

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING SOVEREIGNTY OVER
PEDRA BRANCA / PULAU BATU PUTEH,
MIDDLE ROCKS AND SOUTH LEDGE
(MALAYSIA / SINGAPORE)**

**MEMORIAL OF
SINGAPORE**

VOLUME 1

25 MARCH 2004

MEMORIAL OF SINGAPORE

CHAPTER I — INTRODUCTION.....	1
Section I. The Dispute	1
Section II. The Parties.....	2
Section III. Structure of this Memorial	4
CHAPTER II — THE PHYSICAL AND GEOGRAPHICAL SETTING.....	7
Section I. Pedra Branca	7
Section II. Middle Rocks and South Ledge	11
Section III. Pedra Branca, Middle Rocks and South Ledge form a Distinct Group of Features	13
CHAPTER III — HISTORICAL BACKGROUND.....	15
CHAPTER IV — THE DISPUTE.....	21
Section I. The Origins of the Dispute.....	21
Section II. The Special Agreement.....	25
CHAPTER V — THE ACQUISITION OF TITLE TO PEDRA BRANCA IN 1847-1851.....	29
Section I. Introduction.....	29
Section II. The Basis of Claim.....	30
Section III. The Decision to Build the Lighthouse was Taken by the British Crown	30
Section IV. The Constitutional Relationships: The Government of India, the Court of Directors of the East India Company and the Board of Control	32
Section V. The Entire Process of Planning, Choice of Site and Construction was Subject to the Control and Approval of the British Government and its Representatives	33
A. INTRODUCTION.....	33
B. THE CHOICE OF PEDRA BRANCA AS THE SITE OF THE LIGHTHOUSE	42

CHAPTER V (continued)

Section V.	The Entire Process of Planning, Choice of Site and Construction was Subject to the Control and Approval of the British Government and its Representatives (<i>continued</i>)	
	C. THE CHOICE OF THE NAME OF HORSBURGH LIGHTHOUSE	46
	D. THE PLANNING OF THE CONSTRUCTION WORK.....	47
	1. Developments in 1847 and 1848.....	47
	2. Developments in 1849	49
	3. Developments in 1850	50
	E. THE FUNDING OF THE CONSTRUCTION WORK.....	54
	F. VISITS TO PEDRA BRANCA PRIOR TO THE COMPLETION OF CONSTRUCTION	58
	G. LOGISTICAL SUPPORT PROVIDED BY GOVERNMENT VESSELS.....	61
	H. THE PROVISION OF PROTECTION BY GUNBOATS	62
	I. THE GOVERNMENT OF INDIA WAS THE EXCLUSIVE SOURCE OF LIGHTHOUSE EQUIPMENT AND TOOLS.....	64
	J. THE CONSTRUCTION CONTRACT.....	65
	K. THE SPECIFICATIONS AND ESTIMATES FOR THE CONSTRUCTION.....	66
	L. THE MAINTENANCE OF PUBLIC ORDER DURING THE PROCESS OF PREPARATION AND CONSTRUCTION.....	68
	M. THE CUTTING OF RAIN CHANNELS ON PEDRA BRANCA	69
Section VI.	Official Visits to Pedra Branca after the Completion of the Construction: the Commissioning of the Lighthouse.....	70
Section VII.	Further Evidence of Lawful Possession.....	71
	A. THE PANEL IN THE VISITORS ROOM	71
	B. THE BRITISH <i>NOTICE TO MARINERS</i> DATED 24 SEPTEMBER 1851	72
	C. THE MARINE ENSIGN WAS FLOWN.....	73
Section VIII.	The Manifestation of the Will of the British Crown as a Sufficient Mode of Lawful Possession.....	74
Section IX.	The Taking of Possession Elicited No Opposition from Other Powers	77

CHAPTER V (continued)

Section X.	The Legal Significance of the Lighthouse in these Proceedings	78
Section XI.	Title to Pedra Branca was Acquired by the United Kingdom in Accordance with the Legal Principles Governing Acquisition of Territory in the Period 1847-1851	79
	A. THE BASIS OF SINGAPORE’S TITLE.....	79
	B. THE DOCTRINE OF INTER-TEMPORAL LAW	79
	C. THE PRINCIPLES GOVERNING ACQUISITION OF TERRITORY IN THE MIDDLE AND LATE 19TH CENTURY	81
Section XII.	Conclusions	86

CHAPTER VI — THE CONTINUOUS, PEACEFUL AND EFFECTIVE EXERCISE OF STATE AUTHORITY OVER PEDRA BRANCA BY SINGAPORE AND HER PREDECESSORS IN TITLE SINCE 1851..... 89

Section I.	Introduction	89
Section II.	Since 1851, Singapore has Continuously Exercised State Authority over Pedra Branca.....	93
	A. SINGAPORE AND HER PREDECESSORS IN TITLE ENACTED LEGISLATION SPECIFICALLY RELATING TO PEDRA BRANCA	93
	B. THE BRITISH CROWN AND, SUBSEQUENTLY, SINGAPORE MAINTAINED, IMPROVED AND STAFFED THE LIGHTHOUSE AND OTHER FACILITIES ON PEDRA BRANCA	99
	C. SINGAPORE’S EXERCISE OF REGULATORY AUTHORITY AND JURISDICTION OVER PERSONNEL STATIONED ON PEDRA BRANCA	103
	D. THE STATE ACTIVITIES OF THE UNITED KINGDOM AND SINGAPORE ON PEDRA BRANCA RELATED TO THE ISLAND AS A WHOLE, NOT SIMPLY THE LIGHTHOUSE	105
	1. The Authorities in Singapore Used Pedra Branca as a Meteorological Data Collection Station.....	105
	2. The Display of a British Marine Ensign and, after Independence, a Singapore Ensign over Pedra Branca	107

CHAPTER VI (continued)

Section II.	Since 1851, Singapore has Continuously Exercised State Authority over Pedra Branca (<i>continued</i>)	
	D. THE STATE ACTIVITIES OF THE UNITED KINGDOM AND SINGAPORE ON PEDRA BRANCA RELATED TO THE ISLAND AS A WHOLE, NOT SIMPLY THE LIGHTHOUSE (<i>CONTINUED</i>)	
	3. Singapore’s Exclusive Control over Visits to Pedra Branca and her Use of the Island for other Official Purposes	109
	4. Permission Given to Foreign Parties to Operate in the Territorial Waters of Pedra Branca	113
	5. The Conduct of Naval Patrols and Exercises around Pedra Branca by Singapore and the Installation of Military Communications Equipment on Pedra Branca.....	114
	6. The Investigation by Singapore of Navigational Hazards and Shipwrecks in the Territorial Waters of Pedra Branca	118
	7. Investigation by the Singapore Coroner’s Court into Accidental Deaths off Pedra Branca	122
	8. Proposals by the Port of Singapore Authority to Reclaim Areas Around Pedra Branca	123
Section III.	The Legal Consequences of Singapore’s Long and Peaceful Possession of Pedra Branca in the Maintenance of her Title	124
	A. THE CONSTRUCTION AND CONTINUED MAINTENANCE OF THE LIGHTHOUSE ON PEDRA BRANCA IS EVIDENCE CONFIRMING SINGAPORE’S SOVEREIGNTY OVER THE ISLAND	125
	B. BY EXERCISING STATE AUTHORITY OVER PEDRA BRANCA, SINGAPORE AND HER PREDECESSORS IN TITLE DEMONSTRATED THEIR CONTINUED INTENT TO ACT AS SOVEREIGN.....	127
	1. The Exercise of Legislative Authority over Pedra Branca	128
	2. Singapore Carried Out Numerous Sovereign Acts Over Pedra Branca and Within its Territorial Waters	129
Section IV.	In Contrast to Singapore, Malaysia has Never Carried Out any Sovereign Acts on Pedra Branca.....	132
Section V.	Conclusions	136

CHAPTER VII — MALAYSIA’S RECOGNITION OF SINGAPORE’S SOVEREIGNTY OVER PEDRA BRANCA		139
Section I.	Malaysia’s Implicit and Express Recognition of Singapore’s Sovereignty Over Pedra Branca.....	140
A.	MALAYSIA’S ELOQUENT SILENCE IN THE FACE OF SINGAPORE’S ACTS OF SOVEREIGNTY	140
1.	Malaysia’s Persistent Silence.....	141
2.	Legal Effects of Malaysia’s Silence.....	146
B.	MALAYSIA’S FORMAL ACKNOWLEDGEMENT OF SINGAPORE’S SOVEREIGNTY OVER PEDRA BRANCA	151
C.	MALAYSIA’S REQUESTS TO SINGAPORE FOR AUTHORISATION TO HAVE ACCESS TO PEDRA BRANCA AND ITS WATERS	151
Section II.	Official Malaysian Maps Recognising Singapore’s Sovereignty Over Pedra Branca.....	155
Section III.	Conclusions.....	160
 CHAPTER VIII — JOHOR’S EXPRESS DISCLAIMER OF TITLE TO PEDRA BRANCA.....		 161
Section I.	The Letter dated 21 September 1953	162
A.	THE COLONIAL GOVERNMENT’S ENQUIRY, 1953.....	162
B.	THE REACTION OF THE JOHOR GOVERNMENT	164
Section II.	The Legal Nature of the Letter from the Acting State Secretary of Johor of 21 September 1953.....	166
A.	AN UNCONDITIONAL DISCLAIMER	166
B.	A BINDING UNILATERAL UNDERTAKING.....	168
Section III.	Conclusions.....	178
 CHAPTER IX — MIDDLE ROCKS AND SOUTH LEDGE		 179
Section I.	Middle Rocks and South Ledge Form a Single Group of Maritime Features Together with Pedra Branca.....	180
A.	A SINGLE GROUP OF MARITIME FEATURES.....	181
B.	MIDDLE ROCKS AND SOUTH LEDGE FALL WITHIN PEDRA BRANCA’S TERRITORIAL WATERS.....	184
Section II.	Middle Rocks and South Ledge are Not Capable of Independent Appropriation	190
A.	SOUTH LEDGE	190
B.	MIDDLE ROCKS	194
 SUBMISSIONS		 199
 LIST OF ANNEXES.....		 201

LIST OF MAPS

Number	Title of Map	Location
Map 1	General Setting	<i>after</i> page 3
Map 2	Location of Singapore, Pedra Branca and Johor	<i>after</i> page 8
Map 3	Sketch Map of the Vicinity of Pedra Branca	<i>after</i> page 12
Map 4	<i>Extract from</i> British Admiralty Chart 3831 entitled “Indonesia, Malaysia and Singapore, Singapore Strait, Eastern Part” (1979)	<i>after</i> page 13
Map 5	Map entitled “The Straits of Sincapore”, published by Laurie and Whittle (1799)	<i>after</i> page 13
Map 6	Inset entitled “A Plan of the Strait of Singapore from the latest Surveys”, <i>extracted from</i> map entitled “A New Chart of the Straits of Malacca and Singapore drawn from the latest Surveys, with Additions and Improvements”, published by Norie (1831)	<i>after</i> page 13
Map 7	Map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia”, published by the Director of National Mapping, Malaysia (1979)	<i>after</i> page 21
Map 8	<i>Extract from</i> map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia”, published by the Director of National Mapping, Malaysia (1979), focussing on the Area Around Pedra Branca	page 22
Map 9	Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malayan Coast by J.T. Thomson, Government Surveyor (1851)	<i>after</i> page 36
Map 10	<i>Extract from</i> British Admiralty Chart 3831 (1979), <i>annotated</i> to Show Patrol Sector F5 of the Republic of Singapore Navy	<i>after</i> page 116
Map 11	Map attached to Malaysian Request to Conduct, in Singapore Territorial Waters, a Master Plan Study of Hydro-Electric Potentials of Sarawak and Feasibility Study of Pelagus Rapids Hydro-Electric with HVDC Transmission to Peninsular Malaysia	<i>after</i> page 153
Map 12	Map entitled “Pengerang”, published by the Surveyor General, Federation of Malaya (Series L7010, Edition 1-SDFM) (1962)	<i>after</i> page 158

Number	Title of Map	Location
Map 13	Map entitled “Pengerang”, published by the Surveyor General, Federation of Malaya (Series L7010, Edition 2-SDFM) (1962)	<i>after</i> page 159
Map 14	Map entitled “Pengerang”, published by the Director of National Mapping, Malaysia (Series L7010, Edition 2-DNMM) (1965)	<i>after</i> page 159
Map 15	Map entitled “Pengerang”, published by the Director of National Mapping, Malaysia (Series L7010, Edition 3-PPNM) (1974)	<i>after</i> page 159
Map 16	Sketch Map showing 3-nautical mile Radius Around Pedra Branca	<i>after</i> page 188
Map 17	<i>Extract from</i> Malaysian Maritime Chart 515 entitled “Silat Singapura” published under the superintendence of the Hydrographer, Royal Malaysian Navy (1998)	<i>after</i> page 191

LIST OF ILLUSTRATIONS

Number	Description of Illustration	Location
Image 1	Etching of Pedra Branca, drawn and engraved by Thomas and William Daniell, Showing Pedra Branca before Horsburgh Lighthouse was Built (<i>circa</i> 1820)	<i>after</i> Page 9
Image 2	Etching of Pedra Branca Showing Completed Horsburgh Lighthouse with Marine Ensign (1851)	<i>after</i> Page 10
Image 3	Photograph Showing Pedra Branca as it Appears Today with Middle Rocks in the Background	<i>after</i> Page 10
Image 4	Aerial Photograph of Pedra Branca	<i>after</i> Page 10
Image 5	Photograph Showing South Ledge Completely Submerged at High Tide, with the Wreck of <i>MV Gichoon</i> Showing	<i>after</i> Page 11
Image 6	Photograph Showing South Ledge at Low Tide	<i>after</i> Page 11
Image 7	Photograph Showing South Ledge at Low Tide, with Two Persons on the Largest Rock	<i>after</i> Page 11

Number	Description of Illustration	Location
Image 8	Photograph Showing Middle Rocks with the Western Cluster in Foreground and the Eastern Cluster in Background	<i>after</i> Page 12
Image 9	Photograph Showing the Eastern Cluster of Middle Rocks	<i>after</i> Page 12
Image 10	Close-up Photograph Showing Persons Landing on the Western Cluster of Middle Rocks	<i>after</i> Page 12
Images 11 and 12	Paintings by J.T. Thomson of Pedra Branca, Showing Thomson Supervising Construction Activities on the Island (1850)	<i>after</i> Page 61
Image 13	Painting by J.T. Thomson of Pedra Branca, Showing Quarters for Workers Constructing Horsburgh Lighthouse (1850)	<i>after</i> Page 61
Image 14	Photograph of Plaque Installed in the Visitors' Room of Horsburgh Lighthouse	<i>after</i> Page 72
Image 15	Painting by J.T. Thomson of Pedra Branca, Showing Marine Ensign Flying from Pedra Branca During Construction of Horsburgh Lighthouse (1850-1851)	<i>after</i> Page 74
Image 16	Photograph of Pedra Branca, Showing the Various Structures and Facilities on the Island	<i>after</i> Page 102
Image 17	Photograph of Pedra Branca Taken Sometime Prior to 1970, Showing Marine Ensign Flying from Horsburgh Lighthouse	<i>after</i> Page 107
Image 18	Photograph of Pedra Branca Taken on 26 Apr 1974, with Marine Ensign Highlighted	<i>after</i> Page 107
Images 19 and 20	Recent Photographs of Pedra Branca Showing Marine Ensign Flying from Horsburgh Lighthouse	<i>after</i> Page 107
Image 21	Photograph of South Ledge at Low Tide with the Wreck of <i>MV Gichoon</i> in the Background	<i>after</i> Page 191
Image 22	Time-series Photographs of South Ledge at Various Tide Levels (at High Tide, only the wreck of <i>MV Gichoon</i> is Showing)	<i>after</i> Page 191
Image 23	Three-Dimensional Diagrams of the Sea-Bed Around Pedra Branca, Middle Rocks and South Ledge	<i>after</i> Page 195

A NOTE ABOUT SPELLING

A variety of spellings for Malay terms and names of places and persons appears in the historical documents referred to in this Memorial.

For consistency, the standardised spelling appearing in the left-hand column below is used in the text of the Memorial, except when quoting from historical documents (where the actual spelling used in the historical document is retained).

Standard Spelling used in this Memorial	Variant Spellings used in Historical Documents
Abdul Rahman	Abdu'r-Rahman
Ali	Allie
Hooghly	Hoogly
Hussein	Hussain
Johor	Johore
Lingga	Linga, Lingan, Lingen, Lingin, Linging
Pulau	Pulo
Puteh	Putih
Riau	Rhio, Rio, Riouw
Romania	Rumania, Rumenia, Remunia, Ramunia
Singapore	Sincapore, Sincapour
Temenggong	Tumongong, Tamongong

MEMORIAL OF THE REPUBLIC OF SINGAPORE

CHAPTER I INTRODUCTION

1.1 This Memorial is filed pursuant to the Court's Order dated 1 September 2003 fixing 25 March 2004 as the time-limit for the filing of the Memorial of the Republic of Singapore ("Singapore").

Section I. The Dispute

1.2 The main subject matter of the dispute is a small island called Pedra Branca situated in the middle of the Straits of Singapore at the entrance to the South China Sea. Pedra Branca has been part of Singapore's territory since the 1840s. On 21 December 1979, Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia". By this map, Malaysia purported to include Pedra Branca within Malaysia's territorial waters. Singapore duly lodged a protest with Malaysia against this paper claim on 14 February 1980.

1.3 By a Special Agreement dated 6 February 2003 and notified to the Court on 24 July 2003, Malaysia and Singapore agreed to submit the foregoing dispute to the Court¹. By Article 2 of the Special Agreement:

"The Court is requested to determine whether sovereignty over:-

(a) Pedra Branca/Pulau Batu Puteh;

¹ The Special Agreement is attached to this Memorial as Annex 1.

(b) Middle Rocks;

(c) South Ledge,

belongs to Malaysia or the Republic of Singapore.”

(Middle Rocks and South Ledge are two maritime features lying approximately 0.6 nautical miles and 2.1 nautical miles from Pedra Branca.)

1.4 The Special Agreement does not request the Court to enter into an exercise of delimitation or to make declarations concerning fishing or other economic rights. However, as is demonstrated in Chapter IX, principles of the Law of the Sea are relevant in determining whether sovereignty over Middle Rocks and South Ledge belongs to Singapore or Malaysia.

Section II. The Parties

1.5 Malaysia is a federal State made up of 13 constituent states. She was formed in 1963 through the merger of the Federation of Malaya with the State of Singapore (then a British colony) and the British territories of Sabah and Sarawak in Borneo. Among the 13 constituent states of Malaysia, the one that is relevant to this dispute is the State of Johor. It is the state which is geographically closest to Singapore.

1.6 In the context of this dispute, Malaysia is the successor State to the State of Johor in relation to her claim of sovereignty over Pedra Branca.

1.7 Geographically, the Republic of Singapore consists of the main island of Singapore and 50 or so smaller islands and islets. The English East India Company (“EIC”) established a trading station at Singapore in February 1819. In 1824, the EIC obtained, on behalf of the British Government, full sovereignty over the island of Singapore through a cession treaty with the local Malay chiefs. Singapore remained under British rule until 1963, when she

became part of the newly formed Federation of Malaysia. Singapore separated from Malaysia in 1965 to become an independent and sovereign republic.

1.8 The Republic of Singapore has a total area of about 680 square kilometres (or 260 square miles) and a population of about 4 million. Her land area is slightly smaller than New York City² or roughly one-third the size of Greater London. In comparison, Malaysia has a land area of 329,747 square kilometres (slightly larger than Italy but slightly smaller than Germany) including more than 2,000 off-shore islands³. Malaysia has a population of 24.5 million.

1.9 Singapore is situated south of the Malay Peninsula, at the eastern entrance of the Straits of Malacca. To the north, Singapore is separated from Malaysia by the Straits of Johor, but the two States are connected by a causeway and a bridge. To the south, Singapore is separated from Indonesia by the Straits of Singapore. The position of Singapore relative to neighbouring States is shown in **Map 1** (*General Setting*), overleaf.

1.10 In the context of this dispute, Singapore is the successor in title to the United Kingdom⁴.

² Encyclopaedia Britannica (15th ed., 1988) states that the area of New York City is about 787 square kilometres or 304 square miles.

³ Encyclopaedia Britannica (15th ed., 1988) states that the area of Malaysia is about 329,747 square kilometres or 127,356 square miles.

⁴ Throughout this Memorial, the terms “United Kingdom”, “Great Britain” and “Britain” will be used interchangeably as is appropriate to the context.

Section III. Structure of this Memorial

1.11 In this Memorial, Singapore will show that since 1847, Pedra Branca has been administered as part of Singapore's territory continuously, without any protest or challenge from Malaysia (or any of her predecessors) until the present dispute arose in 1979. Over the span of more than 150 years, Singapore (and her predecessors in title) has exercised her uninterrupted sovereign authority over Pedra Branca and its surrounding waters.

1.12 This Memorial is divided into nine Chapters, including this Chapter.

1.13 Chapter II provides a description of Pedra Branca, Middle Rocks and South Ledge.

1.14 Chapter III provides a summary of the relevant historical background beginning from the founding of Singapore in 1819 to the present day.

1.15 Chapter IV explains in greater detail the origin and context of the dispute, and explains how the dispute came to be submitted to the Court.

1.16 Chapter V explains how the United Kingdom (as predecessor of Singapore) came to acquire sovereignty over Pedra Branca. The Chapter discusses the applicable principles of international law, and demonstrates how Singapore effectively appropriated the island in accordance with principles governing the acquisition of territory in the middle and late 19th century.

1.17 Chapter VI demonstrates how Singapore has effectively and peacefully exercised State authority over Pedra Branca after taking possession of it, and discusses the legal consequences that flow from this exercise of State authority.

1.18 Chapter VII discusses Malaysia's recognition of Singapore's sovereignty over Pedra Branca, both expressly by Malaysia's official acts and implicitly by Malaysia's persistent silence in the face of Singapore's acts of sovereignty. The Chapter also highlights a number of official maps published by the Malaysian government which expressly recognised Pedra Branca as part of Singapore.

1.19 Chapter VIII discusses the express disclaimer of title made through official correspondence in 1953 by the State of Johor (Malaysia's predecessor). This disclaimer is legally binding on Malaysia, and must be given effect.

1.20 Chapter IX addresses the question of sovereignty over Middle Rocks and South Ledge. The Chapter shows that these minor geographical features, found very near to Pedra Branca, must belong to the State adjudicated to have sovereignty over Pedra Branca.

CHAPTER II THE PHYSICAL AND GEOGRAPHICAL SETTING

2.1 This Chapter describes the physical and geographical setting of Pedra Branca, Middle Rocks and South Ledge.

Section I. Pedra Branca

2.2 Pedra Branca is an island measuring 137 metres long, with an average width of 60 metres and covering an area of about 8,560 square metres at low tide. It is described in the *Malacca Strait Pilot* in the following manner :

“**PEDRA BRANCA**, lying in the middle of the eastern entrance of Singapore strait, nearly 8 miles from either shore, is 24 feet (7^m3) high. It is on the western edge of a bank with depths of 6 to 10 fathoms (11^m0 to 18^m3), which extends 1^{1/4} miles eastward of it. It will be known by the lighthouse, which was erected on it in 1851, and named after Horsburgh, the celebrated hydrographer, whose labours have in a high degree benefited the interests of navigation and commerce in every part of the eastern seas.”⁵

2.3 Pedra Branca is made entirely of granite. No vegetation grows there. There is no evidence that Pedra Branca was ever inhabited before the British began constructing the Horsburgh Lighthouse there. Ever since the construction of the Lighthouse, the only people resident on Pedra Branca have been the personnel manning the lighthouse and other equipment on the island.

⁵ Malacca Strait Pilot (1st ed., 1924), at p. 206. *See also*, Malacca Strait Pilot (2nd ed., 1934), at p. 213; Malacca Strait Pilot (3rd ed., 1946), at p. 217; Malacca Strait Pilot (4th ed., 1958), at p. 242. Relevant extracts from the first to the fifth editions of the Malacca Strait Pilot are attached to this Memorial as Annex 79.

2.4 Located at 1°19.8’N, 104°24.4’E, Pedra Branca lies 24 nautical miles to the east of Singapore, at the eastern entrance to the Straits of Singapore, sitting almost exactly in the middle of the straits (7.7 nautical miles from the southern coast of Johor (Malaysia) to the north and 7.6 nautical miles from the northern coast of Bintan (Indonesia) to the south). Thus, J.T. Thomson, the Government Surveyor who designed and constructed Horsburgh Lighthouse on Pedra Branca, described it as:

“...situated at the eastern extremity of the Straits of Singapore, nearly in mid-channel...”⁶

The navigational guides of that period also described it in similar fashion. For example, the 1817 edition of the famous *India Directory*, which was authored by the British Hydrographer Captain James Horsburgh, describes Pedra Branca as:

“...situated in the middle of the entrance of Sincapour strait ...”⁷

Map 2 (*Location of Singapore, Pedra Branca and Johor*) overleaf shows the location of Pedra Branca relative to Singapore, Malaysia and Indonesia.

2.5 Pedra Branca has been known to mariners for centuries. The name “Pedra Branca” is Portuguese for “white rock”, a reference to its original whitish appearance caused by the accumulation of bird droppings over hundreds of years. Pedra Branca has been known by that name and other European language variations thereof in European maps and sailing directions since the 16th

⁶ Thomson J.T., *Account of the Horsburgh Light-house*, 6 Journal of the Indian Archipelago and Eastern Asia 376 (1852), at p. 378. The Journal of the Indian Archipelago and Eastern Asia is also known as Logan’s Journal as it was edited by J.R. Logan. Thomson’s account of the construction of Horsburgh Lighthouse on Pedra Branca is attached to this Memorial as Annex 61. His account is hereafter referred to as “Thomson’s Account”.

⁷ Horsburgh J., *India Directory* (2nd ed., 1817), at pp. 192-193, attached to this Memorial as Annex 3.

century⁸. It was similarly referred to as “Bai Jiao” (meaning “white reef”) in Chinese maps and sailing directions dating back to the 15th century⁹.

2.6 Pedra Branca’s position right in the middle of the Straits of Singapore as it opens into the South China Sea has made it a serious navigational hazard on an important international trade route. From 1824 to 1851 alone, 16 ships were wrecked and another nine stranded after running aground in the vicinity of Pedra Branca¹⁰. In 1847, the British colonial government in Singapore occupied the island and proceeded to build a lighthouse on it named “Horsburgh Lighthouse” in memory of the famous British hydrographer James Horsburgh. Commencing operations in 1851, Horsburgh Lighthouse was the first lighthouse to be built by the British in South East Asia. Shown on the following pages are:

- (a) an etching of Pedra Branca, drawn and engraved by Thomas and William Daniell, showing Pedra Branca before Horsburgh Lighthouse was built (*circa* 1820) (**Image 1**);

⁸ See Warnsinck J.C.M. (ed.), *Jan Huygen van Linschoten’s Itinerario Voyage ofte Schipvaert naer Oost Ofte Portugaels Indien, 1579-1592* (1939), at pp. 94, 101-102 (Dutch original, with English translation), attached to this Memorial as Annex 83:

Dutch Original

Kap. 20: Die Navigatie ende rechte Coursen van Malacca af nae Macau in China...

Van dese Eylandekens 2 mylen z.z.o aen, is gelegen die Pedra Branqua, (dat is, witte steen geseyt) welke is een Eylandeken van witte steen-rootsen ofte Clippen, hebbende daer dicht by noch etlicke andere Rudtsen ende Clippen, ghelegen aende zuydtzyde daer van af, van welke zyde inghelijcks ghelegen ‘t Eylandt van Bintan...

Men heeft rontsom de Pedra branqua, en daer dicht by 6 vadem diepten, suyver gront; sult u altoos wachten vande Clippen ende Rudtsen daer by gelegen...

English Translation

Chapter 20: The navigation and correct courses from Malacca to Macao in China...

From these small islands approximately 2 sea miles in South-Southeasterly direction is situated Pedra Branca (that is to say, the white rock) which is a small island comprising white protruding rocks and boulders, and nearby located on its Southern side there are also other sharp rocks and boulders which is the side where is also situated the island of Bintan...

Around Pedra Branca and close by one has water measuring 6 Dutch fathoms [in] depth, on clean ground; one also has to watch the boulders and sharp rocks which are situated close by...

⁹ See Mills J.B., *Malaya in the Wu-pei-chih charts*, 15 Journal of the Malayan Branch of the Royal Asiatic Society 1 (1937), at pp. 1-10, 21-22, attached to this Memorial as Annex 81.

¹⁰ Thomson’s Account, *supra* note 6, at pp. 385-389.

- (b) a painting by J.T. Thomson, showing Pedra Branca just after the completion of Horsburgh Lighthouse (1851) (**Image 2**);
- (c) a photograph showing Pedra Branca as it appears today with Middle Rocks in the background (**Image 3**); and
- (d) an aerial photograph of Pedra Branca (**Image 4**).

2.7 Pedra Branca's position has long been of strategic significance to shipping from India to China and vice versa. As stated by Thomson in his Account of the Horsburgh Lighthouse:

“The tower and light now placed on Pedra Branca rock and bearing the name of the eminent Hydrographer, James Horsburgh, F.R.S., has not unappropriately been erected in the half-way distance, on the route pursued by shipping carrying the commerce of India and China...”¹¹

Thomson's Account was written in 1852 on the instructions of Colonel Butterworth, the Governor of the Straits Settlements (of which Singapore was a part). His account is the definitive account of the building of the Horsburgh Lighthouse.

2.8 Today, more than 150 years later, the significance of Pedra Branca has not diminished. The Straits of Singapore is one of the busiest international straits in the world. It links the Straits of Malacca (and the Indian Ocean to the West) with the South China Sea (and the Pacific Ocean to the East). This means that most ships going to the Far East from Europe, the Middle East and India, and vice versa, pass through the Straits of Singapore. On average, there are more than 900 ships using the Straits of Singapore every day (i.e., one ship every 1.6 minutes), with more than 80% of these ships arriving and departing from the port of Singapore, making Singapore the busiest port in the world. More than 1,000 ships are within Singapore port limits at any one time.

¹¹ Thomson's Account, *supra* note 6, at p. 376.

2.9 The Straits of Singapore is consequently of great importance to the international shipping community. It plays a crucial part in Singapore's economy as her economic well-being and historical role as an *entrepôt* is heavily dependent on the flow of maritime traffic through the Straits. As Pedra Branca commands the entire eastern approach to the Straits, the continued ability of Singapore to exercise her sovereign territorial rights over Pedra Branca and its surrounding waters is of the utmost importance to Singapore.

Section II. Middle Rocks and South Ledge

2.10 Slightly to the south of Pedra Branca are two minor maritime features known as "South Ledge" and "Middle Rocks".

2.11 South Ledge is a low-tide elevation 2.1 nautical miles south of Pedra Branca. It is described in the *Malacca Strait Pilot* in the following manner:

"South Ledge, consists of three rocks, the northern of which dries 8 feet (2^m4) and lies about about 2 miles south-south-westward of Horsburgh lighthouse; the others do not uncover. They are steep-to and are nearly always marked by heavy tide-rips or by breakers."¹²

Three photographs showing South Ledge appear overleaf:

- (a) a photograph showing South Ledge completely submerged at high tide, with only the wreck of MV Gichoon showing (**Image 5**);
- (b) a photograph showing South Ledge at low tide (**Image 6**); and
- (c) a photograph showing South Ledge at low tide, with two persons on the largest rock (**Image 7**).

¹² Malacca Strait Pilot (2nd ed., 1934), at p. 213, *supra* note 5.

2.12 Between South Ledge and Pedra Branca is a group of small rocky outcrops called “Middle Rocks”, lying about 0.6 nautical miles south of Pedra Branca. Middle Rocks consists of two clusters of small rocks about 250 metres apart. While the largest of these rocks measures about 55 metres by 15 metres, most of the rocks in these two clusters are much smaller, averaging 5 metres in size. Middle Rocks and Pedra Branca are joined to each other by a submerged bank. The *Malacca Straits Pilot* describes Middle Rocks as:

“Middle rocks, from 2 to 4 feet (0^m6 to 1^m2) high, and of a whitish colour, lie about half a mile southward of the lighthouse, and on the south-western edge of the bank on which Pedra Branca lies.”¹³

Included overleaf are close-up photographs of Middle Rocks:

- (a) showing the western cluster of Middle Rocks with the eastern cluster in the background (**Image 8**);
- (b) showing the eastern cluster of Middle Rocks (**Image 9**); and
- (c) showing a close-up of persons on the western cluster of Middle Rocks (**Image 10**).

2.13 The position of Middle Rocks and South Ledge relative to Pedra Branca is shown on **Map 3** (Sketch Map of the vicinity of Pedra Branca) overleaf. A more detailed physical description of Middle Rocks and South Ledge is given in Chapter IX. It is sufficient for the purposes of this Chapter to reiterate that Middle Rocks and South Ledge are extremely insignificant maritime features, as can be seen in **Images 5 to 10**.

¹³ Malacca Strait Pilot (2nd ed., 1934), at p. 213, *supra* note 5. See also Malacca Strait Pilot (3rd ed., 1946), at p. 217, *supra* note 5.

Section III. Pedra Branca, Middle Rocks and South Ledge form a Distinct Group of Features

2.14 In this Memorial, a group of features known as Romania Islands (also called “Lima Islands” in more recent charts and sailing directions) will be referred to from time to time. Within this group lies an island called “Peak Rock”. It is convenient to state clearly that Pedra Branca, Middle Rocks and South Ledge stand by themselves as a group and are distinct from the Romania group of islands. The latter group of islands all lie within close proximity (i.e., well within 3 nautical miles) of the Malay Peninsula and is separated from Pedra Branca, Middle Rocks and South Ledge by the main shipping channel, known as Middle Channel, which is also the deep water channel in this part of the Straits of Singapore. This can be seen from **Map 3** (shown above, after page 12) and from the British Admiralty Chart 3831, an extract of which is presented overleaf, as **Map 4** (*Extract from British Admiralty Chart 3831 (1979) entitled “Indonesia, Malaysia and Singapore, Singapore Strait, Eastern Part”*).

2.15 Older maps and sea-charts have also shown and depicted Pedra Branca, Middle Rocks and South Ledge as a distinct group which is clearly separated from the Romania group of islands. See, in this regard, **Map 5** (*Map entitled “The Straits of Sincapore”, published by Laurie and Whittle, 1799*) and **Map 6** (*Inset entitled “A Plan of the Strait of Singapore from the latest Surveys”, extracted from “A New Chart of the Straits of Malacca and Singapore drawn from the latest Surveys, with Additions and Improvements”, published by Norie, 1831*), shown overleaf.

2.16 An examination of the various pilots and sailing directions of the region confirms that Pedra Branca, Middle Rocks and South Ledge as a group has always been regarded as distinct from the Romania group of islands. For example, an 18th century Pilot states that:

“Pedro Branco bears from the outermost rocks, or islands, off Point Romania, EbS $\frac{1}{2}$ S. 2 $\frac{1}{2}$ leagues. Between these is the channel, or entrance into the Straits of Sincapour...”¹⁴

This geological fact is also repeated in more recent Pilots:

“Middle Channel, between Pedra Branca and Remunia shoals, is 4 miles wide...

Pedra Branca, 24 feet (7^m3) high, lies... 7 $\frac{3}{4}$ miles east-south-eastward of Tanjong Datok [*i.e.* Point Romania]...

Lima islands, together with many dangers around them, extend about 3 miles in a north-north-easterly and south-south-westerly direction, and 2 $\frac{1}{4}$ miles south-eastward of Tanjong Datok.”¹⁵

2.17 Thus Pedra Branca, Middle Rocks and South Ledge do not form part of the Romania Islands, but are a distinct group of features by themselves.

¹⁴ Dunn S. *et al*, *A New Directory for the East Indies* (5th ed., 1780), at p. 509, attached to this Memorial as Annex 2.

¹⁵ Malacca Strait Pilot (3rd ed., 1946), at p. 217, *supra* note 5. See also Malacca Strait Pilot (4th ed., 1958), at p. 242, *supra* note 5.

CHAPTER III HISTORICAL BACKGROUND

3.1 This Chapter provides a summary of the relevant historical background beginning from the founding of Singapore in 1819 up to the present day.

3.2 At the beginning of the 19th century, the island of Singapore and parts of the Malay Peninsula surrounding the Johor River basin (hereafter “peninsular Johor”) were under the control of a native chief named Abdul Rahman who held the title of “Temenggong”. As peninsular Johor was then largely covered by primary forest, the Temenggong lived in a small settlement in Singapore.

3.3 In the Malay political context of that time, the Temenggong was a vassal of the Sultan of the Johor-Riau-Lingga Sultanate. The state of affairs in this Sultanate in 1819, when Sir Stamford Raffles landed in Singapore to establish a trading station there on behalf of the English East India Company (“EIC”), was described by C.M. Turnbull in *A History of Singapore, 1819-1975* in the following words :

“By that time little remained of the once powerful Malay empire. From his capital in the Riau-Lingga archipelago, the Sultan claimed suzerainty over Johor, Pahang and some of the East Sumatran states. In practice the authority of the throne was undermined by disputes and intrigues between Bugis and Malay factions at court. The two most senior vassals, the Bendahara who lived in Pahang, and the Temenggong, whose fief was Johor, Singapore and neighbouring islands, enjoyed an increasing measure of independence.

The succession to the throne had been in dispute since 1812 when the previous Sultan had died, leaving no heirs by his royal marriages but two sons by commoner wives. Hussein, the elder, seemed to be marked for succession by his father. Marriages were arranged for him with relatives of the Bendahara and Temenggong, and he was attending his wedding in Pahang when his father died. In his absence, the Bugis faction acclaimed the younger son Abdu’r-Rahman as Sultan. Abdu’r-Rahman held court at Lingga

while Hussein returned to live in obscurity in Riau, but no formal coronation ceremony could take place because the late Sultan's royal widow, who favoured Hussein, refused to give up the regalia. Abdu'r-Rahman's succession was acknowledged neither by the Temenggong nor the Bendahara, but the Dutch recognized him, and Farquhar [*one of Raffles' lieutenants*], who was familiar with the background to the disputed succession, and by the Temenggong, who was Hussein's father-in-law, decided that, in order to establish legality for the British station at Singapore, it would probably be necessary to recognize the elder claimant."¹⁶

3.4 Accordingly, Raffles had Hussein brought to Singapore from where he was living (in a small island near Singapore) to proclaim him as the Sultan of Johor in order for the new Sultan to lend his authority to the establishment of the British station in Singapore. For this purpose, a Treaty of Friendship and Alliance was made on 6 February 1819 between Raffles (for and on behalf of the EIC) on the one hand and Sultan Hussein (described in the Treaty as "Sultan of Johore") and Temenggong Abdul Rahman (described in the Treaty as "Chief of Singapore") on the other hand¹⁷.

3.5 On 2 August 1824, the EIC entered into a treaty of cession with Sultan Hussein (who was described in the treaty as "Sultan of Johore") and Temenggong Abdul Rahman (who was described in the treaty as "Tumongong of Johore") whereby, in consideration of certain payments to them, they ceded:

"... full sovereignty and property to the... English East India Company, their heirs and successors for ever, the Island of Singapore, situated in the Straits of Malacca, together with the adjacent seas, straits, and islets, to the extent of ten geographical miles, from the coast of the main Island of Singapore."¹⁸

¹⁶ Turnbull C.M., *A History of Singapore, 1819-1975* (1977), at p. 9.

¹⁷ With the proclamation of Hussein as the Sultan of Johor, there were two Sultans of Johor, one under Dutch protection and the other under British protection.

