteh.

18. Tomorrow, Professor Kohen will analyse the letters of permission written by the Temenggong and the Sultan of Johor on 25 November 1844. Malaysia has not been able to trace the letter of request from Governor Butterworth which was referred to in the letters of permission. In 1994, Malaysia requested Singapore to furnish a copy of the Governor's letter if Singapore had

such a copy in their possession. Singapore did not respond to Malaysia's request. If this letter exists today it is likely that it is in Singapore's archives in the file entitled "Letters to Native Rulers". Unfortunately, Malaysia does not have access to these archives.

19. Between 1850 and 1946, the Straits Lights system was developed by Britain to aid navigation through the length of the Malacca and Singapore Straits. The graphic now on the screen, and located at tab 6 in the judges' folders, shows the lights in the Straits Lights system, including the names of the various lighthouses. This was the list which appeared in the 1912 Ordinance of the Colony of Singapore which abolished light dues.

20. The Straits Lights system, including Horsburgh lighthouse, was administered by the Straits Settlements. Each lighthouse was operated from one of the three stations in Singapore, Penang and Malacca. From 1912, the Federated Malay States contributed to the running costs of the Straits Lights when they stopped being funded by the collection of lights dues. But the Straits Settlements kept maintaining the lights because they had the necessary expertise.

21. In 1946, when the Straits Settlements was dissolved and the colony of Singapore and the Malayan Union created, the Straits Lights system ceased to be run as a single system. However, the lighthouses continued to be operated from their original stations in the former Straits Settlements. Pulau Pisang and Horsburgh lighthouses continued to be run from Singapore, and the others, such as Pulau Undan, Cape Rachado, Muka Head and Pulau Rimau were run from their stations in Malacca and Penang both of which in 1946 formed part of the Malayan Union, and are now part of Malaysia.

22. Today, Horsburgh lighthouse and Pulau Pisang lighthouse continue to be run from Singapore, the others from Malaysia. Nothing has changed.

23. The authorities in Singapore simply picked up where the British left off, as did the authorities in Penang and Malacca. The arrangement has worked for over 150 years.

24. The co-operation between the States which later became Malaysia and Singapore was not limited to co-operation in the building of lighthouses and navigational aids.

25. Let me take the example of the Royal Malaysian Navy, previously referred to as the Malayan Naval Force. It had responsibilities for Singapore until 1975 when Singapore established

its own navy. The Royal Malaysian Navy continued to operate primarily from the Woodlands base in Singapore until the early 1980s, and only handed over the Woodlands base to Singapore in 1997.

26. Before and after the creation of the Singapore navy, British and then Malaysian naval forces patrolled the waters of the Straits, including the area of Pulau Batu Puteh.

27. Such co-operative arrangements — and there are many others, for example in the field of communications and water supply — reflect not only our close historical ties but our ongoing rights and obligations as the littoral States of the Malacca and Singapore Straits.

28. Malaysia and Singapore, together with Indonesia, have co-operated for over 30 years in the management of the Straits. On 16 November 1971, all three countries joined forces to form a common position on matters relating to the Straits of Malacca and Singapore, and created the Tripartite Technical Experts Group on Safety of Navigation in the Straits of Malacca and Singapore. This forum meets annually to discuss technical issues relating to the safety of navigation in the Straits.

29. Horsburgh lighthouse and its facilities form part of the multilateral régime for the safety of navigation in the Straits, just as it was a key light in the Straits Lights system in the 1850s until 1946.

30. With traffic in the Straits expected to increase from 94,000 vessels in 2004 to 141,000 in 2020, the safety of navigation, maritime security and protection of the marine environment are key. Ongoing co-operation in the Straits between the three littoral States is crucial.

31. Mr. President, Members of the Court, Singapore now seeks to disrupt the long established arrangements in the Straits.

32. Singapore wants to radically change the basis on which it acquired the lighthouse on Pulau Batu Puteh and the character of its presence on the island.

33. Singapore is endeavouring to create for itself a maritime domain which is a far cry from the basis of its presence on Pulau Batu Puteh as lighthouse administrator.

34. Singapore's presence on Pulau Batu Puteh as lighthouse operator never extended to issues concerning the territorial waters or the continental shelf around Pulau Batu Puteh. In 1969, Malaysia enacted legislation which extended its territorial sea from 3 to 12 nautical miles. Singapore did not protest. Later in 1969, an agreement was reached between Malaysia and

Indonesia in relation to the continental shelf. The delimitation line agreed between Malaysia and Indonesia in 1969 is shown in the map now on the screen. The same graphic is provided as tab 7 in the judges' folder.

35. As you can see, the delimitation line approached the vicinity of Pulau Batu Puteh closely and point 11 is just 6.4 nautical miles from Pulau Batu Puteh. Singapore at no time asserted any interest, raised any objection or reserved its position. Neither did Singapore delimit the area around Pulau Batu Puteh or reserve its position in that area of the Straits in the Territorial Sea Boundary Agreement it concluded with Indonesia in 1973.

36. Singapore's claim not only upsets the existing arrangements in this way but raises the question of what it wants to do with the island. In its pleadings Singapore has relied on a reclamation proposal around Pulau Batu Puteh. An internal document, a 1978 tender evaluation report, shows a prospective artificial island of 5,000 m² towards Middle Rock¹. This is not fanciful conjecture. Singapore has an extremely active reclamation policy, which was the subject of the *Reclamation* case instituted by Malaysia against Singapore in the International Tribunal on the Law of the Sea (ITLOS) in September 2003. The provisional measures Order given by that Tribunal in October 2003 will be known to the Court, as well as the subsequent amicable settlement of that case.

37. But Singapore does not need a bigger island for a better lighthouse. What does it need a bigger island for? Quite apart from the possible effects on environment and navigation in the Straits, this could lead to potentially serious changes to the security arrangements in the eastern entrance to the Straits. In fact, the aggressive methods Singapore has used to assert its claim to Pulau Batu Puteh have already led to regrettable — although not irreversible — changes to the stable conditions in the area.

38. In 1986, well after the critical date, Singapore sent its naval vessels to Pulau Batu Puteh and has since then maintained a permanent, 24-hour guard around Pulau Batu Puteh. This has created tension and danger. Johor fishermen have been chased away by Singapore forces from their traditional fishing waters and sheltering spots around Pulau Batu Puteh. Malaysian officials

¹MS, Vol. 6, Ann. 135.

and naval vessels cannot go anywhere near Pulau Batu Puteh without being physically challenged by Singapore naval vessels. In response to Singapore's actions, Malaysia has chosen to adopt a policy of non-confrontation and to act in a peaceful manner while this dispute is in the process of being settled. We have now learned through its pleadings that Singapore placed military communications equipment on Pulau Batu Puteh in May 1977, which we were not previously aware of and which causes us grave concern. This conduct does not fall within the consent given for the construction and operation of the lighthouse.

39. Great Britain's and Singapore's conduct in respect of Pulau Batu Puteh before the critical date, at least that which was known to Malaysia, was entirely consistent with being the operator of the lighthouses on Pulau Batu Puteh and Pulau Pisang with the consent of the sovereign, Johor.

40. Malaysia, by contrast, has always respected the long-standing arrangements for Singapore's operation of the lighthouses on Pulau Batu Puteh and Pulau Pisang. We have not interfered with Singapore's operation of the lighthouses.

41. But Malaysia does not wish the stability of its relationship with Indonesia altered. Yet this would inevitably follow if Singapore were to be treated as sovereign over Pulau Batu Puteh with attendant implications for established maritime delimitation in the area.

42. Malaysia respectfully requests the Court to bear in mind these important considerations and, accordingly, to reaffirm Malaysia's title to Pulau Batu Puteh, Middle Rocks and South Ledge.

43. Mr. President, distinguished Members of the Court, before ending my submission, I would like to clarify one point. Our problem is with Singapore as a military presence on one of Johor's islands in the eastern entrance of the Singapore Straits. We have no problem with Singapore as the operator of Horsburgh lighthouse. Malaysia wishes to maintain the peaceful and stable conditions at the entrance to the South China Sea. It is Singapore which is seeking to change the situation. The Sultan and Temenggong of Johor, in 1844, gladly consented to the establishment of the lighthouse on Pulau Batu Puteh, and Malaysia has never suggested that its continued operation by Singapore presented any problem. I repeat, Malaysia has always respected the position of Singapore as the operator of Horsburgh lighthouse and I would like to place formally on record that Malaysia will continue to do so. Malaysia's concern is quite different, as I have indicated.

44. Mr. President, I wish to conclude here. After this, my colleague the Co-Agent will describe to you the Sultanate of Johor's geographical make-up, the political events which shaped its territory, and Pulau Batu Puteh's social and economic place in Johor and Malaysia.

45. Mr. President, distinguished Members of the Court, I thank you and would ask you now to call on the Co-Agent of Malaysia, Her Excellency Noor Farida Ariffin.

The VICE-PRESIDENT, Acting President: I thank the Agent of Malaysia, His Excellency Tan Sri Abdul Kadir Mohamad, and now call on the Co-Agent, Her Excellency Dato' Noor Farida Arrifin. You have the floor.

Ms FARIDA:

GEOGRAPHICAL ELEMENTS AND EVOLUTION OF THE TWO STATES

Introduction

1. Mr. President, Members of the Court, it is indeed a great honour for me to appear before you again and to represent Malaysia as its Co-Agent in this case.

2. I wish to present to the Court a brief overview of the geographical composition of the Sultanate of Johor relative to Pulau Batu Puteh, and the events which shaped its territory. You will see that Pulau Batu Puteh fell within Johor's territory and was frequently used by subjects of the Sultanate of Johor.

Geographical overview

3. The extensive reach of the old Sultanate of Johor's territory is recorded in the Malay annals and confirmed in all eighteenth and early nineteenth century descriptions of the Sultanate, which Professor Crawford will take you through in more detail tomorrow. It was at one time a large maritime empire, as you can see on the graphic shown².

4. The Sultanate of Johor's territories extended to the north over Pahang and Johor in the Malay Peninsula. From here they extended north-east out into the South China Sea, and included all the islands in the sea out to the two Natuna Island groups which lie to the north-west of the island of Borneo. The Sultanate included, to the south, the Tambelan Island groups and to the

²Judges' folder, tab 8.

south-west, the islands of the Riau-Lingga archipelago. It extended to the west, covering part of the island of Sumatra and including two key rivers. The Sultanate covered all the islands within this large area, including all those in the Singapore Straits, such as Pulau Batu Puteh and the islands to the north and south of the Straits, taking in Singapore Island and the adjacent islands.

5. A large number of the islands within the territory of the Johor Sultanate are located in the South China Sea well beyond Pulau Batu Puteh³. The Anambas Islands lie 109 nautical miles from the nearest Johor mainland; the Natuna Islands are further still, at 254 nautical miles from the nearest Johor mainland; the Tambelan Islands are located 186 nautical miles from the mainland of Johor.

6. Pulau Batu Puteh, sitting at the eastern entrance of the Singapore Straits, lies right in the middle of the old Sultanate of Johor, a mere 7.7 nautical miles from the Johor mainland. You get a much better idea of how close Pulau Batu Puteh is to the Johor mainland from this photo⁴. It is taken from the east-south-east of the island from the channel between Pulau Bintan in Indonesia and Pulau Batu Puteh, and shows the Johor mainland in the background behind the lighthouse. This is Tanjung Penyusoh, also known as Point Romania, which is the name regularly used to refer to it in the old documents. This is Mount Berbukit, which appears in older records as “Mount Barbuçet”. It sits near the middle of this part of the peninsula, and has traditionally been a key landmark for mariners who took their mark between Pulau Batu Puteh and Mount Berbukit or other landmarks in the area to negotiate the entrances to the Singapore Straits.

7. Pulau Batu Puteh means white rock in Malay and was so named because of the bird droppings which covered it. Its Portuguese name, Pedra Branca, also means white rock. The Chinese also called it white rock, “Pia Chiao” in Chinese, as recorded on the Chinese Wubei Zhi sailing chart and instructions of 1621⁵. The French called it Pierre Blanche, in translation from the Vietnamese envoy’s description of it in Vietnamese on his 1833 trip to Batavia⁶, and on the Bellin’s chart of 1755⁷. Everyone called it white rock in their own language, for the obvious

³Judges’ folder, tab 9.

⁴Judges’ folder, tab 10.

⁵RM, Vol. 2, Ann. 1.

⁶CMM, Vol. 3, Ann. 9, Bach Thach Cang, p. 46 (in original numbering).

⁷Carte réduite des détroits de Malaca, Sincapour, et du Gouverneur, MM, Map Atlas, map 3.

reason that it was one. It is quite preposterous to say, as Singapore has, that the name Pulau Batu Puteh has, and I quote from my Singapore friends, “only recently appeared in maps of the region and is the name by which [Malaysians] refer to it today”, as if we had never called the island white rock in Malay⁸ as others did in Portuguese, Chinese, French and Vietnamese. J. T. Thomson in his account of the Horsburgh lighthouse notes that the island is called “Batu Putih” by the Malays⁹. He even recalls Malays working on the construction of the lighthouse singing songs about “Batu Putih de tingah laut”¹⁰. I won’t attempt to sing it myself, Mr. President, but in English it means “Batu Puteh in the middle of the sea”. It is referred to by its Malay name in the *Singapore Free Press*. The article of 1843 on piracy refers to “Batu Puteh” as being within the territories of the Sultan of Johor¹¹. A 1928 map of Johor labels the island “Batu Puteh”¹².

