

COUNTER-MEMORIAL OF SINGAPORE

CHAPTER I — INTRODUCTION.....	1
Section I. Overview of the Parties’ Pleadings.....	1
A. THE BASIS OF MALAYSIA’S CLAIM.....	1
B. SINGAPORE’S CASE.....	4
C. MIDDLE ROCKS AND SOUTH LEDGE	8
Section II. Structure of this Counter-Memorial	9
CHAPTER II — GEOGRAPHICAL SETTING AND NOMENCLATURE.....	11
Section I. The Geographical Location of Pedra Branca	11
Section II. Malaysia’s Usage of the Term “Pulau Batu Puteh”	12
Section III. Malaysia’s Usage of the Term “Sultanate of Johor”	14
CHAPTER III — HISTORICAL SETTING	17
Section I. Notions of Sovereignty in Early Malay Polities	18
Section II. The Johor-Riau-Lingga Sultanate – An Unstable and Indeterminate Sultanate.....	24
Section III. The Important Distinction Between Pre-1824 and Post-1824 Johor.....	27
A. IMPACT OF THE ANGLO-DUTCH TREATY ON THE JOHOR-RIAU-LINGGA SULTANATE	28
1. The Anglo-Dutch Treaty Did Not Prescribe any Demarcation Line in the Singapore Strait	29
2. The Anglo-Dutch Treaty Did Not Place Pedra Branca in the British Sphere	31
3. Donation by Sultan Abdul Rahman of Mainland Territories in Peninsular Malaya to Sultan Hussein	34
B. THE DOMAIN OF THE STATE OF JOHOR	35
1. The Temenggong’s Domains.....	36
2. The 1855 Treaty of Friendship and Alliance between Sultan Ali and Temenggong Daing Ibrahim.....	37
Section IV. The Question of Applicable Law	38
Section V. Conclusions	39

CHAPTER IV — PEDRA BRANCA WAS NEVER PART OF JOHOR.....	41
Section I. Malaysia has Failed to Explain the Legal Basis of Her Alleged Title to Pedra Branca.....	42
Section II. Malaysia’s Historical Materials Do Not Support Her Case.....	46
A. MALAYSIA’S REFERENCES TO HISTORICAL WRITINGS	46
B. DUTCH COMMUNICATIONS OF 1655 AND 1662.....	47
C. CRAWFURD’S LETTER OF 10 JANUARY 1824 AND PRESGRAVE’S REPORT OF 5 DECEMBER 1828.....	48
D. THE ORD AWARD OF 1868 AND THE REPORT OF THE JOHOR BOUNDARY COMMISSION OF 1898	54
E. THE SULTAN OF JOHOR’S LETTER OF 20 MARCH 1886	56
F. THE 1843 SINGAPORE FREE PRESS ARTICLE.....	59
G. THE STATE OF PUBLIC KNOWLEDGE IN MID-19TH CENTURY SINGAPORE	60
H. THE TEMENGGONG HAD NO AUTHORITY ON OR IN THE VICINITY OF PEDRA BRANCA	62
1. Suppression of Piracy by the Temenggong	63
2. Temenggong’s Visit to Pedra Branca on 2 June 1850	65
3. Alleged Activities of Orang Laut	65
4. Church’s Letter of 7 November 1850.....	67
5. Evidence that the Temenggong Lacked Authority in the Vicinity of Pedra Branca.....	68
Section III. Conclusions.....	71
 CHAPTER V — RECAPITULATION OF THE BASIS OF TITLE TO PEDRA BRANCA: THE TAKING OF LAWFUL POSSESSION BY AGENTS OF THE BRITISH CROWN	73
Section I. Introduction.....	73
Section II. The Basis of Claim.....	73
Section III. The Question of the Permission of Johor and the Decision of the British Government on Pedra Branca as the Location of the Lighthouse.....	82
Section IV. The Rejection of Butterworth’s Proposal and the Sequel, 1845-1847	92
Section V. The Contention of the Malaysian Memorial that the Letters of Permission Extended to Pedra Branca.....	95

CHAPTER V (continued)

Section VI. Rebuttal by Singapore of Various Ancillary Contentions in Chapter 6 of the Malaysian Memorial	109
A. PLANS FOR THE CONSTRUCTION OF A LIGHTHOUSE AT THE ENTRANCE OF THE STRAIT OF SINGAPORE	109
B. THE VISIT OF THE TEMENGGONG TO PEDRA BRANCA ON 2 JUNE 1850	113
C. MALAYSIAN CLAIMS THAT THE INAUGURATION OF THE LIGHTHOUSE DID NOT INVOLVE A CESSION OR CLAIM OF SOVEREIGNTY	115
D. MALAYSIA CONTENDS THAT THE CONSTRUCTION OF THE HORSBURGH LIGHTHOUSE DID NOT CONSTITUTE AN ACQUISITION OF SOVEREIGNTY	120
Section VII. Conclusions	125

CHAPTER VI — THE PARTIES' CONDUCT CONFIRMS SINGAPORE'S TITLE TO PEDRA BRANCA

Section I. Introduction – The Applicable Principles	129
Section II. — The Constitutional Developments and Official Descriptions of Singapore and Malaysia Lend No Support to Malaysia's Case	133
A. MALAYSIA'S CONSTITUTIONAL DEVELOPMENTS DO NOT POINT TO THE EXISTENCE OF MALAYSIAN SOVEREIGNTY OVER PEDRA BRANCA	134
B. SINGAPORE'S CONSTITUTIONAL AND LEGISLATIVE DEVELOPMENTS.....	137
1. The Straits Settlements and Johore Territorial Waters Agreement, 1927	137
2. Establishment of the Colony of Singapore, 27 March 1946.....	140
3. The Curfew Order of 1948	142
4. Establishment of the State of Singapore, 1 August 1958.....	144
Section III. Singapore's Conduct Confirms Singapore's Title to Pedra Branca	151
A. SINGAPORE'S LIGHT DUES LEGISLATION	151
B. J.A.L. PAVITT'S COMMENTS REGARDING PEDRA BRANCA.....	154
C. PULAU PISANG AND PEDRA BRANCA WERE SUBJECT TO DIFFERENT LEGAL REGIMES.....	156

CHAPTER VI (continued)

	D. THE INDONESIA-SINGAPORE TERRITORIAL SEA AGREEMENT 1973	159
	E. CONCLUSIONS AS TO SINGAPORE'S CONDUCT.....	161
Section IV.	Malaysia's Conduct Does Not Evidence Malaysia's Title to Pedra Branca.....	163
	A. MALAYSIAN NAVAL CHARTS OF 1968.....	165
	B. THE 1968 PETROLEUM AGREEMENT WITH THE CONTINENTAL OIL COMPANY OF MALAYSIA	167
	C. THE DELIMITATION OF MALAYSIA'S TERRITORIAL SEA IN THE AREA AROUND PEDRA BRANCA.....	171
	D. THE INDONESIA-MALAYSIA CONTINENTAL SHELF AGREEMENT OF 1969.....	172
Section V.	Bilateral Conduct of the Parties Invoked by Malaysia Has No Bearing on Title on Pedra Branca	174
	A. THE STRAITS SETTLEMENTS AND JOHOR TERRITORIAL WATERS AGREEMENT OF 1927	174
	B. THE STRAITS LIGHTS SYSTEM	176
Section VI.	Conclusions	180

CHAPTER VII — THE 1953 CORRESPONDENCE CONFIRMS

	SINGAPORE'S TITLE	181
Section I.	Introduction.....	181
Section II.	The Singapore Colonial Secretary's Letter of 12 June 1953 is Not "Evidence of Singapore's Recognition of Johor's Original Title" to Pedra Branca.....	184
	A. THE IRRELEVANCE OF THE TREATIES OF 1824 AND OF THE 1927 AGREEMENT	187
	B. THE REFERENCE TO PULAU PISANG AND THE RELATIONSHIP BETWEEN THE MANAGEMENT OF A LIGHTHOUSE AND THE ISSUE OF SOVEREIGNTY	191
Section III.	The Internal Singapore Correspondence Confirms Singapore's Ownership of the Island	193
Section IV.	Singapore Consistently and Constantly Reconfirmed her Ownership of Pedra Branca	195
Section V.	The letter from the Acting State Secretary, Johor, of 21 September 1953 is a Clear Disclaimer of Sovereignty Over Pedra Branca	196
Section VI.	Conclusions	199