¹⁸ *A Treaty of Friendship and Alliance between the Honourable the English East India Company on the one side and their Highnesses the Sultan and Tumungong of Johore on the other, concluded on the Second day of August, One Thousand Eight Hundred and Twenty-Four*

3.6 In 1826, Singapore and the other two British settlements in the Malay Peninsula, viz., Malacca and Penang (also known as the “Prince of Wales Island”), were amalgamated into a single administrative unit called the “Straits Settlements”. The Straits Settlements were governed directly by and as a dependency of the Bengal Government in India. It was during this period, as will be explained in Chapter V, that the British colonial authorities in Singapore took lawful possession of Pedra Branca in 1847 and acquired sovereignty over the island.

3.7 In 1867, the Government in India ceased to be responsible for the Straits Settlements which then became a Crown Colony reporting directly to the Colonial Office in London. This took place on 1 April 1867 and was effected by the Straits Settlements Act of 1866. This Act described the Straits Settlements as:

“*Prince of Wales’ Island*, the Island of *Singapore*, and the Town and Fort of *Malacca*, and their Dependencies.”¹⁹ [emphasis in underline added]

3.8 The Straits Settlements continued as a Crown Colony until they, together with the Malay States in the Malay peninsula, were invaded and occupied by Japan between 1942 and 1945. In September 1945, the Japanese forces surrendered to the South East Asia Allied Forces and immediately thereafter the

(1824), reprinted in Allen, Stockwell & Wright (eds.), *A Collection of Treaties and other Documents Affecting the States of Malaysia, 1761-1963* (1981), at p. 37, attached to this Memorial as Annex 4.

¹⁹ An Act to provide for the Government of the “Straits Settlements”, 29 & 30 Vic. Cap. 115 (United Kingdom), attached to this Memorial as Annex 67.

British established a British Military Administration for “Malaya”²⁰, which was defined to include Singapore and Johor²¹.

3.9 In 1946, with the ending of the British Military Administration, the Straits Settlements were dissolved. Singapore was then constituted as a separate colony on 1 April 1946 by the Singapore Colony Order in Council of 27 March 1946²². Section 3 of the Order in Council provided that:

“The Island of Singapore and *its dependencies*, the Cocos or Keeling Islands and Christmas Island shall be governed and administered as a separate Colony and shall be called the Colony of Singapore.” [emphasis added]

3.10 In 1959, the Colony of Singapore was granted internal self-government by the United Kingdom and renamed the State of Singapore. This was effected by the State of Singapore Act, 1958, section 1(1) of which established the State of Singapore, comprising:

“... the territories included immediately before the passing of this Act in the Colony of Singapore [*viz. 1 August 1958*].”²³

The State of Singapore was officially established on 3 June 1959²⁴.

²⁰ See section 1 of the Military Administration Proclamation (15 Aug 1945), made by Supreme Allied Commander South East Asia, attached to this Memorial as Annex 84.

²¹ *Ibid*, at first preambular paragraph. See also section 2 of the Interpretation Proclamation (22 Sep 1945), made by General Officer Commanding Military Forces, Malaya, attached to this Memorial as Annex 85.

²² Singapore Colony Order in Council, 1946 (United Kingdom), attached to this Memorial as Annex 86.

²³ See State of Singapore Act, 1958 (United Kingdom), attached to this Memorial as Annex 101.

²⁴ Government Notification No. 1414 of 1959 (Colony of Singapore), attached to this Memorial as Annex 102.

3.11 On 9 July 1963, the United Kingdom, the Federation of Malaya²⁵ (of which Johor was a member State) and the States of North Borneo (Sabah), Sarawak and Singapore signed the Malaysia Agreement 1963 in order to form a new independent federation to be called the “Federation of Malaysia”. The United Kingdom Parliament gave effect to this agreement by enacting legislation to relinquish sovereignty and jurisdiction over the State of Singapore and the States of Sabah and Sarawak²⁶. The following month, the Parliament of the Federation of Malaya enacted the Malaysia Act to establish Malaysia²⁷.

3.12 Section 4(3) of the Malaysia Act defined the states comprised in Malaysia as including, *inter alia*, the State of Johor and the State of Singapore, and further provided that:

“The territories of each of the States mentioned... are the territories comprised therein immediately before Malaysia Day [*viz.* 16 September 1963].”²⁸

3.13 On 7 August 1965, the Government of Malaysia and the Government of Singapore signed an agreement (“the Separation Agreement”) to enable Singapore to separate from Malaysia and to become an independent and sovereign State on 9 August 1965. The Separation Agreement began with a preambular paragraph which recited the formation of Malaysia in these terms:

“WHEREAS Malaysia was established on the 16th day of September, 1963, by a federation of the existing states of the Federation of Malaya and the States of Sabah, Sarawak and Singapore into one independent and sovereign nation.”

²⁵ The then Federation of Malaya was granted independence by the United Kingdom under the Federation of Malaya Independence Act 1957.

²⁶ Malaysia Act, 1963 (United Kingdom), attached to this Memorial as Annex 107, at section 1(1).

²⁷ Malaysia Act (Act No. 26 of 1963) (Federation of Malaya), attached to this Memorial as Annex 108.

²⁸ *Ibid*, at s. 4(3).

Article II of the Separation Agreement provided that :

“Singapore shall cease to be a State of Malaysia on the 9th day of August, 1965, (hereinafter referred to as ‘Singapore Day’) and shall become an independent and sovereign state separate from and independent of Malaysia and recognised as such by the Government of Malaysia; and the Government of Malaysia will proclaim and enact the constitutional instruments annexed to this Agreement in the manner hereinafter appearing.”²⁹

3.14 On 22 December 1965, the Singapore Parliament enacted the Interpretation Act 1965 which defined “Singapore” as follows:

“‘Singapore’ means the Republic of Singapore and shall be deemed to include the Island of Singapore and all islands and places which on 2nd June 1959³⁰ were administered as part of Singapore and all territorial waters adjacent thereto.”³¹

²⁹ Separation Agreement between Malaysia and Singapore dated 7 Aug 1965, attached to this Memorial as Annex 111, at preamble and Art. 2.

³⁰ 2 June 1959 was the day immediately before Singapore attained internal self-government. See para. 3.10 above.

³¹ Interpretation Act, 1965 (Republic of Singapore), attached to this Memorial as Annex 112.

CHAPTER IV THE DISPUTE

4.1 As will be shown in greater detail in Chapter V, the British Crown took lawful possession of Pedra Branca in 1847 for the purpose of building Horsburgh Lighthouse. Since then, as Chapter VI will show, Pedra Branca has been occupied and administered as part of Singapore's territory continuously for more than 130 years without any protest or challenge from Malaysia (or her predecessor, the State of Johor) until 1979³².

Section I. The Origins of the Dispute

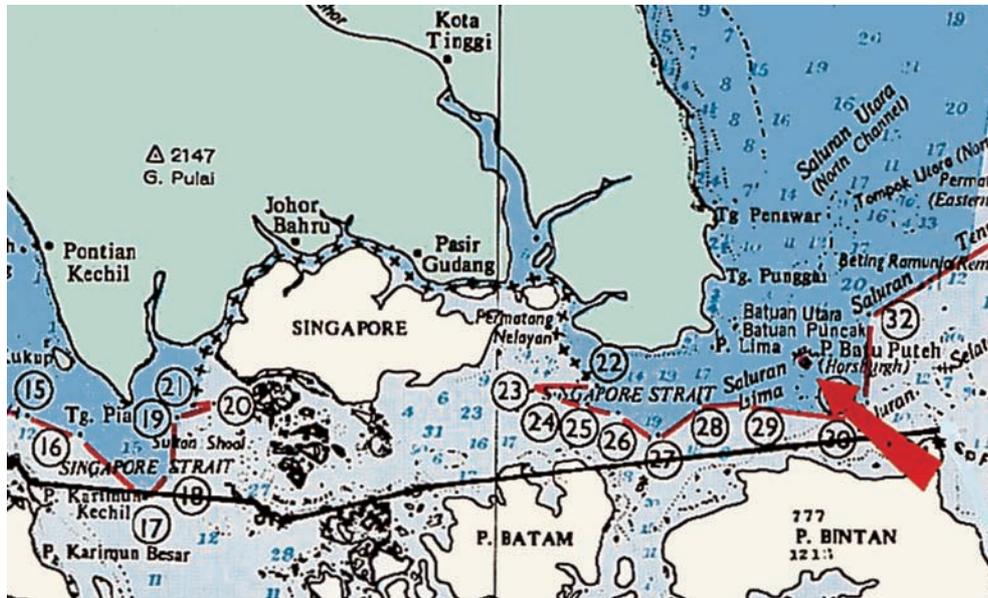
4.2 On 21 December 1979, Malaysia published a map ("the 1979 Map") which showed the outer limits and turning point coordinates of her territorial sea and continental shelf. These limits were not, as between Singapore and Malaysia, derived from any negotiated delimitation exercise³³.

4.3 The 1979 Map covered all of Malaysia's maritime boundaries. A reduced version of the 1979 Map is shown overleaf as **Map 7** (Map entitled "*Territorial Waters and Continental Shelf Boundaries of Malaysia*", published by the Director of National Mapping, Malaysia, 1979).

³² 130 years refers to the period from Singapore's occupation of Pedra Branca (1847) to the date when Malaysia first made a paper claim (1979).

³³ The 1979 Map was published pursuant to legislation passed ten years earlier in August 1969 – the Emergency (Essential Powers) Ordinance No. 7 (Malaysia), attached to this Memorial as Annex 114. Through this piece of legislation, Malaysia claimed a territorial sea of 12 nautical miles and announced its intention to effect the publication of a "large scale map indicating the low water marks, the baselines and the territorial waters of Malaysia." The 1969 Ordinance did not mention or describe the intended limits of Malaysia's 12 nautical mile territorial sea.

4.4 The 1979 Map, published by the Director of National Mapping, Malaysia, purported, for the very first time, to unilaterally define some of Malaysia's boundaries with Singapore. The map shows Pedra Branca as lying within Malaysia's territorial waters. See **Map 8** below.



Map 8 (Extract from map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia”, published by the Director of National Mapping, Malaysia, 1979), focussing on the area around Pedra Branca (indicated by the added red arrow above) – Pedra Branca has been placed within Malaysian territorial waters (dark blue)

4.5 A few days before the publication of the 1979 Map, the Malaysian Ministry of Foreign Affairs contacted Singapore's High Commissioner to Malaysia and asked him to attend a meeting at the Malaysian Ministry of Foreign Affairs on Friday 21 December 1979. The Malaysian Ministry of Foreign Affairs did not explain what the purpose of the meeting was. This was how the Singapore High Commissioner described the meeting in his report to the Singapore Government dated 24 December 1979:

“3 Wisma Putra [*i.e. the Malaysian Ministry of Foreign Affairs*] telephoned my PA [*i.e. Personal Assistant*] four days before to fix an appointment (11.45 am on Friday, 22 [*sic*] December) for me to call on Deputy Secretary General, Hamid Pawanchee. His PA indicated she hoped I would not change the time for the appointment. When my PA asked what the subject

would be the PA said she did not know, but it was ‘bilateral’. It later turned out that the timing was to coincide with a press conference scheduled to be held by [Malaysia’s] Minister of Land and Regional Development, Tan Sri Kadir Yusof. In other words, while Pawanchee was informing me verbally in this office Tan Sri Kadir would be telling the press about the new map being gazetted. This plan was, however, changed at the last moment. I will explain later.

...

5 After Hamid Pawanchee had verbally read the official statement from a prepared text I asked him where I could get copies of the map and the gazette notification. He said they would be available at the Map Sales Office. I then said Tan Sri Kadir would obviously be giving copies of the gazette to the press at a news conference. Pawanchee replied : ‘No, that has been changed. There will be no press conference.’ He did not ask me how I got the information. I did not disclose my source either.

6 The method of informing us was definitely a strategy that was carefully laid out. Pawanchee read it out from a typewritten text and after reading it put it aside. He did not offer me a copy. It was clear the Malaysian Government wanted the notice to be verbal.

7 Pawanchee behaved unnaturally at this meeting. At other times he used to behave in a personal and friendly manner. This time he became silent after reading the statement. I asked if that was all he wanted me to convey to my Government. He merely said : ‘If there are any clarifications or points your government likes to have, they can be discussed in a friendly manner.’

8 I asked Pawanchee if the new continental shelf was drawn only on the provisions of the Geneva Convention 1958 and the Johore-Singapore Maritime Treaty 1927 or were there other considerations. He mumbled ‘Yes, on those two, but if there are clarifications we could meet and discuss.’

...

11 He repeated twice to me that there were no problems with Thailand and Indonesia. Malaysia had discussed with these two neighbours and entered into bilateral agreements with them. He did not say anything about the Philippines. He then point out that in our case Horsburg [*sic*] lighthouse was affected. I looked at the map and saw ‘Pulau Batu Puteh’. ...

12 As an aside, probably to soften the blow on us, Pawanchee pointed out that Hanoi and Jakarta have a dispute on some islands near the Natunas. He was trying to tell me that this sort of thing is to be expected among neighbours.

13 Overall, my reading is that Malaysia is taking the line of gazetting their claim of Pulau Batu Puteh, then wait for Singapore to dispute it. The ball, therefore, is now in our court.”³⁴

4.6 Despite the fact that Malaysia made her claim to Pedra Branca in a hesitant and unusual manner, a response was clearly warranted. After obtaining a copy of the map and considering it in detail, Singapore sent Malaysia a diplomatic note on 14 February 1980. This note, in rejecting Malaysia’s purported claim and requesting that the 1979 Map be amended, stated Singapore’s legal position in the following terms:

“The Government of the Republic of Singapore is gravely concerned at what is set out in the said map. This map purports to claim the island of Pedra Branca as belonging to Malaysia. The Government of the Republic of Singapore rejects this claim. There is no premise in international law on which to found such a claim. The Government of the Republic of Singapore has since the 1840s, by virtue of both its acts and those of its predecessor governments, occupied and exercised sovereignty over Pedra Branca and the waters around it. Since that time, no other country has exercised or claimed jurisdiction or contested Singapore’s sovereignty over Pedra Branca. The Government of the Republic of Singapore therefore requests that the said map be suitably amended to reflect the sovereignty of Singapore over Pedra Branca.”³⁵

³⁴ See Letter from Singapore’s High Commissioner (Kuala Lumpur) to the Singapore Ministry of Foreign Affairs dated 24 Dec 1979, attached to this Memorial as Annex 141. See also Telex from the Singapore High Commission (Kuala Lumpur) to the Singapore Ministry of Foreign Affairs dated 21 Dec 1979, attached to this Memorial as Annex 140.

³⁵ See Singapore’s Note MFA 30/80 dated 14 Feb 1980, attached to this Memorial as Annex 144.

4.7 Malaysia responded to this diplomatic note two months later, on 14 April 1980, by stating:

“... the Government of Malaysia has included the island of Pedra Branca or Pulau Batu Puteh as part of Malaysian territory in the map because, from time immemorial this island has been part of the territory of the State of Johore which is a component State of Malaysia.”³⁶

Section II. The Special Agreement

4.8 In 1981, Singapore’s Prime Minister agreed with Malaysia’s Prime Minister that the matter should be resolved bilaterally through a formal exchange of documents³⁷. Despite many reminders, the exchange did not take place³⁸. In 1989, Singapore recommended to Malaysia that the dispute should be referred to the International Court of Justice for final adjudication³⁹. Eventually, after the Prime Ministers met on 25 January 1992, Malaysia’s Prime Minister agreed with Singapore’s Prime Minister that the formal exchange of documents should be effected⁴⁰. The two Attorneys-General were to “effect the exchange of documents and determine the ownership of Pedra Branca based on legal

³⁶ See Malaysia’s Note EC 87/80 dated 14 Apr 1980, attached to this Memorial as Annex 146.

³⁷ See Singapore’s Note SHC 109/89 dated 1 July 1989, attached to this Memorial as Annex 163.

³⁸ See Singapore’s Note SHC 109/89 dated 1 July 1989 attached to this Memorial as Annex 163; Singapore’s Note SHC 139/89 dated 11 Sep 1989 attached to this Memorial as Annex 166; Singapore’s Note SHC 143/89 dated 13 Sep 1989 attached to this Memorial as Annex 168; Singapore’s Note SHC 64/90 dated 8 June 1990 attached to this Memorial as Annex 169; Singapore’s Note SHC 161/90 dated 22 Dec 1990 attached to this Memorial as Annex 170; Singapore’s Note SHC 104/91 dated 16 Sep 1991 attached to this Memorial as Annex 171; Singapore’s Note SHC 134/91 dated 15 Nov 1991 attached to this Memorial as Annex 176; Singapore’s Note SHC 135/91 dated 15 Nov 1991 attached to this Memorial as Annex 177; Singapore’s Note MFA/D1/858/91 dated 15 Nov 1991 attached to this Memorial as Annex 174; and Singapore’s Note MFA/D1/859/91 dated 15 Nov 1991 attached to this Memorial as Annex 175.

³⁹ See note 37 above.

⁴⁰ See Singapore’s Note SHC 18/92 dated 13 Mar 1992, attached to this Memorial as Annex 179.

principles.”⁴¹ Singapore took the first step, and submitted her arguments and documentary evidence of Singapore’s ownership of Pedra Branca to Malaysia on 15 February 1992.

4.9 Malaysia responded in a Memorandum dated 20 June 1992. Face-to-face consultations between senior officials were held on 4-6 February 1993 and 12-14 January 1994. After two rounds of consultations, further rebuttals and a Supplementary Memorandum, it became clear that the dispute could not be resolved by the parties through bilateral consultations. Singapore then reiterated her suggestion that the dispute should be submitted to the International Court of Justice⁴². Malaysia agreed⁴³, and senior officials were asked to negotiate a Special Agreement to submit the dispute to this Court, pursuant to Article 36 of the Statute of this Court. Senior officials met in 1995, 1996 and 1998 to negotiate the text of the Special Agreement. They agreed on a draft, which was then submitted to the respective governments⁴⁴.

4.10 The Special Agreement was signed by the Foreign Ministers of both States on 6 February 2003. The exchange of instruments of ratification took place on 9 May 2003 and the Special Agreement was jointly notified to the Registrar of the Court on 24 July 2003⁴⁵. It was registered with the Secretariat

⁴¹ See Singapore’s Note MFA/D1/169/92 dated 13 Mar 1992, attached to this Memorial as Annex 180.

⁴² See “Malaysia and Singapore to go by law to resolve sensitive issues” reported by *Bernama News Agency* (9 Sep 1994), attached to this Memorial as Annex 190.

⁴³ See Malaysia’s Note EC135/94 dated 17 Sep 1994, attached to this Memorial as Annex 192.

⁴⁴ See Reports of the 9th Parliament of Singapore, Volume 69, Column 213, *Negotiations on Outstanding Bilateral Issues with Malaysia* (29 June 1998), attached to this Memorial as Annex 199.

⁴⁵ The Special Agreement is attached to this Memorial at Annex 1.

of the United Nations pursuant to Article 102 of the Charter of the United Nations on 13 June 2003⁴⁶.

4.11 Article 2 of the Special Agreement provides:

“The Court is requested to determine whether sovereignty over:-

(a) Pedra Branca/Pulau Batu Puteh;

(b) Middle Rocks;

(c) South Ledge,

belongs to Malaysia or the Republic of Singapore.”

⁴⁶ The Special Agreement has been assigned Registration Number 39388 by the United Nations Secretariat. *See* United Nations, *Statement of Treaties and International Agreements Registered or filed and recorded with the Secretariat during the month of June 2003* (ST/LEG/SER.A/676), at p. 8.

CHAPTER V

THE ACQUISITION OF TITLE TO PEDRA BRANCA IN 1847-1851

Section I. Introduction

5.1 The purpose of the present Chapter is to give an account of the process by which the British Crown decided to take possession of Pedra Branca for the purpose of constructing a lighthouse on it, together with related fixtures and appurtenances, the achievement of this purpose, and the legal consequences.

5.2 As will become clear, the decision to build a lighthouse on Pedra Branca was taken by the (British Colonial) Government of India and it was the British Crown, acting through the Government of India, which planned and substantially paid for the construction. It was, again, the Government of India which, in the person of the appropriate officials in the Straits Settlements, participated in ceremonies which accompanied both the inception of the construction and the inspection of the completed works by an official party on 27 September 1851.

5.3 As a further preliminary, it is pertinent to give emphasis to the fact that the Government of India selected an island on which an appropriate lighthouse would be built. The physical description provided in Chapter II above indicates the character and dimensions of Pedra Branca as a physical feature.

5.4 In these circumstances it must be clear that the feature is not an artificial island created by the construction of the lighthouse or other works, but an island, in the sense of international law, on which a lighthouse has been built.

Section II. The Basis of Claim

5.5 It will be helpful to the Court if the basis of Singapore's claim to Pedra Branca is indicated as a preface to the present chapter. Singapore's claim is *not* based on the Treaty of Cession of 1824.⁴⁷ That treaty dealt only with the main island of Singapore and its immediate vicinity. It did not extend to the area around Pedra Branca. Instead, Singapore's case is that the events of 1847 to 1851 (to be elaborated in due course) constituted a taking of lawful possession of Pedra Branca by agents of the British Crown. In the years that followed, the British Crown, and subsequently, Singapore, continually exercised acts of State authority in respect of Pedra Branca. This effective and peaceful exercise of State authority confirmed and maintained the title gained in the period 1847 to 1851 by the taking of lawful possession on behalf of the Crown.

Section III. The Decision to Build the Lighthouse was Taken by the British Crown

5.6 It is necessary to introduce the sources of British authority in the Straits Settlements. These comprised Singapore, Malacca and Penang (also known as the Prince of Wales Island). The Straits Settlements were created in 1826 and were administered by the East India Company.

5.7 The East India Company acted as an organ of the British Crown and its activities were supervised by the Board of Control in London headed by a British Government Minister⁴⁸.

⁴⁷ This treaty is discussed above, at para. 3.5.

⁴⁸ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 15 Oct 1845, attached to this Memorial as Annex 15; and Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 Feb 1847, attached to this Memorial as Annex 18. See also Article XXV of the 1833 Charter of the East India Company, attached to this Memorial as Annex 5.

5.8 It is universally recognised that the East India Company was the representative of the British Crown in the sphere of international relations. In a Law Officers' Report of 28 December 1897, Webster and Finlay observe that:

“The Royal Niger Company is not a mere trading Company, but has also power to acquire, retain and govern territory. It resembles the East India Company, the position of which was explained by Chief Justice Tindal in the case of *Gibson v East India Company*, 5 Bingham, New Cases (Common Pleas Reports), p.273.”⁴⁹

5.9 In *Gibson v. East India Company*, Chief Justice Tindal had explained the position in detail. In his words:

“The stat. 9 & 10 W., c.44, and the charter of incorporation granted by the King under the powers of that act, form the foundation of the privileges of the present united East India Company. And from the provisions made by the statute it is evident, that the company was established, originally and in the first instance, for the purpose of trade only; namely of exclusively trafficking and using the trade of merchandise to and from the East Indies, and in all places between the Cape of Good Hope, and the Straights of Magellan, and with no other object or design. But, without adverting to various enlargements by the legislature in subsequent reigns, of the term for which the charter was originally granted, it will be sufficient for the present purpose to observe, that about the commencement of the reign of George III., a question arose between the government and the East India Company, as to the claim set up by the latter, to the possession of the territorial acquisitions in India, which had been made by them; a claim inconsistent with the general principle prevailing in the law, both of this and other states, namely, that all conquests made by subjects must necessarily belong to the Crown. And in consequence of this contention an agreement was entered into between the company and the public, ‘that the territorial acquisitions and revenues lately acquired in the East Indies, should remain in possession of the company, and their successors during the term therein mentioned; an Agreement which was carried into effect by the stat. 7G. 3, c.57. The term therein mentioned was afterwards enlarged, and the possession and government of the

⁴⁹ See McNair, *International Law Opinions*, Vol. 1 (1956), at p. 296.

territorial acquisitions continued in the said united company by subsequent acts of the legislature, down to the present time; without prejudice, however, as declared by the preamble to the statute of the 53 G.3, c.155, s.61, to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland, in and over the same, or to any claim of the said united company to any rights, franchises, or immunities.”⁵⁰

5.10 The opinion of Chief Justice Tindal was expressed in 1839. The assessment is shared by later commentators. Thus Schwarzenberger refers to companies like the East India Company as “organs of the States by which their charters had been granted.”⁵¹ Similar opinions were expressed by T.J. Lawrence and H.A. Smith in their publications as well⁵².

Section IV. The Constitutional Relationships: The Government of India, the Court of Directors of the East India Company and the Board of Control

5.11 It will be helpful if the nomenclature is explained. In general, reference to the Government of India involves the Governor-General of India and his Council sitting in Calcutta – all of whom were officers of the East India Company⁵³. The Governor-General of India was subject to the authority of the Court of Directors of the East India Company. This, in turn, was under the direction of the Board of Control, which was headed by the Secretary of State, a British Government Minister. Consequently, all decisions of the Government of India were made under the control of the British Crown, that is to say, the British

⁵⁰ See *Gibson v. East India Company* 5 Bingham, New Cases 262 (Common Pleas Reports) (1839), at pp. 271-272, attached to this Memorial as Annex 7.

⁵¹ See Schwarzenberger G., *International Law as Applied by International Courts and Tribunals*, Vol. 1 (3rd ed., 1957), at p. 80.

⁵² See Lawrence T.J., *The Principles of International Law* (1895), at pp. 79-82, and Smith H.A., *Great Britain and the Law of Nations*, Vol. 2 (1935), at p. 77.

⁵³ Except for one member of the Council called the “legal member” who was in attendance only during legislative proceedings.

Government in London. Below the Governor-General of India, the administration was divided into four Presidencies (Bengal, Bombay, Madras and Agra). The Straits Settlements, including Singapore, were administered as part of the Bengal Presidency at the time when the lighthouse was being planned and constructed.

5.12 As will be demonstrated in due course, the ultimate approval for construction of the lighthouse was obtained from the Court of Directors of the East India Company (sited in London) and this was the appropriate procedure.

Section V. The Entire Process of Planning, Choice of Site and Construction was Subject to the Control and Approval of the British Government and its Representatives

A. INTRODUCTION

5.13 It will be helpful at this stage to present a brief history of the events leading to the construction of the lighthouse and the taking of possession of Pedra Branca. As a preliminary, it is necessary to describe the general character of the evidence. This consists, to a very great extent, of correspondence between three linked pairs of officials of the Government of India, who were instrumental in the planning of the enterprise and, in due course, in the execution of the instructions of the Court of Directors of the East India Company when these were issued in 1847.

5.14 The three pairs of officials functioned in this way:

- (a) The Government of India, through the Bengal Presidency, had authority over, and corresponded with, Colonel W.J. Butterworth, Governor of the Straits Settlements (hereinafter referred to as “Governor Butterworth”);
- (b) Governor Butterworth had authority over, and corresponded with, Thomas Church, Resident Councillor at Singapore; and

- (c) Thomas Church had authority over, and corresponded with, J.T. Thomson, the Government Surveyor at Singapore, who was the architect and engineer responsible for planning and constructing the lighthouse on Pedra Branca (hereinafter referred to as “Thomson”).

5.15 Governor Butterworth was directly involved from early on, and it is recorded that he visited Pedra Branca in 1847⁵⁴. Governor Butterworth was present at the formal laying of the Foundation Stone on 24 May 1850; his name appears on the panel in the Visitors Room of the lighthouse⁵⁵; and he it was who signed the British *Notice to Mariners* dated 24 September 1851. It was also Governor Butterworth who was in charge of the final commissioning ceremony on 27 September 1851.

5.16 But the authoritative witness is clearly Thomson. Apart from the correspondence involving Thomson, a major resource is the *Account of the Horsburgh Light-house*, written by Thomson and published, in 1852, in the *Journal of the Indian Archipelago and Eastern Asia*⁵⁶. This is in fact the text of the official report prepared by Thomson, in his role as Government Surveyor at Singapore, after completion of the project. It is dated 14 August 1852. As the preface explains, the account had been prepared at the wish of Governor Butterworth. On the panel in the Visitors Room, Thomson is described as the

⁵⁴ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 22 July 1847, attached to this Memorial as Annex 22; and Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 1 Oct 1847, attached to this Memorial as Annex 24.

⁵⁵ The panel is mentioned in Thomson’s Account, *supra* note 6, at p. 474, and is described further below, at para. 5.86 of this Memorial. A picture of the panel appears as **Image 14**, shown after p. 72 below.

⁵⁶ See generally Thomson’s Account, *supra* note 6.

“Architect” and it was Governor Butterworth who selected Thomson for that position⁵⁷.

5.17 Thomson was in charge of the entire construction project, and it was under his direct control. Not only did he make regular visits to Pedra Branca, but he spent long periods living on the island in a house. The correspondence between the key officials, together with Thomson’s Account, produces a detailed and reliable volume of evidence.

5.18 The brief history of the events leading to the construction of the lighthouse begins in 1836 when Captain James Horsburgh, an eminent hydrographer of the East India Company, passed away. Merchants in Canton resolved to raise a lighthouse on Pedra Branca to his memory⁵⁸. Funds were also raised to this end by the merchant communities in Bombay and Penang⁵⁹.

5.19 After a lapse of six years, Jardine Matheson & Co. wrote to the Governor of the Straits Settlements in 1842, to inform him that they had collected 5,513.50 Spanish Dollars for the building of a lighthouse on Pedra Branca. The Governor at the time – S.G. Bonham – reported this to the Government in India and recommended that a lighthouse be built on Barn Island⁶⁰. However, Bonham’s suggestion was declined because the British Crown, through the Court of

⁵⁷ See Thomson’s Account, *supra* note 6, at p. 377.

⁵⁸ See Letter from Jardine Matheson & Co. to Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) dated 1 Mar 1842, attached to this Memorial as Annex 8.

⁵⁹ See Thomson’s Account, *supra* note 6, at p. 498.

⁶⁰ See Letter from Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) to Bushby G.A. (Secretary to the Government of Bengal) dated 23 July 1842, attached to this Memorial as Annex 9.

Directors, was reluctant to impose any port duties on vessels calling at Singapore for the maintenance of the lighthouse⁶¹.

5.20 The issue of the lighthouse was revived in 1844, when Bonham's successor, Governor Butterworth, raised the issue of building Horsburgh Lighthouse with the Government of India. However, Governor Butterworth suggested that the Lighthouse be built on Peak Rock off Point Romania instead. See overleaf for **Map 9** (Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malayan Coast by J.T. Thomson, Government Surveyor, 1851), showing the various locations involved. Governor Butterworth also reported that Peak Rock had belonged to the Rajah and the Temenggong of Johor but that he had obtained their consent to cede Peak Rock to the East India Company gratuitously⁶².

5.21 There then ensued some argument between Governor Butterworth and the Government of India over where Horsburgh Lighthouse should be located. In a letter to the Government of India dated 22 August 1845, Governor Butterworth took great pains to explain that while Pedra Branca was the best possible

⁶¹ See Letter from Bushby G.A. (Secretary to the Government of Bengal) to Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) dated 31 Aug 1842, attached to this Memorial as Annex 10.

⁶² See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Currie F. (Secretary to the Government of India) dated 28 Nov 1844, attached to this Memorial as Annex 13. The reference in the letter to the "Rajah of Johore" is a reference to Tengku (Prince) Ali, son of Sultan Hussein of Johore, who died in 1835 leaving Tengku Ali as his successor. The British did not immediately recognise Tengku Ali's rights to be called "Sultan of Johore" and this was why Butterworth did not refer to him as "Sultan of Johore" in the letter. It was only in 1855 that the British recognised Tengku Ali's claim to the title of "Sultan of Johore". The Temenggong of Johore was traditionally the third highest official within the Johor Sultanate, and he possessed a hereditary fiefdom whose extent was described thus: "[t]he immediate sway of the Temenggong of Johore ran from Pontian around Cape Rumenia to Sedili Besar." (See Winstedt R.O., *A History of Johore* (1992 reprint), at p. 102, attached to this Memorial as Annex 185.) If Peak Rock is said to belong to the Temenggong, it could also be said to belong to the Rajah of Johore as he was the overlord of the Temenggong.

position, it was too far from any mainland and inaccessible at certain times of the year⁶³.

5.22 It was not until 1846 that Governor Butterworth changed his mind and agreed that Horsburgh Lighthouse should be built on Pedra Branca⁶⁴.

5.23 Following this, both the Government of India and the Court of Directors in London approved of the construction of the Horsburgh Lighthouse on Pedra Branca. The Court of Directors also agreed that a levy be imposed for the purposes of funding the construction and maintenance of the lighthouse and directed that the lighthouse should be built of stone⁶⁵.

5.24 Thereafter, the full attention of the Government of the Straits Settlements was brought to bear on the issue of constructing the lighthouse on Pedra Branca. On 21 June 1847, Thomas Church, Resident Councillor at Singapore, instructed Thomson, the Government Surveyor, to submit plans and estimates for the construction of Horsburgh Lighthouse⁶⁶. Thomson replied on 9 July 1847 with a description of Pedra Branca and some preliminary plans and estimates⁶⁷.

⁶³ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 22 Aug 1845, attached to this Memorial as Annex 14.

⁶⁴ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Bushby G.A. (Secretary to the Government of Bengal) dated 26 Aug 1846, attached to this Memorial as Annex 16. See also paragraph 5.44 below.

⁶⁵ Compare Letter from Bushby G.A. (Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 3 Oct 1846, attached to this Memorial as Annex 17, and Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 Feb 1847 attached to this Memorial as Annex 18.

⁶⁶ See Thomson's Account, *supra* note 6, at p. 390.

⁶⁷ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 9 July 1847, attached to this Memorial as Annex 21.

5.25 It was in this context that Thomson made his first visit to Pedra Branca. The facts are described by Thomson, in his official Account. The Admiralty had advised against using Peak Rock, and Thomson now had to decide on the modalities for building a suitable lighthouse in the conditions prevailing at Pedra Branca. In his words:

“Peak rock being 33 feet above the level of spring tides, is somewhat higher than Pedra Branca, and being close inshore, the effects of the sea during the north-east monsoon are not so heavy upon it. I had, consequently, after observing the action of the waves at the worst season, deemed it sufficient for the former, to have merely the lower part of the Light-house tower to the height of sixteen feet of granite ashlar, and the rest of brick work, but on being called upon for plans and estimates of a building on Pedra Branca, it was necessary to pause before deciding, as it might be fairly anticipated that the action of the waves would be heavier on its lower surface and more exposed position. I therefore recommended to the authorities, that before the coming on of the ensuing N.E. monsoon, brick pillars should be erected on various parts of Pedra Branca, in order to test the force of the waves, and this was accordingly done on the 1st November, 1847.”⁶⁸

The erection of the brick pillars was carried out under the instructions and supervision of Thomson, and with the knowledge and approval of Governor Butterworth⁶⁹.

5.26 Concurrently, the Government of India obtained the approval of the Court of Directors of the East India Company for the imposition of a levy to fund the construction of and to maintain the lighthouse. On 5 September 1849, the Court of Directors wrote to Governor Butterworth giving their approval for the levying of a duty as soon as the lighthouse was illuminated.

⁶⁸ See Thomson’s Account, *supra* note 6, at pp. 390-391.

⁶⁹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 1 Oct 1847, attached to this Memorial as Annex 24.

5.27 The letter dated 5 September 1849 forms part of a sequence of letters which confirm that the bulk of the expense of construction was to be borne by the Government. This letter explains the interacting considerations very clearly:

“2. The increased charge has been occasioned by the selection (made after communication with the Lords of the Admiralty) of the Island of Pedra Branca instead of Peak Rock, as the site of the Light House, the former being not only much more distant from Singapore and much less accessible, but being also so much more exposed to the influence of the waves during the North East Monsoon, as to render it absolutely necessary that the structure should be ‘entirely faced with granite set in cement’, with a back work of Masonry instead of being composed of brick and Chunan Materials which would have sufficed on Peak Rock which is situated on the Northern Shore of the Straits.

3. The subscriptions hitherto received for the Light House amount to R^s 22,194 leaving a deficit of R^s 28,723, which you propose should be advanced by Government, and to ensure repayment of this loan, you further propose that the duty authorized by us to be levied on Vessels touching at Singapore or clearing out from Indian ports to China or the Eastward of Singapore, should be raised from one rupee to two dollars or 4½ rupees per 100 tons.

4. As the smaller rate would be quite inadequate to meet the expenses of a Light House on Pedra Branca and as there seems no more unobjectionable mode of providing for its construction and maintenance than the imposition of a suitable tonnage duty on shipping, we authorize you to levy a duty as soon as a light is exhibited on that Station: but as we have no doubt that the expenses will exceed the amount you have estimated we direct that a Tonnage duty of 2½ Dollars per 100 Tons be levied on the Shipping above described.”⁷⁰

5.28 The consequence was that the Under Secretary to the Government of India transmitted a copy of the despatch of 5 September 1849 to the Under Secretary of the Government of Bengal in a letter dated 27 October 1849. This letter (and its enclosure from the Court of Directors) was accordingly forwarded

⁷⁰ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 Sep 1849, attached to this Memorial as Annex 31.

by the Government of Bengal to Governor Butterworth under cover of a letter dated 12 November 1849⁷¹.

5.29 These documents make it abundantly clear that the decision for the funding, construction, and location of the lighthouse on Pedra Branca was taken by the Government of India and the British Crown.

5.30 Behind the series of events summarised above lies the consideration of the public interest in safe navigation from the South China Sea through the Straits of Singapore and vice versa and of ships using Singapore as a port of call before proceeding onwards through the South China Sea to China and through the Malacca Straits. The original public meeting of merchants and mariners in Canton, at which the proposal to raise a lighthouse on Pedra Branca was first made, was concerned to commemorate Horsburgh precisely because of his valued work in improving the navigation of the seas between India and China. The construction of the lighthouse in the most helpful place was a logical extension of the work of the famous hydrographer.

5.31 Pedra Branca had long presented serious dangers to shipping. Thomson provides a list of casualties in the period June 1824 to September 1851. The total was 25 and ships of seven different nationalities were involved. Thomson introduces his account of the dangers with the following passage:

“The proximity of Pedra Branca has long been noted for its danger to shipping, and as the commerce of the Eastern settlements has increased, so have the losses become more numerous. The following list of casualties, extracted from the Singapore journals,

⁷¹ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 Sep 1849 attached to this Memorial as Annex 31; Letter from Grey W. (Under Secretary to the Government of India) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 27 Oct 1849 attached to this Memorial as Annex 32, and Letter from Seton Karr W. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 12 Nov 1849, attached to this Memorial as Annex 33.

will serve to show the extent of these losses. It is not offered as being at all complete in its notice of minor accidents, for in many of these cases there was probably no report made to the editors. In the cases of stranding or total loss, I believe none have escaped my attention, as I carefully examined all the Singapore journals published since 1824 with reference to this subject. Between the years 1824 and 1839 inclusive, 5 total wrecks occurred; one vessel was stranded and 3 minor accidents took place; while between the years 1841 and 1851 inclusive, 11 total wrecks occurred, if we include the Metropolis, which was water-logged and abandoned by the crew, thus averaging one vessel per annum; during this period 1 vessel was stranded and 4 minor accidents also took place. It would be impossible at this time to estimate the amount of property lost in these vessels. In the Dourado alone there were 500,000 Spanish dollars sunk to the bottom; while there was on board the Sylph, when she was stranded, opium to the value of 557,200 Spanish dollars, and although most was saved, the accident to her must have created large loss to the owners of the cargo in paying for salvage, and by the loss of time, market, &c.; most of the other vessels in the list will be seen to have been large, and to have contained valuable cargoes.”⁷²

5.32 Whilst the strong public interest lying behind the proposals for a lighthouse in the region was evident from the outset, it is clear that all sides assumed the necessity of government funding (see paragraphs 5.60 to 5.65 below). However, there were certain modalities which had to be decided upon by the Government of India. The first of these was the choice of the site for the lighthouse, and the second was the decision on the method of public funding.