The social and economic role of Pulau Batu Puteh in Johor

8. I will now turn to the role of Pulau Batu Puteh in Johor. The Sultanate of Johor was a maritime empire, and so its islands were an integral feature of its territory, and the rivers and seas served as the primary highways linking the communities that owed allegiance to the Sultanate of Johor. The area around Pulau Batu Puteh and the Singapore Straits was frequented in particular by a Malay group known as the Orang Laut, which means “sea people”, who served the Temenggong of Johor, and were subjects of the Sultanate. The Orang Laut lived in small communities along the lower reaches of rivers, the coasts and the many islands off south-east Sumatra and the Malay Peninsula. They were fishermen and foragers, and also patrolled the seas to conduct trade ships to the ruler’s port, and provided protection for traders involved with Johor.

9. Singapore denies the reality of ties between the Orang Laut and the Sultanate of Johor. Despite Monsieur Pellet¹³, there is no doubt that these ties existed. Carl Trocki writes that the Temenggong’s dominions were made up of sea peoples, including the Orang Laut, and that his

⁸CR 2007/21, p. 17, para. 7.

⁹MS, Vol. 4, Ann. 61, p. 479 (p. 378, original).

¹⁰*Ibid.*, p. 519 (p. 416 original).

¹¹MM, Vol. 3, Ann. 40.

¹²CMS, Map Atlas, map 14.

¹³CR 2007/21 (Pellet).

following included between 6,000 to 10,000 people and he controlled all the traffic moving between the Straits of Malacca and the South China Sea¹⁴. The relationship of the Orang Laut and the Temenggong and the Sultan of Johor is accepted by historians of this area and period. Professor Houben's report, at Appendix 2 to Malaysia's Reply, which says "the Temenggong and a band of Malays controlled the *orang laut* . . . of Singapore and the neighbouring islands", cites several sources, including recent research on the subject¹⁵.

10. Contemporary European documents are also helpful. John Crawford records meeting Orang Laut or "men of the sea" in his *Journal of an Embassy to the Courts of Siam and Cochin China* of 1822¹⁶. He explains (and this quotation is at tab 11 of your folders),

"They are subjects of the King of Johore, and the same people who have been called *Orang Sellat*, or, 'men of the straits', — the straits here alluded to being, not the Great Straits of Malacca . . . but the narrow guts running along the little islets that are so abundantly strewn over its eastern entrance. Under this appellation they have been notorious for their piracies, from the earliest knowledge of Europeans respecting these countries."

11. Edward Presgrave, the Registrar of Imports and Exports, in a report of January 1829 on piracy to the Resident Councillor in Singapore, says that the subjects of Johor include the Orang Rayat, another term for Orang Laut¹⁷. The Sultan of Johor can, he says, command their services in times of emergency such as war, and, I quote, "On such an occasion it is said he can assemble from the several islands and places under his authority from three hundreds to four hundreds prows or boats"¹⁸. I note from Thomson's account that ten or so boats accompanied the Temenggong when he left the island after his stay there in June 1850 during the construction of the lighthouse¹⁹.

12. That these subjects of Johor frequented the area of Pulau Batu Puteh is evident from John Crawford's journal, and also from the letter from J. T. Thomson to the Resident Councillor of Singapore, Mr. T. Church of 2 November 1850 concerning the lighthouse on Pulau Batu Puteh. He says that (and you can find this at tab 12),

¹⁴C. Trocki, *Prince of Pirates: The Temenggongs and Development of Johor and Singapore* (1979), pp. 43-44.

¹⁵RM, Vol. 1, App. II, pp. 227-228, paras. 25-28.

¹⁶RM, Vol. 2, Ann. 7.

¹⁷RM, Ann. 27, para. 5.

¹⁸*Ibid.*, para. 13.

¹⁹MM, Vol. 3, Ann. 60 (p. 430 in the original).

“strict rules should be carried out against those half fishing half piratical sect the orang Ryot or Laut, being allowed to obtain admittance into the building — they frequently visit the rock so their visits should never be encouraged nor any trust put in them . . . In the straits and islets of the neighbouring shores and islands many lives are taken by these people.”²⁰

This warning against letting the Orang Laut into the lighthouse was later formalized in rule 17 of the lighthouse keepers’ rules, which J. T. Thomson records in his account of Horsburgh lighthouse²¹.

13. No one lived on Pulau Batu Puteh, which is hardly surprising given that it is a tiny, uninhabitable, exposed and barren rock. There were, however, camps or settlements on the islands adjacent to Pulau Batu Puteh. This is evident from J. T. Thomson’s discussions of lighthouse mechanisms, it being necessary to distinguish them from the fires on the coast²². Two points emerge from these records. First, the Orang Laut were subjects of Johor, and second Pulau Batu Puteh and its waters were used by the Orang Laut in the course of their activities.

14. Fishermen from Johor continued to use the waters of Pulau Batu Puteh for fishing and shelter right up until the mid 1980s when Singapore established a permanent naval presence there, and prevented them from fishing close to Pulau Batu Puteh. A fisherman from the village Sungai Rengit near Tanjung Penyusoh in Johor, Idris Bin Yusof, says in his affidavit annexed to Malaysia’s Counter-Memorial that:

“Pulau Batu Puteh has been an important fishing area for fishermen from Sungai Rengit for generations because it is close to the village and the waters are very rich in fish. It was not necessary to have a boat with an engine to get to Pulau Batu Puteh. In 1 day of fishing in the waters around Pulau Batu Puteh, a fisherman could usually catch the equivalent of about 3 or 4 days of fish compared to fishing in other areas. The reason for this is that the waters around Pulau Batu Puteh are sheltered, with a slower current, and this attracts many fish.”²³

Saban Bin Ahmad, another fisherman from Sungai Rengit, says the same thing in his affidavit:

“Pulau Batu Puteh was my first choice and favourite place to go fishing because the catch was always so good.”²⁴

²⁰MM, Vol. 3, Ann. 58.

²¹MM, Vol. 3, Ann. 61, “Account of the Horsburgh Light-House” by J. T. Thomson.

²²MM, Vol. 3, Ann. 43 and MR, Vol. 2, Ann. 13 (pp. 22-23 in the original).

²³CMM, Vol. 2, Ann. 5 (English translation), p. 3, para 10.

²⁴CMM, Vol. 2, Ann. 6 (English translation), p. 2, para 6.

15. Saban Bin Ahmad also talks about his and, before him, his father's and grandfather's positive relations with the lighthouse keepers. In bad weather the lighthouse keepers used to provide the fishermen with shelter in the lighthouse in return for fish and other provisions. Idris Bin Yusof also speaks about the arrangements the lighthouse keepers had with the fishermen to provide them with supplies between the deliveries they received from Singapore. Rear-Admiral Thanabalasingam also affirms, based on his experience of patrols in the Pulau Batu Puteh area, that it is a traditional Malaysian fishing ground²⁵.

16. As well as being a key fishing and sheltering spot used by the people from nearby mainland Johor, Pulau Batu Puteh has always been an important navigational marker for mariners, Malay, Chinese and European. Because of its strategic position at the entrance of the Singapore Straits it was used and recorded in sailing instructions as a reference to guide mariners in and out of the narrow and dangerous eastern entrance to the Singapore Straits. Pulau Batu Puteh is marked and named on nearly every early map and chart of the area, including the earliest map produced to the Court, a map of 1595 by Jan Huygen van Linschoten²⁶, and the first sailing chart produced, the Chinese Wubei Zhi's sailing instructions dating from 1621²⁷. This was no remote mysterious feature: it was not *terra incognita* and it was not *terra nullius*.

Political and territorial evolution of Johor

17. Over the 500 years since Sultan Mahmud moved his court to the mouth of the Johor River, the Sultanate of Johor has undergone many changes. What political system has not done so? But throughout this period Pulau Batu Puteh, Middle Rocks and South Ledge always remained part of Johor.

18. When Sir Thomas Stamford Raffles of the English East India Company wanted to establish a firmer foothold for Great Britain and decided to establish a trading post on Singapore Island in the Singapore Straits, he achieved this not by occupation, not by conquest, but by agreement with the local rulers. Raffles entered into a series of agreements in 1819 with Sultan Hussain, whose succession to the Sultanate was being disputed by the Dutch through the

²⁵CMM, Vol. 2, pp. 26-27, paras. 76-80.

²⁶CMS, Map Atlas, map 1.

²⁷RM, Vol. 2, Ann. 1.

medium of his younger brother Abdul Rahman. A co-signatory of all these agreements was the Temenggong of Johor. Both Raffles and the Temenggong recognized Hussain as the lawful Sultan. The agreements established a British factory on Singapore Island.

19. The Dutch recognized Abdul Rahman as the lawful Sultan and challenged the British factory agreements with Hussain and the Temenggong. Britain refused to recognize Abdul Rahman. After some negotiations Great Britain and the Netherlands agreed in the 1824 Anglo-Dutch Treaty on their respective spheres of influence in the area covered by the Sultanate of Johor²⁸. As you can see from this graphic, the Dutch sphere fell to the south of the Straits of Singapore. The British sphere covered all the rest of the Sultanate including the islands in and around the Straits. The 1824 Anglo-Dutch Treaty thus led to the split of the Sultanate of Johor into two parts, one headed by Sultan Hussain, which continued universally to be known as the Sultanate of Johor, and the other by Sultan Abdul Rahman, which became known as the Sultanate of Riau-Lingga. You can see where it fell on this graphic.

20. The Anglo-Dutch Treaty enabled Great Britain to strengthen its position in the Straits, and in 1824 Sultan Hussain and the Temenggong agreed to cede Singapore Island together with “adjacent seas, straits and islets, to the extent of 10 geographical miles from the coast of the main Island of Singapore” to Great Britain. You can see the effect of the Crawford Treaty on the Sultanate of Johor in this graphic²⁹.

21. Pulau Batu Puteh, Middle Rocks and South Ledge remained within the territory of the Sultanate of Johor after the two 1824 treaties. Nothing happened subsequently which altered this.

22. In 1855 internal frictions between the Sultan and the Temenggong of Johor were resolved by an agreement which transferred full authority over the territory of the Sultanate to the Temenggong of Johor and he became the sovereign ruler of Johor, with the exception of the small Kassang territory which remained reserved for the former Sultan. The current Sultan of Johor is the direct descendant of the Temenggong who became the sovereign ruler of Johor under the 1855 Agreement. He is the direct descendant, the great, great, great grandson of Temenggong Abdul Rahman who signed the Crawford Treaty of 1824.

²⁸Judges' folder, tab 13.

²⁹Judges' folder, tab 14.

23. Pahang separated from the old Sultanate of Johor during the nineteenth century. In 1862 Johor and Pahang concluded a treaty which set out to resolve boundary issues between them³⁰. However, despite the 1862 agreement, a dispute soon arose over the land and maritime boundary. It was finally settled in 1868 by an arbitration award given by Sir Harry Ord, British Governor of the Straits Settlements. The Ord Award settled the land boundary along the River Endau which was also to be taken as the starting point and latitude for the maritime boundary out into the South China Sea³¹. The islands south of the line, both inside and outside the 3 nautical mile territorial sea fell within the territory of Johor³². The line now appearing on this graphic represents the boundary confirmed and drawn on the chart attached to the Ord Award. The Ord Award was reconfirmed by an 1898 Boundary Commission.

24. In 1885 the British Government and the State of Johor concluded the Johor Treaty which provided Britain with overland trade and transit rights through the State of Johor but only allowed limited British interference in the internal affairs of Johor. It also provided for British protection of the territorial integrity of the Sultanate. The Sultan invoked this provision the following year, in 1886, when he raised Johor's sovereignty over its many islands, both offshore and in the immediate vicinity of the Johor coast, with the Colonial Office. He wanted Britain to create a register of Johor's many islands to prevent other Powers from assuming they could incorporate them into their protectorates³³. A memorandum drawn up by his Secretary of the same date of "Charts of the Islands belonging to Johore", included Chart 2041 of the Malay Peninsula Eastern Coast, Singapore to Timoan, which he called "Eastern Coast of Johore (immediate vicinity)"³⁴. This chart, now on screen, includes among many, Pulau Batu Puteh, Pulau Tinggi and Pulau Aur. It is the same chart as was attached to the 1868 Ord Award. The Sultan took this precaution because of Dutch activities on the Natunas, Anambas and Tambelans. In 1883 the Dutch had published a map

³⁰MM, Vol. 2, Ann. 8.

³¹MM, Vol. 3, Ann. 86.

³²Judges' folder, tab 15.

³³MM, Vol. 3, Ann. 63.

³⁴Judges' folder, tab 16.

including these three groups of islands in its Rhio residency³⁵. Britain declined to intervene on the Sultan's behalf because it had earlier acknowledged Dutch presence in this area.

25. In 1914, British influence in Johor was formalized and increased through the appointment of a British Adviser. But none of these changes in the nineteenth and early twentieth century had any effect on the continued status of Johor as a separate entity, nor on its territorial extent in the area of the Singapore Straits as settled by the Anglo-Dutch Treaty and the Crawford Treaty, and extending north to the land and maritime boundary with Pahang set by the Ord Award.