CHAPTER VIII — MIDDLE ROCKS AND SOUTH LEDGE	201
Section I. Introduction	201
Section II. The Relationship Between Pedra Branca and the Two Features	202
Section III. The Conduct of the Parties Supports Singapore’s Title over the Two Features	209
A. ABSENCE OF ANY ACTS OF SOVEREIGNTY BY MALAYSIA OVER THE TWO FEATURES	209
B. SINGAPORE HAS CONSISTENTLY TREATED THE THREE FEATURES AS A GROUP	212
Section IV. Conclusions	214
CHAPTER IX — THE MAP EVIDENCE	215
Section I. Introduction	215
Section II. Analysis of the Maps Presented in Malaysia’s Map Atlas	217
A. THE EARLY MAPS SUBMITTED BY MALAYSIA	217
B. 19TH CENTURY MAPS SUBMITTED BY MALAYSIA	219
C. 20TH CENTURY MAPS SUBMITTED BY MALAYSIA	221
1. Maps 15 to 31 and 35 to 36 of Malaysia’s Map Atlas	221
2. Malaysian Official Maps Constituting Admission against Interest (Maps 32 to 34, 38, 39 and 41 of Malaysia’s Map Atlas)	230
3. Other 20th Century Maps Submitted by Malaysia (Maps 40 and 42 to 48 of Malaysia’s Map Atlas)	232
Section III. Conclusions	236
SUBMISSIONS	239
CERTIFICATION	241
APPENDIX A — THE REGIONAL HISTORY IN RELATION TO JOHOR FROM 1511 TO 1963	243
LIST OF ANNEXES (VOLUME 2)	263
LIST OF ANNEXES (VOLUME 3)	266
LIST OF MAPS IN MAP ATLAS (VOLUME 4)	269

LIST OF INSERTS (MAPS AND IMAGES)

Number	Description	Location
Insert 1	Sketch Map of the Vicinity of Pedra Branca	<i>after</i> page 12
Insert 2	Places Mentioned in Chapter III & Appendix A	<i>after</i> page 18
Insert 3	Sketch Map of the Vicinity of Pedra Branca, showing shipping route	<i>after</i> page 34
Insert 4	Map printed on p.46 of Carl Trocki's <i>Prince of Pirates</i> annotated with the approximate location of Pedra Branca	<i>after</i> page 36
Insert 5	Places Mentioned in Chapter IV	<i>after</i> page 42
Insert 6	Map 10 of Malaysian Memorial Map Atlas (Chart attached to the Ord Award, 1868) annotated to highlight area of Johor-Pahang dispute	<i>after</i> page 54
Insert 7	Map attached to the Johore Boundaries Commission Report	<i>after</i> page 56
Insert 8	Chart of the Vicinity of Horsburgh Lighthouse and Adjacent Malayan Coast by J.T. Thomson, Government Surveyor (1851)	<i>after</i> page 82
Insert 9	Satellite photograph showing area covered by Insert 8 (Source: IKONOS, Date: 15 October 2004)	<i>after</i> page 100
Insert 10	Key Places Mentioned in Chapter VI	<i>after</i> page 130
Insert 11	Malaysian Memorial's Insert 22 <i>annotated</i> (in red) to highlight area between Pedra Branca and Middle Rocks	<i>after</i> page 204
Insert 12	Diagram of the seabed surrounding Pedra Branca and Middle Rocks	<i>after</i> page 206
Insert 13	Shipping Accidents Investigated by Singapore (with Year of Occurrence Indicated)	<i>after</i> page 212
Insert 14	1962 Federation of Malaya "Admission against Interest" Map	<i>after</i> page 230
Insert 15	1974 Malaysian "Admission against Interest" Map	<i>after</i> page 232

COUNTER-MEMORIAL OF THE REPUBLIC OF SINGAPORE

CHAPTER I INTRODUCTION

1.1 This Counter-Memorial is filed pursuant to the Court's Order dated 1 September 2003 fixing 25 January 2005 as the time-limit for the filing of the Counter-Memorial of the Republic of Singapore ("Singapore"). It responds to the Memorial of Malaysia of 25 March 2004.

Section I. Overview of the Parties' Pleaded Cases

A. THE BASIS OF MALAYSIA'S CLAIM

1.2 Malaysia's claim to Pedra Branca is based on an alleged "original title" held by the Johor-Riau-Lingga Sultanate (called the "Sultanate of Johor" in Malaysia's Memorial) before 1824, which was subsequently transmitted to Malaysia through an elaborate chain of "succession".

1.3 According to Malaysia, this alleged chain of "succession" proceeded as follows:

- (a) the 1824 Anglo-Dutch Treaty split the region into British and Dutch spheres of influence and resulted in the division of the Johor-Riau-Lingga Sultanate into two successor entities – one north of the Strait of Singapore, the other south of the Strait of Singapore;

- (b) after the split, Pedra Branca became a territory of the northern successor entity (i.e., the State of Johor);¹
- (c) when the State of Johor joined the Malayan Union in 1946, Pedra Branca became part of the territory of the Malayan Union;
- (d) when the Malayan Union was replaced by the Federation of Malaya in 1948, Pedra Branca became part of the territory of the Federation of Malaya;
- (e) when the Federation of Malaya was reconstituted as the Federation of Malaysia in 1963, Pedra Branca became part of Malaysia.

1.4 Before responding in detail to each of the arguments raised by Malaysia in support of her case, Singapore wishes to highlight some basic problems with Malaysia's claim. *First*, the contrived chain of "succession" put forth by Malaysia is based both on an over-simplified interpretation of the 1824 Anglo-Dutch Treaty, and on a skewed and inaccurate account of the history of the region. As Singapore will show in Chapters III and IV below, neither the Anglo-Dutch Treaty nor the historical events support Malaysia's theory concerning this chain of "succession". Needless to say, if Malaysia fails to prove any one link in this chain of "succession", her entire case fails.

1.5 *Secondly*, and more importantly, Malaysia has merely asserted but has failed to furnish any evidence to prove that Pedra Branca was part of the Johor-

¹ Malaysia has, confusingly, referred to the northern successor entity also as the "Sultanate of Johor", thus obscuring the distinction between this new entity and the former Johor-Riau-Lingga Sultanate. This distinction will be explained in Chapter III below. To avoid confusion between the Johor-Riau-Lingga Sultanate and the northern successor entity, Singapore will refer to the latter as the "State of Johor" or "peninsular Johor".

Riau-Lingga Sultanate before 1824 or the State of Johor after 1824. In paragraph 8 of her Memorial, Malaysia claims that:

“in 1844, at the time when consideration was given to the construction of the lighthouse on Pulau Batu Puteh, that island was certainly part of the territories subject to the sovereignty of the Sultanate of Johor. This certainty regarding Johor's title in 1844 *derives from the fact* that, from the early 16th century, the territories of the Sultanate of Johor had extended to the islands south of and around Singapore Strait.”²
[emphasis added]

1.6 This reference to the “Sultanate of Johor” (called “Johor-Riau-Lingga Sultanate” in Singapore’s Memorial) extending “to the islands south of and around Singapore Strait” appears to lay the foundation for an argument based on physical proximity. As Singapore will show in Chapter IV, physical proximity is irrelevant in this case.

1.7 Apart from this oblique invocation of physical proximity, Malaysia is unable to produce any documentary record to support her case. Despite the wealth of historical writings and materials publicly available on the history of the Johor-Riau-Lingga Sultanate, Malaysia has, in a 157-page Memorial, produced nothing more substantial than the general descriptions given by two British officials – John Crawfurd in 1824³ and Edward Presgrave in 1828⁴ – of the “extent” of the Johor-Riau-Lingga Sultanate, neither of which mentions Pedra Branca. As Singapore will show in Chapter IV, these two descriptions do not and cannot support Malaysia’s claim to original title.

1.8 Apart from attempting to draw indirect presumptions from these two general descriptions, Malaysia has also produced no evidence of either an

² MM p. 4, para. 8.

³ MM p. 39, para. 80.

⁴ MM p. 40, para. 82.

intention to claim Pedra Branca or any act of sovereign authority on or in relation to the island, at any time, by the Johor-Riau-Lingga Sultanate, the State of Johor or Malaysia herself.⁵ As this Court has stated in *Minquiers and Ecrehos*:

“What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”⁶

B. SINGAPORE’S CASE

1.9 In contrast, Singapore’s case is based on well-documented and uncontroverted acts of lawful possession undertaken by Great Britain, Singapore’s predecessor in title. Lawful possession of Pedra Branca was taken by agents of the British Crown during the years 1847-1851 for the purpose of constructing a lighthouse. Possession was taken openly without seeking the permission of any Malay chief or any other power in the region, and without protest from any of them.

1.10 Although the idea of a lighthouse on Pedra Branca was first proposed by private merchants, it was the British authorities who made the decision to proceed with the project as a governmental undertaking. The project was commenced, planned and executed entirely by the government – from conducting the survey for a suitable site, the decision to proceed, the planning, the construction, the funding (with more than 75% of the construction cost being met from public revenue), the employment of workers, the supervision, right up to the completion and the official opening of the lighthouse.

⁵ See paras. 2.8 to 2.11 below for an explanation of the nomenclature “Johor-Riau-Lingga Sultanate” and “State of Johor”.

⁶ *Minquiers and Ecrehos* [1953] ICJ Rep 47, at p. 57.

1.11 Following the completion of the lighthouse, Britain (and later Singapore) exercised innumerable official acts of a legislative, administrative and quasi-judicial character on and in relation to the island over a period of 150 years. This continuous and uninterrupted exercise of State authority unequivocally manifested the will and intention of Britain and, subsequently, Singapore to maintain title over Pedra Branca.