⁷² See Thomson’s Account, *supra* note 6, at p. 385.

B. THE CHOICE OF PEDRA BRANCA AS THE SITE OF THE LIGHTHOUSE

5.33 The ultimate choice of the Government of India, and the Court of Directors of the East India Company, was to build the lighthouse on Pedra Branca, but this decision was preceded by a substantial discussion of other sites and, in particular, of Peak Rock. The process of selection was pursued by the representatives of the British Government exclusively.

5.34 The first item consists of the letter from Sir Edward Belcher to Governor Butterworth, dated 1 October 1844. In response to the Governor's request for advice as to a suitable site for a lighthouse, Sir Edward Belcher writes:

“In reply to your communication No. 109 and bearing date April 20th 1844, requesting an opinion upon the most eligible position for a Light House in the Straits of Singapore. I have after very mature consideration and also from a recent special survey, come to the conclusion: That in pursuance of the intent of the vote to erect a Testimonial to the hydrographer James Horsburgh Esq., I am firmly of opinion that it would lend more to the general interests of navigation if such Testimonial stood upon a position where its benefit would be generally useful to navigation of the China Seas as well as these Straits.

For the latter object, nature specially presents the Romania outer island as the most eligible site by affording the means of distinctly avoiding night dangers, and thus enabling vessels to sail to and from Singapore with confidence as well as security.

From a slight inspection of the chart of the Straits, you will perceive that a line drawn from the centre of the outer Romania Island to the tail of Johore Bank would nearly eclipse the light by the intervention of the nearer Land. Vessels have no business near this line as is frequently practised in our British Light Houses, it is very easy to screen the light to the safe line so as to warn vessels in

time to shape a safe course. The law being either on entering or quitting the Straits to ‘keep the Light in sight’.”⁷³

5.35 The “Romania outer island” can only be Peak Rock as the contemporary survey map by Thomson himself demonstrates. See **Map 9**, after page 36 above.

5.36 As shown in Chapter II (see, in particular, paragraphs 2.14 to 2.17), Pedra Branca is not part of the Romania Group of islands. This is also confirmed by Thomson, who states that:

“I received official intimation from the Hon’ble T. Church... in a letter dated 21st June, 1847, that the Government had determined on erecting the Horsburgh Light-house on Pedra Branca, instead of on Peak rock, which belongs to the Romania group; for which position I had furnished plans and estimates in November, 1844.”⁷⁴

5.37 In light of Belcher’s advice, Governor Butterworth instructed Thomson to examine Peak Rock and provide an estimate of costs of building a lighthouse. The report, prepared by Thomson and dated 20 November 1844, is unequivocal on the point that it is Peak Rock in the Romania group which is in issue.

5.38 The following passages from the report are of particular relevance:

“In accordance with your instructions that I should proceed and examine Peak Rock Romania in order to ascertain the probable cost of building a Light House thereon, of a construction fitted for the situation and whose price should not exceed the limited funds, that have been subscribed for its erection – also to estimate the cost of laying a substantial base suited to bear a superstructure of sheet iron and further to make the plans (as far as practicable with the limited sum allowed) in conformity with the recommendation of Sir Edward Belcher viz ‘that the Light house should be based as a

⁷³ See Letter from Belcher E. (Captain of H.M.S. Samarang) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 1 Oct 1844, attached to this Memorial as Annex 11.

⁷⁴ See Thomson’s Account, *supra* note 6, at p. 390.

Martella Tower, and any chance of surprise from Pirates be obviated by clean scarping to low water mark' and lastly to ascertain the position of the Rock with reference to the Romania Islands, the coast of Johore and the Island of Singapore.

I therefore now have the honor of informing you that having proceeded to Peak rock and surveyed the Islands and shores in its vicinity, I found it to be situated, as will be seen on reference to the accompanying charts, about $\frac{3}{4}$ of a mile to the Eastward of Large Romania Island, $1\frac{1}{2}$ miles from Point Romania, and 32 miles East by north from Singapore Town. The Rock is barren, in height about 30 feet above high water, spring Tides – with a length of 160 feet measured due East and west, and a breadth of 130 feet measured north and south – as will be seen on reference to the sections drawn on the chart of Romania Island accompanying this, but it extends to the length of 240 feet, if measured north East and South West.”⁷⁵

5.39 The next stage involved Governor Butterworth writing to the Secretary to the Government of India, reporting the circumstances in which Peak Rock came to be selected as the most appropriate site for the lighthouse to be built with the funds collected to commemorate James Horsburgh.

5.40 This letter, dated 28 November 1844, was accompanied by a copy of Sir Edward Belcher's letter to Governor Butterworth dated 1 October 1844, together with a copy of the plan and section of “the Rock therein alluded to”, prepared by Thomson, the Surveyor:

“... together with an outline chart, showing its position with reference to Pedra Branca, the mainland of Johore, and Island of Romania... This Rock is part of the Territories of the Rajah of Johore, who with the Tamongong have willingly consented to cede it gratuitously to the East India Company.”⁷⁶

⁷⁵ See Letter from Thomson J.T. (Government Surveyor of Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 20 Nov 1844, attached to this Memorial as Annex 12.

⁷⁶ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Currie F. (Secretary to the Government of India) dated 28 Nov 1844, attached to this Memorial as Annex 13.

5.41 The “Rock therein alluded to” or “this Rock” to which reference is made in this extract cannot be construed otherwise than as a reference to Peak Rock: otherwise the phrase “showing its position with reference to Pedra Branca” would make no sense. Consequently, the request for permission addressed to the Temenggong to build a lighthouse on a particular rock must have indicated that the chosen site was Peak Rock. In his report to Governor Butterworth, dated 20 November 1844, Thomson refers to the fact that Peak Rock was not British territory. In paragraph 6 of the letter Thomson observes that Peak Rock:

“... on reference to the chart will be seen intervening the shores of a country under the rule of independent Malay chiefs.”⁷⁷

5.42 In the subsequent period, and until August 1846, the project to build on Peak Rock was maintained in principle. In a letter dated 15 October 1845, the Court of Directors of the East India Company adopted the proposal to build a lighthouse on Peak Rock and authorised the levying of light dues at Singapore and in India in order to provide the necessary funds.⁷⁸

5.43 In April 1845, the Superintendent of Marine in Bengal raised the question of preferring Pedra Branca as a site for a lighthouse. In response Governor Butterworth reported on 22 August 1845 that:

“The number of vessels that have been wrecked in the vicinity of Pedra Branca and Point Romania at the opening of the China Sea imperatively call for a Light House in that neighbourhood and there can be little doubt that the former would be the best possible position for one as far as the light is concerned, but it is so remote from Singapore, at so great a distance from the Main Land and so inaccessible at certain seasons of the year that under all circumstances I should give the preference to the position selected

⁷⁷ See Letter from Thomson J.T. (Government Surveyor of Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 20 Nov 1844, attached to this Memorial as Annex 12.

⁷⁸ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 15 Oct 1845, attached to this Memorial as Annex 15.

by Captain Sir Ed^d. Belcher C.B. as reported in my letter under date the 28th November 1844 No 150.”⁷⁹

5.44 In due course, the results of a further survey of the Straits by Thomson and Captain Congalton, which disclosed many previously unknown rocks and shoals, came to Governor Butterworth’s attention. He instituted further enquiries regarding both Pedra Branca and Peak Rock as sites for the lighthouse. On 26 August 1846, he wrote to the Government of India urging that the lighthouse be built on Pedra Branca. In doing so, he reversed his long-standing position that the lighthouse should be built on Peak Rock. In October 1846, the Government of India agreed, and recommended the Pedra Branca site to the Court of Directors of the East India Company. In February 1847, the East India Company agreed to the change of site; and in May 1847, Governor Butterworth was instructed to begin work on the Horsburgh Lighthouse on Pedra Branca.

C. THE CHOICE OF THE NAME OF HORSBURGH LIGHTHOUSE

5.45 It was the Court of Directors of the East India Company which decided on the name of the lighthouse. In a letter dated 12 November 1849 from the Government of Bengal to Governor Butterworth, there was enclosed a despatch from the Court of Directors, dated 5 September 1849, authorising the immediate construction of a lighthouse on Pedra Branca⁸⁰.

⁷⁹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 22 Aug 1845, attached to this Memorial as Annex 14.

⁸⁰ See Letter from Seton Karr W. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 12 Nov 1849, attached to this Memorial as Annex 33; Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 Sep 1849, attached to this Memorial as Annex 31. See also Acknowledgement letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 13 Feb 1850, attached to this Memorial as Annex 39.

5.46 From the official correspondence, it is evident that the lighthouse was “to be called after the celebrated Hydrographer James Horsburgh Esquire.”⁸¹

D. THE PLANNING OF THE CONSTRUCTION WORK

5.47 The construction work was planned and financed by the Court of Directors of the East India Company and the Government of India. The planning process will be described first of all. As indicated above, the decision to build on Pedra Branca, instead of Peak Rock, had been taken in February 1847, when the East India Company agreed to the change of site⁸².

1. *Developments in 1847 and 1848*

5.48 The next letters, dated 24 April and 10 May 1847, respectively, related to the question of funding and are examined below. The first practical step took the form of instructions from Thomas Church, Resident Councillor at Singapore, to Thomson, the Government Surveyor, to submit plans and estimates for the construction of the lighthouse⁸³. Thomson responded in a letter dated 9 July 1847 with a description of Pedra Branca and some preliminary plans and

⁸¹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 13 Feb 1850, attached to this Memorial as Annex 39. See also Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 22 Feb 1850, attached to this Memorial as Annex 40; Letter from Bayley H.V. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 19 Mar 1850, attached to this Memorial as Annex 41; and Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to The Resident Councillor at Malacca dated 4 Apr 1850, attached to this Memorial as Annex 43.

⁸² See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 Feb 1847, attached to this Memorial as Annex 18.

⁸³ See Thomson’s Account, *supra* note 6, at p. 390.

estimates. The instructions issued by Church clearly originated from the Government of India⁸⁴.

5.49 The studies by Thomson involved a visit to Pedra Branca and the placing of seven brick pillars on different parts of its surface to test the strength of the waves reaching the rock. The accomplishment of this mission took place on 1 November 1847⁸⁵. On 1 March 1848, Thomson returned to Pedra Branca to find that all the brick pillars erected on the north side had been “entirely swept away.”⁸⁶ The significance of these operations will be examined further below.

5.50 In the course of 1847, various documents emerged pointing to the approval by the Government of the preparations for the building of the lighthouse. The following items are significant in this respect:

- (a) Letter from the Under Secretary to the Government of Bengal to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 10 May 1847, which referred to the letter from the Secretary to the Government of India to the Secretary to the Government of Bengal dated 24 April 1847⁸⁷; and
- (b) Letter from the Government of Bengal to the Court of Directors of the East India Company, dated 29 September 1847⁸⁸.

⁸⁴ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848, attached to this Memorial as Annex 27. This letter reports on the preparatory studies by Thomson.

⁸⁵ See Thomson’s Account, *supra* note 6, at p. 390. See also Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 5 Nov 1847, attached to this Memorial as Annex 25.

⁸⁶ See Thomson’s Account, *supra* note 6, at pp. 390-1.

⁸⁷ See Letter from Beadon C. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 10 May 1847, attached to this Memorial as Annex 20; and Letter from Bushby G.A. (Secretary to the Government of India) to Halliday F.J. (Secretary to the Government of Bengal) dated 24 Apr 1847, attached to this Memorial as Annex 19.

⁸⁸ See also Letter Extract from a General Letter from the Government of Bengal to the Court of Directors of the East India Company dated 29 Sep 1847, attached to this Memorial as Annex 23.

2. Developments in 1849

5.51 The critical level of decision-making was reached in 1849. On 5 September 1849, the Court of Directors gave authority for the construction to the Government of India. The despatch relating to this event accompanied a letter from the Government of India to the Government of Bengal dated 27 October 1849. The relevant paragraphs of this letter read as follows:

“With reference to the correspondence noted in the margin, I am directed by the President in Council to transmit the accompanying copy of a Dispatch from the Hon’ble the Court of Directors No.3 dated 5th September 1849, relative to the construction of a Light House on Pedra Branca, and to request that authority may be given to the Governor of Singapore for the immediate commencement of the building.

2nd It will be observed that duty of 2½ dollars per 100 tons is to be levied on the shipping as soon as the Light House is completed. A law will be necessary for the purpose and Colonel Butterworth should be directed to take an early opportunity of submitting the draft of an Act containing such provisions as may be deemed requisite.”⁸⁹

5.52 This document was transmitted by the Government of Bengal to the Governor of the Straits Settlements under cover of a letter dated 12 November 1849. It was on 14 December 1849 that Thomson, the official directly responsible for the construction works, learned from Church that the Court of Directors had approved of his plans for the construction of the lighthouse⁹⁰.

5.53 Thomson acknowledged the receipt of Church’s key letter and its annexed copies of other letters recording the decision by the Court of Directors on 5

⁸⁹ See Letter from Grey W. (Under Secretary to the Government of India) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 27 Oct 1849, attached to this Memorial as Annex 32.

⁹⁰ See Thomson’s Account, *supra* note 6, at p. 402.

September 1849⁹¹. In a letter dated 26 December 1849, Thomson addressed Church on the appointment of an Engineer who would supervise the procurement and emplacement of the lantern, machinery, and other items necessary to constitute the appropriate lighting apparatus⁹².

3. *Developments in 1850*

5.54 The process of construction got under way in 1850, on the basis of the instructions Thomson had received from Church on 14 December 1849. The three months of the north-east monsoon were used to make preparations for the lighthouse operations when they became possible after the monsoon had ended. These preparations included acquisition of the lantern and machinery, the contract for stone and brickwork, preparation of plant and tools, procurement of stone from Pulau Ubin, an island belonging to Singapore, and preparation of stone courses at the Pulau Ubin quarries⁹³.

5.55 On 6 March 1850, Thomson visited Pedra Branca to inspect the island prior to commencing operations⁹⁴. Preparations for work to begin on the island were completed by the end of March. In a letter dated 13 February 1850, Governor Butterworth reported to the Government of Bengal on the arrangements which had been put in place in response to the instructions received on 14 November 1849. This letter was acknowledged by the Government of Bengal in a letter dated 19 March 1850. In a letter dated 30

⁹¹ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 Dec 1849, attached to this Memorial as Annex 34.

⁹² See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 26 Dec 1849, attached to this Memorial as Annex 36.

⁹³ See Thomson's Account, *supra* note 6, at pp. 402-404.

⁹⁴ *Ibid*, at pp. 404-405.

March 1850 from the Marine Branch of the Bengal Government to the the Court of Directors of the East India Company, it was reported that formal approval had been given to the preliminary arrangements reported by Governor Butterworth⁹⁵. In the course of April, a party of workmen was established on Pedra Branca and houses were built for their use⁹⁶. Work was also done on a derrick crane and a pier. The cutting of the foundations for the platform and outside vault began on 22 April 1850⁹⁷.

5.56 On 24 May 1850, the Governor of the Straits Settlements and a party landed on the island and there was a ceremonial laying of the foundation stone of the lighthouse. A detailed account of the ceremony appears in the *Straits Times and Singapore Journal of Commerce*. It is particularly helpful in providing a description of the composition of the official party, as follows:

“The Hon’ble the Governor of the Straits Settlement, Lieutenant Colonel W. J. Butterworth C, B, having requested the Brethren of Lodge ‘Zetland in the East No. 748’ to lay the Foundation Stone of the Horsburgh Testimonial, or Lighthouse for all Nations, with the honours of their craft, on the 24th inst. – the anniversary of Her Majesty’s Birth-day – the Worshipful Master and Brethren of the above Lodge, in number about thirty, accompanied by several visiting Brethren, started for Pedro Branca on the morning of the 24th in the H.C’s. steamer Hooghly, and the barque Ayrshire in tow of Her Majesty’s steamer Fury. Several distinguished visitors, including His Excellency the Rear Admiral Sir F. Austin, C.B. Naval Commander-in-chief and suite, the Hon’ble Thomas Church Esqr. Liet, Colonel Messiter, several of the foreign Consuls, and Merchants of Singapore availed of His Honor the Governor’s

⁹⁵ See Letter from Lettler J.H. of the Marine Department at Bengal to the Court of Directors of the East India Company dated 30 Mar 1850, attached to this Memorial as Annex 42.

⁹⁶ See Thomson’s Account, *supra* note 6, at pp. 405-423.

⁹⁷ *Ibid*, at pp. 416-423.

invitation to witness the ceremony and accompanied him in the Hooghly.”⁹⁸

5.57 The definitive official account is provided by Thomson. The key passages are as follows:

“The 24th day of May being the birthday of Her Most Gracious Majesty, Queen Victoria, was fixed upon as the day on which the foundation stone was to be laid. Her Majesty’s Steam frigate ‘Fury’ arrived off the rock at 11½ A.M. on that day, having in tow the H.C. Steamer ‘Hooghly’ and the merchant vessel ‘Ayrshire’ carrying the Hon’ble Colonel W.J. Butterworth C.B., the Governor of the Straits Settlements, who had invited his Excellency Admiral Austin the Naval Commander-in-Chief of the East India Station, and the Hon’ble T. Church, Esquire, Resident Councillor at Singapore, to accompany him; also M.F. Davidson, Esq. Master of the Lodge Zetland in the East, No. 748, who with the office-bearers of the Lodge and other members of that Lodge, had been requested to perform the ceremony of laying the foundation stone with Masonic honors. Various other civil and military members of the Singapore community, together with the foreign Consuls had come by invitation to witness the ceremony. The foundation stone was laid at 1 P.M. and the following articles were deposited under it in an aperture cut into the solid rock; first, a copper plate with this inscription upon it:

In the Year of our Lord 1850
and
In the 13th Year of the Reign of
VICTORIA,
QUEEN of Great Britain and Ireland,
The Most Noble
JAMES ANDREW MARQUIS of DALHOUSIE, K.T.
being Governor-General of British India,
The Foundation Stone,
of the Light-house to be erected on Pedra Branca
and dedicated to the Memory of the Celebrated
Hydrographer JAMES HORSBURGH, F.R.S.
was laid on the 24th day of May, the anniversary

⁹⁸ See “The Horsburgh Lighthouse” in *Straits Times and Singapore Journal of Commerce* (28 May 1850), attached to this Memorial as Annex 45. A similar account also appeared in the *Singapore Free Press and Mercantile Advertiser* (31 May 1850).

of the Birth-day of Her Most Gracious Majesty,
by the
Worshipful Master M.F. DAVIDSON, Esq.,
and the
Brethren of the Lodge Zetland in the East
No. 748.

In the presence of the Governor of the Straits
Settlements and many of the British and Foreign
Residents of Singapore

J.T. Thomson,
Architect.

There were also deposited some silver money, consisting of a crown, half crown, shilling, six-pence, penny, halfpenny, farthing, a rupee, half and quarter rupee, besides copper coins which consisted of a penny, halfpenny, farthing, eight and sixteenth of a penny; an anna, half and a quarter; a cent, half and a quarter cent; Statements of the Trade of the Straits Settlements, together with Statements of the Revenue and Charges; and further a copy of the original edition of Horsburgh's Directory, copies of the 'Free Press', and 'Straits Times' Newspapers and of the 'Journal of the Indian Archipelago and Eastern Asia', also a plan of the Town of Singapore.⁹⁹

5.58 This account of the ceremony provides further evidence, if this were needed, of the official character of the entire enterprise. During the ceremony the Worshipful Master made the following statement in the presence of Governor Butterworth and all of the other invited officials and guests:

"May the All Bounteous Author of Nature bless our Island, of which this Rock is a dependency..."¹⁰⁰

⁹⁹ See Thomson's Account, *supra* note 6, at pp. 427-428.

¹⁰⁰ See "The Horsburgh Lighthouse" in *Straits Times and Singapore Journal of Commerce* (28 May 1850), attached to this Memorial as Annex 45.

This reference to “our Island” can only be a reference to the main island of Singapore, from whence the attendant party came, and it confirmed that Pedra Branca is a dependency of Singapore.

5.59 Butterworth, who as Governor had attended the ceremony, reported as follows in a letter to W. Seton Karr, the Under Secretary to the Government of Bengal, dated 9 November 1850:

“I have the honor to transmit the accompanying copy of a Letter from the Resident Councillor at Singapore, giving cover to a Report from Mr. Thomson the Government Surveyor on this Season’s operations at the Light House, under construction at Pedra Branca, the first stone of which was laid, with masonic honours, on the 24th May last, being the anniversary of the Birth day of our Most Gracious Majesty Queen Victoria.”¹⁰¹

E. THE FUNDING OF THE CONSTRUCTION WORK

5.60 The genesis of the lighthouse project will be described in summary form in this section¹⁰². At the outset, it is important for the Court to appreciate the scale of the enterprise. The total cost of constructing the lighthouse, which took place over 18 months from March 1850 to September 1851, was 23,665.87 Spanish Dollars or 53,134 Rupees¹⁰³. This was a very substantial amount of money, having regard to the fact that Singapore’s revenues for 1850–1851 and

¹⁰¹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 9 Nov 1850, attached to this Memorial as Annex 49.

¹⁰² See also Tarling N., *The First Pharos of the Seas: The Construction of the Horsburgh Lighthouse on Pedra Branca*, 67 *Journal of the Malayan Branch of the Royal Asiatic Society* 1 (1994), attached to this Memorial as Annex 193. The article has a detailed account of the issue of funding of Horsburgh Lighthouse.

¹⁰³ The conversion rate from Spanish Dollars to Rupees is taken from a letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Halliday F.J. (Secretary to the Government of Bengal) dated 1 Nov 1851, attached to this Memorial as Annex 58, where Butterworth converted 24,141 Spanish Dollars to 54,206 Rupees.

1851–1852 was only 435,511 Rupees and 400,911 Rupees respectively¹⁰⁴. The following table sets out the key developments relating to the funding of the construction of the lighthouse:

22 November 1836	There is a meeting at Marwick’s Hotel in Canton in which merchants and mariners resolve to raise a lighthouse on Pedra Branca to the memory of Horsburgh, who had done much to assist in the navigation of the seas between India and China. To this end, funds are also collected from the Chambers of Commerce in Bombay and Penang.
29 December 1836	Merchants write to the Governor-General in India suggesting the construction of two lighthouses: one at Coney Rock for the western channel, and the other at Pedra Branca ¹⁰⁵ . The Marine Board of the East India Company (EIC) points out to the Governor-General, Lord Auckland, that duties would have to be levied in Singapore to maintain the lighthouses. However, Lord Auckland decides that the matter should not be further considered as the Court of Directors of the EIC (the Court) had banned the imposition of duties at Singapore in order to maintain Singapore’s status as a free port.
1837	Lord Auckland sends W.R. Young to the Straits Settlements to ascertain how the EIC can raise funds after the closing of its China trade. Young recommends that modest customs duties be levied for Penang and Singapore. Governor of the Straits Settlements Bonham agrees with

¹⁰⁴ See “Statement of the Proper Receipts and Disbursements at Singapore for the Official Year 1850-51, exclusive of Military and Convicts” in *Singapore Free Press and Mercantile Advertiser* (31 May 1851), attached to this Memorial as Annex 53; and “Statement of the Proper Receipts and Disbursements at Singapore for the Official Year 1851-52, exclusive of Military and Convicts” in *Singapore Free Press and Mercantile Advertiser* (18 June 1852), attached to this Memorial as Annex 60.

¹⁰⁵ See Memorial from Merchants, Mariners and other interested parties in the trade and navigation of the Straits of Singapore (Calcutta) to Auckland G. (Governor General of India in Council) dated 29 Dec 1836, attached to this Memorial as Annex 6.

this. Both Lord Auckland and the Court balk at this proposal.

- 1 March 1842 Jardine Matheson & Co. write to Straits Settlements Governor Bonham to inform him of the monies (5,513.50 Spanish Dollars) that have been collected for the building of a lighthouse on Pedra Branca.
- 28 April 1842 “The Singapore Free Press” reports that Jardine Matheson has told the Government of the Straits Settlements that they are willing to hand over the monies collected for the construction of a lighthouse on Pedra Branca.
- 23 July 1842 Bonham writes to Bushby, Secretary to the Governor-General in India, to report that a sum of 5,513 Dollars has been ‘placed at the disposal’ of the Government for the construction of a lighthouse in honour of the memory of Mr James Horsburgh. Bonham’s letter reports that the lighthouse is to be built on Barn Island. Bonham suggests that the 5,513 dollars be used to build the lighthouse and procure a lantern, and that maintenance of the lighthouse be funded by a charge imposed on vessels calling at Singapore.
- 31 August 1842 Bushby replies to Bonham to decline the suggestion to impose port duties in Singapore.
- 15 October 1845 The Court of Directors decides that moderate light house duties could be levied at Singapore.

5.61 In this chronology, the proposal by Jardine Matheson to Governor Bonham constitutes a defining moment, and the letter, dated 1 March 1842, should be read in full:

“We beg to acquaint you that we hold in our hands a Sum amounting with interest to Spanish Dollars Five thousand five hundred and thirteen $\frac{50}{100}$ (\$5,513 $\frac{50}{100}$) arising from a Public Subscription collected in China with some small additions from India, in the years 1836-37 for the purpose of erecting a testimonial to the memory of the late celebrated Mr. James Horsburgh.

At a General Meeting of the Subscribers a wish was expressed that the contributions should if possible be devoted to the building of a Light House, bearing the name of Horsburgh on Pedra Branca, at the entrance of the China Sea, but nothing definitive was resolved on.

As this is a design which can only be carried into effect and maintained under the immediate auspices of the British Govt, we beg to express our readiness to hand over the above amount to you in the hope that you will have the goodness to cause a Light House (called after Horsburgh) to be erected either on Pedra Branca or on such other locality as the Govt of the Hon'ble East India Company may seem preferable.

The amount is far from adequate, but we trust the well known munificence of the Hon'ble Company will supply what additional funds may be wanting for an object of such eminent public utility intended at the same time, to do Honour to the memory of one of the most meritorious of their Servants.”¹⁰⁶

5.62 As this letter makes clear, the project could only “be carried into effect and maintained under the immediate auspices of the British Government”, and, as the final paragraph confirms, it was expected that the Government would provide the additional funding which would be necessary.

5.63 Thus, from the outset, and in the correspondence in the period 1842 to 1845, it had been assumed on all sides that the lighthouse envisaged would be financed ultimately by the Government of India. However, the issue of funding was somewhat deflected by the question of selecting a site and a certain reluctance on the part of the Government of India to levy duties which might increase competition from Dutch ports in the region.

5.64 When the Court of Directors decided on Pedra Branca as the site of the project in February 1847, the question of public funding came to the

¹⁰⁶ See Letter from Jardine Matheson to Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) dated 1 Mar 1842, attached to this Memorial as Annex 8.

fore¹⁰⁷. When the Court of Directors approved the scheme in September 1849¹⁰⁸, the decision was on the basis that a levy would be made on shipping as soon as the lighthouse was completed¹⁰⁹.

5.65 In due course the levy was provided for in legislation in 1852 as described below at Chapter VI, paragraph 6.11 below.

F. VISITS TO PEDRA BRANCA PRIOR TO THE COMPLETION OF CONSTRUCTION

5.66 In the period before construction began together with the period of actual construction (from the cutting of the foundations on 22 April 1850 until various final operations on 9 April 1851), there were at least 19 visits by officials of the Government to Pedra Branca¹¹⁰.

5.67 These visits are recorded in the evidence, as follows:

- (a) The Governor of the Straits Settlements visited Pedra Branca in 1847 and reported this in a letter to the Government of Bengal dated 1 October 1847.

¹⁰⁷ See Letter from Bushby G.A. (Secretary to the Government of India) to Halliday F.J. (Secretary to the Government of Bengal) dated 24 Apr 1847, attached to this Memorial as Annex 19; Letter from Beadon C. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 10 May 1847, attached to this Memorial as Annex 20; Letter Extract from a General Letter from the Government of Bengal to the Court of Directors of the East India Company dated 29 Sep 1847, attached to this Memorial as Annex 23; Letter from Seton Karr W. (Under Secretary to the Government of Bengal) to Grey W. (Under Secretary to the Government of India) dated 6 Oct 1848, attached to this Memorial as Annex 28.

¹⁰⁸ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 Sep 1849, attached to this Memorial as Annex 31.

¹⁰⁹ See Letter from Grey W. (Under Secretary to the Government of India) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 27 Oct 1849, attached to this Memorial as Annex 32.

¹¹⁰ See Thomson's Account, *supra* note 6, at pp. 413-444.

- (b) 1 November 1847: Thomson visited Pedra Branca to make his preparations and built seven brick pillars on the rock in order to test the action of the waves at the worst season¹¹¹.
- (c) 1 March 1848: Thomson revisited Pedra Branca (after the monsoon) to examine the state of the pillars.
- (d) 6 March 1850: Thomson visited Pedra Branca in the Government Steamer *Hooghly*¹¹².
- (e) 28 March – 1 April 1850: Bennett, the foreman (acting under Thomson's orders) visited Pedra Branca with the gunboat *Charlotte*¹¹³.
- (f) 1 – 2 April 1850: Thomson visited the rock in the *Hooghly*, with two lighters in tow¹¹⁴. Materials were landed.
- (g) 11 – 12 April 1850: The steamer *Hooghly*, the lighters and the gunboat arrived off the rock early in the morning and materials were landed for the temporary dwellings, together with water supplies. On the morning of 12 April, all the workmen were landed¹¹⁵.
- (h) 24 May 1850: On this day, an official Party, led by the Governor of the Straits Settlements, landed for the purpose of laying the foundation stone: see above at paragraph 5.56 *et seq.*
- (i) October 1850: In a letter to the Governor of the Straits Settlements dated 7 November 1850, Church, the Resident Councillor at Singapore, reports:

“A short time prior to the withdrawal of the workmen, I visited Pedro [*sic*] Branca, and was equally surprised and gratified at the vast rapidity with which the operations had been carried forward

¹¹¹ See Thomson's Account, *supra* note 6, at pp. 390-391. See also Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 5 Nov 1847, attached to this Memorial as Annex 25.

¹¹² See Thomson's Account, *supra* note 6, at pp. 404-405.

¹¹³ *Ibid*, at pp. 406-409.

¹¹⁴ *Ibid*, at pp. 406-411.

¹¹⁵ *Ibid*, at p. 413.

and the substantial and imposing aspect of the Edifice, it was distinctly seen at a distance of 12 miles.”¹¹⁶

- (j) The workmen were withdrawn on 21 October 1850¹¹⁷.
- (k) 27 October 1850: A landing was made by the Gunboat *Nancy*¹¹⁸.
- (l) 2 November 1850: An attempt to land was made by the *Charlotte*¹¹⁸.
- (m) 5 November 1850: The *Charlotte* succeeded in landing¹¹⁸.
- (n) 11 November 1850: Thomson visited Pedra Branca on the *Charlotte*, and effected a landing¹¹⁸.
- (o) 24 November 1850: Thomson visited Pedra Branca on the *Charlotte*, and effected a landing¹¹⁸.
- (p) 9 January 1851: Thomson visited Pedra Branca on the *Charlotte*, but failed to land¹¹⁹.
- (q) 28 January 1851: Thomson made another failed attempt to land¹¹⁹.
- (r) 27 March 1851: Thomson made a landing and the *Charlotte* lay at anchor off the rock for two days. A shed was completed for the workmen for the coming season and the state of the rock was ascertained¹¹⁹.
- (s) 7 April 1851: Mr Bennett, the foreman, visited Pedra Branca on the Gunboat *Nancy* in order to land workmen and materials¹²⁰.
- (t) 9 April 1851: Thomson went on board the *Charlotte* and landed convict labour, water, and materials on Pedra Branca¹²¹.

¹¹⁶ See Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850, attached to this Memorial as Annex 48.

¹¹⁷ See Thomson’s Account, *supra* note 6, at p. 440.

¹¹⁸ *Ibid*, at p. 441.

¹¹⁹ *Ibid*, at p. 442.

¹²⁰ *Ibid*, at p. 443.

¹²¹ *Ibid*, at p. 444.

5.68 In all, the senior Government representatives, Governor Butterworth, Councillor Church and Thomson, made landings on Pedra Branca on at least thirteen occasions. On six other occasions, Government vessels landed workmen and building materials, acting under the instructions and supervision of Thomson. See overleaf, for the following: (a) Paintings by Thomson showing his supervision of the construction activities (**Image 11** and **Image 12**); (b) Painting showing Pedra Branca with living quarters for construction workers (**Image 13**).

G. LOGISTICAL SUPPORT PROVIDED BY GOVERNMENT VESSELS

5.69 During the preparation for the construction and the construction itself, continuous logistical support was provided by Government vessels, namely:

- (a) the Steamer *Hooghly*;
- (b) the Gunboat *Charlotte*;
- (c) the Gunboat *Nancy*; and
- (d) two lighters.

5.70 The Governor of the Straits Settlements sent various letters to the Resident Councillors of Singapore and Malacca ensuring the availability of the gunboats for conveying supplies to Pedra Branca. Such letters included three dated 24 December 1849¹²², 4 April 1850¹²³ and 19 April 1850¹²⁴ respectively. References to the services provided, especially by the steamer and gunboats,

¹²² See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 24 Dec 1849, attached to this Memorial as Annex 35.

¹²³ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Resident Councillor at Malacca dated 4 Apr 1850, attached to this Memorial as Annex 43.

appear frequently in Thomson's Account¹²⁵. Thomson reports in relation to the preparatory stage:

“For the purpose of carrying out materials, I proposed that decked lighters ... should be attached to the works, also two gun-boats for the conveyance of myself, workmen and light materials: the occasional assistance of a steamer for towing was also asked for.”¹²⁶

H. THE PROVISION OF PROTECTION BY GUNBOATS

5.71 The Government had undertaken that two gunboats should always be in attendance at the works¹²⁷. As Thomson makes clear in the pertinent passage of his report¹²⁸, the prevalence of piracy “in the immediate neighbourhood” made the protection of the gunboats a necessity¹²⁹. The gunboat *Charlotte* was a vessel of 23 tons, carried two 6-pounder guns, and had a crew of 27 men¹³⁰. The other gunboat, the *Nancy*, was a vessel of the same size¹³¹.

5.72 The provision of a government steamer and gunboats to assist in the movement of building materials and to provide protection against pirates formed

¹²⁴ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Resident Councillor at Malacca dated 19 Apr 1850, attached to this Memorial as Annex 44.

¹²⁵ See Thomson's Account, *supra* note 6, at pp. 401-449, 472-473. See also letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 Dec 1849, attached to this Memorial as Annex 34.

¹²⁶ See Thomson's Account, *supra* note 6, at p. 401.

¹²⁷ *Ibid*, at pp. 401, 403.

¹²⁸ *Ibid*, at p. 401.

¹²⁹ *Ibid*, at Appendix II pp. 479-487.

¹³⁰ *Ibid*, at p. 406.

¹³¹ *Ibid*, at p. 423.

a regular feature of the consecutive plans and financial estimates relating to the construction of the lighthouse. The relevant documents are as follows:

- (a) 20 November 1844 letter from Thomson to Governor Butterworth¹³²;
- (b) 9 July 1847 letter from Thomson to Church (three references to the gunboats)¹³³;
- (c) 20 May 1848 letter from Thomson to Church¹³⁴;
- (d) 12 June 1848 letter from Governor Butterworth to W. Seton Karr¹³⁵;
- (e) 3 March 1849 letter from the Government of India¹³⁶;
- (f) 20 December 1849 letter from Thomson to Church (a detailed account of the arrangements)¹³⁷;
- (g) 24 December 1849 letter from Governor Butterworth to Church¹³⁸;
- (h) 29 December 1849 letter from Governor Butterworth to Church¹³⁹;

¹³² See Letter from Thomson J.T. (Government Surveyor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 20 Nov 1844, attached to this Memorial as Annex 12.

¹³³ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 9 July 1847, attached to this Memorial as Annex 21.

¹³⁴ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 May 1848, attached to this Memorial as Annex 26.

¹³⁵ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848, attached to this Memorial as Annex 27. *See, in particular*, para. 6.

¹³⁶ See Letter from the Governor General of India in Council to the Court of Directors of the East India Company dated 3 Mar 1849, attached to this Memorial as Annex 30. *See, in particular*, para. 2 of the letter.

¹³⁷ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 Dec 1849, attached to this Memorial as Annex 34.

¹³⁸ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 24 Dec 1849, attached to this Memorial as Annex 35.

- (i) 22 February 1850 letter from Governor Butterworth to Church¹⁴⁰;
- (j) 4 April 1850 letter from Governor Butterworth to the Resident Councillor at Malacca¹⁴¹;
- (k) 19 April 1850 letter from Governor Butterworth to the Resident Councillor at Malacca¹⁴²; and
- (l) 2 November 1850 letter from Thomson to Church¹⁴³.

I. THE GOVERNMENT OF INDIA WAS THE EXCLUSIVE SOURCE OF LIGHTHOUSE EQUIPMENT AND TOOLS

5.73 In his letter to Church dated 20 December 1849, Thomson, as Government Surveyor, stated that the Government would be responsible for the provision of materials and their movement from Singapore to the site. The Government was also responsible for the provision of lighthouse equipment and tools¹⁴⁴.

¹³⁹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 29 Dec 1849, attached to this Memorial as Annex 38.

¹⁴⁰ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 22 Feb 1850, attached to this Memorial as Annex 40.

¹⁴¹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to the Resident Councillor at Malacca dated 4 Apr 1850, attached to this Memorial as Annex 43.

¹⁴² See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to the Resident Councillor at Malacca dated 19 Apr 1850, attached to this Memorial as Annex 44.

¹⁴³ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850, attached to this Memorial as Annex 47.

¹⁴⁴ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 Dec 1849, attached to this Memorial as Annex 34. See also Thomson's Account, *supra* note 10, at p. 403; Letters from Thomson J.T. (Government Surveyor at Singapore) to Stevenson A. (Engineer to the Northern Light Board at Edinburgh) dated 20 Jan 1851, 6 Feb 1851, 1 Apr 1851, attached to this Memorial as Annex 50, Annex 51, and Annex 52 respectively.

J. THE CONSTRUCTION CONTRACT

5.74 The overall control of the Government in the project was assumed from the early days. Thus, in his detailed letter to Governor Butterworth, dated 20 November 1844, Thomson referred to an Agreement signed by a Chinese contractor for the construction of a lighthouse (which, at this period, was envisaged at Peak Rock). In the letter, Thomson stated:

“This agreement of course is only preparatory to a formal one being drawn out when the orders of Government shall be made known.”¹⁴⁵

The agreement was to be signed by the Governor and by the Under Secretary to the Government of Bengal. Thomson reverted to the subject of the construction contract in the important letter to Church dated 20 December 1849. In this letter, Thomson was responding at the most practical level to the information provided to him by Church that the Court of Directors had authorised the “immediate construction” of a lighthouse on Pedra Branca.