26. In 1946, Johor joined the Malayan Union, which became the Federation of Malaya in 1948, consisting of the four Federated Malay States, five Unfederated Malay States, and Penang and Malacca. Penang and Malacca had been, with Singapore, part of the colony of the Straits Settlements until it was dismantled in 1946.

27. The Federation of Malaya gained independence from Britain in 1957. In 1963, the remaining British colonies of North Borneo — now known as Sabah — and Sarawak, together with the colony of Singapore, joined the Federation of Malaya, which was renamed Malaysia. Until this time, Singapore had always been a British colony, either as part of the Straits Settlements until 1946 and thereafter as a separate colony.

28. As Singapore has said, these changes did not have any effect on the territory belonging to Johor and Malaysia or Singapore, nor did Singapore's separation from Malaysia in 1965.

Conclusion

29. Mr. President, Members of the Court, in conclusion, Pulau Batu Puteh, Middle Rocks and South Ledge are among the many maritime features that have always formed part of Johor. You have also seen that Pulau Batu Puteh and its surrounding waters, far from being unknown and unused, have always been used by local Malay peoples, as subjects of the Sultanate of Johor and residents of the State of Johor. None of the political or territorial developments after 1824 altered this.

Mr. President, may I ask you to call on the Attorney-General of Malaysia, Mr. Abdul Gani Patail, to continue Malaysia's presentation.

³⁵MM, Map Atlas, map 11.

Thank you, Mr. President, Members of the Court.

The VICE-PRESIDENT, Acting President: Thank you, Madam, for your argument. I now call on the Attorney-General of Malaysia, His Excellency Tan Sri Gani Patail. You have the floor.

Mr. GANI PATAIL:

THE ORIGINS OF THE DISPUTE

1. Mr. President, distinguished Members of the Court, as the Attorney-General of Malaysia, it is a great honour and privilege for me to appear before this honourable Court. My task for today is to present before the Court the origins of the present dispute, to identify the critical date and to highlight its importance in these proceedings.

The origins of the dispute over Pulau Batu Puteh

2. The sovereignty over Pulau Batu Puteh had never been a subject of dispute prior to 1978. Singapore raised the issue of sovereignty over Pulau Batu Puteh for the very first time during a meeting held on 13 April 1978 between the two officials of the two countries³⁶. In that meeting, Singapore claimed that it had “incontrovertible legal evidence”³⁷ of its sovereignty over Pulau Batu Puteh.

3. In the period after the issue of sovereignty was raised by Singapore in 1978 and Malaysia’s publication of the 1979 map, the Parties engaged in a series of bilateral negotiations to resolve the dispute amicably. The Parties subsequently agreed in principle to refer the dispute to the International Court of Justice. The text of the Special Agreement was finalized in 1998. Both Parties agreed to defer the submission of the dispute to the International Court of Justice until the conclusion of the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*. Following the Judgment in that case, delivered on 17 December 2002, both countries signed the Special Agreement.

³⁶CMM, para. 397.

³⁷RS, Ann. 51.

4. Notwithstanding Singapore's claim, Malaysia had consistently remained clear as to its sovereignty over Pulau Batu Puteh, which is illustrated in the 1979 map³⁸. The map shows the territorial waters and continental shelf boundaries of Malaysia.

5. Mr. President, distinguished Members of the Court, prior to its publication, on 20 December 1979, the Ministry of Foreign Affairs of Malaysia had notified all its ASEAN Missions by telegram concerning the decision to publish the 1979 map³⁹. As shown in the graphics, the telegram stated that "the production of [the] New Map does not constitute new claim[s] by Malaysia but merely [an] indication on [a] specific map of our [Malaysia's] right to the continental shelf"⁴⁰. A copy of the telegram is contained in the judges' folder, under tab 17.

6. On 21 December 1979, the Ministry of Foreign Affairs of Malaysia called for a meeting between the Deputy Secretary-General, Ministry of Foreign Affairs of Malaysia, and the Singapore High Commissioner. Another meeting was held on 8 January 1980 between the officials of the two countries where Singapore raised its concerns regarding the publication of the 1979 map and other related issues⁴¹.

7. Mr. President, distinguished Members of the Court, Singapore did not officially object to the publication of the 1979 map during the first meeting on 21 December 1979⁴². Instead of making clear its claim over Pulau Batu Puteh, Singapore in its pleading seeks to downplay Malaysia's conduct in publishing the 1979 map by alleging, among others, that "Malaysia made her claim to Pedra Branca in a hesitant and unusual manner" and that "the manner in which Malaysia made the claim shows that Malaysia was uncertain and embarrassed about it"⁴³. Such assertions are without any basis at all.

8. Singapore had never been able to produce the "incontrovertible legal evidence"⁴⁴ in the form of documents to support its sovereignty over Pulau Batu Puteh. It did not do so in its Note of

³⁸The 1979 map is entitled "Map Showing the Territorial Waters and the Continental Shelf Boundaries of Malaysia 1979".

³⁹RM, para. 38; RM, Ann. 20.

⁴⁰RM, para. 38; RM, Ann. 20, para. 3.

⁴¹RM, para. 42; RM, Ann. 23.

⁴²RM, para. 42.

⁴³MS, paras. 6.114-6.115; RM, para. 37.

⁴⁴RS, Ann. 51.

14 February 1980. It has not done so since. Even today, Singapore is unable to produce any document proving its claim of sovereignty. Rather it rests, as the learned Professor Brownlie said of the *terra nullius* claim last week, simply on “inference”⁴⁵.

The press conference dated 13 May 1980

9. In the same manner, as shown in the graphics, the statement of the then Prime Minister of Malaysia at the press conference introduced by Singapore last week⁴⁶ was also premised on documents which the Honourable Mr. Lee Kuan Yew said were in Singapore’s possession proving its sovereignty over Pulau Batu Puteh⁴⁷.

Mr. President, Members of the Court, until today Malaysia has yet to see any definitive documents from Singapore to prove this fact. The statement of the then Prime Minister of Malaysia is therefore merely a friendly and respectful statement of a visiting Prime Minister at a press conference convened by his host. Such a statement has no probative value in this Court. But in any case all he said was that the matter needed to be discussed between the two States: that was Malaysia’s position. What has remained entirely unclear was the very existence of the documents purportedly in the possession of Singapore.

The critical date for Pulau Batu Puteh

10. Mr. President, distinguished Members of the Court, although it had been becoming clear that there might be a disagreement, it was only on 14 February 1980 that Singapore through its Protest Note officially claimed Pulau Batu Puteh as part of Singapore’s territory. The Protest Note of 14 February 1980 crystallized the dispute. On this basis the critical date for the dispute over Pulau Batu Puteh is 14 February 1980⁴⁸.

11. The determination of the critical date is important in the present dispute as the conduct now relied on by Singapore occurring after that date was *not* a normal continuation of its prior acts

⁴⁵CR 2007/21, p. 35, para. 5, CR 2007/21, p. 53, para. 90.

⁴⁶CR 2007/20, p. 34, para. 44; CR 2007/23, p. 61, para. 27.

⁴⁷Judges’ folder, tab 18.

⁴⁸MM, para. 15.

of administration of the lighthouse. In that regard, such conduct after the critical date must be disregarded.

12. This Court in the *Indonesia/Malaysia* case said that acts undertaken after the critical date will not be taken into consideration “unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them” (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

13. Singapore however seeks to ignore the importance of the critical date in the present dispute by a loose reference to a “so-called critical date”⁴⁹. In fact, throughout the entire first round of Singapore’s oral presentation, not once did we hear counsel asserting or explaining the principle of the critical date and its relevance or irrelevance to Singapore’s case. But the critical date is highly significant for the reason you stated at paragraph 117 of your recent Judgment in *Nicaragua/Honduras*:

“In the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed *à titre de souverain* which are in principle relevant for the purpose of assessing and validating *effectivités*, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties’ acts become irrelevant for the purposes of assessing the value of *effectivités*.” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, para. 117.)

Applying this passage, the critical date is vital in assessing and validating the evidence. Since the 1980s, Singapore engaged in what has every appearance of being a campaign to strengthen its legal position in the present dispute. Such conduct, especially in the 1990s, carried out well after the dispute had crystallized on 14 February 1980, is as you have held, “irrelevant for the purposes of assessing the value of *effectivités*”.

The critical date for Middle Rocks and South Ledge

14. Mr. President, distinguished Members of the Court, I now turn to the critical date for Middle Rocks and South Ledge. The dispute concerning these two features only crystallized on

⁴⁹CR 2007/22, p. 23, para. 48.

6 February 1993⁵⁰ when, for the first time during the first round of bilateral discussions between the Parties, Singapore included Middle Rocks and South Ledge in addition to its claim to Pulau Batu Puteh. No such claim was ever made known to Malaysia prior to 6 February 1993, officially or otherwise.

15. Singapore claims to have included Middle Rocks and South Ledge in its Protest Note of 14 February 1980 by the phrase “Pedra Branca and the waters around it”. Singapore’s interpretation cannot be correct. Middle Rocks and South Ledge are not claimed as waters but as distinct features. They had well-known names. If Singapore intended to claim them in 1980 it should have said so. It did not.

16. Mr. President, distinguished Members of the Court, this brings me to the end of my submission. I thank you for your attention. If I may ask you now to give the floor to Sir Elihu Lauterpacht to continue with Malaysia’s presentation.

The VICE-PRESIDENT, Acting President: Thank you, Tan Sri Abdul Gani Patail. I now give the floor now to Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT:

PULAU BATU PUTEH: MALAYSIA’S CASE

1. Mr. President, Members of the Court, once again it is my privilege to appear before you and I am particularly pleased that this opportunity has fallen my way in your present composition. I am honoured also to appear once again on behalf of Malaysia.

2. You have heard elaborate expositions of their positions from the distinguished colleagues who represent Singapore. However, in my submission, what they have said has not in any way contributed to a clear understanding of the real issue in this case. Indeed, as I listened to their speeches I sometimes wondered whether my learned friends might have had it in mind to entangle Malaysia in a mass of detail which would obscure the essential simplicity of the case. Malaysia will try not to be led into that trap.

⁵⁰MM, para. 15.

3. You have heard the opening contributions from the Agent and Co-Agent of Malaysia and from the Attorney-General. They have presented to you the historical, geographical and diplomatic background of this case. It now falls to me to provide an overview of Malaysia's responses on the principal substantive issues now in contention. This will be our case in a nutshell. It will be developed more fully in the speeches of my colleagues and myself to be delivered tomorrow and the following days. The case is not a complex one as will, I hope, be shown by the summary on which I will now embark.

I. Sir Hugh Clifford's description of Johor

4. But before entering on these matters, there is one important item to be added to the geographical exposition just presented by Ambassador Noor Farida. If there is any doubt as to the geographical extent of Johor and, in particular, whether it includes Pulau Batu Puteh, I would refer you to a description of Johor that appears in the 13th edition of the *Encyclopaedia Britannica* (1926) which might perhaps be dismissed as a merely academic contribution were it not for the unique authority of its author. The relevant pages of the encyclopaedia are included at tab 19 in the judges' folder.

5. I will first read the relevant lines:

“JOHOR (Johore is the local official, but incorrect spelling), an independent Malayan state at the southern end of the peninsula, stretching from 2° 40' S. to Cape Romania (Ramunya), the most southerly point on the mainland of Asia, and including all the small islands adjacent to the coast which lie to the south of parallel 2° 40' S. It is bounded N. by the protected native state of Pahang, N.W. by the Negri Sembilan and the territory of Malacca, S. by the strait which divides Singapore island from the mainland, E. by the China Sea, and W. by the Straits of Malacca.”

6. I draw attention, in particular, to the words “including all the small islands adjacent to the coast which lie to the south of parallel 2° 40' S”. The reference to “S” or south is clearly a misprint for “N”. The phrase “all the islands” leaves no room for the exclusion of Pulau Batu Puteh.

7. Now, why is this description so important? It is because it was written by Sir Hugh Charles Clifford. He was an eminent member of the British Colonial Service who spent much of his career in Malaysia and eventually became Governor of the Straits Settlements. Even more to the point, as can be seen from the signature page of the 1927 Territorial Waters Agreement, now on the screen, as Governor of the Straits Settlements it was he who signed the

Agreement with Johor on behalf of Britain. It is doubtful whether anyone could have been more familiar than he was with the territorial extent of the Malay States and especially with the status of the islands that were covered, or not covered as the case might be, by the terms of the Agreement⁵¹.

8. Any suggestion that Pulau Batu Puteh was a solitary exception to the general statement about Johor sovereignty over “all the islands south of 2° 40” defies common sense. And would it not have been a remarkable coincidence that after all the discussion that took place between 1844 and 1847 the place, the one place that was eventually chosen should have been the one place that was *terra nullius* and yet that consideration is not once mentioned in the correspondence? Evidently, of no concern to Britain at that time.

II. Only one real issue

9. And so we come back to the only real issue that must dominate the Court’s consideration. All the rest is dependent and subsidiary.

10. This issue is that of the status of Pulau Batu Puteh in 1847. Was it, as Singapore contends, *terra nullius* and thus open to acquisition by Britain? If, as Malaysia maintains, Pulau Batu Puteh was not *terra nullius* in 1847 but belonged to Johor, then the whole of Singapore’s case as pleaded collapses. This is because Singapore places its claim firmly and exclusively on events between 1847 and 1851 on the basis that Pulau Batu Puteh was then open to acquisition. In particular, Singapore expressly states that it does not claim the island on the basis of prescription.