1.12 Britain's (and Singapore's) title over Pedra Branca was time and again recognised and acknowledged by Malaysia and her predecessor, the State of Johor. Such recognition included:

- (a) Malaysia seeking permission from Singapore for her officials to conduct activities around Pedra Branca;
- (b) Malaysia requiring Singapore to cease flying the Singapore Marine Ensign on the lighthouse on Pulau Pisang (which belongs to Malaysia), but at the same time making no such requests with respect to Horsburgh Lighthouse on Pedra Branca; and
- (c) publishing a series of official maps from 1962-1975 which attributed Pedra Branca to Singapore.

1.13 Not only did Malaysia and her predecessor, the State of Johor, consistently recognise and acknowledge Singapore's title, in 1953, the State of Johor expressly, unconditionally and unequivocally disclaimed title to Pedra Branca.

1.14 In her Memorial, Malaysia has sought to deny Singapore's title by arguing that:

- (a) under the Crawford Treaty of 1824 only the island of Singapore and all the islands within 10 geographical miles⁷ from its coasts were ceded to the British,⁸ and Pedra Branca is located outside this zone;
- (b) Britain (Singapore's predecessor) sought and obtained in 1844 the permission of "Sultan" Ali and the Temenggong⁹ to construct the lighthouse on Pedra Branca;¹⁰
- (c) under international law, the mere construction and operation of a lighthouse does not confer sovereignty upon the lighthouse operator: *a fortiori*, when the lighthouse, as in the case of Pedra Branca, was built and operated with the permission of the territorial sovereign;¹¹
- (d) Singapore's unilateral conduct and the bilateral conduct of the parties during this period (e.g., Singapore's boundary treaties with Johor in 1927 and with Indonesia in 1973) show that Singapore did

⁷ One geographical mile is for all practical purposes equivalent to one nautical mile.

⁸ MM p. 35, para. 72(d); p. 50, para. 103(c).

⁹ The "Temenggong" was traditionally the third highest official in the Johor-Riau-Lingga Sultanate. By the mid-19th century, the Temenggong had become the *de facto* ruler of mainland Johor. See Appendix A to this Counter-Memorial and Chapter III of Singapore's Memorial (in particular, paras. 3.1-3.5) for a more detailed explanation of the role and function of the Temenggong.

¹⁰ MM p. 4, para. 9; p. 81, paras. 177(c) and (d).

¹¹ MM p. 5, para. 10.

not regard herself as sovereign over Pedra Branca. In contrast, Malaysia has exercised State authority over Pedra Branca, including the publication of maps showing Pedra Branca as belonging to Malaysia.¹²

1.15 Malaysia's arguments run contrary to the evidence. As Singapore has shown in her Memorial and will further demonstrate in this Counter-Memorial:

- (a) the Crawford Treaty of 1824 is irrelevant. It does not circumscribe British competence in acquiring other territories in the region. Singapore's claim is not based on this Treaty but on Britain's lawful taking of the island in 1847;
- (b) British officials did not seek permission from any local rulers for their activities on Pedra Branca;
- (c) contrary to Malaysia's contention, this Court has recognised that the construction of navigational aids "can be legally relevant in the case of very small islands".¹³ In any event, Singapore's activities on the island are not confined to the operation of the lighthouse, but include a vast range of other acts of State authority, including legislative, administrative and quasi-judicial acts, performed over a period of 150 years on the island and in the waters around it;

¹² MM p. 5, para. 11.

¹³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Judgment of 16 Mar 2001, at para. 197. See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Judgment of 17 Dec 2002, at para. 147.

(d) in contrast, not only have Malaysia and her predecessors been unable to show a single example of the exercise of authority over Pedra Branca, they have repeatedly recognised and accepted Singapore's title through their public acts and also by publishing official maps attributing Pedra Branca to Singapore. In particular, in 1953, Johor officially disclaimed title to Pedra Branca.

C. MIDDLE ROCKS AND SOUTH LEDGE

1.16 As for Middle Rocks and South Ledge, Malaysia claims that these two features do not constitute a group with Pedra Branca. Hence, even if Singapore had title over Pedra Branca, she would not have title over these features as she did not advance any separate claim to these features prior to 1993.¹⁴ This argument is both illogical and untenable under international law.

1.17 Singapore's case is that title over these rocks, both of which lie within the territorial sea of Pedra Branca, naturally follows from Singapore's title over Pedra Branca. In fact, these features have consistently been treated by both Malaysia and Singapore as a group. Furthermore, Malaysia has not exercised a single act of authority on or in relation to Middle Rocks and South Ledge, while Singapore is able to point to various official acts undertaken on or in relation to these two features.

¹⁴ MM p. 131, para. 291; p. 134, para. 300.

Section II. Structure of this Counter-Memorial

1.18 Singapore's Counter-Memorial comprises 9 chapters. **Chapter II** discusses the geographical setting and nomenclature, and responds to Chapter 3 of Malaysia's Memorial.

1.19 **Chapter III** deals with the historical setting and points out various inaccuracies and over-simplifications in Malaysia's presentation of the regional history in Chapter 4 of Malaysia's Memorial.

1.20 **Chapter IV** responds to Chapter 5 of Malaysia's Memorial, by showing that Malaysia's claim of an "original title" is not borne out by the historical materials.

1.21 **Chapter V** recapitulates the legal basis of Singapore's title to Pedra Branca – i.e., the lawful taking of possession by agents of the British Crown without seeking permission from any local rulers and without protest from any other powers. The Chapter also responds to the erroneous claim, in Chapter 6 of Malaysia's Memorial, that the rulers of Johor gave permission for the British to build a lighthouse on Pedra Branca.

1.22 **Chapter VI** responds to Chapter 7 of Malaysia's Memorial by demonstrating that the Parties' conduct unequivocally supports Singapore's title to Pedra Branca.

1.23 **Chapter VII** rebuts Malaysia's argument that the disclaimer of title by Johor on 21 September 1953 "does not refer to sovereignty" by showing that the correspondence can only relate to the question of sovereignty, and that Johor's letter of 21 September 1953 is an unconditional and binding disclaimer of sovereignty over Pedra Branca.

1.24 **Chapter VIII** responds to Malaysia's arguments on Middle Rocks and South Ledge in Chapter 8 of her Memorial, and demonstrates that these two minor features lie within Pedra Branca's territorial sea and therefore share a common destiny with Pedra Branca.

1.25 **Chapter IX** discusses the maps submitted by Malaysia in Chapter 9 of her Memorial and shows that, apart from certain official maps published by Malaysia which expressly identify Pedra Branca as belonging to Singapore, the maps submitted by Malaysia are irrelevant.

1.26 Although the most pertinent aspects of the historical setting are explained in Chapter III of this Counter-Memorial, Singapore has provided, for background information, a more detailed account of the regional history in Appendix A.

1.27 Also attached to this Counter-Memorial are 57 annexes (Volumes 2 and 3), and a Map Atlas containing 31 maps (Volume 4). In addition, three copies of certain documents referred to in this Counter-Memorial but not annexed (or not annexed in full) have been deposited with the Registrar.

CHAPTER II GEOGRAPHICAL SETTING AND NOMENCLATURE

2.1 In Chapter 3 of her Memorial, Malaysia seeks to present arguments in support for her case based on the geographical setting. Malaysia also seeks to bolster her case by asserting that the “name of Pulau Batu Puteh (‘White Rock Island’) [has] been known for centuries”.¹⁵ In this Chapter, Singapore will address these points. For easy reference, **Insert 1** (Sketch Map of the Vicinity of Pedra Branca) overleaf shows the location of various places mentioned in this Chapter.

Section I. The Geographical Location of Pedra Branca

2.2 Malaysia has suggested that Pedra Branca lies nearer to the Malaysian mainland than to the main Island of Singapore,¹⁶ implying a more natural connection with Malaysia. However, she omits to mention two other important facts. *First*, Pedra Branca is geographically nearer to the island of Bintan (Indonesia) than to the Malaysian mainland. Malaysia has sought to obscure the distance between Pedra Branca and Bintan by stating vaguely that “Pulau Bintan is less than 10nm from Pulau Batu Puteh”,¹⁷ even though she has taken the trouble to give the exact distance between Pedra Branca and the Malaysian mainland.¹⁸

¹⁵ MM p. 9, para. 25.

¹⁶ MM p. 3, para. 6; p. 13, para. 32; p. 129, para. 288.

¹⁷ MM p. 11, para. 28.

¹⁸ MM p. 13, para. 32.

2.3 *Secondly*, geomorphologically, only a body of relatively shallow water, mainly within the 20 to 30 metres depth range, lies between Pedra Branca and Indonesia, whereas Pedra Branca is separated from the Malaysian mainland by a deep water channel, which is also the main shipping channel, with depths ranging from 50 metres to more than 70 metres.¹⁹ As Malaysia herself has declared, “the depths in Singapore Strait vary from 20 metres to 95 metres but are mainly in the 30-40 metre range”.²⁰ Thus, the waters between Pedra Branca and Indonesia are among the shallowest in the Strait while those between Pedra Branca and Malaysia are among the deepest in the Strait. These facts demonstrate that any argument based on proximity is not supported by the geography.