5.75 The construction contract was also described by Thomson in his official report, in the context of his immediate response to the receipt of the instructions from Church:

“The contractor for the stone and brick part of the building was next communicated with, and an agreement entered into for their completion. The contractor’s name was Choa-ah-Lam, a Chinese of the Kheh tribe. In the written contract entered into, he and his security engaged to do their portion of the work for the sum of 10,600 Spanish dollars. In the performance of the work they were bound to observe certain conditions as to workmen and materials, which it is scarcely worthwhile here to set forth. On the part of Government it was engaged that two gun-boats should always be

¹⁴⁵ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 20 Nov 1844, attached to this Memorial as Annex 12.

in attendance at the works and that a steamer when necessary should be furnished for the purpose of towing materials.”¹⁴⁶

K. THE SPECIFICATIONS AND ESTIMATES FOR THE CONSTRUCTION

5.76 As part of the process of the original decision-making and the planning of the project, Thomson furnished a series of estimates as required by the Government of India at different junctures. The relevant documents are as follows:

- (a) The estimate by Thomson dated 19 November 1844, submitted to Governor Butterworth, under cover of a letter dated 20 November 1844¹⁴⁷;
- (b) Church’s instructions to Thomson to submit plans and estimates for the construction in a letter dated 21 June 1847¹⁴⁸;
- (c) Thomson’s reply in a letter dated 9 July 1847 containing preliminary plans and estimates¹⁴⁹;
- (d) The plan, specification and estimate prepared by Thomson (on the instructions of the Governor of the Straits Settlements), reported by the latter to the Government of Bengal in a letter dated 12 June 1848¹⁵⁰;

¹⁴⁶ See Thomson’s Account, *supra* note 6, at p. 403.

¹⁴⁷ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 20 Nov 1844, attached to this Memorial as Annex 12.

¹⁴⁸ See Thomson’s Account, *supra* note 6, at p. 390.

¹⁴⁹ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 9 July 1847, attached to this Memorial as Annex 21.

¹⁵⁰ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848, attached to this Memorial as Annex 27.

- (e) The Governor's report, in a letter dated 1 March 1849, of revised estimates prepared by Thomson to the Chamber of Commerce at Singapore¹⁵¹; and
- (f) Detailed questions raised by the Government of India, in a letter dated 3 March 1849, as to the costs and estimates as proposed by Thomson¹⁵².

5.77 The issue of costs was eventually finalised, as appears from Thomson's letter to Church dated 20 December 1849. The opening paragraph reads as follows:

“I have the honor of acknowledging the receipt of your letter No. 1217 of 1849 with annexed copies of letters from his honor the Governor No. 510, from the Under Secretary of the Gov^t. of Bengal No. 7840, and from W. Gray Esq^{re}, Under Secretary to the Gov^t. of India No. 607 containing a copy of a despatch from the Honorable the Court of Directors No. 3 of Sept 1849, relative to a Light house on Pedra Branca, and sanctioning its immediate construction, under the designation of the “Horsburgh Light house”, according to plans, specifications and estimate forwarded with my letters No. 19 & 20 of 1848 and further doing me the honor of entrusting its erection to my care.”¹⁵³

5.78 In the final period of planning and preparation, it was accepted that the Government of India would provide the necessary advances to the appointed engineer with respect to the preparation of the cupola and light. The subject is referred to in the following documents:

¹⁵¹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to the Chairman (Chamber of Commerce at Singapore) dated 1 Mar 1849, attached to this Memorial as Annex 29.

¹⁵² See Letter from Governor General the Government of India in Council to the Court of Directors of the East India Company dated 3 Mar 1849, attached to this Memorial as Annex 30.

¹⁵³ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 Dec 1849, attached to this Memorial as Annex 34.

- (a) Proposal on the subject of employment of the engineer in the letter from Thomson to Church, dated 26 December 1849¹⁵⁴;
- (b) Letter dated 27 December 1849 from Governor Butterworth to the Court of Directors of the East India Company¹⁵⁵;
- (c) Letter dated 19 March 1850 to Governor Butterworth from the Government of Bengal¹⁵⁶; and
- (d) Letter dated 18 September 1850 from the Court of Directors of the East India Company to the Marine Department of the Government of Bengal¹⁵⁷.

L. THE MAINTENANCE OF PUBLIC ORDER DURING THE PROCESS OF PREPARATION AND CONSTRUCTION

5.79 Thomson, the Government Surveyor who was in charge of the operations on Pedra Branca, had general authority to maintain public order in the vicinity. Thus, on 1 May 1850, when the commander and crew of the gunboat *Nancy*, in attendance at Pedra Branca to assist in the operations, refused to obey orders, Thomson placed the gunboat and its crew in the custody of the commander of the steamer *Hooghly*, who was ordered to tow the *Nancy* back to Singapore¹⁵⁸. A few days before this, on 28 April, Thomson had directly intervened in order to pacify and discipline Chinese workmen who were

¹⁵⁴ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 26 Dec 1849, attached to this Memorial as Annex 36.

¹⁵⁵ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 27 Dec 1849, attached to this Memorial as Annex 37.

¹⁵⁶ See Letter from Bayley H.V. (Under Secretary to the Government of Bengal) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 19 Mar 1850, attached to this Memorial as Annex 41.

¹⁵⁷ See Letter from the Court of Directors of the East India Company to the Marine Department of the Government of Bengal dated 18 Sep 1850, attached to this Memorial as Annex 46.

¹⁵⁸ See Thomson's Account, *supra* note 6, at p. 424.

attempting to seize a departing boat, with the intention of leaving Pedra Branca in breach of their contractual obligations¹⁵⁹.

M. THE CUTTING OF RAIN CHANNELS ON PEDRA BRANCA

5.80 By April 1851, the final works were being put in place after the monsoon had finished. These works included an outside platform and a second pier. At this time there were 42 workmen on the rock¹⁶⁰. Early in May, rain channels were cut “around all the higher rocks, which were to guide the rain water into barrels placed to receive it”. Thomson observes, “[t]here were altogether 1,069 square feet of surface thus enclosed and whose rainfall is guided into barrels.”¹⁶¹ This operation clearly assumed a lawful and permanent use and possession of Pedra Branca as a whole. The proposal to make the rain channel is documented in Thomson’s letter to Church, dated 2 November 1850¹⁶², and this proposal was approved by Governor Butterworth in his report of 9 November 1850 to the Government of Bengal, where he said:

“4 ... but I would call particular attention to the thoughtfulness which has dictated the suggestion of channels, for the collection of Rain Water...”¹⁶³

¹⁵⁹ See Thomson’s Account, *supra* note 6, at pp. 421-422.

¹⁶⁰ *Ibid*, at pp. 445-446.

¹⁶¹ *Ibid*, at p. 447.

¹⁶² See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850, attached to this Memorial as Annex 47.

¹⁶³ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 9 Nov 1850, attached to this Memorial as Annex 49.

Section VI. Official Visits to Pedra Branca after the Completion of the Construction: the Commissioning of the Lighthouse

5.81 The Government authority pervading the taking of possession of Pedra Branca and the planning and construction of the lighthouse was given further confirmation by the events which followed on completion.

5.82 On 8 July 1851, Thomas Church, the Resident Councillor at Singapore, arrived at Pedra Branca on board the Government Steamer *Hooghly*. Church and the official party landed and inspected all the works. Thomson, the Government Surveyor, was in attendance¹⁶⁴.

5.83 The completion of the process of construction was marked by a further official visit by the Governor of the Straits Settlements on 27 September 1851. Thomson describes the final commissioning of the lighthouse thus:

“Having got the dome, machinery and light apparatus all ready, nothing remained for us to do but complete the arrangements for permanently lighting the building, which were the housing of provisions, water, oil &c., also procuring Light-keepers and rendering them competent for their duties. The Light was advertised to be shown permanently from the 15th of October, so that in the interval the men who were to compose the establishment were exercised in their several duties. On the 27th September, the Honourable Colonel Butterworth C.B., Governor of the Straits Settlements, with a Party consisting of Sir William Jeffcott, Recorder of the Straits Settlements, Colonel Messitter, commanding the troops, Captain Barker, H.M.S. ‘Amazon,’ Mr Purvis, and the principal merchants of Singapore, together with several military officers, arrived off the rock at 1pm when they landed and minutely inspected the Pharos.

¹⁶⁴ See Thomson’s Account, *supra* note 6, at p. 448.

His Honor the Governor and party embarked again at 4 P.M. after expressing themselves in highly favorable terms regarding all the works and the arrangements connected therewith. The ‘Hooghly’ started at 7 P.M. and the Light-house was illuminated temporarily for the occasion until 10 o’clock P.M. by which time the steamer was out of sight.”¹⁶⁵

5.84 These official visits constituted the final acts in the process of taking lawful possession of the rock and the installation, at Government expense and for Government purposes, of the lighthouse.

Section VII. Further Evidence of Lawful Possession

5.85 The character of the British possession of Pedra Branca is confirmed by a number of other elements which are complementary to the pattern of activities from 1847 to 1851 exhibiting the exclusiveness of the possession.

A. THE PANEL IN THE VISITORS ROOM

5.86 The official character of the lighthouse and its purpose in serving the public interest is clearly indicated by the inscription on the panel in the visitors’ room within the structure. The English text of the inscription reads:

“A.D. 1851
THE HORSBURGH LIGHT-HOUSE
is raised by the enterprise of British Merchants,
and by the liberal aid of the East India Company,
to lessen the dangers of Navigation,
and likewise to hand down,
so long as it shall last,
in the scene of his useful labours,
The memory of the great Hydrographer,

¹⁶⁵ See Thomson’s Account, *supra* note 6, at pp. 453-454.

whose name it bears.

Col. W.J. BUTTERWORTH, C.B.
Governor in the Straits of Malacca

J.T. Thomson
*Architect*¹⁶⁶

A photograph of the panel is shown overleaf, as **Image 14**.

B. THE BRITISH *NOTICE TO MARINERS* DATED 24 SEPTEMBER 1851

5.87 Upon completion of the lighthouse, an official *Notice to Mariners* was issued. The text of the *Notice to Mariners* is as follows:

“ HORSBURGH LIGHT-HOUSE

NOTICE IS HEREBY GIVEN, that a Light-house bearing the above designation in commemoration of the celebrated Hydrographer, has been erected on Pedra Branca, a rock which lies off the eastern entrance of the Straits of Singapore. The Light will be exhibited on the night of the 15th of October, 1851, and every night thereafter from sunset to sunrise.

The following is a specification of the position of the Light-house; the dangers which come within the influence of its Light, and the appearance of the Light – by Mr J.T. Thomson, Government Surveyor:

The Light-house is situated according to the Admiralty Chart in Lat. 1° 20'20" N. and Long. 104° 25' East of Greenwich and by Compass bears from Barbuçet Point – East distant 12½ Nautical miles, and from the N.E. point of Bintang N.W. by W. ¾ W. distant 12 miles.

The following rocks and shoals lying in the way of vessels – and coming within the influence of the Light, bear from the Light-house –

¹⁶⁶ See Thomson's Account, *supra* note 6, at p. 474.

...

The Light will be known to mariners as a revolving bright Light which gradually attains its brightest period once every minute and as gradually declines until it totally disappears to the distant observer, – whilst, when viewed from a short distance, it is never entirely invisible.

The lantern, which is open all round, elevated 95 feet above the level of the sea at High Water Spring Tides, will be seen from the deck of a vessel at a distance of 15 Nautical miles.

As a beacon during the day the light-house will be known by the following description. It stands on a rock which measures 150 feet long and 100 broad and is 24 feet high at its highest point above the level of H.W. Sp. Tides. The Light House is a Pillar of dressed granite and the Lantern covered by a Spherical dome which is painted white.

W.J. BUTTERWORTH.
*Govr of P.W. Island, Singapore
and Malacca.*

*Singapore, 24th Sept, 1851.*¹⁶⁷

5.88 This document was based on a datum: that the island on which the lighthouse stands is British and forms part of Singapore. It was issued by Colonel Butterworth, the most senior British official based in Singapore.

C. THE MARINE ENSIGN WAS FLOWN

5.89 The practice since the lighthouse first began to function was for the marine ensign to be flown: see further, Chapter VI, below. This was adverted to in Thomson's letter to Church dated 20 July 1851, in which he wrote: "The

¹⁶⁷ "Notice to Mariners dated 24 Sep 1851" in Straits Times and Singapore Journal of Commerce (30 Sep 1851 and 3 Oct 1851), and also in *Singapore Free Press and Mercantile Advertiser* (6 Oct 1851), all attached to this Memorial within Annex 56.

Lighthouse flag I presume is different from the national one”¹⁶⁸. The use of the marine ensign was in accordance with contemporary British practice. See overleaf, for a painting showing the flying of the ensign at Pedra Branca (**Image 15**). See also, the images after page 10 (**Image 2**), and after page 61 (**Image 13**).

Section VIII. The Manifestation of the Will of the British Crown as a Sufficient Mode of Lawful Possession

5.90 In the circumstances, no particular formalities were called for, and there was no British constitutional requirement of a formal instrument of annexation. As Sir Kenneth Roberts-Wray points out:

“An instrument of annexation may accompany the acquisition of territory by settlement, conquest or cession, but the unilateral manifestation of the will of the Crown may also be the only means by which a territory has been brought within Her Majesty’s Dominions; for example, in the case of remote unoccupied areas, such as those in the Antarctic, where there is no question of settlement, cession or conquest.”¹⁶⁹

5.91 In the case of territory which does not have a population in the normal way, the formality of annexation is superfluous. The criterion of acquisition of title is the unequivocal evidence of the intention to take possession and to establish sovereignty on a permanent basis. The entire episode involving the selection of Pedra Branca as a site for a lighthouse, the preparation for its construction, the persistent official visits, the ceremonial laying of a foundation stone and the final commissioning of the lighthouse, provides unequivocal evidence of the will of the British Crown to annex Pedra Branca.

¹⁶⁸ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 July 1851, attached to this Memorial as Annex 54.

¹⁶⁹ See Roberts-Wray K., *Commonwealth and Colonial Law* (1966) at pp. 107-108.

5.92 The process of taking lawful possession of Pedra Branca for the purpose of constructing and maintaining a lighthouse began in 1847. It was in the period 1846 and 1847 that the Government of India decided that Pedra Branca was to be the site of the project rather than Peak Rock. In a letter dated 21 June 1847, Church¹⁷⁰, the Resident Councillor in Singapore, instructed Thomson to submit preliminary plans and estimates. Thomson responded in a letter dated 9 July 1847 in which he reviewed a long series of practical matters, including the engagement of a contractor, labour requirements, the housing of workmen on Pedra Branca, and the need to build pillars to assess the force of the monsoon¹⁷¹.

5.93 As a consequence of the instructions received from Church, Thomson, in his role as Government Surveyor, made his first landing on Pedra Branca. The purpose was to build brick pillars on the rock in order to assess the action of the waves at the worst season¹⁷². This assessment was directed to the making of an informed decision on the building materials to be used. The decision to build on Pedra Branca had already been taken and it was the modalities of the construction which were in issue at this stage.

5.94 On 1 March 1848, Thomson revisited Pedra Branca to examine the state of the pillars¹⁷³. In the event he decided that it would be necessary to use granite for the edifice rather than brickwork. These findings are also recorded in the letter dated 12 June 1848 from Governor Butterworth to W. Seton Karr, the Under Secretary to the Government of Bengal.

¹⁷⁰ See Thomson's Account, *supra* note 6, at p. 390.

¹⁷¹ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 9 July 1847, attached to this Memorial as Annex 21.

¹⁷² See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 5 Nov 1847, attached to this Memorial as Annex 25, where Thomson makes a brief reference to "placing brick pillars on Pedra Branca". In Thomson's Account, it is stated that the brick pillars were erected on 1 November 1847. See Thomson's Account, *supra* note 6, at pp. 390-391.

5.95 The building of the brick pillars constituted the first episode of physical activity on Pedra Branca. However, Governor Butterworth had visited the island earlier in 1847, and reported this to the Government of Bengal in a letter dated 1 October 1847.

5.96 On 6 March 1850, Thomson again inspected the island prior to commencing operations¹⁷⁴. Further public activity took place in the course of April 1850, when houses for the workmen were built on Pedra Branca¹⁷⁵.

5.97 The entire process of preparation for the construction and the construction itself was public, and this particularly so in the relatively narrow seas of the region. The key stages in the construction were the subject of contemporary reports in the local newspapers. Thus the laying of the foundation stone was reported in the *Straits Times and Singapore Journal of Commerce* on 28 May 1850¹⁷⁶ and in the *Singapore Free Press and Mercantile Advertiser* on 31 May 1850.

5.98 The completion of the lighthouse and the visit of Governor of the Straits Settlements on 27 September 1851 were reported in the *Straits Times and Singapore Journal of Commerce* on 23 September 1851 and 30 September 1851, respectively. The *Singapore Free Press and Mercantile Advertiser* carried a report on 3 October 1851. The relevant *Notice to Mariners* was published in the *Straits Times and Singapore Journal of Commerce* on 30 September 1851 and 7

¹⁷³ See Thomson's Account, *supra* note 6, at p. 391.

¹⁷⁴ *Ibid*, at pp. 404-405.

¹⁷⁵ *Ibid*, at pp. 405-423.

¹⁷⁶ See "The Horsburgh Lighthouse" in *Straits Times and Singapore Journal of Commerce* (28 May 1850), attached to this Memorial as Annex 45.

October 1851; and in the *Singapore Free Press and Mercantile Advertiser* on 6 October 1851¹⁷⁷.

Section IX. The Taking of Possession Elicited No Opposition from Other Powers

5.99 There is no record of any opposition to the British taking of possession of Pedra Branca. No other State in the region made any protest or reservation of rights. This absence of opposition is particularly striking in light of the public character of the British activities and the references to the construction of the lighthouse in the Singapore newspapers¹⁷⁸. In this context, it is significant that Church rejected a proposal from Thomson for the building of an outstation near Point Romania, precisely on the ground that that “belongs to the Sultan of Johore, where the British possess no legal jurisdiction.”¹⁷⁹ No such question was raised in relation to Pedra Branca.

5.100 It is worth noting that the operations begun in 1847 did not involve the Government of India in seeking permission from other powers in respect of shipping movements, including patrolling by British gunboats for the purpose of protecting the shipping moving building materials.

¹⁷⁷ See *Straits Times and Singapore Journal of Commerce* (23 Sep 1851, 30 Sep 1851 and 7 Oct 1851); *Singapore Free Press and Mercantile Advertiser* (3 Oct 1851 and 6 Oct 1851). Relevant extracts from these newspapers are all attached to this Memorial as Annex 56.

¹⁷⁸ See above, at paragraphs 5.97 to 5.98.

¹⁷⁹ See Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850, attached to this Memorial as Annex 48.

Section X. The Legal Significance of the Lighthouse in these Proceedings

5.101 It may be helpful to the Court if it is clearly indicated that the basis of the title advanced by Singapore is not premised on the role of lighthouses as evidence of State activity. There can be no question that the emplacement of navigational aids may, depending upon all the circumstances, constitute evidence of this character¹⁸⁰. However, in the present case, the taking of lawful possession of Pedra Branca for the purpose of constructing a lighthouse and its appurtenances, and maintaining the installation on a permanent basis, constitutes an independent and self-sufficient basis of title.

5.102 The essence of the matter is the intention of the Government of India, and the Court of Directors, to acquire lawful possession and the exclusive use of the rock for the purposes of the Government. The intention of the British Crown and the taking of possession constitute the basis of title. Having acquired lawful possession and enjoyed the benefits thereof in the period 1847 to 1851, the construction of the lighthouse provides further confirmation of the intention of the British Crown and the element of permanent appropriation.

¹⁸⁰

See e.g., Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment 17 Dec 2002, at paras. 146-148.

Section XI. Title to Pedra Branca was Acquired by the United Kingdom in Accordance with the Legal Principles Governing Acquisition of Territory in the Period 1847-1851

A. THE BASIS OF SINGAPORE'S TITLE

5.103 The basis of Singapore's title to Pedra Branca can be analysed as follows:

- (a) The selection of Pedra Branca as the site for building of the lighthouse with the authorization of the British Crown constituted a classic taking of possession *à titre de souverain*.
- (b) Title was acquired by the British Crown in accordance with the legal principles governing acquisition of territory in 1847–1851.
- (c) The title acquired in 1847–1851 has been maintained by the British Crown and its lawful successor, the Republic of Singapore.

5.104 The various elements in this analysis will be elaborated in due course.

B. THE DOCTRINE OF INTER-TEMPORAL LAW

5.105 The governing principle has been described clearly and authoritatively by Max Huber as follows:

“As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law, international law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and the territories without a master had become relatively few, took account of a tendency already existing had especially developed since the middle of the 18th century, and

laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals.”¹⁸¹

5.106 Sir Gerald Fitzmaurice expounded the doctrine in 1953 in these terms:

“THE DOCTRINE OF INTER-TEMPORAL LAW

(a) *Its character and purpose.* In a considerable number of cases, the rights of States (and more particularly of parties to an international dispute) depend or derive from rights, or a legal situation, existing at some time in the past, or on a treaty concluded at some comparatively remote date. This is more especially the case with claims to territory or territorial waters, bays, &c., or rights in the nature of ‘servitudes’ over territory; but a similar point might arise in respect of, for example, commercial matters under old but still subsisting treaties, such as the treaties of commerce and navigation which many countries concluded in the seventeenth and eighteenth centuries and which are still in force. It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today. In other words, it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern laws that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law...”¹⁸²

5.107 Judge Elias, writing in 1980 in relation to inter-temporal law, observed that:

“There are therefore two elements, the first of which is that acts should be judged in the light of the law temporary with their creation, and the second of which is that rights acquired in a valid manner according to the law contemporaneous with that creation

¹⁸¹ See *Island of Palmas Arbitration (Netherlands v. U.S.)* (1928) 2 RIAA 829.

¹⁸² See Fitzmaurice G., *The Law and Procedure of the International Court of Justice*, 30 Brit. Yr. Bk. Int'l L. 5 (1953).

may be lost if not maintained in accordance with the changes brought about by the development of international law.”¹⁸³

C. THE PRINCIPLES GOVERNING ACQUISITION OF TERRITORY IN THE MIDDLE AND LATE 19TH CENTURY

5.108 In order to provide a reasonable sample of authoritative opinion from the second half of the 19th century, a number of textbooks have been examined with publication dates ranging from 1864 to 1906. The various authorities, it may be assumed, reflect the doctrine or the opinion of governments, in the decade or so preceding publication. The authorities will now be adduced in chronological order.

- (a) G.-F. de Martens, *Précis du Droit des Gens Moderne de l'Europe*, Vol. 1 (2nd ed., 1864)

This work includes a substantial chapter on acquisition of property by the State. In applying the principle of occupation to the acquisition of territory, the writer emphasises the importance of the intention to take possession permanently and the need for evidence of such intention¹⁸⁴.

- (b) Henry Wheaton, *Elements of International Law* (8th ed., 1866, Dana R.H., editor)

The most relevant passages are as follows:

“§ 161. The exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently

¹⁸³ Elias T.O., *The Doctrine of Intertemporal Law*, 74 Am. J. Int'l L. 285, at p. 286 (1980).

¹⁸⁴ G.-F. de Martens, *Précis du droit des gens moderne de l'Europe* Vol. 1 (2nd ed., 1864), at pp. 124 *et seq.*, 130-132.

confirmed by the presumption arising from lapse of time, or by treaties and other compacts with foreign States.

...

§ 164. The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it.”¹⁸⁵

- (c) A.-G. Heffter, *Le Droit International de l'Europe* (translated by Jules Bergson, 3rd French ed., 1873)

This well-known work, which appeared in various editions both in German and in French, recognises “l’occupation des biens sans maître” as a mode of acquisition of territory¹⁸⁶. The writer insists that the intention to appropriate must be followed by an effective taking of possession¹⁸⁷.

¹⁸⁵ Wheaton H., *Elements of International Law* (8th ed., 1866) Dana R.H., (ed.)

¹⁸⁶ Heffter A-G, *Le Droit International de l'Europe* (3rd French ed., translated by Jules Bergson, 1873), at pp. 142-144, para. 70.

¹⁸⁷ *Ibid*, at p. 143.

- (d) J.-L. Klüber, *Droit des gens moderne de l'Europe* (2nd ed., 1874)

This work provides a very similar account of the “droit d’acquérir au moyen de l’occupation”¹⁸⁸. Like Heffter, there is considerable emphasis on the requirement that the taking of possession should be effective.

- (e) M. Bluntschli, *Le droit international codifié* (translated by M.C. Lardy, 2nd ed., 1874)

This work appeared in various editions, both in German and in French. Once again, the emphasis is upon the need for an effective taking of possession¹⁸⁹.

- (f) Sir Robert Phillimore, *Commentaries upon International Law* (3rd ed., 1879)

Phillimore gives an account of occupation as one of the three modes of acquisition recognised by the law of nations¹⁹⁰. Occupation, in his opinion, requires an intent to occupy, which “must be manifested by some *overt* or *external* acts... These acts, then, by the common consent of nations, must be *use* of and *settlement* in the discovered territories.”¹⁹¹

¹⁸⁸ Klüber J-L, *Droit des gens moderne de l'Europe* (2nd ed., 1874), at pp. 175-177, paras. 125-126.

¹⁸⁹ Bluntschli M., *Le droit international codifié* (translated by M.C. Lardy, 2nd ed., 1874), at pp. 170-171, paras. 278-279.

¹⁹⁰ Phillimore R., *Commentaries upon International Law* (3rd ed., 1879), at pp. 327 *et seq.*

¹⁹¹ *Ibid*, at pp. 331-332.

- (g) F. de Martens, *Traité de droit international* (translated by Alfred Léo, 1883)

The famous Russian publicist sets out the conditions for a valid taking of possession as follows:

“Pour qu’une occupation soit valable, comme moyen d’acquérir une propriété internationale, les conditions suivantes doivent être remplies.

1. Au point de vue subjectif, il est nécessaire que l’occupation ait lieu au nom et avec l’assentiment d’un gouvernement. Si elle est effectuée par des fonctionnaires, représentant un Etat, il n’y a aucun doute quant à la nation qui doit être considérée comme propriétaire de la terre occupée. L’occupation entreprise par des particuliers doit être sanctionnée par le gouvernement au profit duquel elle a été accomplie.

2. L’occupation est effective si l’Etat qui l’a entreprise est résolu de soumettre à sa puissance le territoire qu’il a découvert, occupé et annexé. Cette résolution (*animus possidendi*) se manifeste extérieurement par le drapeau national, par les armes et par d’autres symboles, mais avant tout, par l’occupation matérielle de la terre nouvellement découverte, par l’introduction d’une administration, par l’envoi de troupes, par la construction de fortifications, etc.

3. On ne peut occuper que des terres n’appartenant à personne et habituées par des tribus barbares...

5. Les limites de l’occupation sont déterminées par la possibilité matérielle de faire respecter l’autorité du gouvernement dans l’étendue du pays occupé. Là où le pouvoir de l’Etat ne se fait pas sentir, il n’y a pas d’occupation...¹⁹²

¹⁹² de Martens F., *Traité de droit international* (translated by Alfred Léo, 1883), at pp. 463-4.

- (h) Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (1884)

Twiss gives an orthodox account of the “right of occupation”¹⁹³, which is closely related to the “right of discovery”¹⁹⁴. The writer emphasizes that discovery can only give an inchoate title unless some act of possession is carried out¹⁹⁵.

- (i) John Bassett Moore, *A Digest of International Law* (1906)

Moore gives an account of occupation, which he defines as “the discovery, use, and settlement of territory not occupied by a civilised power”, and he observes that “[d]iscovery gives only an inchoate title, which must be confirmed by use or settlement”¹⁹⁶.

5.109 In looking at the legal doctrine of the second half of the 19th century there can be no doubt that the appropriation of Pedra Branca to the exclusive use of the British Crown in 1847-1851 constituted title by occupation, that is, by the taking of possession. The literature requires an intention to acquire sovereignty, a permanent intention to do so, and overt action to implement the intention and to make the intention to acquire manifest to other States. It is difficult to conceive of a manifestation of sovereignty and exclusive possession as unmistakable in meaning as the taking of possession of Pedra Branca by persons acting with the authority of the British Crown, more particularly in the light of the purpose of taking possession and the construction which followed.

¹⁹³ Twiss T., *The Law of Nations Considered as Independent Political Communities: on the rights and duties of nations in time of peace* (1884), at pp. 196-197, para. 118.

¹⁹⁴ *Ibid*, at pp. 197-204, paras. 119-123.

¹⁹⁵ *Ibid*, at pp. 197-198, para. 119.

¹⁹⁶ Moore J.B., *A Digest of International Law*, Vol. 1 (1906), at p. 258.

5.110 The doctrine quoted in this Chapter is compatible with the practice of States at the material time. On this aspect of the matter reference can be made to McNair's *International Law Opinions*, which cites *Reports of the Law Officers* dated 1842 and 1868¹⁹⁷. The *Reports* stress the need to establish title by means of effective occupation, as McNair points out in his commentary¹⁹⁸.

5.111 The sources confirm that an uninhabited island (such as Pedra Branca) was perfectly capable of appropriation by the taking of lawful possession.

Section XII. Conclusions

5.112 Singapore will now present her conclusions on the basis of the facts and legal considerations set forth above.

- (a) The basis of the claim to sovereignty in respect of Pedra Branca is the lawful possession of Pedra Branca effected by a series of official actions in the period 1847 to 1851, beginning with the first landing on Pedra Branca by Thomson some time between 21 June and 9 July 1847, and ending with the ceremonial official commissioning of the lighthouse on 27 September 1851.
- (b) The decision to build the lighthouse on Pedra Branca was taken by the Court of Directors of the East India Company as an official organ of the British Crown.
- (c) The entire process of planning, choice of site, and construction, was subject to the exclusive control and approval of the British Crown and its representatives.
- (d) The pattern of activities and official visits in the period 1847 to 1851 constitutes an unequivocal manifestation of the will of the British Crown to claim sovereignty in respect of Pedra Branca for the purpose of building the Horsburgh Lighthouse and its appurtenances, and maintaining them on a permanent basis.

¹⁹⁷ McNair, *supra* note 49, at pp. 255-258.

¹⁹⁸ *Ibid*, at p. 285.

- (e) The acts of taking possession were peaceful and public and elicited no opposition from other powers.
- (f) Title to Pedra Branca was acquired by the British Crown in accordance with the legal principles governing acquisition of territory in the period 1847 to 1851.

5.113 The evidence and relevant legal considerations establish that the British Crown acquired sovereignty in the period 1847 to 1851, an entitlement subsequently inherited by the Republic of Singapore. The maintenance of this title, on the basis of the effective and peaceful exercise of State authority since 1851, is described in Chapter VI.

5.114 The question of sovereignty in relation to Middle Rocks and South Ledge will be examined in Chapter IX below.

CHAPTER VI
THE CONTINUOUS, PEACEFUL AND EFFECTIVE EXERCISE OF
STATE AUTHORITY OVER PEDRA BRANCA BY SINGAPORE
AND HER PREDECESSORS IN TITLE SINCE 1851

Section I. Introduction

6.1 As demonstrated in the previous Chapter, the British Crown acquired title to Pedra Branca during the period 1847 to 1851 when it took lawful possession of the island and completed the erection of the Horsburgh Lighthouse. Prior to that time, no other State had ever occupied the island or exercised any sovereignty over it.

6.2 Horsburgh Lighthouse was built to ensure the safety of navigation in the Straits of Singapore through which shipping from Europe and India had to pass to reach China and other parts of East Asia and vice versa. This factor was of crucial importance to the authorities of Singapore. The building of Horsburgh Lighthouse, and the British occupation of Pedra Branca for this purpose, furthered the very objective for which Singapore was founded – to secure the important trade route passing through the Straits of Malacca and the Straits of Singapore – and played an important role in the continued success of Singapore as a major commercial *entrepôt*.

6.3 On 24 September 1851, the Governor of the Straits Settlements, W.J. Butterworth, issued an official *Notice to Mariners* which announced the completion of the lighthouse on Pedra Branca, indicated its geographic co-ordinates and stated that, commencing on 15 October 1851, the light would be

exhibited every night thereafter from sunset to sunrise¹⁹⁹. The *Notice to Mariners*, which is quoted at paragraph 5.87 above, also noted that the height of the lighthouse was elevated 95 feet above sea-level and could be seen in clear weather by vessels at a distance of 15 nautical miles. There was no protest or reaction of any kind by Johor to this notice.

6.4 The 1851 *Notice to Mariners* was in effect the beginning of the continuous, open and peaceful display of State authority exercised by Singapore and her predecessors over Pedra Branca following its lawful possession by the United Kingdom. Since its construction, and for more than 150 years up to the present, the British colonial government in Singapore and later the Government of Singapore have operated and maintained Horsburgh Lighthouse, and have exercised authority over Pedra Branca and its territorial waters, without any challenge or objection from Malaysia or any other State until Malaysia published a map in December 1979 purporting to include Pedra Branca within her territorial waters²⁰⁰.

6.5 The exercise of State activities over Pedra Branca was authorized by, and carried out under the jurisdiction of, first the Government of India, and subsequently, after the Straits Settlements ceased to be part of the Government of India, the British Crown Colony of the Straits Settlements of which Singapore formed a part, and then the Singapore Government.

¹⁹⁹ See note 177 above.

²⁰⁰ Malaysia's 1979 map is discussed below at paras. 6.114 *et seq.*

6.6 Apart from taking possession of Pedra Branca and building and operating the lighthouse, the Singapore authorities and their predecessors have administered and controlled Pedra Branca in a wide-ranging number of ways. These include:

- (a) enacting legislation relating to Pedra Branca and the Horsburgh Lighthouse;
- (b) assuming responsibility for the maintenance and improvement of the lighthouse and other facilities on the island;
- (c) exercising regulatory authority and jurisdiction over personnel residing on the island and maintaining peace and good order thereon;
- (d) collecting meteorological information from Pedra Branca;
- (e) building and upgrading a jetty on Pedra Branca;
- (f) flying the British and, subsequently, the Singapore Marine Ensign on the island;
- (g) vetting applications for persons (including Malaysian nationals) to visit Pedra Branca and otherwise controlling access to the island;
- (h) regular visits by civil and military officials from Singapore to the island without seeking any permission from Malaysia;
- (i) granting permission for Malaysian authorities to undertake scientific and technical surveys on Pedra Branca and within Pedra Branca's territorial waters;
- (j) carrying out naval patrols and conducting naval exercises within Pedra Branca's territorial waters;
- (k) investigating and reporting on hazards to navigation and shipwrecks in the waters around the island;
- (l) investigating incidents of accidental death in the waters of Pedra Branca; and
- (m) considering sea reclamation plans to extend the island.

6.7 In Section II below, Singapore will review the facts evidencing her continuous exercise of sovereign authority over Pedra Branca. In Section III, Singapore will discuss the legal consequences which follow from her administration and control of the island. As will be seen, the activities discussed below were all undertaken *à titre de souverain*. The open, peaceful and continuous exercise of State authority by Singapore and her predecessors on Pedra Branca after 1851 thus maintained, and was the natural result of, the title acquired by the British Crown during the period 1847 to 1851. Finally, in Section IV, Singapore will demonstrate that Malaysia can point to no competing activities of a sovereign nature that she undertook with regard to Pedra Branca during the relevant period.

6.8 As the following sections will demonstrate, the United Kingdom's and, subsequently, Singapore's administration of Pedra Branca has been far-reaching and continuous since 1851. Malaysia, in contrast, only advanced a claim to the island in 1980 in response to Singapore's objection to her publication of a map in 1979 purporting to show Pedra Branca as falling within Malaysia's territorial waters²⁰¹. Moreover, Malaysia's first protest over Singapore's activities on Pedra Branca only occurred in 1989²⁰². By that time, Singapore and her predecessors had already been engaged in a long-standing pattern of administration and control over Pedra Branca and its waters for over 130 years. That administration has continued, uninterrupted, to the present.

6.9 To the extent that the dispute over Pedra Branca may be said to have emerged in 1979-1980, Singapore's activities with respect to Pedra Branca after that date represent no more than a continuation of Singapore's previous display

²⁰¹ See Malaysia's claim to Pedra Branca, quoted in para.4.7 above, and the diplomatic note cited at note 36 above.

²⁰² See paragraph 6.113 below, and note 301 below.

of sovereign authority over the island. As the Court noted in the *Indonesia/Malaysia* case, acts occurring after a dispute has crystallized are legally relevant and can be taken into consideration when they constitute “a normal continuation of prior acts and are not taken for the purpose of improving the legal position of the Party which relies on them”²⁰³. This was clearly the situation with respect to the activities which occurred after 1979 that Singapore will discuss. All of these were part of a consistent pattern of State activity relating to Pedra Branca which commenced in 1851 and continued thereafter, and thus represented further evidence of the exercise of official functions relating to the island carried out by Singapore *à titre de souverain*.

Section II. Since 1851, Singapore has Continuously Exercised State Authority over Pedra Branca

A. SINGAPORE AND HER PREDECESSORS IN TITLE ENACTED LEGISLATION SPECIFICALLY RELATING TO PEDRA BRANCA

6.10 In the exercise of their sovereign authority, Singapore and her predecessors enacted a series of laws relating to Pedra Branca. These measures included legislative acts relating to defraying the costs of establishing and maintaining the Horsburgh Lighthouse, vesting control of the lighthouse under the jurisdiction of various governmental bodies, and regulating the activities of persons residing, visiting and working on the island. All of these measures were open and notorious and were published as official government documents. None of them elicited any protest from Malaysia.

²⁰³ See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 180, at para. 135.

6.11 The exercise of legislative authority over Pedra Branca began on 30 January 1852 when the Government of India enacted Act No. VI of 1852 – “An Act for defraying the Cost of a Light-House on Pedra Branca”²⁰⁴. In addition to imposing tolls on ships calling at Singapore harbour, Act No. VI dealt with matters of government.

6.12 Section I of the Act provided:

“The Light-House on Pedra Branca aforesaid shall be called “The Horsburgh Light-House,” and the said Light-House, and the appurtenances thereunto belonging or occupied for the purposes thereof, and all the fixtures, apparatus, and furniture belonging thereto, shall become the property of, and absolutely vest in, the East India Company and their successors.”

6.13 Section IV was concerned with the question of management and control. It provided:

“The management and controul of the said “Horsburgh Light-House,” and of the keeper thereof, and of everything relating thereto, is hereby vested in the Governor of the Straits Settlements.”²⁰⁵

6.14 The 1852 Act formally integrated Horsburgh Lighthouse into the British legislative system following the appropriation of Pedra Branca during the period 1847 to 1851. Having taken possession of Pedra Branca, it was natural for the British Crown to enact laws dealing with the ownership, management and control of the lighthouse and its appurtenances. As is discussed at paragraphs 6.102 to 6.104 below, these kinds of legislative measures are legally very significant. They represent important evidence of the exercise of sovereign

²⁰⁴ Act No. VI of 1852 (India), attached to this Memorial as Annex 59.

²⁰⁵ As explained in para. 5.11 above, the Governor of the Straits Settlements was responsible to the Governor-General of India, and, like the Governor-General, was an officer of the East India Company.

authority over Pedra Branca itself which was the specific subject matter of the legislation in question.

6.15 To further appreciate the significance of the 1852 Act, it should be recalled that it was enacted by the Governor-General of India in exercise of his legislative powers in India. As explained in Chapter V, the East India Company was the vehicle through which the British Crown governed India. The Governor-General of India was an officer of the East India Company responsible to the Court of Directors of the East India Company which was, in turn, responsible to the British Government in London for the governance of India. Section I of the 1833 Charter of the East India Company provided that all property of the East India Company was held in trust for (i.e., on behalf of) the British Crown for the service of the Government in India²⁰⁶. Consequently, for the period in question, property belonging to the East India Company was property of the Government in India and vice versa.

6.16 Given that territorial and other possessions held by the British Government in India were held in the name of the East India Company, it follows that the vesting of the lighthouse and its appurtenances in the East India Company by Act No. VI of 1852 was not merely a transfer of property to a private company. Instead it was a legislative measure enacted by the East India Company to vest real property in itself. Such a measure is clearly an exercise of jurisdiction *à titre de souverain* for the following reasons.