A. In 1847 Pulau Batu Puteh belonged to Johor and was not *terra nullius*

11. Permit me to begin by referring to a study of the question of sovereignty in south-east Asia that is contained in a most pertinent book by the late Professor Charles Alexandrowicz, entitled an *Introduction to the History of the Law of Nations in the East Indies*, which was published in 1967. In Chapter III headed “The Grotius-Freitas Controversy over the East Indies”, Alexandrowicz referred to the problem of sovereignty. (I note in passing that Professor Alexandrowicz was an academic who was quite independent of both Parties. His views were not expressed at the solicitation of either side. He wrote well before this dispute arose.)

⁵¹See judges’ folder, tab 20.

Alexandrowicz asks the question: how does Grotius approach the problem of opening the doors of the East Indies to European penetration? He eliminates the possibility of conceiving the East Indies as a legal vacuum as far as the law of nations is concerned. What he stresses most emphatically is the existence of organized political entities in the East Indies which he considers independent and sovereign.

12. Alexandrowicz then quotes Grotius as saying: “These islands of which we speak always have had their own Kings, their own Governments, their own laws and their own legal systems.”⁵²

13. Alexandrowicz himself then continues:

“The immediate consequence to be drawn from this statement was that European powers coming to this part of the world could not acquire territorial or other rights by discovery, occupation of *terra nullius*, by papal donation or any other unilateral act carried out in disregard of the sovereign authorities governing the countries of the East Indies.”⁵³

14. I may also refer to an earlier article by Alexandrowicz in the *British Year Book of International Law* (1959), Volume 35 (p. 167) where he says:

“Assuming that a number of Asian communities were endowed with statehood and sovereignty and capable of entering into transactions with the Portuguese and other European powers which produced rights and duties in the law of nations, we have to exclude the possibility of acquisition of their territories by occupation or discovery.”

He quotes Grotius as saying that: “The property and the sovereignty of the East Indies ought not to be considered as if they had been previously *res nullius* and as they belong to the East Indians they could not have been legally acquired by other persons.”⁵⁴ These passages appear at tab 22.

15. The “East Indians” who were thus acknowledged to possess sovereignty over these territories and islands included the Sultanate of Johor, which was established in 1512 and of which the relevant part has continued up to the present day as the State of Johor, which is part of Malaysia. As has already been recalled by the Co-Agent, there is no doubt that the Sultanate of Johor before 1824 encompassed an area which covered north and south of the Singapore Strait, including Pulau Batu Puteh, and that Malay notions of sovereignty at that time included notions of territoriality.

⁵²Alexandrowicz, *Introduction to the History of the Law of Nations in the East Indies*, 1967.

⁵³*Ibid.*, p. 45. See judges’ folder, tab 21.

⁵⁴See judges’ folder, tab 22.

16. Singapore, however, has sought to bolster its position by invoking what it calls “Sultan Abdul Rahman’s donation of 1825” — Rahman was the ruler of the southern part of Johor after its division. In this document Abdul Rahman claimed that whatever may be in the sea is his territory and whatever is situated on the mainland belongs to his brother Sultan Hussain, who ruled mainland Johor. From this Singapore concludes that “Malaysia’s theory that Pedra Branca was allocated to Sultan Hussain as a result of the Anglo-Dutch Treaty” is plainly wrong⁵⁵. That does not matter. What does matter is that if it did not belong to Sultan Hussain, it must have belonged to Sultan Abdul Rahman. There were no gaps in the area: it could not have been *terra nullius*. For this reason among others, Singapore’s recourse to this so-called “donation” can accordingly be completely set aside.

Mr. President, when would you like me to break?

The VICE-PRESIDENT, Acting President: Maybe this is a good time for a break.

Sir Elihu LAUTERPACHT: If that is convenient for you I will be glad to break there.

The VICE-PRESIDENT, Acting President: Very well. We will break now for 10 minutes.

The Court adjourned from 11.20 to 11.30 a.m.

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

Sir Elihu LAUTERPACHT:

B. Documentary confirmation that Pulau Batu Puteh was not *terra nullius* in 1847

17. Mr. President, distinguished Members of the Court, it is unnecessary at this stage for me to go further into the early history of Johor. The fact that Pulau Batu Puteh was not regarded as *terra nullius* in 1847 but belonged to Johor is conclusively confirmed by reference to eight significant items of the period from 1824 to 1851. As against them, there are no documents of that time, or indeed of any time, that refer to or treat Pulau Batu Puteh as *terra nullius*. It is significant that Singapore has sought to gloss over them. The fact that I mention these items specifically

⁵⁵CR 2007/20, p. 50.

however does not diminish the value or importance of the other indications to the same effect to which Professor Crawford will presently refer.

18. Mr. Pellet, whose sharpness of comment in these matters is, I hope, less abrasive in the French original than it appears in its English translation, has taken it upon himself to criticize to the point of seeming extinction the documents adduced by Malaysia in support of the view that Pulau Batu Puteh was not *terra nullius* in 1847. He chooses first those that he sees, perhaps, as the least probative⁵⁶. Though I do not accept his criticism I will not take time now to cross swords with him over them. There are more important fish to fry. Rather, let us look at the later items which tell a rather different story than the one that Mr. Pellet has presented.

19. The first item that should engage our attention is the Crawford letter of 10 January 1824. This is afforded a somewhat superficial treatment by Mr. Pellet, and understandably so. It does not suit his book at all.

1. The first item: Crawford letter, 10 January 1824⁵⁷

20. Crawford was the British Resident in Singapore and in a report to the Government of India he stated that the principality of Johor:

“extends on the Continent from Malacca to the extremity of the Peninsula on both Coasts. It had several Settlements on the island of Sumatra, and embraced all the islands in the Mouth of the Straits of Malacca *with all those in the China Seas as far as the Natunas in the latitude of 4° North and longitude 109° East.*” (Emphasis added.)

It is particularly relevant to note the next sentence in that report. It bears on the Singapore contention that uninhabited places in the region were *terra nullius*:

“These Countries are all sterile being inhabited here and there on the Coast only, and Commonly by a race of Pirates or Fishermen whose condition in society, ignorant of agriculture and without attachment to the soil, rises very little beyond the savage state. Neither is there any good evidence of there ever having existed a better or more improved order of society.”⁵⁸

But Mr. Crawford did not suggest that because these areas were “sterile” or virtually uninhabited they were, therefore, *terra nullius* and open to occupation by Britain.

⁵⁶CR 2007/21, p. 13.

⁵⁷CMS, Vol. 2, Ann. 2, para. 20. See judges' folder, tab 23.

⁵⁸See judges' folder, tab 23.

21. As just mentioned, Crawford described the territories of Johor as embracing all the islands in the China Sea “as far as the Natunas”. You will see the graphic also at tab 24. As you can see from the map, the Natunas are a considerable distance off the coast of mainland Johor, 254 nautical miles. It is hardly likely that these islands would be considered part of Johor but that Pulau Batu Puteh, which is much closer to the mainland, would not be.

22. Singapore rejects what Crawford says because, so Singapore argues, it relates to several thousand square miles of sea. The comment hardly seems to be to the point. What matters are the islands not the area of the seas in which they are located. But Mr. Pellet takes the criticism of this document no further, preferring to turn his attention in similar terms to the Presgrave report of 1828. I will come to that in a moment.

23. But before that there are three intervening items over which Mr. Pellet chooses to pass.

24. The first is the second item in my list of eight.

2. The second item: Treaty of Cession of Singapore, 1824⁵⁹

25. And this is the Treaty of Cession of 1824 itself which we usually call the Crawford Treaty, which was concluded between the East India Company and the Sultan and Temenggong of Johor. In Article II the Sultan and Temenggong “hereby cede in full sovereignty and property” to the East India Company “the island of Singapore, situated in the Straits of Malacca, together with the adjacent seas, straits and islets, to the extent of 10 geographical miles from the coast of the said main island of Singapore”⁶⁰. Now this clearly constitutes British acknowledgment of the sovereignty of Johor over the islands that were ceded by Johor; it implies also that Johor was sovereign over islets beyond ten miles from the coast of Singapore that were adjacent to and of the same character as the islands that were ceded — the limit of 10 miles was chosen for defence reasons. If those islands and islets were subject to the sovereignty of Johor, it would not be logical to treat Pulau Batu Puteh differently.

26. And just before I go to the third item of that period, I should jump forward for a moment to the Territorial Waters Agreement of 1927⁶¹. I have just mentioned this as having been signed by

⁵⁹MM, Vol. 2, Ann. 6.

⁶⁰See judges’ folder, tab 25.

⁶¹MM, Vol. 2, Ann. 12.

Sir Hugh Clifford. The Preamble of that Treaty of 1927 refers to the 1824 Treaty as containing the cession by Johor of “the island of Singapore, together with certain adjacent seas, straits and islets”. A little further on the Preamble states that His Britannic Majesty “is desirous that certain of the said . . . islets shall be retroceded and shall *again form part* of the State and Territory of Johor” (emphasis added). Thus we have here confirmation of the implication that I mentioned a few moments ago that the cession of islands and islets in the 1824 Treaty shows that they must have been part of Johor territory then. The confirmation takes the form of a retrocession — not a cession — a *retrocession*. What had once belonged to Johor was being given back to it in 1927 — thus acknowledging that the islets involved had originally belonged to Johor. They had not been *terra nullius* in 1824. And if they were not *terra nullius* then, why would Pulau Batu Puteh, situated in the same strait, have been different? Singapore claims that this was because Pulau Batu Puteh was uninhabited, but this cannot be so, because even some of the islands ceded in 1824 and retroceded in 1927 were also uninhabited. This appears from Crawford’s account in the *Singapore Chronicle* entitled “Journey of a voyage around the island of Singapore”⁶². The simple and compelling explanation is that Pulau Batu Puteh was no different from the other islands and islets in the Singapore Straits which were all considered as belonging to Johor.

27. So I pass now to the third and fourth items on my list. They find no place in Singapore’s analysis.

3. The third item: Crawford letter, 3 August 1824⁶³

28. The third item is Crawford’s letter of 3 August 1824. It is the explanatory report, written by Crawford on the day following the conclusion of the Treaty of Cession in 1824. That’s in graphic 7. In it, Crawford made the important point that the Sultan and Temenggong not only exercised the powers of government in the area

“but being like other Asiatic Sovereigns, *de facto* the real proprietor of the soil — a principle the more satisfactorily established in the present instance, since the whole ceded territory when it came into our occupation was unreclaimed — in a state of nature and strictly destitute of permanent inhabitants”.

⁶²See Crawford, “Journal of a Voyage round the island of Singapore”, *Singapore Chronicle*, November 1825, reprinted in J. H. Moor, *Notices of the Indian Archipelago*. See judge’s folder, tab 26.

⁶³CMS, Vol. 2, Ann. 3. See judges’ folder, tab 27.

This meant that the presence of population and reclamation were not the factors controlling title to territory. This entirely contradicts the Singapore thesis that Johor was sovereign only over territory actually inhabited by Johor people.

29. The letter also contains the following important sentence: “[T]he cession made is not confined to the main island of Singapore alone, but extends to the *Seas, Straits* and Islets (the latter probably not less than 50 in number) within 10 geographical miles of its coasts.”⁶⁴ This shows clearly that Crawford regarded even islets, some of them evidently very small, as part of the territory of Johor, and capable of being acquired by cession.

4. The fourth item: Crawford letter, 1 October 1824⁶⁵

30. So we come now to my fourth item, the Crawford letter of 1 October 1824, at tab 28. The fourth document is the letter from Crawford to the Secretary of the Government of India on 1 October 1824 in which he observes that the exclusion of the British Government from

“entering into political relations with the chiefs of *all the islands* lying south of the Straits of Singapore and between the Peninsula and Sumatra may prove a matter of some inconvenience to us, as it in fact virtually amounts to a dismemberment of the principality of Johor and must thus be productive of some embarrassment and confusion” (emphasis added).

This observation implies two things. The first, arising from the mention of the virtual dismemberment of the principality of Johor, is that prior to 1824 that principality extended south and north of the Straits of Singapore. The second implication is that Crawford considered that all the islands not lying south of the Singapore Strait belonged to the Sultan of Johor⁶⁶.

5. The fifth item: Presgrave report, 5 December 1828⁶⁷

31. So we go now to the fifth item, the Presgrave report of December 1828. A report from Edward Presgrave, Registrar of Imports and Exports, to Mr. Murchison, the Resident Councillor, on the extent of Johor territory. This was summarily and unjustifiably dismissed by Mr. Pellet.

⁶⁴CMS, Ann. 2, p. 28.

⁶⁵MM, Vol. 3, Ann. 24. See judges’ folder, tab 28.

⁶⁶MM, Vol. 3, Ann. 24.

⁶⁷MM, Vol. 3, Ann. 27. See judges’ folder, tab 29.

But nonetheless let us look at it. The letter was later submitted to the courts in India in a piracy case where the extent of Johor was in issue. In it he gave a description of

“the limits of what is usually termed the Johor Empire. It appears to embrace the Southern part of the Malayan Peninsula till joined by the Malacca territory, and principality of Pahang, a small portion of the eastern coast of Sumatra, laying between the Jambi and Siak Countries, *all the Islands lying between* the Karimons to the South, Pulau Aor to the East, at the entrance of the China Sea and Linggin and the numerous Islands adjacent thereto, extending nearly to the Islands of Banka and Billiton.”⁶⁸ (Emphasis added.)