2.4 Malaysia has also sought support from some old maps which she claims depict Pedra Branca as closely associated with the Johor mainland.²¹ In reality, the early cartography shows otherwise: that Pedra Branca stands clearly apart from, and without any hint of physical connection with the Malaysian mainland. A full discussion of these maps is found in Chapter IX of this Counter Memorial.

Section II. Malaysia’s Usage of the Term “Pulau Batu Puteh”

2.5 Malaysia has stated that:

“the Malay ‘Pulau Batu Puteh’ (‘White Rock Island’) is rendered ‘Pedra Branca’ in Portuguese, ‘Pierre Blanche’ in French, ‘*Pia Chiao*’ in Chinese. All these names have exactly the same meaning...”²²

¹⁹ See Report on Hydrographic Survey around the Waters of Pedra Branca, Middle Rocks and South Ledge (2003) (SM Vol. 7, Annex 201).

²⁰ MM p. 11, para. 31.

²¹ MM p. 137-138, para. 307.

²² MM p. 3, para. 5.

The use of the word “rendered” in the above statement is incorrect and misleading insofar as it implies that the Malay name “Pulau Batu Puteh” pre-existed the Portuguese name “Pedra Branca”, and that the Portuguese name “Pedra Branca” was simply a “rendition” of the Malay name “Pulau Batu Puteh”. Equally incorrect is Malaysia’s statement that the “name of Pulau Batu Puteh (‘White Rock Island’) [has] been known for centuries”.²³ While the name of this island (i.e., “Pedra Branca”) has been known for centuries, it is certainly not the case that the island has been known as “Pulau Batu Puteh” for centuries.

2.6 When the Portuguese started charting the maritime features in the region in the 16th century, they used Malay pilots to identify the islands *by their local names*, which they would then also adopt. As stated by Luis Filipe Thomaz in his study of Portuguese cartography:

“The whole Portuguese toponymy of the Far East and South-East Asia, is Malay... Even common nouns such as *luça* or *nuça* (< *nusa*) and *pulo* (< *pulau*)... have been adopted by the Portuguese and appear in maps. Malay place-names tend even to predominate over local names... It is interesting to note that beyond the boundaries of the world frequented by Malay seafarers, Malay toponymy fades again...”²⁴ [italics in original]

If there had been an established local name for Pedra Branca, the Portuguese would have adopted it. Instead, they gave it the Portuguese name of “Pedra Branca”. In contrast, most insular features in the region were referred to by their local Malay names in many Western maps dating back to the 16th century (for

²³ MM p. 9, para. 25.

²⁴ Thomaz L.F., *The Image of the Archipelago in Portuguese Cartography of the 16th and Early 17th Centuries*, in Kratoska P.H. (ed.), *Southeast Asia: Colonial History*, Vol. 1 (2001), at pp. 46-47, relevant extracts of which are attached to this Counter-Memorial as Annex 56. Judge Huber, in the *Island of Palmas Case*, also accepted that it was customary for European explorers to adopt native names for islands where such names were known to exist. *See Island of Palmas Arbitration (Netherlands v. U.S.)* (1928) 2 RIAA 829, at p. 845.

example, Pulau Pisang was rendered *Pulo Picaon* in Portuguese while Pulau Tioman was rendered *Pulo Timaõ*).²⁵

2.7 The foregoing provides strong indication that there were no Malay names in use for Pedra Branca when the Portuguese first arrived. The Malays and their rulers simply did not have sufficient interest in Pedra Branca to give it a Malay name, much less claim it as a part of their dominions. This historical reality contradicts Malaysia's case based on "original title", and is consistent with Singapore's historical analysis and arguments in Chapters III and IV below.

Section III. Malaysia's Usage of the Term "Sultanate of Johor"

2.8 In Singapore's Memorial, the term "Johor-Riau-Lingga Sultanate" is used to describe the sultanate established by Sultan Mahmud I after he fled Malacca in 1511.²⁶ Many historians employ the composite label "Johor-Riau-Lingga" because the seat of the Sultan shifted amongst Johor, Riau and Lingga at various times.²⁷ The Johor-Riau-Lingga Sultanate is sometimes referred to simply as the "Johor Empire" or the "Johor Sultanate". Malaysia has, in her Memorial, referred to the Johor-Riau-Lingga Sultanate as the "Sultanate of Johor".

²⁵ See e.g., Singapore Counter-Memorial Map Atlas, Map No. 1 (Map of Asia from Linschoten's *Itinerario*, 1595), Map No. 2 (Map by Willem Lodewijcksz, 1598) and Map No. 3 (Map of the Molucca Islands by Petrus Placius, 1617).

²⁶ See note 602 in Appendix A regarding the various Sultans named "Mahmud" referred to in this Counter-Memorial.

²⁷ Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), relevant extracts of which are attached to this Counter-Memorial as Annex 50. See in particular, at p. 1, note 1:

"The capital of the Johor kingdom was moved about twenty times between 1512 and 1682, generally because of Portuguese or Achehnese attacks or because of the installation of a new ruler. From 1513 to 1526, it was at Bentan (Riau). From 1526 to 1618, it was at various sites on the Johor River. In 1618, it was moved to Lingga and then to Tambelan. From 1637 to 1673, it was again located at various places on the Johor River, generally Batu Sawar. It was again at Riau in 1673-85. It was back on the Johor River at Kota Tinggi from 1688 to 1700. From 1722 to 1819, it was at Riau."

2.9 The 1824 Anglo-Dutch Treaty led to the dismemberment of the Johor-Riau-Lingga Sultanate – with Riau-Lingga within the Dutch sphere and mainland Johor (in the Malay Peninsula) within the British sphere. In Singapore’s Memorial, this new political entity in the Malay Peninsula is referred to as the “State of Johor”, “peninsular Johor” or, simply, “mainland Johor”. This is an entirely different entity from the former Johor-Riau-Lingga Sultanate. As historian Carl Trocki puts it:

“The term ‘Johor’ is used by historians to refer to two different states – an old one and a new one. Old Johor was the maritime Malay empire that succeeded Malacca. It began in 1512 when the defeated Sultan of Malacca established a capital on the Johor River, and gradually disintegrated in the eighteenth century... Modern Johor occupies the southern tip of the Malay Peninsula and is one of the eleven states of the Federation of Malaysia. It dates from the mid-nineteenth century... The [*temporal*] dividing line between the two, as far as one can make out, was the foundation of Singapore by Sir Thomas Stamford Raffles in 1819.”²⁸ [footnotes omitted]

2.10 Malaysia has, however, employed the term “Sultanate of Johor” to describe this new political entity, as if the old Johor-Riau-Lingga Sultanate and the new State of Johor were the same political entity.²⁹ Malaysia’s approach in obscuring the distinction between the two political entities would appear to be tactical – to suggest, without proof, a continuous and uninterrupted chain of state succession, thereby making it unnecessary to show how and when the old Sultanate’s alleged “original title” came to be transmitted to the State of Johor.

²⁸ *Ibid*, at p. 1 – For the nature of the “maritime Malay empire” described as “old Johor” in this passage, *see below*, at para. 3.15. As for the phrase “eleven states”, this is a reference to the 11 states in the Malay Peninsula. The Federation also includes two states in Borneo.

²⁹ *See e.g.*, MM p. 24, para. 51. *See also* MM p. 30, para. 61 (where the term “Sultanate of Johor” is used to describe the 16th century entity), compared with para. 62 (where the same term is used to describe the 19th century entity).

2.11 To avoid any confusion between these two political entities, Singapore will, in this Counter-Memorial, continue to use the nomenclature that she has used in her Memorial:

- (a) “Johor-Riau-Lingga Sultanate” is used to describe the sultanate established by Sultan Mahmud I after he fled Malacca in 1511;
- (b) “State of Johor”, “peninsular Johor” or “mainland Johor” are used to describe the new political entity on the Malay Peninsula after 1824.

CHAPTER III HISTORICAL SETTING

3.1 In Chapter 4 of her Memorial, Malaysia has provided an account of the regional history in an attempt to support her claim to an “original title” to Pedra Branca. Malaysia’s account contains inaccuracies, inappropriate generalisations and material omissions, some of which will be highlighted and addressed by Singapore in this Chapter. By way of supplement, Singapore has set out, in Appendix A to this Counter-Memorial, a more detailed account of the regional history to give the Court a better appreciation of the historical context and developments.

3.2 Section I of this Chapter examines the notion of sovereignty prevailing in traditional Malay polities and shows that its most significant feature was the allegiance of inhabitants and not the control of territory as such. Section II shows that, contrary to Malaysia’s assertion of stability and continuity, the extent and influence of the Johor-Riau-Lingga Sultanate was unstable and in a constant state of flux, and that it was no longer a significant power by the beginning of the 19th century. Section III discusses the key events of 1824 and the dislocations and discontinuities they created in the Malay world. Section IV puts the rest of this Chapter in perspective by discussing Singapore’s position on the question of applicable law. The clear conclusion that emerges is that, whether assessed under classical principles of international law or under regional custom of allegiance, Johor had no prior title to Pedra Branca when the British took possession of the island in 1847.