²⁰⁶ See relevant provisions of the 1833 Charter of the East India Company, attached to this Memorial as Annex 5.

6.17 *First*, such an act, by a government to appropriate real property to itself, was a clear display of territorial jurisdiction. As the Permanent Court observed in the *Lotus* case:

“... a State ... may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention.”²⁰⁷

6.18 *Second*, under section XLIII of the 1833 Charter of the East India Company, the legislative power of the Governor-General in Council – i.e., the legislature of the Government in India – was purely territorial in nature in the sense that the Governor-General was not granted power to legislate extra-territorially.²⁰⁸ Since the Government in India could not pass extra-territorial legislation, any law vesting or affecting real property on Pedra Branca, such as Act No. VI of 1852, presupposed that the Government in India already regarded Pedra Branca as British territory (i.e., as a result of the events on Pedra Branca from 1847 to 1851 discussed in Chapter V).

6.19 The enactment of Act No. VI of 1852 thus provides clear evidence that the Government in India regarded Pedra Branca as British territory and acted as such. These arrangements represented a specific exercise of State authority over Pedra Branca by the British Crown and were undertaken *à titre de souverain*.

6.20 On 7 April 1854, the Government of India further demonstrated its authority over Pedra Branca by repealing Act No. VI of 1852 and replacing it

²⁰⁷ See *S.S. Lotus (France v. Turkey)* [1927] P.C.I.J. Ser. A, No. 10, at pp. 18-19. See also F. A. Mann, *Studies on International Law* (1973), where the author reflected this well-established principle and wrote that “no State has jurisdiction so as to bind property outside its borders.”

²⁰⁸ See relevant provisions of the 1833 Charter of the East India Company, attached to this Memorial as Annex 5.

with new legislative measures (Act No. XIII of 1854) for defraying the costs of the lighthouse thereon and its maintenance²⁰⁹. The purpose of this Act was to change the basis on which light dues were collected. Section II of Act No. XIII provided:

“The Light-House on Pedra Branca aforesaid shall continue to be called ‘The Horsburgh Light-House,’ and the said Light-House, and the appurtenances thereunto belonging or occupied for the purposes thereof, and all the fixtures, apparatus and furniture belonging thereto, shall remain the property of, and be absolutely vested in, the East India Company and their successors.”

6.21 Section VIII of the 1854 Act repeated in large measure the provisions of section IV of Act No. VI of 1852. It provided that: “The management and control of the said ‘Horsburgh LightHouse,’ and of the Straits’ [*sic*] Lights, are hereby vested in the Governor of the Straits’ Settlements.” Section X then provided:

“The Funds raised by the tolls payable under this Act shall be applicable in the first place to defray the necessary expenses of maintaining and keeping up the said Light-House and the said Straits’ Lights, and the establishment and maintenance of such other lights as aforesaid, as the Governor General of India in Council may think fit to establish and maintain, and all necessary expenses incidental thereto, and the surplus thereof shall from time to time, be applied in liquidation of the moneys advanced by the East India Company towards the erection and completion of the said Light-House, and the apparatus and furniture thereof.”

6.22 Sovereignty over Pedra Branca having been established in 1847-1851, the 1852 and 1854 Acts formally vested title over Horsburgh Lighthouse and its appurtenances in the British Crown for internal constitutional purposes. Thereafter, the United Kingdom, in the maintenance of her sovereignty over Pedra Branca, periodically enacted orders modifying the tolls that were assessed

²⁰⁹ Act No. XIII of 1854 (India), attached to this Memorial as Annex 62.

on ships passing through the Straits of Singapore for the upkeep of the light on Pedra Branca²¹⁰.

6.23 In 1957, the Singapore Light Dues Board was established, pursuant to the Light Dues Ordinance (No. 6 of 1957), with responsibility for administering the fund into which light dues were remitted²¹¹. The Board was responsible for the provision and upkeep of all maritime navigational aids in Singapore waters including the station at Pedra Branca. The Chairman of the Board was ex officio the Master Attendant, the head of the Singapore Marine Department. The other members of the Board were appointed by a Government Minister²¹².

6.24 On 1 April 1973, Singapore enacted the Light Dues (Repeal) Act 1973 which transferred the assets, liabilities and employees of the Singapore Light Dues Board to the Port of Singapore Authority and repealed the 1957 Ordinance²¹³. A further reorganization took place in 1997 under the Maritime and Port Authority of Singapore Act 1996 which transferred the functions of the Port of Singapore Authority to the Maritime and Port Authority of Singapore²¹⁴.

6.25 On 29 November 1991, the Singapore Minister for Home Affairs issued the Protected Places (No. 10) Order 1991²¹⁵. Section 2 of the Order provided

²¹⁰ See e.g., Order in Council of 23 Oct 1907 (Straits Settlements), attached to this Memorial as Annex 76; and The Light-Houses Ordinance 1912 (Straits Settlements), attached to this Memorial as Annex 77.

²¹¹ See Light Dues Ordinance (No. 6 of 1957) (Colony of Singapore), attached to this Memorial as Annex 99.

²¹² *Ibid*, at s. 6.

²¹³ See Light Dues (Repeal) Act 1973 (Republic of Singapore), attached to this Memorial as Annex 118.

²¹⁴ See Maritime and Port Authority of Singapore Act 1996 (Republic of Singapore), attached to this Memorial as Annex 196.

²¹⁵ See Protected Places (No. 10) Order 1991 (Republic of Singapore), attached to this Memorial as Annex 178.

that the premises described in the First Schedule to the Order were declared to be protected places and that no person shall be in those premises unless he had a pass-card or permit issued by the Secretary of the Port of Singapore Authority. Under item 10 of the Schedule, “[t]he island occupied by ‘Port of Singapore (Horsburgh Lighthouse)’” – i.e., Pedra Branca – was included amongst the places covered by the Order, thus further attesting to the exercise of State functions by Singapore relating specifically to Pedra Branca²¹⁶.

6.26 As will be seen in the following sections, Singapore and her predecessors have administered and controlled a broad spectrum of other activities on and in the territorial waters around Pedra Branca ever since lawful possession of the island was effected.

B. THE BRITISH CROWN AND, SUBSEQUENTLY, SINGAPORE MAINTAINED, IMPROVED AND STAFFED THE LIGHTHOUSE AND OTHER FACILITIES ON PEDRA BRANCA

6.27 The legislative acts discussed in the previous section show that administrative control over Pedra Branca and the maintenance of the Horsburgh Lighthouse after 1851 remained vested in the British Government and, later, in Singapore.

6.28 In 1883, an official Government notification was published in the Straits Settlements Government Gazette inviting tenders for strengthening the jetty on Pedra Branca and constructing a small landing stage²¹⁷. In 1902, another

²¹⁶ See also the plan/map of Pedra Branca attached to the Protected Places (No. 10) Order 1991 (Republic of Singapore), attached to this Memorial as Annex 178.

²¹⁷ See Government Gazette No. 21 of 1883 dated 10 Jan 1883, and Government Gazette No. 159 of 1883 dated 5 Apr 1883, attached to this Memorial as Annex 70.

Government notification invited tenders for the provision of new girders, tension rods and roof of davits of the pier at Pedra Branca²¹⁸.

6.29 New lighting equipment was installed on the lighthouse in 1887 and was publicized by the issuance of a further *Notice to Mariners* on 2 September 1887²¹⁹. This equipment continued to work well until 1966, when it was upgraded²²⁰.

6.30 Evidence of the continuous maintenance of the facilities on Pedra Branca may be found in the Annual Reports of the Marine Department of the Straits Settlements and the Colony of Singapore starting in 1937²²¹. These improvements were carried out by the Marine Section of the Public Works Department of Singapore or by independent contractors hired by that department²²². Amongst the activities carried out, as shown in the relevant Annual Reports, were the following:

- (a) in 1948, larger living quarters were built for the lightkeeper and crew stationed on Pedra Branca;
- (b) in 1950, the pier foundation at Pedra Branca was repaired and strengthened and a radio telephone installed;
- (c) in 1951, maintenance repairs were carried out along with repainting and whitewashing;

²¹⁸ See Government Gazette No. 767 of 1902 dated 13 June 1902, attached to this Memorial as Annex 74; and Government Gazette No. 867 of 1902 dated 8 July 1902, attached to this Memorial as Annex 75.

²¹⁹ See “Notice to Mariners” dated 2 Sep 1887, attached to this Memorial as Annex 73. See also, “Notice to Mariners” dated 29 June 1887, attached to this Memorial as Annex 72.

²²⁰ See the Marine Department Annual Report for 1966, in *Extracts from Selected Annual Reports of the Marine Department (Singapore)*, attached to this Memorial as Annex 82.

²²¹ See *Extracts from Selected Annual Reports of the Marine Department (Singapore)*, attached to this Memorial as Annex 82.

²²² See Letter from the Master Attendant, Singapore to the Permanent Secretary (Commerce & Industry) dated 5 Sep 1957, attached to this Memorial as Annex 100.

- (d) in 1952, authorisation was given to fly the new Ensign of the Colony of Singapore on all Marine Department Establishments, including Pedra Branca;
- (e) in 1952, boat davits were fitted at the lighthouse;
- (f) in 1959, dihedral radar reflectors were installed;
- (g) by 1962, a radio beacon had been installed;
- (h) in 1966, a new electric-powered optic and light source was installed and an alternator room was added to the lighthouse;
- (i) in 1967, general repairs and repainting were effected; and
- (j) in 1971, there were further general repairs and repainting (ordinarily, these took place every four years), an additional diesel fuel storage tank was installed, and the diesel engines' cooling water tanks and piping connections were renewed²²³.

Throughout this period, Singapore maintained personnel on Pedra Branca to staff the lighthouse, and arranged for regular visits to the island to effect the various works and enhancements.

6.31 Singapore undertook further improvements in 1988 when the lighthouse became fully automated and solar panels were mounted on a new housing structure²²⁴. With the installation of a remote monitoring system linked to the Singapore Port Operation Center, the number of personnel stationed on the island was reduced.

6.32 In 1989, Singapore installed radar on the island and linked this to a Vessel Traffic Information System operated out of Singapore²²⁵. This was followed, in

²²³ See generally, *Extracts from Selected Annual Reports of the Marine Department (Singapore)*, attached to this Memorial as Annex 82.

²²⁴ See *Extract from the Annual Report of the Port of Singapore Authority for 1987*, attached to this Memorial as Annex 158.

²²⁵ See Marine Circular 8 of 1989 dated 20 July 1989 and Marine Circular 12 of 1989 dated 25 Aug 1989, issued by the Port of Singapore Authority, attached to this Memorial as Annex 165.

1992, by the construction of helicopter landing facilities on the island²²⁶. A further upgrade was made to the light in 1996²²⁷. Once again, they represented a continuation of Singapore's long-standing administration of Pedra Branca. See overleaf for a diagrammatic representation of the various facilities and structures on Pedra Branca today (**Image 16**).

6.33 Singapore and her predecessors have also assumed exclusive responsibility for staffing the lighthouse on Pedra Branca continuously since its completion in 1851.

6.34 The original staffing plans for Horsburgh Lighthouse were set out in an 1851 letter from J.T. Thomson to the Resident Councillor in Singapore, Thomas Church, and subsequently approved by Colonel Butterworth²²⁸. The lighthouse was serviced by a rotating contingent of 13 persons of which eight were to be stationed on Pedra Branca at any one time, and the expenses relating to their salaries and upkeep were endorsed by Butterworth, in his capacity as Governor. When the lighthouse was electrified in 1966, the crew was cut to four men, and it was further reduced to two in 1989 when the light became automated. These personnel were augmented from time to time as required by visiting inspectors, repairmen and maintenance crews²²⁹.

²²⁶ See *Newspaper Reports on the Helipad at Pedra Branca*, attached to this Memorial as Annex 172 and Annex 173.

²²⁷ See Letter from the Hydrographic Department, Maritime and Port Authority of Singapore to Director-General, Maritime and Port Authority of Singapore, dated 13 June 1996, attached to this Memorial as Annex 197.

²²⁸ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 July 1851, attached to this Memorial as Annex 54; Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 23 Aug 1851, attached to this Memorial as Annex 55; and Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Church T. (Resident Councillor at Singapore) dated 28 Oct 1851, attached to this Memorial as Annex 57.

²²⁹ See *Selected Entries from the Horsburgh Lighthouse Visitors Logbook (including transcriptions)*, attached to this Memorial as Annex 87.

C. SINGAPORE'S EXERCISE OF REGULATORY AUTHORITY AND JURISDICTION OVER PERSONNEL STATIONED ON PEDRA BRANCA

6.35 In the maintenance of their pre-existing title, the Government of Singapore and her predecessors have exercised sovereign authority and legislated for the maintenance of peace and good order on Pedra Branca and have regulated the activities of personnel stationed there even to the extent of exercising criminal jurisdiction over them.

6.36 In 1928, the Government of the Straits Settlements amended the Merchant Shipping Ordinance to provide that:

“Any person employed in a lighthouse, who willfully or negligently omits to do any act proper and requisite to be done by him with respect to the light or signals exhibited in a lighthouse, shall, if such omission is of a nature likely to cause danger to navigation, be liable upon conviction before a District Court to a fine not exceeding five hundred dollars or to imprisonment of either description for a term not exceeding two years.”²³⁰

6.37 With respect to regulatory activities, the Master Attendant of Singapore issued “Standing Orders and Instructions – Lighthouses” on 13 September 1961²³¹. These Standing Orders pertained to Horsburgh Lighthouse, and included, amongst other matters, an instruction (section 6) that no visitors were allowed to land or stay at lighthouses without a permit issued by the Master Attendant. Under section 10 of the Standing Orders, the State Ensign of Singapore was directed to be flown during daylight hours. Section 15 of the Standing Orders provided that, with respect to Horsburgh Lighthouse, a

²³⁰ See section 269 of the Merchant Shipping Ordinance (Chapter 150 of the 1936 Revised Edition of the Laws of the Straits Settlements), with subsequent revisions of the section i.e., section 233 of the 1970 Revised Edition and section 215 of the 1985 Revised Edition, attached to this Memorial as Annex 80. As shown in the 1970 Revised Edition, the fine imposable was later increased to 1,000 dollars.

²³¹ “Standing Orders and Instructions – Lighthouses” dated 13 Sep 1961, attached to this Memorial as Annex 106.

transmitting beacon would be separately maintained by the Singapore Telecommunications Department.

6.38 In 1974, the Navigational Aids Section of the Port of Singapore Authority issued new “Standing Orders and Instructions to Lighthouse Personnel”²³². Section 2 of these Standing Orders provided that they were applicable to personnel stationed at the Horsburgh Lighthouse on Pedra Branca.

6.39 Apart from regulating the ordinary duties of lighthouse keepers and staff, the Standing Orders contained provisions having a wider application attesting to Singapore’s authority. For example, section 9 of the Standing Orders provided:

“Lightkeepers are instructed to see that no visitors are allowed to land or stay at lighthouses without a valid permit. Shelter may, however, be afforded to persons in distress or requiring assistance and in all such cases, the Lightkeeper should report the circumstances to the Office forthwith.”

6.40 The actual exercise of control by Singapore over visits to Pedra Branca is discussed in greater detail at paragraphs 6.54 to 6.64 below.

²³² “Standing Orders and Instructions to Lighthouse Personnel 1974” dated 12 Feb 1974, attached to this Memorial as Annex 119.

D. THE STATE ACTIVITIES OF THE UNITED KINGDOM AND SINGAPORE ON PEDRA BRANCA RELATED TO THE ISLAND AS A WHOLE, NOT SIMPLY THE LIGHTHOUSE

6.41 Thus far, this Chapter has focussed on the actions of an official nature that the United Kingdom and Singapore undertook with respect to Horsburgh Lighthouse on Pedra Branca. It is significant, however, that the exercise of sovereignty by Singapore and her predecessors over Pedra Branca related not simply to the lighthouse, but also to the island as a whole as well as to its territorial waters and encompassed numerous non-lighthouse activities.

1. The Authorities in Singapore Used Pedra Branca as a Meteorological Data Collection Station

6.42 As early as 1851, the architect and engineer of Horsburgh Lighthouse, J.T. Thomson, proposed that meteorological observations be made by personnel stationed on Pedra Branca. In his letter to Resident Councillor Church dated 20 July 1851, there is a heading “Meteorological Observations” under which Thomson writes:

“In an establishment of this nature – where the duty is regular and continuous – these observations can be made with little labour or troubles to the Keepers ... In the meantime I have only proposed observations in the thermometer and rain guage to be placed in the Light house Journal...”²³³

²³³ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 July 1851, attached to this Memorial as Annex 54.

6.43 That Horsburgh Lighthouse was actually used as a meteorological station as envisaged by Thomson can be seen from his *Account of the Horsburgh Light-House*, where he stated:

“Since the 1st of November, 1851, to the present time, (July 1852) the indications of the thermometer have been registered twice a day....”²³⁴

Thomson provided temperature readings for Pedra Branca from November 1851 to June 1852.²³⁵

6.44 Thereafter the lighthouse continued to be used as a meteorological station as evidenced by the publication in the official Government Gazette of meteorological data taken on Pedra Branca in the 1860s²³⁶.

6.45 During the Second World War, the lighthouse fell into disrepair. After the Second World War, new rainfall gauges were installed on Pedra Branca on 28 May 1953 by the Meteorological Department, which came directly under the authority of the Ministry of Communications of the Government of the Crown Colony of Singapore. As the daily rainfall records show, from 1 June 1953 to April 1988, rainfall data was collected daily by the lighthouse keepers²³⁷. The information was then forwarded to the Meteorological Department, which collated the information on a monthly and annual basis. Officers from the Meteorological Department also visited Pedra Branca to maintain the rain gauges.

²³⁴ Thomson’s Account, *supra* note 6, at p. 381.

²³⁵ *Ibid*, at p. 381-382.

²³⁶ See *Extracts from the Straits Settlements Government Gazette 1865-1867*, attached to this Memorial as Annex 66.

²³⁷ See Rainfall records of Pedra Branca from 1953 to 1988, attached to this Memorial as Annex 92.

6.46 The rainfall data was then combined with figures for rainfall obtained from other places within Singapore's territory to derive the annual average rainfall figures for Singapore as a whole. In this regard, it is significant that rainfall data was also collected for Raffles and Sultan Shoal lighthouses, which were within Singapore's territory, but not for the lighthouse on Pulau Pisang, which was administered by Singapore, but sited on territory belonging to Malaysia.

2. *The Display of a British Marine Ensign and, after Independence, a Singapore Ensign over Pedra Branca*

6.47 During the construction of Horsburgh Lighthouse, and subsequently for more than a century, a British Marine Ensign flew continuously over Pedra Branca. The earliest proposal for flying the Ensign after the completion of the Lighthouse was contained in Thomson's letter of 20 July 1851. That the Ensign was flown during the construction, and after completion, of the Lighthouse can be seen from the photographs and paintings of Pedra Branca overleaf (**Images 17 to 20**), and above, after page 10 (**Image 2**) and page 74 (**Image 15**).

6.48 The fact that national emblems such as the one flown at Pedra Branca are indications of sovereignty has been confirmed in the Court's decision in the *Temple Case*. There, the Court underscored the clear implications for sovereignty that the flying of a flag over a particular territory has (in that case, at the Temple of Preah Vihear itself)²³⁸.

6.49 On 27 October 1952, authorization was received to fly the new Ensign of the Colony of Singapore on all Marine Department establishments (including the

²³⁸ See *Temple of Preah Vihear (Cambodia v. Thailand) (Merits)* [1962] ICJ Rep 6, at p. 30. See also, paras. 7.10 to 7.12 below.

lighthouse on Pedra Branca). The Annual Report of the Singapore Marine Department described the flying of the Ensign as follows:

“Authorization to fly the new Ensign of the Colony of Singapore from all Government vessels and Marine Department establishments was received on the 27th October [1952] and put into effect by the Department the following day.

It is a Blue Ensign with the Colony badge in the fly, which consists of a circle having a white background containing a red cross pall reversed bearing an Imperial Crown in the centre. The reversed pall is unique in British heraldry, and was also a feature of the former Straits Settlements Ensign except that in the latter it was white on a red diamond shaped label and bore three crowns, one for each of the Settlements (Singapore, Penang and Malacca).”²³⁹

6.50 The following year, on 19 June 1953, W.H. Walmsley, Acting Master Attendant, issued a set of “Lighthouse Laws and Orders”, which included an order to lighthouse personnel to fly the Government’s Ensign daily²⁴⁰. Since Singapore’s independence in 1965, the Singapore Marine Ensign has continuously flown over the island.

6.51 In 1974, Standing Orders and Instructions to Lighthouse Personnel were issued. Section 11 of these orders provided:

“FLYING OF ENSIGN

Except at Pulau Pisang Lighthouse, the Singapore Marine Ensign is to be flown from 0800 hrs until sunset every day. Lighthouses will be informed by R/T whenever the Ensign is required to be flown at half-mast.

No Ensign is to be flown at Pulau Pisang Lighthouse.”²⁴¹

²³⁹ See the Marine Department Annual Report for 1952, in *Extracts from Selected Annual Reports of the Marine Department (Singapore)*, attached to this Memorial as Annex 82.

²⁴⁰ “Lighthouse Laws and Orders” dated 19 June 1953, attached to this Memorial as Annex 94.

²⁴¹ “Standing Orders and Instructions to Lighthouse Personnel 1974”, attached to this Memorial as Annex 119.

6.52 The flying of the Singapore Ensign on Pedra Branca was open and notorious yet elicited no protest from Malaysia.

6.53 It should be noted that Malaysia has demonstrated her awareness of the significance of flying national emblems over territory for purposes of evidencing sovereignty. Malaysia demanded (and obtained) the lowering of the Singapore Ensign flown until 3 September 1968 over another lighthouse facility maintained by Singapore at Pulau Pisang, a territory over which Singapore does not exercise or claim sovereignty²⁴². It was for this reason that the 1974 Standing Orders to Lighthouse Personnel instructed that no Ensign be flown on Pulau Pisang. However, the Ensign continues to be flown from Pedra Branca to this day.

3. Singapore's Exclusive Control over Visits to Pedra Branca and her Use of the Island for other Official Purposes

6.54 In the further maintenance of Singapore's title to Pedra Branca, the Government of Singapore has controlled and, where appropriate, authorized access to the island by personnel from Singapore as well as from other States including Malaysia. As noted above, regulatory authority for controlling access to the island was contained in section 6 of the 1961 Standing Orders and in section 9 of the 1974 Standing Orders and Instructions to Lighthouse Personnel²⁴³. Failure by Singapore employees stationed on Pedra Branca to comply with these regulations subjected them to penal sanctions under section 233 of the Merchant Shipping Act which was itself referred to under section 22 of the 1974 Standing Orders.

²⁴² See Letter from the Ministry of Foreign Affairs, Singapore to the Attorney-General, Singapore dated 4 Sep 1968, attached to this Memorial as Annex 113. Pulau Pisang is located off the west coast of Johor. Its exact location can be seen in Map 2, after page 8.

²⁴³ See paras. 6.54 to 6.64 above.

6.55 In Annex 105, the Court will find a representative sample of requests submitted by applicants to the Master Attendant of Singapore to visit Pedra Branca together with the Master Attendant's response. On numerous occasions, the Master Attendant approved these applications on condition that visitors travelled at their own risk. However, the Master Attendant also exercised his authority by occasionally rejecting applications. Moreover, due to the number of applications that were received to visit the lighthouse, the Master Attendant was obliged to establish a set of rules relating to such visits, thus further demonstrating Singapore's control over the island²⁴⁴.

6.56 Starting in 1946, a logbook was kept at Horsburgh Lighthouse to record visits to the island²⁴⁵. Its entries reveal that Singapore officials visited Pedra Branca literally hundreds of times and for a variety of purposes without any interference or objection from Malaysia. These visits ranged from routine inspections by the Deputy Master Attendant to maintenance missions and visits by senior ministerial and naval officials, police personnel and even Members of Parliament.

6.57 The logbook also shows that the scope of activities undertaken by Singapore officials visiting Pedra Branca was considerable and did not solely relate to the lighthouse or its communications facilities. In November 1952, the island was inspected for purposes of ascertaining its suitability for naval requirements. On many occasions, repairs and extensions were made to the jetty. Other entries reveal that Singapore took continuous steps to maintain the meteorological recording devices installed on Pedra Branca as well.

²⁴⁴ See Letter from the Master Attendant to the Staff of the Marine Department dated 6 May 1961, attached to this Memorial as Annex 104.

²⁴⁵ See *Selected Entries from the Horsburgh Lighthouse Visitors Logbook (including transcriptions)*, attached to this Memorial as Annex 87.

6.58 These activities represented a continuation of Singapore's exercise of State authority on the island and a further confirmation of her title to that territory.

6.59 Singapore's exercise of control over Pedra Branca extended to nationals of foreign States. Thus, the record shows that Singapore approved an application to visit Pedra Branca submitted by a member of the American Piscatorial Society to study the migratory habits of fish²⁴⁶.

6.60 It is highly significant that when Malaysian officials wished to visit the island to conduct scientific surveys, they were also obliged to obtain permits from the relevant Singapore authorities. At no time did Malaysia protest this clear exercise of sovereign authority over Pedra Branca by Singapore.

6.61 In March 1974, for example, a number of Malaysian officials sought to visit Pedra Branca and stay at Horsburgh Lighthouse as part of a joint survey team (comprising members from Malaysia, Indonesia, Japan and Singapore) to make tidal observations²⁴⁷. The survey was planned to be carried out over a period of seven to eight weeks in areas which included the waters around Pedra Branca. In order to obtain the necessary approval from the competent Singapore ministries, the Hydrographic Department of Singapore requested Malaysia to furnish the particulars of the Malaysian members of the survey team who

²⁴⁶ See Letter from the American Piscatorial Society to the Light Dues Board, Singapore dated 17 June 1972, attached to this Memorial as Annex 117.

²⁴⁷ See Letter from Hydrographic Department, Port of Singapore Authority to Navigational Aids Section, Port of Singapore Authority dated 26 Mar 1974, attached to this Memorial as Annex 121.

proposed to take part in the study²⁴⁸. This request was duly complied with by a Lieutenant Commander of the Royal Malaysian Navy²⁴⁹.

6.62 As discussed in more detail in Chapter VII, a similar event took place in 1978 when the High Commission of Malaysia in Singapore wrote to the Singapore Ministry of Foreign Affairs requesting permission for a Malaysian government vessel to enter Singapore territorial waters to conduct an inspection of Tide Gauges²⁵⁰. After the appropriate formalities were complied with, the Singapore Ministry of Foreign Affairs acceded to Malaysia's request²⁵¹.

6.63 In contrast, when Malaysian personnel attempted to visit the island without prior authorization from the authorities in Singapore, they were denied access. On 4 May 1978, for example, the lightkeeper on Pedra Branca informed the Port of Singapore Authority that two persons who claimed to be from the Survey Department of West Malaysia had landed on the island the previous month in order to carry out triangulation observations. The lightkeeper told the visitors that "he could not allow them to remain at the lighthouse unless prior permission has been obtained from this [*the Port of Singapore Authority*] office"²⁵². As a consequence, the two men left by tugboat. Singapore received no protest from Malaysia over this incident.

²⁴⁸ See Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer of K.D. Perantau dated 26 Mar 1974, attached to this Memorial as Annex 120.

²⁴⁹ See Letter from Mak S. W. (Commanding Officer of Royal Malaysian Navy Vessel K.D. Perantau) to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974, attached to this Memorial as Annex 122.

²⁵⁰ See Malaysia's Note EC 219/78 dated 9 May 1978, attached to this Memorial as Annex 137.

²⁵¹ See Singapore's Note MFA 115/78 dated 12 May 1978, attached to this Memorial as Annex 138.

²⁵² Letter from the Hydrographic Department, Port of Singapore Authority to Secretary (Administration) dated 4 May 1978, attached to this Memorial as Annex 136.

6.64 These events clearly demonstrate that Singapore considered Pedra Branca and its territorial waters to fall under her sovereignty and that Singapore exercised her authority by controlling access by visitors, including Malaysian officials and nationals of other States. They also show that Malaysia recognised Singapore's sovereignty and acted accordingly, a matter which is discussed in Chapter VII.

4. Permission Given to Foreign Parties to Operate in the Territorial Waters of Pedra Branca

6.65 Singapore has also controlled access by foreign parties to her territorial waters around Pedra Branca, and foreign parties recognized Singapore's sovereignty over Pedra Branca when seeking to engage in activities in these waters.

6.66 For example, in 1981, when the British marine salvage operators, Regis Ltd., were retained to recover items lost overboard by a Japanese freighter 6 to 10 miles off Pedra Branca, the Managing Director of Regis approached the Singapore Hydrographic Department with a request to make preliminary surveys of the area prior to a full-scale search²⁵³. Regis provided details relating to the proposed search in a subsequent letter dated 18 June 1981. In relevant part, the letter stated:

“As you requested we enclose a diagram of the waters concerned; it shows that the area to be looked at lies entirely within the territorial waters (as defined by accepted international practice) of the islet on which Horsburgh Light House stands.”²⁵⁴

²⁵³ Letter from Regis Ltd to the Hydrographic Department, Port of Singapore Authority dated 25 May 1981, attached to this Memorial as Annex 151.

²⁵⁴ Letter from Regis Ltd to Hydrographic Department, Port of Singapore Authority dated 18 June 1981, attached to this Memorial as Annex 152. *See also* Letter from Regis Ltd to the Port

6.67 Singapore granted permission for the search to be carried out by a letter dated 2 July 1981²⁵⁵. As a further illustration of her exercise of sovereignty over Pedra Branca, Singapore's approval was subject to a number of conditions. These included:

- (a) that copies of the Sonar Search Traces be made available to the Port of Singapore Authority;
- (b) that a representative of the Hydrographic Department of the Port of Singapore Authority accompany the survey throughout its duration;
- (c) that no further tasks be undertaken with regard to the project without prior permission; and
- (d) that a copy of the findings of the survey be provided to the Port of Singapore Authority.

5. The Conduct of Naval Patrols and Exercises around Pedra Branca by Singapore and the Installation of Military Communications Equipment on Pedra Branca

6.68 Singapore also engaged in frequent naval patrols in the territorial waters around Pedra Branca and installed military communications equipment on the island. These activities were carried out at Singapore's own initiative and without seeking any prior authorization from Malaysia.

Master, Port of Singapore Authority dated 1 July 1981, attached to this Memorial as Annex 153. This letter stated that Regis "had been informed that the waters belonged without doubt to Singapore".

²⁵⁵ Letter from Port Master, Port of Singapore Authority to Regis Ltd dated 2 July 1981, attached to this Memorial as Annex 154.

(1) *Singapore Naval Patrols in the Territorial Waters of Pedra Branca*

6.69 In exercise of Singapore’s sovereign rights over Pedra Branca and its surrounding waters, the Republic of Singapore Navy conducts regular patrols in those waters. In carrying out its duties of patrolling Singapore’s territorial waters, the Republic of Singapore Navy divides its area of patrol into five patrol sectors. The patrol sector in the vicinity of Pedra Branca was known as “Sector F5”.

6.70 The Republic of Singapore Navy was officially formed on 1 April 1975, from units of the then Maritime Command of the Singapore Armed Forces. In the same year – in other words, four years before Malaysia’s publication of her 1979 Map – the Commander of the Republic of Singapore Navy issued Operations Instructions No. 10/75, dated 18 September 1975²⁵⁶, which instructed (among other things) that :

“With effect from 18 Sep 75, there will be five patrol areas and they will be designated as below and bound by the following co-ordinates :

<u>Area</u>	<u>Co-Ordinates</u>	
F1 (Sultan Shoal to Raffles Lt)	...	
F2 (Raffles Lt to St. John’s Isle)	...	
F3 (St John’s Isle to Johore Shoal)	...	
F4 (Johore Shoal to Horsburgh Lt)	...	
F5 (Horsburgh Lt extending North-Easterly)	01° 19.0’ N 01° 17.5’ N 01° 28.0’ N 01° 33.0’ N	104° 18.0’ E 104° 20.5’ E 104° 35.0’ E 104° 32.0’ E ”

²⁵⁶ Republic of Singapore Navy Operations Instruction No. 10/75 dated 18 Sep 1975, attached to this Memorial as Annex 123.

The area covered by Sector F5 is marked out overleaf on a British Admiralty Chart (**Map 10** - Extract from *British Admiralty Chart 3831* (1979), annotated to show Patrol Sector F5 of the Republic of Singapore Navy).²⁵⁷ The Republic of Singapore Navy continues to patrol in this area to this day.

6.71 The establishment of official naval patrol sectors in the territorial waters of Pedra Branca, and the conduct of regular naval patrols therein, is further evidence of the maintenance of Singapore's long-standing title over Pedra Branca.

(2) *The Establishment of Military Communications Equipment on Pedra Branca*

6.72 In 1977, the Singapore Navy also installed military communications equipment on Pedra Branca in order to upgrade radio communications with Singapore Navy vessels operating in the outer reaches of Singapore's territorial waters, including in Sector F5.

6.73 The need for a military rebroadcast relay station on Pedra Branca was explained in a letter dated 6 July 1976 from the Republic of Singapore Navy to the Port of Singapore Authority in the following terms:

“1. The Republic of Singapore Navy (RSN) patrols the outer limits of our territorial waters and carries out frequent exercises with Republic of Singapore Air Force (RSAF) in South China Seas. On several occasions the crafts, both sea and air crafts, encountered communication problems with our communication centres in Singapore. On further investigation, it is established that the problems are technical owing to atmospheric conditions and

²⁵⁷ For operational reasons, Sector F5 was limited to areas to the north of Pedra Branca because waters to the south of Pedra Branca are strewn with numerous nautical hazards, making regular patrols impractical.

distance. It is therefore necessary to set-up a relay/rebroadcasting station to breach the distance.

2. The location most suitable for the relay/rebro station is Horsburgh Lighthouse. The relay station requires floor space of 3 ft by 2 ft for two radio sets (VHF and HF) to be set up and power source in the lighthouse. The station will not be manned but periodic maintenance by the radio technicians is required.

3. Obviously it is quite a demand on the limited space in the lighthouse. However may I request your co-operation in this regard in order that communication needs for both security and defence could be met.

4. I therefore seek your approval in principle from your good office so that installation details could be worked out and discussed at a later date.”²⁵⁸

6.74 The Port of Singapore Authority replied positively on 8 July 1976²⁵⁹. This reply also made clear that the Port of Singapore Authority, which serviced and maintained the lighthouse, had no responsibility for operating or maintaining the relay station, although it requested that it be kept informed of any personnel proceeding to the lighthouse to repair or service it. The relay station was exclusively for the use of the Republic of Singapore Navy which was responsible for its establishment and maintenance²⁶⁰. After receiving the positive reply, a series of equipment trials were then carried out by the Republic of Singapore Navy personnel on Pedra Branca²⁶¹. The relay station was installed on 30 May 1977²⁶².

²⁵⁸ Letter from the Singapore Ministry of Defence to the Hydrographic Department, Port of Singapore Authority dated 6 July 1976, attached to this Memorial as Annex 124.

²⁵⁹ Letter from the Hydrographic Department, Port of Singapore Authority to the Singapore Ministry of Defence dated 8 July 1976, attached to this Memorial as Annex 125.

²⁶⁰ See Extracts from Minutes of the 218th Staff Coordination Meeting Held on 21 Oct 1976, attached to this Memorial as Annex 128

²⁶¹ See Letter from the Ministry of Defence to the Port of Singapore Authority dated 14 Aug 1976, attached to this Memorial as Annex 126; Letter from the Ministry of Defence to the Port of Singapore Authority dated 6 Sep 1976, attached to this Memorial as Annex 127; Letter from the

6.75 The significance of this example of the exercise by Singapore of authority over Pedra Branca is two-fold. *First*, the installation of military equipment on Pedra Branca took place two years prior to the first suggestion by Malaysia that it had a claim over Pedra Branca. The installation was carried out openly, involving the transportation of equipment to Pedra Branca by military helicopters.²⁶³ Military helicopters were also used to transport equipment for trials before installation²⁶⁴ and for maintenance of the relay station after installation²⁶⁵. Malaysia made no protest at the time. *Second*, the relay station had nothing to do with the operation of Horsburgh Lighthouse. It was an entirely independent operation, carried out under the authority of the Republic of Singapore Navy, involving regular visits by military personnel to maintain the equipment and, as such, represented yet another concrete example of Singapore's exercise of sovereignty over Pedra Branca on the ground.

6. *The Investigation by Singapore of Navigational Hazards and Shipwrecks in the Territorial Waters of Pedra Branca*

6.76 Singapore and her predecessors-in-title have also exercised sovereign authority over Pedra Branca by investigating and reporting on maritime hazards and shipwrecks within the island's territorial waters.

Republic of Singapore Navy to the Port of Singapore Authority dated 24 Nov 1976, attached to this Memorial as Annex 129.

²⁶² See Letter from Headquarters (Communications and Electronics) of the Ministry of Defence to the Hydrographic Department, Port of Singapore Authority dated 26 May 1977, attached to this Memorial as Annex 132.

²⁶³ See Minutes of Discussion (held on 7 Nov 1976) on Communications Installation for Horsburgh Lighthouse dated 29 Nov 1976, attached to this Memorial as Annex 130.

²⁶⁴ See Telex Instructions from HQ Republic of Singapore Air Force to Changi Air Force Base dated 7 Dec 1976, attached to this Memorial as Annex 131.

²⁶⁵ See Republic of Singapore Air Force Tasking Instructions dated 22 Aug 1977, attached to this Memorial as Annex 133.

6.77 As early as 1920, a Court of Investigation of the Straits Settlement, Port of Singapore, held a formal investigation into the circumstances surrounding a collision between a British vessel and a Dutch ship about 1½ to 1¾ miles north of Pedra Branca²⁶⁶. The Master of the British vessel was reprimanded by the Court for his actions.

6.78 On 7 November 1963, a British cargo vessel, the *MV Woodburn*, became stranded on a submerged reef adjacent to Pedra Branca. A preliminary inquiry was conducted by the Master Attendant pursuant to Singapore's Merchant Shipping Ordinance²⁶⁷. On the recommendation of the Master Attendant, Singapore's Deputy Prime Minister, acting under section 315 of the Singapore Merchant Shipping Ordinance, convened a Court of Investigation on 4 December 1963 to examine the circumstances surrounding the incident²⁶⁸. Under section 315, the Minister cannot appoint a Court of Investigation for a ship not registered in Singapore unless the incident either "occurs on or near the coast of [*Singapore*]" or the Government of the ship's registry consents. No consent was sought from the United Kingdom in this case. So the decision to appoint a Court of Investigation could only be on the basis that the Minister regarded an accident near Pedra Branca to be an accident on or near the coast of Singapore. As a result of the investigation, the Certificate of Competency of the *MV Woodburn's* Chief Officer was suspended for 12 months.

²⁶⁶ *Report of the Court of Investigation to Examine into the Circumstances Attending the Collision between the British S.S. Chak Sang and the Dutch S.S. Ban Fo Soon about 1.5 to 1.75 Miles North of the Horsburgh Lighthouse on the Night of the 9th July 1920*, dated 5 Aug 1920, attached to this Memorial as Annex 78.

²⁶⁷ *Stranding of the M.V. Woodburn on the Horsburgh Lighthouse Reef: Report of Preliminary Inquiry by Master Attendant Singapore*, dated 14 Nov 1963, attached to this Memorial as Annex 109.

²⁶⁸ See Appointment Letter from the Deputy Prime Minister, Singapore pursuant to the Merchant Shipping Ordinance, appointing a Court of Investigation in respect of the Stranding of the M.V. Woodburn, dated 4 Dec 1963, attached to this Memorial as Annex 110.