Here they are on the map⁶⁹. Pulau Batu Puteh is clearly amongst the islands referred to because you will see that Pulau Aor is quite a way up the east side of the Johor coast. So, really he is saying that everything from there downwards and round is Johor territory. Pulau Batu Puteh is clearly amongst these islands.

6. The sixth item: Dutch map, 1842⁷⁰

32. And now we go to the sixth item, the Dutch map of 1842, a map of the Dutch East Indies prepared in 1842 by order of the King of the Netherlands⁷¹. This showed the Dutch view of the division of the spheres of influence in the region. The line there clearly shows the island of Pedra Branca as falling north of the Dutch sphere of influence and thus as being within the British sphere of influence. Professor Schrijver will illustrate this during his speech. This does not mean that it was subject to British sovereignty, but it did indicate that it was not regarded as *terra nullius*.

7. The seventh item: *Singapore Free Press* article, 25 May 1843⁷²

33. And so to the seventh item, the *Singapore Free Press* article of May 1843. This article refers to the activity of pirates in the area. The newspaper said:

“The places and islands near which these piracies are most frequently committed and where the pirates go for shelter and concealment, such as Pulo Tinghie, Batu Puteh, Point Romania etc., are all within the territories of our well-beloved ally and pensionary, the Sultan of Johor.”⁷³

⁶⁸See judges' folder, tab 29.

⁶⁹MM, Vol. 3, Ann. 27, para. 3.

⁷⁰Malaysia's Map Atlas, map 7.

⁷¹CMM, Vol. I, Ann. 1, p. 277.

⁷²MM, Vol. 3, Ann. 40. See judges' folder, tab 31.

⁷³See judges' folder, tab 31.

8. The eighth item: Butterworth correspondence, 1844

34. And now to the eighth item, the Butterworth correspondence of 1844. This is correspondence that passed between Governor Butterworth, who was the Governor of Prince of Wales Island, Singapore and Malacca, in November 1844. We have two letters, dated 25 November 1844, from the Sultan of Johor and from the Temenggong to Governor Butterworth, both relating to a proposal to build a lighthouse at the entrance to the Singapore Strait somewhere near the southern tip of Johor. The letter from the Sultan does not provide much guidance, since it merely says that he is pleased that a lighthouse is to be constructed⁷⁴. The letter from the Temenggong refers specifically to the desire of the Company to erect a lighthouse near Point Romania⁷⁵. The Temenggong stated that he had no objection to such a measure and that — this is the important quote — “the company are at full liberty to put up a Light House there, *or any spot deemed eligible*”⁷⁶ (emphasis added). The question is whether the permission so granted included Pulau Batu Puteh as being “near Point Romania or any spot deemed eligible”.

35. There can be very little doubt that it did. Unfortunately, we do not have the letters of request from Governor Butterworth to the Temenggong and the Sultan. Like many other documents in this case, these must originally have been in the Singapore archive. Malaysia has requested their production by Singapore, but Singapore has given no reply. In the circumstances we are obliged to consider two possible inferences that may be drawn from the available correspondence read as a whole. And I leave entirely aside any suggestion of a third inference, namely that Singapore has deliberately concealed these letters. The first inference is that the Governor’s request referred specifically to Pulau Batu Puteh and/or its surroundings. If it did then, of course, it would be a very clear acknowledgment by the Governor that he regarded Pulau Batu Puteh as an island belonging to Johor. The other possibility is that it did not refer expressly to Pulau Batu Puteh but simply used such words as “near Point Romania or any spot deemed eligible”. If these words alone were used, it seems, having regard to the prominent place that Pulau Batu Puteh occupied in earlier correspondence, that in all probability Pulau Batu Puteh was included within the Governor’s request and was so understood by the Temenggong. That Britain

⁷⁴MM, Vol. 3, Ann. 44. See judges’ folder, tab 32.

⁷⁵MM, Vol. 3, Ann. 45. See judges’ folder, tab 33.

⁷⁶*Ibid.*

considered that the letters of permission extended to Pulau Batu Puteh is shown by its subsequent conduct. The letters were annexed to all relevant correspondence between Singapore, Bengal, India and London concerning the proposed lighthouse. Governor Butterworth attached the letters of consent to a letter to London of 26 August 1846 saying that “the whole of the details for the case of Light Houses as set forth in my earlier letter under the date of 28 November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new position” of Pedra Branca⁷⁷. In other words, the letters of permission were taken as equally applicable to Pulau Batu Puteh. And no suggestion was made — bear this in mind, please, all the time — no suggestion made anywhere here that Pulau Batu Puteh was being approached on the basis that it was *terra nullius* and could be occupied by anybody.

36. The question of whether the manuscript word used in the copy of the Governor’s letter was “case” or “care” will be addressed presently by Professor Kohen. Malaysia reads the word as being “case”. But whichever is the correct reading, what matters is the Governor’s statement of the applicability of the details set forth in his earlier letter of 28 November 1844⁷⁸.

37. It is unnecessary to pursue further the question of Johor’s title to Pulau Batu Puteh prior to 1847. The answer is clear. There can be no reasonable doubt that in 1847 Britain interpreted Johor’s consent as extending to Pulau Batu Puteh and took it for granted that Pulau Batu Puteh belonged to Johor. Britain could not then have acquired it as *terra nullius*.

I do venture to emphasize that the Court in its consideration of this matter cannot leave aside these documents that I have just mentioned, they are absolutely integral to the validity of any reasoning on this subject. But let me proceed.

III. Supposing (*quod non*) that Pulau Batu Puteh was *terra nullius* in 1847; did Britain thereafter acquire title to it?

38. Let me just suppose for a few minutes what is absolutely not the case, that Pulau Batu Puteh actually was *terra nullius* in 1847, when Singapore says that Britain began to build a lighthouse there. What did Britain then do that would have been effective to establish its title there?

⁷⁷MM, Vol. 3, Ann. 51.

⁷⁸MM, Vol. 3, Ann. 46.

39. Singapore contends that Britain took “lawful possession” of the island in 1847 and that between 1847 and 1851 Britain perfected title to the island. Is this really a sustainable proposition?

40. Singapore itself refers to the literature that requires that in order to establish a title to Pulau Batu Puteh between 1847 and 1851 by so-called “lawful possession”, it must show that Britain had an *intention* thus to acquire sovereignty by occupation⁷⁹.

A. Singapore has not shown an intention on the part of Britain to acquire title to Pulau Batu Puteh

41. In truth, Britain’s conduct in the years following 1847 did not reveal the intention necessary to convert the fact of physical presence into a perfected title. As hardly needs saying, the acquisition of title to *terra nullius* requires not only the fact of physical presence but also evidence that the occupier intended to vest title in itself. Mere presence, unless accompanied by evidence of the appropriate intention, does not establish title.

42. There was no official or formal declaration by the British authorities of the Government’s intention to vest in itself title to or sovereignty over the island.

B. British practice when asserting title to territory

43. It is instructive to look for a moment at the practice of the British authorities when acquiring title to *terra nullius*, or annexing territory ceded to Britain. They invariably did so by some formal act. This practice has been set out in detail in the Malaysian Counter-Memorial, paragraphs 73 to 92, to which it is only necessary to add a reference to a work by Keller, Lissitzyn and Mann on *Creation of Rights of Sovereignty through Symbolic Acts [1400-1800]* (1967). The relevant chapter in that book is “English Practice” (Chap. V, p. 98):

“English practice in taking formal possession, therefore, was in general characterised by a considerable degree of formality. The usual procedure, it will have been noted, consisted in the erection of some sign of possession, usually in the form of a cross adorned with the royal arms and a plaque inscribed with some appropriate legend, and in the recitation with great solemnity of a verbal formula proclaiming the English sovereign’s title to the area concerned.”⁸⁰

44. This is clearly illustrated in the practice of the time by the action taken by Britain following the acquisition of Singapore itself. On 16 August 1825, Crawford reported that, in

⁷⁹MS, para. 5.109.

⁸⁰See judges’ folder, tab 34.

response to instructions, he had sailed round Singapore and had taken possession “with the necessary formalities of all the islands within 10 miles of the main island of Singapore”⁸¹. At each of these islands, Pulau Ubin, Rabbit and Coney Islands, he read a formal declaration and fired a 21-gun salute. Coney and Rabbit differed little in size from Pulau Batu Puteh. They were uninhabited, and at about the same distance from the northern shore of the Strait. One is bound to expect from Singapore some convincing explanation of why this formal practice should have been followed in relation to these small islands, but not, when it became necessary, in relation to Pulau Batu Puteh. And remember, they were actually building something on Pulau Batu Puteh, and if they had wanted to acquire title to it they would certainly have taken the steps necessary to establish that. No explanation has been forthcoming. One may suggest that this is because it never occurred to the British authorities to claim title to Pulau Batu Puteh. They did not need to do so because the construction of the light did not require sovereignty. So they simply did not do so. I shall revert to this matter in a later speech.

C. What did Britain do in the years 1847-1851?

45. So, what did Britain do in the years 1847 to 1851 when, according to Singapore, they were establishing their title there? I turn briefly to examine this. One looks in vain for evidence of any official, formal, direct, or even indirect, assertion of title. Bearing in mind that nothing happened in 1847, 1848 or 1849 that could be so regarded, the most obvious occasion on which some formal act could have occurred was the ceremonial laying of the foundation stone on 24 May 1850⁸². The Governor of Singapore was there, but the opportunity was not taken to declare Britain’s title. Examination of accounts of the ceremonies on that date, even as set out in the Singapore Memorial⁸³, does not reveal any trace of a specific and formal claim to title by Britain. In particular, the copper plaque, then set into stone, merely records that the foundation stone was laid by the Master of the Masonic “Lodge Zetland in the East”— not by the Governor— without any mention of adhesion to Singapore; and the reference to the Governor of the Straits Settlements says no more than that he was present at the ceremony. The episode is more

⁸¹RM, Vol. 2, Ann. 5.

⁸²See judges’ folder, tab 35.

⁸³MS, paras. 5.56-5.59.

consistent with the construction of a lighthouse that was to be administered by the British authorities than with any claim to sovereignty over the underlying rock.

46. Measured by the standards then applicable, it is clear that the ceremony of 24 May 1850 did not amount to the performance of a symbolic act of taking possession and was not seen as such by the participants. Singapore's Reply asserts⁸⁴ that there can be no doubt that the process of acquisition began — their words — *at least*, whatever at least may mean, in 1847. What does at least mean as opposed to at most or at latest? Anyway, the process of acquisition began at least in 1847, when “Thomson began operations which involved the assumption that the island was a *terra nullius*”. There is no evidence that he made such an assumption or that his conduct so assumed. In truth, however, as may be gathered from Thomson's own narrative, he did no more in 1847 than erect brick pillars on 1 November “in order to test the force of the waves”⁸⁵. Not until April 1850 did work actually begin on the rock⁸⁶ — unaccompanied by any formality. I mention those years because of course Singapore is saying that title was acquired by a series of steps in 1847, 1848, 1849, 1850 and 1851. Not till April 1850 did work actually begin on the rock, unaccompanied by any formality. There was nothing in that work that indicated an intention to acquire sovereignty over the rock. Singapore cannot point to any moment at which the British authorities took possession. Instead, it adopts a shotgun — or scattergun — approach, presenting in its pleadings at least three different dates at which possession was assumed. These are: first, *before 1847*, when Pulau Batu Puteh was chosen as the site of the lighthouse; secondly, *1847 itself*, when preparations for construction began; thirdly, *the period between 1847 and 1851*, culminating in the inspection of the lighthouse on 21 September 1851 once it was constructed⁸⁷. This must be a rare if not unique occasion in the history of territorial litigation that a taking of possession of an uninhabited rock is presented as a complex act lasting at least four years and without a single manifestation during that period of the intention to acquire sovereignty. Even the *Clipperton Island* case, also referred to by Mr. Brownlie in speaking of a series of acts, could not have contemplated vagueness

⁸⁴RS, para. 3.114.

⁸⁵See Thomson's account in MS, Vol. 4, Ann. 4, p. 491.

⁸⁶*Ibid.*, p. 509-510.

⁸⁷CMM, paras. 57-58.

of this degree. In any case, the mention of “a series of acts” in the *Clipperton* case was unsupported by any explanation and should be regarded at most as merely *obiter dictum*.

47. The fact is that the only activity of Britain on Pulau Batu Puteh was related to the lighthouse and it was followed on the grant of permission from the sovereign of Johor. The only intention that can be shown was to assume ownership of the lighthouse and that was expressed subsequent to 1851. The Indian Act of 1852⁸⁸ declared that the Horsburgh lighthouse — and I quote from the Act — “shall become the property of and absolutely vest in the East India Company”, not that Britain had, or would, become sovereign over it, as might have been expected in the Preamble to such an act. There is no contemporary documentation of any kind which implicitly or explicitly specifies that Pulau Batu Puteh was or had become British territory⁸⁹.