3.3 As the discussion in this Chapter will demonstrate, what is of decisive importance in this case “is not indirect presumptions deduced from events in the

Middle Ages, but the evidence which relates directly to the possession of” the features in dispute.³⁰

Section I. Notions of Sovereignty in Early Malay Polities

3.4 The consensus among modern scholars of Malay history is that, unlike modern European States, the concept of “sovereignty” in traditional Malay polities was based, not on the control of territory, but on the allegiance of inhabitants. For example, historian Nicholas Tarling wrote:

“The idea that the ambit of a state was geographically fixed was rarely accepted. What counted in Southeast Asia, sparse in population, was allegiance. Whom, rather than what, did the state comprise?... What concerned a ruler was the people not the place.”³¹

Historian Leonard Andaya has also written:

“Historians have long accepted the truism that in Southeast Asia it is not the control over land but people which is the crucial element in statecraft.”³²

The number of historians who have made the same point in one way or another is formidable.³³ Their conclusions are further reinforced by the findings of

³⁰ *Minquiers and Ecrehos, supra* note 6, at p. 57.

³¹ Tarling N., *Nation and States in Southeast Asia* (1998), at p. 47.

³² Andaya L., *Writing a History of Brunei* in Barrington B. (ed.), *Empires, Imperialism and Southeast Asia: Essays in Honour of Nicholas Tarling* (1997), at p. 201.

³³ These are four examples:

(a) Wheatley P., *Impressions of the Malay Peninsula in Ancient Times* (1964), at p. 183:

“Boundaries were unknown but frontiers – wastes of uninhabited forest separating tracts of more or less permanent settlement – fluctuated constantly, and states underwent a continual process of absorption and fission as charismatic rulers competed for control over labour in the villages scattered peripherally around the capitals of the city-states.”

Malay specialists in other disciplines such as sociology and anthropology. A useful summary of their findings is provided by Jane Carsten in her study of boundaries in Malaysia:

“The traditional Southeast Asian state, or *negeri*, was a different kind of entity from the modern nation-state. Its borders were shifting and permeable... Anderson, Tambiah (1976), Wolters (1982), Errington (1989) and others have discussed the nature of the traditional Southeast Asian polity. In Southeast Asia the traditional state was defined by its centre not by its boundaries... control over people was of greater significance to the ruler than control over land...”³⁴

3.5 This difference between the European concept of territorial sovereignty and traditional Malay notions of “sovereignty” is clearly illustrated by the dislocation experienced by the Malay rulers when the British began more active

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- (b) Barnard T.P., *Multiple Centres of Authority: Society and environment in Siak and eastern Sumatra, 1674-1827* (2003), at p. 4:

“The fluidity – the lack of set borders, parameters, or standards – in Siak society is captured in the narrative of the *Hikayat Siak*.”

[*Note:* The Siak Sultanate was based in Sumatra and was a client state of Johor in the 17th century, and broke away in the 18th century to become one of the rivals of the Johor Sultanate during the late 18th century.]

- (c) Wolters O.W., *History, Culture, and Region in Southeast Asian Perspectives* (1999), at p. 131:

“... Malay texts never emphasize territory but only the center of power, the center’s outreach being vaguely described in terms of river basins.”

[*Note:* Wolters was surveying the current literature dealing with issues of historical geography of the Srivijaya Kingdom, which was based in Sumatra, and citing studies showing the parallels between the Srivijaya Kingdom and later Malay rulers.]

- (d) Lewis D., *Jan Compagnie in the Straits of Malacca 1641-1795* (1995), at p. 9:

“Land was of little consequence in reckoning status. Population and wealth were the denominators – and wealth often dictated population, for Malay demography was notoriously fluid...”

³⁴ Carsten J., *Borders, Boundaries, Tradition and State in the Malaysian Periphery*, in Wilson T.M. & Donnan H. (eds.), *Border identities: Nation and state at international frontiers* (1998), at pp. 217-222.

interference in the affairs of the Malay states in the late 19th and early 20th centuries. Historians Barbara and Leonard Andaya wrote:

*“While Malays conceived of a ruler’s authority in terms of his control over people and resources, the British related it to control over land. As Malay rulers were progressively drawn under the British umbrella, there was normally a period of sometimes painful negotiation by which colonial administrators established the territorial boundaries between neighbouring states. Sometimes these settlements simply made ancient understandings explicit, but on other occasions decisions were based on compromises that had little to do with local loyalties; several offshore islands, for example, were ‘shared’ between Johor and Pahang.”*³⁵
[emphasis added]

3.6 This is a point which Malaysia is familiar with, having dealt with it in her written and oral pleadings in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (“the *Indonesia/Malaysia* case”). In fact, in rebutting Indonesia’s claim that the Sultanate of Bulungan held historic title to the disputed islands, Malaysia submitted a study by Professor Houben,³⁶ in which he adopted the following instructive passage from A.C. Milner:

*“Just as the Malay state lacked governmental or legal structures, so it differed from Western states in its geographical definition. Territorial borders were often unknown... The actual location of the Malay state, in fact, appears to have been a matter of relatively little importance... The Malay word often translated loosely as ‘government’, ‘state’ or ‘kingdom’ was *kerajaan*... [K]erajaan connotes little more than ‘being in the condition of having a Raja’.”*³⁷ [emphasis added]

3.7 It is therefore noteworthy that Malaysia has completely omitted to acknowledge, much less discuss, this historical fact in her Memorial for the present case. But Malaysia’s deafening silence about this matter is

³⁵ Andaya B.W. & Andaya L., *A History of Malaysia* (2nd ed., 2001), at p. 204.

³⁶ This study was submitted by Malaysia as part of her Counter-Memorial in the *Indonesia/Malaysia* case. See *ICJ Pleadings, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Counter-Memorial of Malaysia, at Appendix I.

³⁷ Milner A.C., *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (1982), at pp. 8-9.

understandable – it presents an insurmountable obstacle to Malaysia’s claim that “Pulau Batu Puteh had *always* been under the sovereignty of Johor”³⁸ in two respects.

3.8 *First*, the emphasis in the traditional Malay sultanate on personal allegiance of inhabitants as opposed to control of land implies that it was common to find territory which was not regarded as belonging to anyone. As one expert on early South East Asian cartography puts it:

“Whereas European eyes presumed that a country’s possessions extended as far as its border with its neighboring country, in Southeast Asia there were usually spaces in-between, ‘empty’ land, *which was not part of any kingdom* and which sometimes served as a neutral buffer.”³⁹
[emphasis added]

Therefore, even if, as alleged by Malaysia, “the Sultanate of Johor extended north and south of Singapore Strait and included many islands in and around the Strait”,⁴⁰ it does not necessarily mean that every single rock and island in or around the Strait would have belonged to the Sultanate. Similarly, Crawford’s and Presgrave’s descriptions of the Johor-Riau-Lingga Sultanate, which state in general language that the Sultanate extended from Point A to Point B, must be read and understood against this background.⁴¹ Malaysia has relied heavily on these two descriptions in support of her case based on original title, but reliance on such general descriptions does not excuse Malaysia from having to show how her predecessors have acquired original title to Pedra Branca.

³⁸ MM p. 37, para. 73, emphasis added.

³⁹ Suarez T., *Early Mapping of Southeast Asia* (1999), at p. 20.

⁴⁰ MM p. 15, para. 36.

⁴¹ For detailed treatment of these two descriptions, *see below*, para. 4.20 *et seq.*

3.9 *Secondly*, the essential element of personal allegiance means that, in many cases, the only reliable way of finding out whether a particular territory could be said to belong to a particular ruler was to obtain the views of the inhabitants as to who they regarded as being their ruler. A number of examples documented during this period illustrate this:

- (a) In a letter dated 1 October 1824, John Crawfurd, the ranking British official in Singapore, informed the Government of India that the islands of Carimon and Bulang belonged to the Temenggong of Johor, and stated that:

“The Carimon Islands and the Malayan Settlement of Bulang are two of the principal possessions of the Tumongong of Johore or Singapore, and his claim to them is not only allowed by the rival Chiefs but *more satisfactorily ascertained by the voluntary and cheerful allegiance yielded to him by the inhabitants.*”⁴²
[emphasis added]

- (b) In 1851, J.T. Thomson published an account of his 1849 official survey of the east coast of Johor, Pahang and adjacent islands. In that account, Thomson found that he could not accurately ascertain the exact boundary between Johor and Pahang and that he was only able to ascertain that a particular group of islands “undoubtedly belongs to Pahang as all the inhabitants acknowledge the Raja as their chief and pay tribute annually.”⁴³

⁴² See Letter from Crawfurd J. (Resident of Singapore) to Swinton G. (Secretary to the Government in India), dated 1 Oct 1824, attached to this Counter-Memorial as Annex 4.

⁴³ Thomson, J.T., *Description of the Eastern Coast of Johore and Pahang, and Adjacent Islands*, 5 Journal of the Indian Archipelago and Eastern Asia 83 (1851), at p. 84. The entire article is attached to this Counter-Memorial as Annex 15 (hereafter, “Thomson’s Description of the Eastern Coast”).