6.79 On 29 November 1979, a Panamanian cargo vessel, the *MV Yu Seung Ho*, ran aground approximately 600 metres east of Pedra Branca. Pursuant to section 389 of the Singapore Merchant Shipping Act, the Minister of Communications of Singapore appointed two officers to investigate the matter²⁶⁹. As a result of this inquiry, the Master and Second Officer of the ship were debarred from serving on Singapore ships²⁷⁰.

6.80 In 1981, Singapore issued a *Notice to Mariners* with regard to a vessel which was stranded approximately 500 meters from Horsburgh Lighthouse. Mariners were advised to exercise caution when taking radar bearings from the Lighthouse²⁷¹.

6.81 Two years later, a Report was made by Singapore to the Twelfth Tripartite Technical Experts Group Meeting on Safety of Navigation in the Straits of Malacca and Singapore on 5-6 May 1983²⁷². The meeting consisted of experts from Malaysia, Singapore and Indonesia. In the Report, the Singapore delegation informed the meeting that “two wrecks in the vicinity of the Horsburgh Lighthouse had been verified,” and that a *Notice to Mariners* had accordingly been issued. No questions were raised as to Singapore’s jurisdiction over these hazards in the vicinity of Pedra Branca.

²⁶⁹ See Letter from Director of Marine, Singapore, to Captains Thomas and Chua, notifying them that they had been appointed to investigate the grounding of the Panamanian registered vessel, *Yu Seung Ho*, dated 4 Dec 1979, attached to this Memorial as Annex 139.

²⁷⁰ See Letters from Director of Marine, Singapore, to Bang No Hyeon and Bak Jong Hak, dated 8 Jan 1980, both attached to this Memorial as Annex 142.

²⁷¹ See Singapore Notice to Mariners dated 1 Jan 1981 and Singapore Notice to Mariners dated 1 Oct 1981, attached to this Memorial as Annex 150.

²⁷² See Report of the Twelfth Tripartite Technical Experts Group Meeting on Safety of Navigation in the Straits of Malacca and Singapore 5-6 May 1983, dated 6 May 1983, attached to this Memorial as Annex 156.

6.82 To this day, Singapore continues to investigate shipping accidents occurring in the waters around Pedra Branca. A representative sample of recent accidents occurring within Pedra Branca's territorial waters, which were investigated by Singapore authorities, is listed below.

- (a) The grounding of Singapore ship *MV Kota Angkasa*, on 22 June 1985, at Lat. 1° 19.4'N Long. 104° 24.5'E – i.e., about 800 metres south of Pedra Branca and about 200 metres north of the western cluster of Middle Rocks²⁷³.
- (b) The grounding of Nigerian ship *MV Binta Yar'adua*, on 20 June 1988, at Lat. 1° 19.5'N Long. 104° 24.75'E – i.e., about 800 metres south-east of Pedra Branca and about 400 metres north of the eastern cluster of Middle Rocks²⁷⁴.
- (c) The grounding of Norwegian ship *MV Martha II*, on 17 September 1992, at Lat. 1° 17.7'N Long. 104° 23.7'E – i.e., about 100 metres from South Ledge²⁷⁵.
- (d) The grounding and sinking of Malaysian ship *MV Gichoon*, on 14 October 1996, at South Ledge. The wreck of *MV Gichoon* can still be seen at South Ledge today (see **Image 5** and **Image 6**, after page 11 above)²⁷⁶.
- (e) The grounding of Singapore ship *MT Ocean Gunard*, on 6 August 1998, at South Ledge²⁷⁷.

6.83 These investigative activities by Singapore met with no protests from Malaysia. The only time that Malaysia ever protested against such

²⁷³ See Investigation Report on Grounding of *MV Kota Angkasa* on 22 June 1985, attached to this Memorial as Annex 157.

²⁷⁴ See Investigation Report on Grounding of *MV Binta Yar'adua* on 20 June 1988, attached to this Memorial as Annex 159.

²⁷⁵ See Investigation Report on Grounding of *MV Martha II* on 17 September 1992, attached to this Memorial as Annex 184.

²⁷⁶ See Investigation Report on Grounding of *MV Gichoon* on 14 October 1996, attached to this Memorial as Annex 198.

²⁷⁷ See Investigation Report on Grounding of *MT Ocean Gunard* on 6 August 1998, attached to this Memorial as Annex 200

investigations was on 30 June 2003, when Malaysia protested against a routine investigation conducted by the Maritime and Port Authority of Singapore into the grounding of *MV APL Emerald* in a stretch of shallow waters between Middle Rocks and South Ledge (less than 1 nautical mile from Pedra Branca)²⁷⁸. The significance of this sudden and very late change in Malaysia's practice is discussed in paragraph 6.116 below.

7. Investigation by the Singapore Coroner's Court into Accidental Deaths off Pedra Branca

6.84 On 24 June 1980, a Singapore Navy vessel operating in rough seas capsized off Pedra Branca while attempting to disembark armed forces personnel on the island for the purposes of maintaining the military equipment there. The vessel foundered and was lost with three dead and 13 survivors. The bodies of the three dead soldiers were never found.

6.85 A coroner's inquiry was duly conducted into the deaths by the Singapore State Coroner²⁷⁹. Under Singapore law, the jurisdiction of the Coroner is founded upon the discovery of a body within his jurisdiction. However, when a body cannot be found, section 278 of the Singapore Criminal Procedure Code allows the Coroner to assume jurisdiction if he believes that the deaths have occurred within his jurisdiction²⁸⁰.

²⁷⁸ See Malaysia's Note EC 65/2003 dated 30 June 2003, attached to this Memorial as Annex 202.

²⁷⁹ See Findings of the Singapore State Coroner in Inquiry 1129A-C of 1980 dated 4 Aug 1981, attached to this Memorial as Annex 155.

²⁸⁰ See Criminal Procedure Code (Singapore), sections 270-278, attached to this Memorial as Annex 149.

6.86 In the instant case, the Coroner's report expressly states that his inquiry was conducted under section 278 of the Criminal Procedure Code. This was a normal procedure given that the incident occurred in the territorial waters around Pedra Branca which were under Singapore's sovereignty. The report found no culpability and ruled that the deaths were accidental. It was, in the circumstances, further evidence of the normal exercise of State authority with respect to territory which formed part of Singapore.

6.87 The inquiry was conducted by way of a public hearing in open court. Malaysia made no protest at that time, or at any time since.

8. Proposals by the Port of Singapore Authority to Reclaim Areas Around Pedra Branca

6.88 Due to her limited size, Singapore has frequently engaged in reclamation projects in maritime areas surrounding her territory. In 1970, the Government of Singapore directed the Port of Singapore Authority to study the possibility of reclaiming areas around Pedra Branca²⁸¹.

6.89 The Authority first carried out a detailed hydrographic survey of the area. Based on this survey, a profile was prepared calling for the reclamation of some 5,000 square metres of land area around Pedra Branca. A diagrammatic scheme of the project appears in Annex 135. The possibility of installing a desalination plant was also considered, and an invitation for tenders was published in the national newspapers. Three companies tendered for the project, but a decision was ultimately taken not to proceed with it²⁸¹.

²⁸¹ The background and the instructions to the Port of Singapore Authority to prepare for these works is recounted in the *Reclamation and Shore Protection Works at Horsburgh Lighthouse: (i) Newspaper Advertisement dated 27 Jan 1978, and (ii) Tender Evaluation Report dated 7 Apr 1978*, attached to this Memorial as Annex 135.

6.90 Despite the fact that the reclamation project did not take place, the steps that the Government of Singapore took to examine its feasibility and to procure tenders again attests to the fact that Pedra Branca was considered to be Singapore territory.

Section III. The Legal Consequences of Singapore's Long and Peaceful Possession of Pedra Branca in the Maintenance of her Title

6.91 In order to appreciate the legal significance of the long and peaceful exercise of State authority by Singapore and her predecessors over Pedra Branca discussed in the previous sections, it is necessary to place the issue of title in its proper context.

6.92 Chapter V demonstrated that the United Kingdom acquired title to Pedra Branca during the years 1847-1851 when the island was lawfully possessed and Horsburgh Lighthouse was constructed. Following its appropriation, first the United Kingdom and, subsequently, Singapore confirmed and maintained this title by the continuous and unopposed exercise of State functions on Pedra Branca and within its territorial waters – in other words, by using Pedra Branca for any appropriate State purposes that were necessary.

6.93 As has been shown, these activities were undertaken *à titre de souverain*. They related both to the maintenance, expansion and staffing of the lighthouse as well as to the administration and control of the island as a whole and its territorial waters. In short, Pedra Branca was used for a wide-ranging variety of State purposes.

6.94 Singapore does not rely on these activities as creating, or constitutive of, her title to Pedra Branca. Nor does Singapore argue that it has a “better title” to Pedra Branca based on these elements. Rather, Singapore's title was already established as a result of the prior possession of the island by the United

Kingdom in the years 1847-1851. The evidence discussed in the previous sections demonstrates that the United Kingdom and Singapore thereafter maintained that title by exercising a continuous pattern of State functions on the ground – that is, by carrying out open and peaceful acts of administration and control on Pedra Branca itself and within its territorial waters without opposition from Malaysia which only voiced a claim to the island in 1979.

6.95 In such circumstances, State activities serve to confirm Singapore’s pre-existing legal title. As the Court stated in the *Frontier Dispute*:

“Where the act corresponds exactly to law ... the only role of *effectivité* is to confirm the exercise of the right derived from a legal title.”²⁸²

Put another way,

“Elle [l’effectivité] joue sans conteste un rôle pour le maintien des titres et elle est une manifestation essentielle de l’exercice de la souveraineté.”²⁸³

A. THE CONSTRUCTION AND CONTINUED MAINTENANCE OF THE LIGHTHOUSE ON PEDRA BRANCA IS EVIDENCE CONFIRMING SINGAPORE’S SOVEREIGNTY OVER THE ISLAND

6.96 There is ample authority for the proposition that the building and maintenance of a lighthouse on a small island is, in and of itself, evidence of sovereignty. In the *Qatar-Bahrain* case, for example, the Court was called upon to assess the legal relevance of the fact that Bahrain had erected a navigational pillar on a very small insular feature, Qit’at Jaradah. While the Court noted that

²⁸² See *Frontier Dispute (Burkina Faso/Mali) (Merits)* [1986] ICJ Rep 554, at para. 63.

²⁸³ Kohen M.G., *Possession Contestée et Souveraineté Territoriale* (1997), at p. 159.

purely private activities, such as the drilling of artesian wells, were controversial as acts performed *à titre de souverain*, it held that:

“The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands.”²⁸⁴

6.97 The Court took the same position in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*²⁸⁵. In that case, Malaysia argued that the construction of lighthouses on both of the disputed islands by the United Kingdom, and their subsequent maintenance by Malaysia after independence, were “part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved”²⁸⁶. After quoting with approval the passage in the Judgment in the *Qatar/Bahrain* case cited above – to the effect that the construction of navigational aids on small islands can be legally relevant – the Court stated:

“The Court is of the view that the same considerations apply in the present case.”²⁸⁷

6.98 Arbitral decisions support the same conclusion. The *Grisbadarna* arbitration is a case in point. There, the Arbitral Tribunal found that:

“[t]he stationing of a light-boat, which is necessary to the safety of navigation in the region of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests.”²⁸⁸

²⁸⁴ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Judgment of 16 Mar 2001, at para. 197.

²⁸⁵ See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 180, at para. 147.

²⁸⁶ *Ibid*, at para. 146.

²⁸⁷ *Ibid*, at para. 147.

²⁸⁸ See *The Grisbadarna Case (Norway v. Sweden)*, decision of 23 Oct 1909, Hague Ct. Rep. 121 (1916), at p. 131.

The Tribunal thus concluded:

“... It is shown by the foregoing that Sweden had no doubt as to her rights over the *Grisbadarna* and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.”²⁸⁹

6.99 The Arbitral Tribunal in the *Grisbadarna* case considered that these kinds of acts not only constituted proof of Sweden’s conviction that the *Grisbadarna* banks were Swedish, but also that they showed that Sweden:

“not only thought that she was exercising her right but even more that she was performing her duty.”²⁹⁰

**B. BY EXERCISING STATE AUTHORITY OVER PEDRA BRANCA, SINGAPORE
AND HER PREDECESSORS IN TITLE DEMONSTRATED THEIR CONTINUED
INTENT TO ACT AS SOVEREIGN**

6.100 In the *Legal Status of Eastern Greenland* case, the Permanent Court held that:

“...a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”²⁹¹

6.101 In the present case, Singapore has a pre-existing title by virtue of the taking of possession of Pedra Branca by the British Crown in the years 1847-1851. On the basis of this prior title, the British Government and, after independence, Singapore consistently maintained that sovereignty, and

²⁸⁹ See Judgment in *The Grisbadarna Case*, *supra* note 288, at p. 131.

²⁹⁰ *Ibid*, at p. 130.

²⁹¹ See *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, Judgment (1933) P.C.I.J. Reports, Ser. A/B, No. 53, at pp. 45-46.

demonstrated their intention and will to do so by exercising administration and control over the island in an open, constant and peaceful manner.

1. *The Exercise of Legislative Authority over Pedra Branca*

6.102 The details of the legislative acts which the United Kingdom and Singapore enacted with respect to Pedra Branca have been discussed earlier in this chapter.²⁹² To place these activities in their proper legal context, it is useful to recall the Permanent Court's observation in the *Legal Status of Eastern Greenland* case that:

“Legislation is one of the most obvious forms of the exercise of sovereign power...”²⁹³

6.103 Starting in 1852, and continuing up to the present, the United Kingdom and Singapore enacted a number of laws that related specifically to Pedra Branca. These laws were implemented on the ground by Singapore, in particular, taking a number of regulatory measures with respect to Pedra Branca based on her internal legislation. These measures were performed *à titre de souverain* and were not contested by Malaysia. In these circumstances, it can be concluded that:

“...l'adoption d'une législation destinée à être appliquée dans une région déterminée est une manifestation claire de l'exercice d'une activité étatique à son égard.”²⁹⁴

²⁹² See para. 6.10 *et seq.*

²⁹³ See *Legal Status of Eastern Greenland Case*, *supra* note 291, at p. 48.

²⁹⁴ Kohen M., *supra*, note 283, at pp. 210-211. As the author notes, “On peut conclure que pour la Cour, la législation peut être considérée comme expression du corpus possessionis.”

6.104 It is not necessary to take this legislative activity in isolation. Rather, it is but one example amongst many of Singapore's intention and will to exercise sovereignty over the island as a logical extension of her prior title.

2. Singapore Carried Out Numerous Sovereign Acts Over Pedra Branca and Within its Territorial Waters

6.105 Singapore has also shown that she carried out a constant stream of State activities on Pedra Branca itself. These included maintaining, expanding and repairing the lighthouse. However, they also included a broad scope of non-lighthouse activities. To recapitulate, Singapore built a docking pier on the island, organized official visits to Pedra Branca by Singapore government officials, regulated visits (and accompanied such visits when they were duly authorized) by foreign nationals (including Malaysian officials) to the island and its waters, flew the British and, subsequently, the Singapore Marine Ensign over the lighthouse, carried out investigations of shipwrecks and maritime hazards within the island's territorial waters, undertook naval patrols and exercises around the island, controlled visits by vessels of other States to these waters, installed military communication equipment on the island, collected meteorological data, investigated cases of accidental death and even studied sea reclamation in the waters of Pedra Branca.

6.106 The relevance of these kinds of activities relating, as they do here, specifically to the island in dispute, has been recently emphasized by the Court in its decision in the *Indonesia/Malaysia* case. Although that case did not involve an examination of State activities undertaken in the context of a previously established legal title, as is the case here, the Court's pronouncements are nonetheless important for purposes of underscoring the relevance of activities carried out on the territory in dispute. In the Court's words:

“The Court finally observes that it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such.”²⁹⁵

6.107 In the past, the Court has been satisfied with very little in terms of the actual exercise of State authority to uphold a claim of sovereignty over small islands or remote territory. In the *Legal Status of Eastern Greenland* case, for example, the Permanent Court stated that:

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”²⁹⁶

6.108 In the present case, Singapore has placed in the record not simply evidence of its pre-existing title over Pedra Branca, but also evidence of a substantial and long-standing series of activities undertaken thereafter with respect to Pedra Branca. The facts adduced by Singapore are thus far stronger and of a different legal character – i.e., a confirmation of Singapore’s prior title – than those examined by the Court in the *Indonesia/Malaysia* case²⁹⁷. Yet, even in that case, the Court had occasion to observe that the acts in question, though modest in number:

“...are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State

²⁹⁵ See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 180, at para. 136.

²⁹⁶ See *Legal Status of Eastern Greenland Case*, *supra* note 291, at pp. 45-46.

²⁹⁷ In *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *supra* note 180, Malaysia had merely relied on the fact that navigational aids (beacons) had been built on both of the disputed islands, the collection of turtle eggs had been regulated, and one of the islands had been proclaimed as a nature reserve.

functions in respect of the two islands in the context of the administration of a wider range of islands.”²⁹⁸

6.109 The *Indonesia/Malaysia* case involved a question relating to the relative strength of title of the parties. It must therefore be distinguished from the present dispute where the acts of the United Kingdom and Singapore relating to Pedra Branca were carried out in the confirmation and maintenance of a pre-existing title. Nonetheless, the case precedents are relevant in underscoring the compelling nature of the examples of State authority that Singapore has adduced. While in some cases, the Court has been satisfied with “very little in the way of the actual exercise of sovereign rights”²⁹⁹, here the evidence presented by Singapore is overwhelming and fully consistent with the existence of a prior title. In contrast, when it comes to assessing the position of Malaysia with respect to Pedra Branca, Malaysia can neither point to the existence of a prior title to the island nor to any competing activities carried out on Pedra Branca itself in the capacity of a sovereign.

6.110 The foregoing analysis is not merely a reflection of a rule of evidence. It is a concomitant of the law’s crucial preference for stability, particularly in matters of title and most emphatically in matters of title to territory. As the Tribunal concluded in the *Grisbadarna Arbitration*:

“... it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible...”³⁰⁰

6.111 For more than 150 years, Singapore has amply satisfied the dual elements of sovereignty – the *animus occupandi* and the *corpus occupandi* - necessary in

²⁹⁸ See *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *supra* note 180, at para. 148.

²⁹⁹ See *Legal Status of Eastern Greenland Case*, *supra* note 291, at pp. 45-46.

³⁰⁰ See Judgment in *The Grisbadarna Case*, *supra* note 288, at p. 130. See also, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, at para. 72.

the context of an island such as Pedra Branca as to which there is no credible countervailing claim that can be advanced.

Section IV. In Contrast to Singapore, Malaysia has Never Carried Out any Sovereign Acts on Pedra Branca

6.112 If the documentary record is striking in demonstrating that the United Kingdom and Singapore carried out extensive State functions on Pedra Branca ever since its acquisition, it is equally striking in revealing the complete absence of any similar activities on the part of Malaysia. Quite simply, Singapore does not believe that Malaysia can point to a single example of State activity that Malaysia undertook on Pedra Branca at any time after the island had been acquired by the United Kingdom in 1847-1851.

6.113 Moreover, neither Malaysia nor her predecessor ever protested against any of the constant, clear and public manifestations of State authority performed by Singapore and the United Kingdom until very late in the day. In fact, the first protest of any kind lodged by Malaysia was dated 14 July 1989, almost ten years after the publication of Malaysia's 1979 map depicting her continental shelf claims³⁰¹. As will be discussed in Chapter VIII below, Malaysia had even expressly disclaimed title to Pedra Branca in official correspondence in 1953 – a development which was entirely consistent with her silence over Singapore's activities³⁰².

³⁰¹ See Malaysia's Note EC 60/89 dated 14 July 1989, attached to this Memorial as Annex 164.

³⁰² See generally, Chapter 8 below.

6.114 Singapore is aware that, in recent years, Malaysia has tried to make good her past inaction. In 1979, she issued an official map which for the first time included Pedra Branca within Malaysian territorial waters. This was the very first indication that Malaysia considered herself to have a claim over Pedra Branca and constitutes the starting point of the dispute. Even so, the manner in which she made the claim (see paragraph 4.5 above) shows that Malaysia was uncertain and embarrassed about making it.

6.115 *First*, Malaysia called for a meeting with the Singapore High Commissioner to discuss the 1979 Map, and then cancelled, at the last minute, a press conference about the map which had been scheduled at the same time as the meeting. *Secondly*, during the meeting, the fact that Malaysia was purporting to make a claim to Pedra Branca was not mentioned at all in the prepared text which was read out by the Malaysian official to the Singapore High Commissioner. It was only after the prepared text had been read out and other discussions about the map had taken place that the Singapore High Commissioner was informed that in Singapore's case, Pedra Branca was affected. The hesitant and surreptitious manner in which Malaysia conveyed her claim to Pedra Branca to Singapore shows that she was not only embarrassed about making her claim at that point of time, but the emphasis on consultations in the prepared text indicates that she was also aware that her claim would be entirely disputed by Singapore. Singapore promptly protested against this map by a diplomatic note of 14 February 1980³⁰³.

³⁰³ See Singapore's Note MFA 30/80 dated 14 Feb 1980, attached to this Memorial as Annex 144.

6.116 Since then, Malaysia has attempted to be more “present”, if not actually on Pedra Branca itself, then at least “on paper” in the waters surrounding the island. One example of the dramatic change in Malaysia’s practice in this regard is the very late protest of 6 November 2003, wherein Malaysia, for the first time, protested against the routine patrols of Singapore Navy ships and the routine transfer of maintenance and other personnel to and from Pedra Branca. This protest was remarkable because Malaysia had hitherto not protested routine activities by Singapore. Another example of Malaysia’s change in practice is her protest against Singapore’s acts of investigation in respect of an accident involving the *MV APL Emerald*, in Singapore’s territorial waters around Pedra Branca³⁰⁴. This protest stands in sharp contrast to Malaysia’s silence in the face of similar investigations for previous accidents.

6.117 It should be stressed that on every occasion that Singapore became aware of Malaysian activities within Pedra Branca’s territorial waters, Singapore issued a protest against what were no more than belated attempts to challenge Singapore’s long-standing and, until then, unchallenged sovereignty over the island³⁰⁵.

³⁰⁴ See Malaysia’s Note EC 65/2003 dated 30 June 2003, attached to this Memorial as Annex 202; Malaysia’s Note EC 106/2003 dated 6 Nov 2003, attached to this Memorial as Annex 203; and Malaysia’s Note EC 109/2003 dated 6 Nov 2003, attached to this Memorial as Annex 204. These belated assertions of sovereignty have been rejected by Singapore. See Singapore’s Notes MFA/PD1/00007/2004 dated 5 Feb 2004 (Annex 205) and MFA/PD1/00007/2004 dated 5 Feb 2004 (Annex 206).

³⁰⁵ See e.g., Singapore’s Notes SHC 98/89 dated 16 June 1989 (Annex 160); SHC 99/89 dated 16 June 1989 (Annex 161); SHC 103/89 dated 22 June 1989 (Annex 162); SHC 109/89 dated 1 July 1989 (Annex 163); SHC 139/89 dated 11 Sep 1989 (Annex 166); SHC 141/89 dated 11 Sep 1989 (Annex 167); SHC 135/91 dated 15 Nov 1991 (Annex 177); SHC 41/92 dated 15 May 1992 (Annex 181); MFA/D1/422/92 dated 8 June 1992 (Annex 182); SHC 75/92 dated 17 Aug 1992 (Annex 183); MFA/D1/0080/93 dated 30 Jan 1993 (Annex 186); MFA/D1/675/83 dated 30 July 1993 (Annex 187); MFA/D1/678/93 dated 30 July 1993 (Annex 188); MFA 1094/93 dated 1 Dec 1993 (Annex 189); MFA/D1/554/94 dated 14 Sep 1994 (Annex 191); MFA 815/94 dated 3 Jan 1995 (Annex 194); MFA 200/95 dated 2 Mar 1995 (Annex 195).

6.118 From a legal point of view, Malaysia's recent attempt to claim sovereignty over Pedra Branca calls for two brief remarks.

6.119 *First*, the first sign that Malaysia was making a claim of sovereignty over Pedra Branca occurred at the end of 1979, when she issued the pre-cited map. Never before had she made any claim of that kind. Whatever the scope and merits of the doctrine of the "critical date" in international law, the Court, as it has recently recalled:

"... cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized 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 (see the Arbitral Award in the *Palena* case, 38 International Law Reports (*ILR*), pp. 79-80)."³⁰⁶

6.120 *Second*, it follows from the above that, in the present case, there is no need to resort to the doctrine of "relative title", according to which competing claims over a given territory must be resolved in favour of the State party to the dispute which can prove the "stronger title"³⁰⁷. Singapore *has* a title, confirmed by the long and undisputed display of the exercise of sovereign authority; Malaysia has simply no title and has never acted *à titre de souverain* on the island, not even in its vicinity before the critical date.

6.121 It can also be added that, in any case,

"... failure by a State to lodge a formal protest may be discounted where it adequately demonstrates its rejection of the acts or assertions of another State by continuing itself to perform acts which can only be construed as a rejection of those acts or

³⁰⁶ See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 180, at para. 135. See also *Minquiers and Ecrehos* [1953] ICJ Rep 47, at pp. 59-60.

³⁰⁷ See e.g., *Minquiers and Ecrehos*, *supra* note 306, at p. 67. See also *Legal Status of Eastern Greenland Case*, *supra* note 291, at p. 46; Max Huber's Award in the *Island of Palmas*, *supra* note 181, at 831.

assertions, as where an assertion of territorial sovereignty is met by the continued exercise of sovereignty over the territory in question, day by day, through acts of legislation, government and the courts.”³⁰⁸

In the present case, the peaceful and undisturbed continuance of the exercise of her sovereign jurisdiction by Singapore can only be construed as a rejection of Malaysia’s acts and assertions. Moreover, as will be shown in Chapters VII and VIII, Malaysia has clearly recognised Singapore’s sovereignty over Pedra Branca, not only by her silence, but also by positive and express acts and positions.

Section V. Conclusions

6.122 On the basis of the foregoing, it can be concluded that:

- (a) title to Pedra Branca already vested in the British Crown and, subsequently, in Singapore as a result of official actions that took place on the island in the period 1847-1851 as discussed in Chapter V;
- (b) thereafter, the United Kingdom and Singapore engaged in an open and continuous pattern of State activities relating to Pedra Branca which confirmed and maintained that title;
- (c) these activities were of an official character and were undertaken *à titre de souverain*;
- (d) the activities in question encompassed a wide array of State functions related to the island as a whole and its territorial waters;
- (e) in a number of instances, Singapore’s administration and control of Pedra Branca included controlling access to the island by Malaysian officials who sought Singapore’s approval to visit the island;

³⁰⁸ See Jennings R. and Watts A., *Oppenheim’s International Law*, Vol. 1 (9th ed., 1992), at p. 1195.

- (f) for some 140 years, none of these activities elicited any protest from Malaysia despite their open, notorious and peaceful character;
- (g) Malaysia only purported to claim Pedra Branca in 1979 when she published a map showing Pedra Branca as falling within her jurisdiction. This map was promptly protested by Singapore;
- (h) to the extent that Malaysia thereafter attempted to build a “paper claim” to the island, these attempts were all of a self-serving nature undertaken after the dispute had already crystallized and were protested by Singapore; and
- (i) in contrast, Singapore’s activities on Pedra Branca and within her territorial waters after 1979 represented no more than a continuation of Singapore’s long-standing administration of the island prior to that date.

CHAPTER VII

MALAYSIA'S RECOGNITION OF SINGAPORE'S SOVEREIGNTY OVER PEDRA BRANCA

7.1 In the previous Chapter, Singapore has shown that she and her predecessors in title have peacefully exercised sovereign authority over Pedra Branca after taking lawful possession of the island in 1847. It was not until 1979 that Malaysia challenged, in an oblique manner, Singapore's title to Pedra Branca.

7.2 The contrast could not be more striking between, on the one hand, the consistent pattern of documented State activities by Singapore (and her predecessors) over and around the island and, on the other hand, the complete absence of any documented activities of any nature on the part of Malaysia (and her predecessor, Johor). There was, quite simply, no act or activity of any kind that evidenced a claim by Johor or Malaysia before 1979.

7.3 For more than 130 years, Singapore's sovereignty over Pedra Branca remained unchallenged and, until 1979, there had been no indication of any claim that Pedra Branca belonged to any other State. It was only in 1979 that Malaysia laid an indirect claim to Pedra Branca through the publication of an official map that included Pedra Branca within her territorial waters, in circumstances which indicated clearly that Malaysia was aware of the weakness of her claim (see paragraph 6.114 above)³⁰⁹. Since then, Malaysia has attempted to maintain her claim and tried to reinforce it through various manifestations of authority, which have been consistently opposed by Singapore.

³⁰⁹ The 1979 Map is discussed in paras. 4.2 to 4.4 above. The circumstances under which Malaysia communicated this map to Singapore is discussed in para. 4.5 and paras. 6.114 *et seq.*

7.4 The purpose of the present Chapter is to show that Malaysia and her predecessors have recognised Singapore’s sovereignty over Pedra Branca, both expressly and implicitly by their persistent silence towards Singapore’s acts of sovereignty (*see* Section I below). Moreover, Malaysia’s own maps acknowledge Singapore’s sovereignty over the island (*see* Section II below).

Section I. Malaysia’s Implicit and Express Recognition of Singapore’s Sovereignty Over Pedra Branca

7.5 As shown in Chapters V and VI above, since 1847, Singapore has continuously engaged in acts of State authority which confirm her original title to Pedra Branca, and which, if need be, are by themselves sufficient to establish Singapore’s sovereignty over Pedra Branca. This continuous exercise of sovereignty over the island is in sharp contrast to Johor’s and then Malaysia’s “*ineffectivité*” (i.e., absence of any *effectivité*) as neither of them had ever performed any competing activities during the relevant period. Singapore’s activities were performed openly and publicly. In spite of this, neither Johor nor Malaysia, until 1979, nor any other State, has ever protested or challenged these acts of sovereign authority (*see* Subsection A below). Furthermore, Malaysia has on several occasions, both before and after 1979, formally acknowledged Singapore’s sovereignty over Pedra Branca (*see* Subsection B below).

A. MALAYSIA’S ELOQUENT SILENCE IN THE FACE OF SINGAPORE’S ACTS OF SOVEREIGNTY

7.6 Singapore’s effective exercise of sovereign jurisdiction must be seen in contrast to Malaysia’s total “*ineffectivité*” as amply demonstrated by her persistent and prolonged indifference and inaction in the face of Singapore’s consistent assertions of sovereignty through her constant and public acts of State authority. This silence is not devoid of legal effect.

1. Malaysia's Persistent Silence

7.7 In Chapter V of this Memorial, Singapore has shown that she has lawfully acquired sovereign title over Pedra Branca by taking possession of the island and building the Horsburgh Lighthouse. In Chapter VI, Singapore has listed the various ways in which she has publicly and openly exercised State authority on or in relation to Pedra Branca after 1851. They are principally:

- (a) the responsibility assumed by Singapore and her predecessors for the construction, operation, maintenance and improvements made from time to time to the Horsburgh Lighthouse³¹⁰;
- (b) a diversified pattern of activities pertaining to navigational safety and security including the publication of official notifications of wrecks and other dangers to navigation³¹¹;
- (c) the enactment of legislation specifically relating to Pedra Branca³¹²;
- (d) the exercise of jurisdiction over personnel stationed on the island³¹³;
- (e) the deployment of naval patrols and the investigation of navigational hazards and shipwrecks in the territorial waters of Pedra Branca³¹⁴;
- (f) the exercise of control and the giving of authorisation for access to the island by personnel from other States, including Malaysia, and for activities in the surrounding waters³¹⁵; and

³¹⁰ See generally, Chapter 6 and *in particular*, paras. 6.27 to 6.34.

³¹¹ See above, paras. 6.68 to 6.86.

³¹² See above, paras. 6.10 to 6.26.

³¹³ See above, paras. 6.35 to 6.40.

³¹⁴ See above, paras. 6.76 to 6.81.

³¹⁵ See above, paras. 6.54 to 6.67.

(g) the flying of the British and then the Singapore Marine Ensign³¹⁶.

7.8 Malaysia and her predecessors had never protested against these clear, public and continuous manifestations of State authority by Singapore (and her predecessors) until well after 1979. Indeed, the first protest of any kind lodged by Malaysia was made on 14 July 1989, almost ten years after the publication of the 1979 Map, despite the continuous display of State authority by Singapore in the intervening years after 1979³¹⁷.

7.9 This last point is of particular legal significance since, as established by consistent judicial and arbitral precedents, the absence of protest by foreign States in such situations confirms and strengthens territorial titles.

7.10 Thus, concerning the flying of national emblems, in the *John E. Gowen and Franklin Copeland Case*, the U.S.-Venezuela Mixed Commission recognised the Venezuelan claim since:

“[t]he United States never claimed jurisdiction and *made no protest when its flag was hauled down* under the orders of the captain of the Venezuelan man-of-war.”³¹⁸

7.11 In the present case, neither Johor nor Malaysia ever protested against the regular flying of the British and Singapore emblems over Pedra Branca, even

³¹⁶ See above, paras. 6.47 to 6.53.

³¹⁷ See Malaysia’s Note EC 60/89 dated 14 July 1989, attached to this Memorial as Annex 164, where Malaysia protested against the construction at Pedra Branca of communications equipment for the Vessel Traffic Information System. This was the first protest by Malaysia against activity at Pedra Branca undertaken by Singapore or her predecessors in title.

³¹⁸ See the Los Monges dispute, award of 2 Sep 1890, pertaining to Messrs John Gowen and Franklin Copeland, as discussed in Moore J.B., *History and Digest of the International Arbitrations to which the United States has been a Party*, Vol. 4 (1898), 3354, at 3356. Similarly, in *Island of Palmas*, *supra* note 181, at p. 870, Max Huber considered that “the exercise of some acts of States authority and the existence of *external signs of sovereignty*, e.g. *flags and coats of arms* [...] constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority” (emphasis added).

though this was done as a clear display of State authority and without seeking consent from Malaysia or Johor, and Malaysian officials were fully aware of this³¹⁹.

7.12 Moreover, Malaysia's long silence regarding this clear and public manifestation of Singapore's sovereignty over Pedra Branca since 1847 is in sharp contrast to Malaysia's response to the flying of the Singapore marine ensign on the lighthouse administered by Singapore at Pulau Pisang, an island which belongs to Malaysia. In 1968, Malaysia objected to the flying of the Singapore flag over Pulau Pisang Lighthouse³²⁰. Following Malaysia's objection, Singapore ceased flying her flag on the Lighthouse. In contrast, at no time had Malaysia ever protested against Singapore's flying of her flag over Pedra Branca.

7.13 If Malaysia had any belief that she had a claim to sovereignty over Pedra Branca, one would have expected Malaysia to have exercised or attempted to exercise her sovereign authority over the island in the same way that she had done with respect to Pulau Pisang, if only to put on record that, notwithstanding Singapore's presence on Pedra Branca, Malaysia had sovereign authority over the island. This omission on Malaysia's part is especially significant as it occurred shortly after Singapore left the Federation of Malaysia in August 1965, when the governments of both countries treated each other with the utmost caution on bilateral issues.

7.14 Singapore contends that, given these facts, Malaysia had consciously (and correctly) decided that, in contrast with Pulau Pisang, any protest was not appropriate with respect to the flying of the Singapore flag on Pedra

³¹⁹ See above, paras. 6.47 to 6.53.

³²⁰ See Letter from the Ministry of Foreign Affairs, Singapore, to the Attorney-General, Singapore, dated 4 Sep 1968, attached to this Memorial as Annex 113.

Branca. This difference of treatment by Malaysia is significant in showing Malaysia's state of mind in relation to title over Pedra Branca.

7.15 The difference between how Pulau Pisang and Pedra Branca were treated extended, and continues to extend, beyond the flying of the flag from the lighthouses. Previously, Singapore's lighthouse keepers at Pulau Pisang were not required to comply with normal Malaysian customs and immigration procedures. However, in 1992, the Malaysian Government reviewed this situation and eventually decided in August 2002 to impose full immigration and customs control over Singapore lighthouse keepers and crew at Pulau Pisang. No attempt has ever been made to impose immigration and customs procedures on lighthouse keepers and crew travelling to Pedra Branca. Nor has there been any intimation that this would be done.

7.16 Singapore contends that the difference in the way Malaysia treated Pulau Pisang and Pedra Branca is consistent with and accurately reflects Malaysia's understanding and acknowledgement of Singapore's sovereign authority over Pedra Branca. This difference in treatment reflects Malaysia's conviction and acceptance that Pulau Pisang is under Malaysia's sovereignty but Pedra Branca is not.

7.17 Singapore contends that it is reasonable, and indeed natural, to conclude that if Malaysia really believed that she had sovereignty over Pedra Branca, she could (and should) have strongly challenged Singapore's acts of sovereign authority on or in relation to Pedra Branca on many occasions. There were certainly many opportunities for Malaysia to do so, beginning with the taking of

possession of the island to build a lighthouse³²¹. It is crystal-clear from the record that Malaysia never did so until many years after the publication of the 1979 Map.

7.18 Another striking illustration of silence amounting to clear recognition is the attitude of Malaysia regarding police and security activities on and in the vicinity of Pedra Branca³²². Not only was there a complete absence of Malaysian police and security activities, Malaysia had at all material times, expressly agreed or deferred to Singapore's jurisdiction in such matters³²³. In this respect, it is worth recalling the inter-federal arbitration concerning delimitation between the Emirates of Dubai and Sharjah. The Arbitral Tribunal, in its Award of 19 October 1981 based on public international law, stated thus:

“Between 1967 and 1975 the Sharjah police remained inactive, whereas the Dubai police were present and Sharjah even allowed the latter to evict one of its nationals from his place of work and did nothing although major work was being carried out on what it should have considered its territory.”³²⁴

7.19 Similarly, one would not have expected Malaysia to have remained silent on the several solemn occasions when international decisions were made relating to the legal regime of waters in the region. One such occasion was the adoption of the Joint Statement on the Malacca and Singapore Straits signed by Indonesia,

³²¹ See *Schooner “John J. Fallon” v. The King* (1917), 37 *Dominion Law Reports* (1st) 659, at 665, also cited by Kolb R., “L’interprétation de l’article 121, alinéa 3, de la Convention de Montego Bay”, 40 *Annuaire Français de Droit International* 881 (1994). See also, but concerning a light-boat, *Grisbardarna*, *supra* note 288; the British protest against French plans to build a lighthouse in *Minquiers and Ecrehos*, *supra* note 306. See *Minquiers and Ecrehos (United Kingdom v. France) (Oral Arguments)* [1953] 1 ICJ Pleadings 68, at para. 106, and the French letter dated 27 Apr 1903 in *Minquiers and Ecrehos (United Kingdom v. France) (Oral Arguments)* [1953] 2 ICJ Pleadings 429.

³²² See above, paras. 6.68 to 6.75, 6.84 to 6.86.

³²³ See above, paras. 6.61 to 6.64, and below, paras. 7.31 to 7.36.

³²⁴ See *Dubai-Sharjah Border Arbitration*, 91 I.L.R. 543 (1993), at p. 622. The Tribunal was presided by Philippe Cahier and composed of John L. Simpson and Kenneth R. Simmonds.