IV. Britain’s conduct subsequent to 1851 is irrelevant

48. In a later speech I will go in detail through those years, 1847 to 1851 again, but for the moment I can leave that aspect of the matter there. I come to Britain’s conduct subsequent to 1851 and declare that it is irrelevant. If Britain did not acquire title in the period 1847 to 1851 because Pulau Batu Puteh was then part of Johor, Britain’s subsequent conduct is not to the point at all. The reason is that the mere operation of the light would not by itself have established Britain’s title. Strictly speaking, it is unnecessary for Malaysia to respond at all to the presentation by Singapore of evidence allegedly supporting its contention that it has maintained continuous, peaceful and effective exercise of State authority over Pulau Batu Puteh in the period since 1851. It is not really necessary for us to deal with all this. Again, it is important to note that Singapore does not rest its case on prescription, for this approach would necessarily have involved an admission on the part of Singapore of prior Malaysian sovereignty over the rock. Prescription is not an element in this case.

49. Singapore repeatedly states that its conduct after 1851 merely *confirms and maintains* — that is their chosen phrase — a title already acquired by it in the period 1847 to 1851. So it hardly needs saying that unless by 1851 there really existed British title over Pulau Batu Puteh, there was nothing that could be maintained or confirmed. I well remember, Mr. President, that what I was

⁸⁸MM, Vol. 3, Ann. 84.

⁸⁹CMM, para. 68.

taught as a schoolboy — my arithmetic teacher said “Lauterpacht”, no, he did not actually say “Lauterpacht”, he said “lobster pot”, that being my nickname! “Lobster pot” he said “can you not understand that when zero is multiplied by any number whatsoever the result is always zero”: so that a title that is zero, that does not exist, cannot be confirmed or maintained by any amount of subsequent multiplication of State action. And that goes beyond what he said!

50. Nonetheless, Singapore lists repeatedly the items of conduct which it says were performed *à titre de souverain* in and on Pulau Batu Puteh. But overwhelmingly this is practice concerning the operation of the lighthouse, what you would expect. It has nothing whatsoever to do with sovereignty over the island. The cases and doctrinal writings clearly support the view that constructing and operating a lighthouse and other navigational aids are not acts in themselves performed *à titre de souverain*. *A fortiori* this is true when the lighthouse is built and operated with the consent of the territorial sovereign⁹⁰. Singapore itself says that “the basis of the title advanced by Singapore is not premised on the role of lighthouses as evidence of State activity”⁹¹. But for the most part — and entirely so in the period prior to 1980 — the conduct it relies on as evidence *à titre de souverain* is conduct undertaken by the operator of Horsburgh lighthouse. Such conduct undertaken in the running of a lighthouse cannot simply be raised to the level of conduct *à titre de souverain* — even if such conduct were relevant, which, as I have submitted, it cannot be.

51. Singapore invokes a number of authorities. But in none of the cases cited are the facts similar to what happened here, where the lighthouse was built by Britain with the permission of the local ruler. Nineteenth century writers, such as Heffter and Westlake, make a clear distinction between sovereignty, *imperium*, and ownership, *dominium*. This is reflected in the distinction between sovereignty and property made in Article 2 of the 1824 Crawford Treaty. Johor agreed to cede Singapore Island and the adjacent seas, straits, and islets to the extent of 10 geographical miles “in full sovereignty and property” to the East India Company. I particularly invite the Court’s attention to the report sent by Crawford to the Government of India on 3 August 1824, presented in the Singapore pleadings themselves⁹².

⁹⁰MM, para. 10.

⁹¹MS, para. 5.101; CMS, para. 6.105, 7.21 (“Singapore’s title is not based on the role of the lighthouse as an *effectivité per se*”).

⁹²CMS, Vol. 2, Ann. 3, p. 27.

“The 2nd, 3rd and 4th Articles of the Treaty convey to the Hon’ble East India Company as complete a cession of the *Sovereignty* and *property* of the island of Singapore and Places adjacent to it, as I could find words to express it in. In framing these conditions, I have viewed the Sultan as possessing the right of paramount dominion, and the Tumungung, as not only virtually exercising the powers of Government, but being like other Asiatic Sovereigns *de facto* the real proprietor of the soil — a principle the more satisfactorily established in the present instance, since the whole ceded territory when it came into our occupation was unreclaimed — in a state of nature and strictly destitute of permanent inhabitants.”⁹³

By contrast the 1852 Indian Act No. VI, the first piece of legislation to deal with Horsburgh lighthouse and which Singapore claims was an *effectivité* confirming the title acquired by 1851, provided that the lighthouse “shall become the property of, and absolutely vest” in the East India Company — *become the property of*. Note the distinction: the 1824 Treaty *ceded sovereignty and property* in Singapore to the Company; the 1852 Indian Act vested *property in a lighthouse* in the East India Company. They are quite different things.

52. But having just spoken of the 1852 Indian Act, there is something even more important to be said about it. Singapore has invoked it as evidence that Britain exercised sovereignty over Pulau Batu Puteh in 1852. Otherwise, so Singapore argues, on what basis could Britain have thought that it was entitled to enact legislation applying to a lighthouse on the island? To legislate, so Singapore suggests, one must be sovereign over the area. But the answer turns out to be quite simple.

A. The 1852 Indian Act and the Foreign Jurisdiction Act

53. The 1852 Act cannot be read in isolation. As early as 1843 the British Parliament had enacted the first of a series of Foreign Jurisdiction Acts⁹⁴. This was — and I am quoting from the preamble — “to remove doubts as to the exercise of Power and Jurisdiction by Her Majesty within diverse Countries and Places out of Her Majesty’s Dominions, and to render the same more effectual”. The 1843 Act provided that it

“shall be lawful for Her Majesty to hold, exercise, and enjoy any Power or Jurisdiction which Her Majesty now hath or may at any Time hereafter have within any Country or Place out of Her Majesty’s Dominions, in the same and as ample a manner as if Her Majesty had acquired such Power or Jurisdiction by the Cession or Conquest of Territory”.

⁹³See judges’ folder, tab 36.

⁹⁴See judges’ folder, tab 37.

In effect, the Act empowered Her Majesty to legislate for places that were *not* British territory without such conduct reflecting or amounting to a claim to sovereignty over those places. It does not mean that such places became British territory. Britain exercised jurisdiction for decades throughout many regions, principally now known as the Gulf, without such conduct being invoked or regarded as a basis of a claim for sovereign title. Thus, the correct way to view the 1852 Act now invoked by Singapore as evidence of British sovereign conduct in relation to Pulau Batu Puteh is to see it as no more than an exercise of foreign jurisdiction and not as a reflection of a claim to sovereignty. It is only necessary to glance at W.E. Hall's magisterial work on the *Foreign Jurisdiction of the British Crown* to see how widespread was British conduct in foreign States, without such conduct involving any claim to sovereignty.

B. The operation of lighthouses is not a basis for a claim to sovereignty

54. Nor is it surprising that Britain should have felt able to legislate for the Pulau Batu Puteh lighthouse without this action constituting evidence of a claim to sovereignty over the island. As noted by this Court in the *Minquiers and Ecrehos* case, lighting and buoying since 1861 could not be considered sufficient evidence of an intention to act as sovereign. They were not seen as acts of such a character that they could be considered as involving a manifestation of State authority. Similarly, the *Eritrea/Yemen* Arbitral Award held that "the operation and maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty"⁹⁵.

55. Singapore relies on the Court's statement in *Qatar v. Bahrain* where it said that "[t]he construction of navigational aids . . . can be legally relevant in the case of very small islands" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Judgment, I.C.J. Reports 2001*, p. 100, para. 19). When read in context, this statement underscores the point that the construction of aids to navigation may be relevant in questions of sovereignty in cases where there is no other basis of title and the construction and administration of the aids evidence the intention of the State concerned to act *à titre de souverain*. But there is no indication of any intention on the part of this Court to set aside the earlier jurisprudence, as confirmed in the

⁹⁵*Eritrea/Yemen*, Arbitral Award, para. 328; MM, para. 173.

2002 *Indonesia/Malaysia Judgment (Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 685, para. 147)*⁹⁶. The key proposition of the case law — that the operation and maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty — is amply illustrated by State practice, to which we shall revert later. Now I need only mention the Straits Lights System and the Middle East Navigation System, to both of which I shall refer more fully in a later speech.

56. The accumulation of case law and practice is completely at odds with Singapore's proposition that the construction and maintenance of the Horsburgh lighthouse somehow in and of itself constituted a "taking of lawful possession" of Pulau Batu Puteh for the purpose of acquiring sovereignty. The jurisprudence is clear. Conduct in the administration of a lighthouse does not, without more, evidence sovereignty. Such conduct will only be relevant if it discloses an *animus occupandi*, not simply in respect of the lighthouse and its associated facilities but specifically in respect of the territory on which the lighthouse is located. Even an *animus occupandi* will not by itself be sufficient in circumstances in which title to the territory is already vested in another State and there is no evidence of an intent on the part of Johor to abandon its title. This is especially so when the only *animus* is a belated one on Singapore's part. As already stated, Britain, when building and operating the Horsburgh lighthouse, showed no intention at all of acquiring sovereignty over Pulau Batu Puteh. In light of this, plus the strong British practice in the nineteenth and twentieth centuries of building and administering lighthouses on its key trade routes on the territories of other States, the continued administration today by Singapore of a lighthouse which formed part of the Straits Lights System cannot be regarded as evidence of its sovereignty over the territory where it is located⁹⁷. Malaysia's position here is entirely in line with the Court's case law and that of arbitral tribunals.

57. Singapore also claims that it has carried out non-lighthouse *effectivités* in respect of the island. These activities can either be attributed to Singapore's role as the lighthouse administrator or are otherwise unconnected with sovereignty over the island. Singapore also argues that it can

⁹⁶MM, para. 175.

⁹⁷CMM, para. 176.

rely on *effectivités* after the critical date especially those going beyond the operation of the lighthouse. It almost goes without saying that it cannot⁹⁸. Malaysia has shown that there was no performance before 1980 of acts *à titre de souverain*. Nor can post-1980 evidence be taken into consideration, as the learned Attorney-General has just emphasized.

C. The irrelevance of Johor’s so-called “competing activity”

58. Here is a point. Singapore has repeatedly invoked the fact that Malaysia “never carried out any competing activities on the island of its own”⁹⁹. What did Singapore expect Malaysia to do in the way of “competing activities” on the island? The fact needs to be borne in mind that Pulau Batu Puteh is a very small place. There is now shown on the screen a map of Pulau Batu Puteh taken from Thomson’s *Account*¹⁰⁰. You will observe that it has been surrounded by a rectangle. That rectangle, I must tell you, has the dimensions of a standard soccer pitch drawn to the same scale. The island of Pulau Batu Puteh can thus be seen as filling less than half the area of a football field. And all of that area — all of that island — was increasingly taken up by the lighthouse and its appurtenances. Where was Johor to engage in “competing activities on the island”? And what “competing activities” could there have been on the island? Was it to build a “competing” lighthouse? The truth is, the point about the absence of competing activities by Johor is, if I may respectfully say so, meaningless verbiage. Johor had licensed Britain to construct and operate a lighthouse. After that there was nothing for Johor to do except let Britain get on with the operation of the lighthouse and any related activities as a prudent and careful lighthouse operator would adopt. There was no scope for any competitive Johor activity.

59. The immense amount of time and effort that Singapore has put into its recital of the acts that it has performed on Pulau Batu Puteh since 1851 really amounts to a subtle attempt to change the whole balance of the case. Singapore has asserted that it had gained title by the end of 1851. It has advanced its subsequent activity as no more than a “confirmation and maintenance” of the title thus acquired. Moreover, it has acknowledged that it does not claim title on the basis of prescription. This is important, and understandable. Prescription can only form a basis for title if

⁹⁸CMM, paras. 9-10.

⁹⁹E.g., CR 2007/22, p. 12, para. 2 (Bundy).

¹⁰⁰See judges’ folder, tab 39.

someone else had a previous title. Here that would have had to be Johor, and Singapore cannot accept that. So, prescription is excluded. Yet, one is left with the feeling that Singapore may be trying to induce the Court to accept a kind of prescriptive title without actual recourse to that concept — some kind of “pseudo” prescriptive conduct. If that is the case, then Malaysia submits that the Court must firmly resist it. Either Britain acquired title by 1851 or it did not. If it did, Singapore is right. If it did not, Singapore loses, and loses without more. It is as simple as that.

60. I am reminded at this point, Mr. President, of the very pertinent observation made by you, yourself, in the *Nigeria v. Cameroon* case, when you introduced into your separate opinion an indication that the Court had not needed to dispose at such length of this issue of sovereignty. You said, “this was all the Court needed to do, and all it should have done, to dispose satisfactorily of the issue of territorial sovereignty” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment, I.C.J. Reports 2002*, p. 493, para. 1.) It was not necessary to revert to the other questions examined at length by the Court.

61. I venture to suggest that this is another case for the adoption of the same approach of isolating the controlling issue and limiting the judgment accordingly. All that is necessary to decide the issue of sovereignty is to assess the validity of the Singapore claim that Pulau Batu Puteh was *terra nullius* in 1847. Nothing after that date is relevant.

D. The September 1953 letter is irrelevant

62. There is, however, one point in the Singapore case which calls for brief notice. This is the Singapore argument based on the letter of September 1953 from the Acting State Secretary of Johor to the Colonial Secretary of Singapore¹⁰¹. In it, Johor replied to a Singapore question regarding the status of Pulau Batu Puteh. It said that Johor “does not claim ownership” of the island. Singapore argues that Malaysia cannot now claim Pulau Batu Puteh “given her predecessor’s formal disclaimer”¹⁰². Singapore has made much of this.