3.10 For this reason, all detailed 19th century descriptions of Johor made by contemporary officials naturally included only inhabited islands and continental territories: see, for example, the list of islands attached to Presgrave's report of 1828.⁴⁴ Another example is the list in Begbie's *The Malayan Peninsula*, written in 1834.⁴⁵ Neither list mentions Pedra Branca.

3.11 Whether examined within the local context of allegiance or under classical international law principles, Malaysia's claim to original title completely fails. As Pedra Branca was uninhabited, there were no people on it from whom allegiance could be sought by any ruler. No Malay ruler would have taken an interest in claiming Pedra Branca as territory, and none did. This view is supported by the complete absence of any mention of Pedra Branca (or "Pulau Batu Puteh", as Malaysia prefers to call it) in any Malay texts, correspondence or historical material. Furthermore, Malaysia has failed to demonstrate any intention or will to act as sovereign or any actual exercise or display of State authority over Pedra Branca. These factors present an insuperable obstacle in the way of any claim by Malaysia that "Pulau Batu Puteh had *always* been under the sovereignty of Johor".⁴⁶

⁴⁴ Malaysia has omitted this list of territories from Annex 27 of her Memorial, even though it is mentioned in Paragraph 4 of Presgrave's report and forms an integral part of the report. Singapore has attached the list to this Counter-Memorial as Annex 7.

⁴⁵ Begbie, P.J., *The Malayan Peninsula* (1834, reprinted 1967), at pp. 269-272, attached to this Counter-Memorial as Annex 8.

⁴⁶ MM p. 37, para. 73, emphasis added.

3.12 Aware of the insurmountable difficulties she faces with this aspect of her case, Malaysia is compelled to repeatedly assert that Pedra Branca was “used as part of the coastal economy”.⁴⁷ But she has produced no proof whatever to show such usage. In any event, it is a well established principle of international law that activities by private individuals do not confer title to territory. As the Court observed in the *Indonesia/Malaysia* case:

“... activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.”⁴⁸

In the present case, Malaysia has produced no evidence whatever that there was any governmental involvement in any of these alleged activities.

Section II. The Johor-Riau-Lingga Sultanate – An Unstable and Indeterminate Sultanate

3.13 Malaysia has sought to give the impression that the Johor-Riau-Lingga Sultanate was a stable and unchanging kingdom throughout its existence and that it was a major power even in the modern period. In her Memorial, Malaysia argues:

“Despite frequent incursions by the Portuguese and subsequently, the Dutch, the Siamese and the British, and notwithstanding frequent internal power struggles, the Sultanate of Johor *was able to remain a major power in the Malay region and to survive into the modern period.*”⁴⁹ [emphasis added]

⁴⁷ MM p. 37, para. 75.

⁴⁸ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 140.

⁴⁹ MM p. 17, para. 37.

This attempt by Malaysia to exaggerate the stability and continuing power of the Johor-Riau-Lingga Sultanate is clearly aimed at shoring up Malaysia’s weak case based on an alleged “original title”. This Counter-Memorial will however show that:

- (a) the political fortunes of the Johor-Riau-Lingga Sultanate and the extent of its influence were in a constant state of flux; and
- (b) by the beginning of the 19th century, the Johor-Riau-Lingga Sultanate was no longer a significant power in the region.

3.14 To provide the proper historical context, Singapore has included with this Counter-Memorial a detailed account of the regional history in Appendix A. The key events described in Appendix A can be summarised as follows:

- (a) The Johor-Riau-Lingga Sultanate led a precarious existence for most of the 16th century, enjoyed a brief period of prosperity from the mid-17th century, but lost its power and influence at the end of the reign of Sultan Mahmud II (1685-1699)⁵⁰ as a result of internal divisions. Historian Leonard Andaya has recorded that:

“In just two years Johor had changed from the acknowledged leading entrepot in the Malay world to a small backwater port.”⁵¹

- (b) Sultan Mahmud II was assassinated in 1699. This act of regicide ended the Malacca royal line and was a catastrophic event in Malay history. It caused many client states to break away,⁵²

⁵⁰ See note 602 in Appendix A regarding the various Sultans named “Mahmud” referred to in this Counter-Memorial.

⁵¹ Andaya L., *The Kingdom of Johor, 1641-1728* (1975), at p. 184, writing about the years 1697-1699.

- (c) In 1784, the Dutch captured Riau, the then capital of the Johor-Riau-Lingga Sultanate, following which the Sultan signed a treaty ceding sovereignty over the Sultanate to the Dutch.⁵³
- (d) In 1795, the defeat of the Dutch in the French Revolutionary Wars led to the British taking over Malacca from the Dutch and also removing the Dutch garrison from Riau.⁵⁴ In 1818, the British returned Malacca to the Dutch who then returned to Riau in the same year and renewed the 1784 treaty with the Johor-Riau-Lingga Sultanate. Concerning these tumultuous years, historian R.O. Winstedt has commented:

“Naturally during all these years the old mainland kingdom of Johor had sunk into insignificance.”⁵⁵

- (e) In 1812, Sultan Mahmud III of Johor died, leaving behind two sons, Hussein and Abdul Rahman, neither of whom were born from royal wives. Taking advantage of the absence of Hussein, Abdul Rahman assumed the throne. Hussein, lacking any forces to

⁵² Andaya B.W. & Andaya L., *supra* note 35, at pp.78-79.

⁵³ Lewis D., *supra* note 33, at p. 110 (“The resulting treaty ended Johor’s independence”) and at p. 113 (“[*The Dutch*] claimed the territories of Johor and Pahang by right of conquest”). Andaya B.W. & Andaya L., *supra* note 35, at p. 108 (“Riau-Johor was to become a Dutch vassal state, a *leenrijk*, where Malays would rule only at the VOC’s [*i.e. Dutch East India Company’s*] pleasure”). Winstedt R.O., *A History of Johore* (1932, reprinted 1992), at p. 74 (“On 10 November a formal treaty was signed. *The Sultan and chiefs acknowledged that the kingdom and port had become by right of war the property of the Dutch, which the Malays would hold as a fief under certain conditions.*” - italics in original).

⁵⁴ Andaya B.W. & Andaya L., *supra* note 35, at p. 112.

⁵⁵ Winstedt R.O., *supra* note 53, at p. 75. See also Andaya B.W. & Andaya L., *supra* note 35, at p. 109 (“The catastrophic effects of these years, when the Malay ruler exercised little authority and the economy was moribund, ended any hopes that Riau [*i.e., the seat of the Johor-Riau-Lingga Sultanate*] might once again assume its former position in the Malay world.”).

support his claim, retired and “lived in obscurity in Riau”.⁵⁶ He was later installed as a rival “Sultan of Johor” by the British to lend legitimacy to the British presence in Singapore.⁵⁶

Thus, by the beginning of the 19th century, the Johor-Riau-Lingga Sultanate was “in a state of dissolution”.⁵⁷

3.15 The foregoing summary demonstrates that Malaysia’s claim that “the Sultanate of Johor was able to remain a major power in the Malay region and to survive into the modern period”⁵⁸ does not stand up to scrutiny. Instead, the picture is that of an unstable kingdom, whose extent and influence depended on constantly shifting allegiances and which at times amounted to no more than a mere collection of thinly populated centres at river mouths. Given this historical background, it is surprising that Malaysia can confidently claim, without proof, that Pedra Branca had always been a territorial possession of the Johor-Riau-Lingga Sultanate.

Section III. The Important Distinction Between Pre-1824 and Post-1824 Johor

3.16 Malaysia has argued that the Anglo-Dutch Treaty of 1824, in dividing the Malay region into British and Dutch spheres of influence, led to Pedra Branca being placed in the British sphere. This is said to have resulted in the Johor-

⁵⁶ Turnbull C.M., *A History of Singapore 1819-1988* (1989), at p. 9.

⁵⁷ See *State of Johore Annual Report for 1949* (written by Dato Wan Idris bin Ibrahim, Ag. Mentri Besar [*i.e.*, *Chief Minister*], Johore, printed by Government Printing Department, Johore), at p. 57, attached to this Counter-Memorial as Annex 32. The same report also noted that “in 1847 Johor Lama [*i.e.*, *old Johor*] consisted of only 25 huts”.

⁵⁸ MM p. 17, para. 37.

Riau-Lingga Sultanate's title to Pedra Branca being transmitted to the emerging State of Johor (which Malaysia calls "Sultanate of Johor").⁵⁹

3.17 Singapore notes that this argument is predicated upon the Johor-Riau-Lingga Sultanate having title to Pedra Branca in the first place. Since Malaysia is not able to prove that Pedra Branca was part of the Johor-Riau-Lingga Sultanate, Malaysia's argument concerning the Anglo-Dutch Treaty is irrelevant to this case. Nevertheless, in this Section, Singapore will consider Malaysia's argument on its own terms, and will show that, even on a most charitable view of the evidence, Malaysia's argument is without any merit.

3.18 This Section therefore begins with a discussion of the impact of the Anglo-Dutch Treaty on the Johor-Riau-Lingga Sultanate, and closes by drawing certain conclusions on the territorial extent of the State of Johor.