Malaysia and Singapore on 16 November 1971³²⁵. Malaysia also made no reference to any claim of sovereignty she might have over Pedra Branca during the discussions that led to the adoption by the Inter-Governmental Maritime Consultative Organization (“IMCO”) Assembly, on 14 November 1977, of its Resolution 375 (X) establishing a new navigation scheme in the Horsburgh Light Area³²⁶. On both of these crucial occasions, Malaysia did not express or reserve her claim regarding Pedra Branca, nor did she even hint that she might have such a claim.

2. *Legal Effects of Malaysia’s Silence*

7.20 In the 1981 Award in the *Dubai-Sharjah Border Arbitration*, the Arbitral Tribunal observed:

“...there is a substantial body of case law which indicates that, when one State engages in activity, by means of which it seeks to acquire a right or to change an existing situation, a lack of reaction by another State at whose expense such activity is carried out, will result in the latter forfeiting the rights which it could have claimed.”³²⁷

This is, of course, even more true when, as in the present case, the question is not one of acquiring new rights or changing an existing situation, but of confirming an already existing right and confirming a situation which has remained unchallenged for over 130 years.

³²⁵ See Joint Statement on Matters Relating to the Straits of Malacca and Singapore issued by the Governments of the Republic of Indonesia, Malaysia and Singapore dated 16 Nov 1971, attached to this Memorial as Annex 116.

³²⁶ See Resolution 375 (X) of the IMCO Assembly dated 14 Nov 1977, attached to this Memorial as Annex 134.

³²⁷ *Dubai-Sharjah Border Arbitration*, *supra* note 324, at p. 622.

7.21 As the Chamber of the Court in *Frontier Dispute (Burkina Faso/Mali)* explained, in respect of the conduct of administrative authorities:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title.”³²⁸

7.22 The relevant “acts” can be either “positive” in the sense that the administrative authorities have performed an act, or “negative” in that the other side has omitted to act or to protest. In the present case, Singapore has constantly and consistently acted, while, no less constantly and consistently, Malaysia has omitted to act, has failed to react, and has remained absolutely silent to Singapore’s acts of authority³²⁹.

7.23 The present case is a remarkably clear instance where the persistent omission by one State to act and to react to the exercise of sovereign authority by another State constitutes acquiescence, which in international law, “has the same effect as recognition, but arises from conduct, the absence of protest when this might reasonably be expected”³³⁰. Indeed, the nature and duration of the acquiescence by Malaysia (and her predecessors) in this case is tantamount to recognition that she had no title to Pedra Branca and that Singapore has.

³²⁸ See *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 282, at pp. 586-587, para. 63. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Rep 351, at p. 398, para. 61.

³²⁹ See *above*, Chapter 6, in particular paras. 6.112 to 6.121.

³³⁰ Brownlie I., *Principles of Public International Law* (2003), at p. 151.

7.24 As noted by the Arbitral Tribunal in the *Dubai-Sharjah Border Arbitration*, case law unanimously confirms this principle. In this Award, the Tribunal stated:

“What appears decisive to the Court is not that Sharjah did not assert its authority over an un-populated region by some positive action, but that it offered no opposition to the Government of Dubai treating the Al Mamzer peninsula as its own territory.”³³¹

The Tribunal then referred to some important precedents:

“In the *Grisbadarna* case, decided in 1909, the mooring of a Swedish light vessel needed for safe navigation, and the positioning by Sweden of a fairly large number of buoys justified among other things, in the absence of any protest from Norway, granting the disputed maritime area to Sweden [United Nations, *Reports of International Arbitral Awards*, Vol. XI, p. 161]

In the *Island of Palmas* case, decided in 1928, the sovereignty of the Netherlands over this island was recognized not only because:

‘... the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas’,

but also because Spain, which originally had a legal claim based on discovery, had recorded :

‘... no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Islets and their dependencies (Miangas included) has been recorded’ [*Ibid.*, Vol. II, pp. 851 and 868]

In the *Norwegian Fisheries* case, the International Court of Justice, deeming that the method adopted by the Norwegian Government for laying down base lines to define its fishing grounds was not contrary to international law, wanted to see what the attitude of the United Kingdom had been in this matter. Observing that the latter had refrained from expressing any reservations, it added :

³³¹ *Dubai-Sharjah Border Arbitration*, *supra* note 324, at p. 622.

‘... her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom’ [ICJ *Reports*, 1951, p. 139].

In the case of the *Temple of Préah-Vihéar*, the geographical map defining the boundary between Siam and Cambodia was deemed by the International Court of Justice not to have been binding in the beginning. However :

‘... it is clear that circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced’ [ICJ *Reports*, 1962, p. 23).

It emerges from this analysis that a State must react, although using peaceful means, when it considers that one of its rights is threatened by the action of another State.

Such a rule is perfectly logical as lack of action in a situation like this can only mean two things: either the State does not believe that it really possesses the disputed right, or for its own private reasons, it decided not to maintain it.

In the case in question, as the Court has pointed out, the Emirate of Dubai performed acts of authority in the Al Mamzer area, above all between 1967 and 1975, which should have brought about some reaction on the part of the Emirate of Sharjah, but nothing of this kind was recorded until 1975.

Dubai’s actions were doubtless relatively sporadic, but international law [the *Island of Palmas* case, the 1933 Judgment of the Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland*, Series A/B, No. 53, p. 46] admits that the extent to which sovereign rights may require to be exercised depends on the territory in question and that this exercise may be very limited when it is a question of territories which are sparsely populated or have no permanent inhabitants, which is precisely the case with the Al Mamzer peninsula.

International law also requires demonstrations of sovereignty to be both peaceful and public. It is not disputed that the Dubai authorities behaved peacefully and the Court has pointed out that

the Government of Sharjah could not have been unaware of what was happening at Al Mamzer.”³³²

7.25 The case-law cited in this award is impressive. When applied to the present case, there is no doubt that Malaysia’s long and persistent silence – in the face of a continued, peaceful and public pattern of acts of Singapore as sovereign – is an unequivocal recognition of, or at the very least clear acquiescence in, Singapore’s sovereignty over Pedra Branca.

7.26 As the Chamber of the Court recalled in the *Gulf of Maine Case*:

“... acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.”³³³

7.27 When States remain silent in the face of another State’s clear and unambiguous acts or practice, it means that they acquiesce in them. Their silence “... bears witness to the fact that they did not consider it to be contrary to international law.”³³⁴

7.28 This is precisely the case here – Malaysia’s silence, in the face of Singapore’s unambiguous acts of sovereignty over Pedra Branca, clearly bears witness to the fact that she did not consider she had any claim over the area. This is confirmed by her “*ineffectivité*”, which contrasts with Singapore’s long-standing and uninterrupted acts *à titre de souverain*.

³³² *Dubai-Sharjah Border Arbitration*, *supra* note 324, at p. 622-624.

³³³ *See Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada v. United States of America)* [1984] ICJ Rep 246, at p. 305, para. 130. *See also, Temple of Preah Vihear*, *supra* note 238, at pp. 30-31.

³³⁴ *See Fisheries (United Kingdom v. Norway) (Judgment)* [1951] ICJ Rep 116, at p. 139.

B. MALAYSIA'S FORMAL ACKNOWLEDGEMENT OF SINGAPORE'S SOVEREIGNTY OVER PEDRA BRANCA

7.29 As shown above, by her persistent silence vis-à-vis Singapore acts of authority, Malaysia has recognised Singapore's sovereignty over Pedra Branca. But Malaysia and her predecessor, the State of Johor, went even further. *First*, in a letter sent on 21 September 1953 by the Acting State Secretary of Johor to the Colonial Secretary of Singapore, Malaysia's predecessor made an express disclaimer of title to Pedra Branca, which was also a formal confirmation of her recognition of Singapore's sovereignty. Singapore will deal with this very significant episode in the next Chapter of the present Memorial. *Second*, in various other circumstances, Malaysia positively acknowledged Singapore's sovereignty over Pedra Branca.

7.30 Not only has Malaysia's recognition of Singapore's sovereignty resulted from her silence in the face of Singapore's acts of sovereignty on the island, Malaysia has also explicitly acknowledged Singapore's sovereignty on many occasions when she requested permission from Singapore to perform activities at Pedra Branca or in its surrounding waters.

C. MALAYSIA'S REQUESTS TO SINGAPORE FOR AUTHORISATION TO HAVE ACCESS TO PEDRA BRANCA AND ITS WATERS

7.31 In March 1974, a number of Malaysian officials sought to visit Pedra Branca and stay at Horsburgh Lighthouse as part of a joint survey team (comprising members from Malaysia, Indonesia, Japan and Singapore) to make

tidal observations³³⁵. The survey was planned to be carried out over a period of seven to eight weeks in areas which included the waters around Pedra Branca. As discussed above (at paragraphs 6.61 to 6.64), the particulars of the Malaysian members of the survey team were duly provided by a Lieutenant Commander of the Royal Malaysian Navy at the request of the Hydrographic Department of Singapore³³⁶ and permission was thereafter granted. The Lieutenant Commander's letter also drew attention to the fact that a participant of the Port of Singapore Authority would be present at all times. Significantly, Malaysia raised no objection to the fact that Singapore's permission was required to visit the island – an action which was fully consistent with Johor's earlier statement in 1953 that she had no claim over Pedra Branca³³⁷.

7.32 A similar event took place in 1978 when the High Commission of Malaysia in Singapore wrote to the Singapore Ministry of Foreign Affairs requesting permission for a Malaysian government vessel – NV “Pedoman” – “to enter Singapore territorial waters and conduct an inspection of Tide Gauges from 9 May – 2 June 1978.”³³⁸ The High Commission's letter listed the places where Malaysia's vessel would be calling at, the very first of which was the “Horsburg [*sic*] Lt. House Station”. It then stated:

“The High Commission would be grateful for the Ministry's assistance in securing clearance for NV ‘Pedoman’ to enter Singapore's territorial waters for the abovementioned purpose.”³³⁹

³³⁵ See Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer of K.D. Perantau dated 26 Mar 1974, attached to this Memorial as Annex 120.

³³⁶ See Letter from Mak S. W. (Commanding Officer of Royal Malaysian Navy Vessel K.D. Perantau) to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974, attached to this Memorial as Annex 122.

³³⁷ See Chapter 8, below.

³³⁸ See Malaysia's Note EC 219/78 dated 9 May 1978, attached to this Memorial as Annex 137.

³³⁹ *Ibid.*

Here again, the Singapore Ministry of Foreign Affairs acceded to Malaysia's request³⁴⁰.

7.33 Even after the publication of Malaysia's map in 1979 purporting to show Pedra Branca as appertaining to Malaysia, Malaysia continued to seek permission from Singapore to enter the waters around Pedra Branca.

7.34 On 28 January 1980, for example, the Malaysian High Commission in Singapore wrote to the Singapore Ministry of Foreign Affairs informing the latter that the Sarawak Electricity Supply Corporation, together with the National Electricity Board of Peninsular Malaysia and German consultants, wished to carry out a feasibility study for electrical power transfer by underwater cable from Sarawak to Peninsular Malaysia. The last paragraph of the letter requested Singapore's permission for the project in the following terms:

“I would appreciate if early approval could be granted by your Government, since the above project will covers [*sic*] also your territorial waters.”³⁴¹

The reference to Singapore's territorial waters was obviously to the waters around Pedra Branca as the sketch map included in Malaysia's request conveyed through the Malaysian High Commission on 26 March 1980 demonstrates³⁴². This Malaysian sketch map is reproduced overleaf as **Map 11**. Geographically, there are no Singapore territorial waters between Sarawak and Peninsular Malaysia, except for the waters around Pedra Branca. Singapore's

³⁴⁰ See Singapore's Note MFA 115/78 dated 12 May 1978, attached to this Memorial as Annex 138, wherein Singapore granted the request sought for by Malaysia.

³⁴¹ See Letter from the Malaysian High Commission to the Ministry of Foreign Affairs, Singapore dated 28 Jan 1980, attached to this Memorial as Annex 143.

³⁴² See Letter from the Malaysian High Commission to the Ministry of Foreign Affairs, Singapore dated 26 Mar 1980, attached to this Memorial as Annex 145.

Ministry of Foreign Affairs responded by a letter dated 7 June 1980 that Singapore had no objection to the proposed survey³⁴³.

7.35 In all these circumstances, Malaysia's conduct clearly constitutes formal acknowledgement of Singapore's sovereignty over Pedra Branca since, obviously, there would be no sense in Malaysia requesting authorization to have access to her own territory. As explained in Chapter VI above (paragraphs 6.54 to 6.67), these events also demonstrate that, on her part, Singapore consistently acted as sovereign over Pedra Branca and that Malaysia submitted to these manifestations of sovereignty even when they directly affected Malaysian nationals, including Malaysian government officials.

7.36 There can be no doubt that both by her conduct and by her silence and omission to act and react to Singapore's repeated activities as sovereign, Malaysia has recognised or acquiesced in Singapore's sovereignty.

7.37 Moreover it is evident from the 1979 episode when the Under Secretary-General of the Malaysian Ministry of Foreign Affairs summoned the Singapore High Commissioner to inform him of the publication of the 1979 Map (see above, at paragraph 4.5) that Malaysian officials clearly understood that the Malaysian claim was entirely new and was not in conformity with a long-standing situation³⁴⁴.

³⁴³ See Letter from the Ministry of Foreign Affairs, Singapore to the Malaysian High Commission dated 7 June 1980, attached to this Memorial as Annex 147.

³⁴⁴ See also, para. 6.114 *et seq.*

Section II. Official Malaysian Maps Recognising Singapore's Sovereignty Over Pedra Branca

7.38 Another manifestation of Malaysia's acknowledgement of Singapore's sovereignty over Pedra Branca is found in a significant number of maps published by the Malaysian Government from time to time. These maps are relevant in the present case as they represent admissions against interest by Malaysia.

7.39 Prior to 1979, Malaysia consistently issued official maps attributing Pedra Branca to Singapore and thus acknowledged that the island belonged to Singapore. These maps are entirely consistent both with Singapore's continuous exercise of State functions over Pedra Branca (discussed in Chapter VI) and with Johor's official declaration in 1953 that it did not claim sovereignty over Pedra Branca (discussed in Chapter VIII).

7.40 International tribunals often refer to cartographic evidence as one of the factors to be taken into account when ascertaining where title to territory lies in a territorial dispute. Maps are usually classified into different categories, with varying degrees of reliability and probative weight, depending on their provenance and technical accuracy. In the general hierarchy, the most important maps are those which are deemed to be "the physical expression of the will of the State or States concerned"³⁴⁵, i.e., maps which are annexed to and form an integral part of a treaty.

7.41 Also of primary importance are maps that have an official character, in other words, maps emanating from a governmental agency or otherwise recognized by a government as official. These official maps have a higher degree of probative value than ordinary maps and can be used to confirm

sovereignty, particularly when a series of such maps, over a significant period, shows the same attribution of territory.

7.42 In the *Island of Palmas* case, Judge Huber stressed the legal significance of official or semi-official maps, particularly when they represent a position inconsistent with that previously advanced by the issuing State, and notably when they “do not assert the sovereignty of the country of which the Government has caused them to be issued”³⁴⁶. Thus, self-serving maps, issued by a government in support of its claim, will have little evidentiary weight.

7.43 When a government publishes or otherwise endorses a map, it may be precluded or estopped from challenging that map later. As the Court of Arbitration noted in its award in the *Beagle Channel* arbitration:

“Clearly, a map emanating from Party X showing certain territory as belonging to Party Y is of far greater evidential value in support of Y’s claim to that territory than a map emanating from Y itself, showing the same thing.”³⁴⁷

7.44 The publication of maps is part of State conduct and when a government has published a series of official maps consistently showing the same territorial situation over a certain period of time, that conduct may be relevant in representing the views of the government. As the Judicial Committee of the Privy Council held in its 1927 opinion in the *Canada-Newfoundland Boundary Dispute*:

“... the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by

³⁴⁵ See *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 282, at pp. 582, para. 53.

³⁴⁶ See *Island of Palmas*, *supra* note 181, at p. 852.

³⁴⁷ See *Beagle Channel Arbitration (Argentina v. Chile)* (Award of 18 Feb 1977), 52 ILR 97, at p. 205.

Newfoundland, is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion.”³⁴⁸

7.45 A similar conclusion was reached by the Tribunal in the first stage of the *Eritrea-Yemen* arbitration. In that case, Eritrea argued that Italy, Eritrea’s predecessor in interest, had claimed sovereignty over the disputed Hanish Islands prior to World War II. In response to Eritrea’s arguments, Yemen produced a number of official Italian maps published throughout the 1924-1939 period which consistently showed that the disputed islands had not been included in the former Italian colony of Eritrea and that, therefore, Italy had never regarded these islands as falling under her sovereignty. In upholding Yemen’s position on this point, the Tribunal held:

“To the extent that these [*maps*] may be viewed as admissions against interest from official Italian sources, which are not controverted by Eritrean evidence, they have relevance to the Eritrean claim that Italy considered herself sovereign over the Islands at the outbreak of the Second World War. The best interpretation of this evidence appears to be that *official* cartography did not wish formally to portray the Islands as being under Italian sovereignty in the inter-war period – and even went so far as to assign the Islands to Yemen. On balance, the evidence seems to establish that Italy, in the interbellum period, did not consider the Islands to be under Italian sovereignty or at least does not establish that Italy in that period did consider the Islands to be under Italian sovereignty.”³⁴⁹

7.46 Further authority on this point is provided by the decision rendered by the Boundary Commission in the *Eritrea/Ethiopia* case. In that case, the Commission was presented with a great number of official maps showing a

³⁴⁸ See *In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula (the Canada/Newfoundland Boundary Dispute)* 137 Law Times Reports 199.

³⁴⁹ *Eritrea/Yemen Arbitration*, Award of the Arbitral Tribunal in Phase One: Territorial Sovereignty and Scope of the Dispute, dated 9 Oct 1998, 114 ILR 2, at para. 374. The Award is also published in (1998) 22 RIAA 215, at pp. 293-294.

consistent depiction of a portion of the boundary. The Commission concluded as follows:

“... a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences.”³⁵⁰

7.47 In the present case, there exists a number of official Malaysian maps which consistently depict the island of Pedra Branca as appertaining to Singapore. The first of these maps – entitled “Pengerang” (Series L7010, Edition 1-SDFM) – was published in 1962 by the Surveyor General of the Federation of Malaya, the highest mapping authority in the Federation of Malaya (see **Map 12**). The map shows the island of Pedra Branca (labelled “P. Batu Puteh” on the map) with the bracketed word “Singapore” appearing under it. The same designation appears, on the left hand side of the map, under the island labelled “Pulau Tekong Besar”, which unquestionably belongs to Singapore, thus clearly signifying that both islands belonged to and were subject to Singapore’s sovereignty. At the time this map was published, Singapore was a British colony, whereas the Federation of Malaya had already been an independent sovereign State since 1957.

³⁵⁰ *Decision of the Eritrea-Ethiopia Boundary Commission Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Decision of 13 Apr 2002, reprinted in 41 Int’l L. Materials 1057 (2002), at para. 3.21.

7.48 The same attribution was also made in at least three other official Malaysian maps:

- (a) In 1962, the Surveyor General of the Federation of Malaya published a second edition of this map (Series L7010, Edition 2-SDFM). Pedra Branca was similarly shown with the word “Singapore” appearing under it (see **Map 13**).
- (b) In 1965, the Director of National Mapping, Malaysia, published another map (Series L7010, Edition 2-DNMM). The Director of National Mapping is the highest cartographic authority in Malaysia. This map again showed Pedra Branca with the word “Singapore” appearing under it (see **Map 14**).
- (c) In 1974, the Director of National Mapping, Malaysia, published another map (Series L7010, Edition 3-PPNM). This map showed Pedra Branca with the word “Singapura” under it. “Singapura” is the Malay-language name for Singapore (see **Map 15**).

7.49 It should be noted that the 1962 maps and the 1965 map contain the following statement: “This map must not be considered an authority on the delimitation of international or other boundaries”, while the 1974 map contains the following disclaimer: “This map is not an authority on boundaries”. These reservations are clearly limited to boundaries and cannot be read to apply to the attribution of a territory – such as an island – to a State, as in the present case. However, in any event, the presence of a disclaimer does not diminish the importance of the map as recognition of a “geographical fact”. As noted by the Boundary Commission in the *Eritrea/Ethiopia* case, in connection with the effect of disclaimers:

“As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected itself produced and disseminated it, even

against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do not exclude its admissibility.”³⁵¹

7.50 In conclusion, Malaysia’s own maps confirm that Pedra Branca forms part of Singapore’s territory. These maps were published prior to the emergence of the dispute between the Parties by the highest mapping authority of Malaysia and her predecessor and thus are entitled to the highest degree of probative value as admissions against interest by the Government of Malaysia.

Section III. Conclusions

7.51 It follows from the above considerations that:

- (a) Malaysia’s persistent lack of protest in the face of Singapore’s constant and clear manifestations of sovereignty over Pedra Branca and its adjacent waters since 1847 and up to 1989 constitutes a clear recognition of Singapore’s sovereignty;
- (b) Malaysia has clearly recognised Singapore’s sovereignty over the island, not only by her silence, but also by positive and express acts and conduct, in particular, by submitting to Singapore’s jurisdiction over Pedra Branca and its surrounding waters through her repeated requests for permission from Singapore to visit Pedra Branca and carry out activities in its surrounding waters;
- (c) Malaysia’s own official maps issued before 1979 acknowledged that the island belongs to Singapore.

7.52 These conclusions are consistent with and have been confirmed by the official exchange of letters in the early 1950s, when Johor, as Malaysia’s predecessor, expressly disclaimed title to Pedra Branca. Singapore will elaborate on this important disclaimer in the next Chapter.

³⁵¹ *Decision of the Eritrea-Ethiopia Boundary Commission, supra* note 350, at para. 3.27.

CHAPTER VIII JOHOR'S EXPRESS DISCLAIMER OF TITLE TO PEDRA BRANCA

8.1 The various manifestations of Malaysia's recognition of Singapore's sovereignty over Pedra Branca described in Chapter VII are all the more significant in that they are entirely consistent with and confirm Malaysia's predecessor – Johor's – express disclaimer of title to the island. This extremely important disclaimer was given in 1953 when the Acting State Secretary of Johor declared, in his letter of 21 September 1953 to the Colonial Secretary of Singapore, that “the Johore Government does not claim ownership of Pedra Branca”³⁵².

8.2 It should be emphasised at the outset that Singapore regards the 1953 correspondence as complementing other evidence of her long-standing title to Pedra Branca. The letter of 21 September 1953 from the Acting State Secretary of Johor to the Colonial Secretary of Singapore is a clear and striking confirmation of two things: (a) that the Government of Johor never had any claim of title to Pedra Branca, and (b) that even if she had any possible claim of title prior to 1953, she was now disclaiming it. Furthermore, in the context of Singapore's possession of the island and in the absence of any claim or interest by third States, Johor's disclaimer amounts to an unequivocal recognition of Singapore's title.

³⁵² Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953, attached to this Memorial as Annex 96.

8.3 Given the significance of this letter, it is, in Singapore's view, necessary to examine in some detail:

- (a) the circumstances in which the letter of 21 September 1953 came to be written (*see* Section I below); and
- (b) the legal significance to be attributed to it (*see* Section II below).

Section I. The Letter dated 21 September 1953

A. THE COLONIAL GOVERNMENT'S ENQUIRY, 1953

8.4 The 1953 correspondence was in response to an enquiry of 12 June 1953 made on behalf of the Colonial Secretary, Singapore by J.D. Higham, the Under-Secretary in the Colonial Secretary's Office³⁵³. This followed from an earlier exchange between the Master Attendant of Singapore and the Director of Marine of the Federation of Malaya, which started when the latter wrote to the former regarding the maintenance of the *Pulau Pisang lighthouse*³⁵⁴. However, in his reply, the Master Attendant took it upon himself to make inquiries in respect of *both* Pulau Pisang *and* Pedra Branca³⁵⁵. This led to the Johor authorities being approached.

³⁵³ Letter from Higham J.D., on behalf of the Singapore Colonial Secretary, Singapore to the British Adviser, Johor dated 12 June 1953, including Annex A (Extract from Mr John Crawford's Treaty of 1824) and Annex B (Extract from a despatch by the Governor of Prince of Wales Island, Singapore and Malacca to the Secretary to the Government of India dated 28 Nov 1844), attached to this Memorial as Annex 93.

³⁵⁴ Letter from the Director of Marine, Federation of Malaya to the Master Attendant, Singapore dated 23 Sep 1952, attached to this Memorial as Annex 89. Pulau Pisang is located on the west coast of Johor. Its exact location is shown on Map 2, printed after page 8.

³⁵⁵ *See* Letter from the Master Attendant, Singapore to the Director of Marine, Federation of Malaya dated 29 Sep 1952, attached to this Memorial as Annex 90.

8.5 Mr. Higham’s letter was addressed to the British Adviser and copied to the Chief Secretary of the Federation of Malaya³⁵⁶. This letter explained that the Colonial Secretary of Singapore, was seeking “... information about the rock some 40 miles from Singapore known as Pedra Branca on which the Horsburgh Lighthouse stands,” this being “... relevant to the determination of the boundaries of the Colony’s territorial waters”. Mr. Higham went on to state that this rock was outside the limits ceded to the East India Company with the island of Singapore in the 1824 Treaty³⁵⁷ and that this rock was mentioned in a despatch from the Governor of Singapore of 28 November 1844 (an extract from which was enclosed as Annex B to Mr. Higham’s letter of 12 June 1953)³⁵⁸. The relevant passage quoted in Annex B is the final sentence of paragraph 4 of the original despatch³⁵⁹.

8.6 Mr. Higham continued by referring to the lighthouse “built in 1850 by the Colony Government who have maintained it ever since”. He commented that this, by international usage, no doubt “confers some rights and obligations on the Colony [*of Singapore*].”

8.7 Continuing, Mr. Higham was careful to distinguish the status of Pedra Branca from that of Pulau Pisang. In respect of the latter, there was an indenture of 6 October 1900 in the Johor Registry of Deeds which stated that “... a part of

³⁵⁶ The Chief Secretary of the Federation was the senior officer in charge of administrative matters in the Government of the Federation of Malaya and was the counterpart of the Colonial Secretary in Singapore.

³⁵⁷ This treaty is discussed above, at para. 3.5.

³⁵⁸ The rock mentioned in that extract, despite the mistaken manuscript interpolation “[i.e. Pedra Branca]”, is undoubtedly Peak Rock (and not Pedra Branca). The original text of the 28 Nov 1844 letter, without the interpolation, is attached to this Memorial as Annex 13.

³⁵⁹ Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, including Annex A (Extract from Mr John Crawford’s Treaty of 1824) and Annex B (Extract from a despatch by the Governor of Prince of Wales Island, Singapore and Malacca to the Secretary to the Government of India dated 28 Nov 1844), attached to this Memorial as Annex 93.

Pulau Pisang was granted to the [*British*] Crown for the purposes of building a lighthouse'. Although certain conditions were attached to this grant, "... it is clear that there was no abrogation of the sovereignty of Johore". Mr. Higham concluded by stressing the desirability of clarifying the status of Pedra Branca and by enquiring:

"...whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of."

8.8 Two points should be noted about this letter. The first, and most significant, is that the recipient and the copy addressee (the Chief Secretary of the Federation of Malaya) were put on notice that the information was being requested in order to "... clarify the status of Pedra Branca" with a view to determining "the boundaries of the Colony's territorial waters". It was not a hypothetical or purely academic enquiry. The second is that, in conceding, in the case of Pulau Pisang, that there had been no "abrogation" of the sovereignty of Johor, the writer was clearly assuming that Singapore had sovereignty over Pedra Branca unless there was evidence of Johor's title to the island. This explains Higham's mention that the lighthouse was built by the Singapore Government in 1850 and the Government had maintained it without interruption thereafter.

B. THE REACTION OF THE JOHOR GOVERNMENT

8.9 An immediate response to Mr. Higham's letter of 12 June 1953 to the British Adviser in Johor came in an incompletely dated letter of June 1953 from J.D. Turner, Secretary to the Johor British Adviser³⁶⁰. This letter was received

³⁶⁰ Letter from Turner J.D. (Secretary to the British Adviser, Johor) to the Colonial Secretary, Singapore, received on 18 June 1953, attached to this Memorial as Annex 95.

by the Colonial Secretary, Singapore, on 18 June 1953. Mr. Turner's letter was of a purely temporising nature, explaining to the Colonial Secretary, Singapore that the British Adviser in Johor had passed on his letter of 12 June to the State Secretary "... to whom it should, in the British Adviser's opinion, have been addressed in so far as Johore [*was*] concerned". Mr. Turner's letter added that the State Secretary would doubtless wish to consult with the Commissioner for Lands and Mines and Chief Surveyor and examine any existing archives before forwarding the views of the State Government to the Chief Secretary.

8.10 This exchange culminated in the brief letter of 21 September 1953 from M. Seth bin Saaid, the Acting State Secretary of Johor to the Colonial Secretary, Singapore. This letter informed the Colonial Secretary, Singapore that:

"... the Johore Government does not claim ownership of Pedra Branca."³⁶¹

8.11 This letter put to rest the status of Pedra Branca vis-à-vis Johor. The validity of this letter has never been questioned. The letter itself has also never been retracted at any time. The answer of the Acting Secretary of State formed the basis of an express mutual understanding between Singapore and Johor on the status of Pedra Branca, a mutual understanding which went unquestioned until Malaysia sought to deny it 26 years later by publishing the 1979 Territorial Waters and Continental Shelf Boundaries Map³⁶².

³⁶¹ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953, attached to this Memorial as Annex 96.

³⁶² The 1979 Map is discussed in paras. 4.2 to 4.4 above.

Section II. The Legal Nature of the Letter from the Acting State Secretary of Johor of 21 September 1953

A. AN UNCONDITIONAL DISCLAIMER

8.12 The statement made in the letter from the Acting State Secretary of Johor of 21 September 1953 that "... the Johore Government does not claim ownership of Pedra Branca" was self-evidently unconditional. No qualification was expressed; and no expectation of any acceptance or confirmation by the Colonial Secretary of Singapore was asked for or even hinted at. This was a formal declaration and assurance that Johor was not asserting a claim to sovereignty over Pedra Branca.

8.13 It is immaterial that the letter speaks of "ownership" rather than "sovereignty". In this particular context, the two expressions are indistinguishable. The enquiry in 1953 was not merely about the ownership of *the lighthouse*, but was made in relation to determining "the boundaries of the Colony's territorial waters." The enquiry clearly concerned *the island*, and the answer disclaimed any title to *Pedra Branca* and *not* just to the Horsburgh Lighthouse. For a State to disclaim ownership of an island is to disclaim sovereignty over it. Moreover, it is clear from the context of the exchange of letters that sovereignty and not mere property rights was being discussed. Johor's disclaimer was in response to the letter of 12 June 1953, which:

- (a) spoke of the need to ascertain the status of Pedra Branca because it was relevant to "the determination of the boundaries of the Colony's territorial waters";
- (b) observed that Pedra Branca lay outside the limits of the territory ceded by Johor in 1824; and
- (c) noted, by way of contrast, Johor's unquestioned sovereignty over Pulau Pisang.

8.14 The situation here is quite different from the situation in which State A has title to (sovereignty over) a piece of territory which is nonetheless in the *de facto* possession of State B. In the present case, Johor knowingly – and three months after receiving the enquiry – *disclaimed* title to Pedra Branca in 1953, never having occupied it at any time prior thereto, whereas Singapore had been in sole and uninterrupted possession of Pedra Branca since 1847, and had in fact administered and maintained both the lighthouse and the island on which it stood continuously since the completion of the lighthouse in 1851.

8.15 The letter of the Acting Secretary of State of Johor of 21 September 1953 correctly describes the legal consequences of this situation. The State Secretary was (as described by the Constitution of the State of Johor) “the principal officer in charge of the administrative affairs of the State” and was an *ex officio* member of both the legislative and executive organs of the State of Johor³⁶³. He had the power to make a disclaimer of title on behalf of Johor.

8.16 It should be emphasised that it is not Singapore’s case that Johor *abandoned* or *relinquished* title to Pedra Branca in 1953. Abandonment or relinquishment of title is possible only if there is a pre-existing title. What Johor did by her 1953 letter was not to renounce title (since she did not have title) or a “claim” to ownership, but rather to *pronounce* explicitly that Johor *did not have* a claim to ownership of Pedra Branca. It must also be emphasised that, in the context of Singapore’s possession of the island and in the absence of any claim or interest by third States, Johor’s disclaimer can only be regarded as an unequivocal recognition of Singapore’s title.

³⁶³ See Articles VI (1), IX (1), XXII (1) of the The Johore Constitution Supplement, 1367 (State of Johore), enacted on 1 Feb 1948, attached to this Memorial as Annex 88.

B. A BINDING UNILATERAL UNDERTAKING

8.17 In specifically disclaiming title to Pedra Branca on behalf of the Johor Government (“...the Johore Government does not claim ownership of Pedra Branca”), the Acting State Secretary of Johor, in his letter of 21 September 1953, was giving a solemn undertaking which Singapore was entitled to rely, and did rely, upon.

8.18 The letter of 21 September 1953 can best be characterised as a binding unilateral declaration made in response to a specific enquiry. The present Court, in its Judgments in the *Nuclear Tests* cases, set out in general terms its analysis of the circumstances in which a unilateral declaration may be regarded as binding on the declarant State:

“It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.”³⁶⁴

³⁶⁴ See *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253, at p. 267, para. 43; and *Nuclear Tests (New Zealand v. France)* [1974] ICJ Rep 457, at p. 472, para. 46.

8.19 The letter of 21 September 1953 fulfils all the requirements identified in this passage for a binding unilateral act. The disclaimer of title to Pedra Branca could hardly be more specific³⁶⁵. The letter self-evidently concerns a legal or factual situation, since it was a response to a specific enquiry from Singapore drawing attention to her wish to clarify the status of Pedra Branca. Moreover, it was a response given on behalf of Johor in circumstances where the Johor authorities were or must have been aware that since Singapore had taken lawful possession of Pedra Branca and maintained the lighthouse since 1847, Singapore had sovereignty over the island. There were at least two indications of this in Mr. Higham’s letter to the British Adviser, Johor of 12 June 1953. The first is the reference in the letter to the enquiry about Pedra Branca being “... relevant to the determination of the Colony’s territorial waters”; the second is the generalised assertion that the maintenance of the lighthouse on Pedra Branca by the Singapore Government since it was built “no doubt confers some rights and obligations on the Colony [*of Singapore*]”.

8.20 Therefore, in 1953, the Johor authorities were aware that Singapore must have a claim of sovereignty over Pedra Branca on the basis of, among other things, Singapore’s taking of possession and continuous use of the island. In light of this awareness, the Johor authorities must have intended for the 21 September 1953 letter to be a legally binding undertaking *not* to put forward a claim to Pedra Branca. The very terms of the assurance given in the letter of 21 September 1953 on behalf of Johor confirm that it was intended to be a firm and

³⁶⁵ This is in contrast with the argument made by India and partly accepted by the Tribunal in the case concerning the *Rann of Kutch* where the acts relied upon constituted “a *relinquishment of potential* rights rather than an explicit acceptance of claimed rights”. See *Indo-Pakistan Western Boundary (Rann of Kutch)*, Award of 19 Feb 1968, 17 RIAA 1 (1968), at p. 533 (italics added). The opinion of the Chairman, G. Lagergren, was endorsed by Mr. Entezam. In the present case, the disclaimer is explicit and unqualified.

unqualified disclaimer of title by Johor, capable of being relied upon by the Singapore authorities. As the Court has said in the *Nuclear Tests* cases:

“... a State may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act.”³⁶⁶

8.21 The Court has also endorsed the rule that the form of the communication is not relevant. What is relevant is the substance and intent of the communication:

“... this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.”³⁶⁷

8.22 Finally, the Court, in the *Nuclear Tests* cases, was able to derive the requisite juridical support for its opinion regarding the binding nature of certain unilateral declarations from the principle of good faith:

“Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”³⁶⁸

8.23 The *dicta* of the Court in the *Nuclear Tests* cases do not stand alone. The Court’s predecessor had, more than forty years earlier, already pronounced on

³⁶⁶ *Nuclear Tests (Australia v. France)*, *supra* note 364, at p. 267, para. 44; and *Nuclear Tests (New Zealand v. France)*, *supra* note 364, at pp. 472-473, para. 47.

³⁶⁷ *Nuclear Tests (Australia v. France)*, *supra* note 364, at p. 267, para. 45; and *Nuclear Tests (New Zealand v. France)*, *supra* note 364, at pp. 472-473, para. 48.

³⁶⁸ *Nuclear Tests (Australia v. France)*, *supra* note 364, at p. 268, para. 46; and *Nuclear Tests (New Zealand v. France)*, *supra* note 364, at pp. 473, para. 49.

the legal significance in international law of an oral declaration made by the Norwegian Foreign Minister to his Danish counterpart. This was in the *Eastern Greenland* case, the circumstances of which bear some comparison with the present case. In the *Eastern Greenland* case, Denmark, having made a prior claim to the territory in question, challenged a subsequent act of “occupation” of that territory by Norway in 1931. In support of this challenge, Denmark invoked a verbal assurance, made by the Norwegian Foreign Minister on 22 July 1919, that the Norwegian Government would not do anything to obstruct Danish plans for the territory. In deciding that Norway was bound by this statement made by her Foreign Minister (Mr. Ihlen), the Permanent Court stated:

“The Court considers it beyond all dispute that a reply of this nature, given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power in regard to a question falling within his province, is binding upon the country to which the Minister belongs.”³⁶⁹

8.24 In the *Eastern Greenland* case, the Norwegian Foreign Minister had in effect stated that Norway would not challenge the Danish claim to sovereignty over Eastern Greenland. Norway was held to that promise. The “Ihlen Declaration” may not have been an express disclaimer of title on behalf of Norway; but it can be viewed as an implicit recognition of, or acquiescence in, the Danish claim of title to Eastern Greenland. This reasoning applies, *a fortiori*, to Singapore’s title to Pedra Branca.

8.25 Verhoeven, in his seminal work, *La reconnaissance internationale dans la pratique contemporaine*, published in 1975, explores the close links which exist between the concepts of “recognition”, “admissions”, “renunciations”, “acquiescence” and “estoppel”:

³⁶⁹ See *Legal Status of Eastern Greenland Case*, *supra* note 291, at p. 71.

“Il est difficile en effet d’en tirer argument quant aux effets spécifiques de la reconnaissance d’autant que la jurisprudence parle généralement indifféremment de ‘reconnaissance’, ‘acquiescement’, ‘acceptation’, ‘consentement’,”³⁷⁰

As regards the *Eastern Greenland* case, Verhoeven makes the entirely valid point that it is very difficult to dissociate the reasoning based upon an implied recognition from the consolidation of a territorial title forming the context in which that implied recognition was given.

8.26 It is certainly true that not all instances of inconsistency of conduct on the part of a State would attract the same consequences. Indeed, in the *Gulf of Maine* case, the Chamber of the Court was not prepared to find an estoppel against the United States for failing to protest against the issue of exploration permits by Canada over part of the disputed area:

“... while it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.”³⁷¹

8.27 This having been said, there is of course a world of difference between an isolated negative failure to react to an isolated event and a positive denial of any claim of title to a parcel of territory which later becomes a matter of dispute between the two States concerned. The former may be ambivalent; the latter represents a definite and unambiguous position, and the statement incorporating it is, even if for that reason alone, much more likely to be relied upon by other States.

³⁷⁰ Verhoeven J., *La reconnaissance internationale dans la pratique contemporaine* (1975), at p. 799.

³⁷¹ See *Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada/United States of America)*, *supra* note 333, at p. 308, para. 140.