63. It hardly needs saying that for the British colonial authorities in Singapore to ask “for information” about the rock and to ask Johor “to clarify” its status is hardly conduct to be expected

¹⁰¹MM, Vol. 3, Ann. 69.

¹⁰²RS, para. 7.19.

of a State whose successor now asserts with such confidence a sovereignty over the subject of the enquiry going back 100 years previously. Nor is the Johor reply couched in terms which indicate that it does not claim *sovereignty* over the rock. All it says is that Johor does not claim “ownership” over the rock. I have already emphasized the distinction between “ownership” and “sovereignty”. “Ownership” is primarily a private law concept; “sovereignty” is, of course, a concept of international law. When the Acting Secretary of State of Johor wrote that Johor “did not claim ownership” of the island, he was using “ownership” in its private law sense. In any case, he could not have meant “sovereignty” since he, in his position, lacked the capacity to dispose of Johor’s territory.

64. Whatever the Acting State Secretary may have meant, the fact remains that Johor did not become bound by his statement in the manner asserted by Singapore. There is a very pertinent passage in the leading American treatise on international law by the distinguished Professor Charles Cheney Hyde. Under the heading “Official and other Geographical Statements” he has this to say — I omit his detailed references, but they appear in the photocopied statement which appears at tab 38 of your folder:

“Official geographical statements issued in behalf of a State may, like maps published under its auspices, establish authoritatively what it deems to be the limits of its domain . . . [That will fall sweetly upon Singapore’s ears.] Still again, officials in high office may through governmental channels or otherwise, announce what they understand to be the territorial limits of their country. The announcements may be registered in reports or instructions, or historical or geographical writings proclaiming to the world [*to the world*] the understandings of the authors. [Then comes this important sentence.] *Such utterances do not prevent the State in whose behalf they are made from contradicting them by sufficient evidence.*”¹⁰³ (Emphasis added.)

65. That is exactly the case here. If, by “ownership” of the rock, the Acting State Secretary meant “sovereignty” — which there is no evidence that he did — then that statement is certainly contradicted by sufficient evidence. As has already been mentioned by the Co-Agent of Malaysia, Ambassador Ariffin, and is supported by much else in this case, there is sufficient — indeed, more than sufficient — evidence supporting Johor’s title to Pulau Batu Puteh.

66. As for the Singapore contention that it “relied” on the Johor statement, developed in the Reply of Singapore, paragraph 7.17, this cannot be seriously supported. Reliance is, of course,

¹⁰³Hyde, *International Law*, Vol. I, 2nd rev. ed. (1945), pp. 497-498. See judges’ folder, tab 38.

necessary if an estoppel is to be maintained. As Singapore itself admits, the items of “reliance” listed there do not actually reflect a change of position by Singapore, induced by the Johor response. They were, with minor exceptions, all items related to the operation of the lighthouse.

67. In short, the 1953 Johor letter is not an item which can be considered as a factor supportive of Singapore’s argument that it had completed the acquisition of title to Pulau Batu Puteh by 1851. Rather the reverse. One is bound to ask why 100 years later, Singapore is raising, in terms of seemingly genuine doubt, the question of title to Pulau Batu Puteh.

V. Middle Rocks and South Ledge

68. I come now to the final point. A word still remains to be said about Singapore’s expansion of its claim to cover Middle Rocks and South Ledge. This matter will be dealt with in due course by Professor Schrijver. These features are manifestly distinct from Pulau Batu Puteh. They are not geologically connected to the island. Middle Rocks are separated from the island by a channel six-tenths of a mile wide, and South Ledge is 2.1 miles from Pulau Batu Puteh. Singapore has not identified any conduct on its part that can amount to a claim to these features prior to the negotiations between the two sides which took place in 1993.

69. That is not to say that these features are *terra nullius*. Far from it. They are subject to the sovereignty of Johor, not as dependencies of Pulau Batu Puteh, but because they have always been amongst the islands, islets and features in the northern part of the Strait over which Johor has possessed sovereignty.

VI. Summary

70. Mr. President, I now approach the end of this opening review of Malaysia’s case. Permit me to close with a brief summary of the position.

71. Every stage, phase or element in Singapore’s claim to Pulau Batu Puteh is ill founded:
— *First*, Malaysia has shown that prior to 1847 Pulau Batu Puteh was part of the territories of the Sultan of Johor. Singapore has been unable to show that Pulau Batu Puteh was *terra nullius*.
— *Second*, Britain’s conduct in the period 1847-1851, on which Singapore relies to found the establishment of title during that period, cannot be regarded as effective. Singapore concedes that it must show an intention for Britain to have acquired title in that period. But there is no

evidence of British conduct that can be interpreted as a manifestation of intention to acquire sovereignty in those four years.

- *Third*, events after 1851 are not relevant to the question of title in this case. Singapore's contention that it was maintaining and confirming its pre-established title is unsustainable. One cannot confirm and maintain a title that does not exist. One might call that the "lobster pot syndrome". Nor is the operation of a lighthouse with the permission of the local sovereign a basis on which the operator can found its own claim to sovereignty.
- *Fourthly*, it is absurd to invoke an absence of competing activity on the part of Johor. There was no room for any competing activity.
- *Fifthly*, Singapore's reliance upon the letter of September 1953 is ineffectual. How extraordinary it is that a State now claiming title to an island should, more than a century after it asserts that the claimed title had been perfected, evince such doubt about its position that it is obliged to ask the other State concerned what the legal position is!
- *Finally*, there is no substance in Singapore's claim to Middle Rocks and South Ledge. Like Pulau Batu Puteh itself, they are amongst the features in the northern part of the Singapore Straits that have always belonged to Johor. Moreover, Singapore can invoke no conduct on its part in relation to these islands.

72. At this point I would otherwise have ended. But there is one aspect of the Singapore arguments in relation particularly to the 1824 Treaty that cannot be passed over in silence and with which I would wish to conclude. The fact that I leave it to the end does not mean that it is an afterthought but simply that it is one that I wish to leave with you as one of significant importance. If all that Mr. Pellet says about the lack of evidence of Johor title to the islands south of the mainland is correct, then what title did the Sultan of Johor have to the island of Singapore itself? What title did he have to cede it to Britain? Could he point to any title deed vesting it in himself? Was it not an island virtually uninhabited by people of Johor? The learned counsel for Singapore has not merely shot Singapore in the foot, he has amputated both its legs! If the Sultan had no title to Pulau Batu Puteh in 1824, for the same reasons he could not have had a title to the island of Singapore. And if he had no title to give, there was no title for Britain to accept. As counsel for Singapore have so often reminded the Court, *nemo dat quod non habet*. The ramifications of this

possibility are too shocking almost to contemplate. Is the State that now appears opposite Malaysia in this Court one whose territory was acquired by a cession of land that did not belong to the granter? The Court will no doubt wish to hear how Singapore gets round this question, without at the same time having to acknowledge that, by the same token, the territories of Johor must also have included Pulau Batu Puteh.

73. With this question, Mr. President, and distinguished Members of the Court, lingering in our minds, I reach now the end of this opening summary of Malaysia's case in reply to Singapore. I thank you, Mr. President, and the Court for your patient attention and respectfully invite you to call on Professor Crawford to embark on the first of the more detailed speeches in Malaysia's reply. Thank you.

The VICE-PRESIDENT, Acting President: Thank you, Sir Elihu, for your statement. I now call on Professor Crawford to take the floor.

Mr. CRAWFORD: Mr. President, Members of the Court, it is an honour to appear before you again.

THE SULTANATE OF JOHOR AND ITS ORIGINAL TITLE TO (PULAU BATU PUTEH (PBP) (PART 1)

Introduction

1. In this presentation I will show that the Sultanate of Johor had original title to PBP, as I will call it, in the period prior to the construction of the lighthouse. In doing so I will respond to the presentations last week by Mr. Chan and Mr. Pellet. Mr. President, this speech, like Gaul under the Romans and the Sultanate of Johor after the 1824 Treaty, is in two parts. I will try to break it at an appropriate moment.

2. The Court will have observed a considerable difference between the approaches of Mr. Chan and Mr. Pellet. Mr. Chan presented the theory of the disappearing Sultanate. Old Johor vanished as an entity towards the end of the eighteenth century and new Johor did not come to legal life for more than 60 years, if not even longer. During that period there may have been ties of personal allegiance but the subjects of the Sultan and Temenggong were in a sort of legal diaspora, a no-man's-land writ large — all hole and no cheese, you might say. Mr. Pellet was less

ambitious — uncharacteristically. He sought not to disqualify the whole of Johor as *terra nullius* but just the bits of it that Singapore now wants — cheese maybe, but at least one significant hole, conveniently located at the eastern end of the Straits. Mr. Pellet relied on the burden of proof and attacked particular documents adduced by Malaysia in support of its claim that PBP was not *terra nullius* but formed part of Johor. He was, in his customary manner, fiercely forensic. So much so that I doubt Singapore’s own claim — because in these proceedings *both* Parties have to prove the propositions on which their case rests — would survive his examination. After all, Mr. Brownlie admitted that it is a matter of “inference” that the British Crown treated PBP as *terra nullius* in 1847¹⁰⁴, and further that the Singapore case of “lawful taking of possession” depends on PBP having been *terra nullius* in 1846¹⁰⁵. He accepted that. Thus the *whole* of Singapore’s case, as it has been pleaded, depends on an inference. For Mr. Pellet, no Malaysian inference passes through the eye of his forensic needle — but Singapore’s inferences are apparently OK.

3. What is the relationship between the Chan and the Pellet theories of Singapore’s case? The Chan theory is the more fundamental — existential, indeed, for Johor and, as Sir Elihu has just implied, for Singapore as well. But you can only evaluate the evidence discussed by Mr. Pellet when you understand what happened to Johor in the first half of the nineteenth century, and whatever its demerits as history — let alone law — Mr. Chan’s approach has the great merit of addressing our argument on this point. If Mr. Chan is right, then Malaysia is wrong, since the Sultanate of Johor did not exist at relevant times and thus had no territory, or if it did somehow exist on the mainland at least it had no islands. But if Mr. Chan is wrong, then Mr. Pellet is wrong too. Today, I will show that Mr. Chan is wrong and that the Sultanate did not disappear. Tomorrow, I will demonstrate the corollary proposition, with your permission, Mr. President — that Mr. Pellet is wrong too and that the three features were part of Johor.

The Chan theory: radical discontinuity comes to Johor

4. Mr. President, Members of the Court, expressed through the words of Mr. Chan last week the discontinuity thesis has the following three elements:

¹⁰⁴CR 2007/21, p. 35, para. 5 (Brownlie).

¹⁰⁵CR 2007/21, p. 43, para. 44 (Brownlie). (“The term ‘lawful possession’ is synonymous with the effective occupation of *terra nullius* . . .”).

First, the Sultanate of Johor — the entity that is now the Malaysian State of Johor — “dates from the mid-nineteenth century”¹⁰⁶, specifically from 1855 when Temenggong Daing Ibrahim was recognized as Sultan¹⁰⁷, in replacement to the Sultan who went off to Kassang, I should say. Malay sovereignty was “based on the allegiance of subjects and not on the control of land”¹⁰⁸. Thus it was virtually non-territorial: that is the second proposition. And the third proposition, it was “only in the late nineteenth century” that the concept of territorial sovereignty became apposite for the Malay States, including Johor¹⁰⁹.

5. These three propositions can be contradicted on three counts: first, by the expert opinions given by Professor Houben and Professor Andaya; secondly, by the documentary and historical evidence, and thirdly by the conduct of the parties, notably the Netherlands and Great Britain. Mr. Chan’s account flies in the face of all three.

(a) *The expert evidence*

6. Let me take first the expert evidence. There can be no doubting the expertise of Professors Houben and Andaya as historians of the region. Singapore presented no equivalent evidence of its own. Instead, and remarkably, Mr. Pellet complained that Malaysia did not ask them to express their opinion on the ultimate legal issue for the Court — who had legal title to these three features in 1847¹¹⁰? Where, it may be asked, are the experts testifying on that question on behalf of Singapore? For its part Malaysia did not ask these historians, Professors Houben and Andaya, to second-guess your legal decision. Rather it asked them to give you guidance on the historical basis for assessing claims to radical discontinuity — as made by Singapore in its written pleadings and as made by Mr. Chan last week.

7. For his part, Professor Andaya states that “shifting political fortunes and divisions within the royal household did not undermine Malay conceptions of continuity of such kingdoms”¹¹¹. The crucial factor was the ability of the ruler or his descendants to survive and re-establish a new royal

¹⁰⁶CR 2007/20, p. 37, para. 3 (Chan).

¹⁰⁷CR 2007/20, p. 51, para. 45 (Chan).

¹⁰⁸CR 2007/20, p. 39, para. 9 (Chan); see also CR 2007/20, p. 42, para 20.

¹⁰⁹CR 2007/20, p. 44, para. 23 (Chan).

¹¹⁰CR 2007/21, p. 21, para. 37 (Chan).

¹¹¹RM, App. I, para. B2.

centre anywhere in the area of lands and seas they claimed¹¹². He notes that such changes in the centre of the Sultanate were not a sign of weakness but in the circumstances of resilience and adaptability¹¹³.

8. Professor Houben explains that “the existence of multiple centres of authority within the state and shifts in the location of the centres cannot be portrayed in terms of structural weakness or repeated and prolonged decline”¹¹⁴.