A. IMPACT OF THE ANGLO-DUTCH TREATY ON THE JOHOR-RIAU-LINGGA SULTANATE

3.19 Malaysia argues that:

"For the effect of the Anglo-Dutch Treaty was to split 'the ancient kingdom of Johore' into two parts. *One, the Sultanate of Johor, remained based in the southern part of Malay Peninsula* and came within the British sphere. The other, the Sultanate of Riau-Lingga, was within the Dutch sphere of influence and was to the south of Singapore Strait."⁶⁰ [emphasis added]

Malaysia then asserts, without proof, that "Pedra Branca lay within the British sphere of influence", thus implying that Pedra Branca became part of the northern successor entity in the British sphere (which Singapore calls "State of

⁵⁹ MM p. 15, para. 36.

⁶⁰ MM p. 24, para. 51.

Johor” and Malaysia calls “Sultanate of Johor”). By asserting that the Sultanate “remained based in the... Malay Peninsula” and by continuing to use the same name “Sultanate of Johor” to describe both the undivided Johor-Riau-Lingga Sultanate and the new, much smaller entity emerging in the Malay Peninsula (which later became the State of Johor), Malaysia is engaging in a disingenuous attempt to use the term “Sultanate of Johor” to effect a form of “state succession” by semantics.

1. The Anglo-Dutch Treaty Did Not Prescribe any Demarcation Line in the Singapore Strait

3.20 To bolster her arguments on the Anglo-Dutch Treaty, Malaysia has produced a creative, and tendentious, sketch map of the Strait of Singapore showing a boundary line within the Strait dividing the northern part of the Strait and the southern part of the Strait.⁶¹ In the vicinity of Pedra Branca, this boundary line is shown detouring from its previous course, bulging slightly southwards so that Pedra Branca, Middle Rocks and South Ledge are all shown to be within the British sphere of influence north of the boundary. This sketch map is then used, in a circular argument, to justify the assertion that these three features came to be part of the northern successor entity.

3.21 It is surprising that Malaysia has gone to such an extent to shore up her case concerning her claim to an “original title”. In fact, the Anglo-Dutch Treaty had no map attached to it. There were therefore no official maps from which Malaysia could derive the rather astounding boundary line found in Insert 6 of her Memorial. Nor could the boundary line in Insert 6 of Malaysia’s Memorial,

⁶¹ MM p. 23, Insert 6 - *British Sphere After the Anglo-Dutch Treaty 1824*.

by any stretch of the imagination, be said to have been derived from the text of the Treaty.

3.22 The Treaty did not prescribe any territorial boundary or demarcation line in the Strait of Singapore. The principal object of the Treaty was to determine the respective spheres of influence between the British and the Dutch to avoid future conflicts, not the allocation of territories between the Sultans under their respective protection.⁶² Article X of the Treaty merely prohibited the Dutch from forming any establishment “on any part of the Peninsula of Malacca” (i.e., the Malay Peninsula), while Article XII merely provided that:

“...no British Establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintang, Lingin, or on any of the other Islands South of the Straights of Singapore.”⁶³

3.23 Accordingly, the Treaty did not divide up the waters of the Singapore Strait between the British and the Dutch or between Sultan Abdul Rahman (under Dutch protection) and Sultan Hussein (under British protection). By focusing on the “Peninsula of Malacca” (i.e., the Malay Peninsula) in Article X and on “Islands South of the Straits of Singapore” in Article XII, the Treaty left the entire Singapore Strait undivided and open to access by both the British and the Dutch. This historical truth is confirmed by the negotiating history which shows that although the Dutch initially proposed a demarcation line within the Singapore Strait, the idea was abandoned for fear that any such demarcation line would invite the jealousy of other powers, who may interpret the prescription of such a line as an attempt by Britain and Netherlands to divide up the region

⁶² The preambular paragraph of the Treaty states that the Parties wished to settle their differences concerning their possessions and the commerce of their subjects in the East Indies “so that the welfare and prosperity of both Nations may be promoted, in all time to come” and so that “all occasions of misunderstanding between Their respective Agents may be, as much as possible, prevented...”.

⁶³ *Treaty between His Britannick Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies*, dated 17 Mar 1824 (MM Vol. 2, Annex 5).

between themselves.⁶⁴ Hence, the demarcation line shown in Malaysia's supposedly illustrative map is entirely speculative and has no historical, geographical or legal basis.

3.24 Even if, *arguendo*, a dividing line could be inferred from the text of this Treaty, the only reasonable interpretation would be that the entire breadth of the Singapore Strait formed the dividing "line" or, rather, dividing zone.⁶⁵ This would have left Pedra Branca in neither the British sphere nor the Dutch sphere.

2. The Anglo-Dutch Treaty Did Not Place Pedra Branca in the British Sphere

3.25 Malaysia argues that Pedra Branca was placed within the British sphere because "there is no doubt that Pulau Batu Puteh is not an island to the 'South of the Straights of Singapore'."⁶⁶ There are two problems with this argument. *First*, it simply begs the question of what "South of the Straights of Singapore" means in relation to Pedra Branca. *Secondly*, it assumes, wrongly, that everything which is not "South of the Straights of Singapore" must necessarily fall within the British sphere.

⁶⁴ Irwin G., *Nineteenth Century Borneo: A Study in Diplomatic Rivalry* (1955), at pp. 62-63, relevant extracts of which are attached to this Counter-Memorial as Annex 36. *See also* Marks H., *The First Contest for Singapore: 1819-1824* (1959), at pp. 189, 192, 201, 206 & 209, relevant extracts of which are attached to this Counter-Memorial as Annex 39.

⁶⁵ *See e.g.*, Dutch Ministry of Colonies, *Internal Note Relating to the Borneo Question with England* dated 15 Oct 1858, relevant extracts of which are attached to this Counter-Memorial as Annex 18, where Article 12 of the Anglo-Dutch Treaty was described as adopting "the Straits of Singapore as the dividing line". *See also* Prescott J.R.V., *Map of Mainland Asia by Treaty* (1975), at p. 410 ("Thus although no precise maritime boundary was drawn, the boundary was defined by the allocation of islands to the two parties").

⁶⁶ MM, p. 24, para. 53.

3.26 On the first point, Pedra Branca may well be said to lie south of the Strait not only because it is geographically nearer to the coast of Bintan than to the Johor mainland but also because it lies south of the main shipping channel in this part of the Strait. In the vicinity of Pedra Branca, the Strait of Singapore splits into 3 branches – the North Channel (which runs between the Romania Islands and the Johor mainland), the Middle Channel (which runs between Romania Islands and Pedra Branca) and the South Channel (which runs between Pedra Branca and the Indonesian island of Bintan). Of the three channels, the best candidate for being regarded as the eastward continuation of the Singapore Strait must be the Middle Channel, since that is the deepest channel and the main shipping channel.⁶⁷

3.27 Therefore, Malaysia’s logic would place Pedra Branca south of the Singapore Strait and within the Dutch sphere of influence, if indeed the issue of spheres of influence were relevant to the dispute concerning the island. In this connection, it is worth noting that Winstedt in his *History of Johore* states, at page 2: “[a]fter the treaty of London in 1824, the islands on the starboard side of the East Indiamen faring to China fell within the Dutch sphere of influence”⁶⁸ and later, at page 97:

“All land right of the East Indiamen’s course to China now fell within the Dutch sphere of influence, and all land to the left of that course fell within the British sphere.”⁶⁹

⁶⁷ Thomson J.T., *Account of the Horsburgh Light-house*, 6 *Journal of the Indian Archipelago and Eastern Asia* 376 (1852) (hereafter, “Thomson’s Account”), at p. 379 (SM Vol. 4, Annex 61, p. 480): “There are three channels leading into the Straits of Singapore from the China sea. That on the north of Pedra Branca, and between it and the Romania Shoal, is the one principally used and is termed the Middle Channel.” See also Dunn S. *et. al.*, *A New Directory for the East Indies* (5th ed., 1780) p. 509 (SM Vol. 2, Annex 2, p. 6) and Horsburgh J., *India Directory*, Vol. 1 (2nd ed., 1817) pp. 192-193 (SM Vol. 2, Annex 3, pp. 8-9), both of which recommended using the channel *North* of Pedra Branca (i.e., the Middle Channel) to enter or leave the Singapore Strait.

⁶⁸ Winstedt R.O., *supra* note 53, at p. 2.

⁶⁹ *Ibid*, at p. 97.

As explained in the previous paragraph, ships sailing to China through the Singapore Strait would use the Middle Channel, and Pedra Branca lies to the right or starboard side of this route. See **Insert 3** (Sketch Map of the Vicinity of Pedra Branca, Showing Shipping Route), overleaf.

3.28 Even more importantly, on the second point, Malaysia’s argument fails because the Anglo-Dutch Treaty does not say that *every island which is not* “South of the Straights of Singapore” automatically falls within the British Sphere. Instead, the Treaty simply provides that the British were to have *no influence* “South of the Straights of Singapore” while the Dutch were to have *no influence* in the “Peninsula of Malacca”. Malaysia’s logic can therefore be easily turned around to support the argument that Pedra Branca was placed in the *Dutch sphere* because it is not part of the “Peninsula of Malacca”.