8.28 Singapore accepts that the letter from the Acting State Secretary of Johor of 21 September 1953 was, on its face, a “negative” pronouncement (a disclaimer of title) by Johor and not a “positive” recognition of Singapore’s title. Nonetheless, such a negative pronouncement can be as good as positive recognition.

8.29 In the *Eastern Greenland* case, a similar negative pronouncement by the Norwegian Foreign Minister to his Danish counterpart was held binding on Norway. This, combined with the evidence of Danish occupation of Eastern Greenland, was sufficient to convince the Permanent Court that Denmark was sovereign in title over the disputed land. However one views the letter of 21 September 1953 from the Acting State Secretary of Johor, there can be no doubt that the letter embodies a binding unilateral undertaking of the kind considered by the Permanent Court in the *Eastern Greenland* case and by the present Court in the *Nuclear Tests* cases.

8.30 The present case is even stronger. The facts show that Malaysia has not only acquiesced in Singapore’s title to Pedra Branca – Malaysia is in fact estopped from lodging a claim of sovereignty on Pedra Branca.

8.31 Estoppel has been accepted and applied by the Court as a general principle of international law. Thus, in its Judgment on Nicaragua’s application to intervene in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the Chamber of the Court defined estoppel as:

“... a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.”³⁷²

³⁷² *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application by Nicaragua to Intervene)* [1990] ICJ Rep 3, at p. 118, para. 63. See also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, at p. 26, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (Preliminary Objections)* [1998] ICJ Rep 275, at p. 303, para. 57.

8.32 Even though estoppel is a concept which is not found in all systems of law, it is unanimously accepted that the underlying idea is fully applicable in international law. As Professor Dominique Carreau puts it, “il s’agit là d’une règle de bon sens qui signifie simplement que l’on ne peut pas se contredire”³⁷³.

8.33 There is a close link between estoppel and acquiescence; indeed they may relate to the same conduct, but viewed from the opposite ends of a telescope. As has been aptly explained:

“A claim of estoppel may and indeed frequently does relate to the existence, non-existence or deemed existence of a particular state of mind of the respondent State, and in particular its acceptance of, or consent to, a particular matter; but while a claim of acquiescence asserts that the State concerned *did* accept or agree on that point, a claim of estoppel accepts, by implication, that the respondent State did *not* accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be permitted to deny the conclusion which its conduct suggested.”³⁷⁴ [italics in original]

8.34 The Court itself has also stressed this close link between the concepts of estoppel and acquiescence. Thus, the Chamber, in the *Gulf of Maine* case, observed:

“... that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both flow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by

³⁷³ See Carreau D., *Droit international* (7th ed., 2001), at p. 229, para. 565 (translation: “this is a rule based upon common sense which simply means that a person cannot contradict himself”). Carreau adds, at p. 230: “Cette règle d’estoppel, que l’on peut appeler pour simplifier *principe de non-contradiction*, revêt deux modalités particulières: soit l’acquiescement tacite, soit la reconnaissance formelle.” (translation: “This rule of estoppel, which may be called by way of simplification, the *principle of non self-contradiction*, takes on two particular modalities: either tacit acquiescence or formal recognition”), italics in the original.

³⁷⁴ Thirlway H., “*The Law and Procedure of the International Court of Justice 1960-89*” 60 *Brit. Year Book Int’l L.* 4, at p. 29 (1989).

unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.”³⁷⁵

8.35 The key elements of a plea of estoppel to operate as a bar *in limine* to the pursuit of a claim are that the representation made by one party must have been clear and unequivocal, and must have been relied upon by the other party to its detriment or to the advantage of the party making the representation. It goes without saying that the representation made by the Acting State Secretary of Johor to the effect that “the Johore Government does not claim ownership of Pedra Branca” was clear and unequivocal. There was no ambiguity and no lack of clarity in this unconditional disclaimer. Moreover, Singapore relied on this disclaimer, which was entirely consistent with the legal *status quo*. It is worth noting in this respect that, on 13 October 1953, the Office of the Colonial Secretary of Singapore wrote the following note to the Acting Master Attendant:

“Reference your minute dated 6th February, 1953, the State Secretary, Johore, states that the Johore Government does not claim the ownership of Pedra Branca Rock on which the Horsburgh Lighthouse stands.

2 On the strength of this, the Attorney General agrees that we can claim it as Singapore territory.”³⁷⁶

8.36 Having established that there is no doubt that Singapore had relied upon Johor’s disclaimer, the next question that has to be addressed is whether she had relied upon the disclaimer by Johor to her *detriment*, given that Singapore had already been administering Pedra Branca and the Horsburgh Lighthouse without interruption for more than 100 years when the disclaimer of title was made by

³⁷⁵ See *Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada/United States of America)*, *supra* note 333, at p. 305, para. 130.

³⁷⁶ Letter from Colonial Secretary, Singapore to Master Attendant, Singapore dated 13 Oct 1953, attached to this Memorial as Annex 97. See also Letter from Master Attendant, Singapore to Colonial Secretary, Singapore dated 6 Feb 1953, attached to this Memorial at Annex 91, where the Master Attendant had enquired about the decision concerning the 3-mile limit of territorial waters around Pedra Branca.

Johor. It is Singapore's case that she *did* act to her detriment in that, having been reassured that Johor had no claim to Pedra Branca, Singapore continued to maintain and improve the lighthouse and the related facilities at her cost³⁷⁷.

8.37 In any event, acquiescence also applies to this case, and it does not require that the State relying upon it should have acted to her detriment. As quoted above, in the *Gulf of Maine* case, the Chamber stated that:

“... acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...”³⁷⁸

8.38 This dictum fully applies to the facts of the present case. Singapore had been open, direct and purposeful when it made her enquiry about the status of Pedra Branca on 12 June 1953. Indeed, Mr. Higham had commented that the maintenance of the Horsburgh Lighthouse on Pedra Branca no doubt conferred “some rights and obligations on the Colony [of Singapore]”. These words, when viewed in the context of Singapore's acceptance that Johor had sovereignty over Pulau Pisang, amounted to an assertion of sovereignty over Pedra Branca by Singapore. Singapore was surely justified in interpreting the disclaimer of title made on behalf of Johor on 21 September 1953 as ensuring that neither Johor nor any successor in title to Johor would or could raise any objection to Singapore's title to Pedra Branca. This is acquiescence within the meaning of the dictum in the *Gulf of Maine* case cited above.

³⁷⁷ See above, Chapter 6, in particular paras. 6.27 to 6.34.

³⁷⁸ *Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada/United States of America)*, supra note 333, at para. 130. See para. 8.26 above.

8.39 As Judge Alfaro has also convincingly explained in his separate opinion appended to the Judgment of the Court in the *Temple Case*:

“Whatever term or terms [*estoppel*, *preclusion*, *forclusion*, *acquiescence*] be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*). Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*).

The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation.

A State may also be bound by a passive or negative attitude in respect of rights asserted by another State, which the former State later on claims to have. Passiveness in front of given facts is the most general form of acquiescence or tacit consent.”³⁷⁹

³⁷⁹ *Temple of Preah Vihear*, *supra* note 238, at p. 40, pp. 43-51 (where very many examples are provided). See also Fitzmaurice’s separate opinion, *ibid*, at pp. 62-65; Jennings R., *The Acquisition of Territory in International Law* (1963), at pp. 36-51.

Section III. Conclusions

8.40 The 1953 correspondence is highly significant in showing that:

- (a) the Colonial Secretary of Singapore sought clarification about the legal status of Pedra Branca in a letter dated 12 June 1953 to the Government of Johor;
- (b) the terms of this letter showed that colonial authorities in Singapore were aware that Singapore had sovereign rights over the island;
- (c) the Acting Secretary of State of Johor confirmed Singapore's position when he declared, in a letter dated 21 September 1953, that "... the Johor Government does not claim ownership of Pedra Branca";
- (d) the disclaimer was an unequivocal admission that Johor had no sovereignty over the island and by necessary implication, Johor accepted Singapore's sovereignty;
- (e) the disclaimer is fully binding on Malaysia as Johor's successor.

8.41 The facts and arguments in Chapters VII and VIII leave no doubt that Malaysia is bound (a) by her "passive or negative conduct" in relation to the sovereign rights asserted and exercised by Singapore, (b) by her repeated requests to Singapore for authorisation to carry out activities on Pedra Branca and its vicinity, and (c) by her predecessor's formal disclaimer of rights over the island.

CHAPTER IX MIDDLE ROCKS AND SOUTH LEDGE

9.1 Middle Rocks are two clusters of rocks lying a mere 1 km (or 0.6 nautical miles) to the south of Pedra Branca. The western cluster of Middle Rocks lies 0.9 meters above the high water mark while the eastern cluster lies 1.5 meters above the high water mark. The two clusters lie about 250 metres apart.

9.2 The western cluster consists of several rock outcrops spread over an area measuring 45 meters by 20 meters. The largest of these rock outcrops measures 5 by 4 meters at low-tide. The eastern cluster consists of two ridges and one rocky outcrop with several small rocks interspersed between them. The larger ridge measures about 55 meters by 15 meters while the smaller ridge measures about 45 meters by 15 meters. The rocky outcrop measures about 16 by 4 meters. All the rocks are bare of vegetation.

9.3 Middle Rocks are located 7 nautical miles from the Indonesian coast and 8 nautical miles from the Malaysian coast.

9.4 South Ledge is a low-tide elevation lying 2.1 nautical miles south of Pedra Branca. It is completely submerged at high tide. At low tide, South Ledge is visible as three isolated rocks situated 20 to 25 meters apart. The largest of the three rocks measures about 5 meters by 2 meters. The two smaller rocks have diameters of 3.5 meters and 2.5 meters respectively.

9.5 South Ledge is located 5.5 nautical miles from the Indonesian coast and 7.8 nautical miles from the Malaysian coast.

9.6 As provided for in Article 2 of the Special Agreement between the Parties:

“The Court is requested to determine whether sovereignty over:-

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

belongs to Malaysia or the Republic of Singapore.”

9.7 Singapore’s position is that sovereignty in respect of Middle Rocks and South Ledge goes together with sovereignty over Pedra Branca. Whoever owns Pedra Branca owns Middle Rocks and South Ledge, which are dependencies of the island of Pedra Branca and form with the latter a single group of maritime features (*see* Section I below). Moreover, being minor maritime features lying within the territorial waters of Pedra Branca, and not having been independently appropriated by any State, sovereignty over Middle Rocks and South Ledge must necessarily be in the hands of the State which exercises sovereignty over Pedra Branca itself, since these features are not capable of autonomous appropriation (*see* Section II below).

Section I. Middle Rocks and South Ledge Form a Single Group of Maritime Features Together with Pedra Branca

9.8 Even though Middle Rocks and South Ledge have slightly different legal characteristics, as will be shown in Section II below, they are both mere dependencies of Pedra Branca and their legal fate must be alike:

- (a) first, both Middle Rocks and South Ledge form geographically and morphologically a single group of maritime features; and
- (b) second, Malaysia is unable to show that it has appropriated these maritime features through any acts of sovereignty. Since these uninhabited, unoccupied reefs have never been independently

appropriated by Malaysia, they belong to Singapore by virtue of them falling within Singapore's territorial waters generated by Pedra Branca.

A. A SINGLE GROUP OF MARITIME FEATURES

9.9 As explained by Judge Huber in the *Island of Palmas* arbitration:

“Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). ...

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law, a unit, and that the fate of the principal part may involve the rest.”³⁸⁰ [emphasis in underline added]

9.10 Two points were made by Judge Huber in this passage concerning the principle of proximity – *first*, the principle of proximity has no relevance with regards to “islands situated outside territorial waters” and *second*, the principle of proximity is relevant as regards islands forming a group, such that they can be regarded in law as one unit.

9.11 This concept of unity of a group of islands or other maritime features sharing the same legal destiny has been applied on several occasions by this Court.

³⁸⁰ *Island of Palmas*, *supra* note 181, at pp. 854-855 (italics added).

9.12 In *El Salvador/Honduras*, the Chamber of the Court, referring to the *Minquiers and Ecrehos* case, said:

“The small size of Meanguerita, its contiguity to the larger island [Meanguera], and the fact that it is uninhabited, allow its characterization as a ‘dependency’ of Meanguera, in the sense that the Minquiers group was claimed to be a ‘dependency of the Channel Islands’ (*I.C.J. Reports 1953*, p. 71).”³⁸¹

Then, having decided “that El Salvador may be regarded as sovereign over the island” of Meanguera, since it was “in effective possession and control” of the island, the Chamber of the Court concluded:

“As regards Meanguerita the Chamber does not consider it possible, in the absence of evidence on the point, that the legal position of that island could have been other than identical with that of Meanguera.”³⁸²

9.13 More recently, the concept of an island group was recognised in *Qatar/Bahrain* when the Court chose to dispose of the Hawar Islands, comprising “31 islands and islets”, as a single group³⁸³. Similarly, in its Award of 9 October 1998, the Arbitral Tribunal between Eritrea and Yemen allocated

³⁸¹ *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *supra* note 328, at p. 570, para. 356. *See also* p. 579, para. 368, where the Court characterised “Meanguera (to which Meanguerita is an appendage)”. In the *Minquiers and Ecrehos* case, the Court defined “the islets and rocks of the Ecrehos and Minquiers” as forming “groups”. *See Minquiers and Ecrehos*, *supra* note 306, at p. 72. *See also* the Individual Opinion of Judge Levi Carneiro, *ibid*, at pp. 99-102. Similarly, in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, at p. 88, para. 128, the Court treated “the Kerkennah Islands, surrounded by islets and low-tide elevations” as a single whole. In *Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada/United States of America)*, *supra* note 333, at p. 336, para. 222, the Chamber dealt with Seal Island together with “its smaller neighbour, Mud Island”.

³⁸² *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, *supra* note 328, at p. 579, para. 367.

³⁸³ *See Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at pp. 70-85, para. 98-148.

the disputed islands according to “sub-groups”, each considered as forming a whole³⁸⁴.

9.14 Similarly, Middle Rocks, South Ledge and Pedra Branca form a single group of maritime features, given their proximity to Pedra Branca (respectively 0.6 nautical miles and 2.1 nautical miles) and their relatively small size compared to Pedra Branca. Consequently, Middle Rocks and South Ledge can only be regarded as “dependencies” of Pedra Branca, in the meaning adopted by the jurisprudence of the Court. As explained in paragraphs 2.15 to 2.17, this is how older sea charts and sailing directions have always treated Pedra Branca, Middle Rocks and South Ledge.

9.15 It is also extremely revealing and noteworthy that Pedra Branca, Middle Rocks and South Ledge are situated to the south-east of the main navigational channel (known as Middle Channel) in the Straits of Singapore and to the north of another navigational channel (known as South Channel). As the extract from the British Admiralty Chart 3831 (reproduced as **Map 4**, after page 13) shows, Pedra Branca, Middle Rocks and South Ledge are bounded as a group to the north and south by these two navigational channels.

9.16 Further justifications for treating Pedra Branca and its dependencies as a group are to be found in the geomorphological evidence that the three features form a single physical unit. In particular, geological examination of rock samples taken from Pedra Branca, Middle Rocks and South Ledge shows that the three features are constituted with the same rock type (namely, a light, coarse-grained biotite granite), which shows that the three features belong to the same rock body.

³⁸⁴ *Eritrea/Yemen*, *supra* note 349 at para. 460-466; and the *dispositif* of the Award, at para. 527.

9.17 Moreover, both countries have treated the three features as a whole. Thus, after Malaysia published her 1979 Map claiming Pedra Branca to be within her territorial waters, Singapore lodged a protest in February 1980 to the effect that “*Pedra Branca* and the waters around it” belonged to Singapore³⁸⁵.

B. MIDDLE ROCKS AND SOUTH LEDGE FALL WITHIN PEDRA BRANCA’S TERRITORIAL WATERS

9.18 Even if Middle Rocks and/or South Ledge were capable of autonomous appropriation (which Singapore does not admit, as will be shown in Section II below), Malaysia’s claim would only have some credibility if she could prove that, before the present dispute crystallized, she acted *à titre de souverain* with regard to these features, which are situated within Pedra Branca’s territorial sea. This Malaysia cannot do.

9.19 The Judgment of the Court in *Qatar/Bahrain* makes clear that even effective activities which are sufficient to create or perfect a State’s title to an island would not have any effect for acquiring title to a low-tide elevation.

9.20 In that case, Bahrain had relied on various acts of authority in support of her claim of sovereignty on Fasht ad Dibal, a low-tide elevation³⁸⁶. The Court noted that:

“[w]hether this claim by Bahrain is well founded depends upon the answer to the question whether low-tide elevations are territory

³⁸⁵ See Singapore’s Note MFA 30/80 dated 14 Feb 1980, attached to this Memorial as Annex 144.

³⁸⁶ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at p. 100, para. 199 and at p. 101, para. 203.

and can be appropriated in conformity with the rules and principles of territorial acquisition.”³⁸⁷

After a lengthy discussion, the Court firmly rejected Bahrain’s claim³⁸⁸.

9.21 *A fortiori*, there is no basis for any Malaysian claim to South Ledge, a low-tide elevation on which Malaysia has never carried out any activities. Accordingly, South Ledge, like Fasht ad Dibal in the *Qatar/Bahrain* case, must go to whoever owns the territorial waters in which it is situated – that is, Singapore.

9.22 Similarly, Malaysia is unable to show any *effectivités* to support her claim to Middle Rocks, which, in contrast with South Ledge, are partly above water at high tide. Indeed, as the Court recognised in its recent Judgment in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*:

“In particular in the case of very small islands which are uninhabited or not permanently inhabited ... *effectivités* will indeed generally be scarce.”³⁸⁹

9.23 As Sir Gerald Fitzmaurice put it:

“...if it can be shown that the disputed areas (whether by reason of actual contiguity or of proximity) are part of an entity or unity over which *as a whole* the claimant State has sovereignty, this may (under certain conditions and within certain limits) render it unnecessary – or modify the extent to which it will be necessary – to adduce specific evidence of State activity in relation to the disputed areas as *such* – provided that such activity, amounting to

³⁸⁷ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at p. 101, para. 204.

³⁸⁸ *Ibid*, at pp. 101-103, para. 204-209. See *below*, at para. 9.40.

³⁸⁹ See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 180, at para. 134.

effective occupation and possession, can be shown in respect of the entity as a whole.”³⁹⁰

As a consequence:

“... sovereignty, once shown to exist in respect of an entity or natural unity *as a whole*, may be deemed, *in the absence of any evidence to the contrary*, to extend to all parts of that entity or unity.”³⁹¹

9.24 Singapore has continuously exercised sovereign authority over the waters surrounding Pedra Branca, within which Middle Rocks and South Ledge are located. These activities have been discussed in Chapter VI of this Memorial.

9.25 As the Permanent Court put it in the *Eastern Greenland* case in 1933:

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.”³⁹²

9.26 This is certainly so in the present case. Singapore has been constantly acting *à titre de souverain* in the waters neighbouring Pedra Branca, including around Middle Rocks and South Ledge. Malaysia, on her part, has been continually absent at all material times. After 1979, Singapore has continued to

³⁹⁰ See Fitzmaurice G., “*The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II*” 32 Brit. Yr. Bk. Int’l L. 20 (1955-1956), at p. 73. The italics are in the original text. See also Judge Levi Carneiro’s Individual Opinion in *Minquiers and Ecrehos* (discussed in Fitzmaurice, *ibid*, at p. 75): “... the Minquiers and Ecrehos are closer to Jersey than the mainland. They must be regarded as attached to Jersey rather than to the mainland. These islets were, and continue to be part of its ‘natural unity’... It seems inconceivable ... that England, having an important interest in the Channel Islands and full domination over the sea, and possessing all the principal islands, should not, without some special reason, have conquered and retained the Ecrehos and the Minquiers or, rather, that she should have left them to France” (*Minquiers and Ecrehos*, *supra* note 306, at p. 102; see also the Individual Opinion of Judge Basdevant, *ibid*, p. 78).

³⁹¹ See Fitzmaurice, *supra* note 390, at p. 75. Italics in original.

³⁹² See *Legal Status of Eastern Greenland Case*, *supra* note 291, at p. 46.

exercise sovereign authority over the waters around Pedra Branca and continued to vigilantly protest any Malaysian encroachment into those waters³⁹³, which by virtue of close proximity, are indistinguishable from the waters around Middle Rocks and South Ledge.

9.27 As the Court recalled in its Judgment of 16 March 2001, in the case concerning the *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*:

“It is... the terrestrial territorial situation that must be taken as the starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.”³⁹⁴

9.28 In the light of this principle, it is appropriate to recall the position taken by the Arbitration Tribunal in the *Eritrea/Yemen* case:

“There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal State, unless there is a fully-established case to the contrary (as, for example, in the case of the Channel Islands).”³⁹⁵

³⁹³ See above, at para. 6.116.

³⁹⁴ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at p. 97, para. 185.

³⁹⁵ *Eritrea/Yemen*, *supra* note 349, at para. 474. *C.f.*, *ibid.*, at para. 458: “... there is some presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a clearly better title”.

9.29 In the present case, there can be no doubt that both Middle Rocks and South Ledge are situated within the territorial sea of Pedra Branca:

- (a) in the case of South Ledge, this low-tide elevation lies 2.1 nautical miles off Pedra Branca; as for Middle Rocks, they lie 0.6 nautical miles from the island;
- (b) there can be no question that Pedra Branca itself is entitled to a territorial sea (*see e.g.*, Article 10, para. 2, of the Geneva Convention on the Territorial Sea and Article 121 of the U.N. Convention on the Law of the Sea, to which both Malaysia and Singapore are Parties³⁹⁶);
- (c) as a former British colony, Singapore has traditionally claimed a 3-mile breadth for its territorial sea³⁹⁷ but on 15 September 1980 Singapore declared that it would extend its territorial sea claim to 12 miles³⁹⁸. Whether on the basis of a 12-mile territorial sea or a 3-mile territorial sea, both Middle Rocks and South Ledge fall well within the territorial sea to which Pedra Branca is entitled.

See overleaf for **Map 16** (Map showing that Middle Rocks and South Ledge are within 3 nautical miles of Pedra Branca).

9.30 Although Middle Rocks and South Ledge sit within the 12-nautical mile belt measured from the Malaysian coast, this fact has no impact on the disposition of these features.

³⁹⁶ Since 14 October 1996 and 17 November 1994 respectively. *See Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 18 November 2003*, available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (visited: 3 Dec 2003).

³⁹⁷ *See* McNair A., *International Law Opinions*, Vol. 1 (1956), at p. 331 which shows that Britain has adopted the 3-mile rule as early as 1806. *See* further, the UK Territorial Waters Jurisdiction Act 1878 which formally declared the 3-mile rule for all British dominions. This Act is attached to this Memorial as Annex 69.

³⁹⁸ *See* Statement by the Singapore Ministry of Foreign Affairs, 15 Sep 1980, attached to this Memorial as Annex 148.

9.31 Malaysia only declared a 12-nautical mile territorial sea in 1969³⁹⁹. For more than 100 years, Johor, and later Malaysia, only recognised a 3-mile territorial sea.

9.32 From as early as 1861, Britain and Johor had reached a common understanding that Johor's territorial waters extended to 3 miles⁴⁰⁰. Later, Article 5 of the 1885 Treaty between Britain and Johor⁴⁰¹ declared that Johor waters "extends to three miles from the shore of the State". After independence in 1957, the Federation of Malaya (and later Malaysia) did not formally declare the breadth of her territorial sea until the extension to 12 miles in 1969. Moreover, Malaysia's own State practice confirms that she has adhered to the British tradition of 3 miles right up to 1969 as shown e.g., by the synoptical table of the breadth of territorial seas prepared in 1960 by the Secretariat for the Second United Nations Law of the Sea Conference, based on submissions by States and which recorded the Federation of Malaya's territorial sea as 3 miles⁴⁰².

³⁹⁹ Section 3 of the *Emergency (Essential Powers) Ordinance No. 7 1969*, attached to this Memorial as Annex 114.

⁴⁰⁰ See para. 15 of the Letter from His Highness Daing Ibrahim Maharajah (Tumongong of Johore) to Cavenagh O. (Governor of Prince of Wales Island, Singapore and Malacca) dated 8 Aug 1861, attached to this Memorial as Annex 63, stating that Johor's waters only extended "as far as by the law and custom of nations." See also Letter from Cavenagh O. (Governor of Prince of Wales Island, Singapore and Malacca) to the Secretary to the Government of India dated 16 Oct 1861, attached to this Memorial as Annex 64, where the Governor reported that the Temenggong's legal advisers informed that an appeal will be lodged against the exercise of British jurisdiction within 3 miles of the Johore coast. See also the Advocate General's Opinion to the Government of India in Letter from Ritchie W. (Advocate General) to Durand H.M. (Officiating Secretary to the Government of India Foreign Department) dated 18 Oct 1861, attached to this Memorial as Annex 65.

⁴⁰¹ Agreement on certain points touching the relations of Her Majesty's Government of the Straits Settlements with the Government of the Independent State of Johore dated 11 Dec 1885, attached to this Memorial as Annex 71.

⁴⁰² UN Document A/CONF.19/4 dated 8 Feb 1960, *Official Records of the Second United Nations Law of the Sea Conference*, attached to this Memorial as Annex 103.

9.33 This means that, for more than 100 years, both Middle Rocks and South Ledge fell within the 3-mile territorial sea generated by Pedra Branca, but outside the territorial sea measured from the coast of Johor. By the time Malaysia declared a 12-mile belt in 1969, Singapore had already established and maintained, for more than a century, her title over Pedra Branca and, consequently to all maritime features within its 3-mile territorial sea. The subsequent extension of Malaysian territorial waters to 12 miles cannot affect Singapore's prior title.

Section II. Middle Rocks and South Ledge are Not Capable of Independent Appropriation

9.34 Taken together, Middle Rocks and South Ledge are part of a group of maritime features which belongs to Singapore, whose sovereignty over Pedra Branca is indisputable as shown in the previous Chapters of this Memorial. Moreover, it will be apparent that, taken in isolation, neither South Ledge nor Middle Rocks are capable of appropriation.

A. SOUTH LEDGE

9.35 According to Article 11, paragraph 1, of the 1958 Geneva Convention on the Territorial Sea – a provision unanimously adopted during the first United Nations Conference on the Law of the Sea:

“A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide.”⁴⁰³

⁴⁰³ The 1958 Convention on the Territorial Sea and the Contiguous Zone 516 UNTS 205. See Summary Record of the 19th Plenary Meeting, *Official Records of the First United Nations Law of the Sea Conference*, Vol. II, p. 64 (originally issued as A/CONF.13/SR.19), at para. 31.

9.36 This definition has been incorporated *verbatim* in Article 13 of the 1982 U.N. Convention on the Law of the Sea and accepted as customary international law by the Court in its Judgment of 16 March 2001 in the case concerning *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*⁴⁰⁴.

9.37 According to this definition, South Ledge is indisputably a low-tide elevation, and is shown on maritime charts as such. For example, British Admiralty Chart 3831 indicates unequivocally that South Ledge is a low-tide elevation by giving its height in underlined figures, denoting that it is a drying height measured from chart datum⁴⁰⁵. Similarly, Malaysia's own maritime Chart 515 places the words "dries 2.1m" against South Ledge indicating unequivocally that South Ledge is a drying rock⁴⁰⁶. Chart 515 is presented as **Map 17** (Extract from Malaysian Maritime Chart 515 entitled "Silat Singapura" published under the superintendence of the Hydrographer, Royal Malaysian Navy (1998)) overleaf.

9.38 The series of pictures overleaf do not leave any shadow of a doubt in this respect. The first photograph (**Image 21**) was taken on 10 October 2003, at low tide (0.9 m). It shows three rocks and the wreck of the vessel *Gichoon* which ran aground on South Ledge on 14 October 1996. Further photographs taken on the same day (**Image 22**), when the tide was higher, show very clearly that the rocks that comprise South Ledge are fully covered at high tide. They are completely submerged, and only the hull of *Gichoon* can be seen.

⁴⁰⁴ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at p. 100, para. 201. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* note 381, at p. 89, para. 128; Guillaume G., "Les hauts-fonds découvrants dans la jurisprudence de la C.I.J." in Guillaume G., *La Cour internationale de Justice à l'aube du XXIème siècle* (2003), at p. 304.

⁴⁰⁵ See above, Map 4 (Extract from British Admiralty Chart 3831 - Indonesia, Malaysia and Singapore, Singapore Strait, Eastern Part (1979)), after p. 13.

⁴⁰⁶ See Map 16 (Extract from Malaysian Maritime Chart 515 – Silat Singapura, published under the superintendence of the Hydrographer, Royal Malaysian Navy (1998)).

9.39 As a matter of law, low-tide elevations are not capable of independent appropriation. The Court first took such a view *a contrario* in the *El Salvador/Honduras* case, when it said:

“That Meanguerita is ‘capable of appropriation’, to use the wording of the *dispositif* of the *Minquiers and Ecrehos* case, is undoubted; it is not a low-tide elevation, and is covered by vegetation, although it lacks fresh water.”⁴⁰⁷

9.40 The question of whether low-tide elevations are capable of independent appropriation was most recently considered by this Court in *Qatar/Bahrain*. The relevant portion of the Court’s Judgment reads:

“204. Whether this claim by Bahrain [*that it has appropriated the low-tide elevation by effectivités*] is well founded depends upon the answer to the question whether low-tide elevations are territory and can be appropriated in conformity with the rules and principles of territorial acquisition. In the view of the Court, the question in the present case is not whether low-tide elevations are or are not part of the geographical configuration and as such may determine the legal coastline. The relevant rules of the law of the sea explicitly attribute to them that function when they are within a State’s territorial sea. *Nor is there any doubt that a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil.* The decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

205. International treaty law is silent on the question whether low-tide elevations can be considered to be ‘territory’. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive

⁴⁰⁷ *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, *supra* note 328, at p. 570, para. 356.

rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast.

206. The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.

207. In this respect, the Court recalls the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as islands or other territory...

208. Paragraph 3 of Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and paragraph 4 of Article 7 of the 1982 Convention on the Law of the Sea provide that straight baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them. These provisions are another indication that low-tide elevations cannot be equated with islands, which under all circumstances qualify as basepoints for straight baselines.

209. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.”⁴⁰⁸ [emphasis added]

9.41 In the above Judgment, the Court declined to award the low-tide elevation of Fasht ad Dibal to Bahrain, even though Bahrain’s claim to ownership of the

⁴⁰⁸ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284.

low-tide elevation was based on the same *effectivités* upon which the Court had already awarded a neighbouring island, Qit'at Jaradah, to Bahrain⁴⁰⁹. The result was that sovereignty over Fasht ad Dibal fell to Qatar, who had sovereignty over the territorial sea within which the low-tide elevation was situated⁴¹⁰.

9.42 In the present case, Malaysia can avail herself of no *effectivité* whatsoever. As the Court made clear in *Qatar/Bahrain*, there is no doubt “that a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil.”⁴¹¹ For this reason alone, and without prejudice to other reasons⁴¹², there can be no doubt that South Ledge belongs to Singapore, as a consequence of her sovereignty over Pedra Branca.

B. MIDDLE ROCKS

9.43 Unlike South Ledge, Middle Rocks are above water even at high tide. They therefore satisfy the definition of “islands” in Article 121 of the 1982 United Nations Convention on the Law of the Sea. However, they are extremely small in size⁴¹³. As such, any attempt to treat them separately from Pedra Branca is an exercise in surreality.

9.44 As indicated by their very name, Middle Rocks are mere rocks. They certainly “cannot sustain human habitation or economic life of their own”. A

⁴⁰⁹ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *supra* note 284, at para. 197.

⁴¹⁰ *Ibid*, at p. 109, para. 222.

⁴¹¹ See above, para. 9.40.

⁴¹² See above, Section I of this Chapter.

⁴¹³ See the physical description of Middle Rocks above, at paras. 2.12 and 9.1.

mere glance at the photographs shown in this Memorial (see **Images 8, 9 and 10** after Page 12 above) suffices to establish this.

9.45 Moreover, Middle Rocks are, geographically speaking, but a resurgence of the main island. They lie at 0.6 nautical miles (1 km) from Pedra Branca proper from which they cannot be reasonably dissociated. On the other hand, it must be kept in mind that they are 8 nautical miles from Malaysia's coast. The distance from Middle Rocks to the Malaysian coast is 20 times the distance from Middle Rocks to Pedra Branca. In other words, just like South Ledge⁴¹⁴, Middle Rocks are situated in Pedra Branca's territorial sea and the extension to 12 miles of the breadth of Malaysia's territorial sea in 1969 does not change the picture.

9.46 An examination of the seabed around Middle Rocks and Pedra Branca reveals very shallow waters between Pedra Branca and Middle Rocks, with a drastic drop in the level of sea bed slightly north of Pedra Branca and slightly south of Middle Rocks. As the three-dimensional diagrams of the seabed around Pedra Branca and Middle Rocks shows (**Image 23**, overleaf), Pedra Branca and Middle Rocks are in fact one single rock formation, standing apart from the surrounding seabed.

9.47 These three-dimensional diagrams were computer-generated using data obtained by an hydrographic multibeam sonar survey carried out by the Maritime and Port Authority of Singapore from 8 to 13 April 2003⁴¹⁵. The study concluded that:

“Pedra Branca and Middle Rocks appear to be a single rock formation. Based on the bathymetry, there exists a clearly observable underwater ridge at the depth of less than 20 metres

⁴¹⁴ See above, para. 9.30 to 9.33.

⁴¹⁵ Report on Hydrographic Survey around the Waters of Pedra Branca, Middle Rocks and South Ledge (8 Apr 2003 to 13 Apr 2003), attached to this Memorial as Annex 201.

that curved southward from east of Pedra Branca linking with Middle Rocks...”⁴¹⁶

9.48 It is highly significant that in all marine pilots, Pedra Branca and Middle Rocks are discussed and described together. As early as the end of the 16th century, the Dutch explorer and cartographer Jan Huygen van Linschoten described Pedra Branca in his *Itinerario Voyage ofte Schipvaert naer Oost Ofte Portugaels Indien, 1579-1592 (Itinerary of the Voyage by Ship to the East or Portuguese Indies)*. Chapter 20 of this book, which may be regarded as the first complete sailing directions in the region, is devoted to “Die Navigatie ende rechte Coursen van Malacca af nae Macau in China” (“The Navigation and Correct Courses from Malacca to Macao in China”), states:

“Van dese Eylandekens 2 mylen z.z.o. aen, is gelegen die Pedra Branqua, (dat is, witte steen geseyt) welke is een Eylandeken van witte steen-rootsen ofte Clippen, hebbende daer dicht by noch etlicke andere Rudsten ende Clippen, ghelegen aende zuydtzyde daer van af, van welke zyde inghelijcks ghelegen’t Eylandt van Binton... Men heeft rontsom de Pedra Branqua, en daer dicht by 6 vadem diepten, suyver gront; sult u altoos wachten vande Clippen ende Rudtsen daer by gelegen.”⁴¹⁷

⁴¹⁶ Report on Hydrographic Survey around the Waters of Pedra Branca, Middle Rocks and South Ledge, *supra* note 415, at para. 20(a). See also observations at para. 17.

⁴¹⁷ See Warnsinck J.C.M. (ed.), *Jan Huygen van Linschoten’s Itinerario Voyage ofte Schipvaert naer Oost Ofte Portugaels Indien, 1579-1592* (1939), at pp. 94, 101-102 (Dutch original, with English translation), attached to this Memorial as Annex 83. The English translation of this passage is repeated here for easy reference:

Chapter 20: The navigation and correct courses from Malacca to Macao in China...

From these small islands approximately 2 sea miles in South-Southeasterly direction is situated Pedra Branca (that is to say, the white rock) which is a small island comprising white protruding rocks and boulders, and nearby located on its Southern side there are also other sharp rocks and boulders which is the side where is also situated the island of Binton...

Around Pedra Branca and close by one has water measuring 6 Dutch fathoms [in] depth, on clean ground; one also has to watch the boulders and sharp rocks which are situated close by...

9.49 Similarly, to take a more recent example, the *Malacca Pilot*, first edition, 1924, reads:

“**PEDRA BRANCA**, lying in the middle of the eastern entrance of Singapore strait, nearly 8 miles from either shore, is 24 feet (7^m3) high. It is on the western edge of a bank with depths of 6 to 10 fathoms (11^m0 to 18^m3), which extends 1^{1/4} miles eastward of it. ...

A rock which dries 2 feet (0^m6) lies 3 cables, 075°, from the lighthouse.

A patch, with a depth of 4^{1/2} fathoms (8^m2), and steep-to, lies 4 cables northward of the lighthouse.

Middle rocks, southward of Pedra Branca, are of a whitish colour, from 2 to 4 feet (0^m6 to 1^m2) high, and stand on the southern edge of the surrounding bank at 6 cables from the lighthouse.”

Even more clearly, the second edition (1934) notes:

“**Pedra Branca** – Light – Pedra Branca, 24 feet (7^m3) high, lies in the middle of the eastern entrance to Singapore strait, and on the southern side of Middle channel; it is situated on the western edge of a bank with depths of less than 10 fathoms (18^m3).

A rock which dries 2 feet (0^m6) lies about 3 cables eastward of the lighthouse, and a 4^{1/2} fathom (8^m2) patch, which is steep-to, lies 4 cables northward of the lighthouse.

Middle rocks, from 2 to 4 feet (0^m6 to 1^m2) high, and of a whitish colour, lie about half a mile southward of the lighthouse, *and on the south-western edge of the bank on which Pedra Branca lies.*”⁴¹⁸ [emphasis added]

⁴¹⁸ Malacca Strait Pilot (2nd ed., 1934), at p. 213, *supra* note 5. See also Malacca Strait Pilot (3rd ed., 1946), at p. 217, *supra* note 5.

The subsequent editions of the Malacca Strait Pilot have similar descriptions⁴¹⁹. These materials acknowledge that Middle Rocks are located on the same geographical bank as Pedra Branca.

9.50 It is Singapore's position that minute rock formations (such as Middle Rocks), lying in the vicinity of the mainland (viz. Pedra Branca in the instant case), cannot be treated as being capable of independent appropriation as islands.

9.51 In any case, it is not necessary to devote too much time to this issue. Even if Middle Rocks can be regarded as islands capable of autonomous appropriation, *quod non*, as explained above⁴²⁰, Malaysia is unable to show any exercise of sovereignty over Middle Rocks to establish a title to them.

9.52 In conclusion:

- (a) Middle Rocks and South Ledge form a single group of maritime features with Pedra Branca, of which they are mere dependencies;
- (b) They have been treated as such by both States and have always appeared as such in relevant maritime charts;
- (c) South Ledge is, in any case, a low-tide elevation, not susceptible as such of independent appropriation while Middle Rocks are but a resurgence of the main island;
- (d) Both features clearly fall within Pedra Branca's territorial sea;
- (e) Singapore has constantly and consistently exercised sovereign authority in the surrounding waters; and
- (f) As sovereignty over Pedra Branca clearly belongs to Singapore, so does sovereignty over Middle Rocks and South Ledge.

⁴¹⁹ See the various editions of the Malacca Strait Pilot, in Annex 79. See also the *China Sea Directory*, vol. I (1867), at p. 242, attached to this Memorial as Annex 68.

⁴²⁰ See Section I, Subsection (b), in this Chapter.

SUBMISSIONS

For the reasons set out in this Memorial, the Republic of Singapore requests the Court to adjudge and declare that:

- (a) the Republic of Singapore has sovereignty over Pedra Branca / Pulau Batu Puteh;
- (b) the Republic of Singapore has sovereignty over Middle Rocks; and
- (c) the Republic of Singapore has sovereignty over South Ledge.

Prof. Tommy Koh
Agent for the Government of the Republic of Singapore