9. Singapore draws unsustainable inferences from traditional concepts of Malay authority in an attempt to support its theory that PBP was *terra nullius*. It argues that Malay authority was based on allegiance rather than territory and because PBP was uninhabited, it was never part of the Sultanate of Johor.

10. Mr. President, Members of the Court, on analysis all sovereign authority depends on some combination of territory — people after all have to be somewhere — and allegiance — people need systems of authority and social structures. The personal allegiance of the inhabitants to the rulers of Johor did not preclude a sense of territory, which also included islands whose surrounding waters were used by them. Professor Ariffin has provided details of the Orang Laut’s activities and allegiance to Johor in what was as much a maritime as a land-based kingdom. This is supported by a number of statements by British representatives.

— Crawford as Envoy of the Governor General of India to Siam and Cochin-China, who said of the Orang Laut “[t]hey are subjects of the King of Johore . . .”¹¹⁵.

— Thomson who referred to them in a somewhat amusing phrase as a “half fishing half piratical sect” — at least they were versatile — and said “they frequently visit the rock . . .”¹¹⁶: he was referring to PBP, not to Peak Rock. They “frequently visit the rock”: they used it, as far as we can tell, all the time; they were good boatmen.

¹¹²RM, App. I, para. B2.

¹¹³RM, App. I, para. B5.

¹¹⁴RM, App. II, para. 15.

¹¹⁵John Crawford, *Journal of an Embassy from the Governor-General of India to the Courts of Siam and Cochin China; Exhibiting a View of the Actual State of Those Kingdoms* (London: Colburn, 1828; Historical Reprints, Kuala Lumpur: Oxford University Press, 1967), 42-43; RM, Vol. 2, Ann. 7 (emphasis added).

¹¹⁶MM, Ann. 58.

— The Rules for Light-Keepers, very wisely I might say, provided that the Orang Laut should be kept out of the house¹¹⁷. There was no suggestion they should be kept away from their normal avocation of fishing with occasional rests on the rock, as one can gather.

11. I will mention tomorrow some of the statements which indicate that for the nineteenth century the islands to which Johor's reach extended included islands far out in the China Sea. It is sufficient for the moment to say that none of the islands proximate to the coastline of Johor — whether within or beyond 3 miles, inhabited or uninhabited, ceased to be part of Johor in 1824, or ceased to be part of the domains of the people owing allegiance to the Sultan and Temenggong of Johor.

(b) *The documentary evidence*

12. I turn to the documentary evidence. I would stress that the Court does not need — and perhaps there will be a sense of relief in this — to decide about events in the seventeenth or eighteenth century as such. You do not even need to decide as a matter of Malay law the merits of the dynastic dispute that divided the two sons of the last as they were exclusively pan-Malay Sultan of Johor. I will not follow in detail Mr. Chan on his roller-coaster ride through the last several centuries¹¹⁸ — though unusually for a roller-coaster, Mr. Chan's ride had many more goings down than it had comings up. In fact for a roller coaster ride it seemed to be all the way down with minor hiccups. However, a few words are in order.

The ancient Kingdom of Johor

13. After the fall of Malacca to the Portuguese in 1511, the ruler re-established the centre of his kingdom at the mouth of the Johor River, that is why it is called the Sultanate of Johor. The Sultanate developed as a maritime State, and as a regionally significant maritime force in and around the Straits of Singapore. Johor entered into numerous treaties with the Dutch through the VOC, starting in 1606, but it was never a mere vassal.

14. In 1655 the Dutch Governor in Malacca, having been informed of Chinese junks trading with Johor, proposed that the VOC send two boats to cruise to “the south of Singapore Strait under

¹¹⁷MM, para. 144.

¹¹⁸CR 2007/20, pp. 39-41, paras. 10-15 (Chan).

the Hook of Barbukit [Ambassador Farida showed you Barbukit Hill earlier, and at the Hook of Barbukit] and in the vicinity of Pedra Branca” in order to prevent Chinese traders from entering the Johor River but to divert them to Malacca or Batavia¹¹⁹. The Governor was clearly reluctant to act without express instructions, stating: “As we have seen often, unless the Johor ruler is greatly attracted to this idea, without express command we dare not put this into effect.”¹²⁰ I emphasize the words “as we have seen often”: this was not an isolated incident.

15. Singapore produces its own translation to counter Professor Andaya’s translation of the Dutch document of 1655 — the Court does not have to decide that either. Even if Singapore’s translation is accurate in indicating that the cruisers should await the command of Batavia rather than the Sultan, what is explicit here is the operative displeasure of the Johor ruler, directed to interference in his waters and in his trade. In fact the Dutch were careful not to antagonize the Johor ruler because of his control over the Orang Laut who could wreak havoc on the shipping when they were not fishing.

16. In 1662, a message from the Governor-General and Council of the VOC in Batavia suggests that the idea was pursued and that two junks were taken from the Strait and diverted to Malacca. The Governor-General described Johor’s reactions:

“The king of Johor has sent an envoy to the governor of Melaka to indicate his great displeasure regarding the seizure of the above-mentioned two junks, not without using offensive and threatening terms in the event that the same thing occurs in the future . . .”¹²¹

Johor’s “great displeasure” was at the infringement of its territorial rights. The waters and the islands concerned are the very waters and islands concerned in this case. Even in the seventeenth century the coast around Point Romania was linked to PBP.

17. After 1699 the principal centre of Johor shifted from its original peninsular location to the island of Riau, south of the Straits. It was another shift of capital, it did not affect the extent of the Sultanate as such. The extent of the Sultanate of Johor’s position in the region is demonstrated by the Andayas’ description that “by the late seventeenth century, Johor had become the

¹¹⁹MM, Ann. 22.

¹²⁰MM, Ann. 22.

¹²¹MM, Ann. 21.

pre-eminent power in the Straits”¹²². It is indisputable that its territory extended to the north and south of the Straits and to the east and the west.

The period from 1784

18. During the years after 1784, culminating in 1824, the Sultanate of Johor was reconfigured as a result of Dutch and British interference. Singapore claims that in 1784 Johor’s independence was lost to the Dutch: old Johor “disintegrated in the eighteenth century”¹²³. Professor Houben criticizes Singapore’s account as not reflecting the historical situation¹²⁴. After 1784, when the Dutch destroyed the Sultan’s capital at Riau, the Sultan went to Pahang, then to Trengganu and finally to Lingga. He died in 1812 leaving two sons, who disputed the succession to the throne. The Dutch supported the younger son, Abdul Rahman, while the older son, Husain — who had been chosen by his father as his successor in accordance with Malay custom — was recognized by the British and the Temenggong. There was a not uncharacteristic disagreement between two States in the region as to which of two successors to recognize. Anyone who knows anything about European history will recognize the scenario.

19. Briefly, the trajectory of Johor in this period was as follows¹²⁵:

- (1) First, the Temenggong was the third officer of State in the Empire; his title went back to its foundation in the early sixteenth century. By 1818 he was based in Singapore, which was part of his domains. They included but were not limited to islands in and around the Straits; they extended to mainland Johor and south of the Straits, for example, to the Carimons.
- (2) The Temenggong alone signed the first Agreement of 30 January 1819 with Raffles, providing for the establishment of a factory at what was described as “Singapore-Johor”¹²⁶.

¹²²B. W. Andaya & L. Y. Andaya, *A History of Malaysia* (Houndsmill, Basingstoke: Palgrave, rev. ed, 2001); 76, 82.

¹²³CR 2007/20, p. 37, para. 3 (Chan).

¹²⁴RM, App. II, para. 15.

¹²⁵See the reports by Professors Andaya and Houben, RM, Vol. 1, Apps. 1 & 2 respectively and works there cited.

¹²⁶MM, Ann. 2.

- (3) Both the Temenggong and Sultan Husein signed the Treaty of Friendship and Alliance of 6 February 1819¹²⁷. At this time the dynastic conflict between Husein and his brother Abdul Rahman remained unresolved, the Dutch taking one side, the British another.
- (4) Several supplementary agreements concerning Singapore were signed with the British in these years¹²⁸.
- (5) In 1825 the Temenggong died and was succeeded by Daing Ibrahim who, with his son Abu Bakar, transformed the fortunes of the Sultanate. Between them they held power for 70 years.
- (6) At first there was considerable tension between the British and the Johor authorities. But the British found that they needed the Temenggong in their efforts against what they termed “piracy”; this collaboration, which began in the 1830s, eventually led to the British presentation of a ceremonial sword to the Temenggong on 5 September 1846¹²⁹.
- (7) In the 1840s the Temenggong, whose domain had been largely maritime, began to settle the interior of peninsula Johor, licensing gutta-percha collectors and later gambier plantations — given the time, I will not explain what gutta-percha and gambier are; no doubt the Court already knows.
- (8) The Agreement between the Sultan and Temenggong of 1855¹³⁰, which Mr. Chan sees as the start of Johor, was nothing of the kind. It was merely the beginning of the end for the Sultan, who was confined to a small territory of Kassang on the west coast. In 1885 Temenggong Abu Bakar became officially the Sultan.
- (9) Treaties continued to be made during this period with the British, e.g., in 1862¹³¹ and with other Malay States, e.g., with Pahang in 1862¹³²). Johor did not become a Protected State until 1885¹³³ and did not accept a British Resident until 1914¹³⁴.

¹²⁷MM, Ann. 52.

¹²⁸See, e.g., MM, Ann. 4.

¹²⁹MM, Ann. 53.

¹³⁰MM, Ann. 7.

¹³¹MM, Ann. 9.

¹³²MM, Ann. 8.

¹³³MM, Ann. 10.

¹³⁴MM, Ann. 11.

(10) The present Sultan of Johor is the sixth generation from Abdul Rahman who became Temenggong in 1806¹³⁵. During the same period — 1806 to the present — the Dutch have had six sovereigns, the British have had nine.

(c) State practice affecting the Sultanate

20. Likewise, British and Dutch practice contradicts Singapore's theory, as expressed by Mr. Chan. Singapore's theory implies that every island or other parcel of land that was not permanently inhabited was *terra nullius*. But Great Britain acquired sovereignty over many uninhabited islands within 10 miles from the Island of Singapore. The Crawford Treaty entailed British recognition of the prior authority of the Sultan and Temenggong over these islands many of which were uninhabited¹³⁶.

21. The practice of the two States in respect of their spheres will be dealt with by my colleague Nico Schrijver. It is sufficient to refer to three treaties which cover the whole history of Johor since the Anglo-Dutch Treaty of 1824 split the two Sultanates. I am not so concerned with the terms of these treaties, which will be discussed by my colleagues, as with the *parties* to them.

— The first is the 1824 Crawford Treaty: a "Treaty of Friendship between the Honourable the English East India Company on the one side, and their Highnesses the Sultan and Tumongong of Johore on the other". It may be noted that one of the named parties to this bilateral treaty did cease to exist 30 years later — the Honourable the English East India Company — although, of course, it represented the British Crown, which continued. I suppose that, to paraphrase Hamlet, it is more honourable to continue to exist than not¹³⁷. But of the two named allies signatory to the 1824 Crawford Treaty only Johor achieved the distinction of continuation.

— The second treaty is the 1927 Johore Territorial Waters Agreement, between Sir Hugh Charles Clifford, Governor of the Straits Settlements on behalf of the Crown, and Sultan Ibrahim, son of Abu Bakar, son of Daing Ibrahim, son of Abdul Rahman. He is described in the Agreement as Sultan of the State and Territory of Johor. You have heard from

¹³⁵For the genealogy see RM, 50.

¹³⁶Judges' folder, tab 40.

¹³⁷W. Shakespeare, *Hamlet*, Act 3, Scene 1, ll 62-5.

Sir Eli about Governor Clifford who, in his spare time, wrote for the *Encyclopedia Britannica*. The Straits Settlements were wound up in 1946. Johor continued. And the 1927 Agreement was an agreement of *retrocession*. The parties acknowledged that the Treaty of 1824 had been concluded between them. No sign of any vacuum or discontinuity.

— The third treaty is the 1995 Malaysia-Singapore Delimitation Agreement, expressly made to delimit more precisely, and to fix, the territorial waters boundary — I stress, *the* territorial waters boundary — between the two States “in accordance with the Straits Settlement and Johor Waters Agreement 1927”. The preamble states — you can see it on the screen:

“And whereas the State and Territory of Johor has been succeeded to by Malaysia and is [*sic.*] a State within Malaysia and the Settlement of Singapore has been succeeded to by the Republic of Singapore; . . .”¹³⁸

Thus the Parties to the present case, before this Court, recognized that their predecessors in title had concluded an agreement in 1927, which itself recognized that their boundaries had been fixed in principle *by them* in 1824. No sign of discontinuity here!

22. Mr. President, Members of the Court, there is no basis for Singapore’s image of the “disappearing Sultanate”. In particular, the Chan thesis is contradicted by the very transactions on which the territorial extent of modern Singapore rests.

Mr. President, that would be a convenient moment to break.

Mr. President, Members of the Court, thank you for your patient attention.

The VICE-PRESIDENT, Acting President: And, I thank you, Professor Crawford, for your statement. This brings to a close this morning’s sitting. We shall now rise and meet tomorrow morning at 10 o’clock.

The Court rose at 1.05 p.m.

¹³⁸Judges’ folder, tab. 41.