3.29 The truth of the matter is that the Anglo-Dutch Treaty did not place Pedra Branca in either the British sphere or the Dutch sphere. This remained the case until the British took lawful possession of the island in 1847.

3.30 To sum up: the Anglo-Dutch Treaty is totally irrelevant in the context of the present dispute. It dealt with spheres of influence. The Treaty did not deal with the status of Pedra Branca, which was not mentioned at all in the Treaty. The negotiating history of the Treaty demonstrates that the parties did not address their minds to Pedra Branca. Malaysia’s claim to original title to Pedra Branca based on the words “south of the Straights of Singapore” in the Anglo-Dutch Treaty does not stand up to scrutiny. In fact, the Anglo-Dutch Treaty had absolutely nothing to do with Pedra Branca.

3. *Donation by Sultan Abdul Rahman of Mainland Territories in Peninsular Malaya to Sultan Hussein*

3.31 The Anglo-Dutch Treaty did not, by its terms, effect a division of the Johor-Riau-Lingga Sultanate. Instead, the subsequent dismemberment of the Sultanate resulted from the practical fact that Sultan Abdul Rahman (who in the eyes of the locals was the legitimate ruler of the Johor-Riau-Lingga Sultanate), as well as his officials in Riau, had been cut off and could no longer exert effective power in the Malay Peninsula (which had fallen within the British sphere). This allowed the territories in the Malay Peninsula to eventually gain independence from the Riau court. The territorial extent of the northern breakaway fragments (i.e., peninsular Johor and Pahang) is not determined by the terms of the Anglo-Dutch Treaty but by subsequent acts of and dealings amongst the relevant Malay rulers.

3.32 One example of such dealing was the express donation of territory by Sultan Abdul Rahman to Sultan Hussein one year after the Anglo-Dutch Treaty was signed. This donation was made on the advice of the Dutch, who wished to avoid any confusion over which territories remained under the control of Sultan Abdul Rahman in the post Anglo-Dutch Treaty period. In 1825, they sent an official, Christiaan van Angelbeek, to explain to the Sultan the implications of the Anglo-Dutch Treaty and to advise him to formally cede the mainland territories of Johor and Pahang to his brother Hussein (who was living in Singapore under British protection).

3.33 As a result, Sultan Abdul Rahman sent a letter to Hussein to donate “the lands of Johor, Pahang” in the Malayan Peninsula to Hussein while retaining all islands in the sea for himself. The text of Sultan Abdul Rahman’s letter reads:

“Your brother sends you this letter... to give you notice of the conclusion of a treaty between His Majesty the King of the Netherlands and His Majesty the King of Great Britain, *whereby the division of the lands of*

Johor, Pahang, Riau and Lingga is stipulated. *The part of the lands assigned to you, My brother, I donate to you with complete satisfaction, and sincere affection, for we are brothers and the only children left behind by our father... Your territory, thus, extends over Johor and Pahang on the mainland or on the Malay Peninsula. The territory of Your brother extends out over the Islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands. Whatsoever may be in the sea, this is the territory of Your brother, and whatever is situated on the mainland is yours. On the basis of these premises I earnestly beseech you that your notables, the Paduka Bendahara of Pahang and Temenggong Abdul Rahman, will not in the slightest concern themselves with the islands that belong to Your brother.*⁷⁰ [emphasis added]

3.34 The nature and terms of Sultan Abdul Rahman's donation of territories to Sultan Hussein is another impediment to Malaysia's claim that original title to Pedra Branca is derived from the Johor-Riau-Lingga Sultanate. By the terms of that letter, Sultan Abdul Rahman donated only the *mainland territories* to his brother Sultan Hussein, and retained for himself *all islands in the sea*. Thus, even if Pedra Branca was a possession of the Johor-Riau-Lingga Sultanate (which it was not), it would have been retained by Sultan Abdul Rahman and not become part of the State of Johor.

B. THE DOMAIN OF THE STATE OF JOHOR

3.35 The donation of the mainland territory by Sultan Abdul Rahman to Sultan Hussein nonetheless did not result in Sultan Hussein being able to exercise any authority over these territories. As acknowledged by Malaysia in her Memorial, the Temenggong came to be the *de facto* ruler of mainland Johor. It is thus necessary to examine the extent of the Temenggong's domain in this period.

⁷⁰ See letter from Sultan Abdul Rahman to Sultan Hussein dated 25 June 1825, attached to this Counter-Memorial as Annex 5. At the same time, the Under-King (who was the real power behind Sultan Abdul Rahman) also sent to Hussein a letter in similar terms confirming and giving full effect to Sultan Abdul Rahman's donation. See Letter from the Under-King Raja Jaffar to Sultan Hussein dated 25 June 1825, attached to this Counter-Memorial as Annex 6.

1. The Temenggong's Domains

3.36 Singapore has not been able to trace any official document or historical record documenting the extent of the Temenggong's domain in the early 19th century.⁷¹ But Winstedt, in his study published in 1932 stated: "The immediate sway of the Temenggong of Johor ran from Pontian around Cape Rumenia to Sedili Besar."⁷² Historian Carl Trocki, in his authoritative study of the Temenggongs of Johor, concludes that apart from 1,000 followers in mainland Johor and 1,500 followers in Singapore, the Temenggong's domain in the period 1823-1824 was limited to the *western* portion of the Riau Archipelago.⁷³ This conclusion is illustrated in the same study by a sketch map, reproduced opposite as **Insert 4**. The sketch map shows that the Temenggong's domains did not extend to Pedra Branca.

3.37 Mid-19th century observers also confirmed that there was no relationship between Pedra Branca and mainland Johor. According to Thomson's *Account* (1852), personnel on Pedra Branca (which is 42 miles from Singapore) had to get "all provisions and other necessities"⁷⁴ from Singapore because:

"... the coasts between Pedra Branca and Singapore, with the exception of a few miserable fishing villages, *none of which are within 20 miles of it* and whose inhabitants are well known to be addicted to piracy, are uncultivated and covered with primeval forest, which, besides being infested with wild animals, such as the tiger, bear, rhinoceros and elephant, is almost impenetrable to man, by reason of thick underwood thorns and creepers."⁷⁴ [emphasis added]

⁷¹ Trocki C., *supra* note 27, at p. 42 ("It is of interest that no contemporary account (*c.* 1800-30), whether Malay, English, or Dutch, has much to say about the Temenggongs' government on the mainland of Johor. This is probably because there really was not one to speak of.")

⁷² Winstedt R.O., *supra* note 53, at p. 102.

⁷³ Trocki C., *supra* note 27, at pp. 44, 46.

⁷⁴ Thomson's *Account*, *supra* note 67, at p. 379 (SM Vol. 4, Annex 61, p. 480).

There were no settlements, and thus no governmental administration, within 20 miles of Pedra Branca.⁷⁵

2. *The 1855 Treaty of Friendship and Alliance between Sultan Ali and Temenggong Daing Ibrahim*

3.38 Through a British-brokered settlement in 1855, the Temenggong, who was until then the *de facto* ruler of the State of Johor, became its *de jure* ruler as well. Malaysia describes this episode in the following terms:

“In March 1855, the then Sultan and the Temenggong concluded an agreement in order to put an end to their differences. This amounted to a transfer of full authority to the Temenggong over the whole of the territory of Johor, with the exception of the small Kassang territory which remained reserved for the Sultan.”⁷⁶

3.39 This so-called “transfer of full authority” was effected by a treaty dated 10 March 1855, between the Temenggong and Ali, son of Sultan Hussein (who died in 1835). In return for formal recognition as Sultan of Johor and for certain monetary payments, Ali agreed to “cede in full sovereignty and absolute property”⁷⁷ to the Temenggong all of mainland Johor, retaining only a small territory around the Kassang river for himself. The territories ceded under the Treaty, to quote the exact words used, were:

“the whole of the territory of Johore *within the Malayan Peninsula* and its dependencies, with the exception of the Kassang territory...”⁷⁷
[emphasis added]

⁷⁵ In a letter dated 7 Nov 1850, the Resident Councillor of Singapore, T. Church, suggested requesting the Temenggong to form a village at Romania under the control of a respectable penghulu (village headman), thereby confirming that no organized government had been formed anywhere near Point Romania. 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 (SM Vol. 3, Annex 48; MM Vol. 3, Annex 59).

⁷⁶ MM pp. 30-31, para. 63.

⁷⁷ *Treaty of Friendship and Alliance between His Highness Sultan Ali Iskander Shah bin Sultan Hussain Mahomed Shah and His Highness Datu Tumungong Daing Ibrahim bin Abdul Rahman Sri Maharajah* dated 10 Mar 1855, Article 1 (MM Vol. 2, Annex 7).

The express words of cession focused on territories within the Malay Peninsula. No mention was made of Pedra Branca, which was certainly not part of the Malay Peninsula. To put the point in its historical context, it is worth recalling that by this time, Pedra Branca was already British territory, as a result of the taking of lawful possession of the island in 1847 by agents of the British Crown.

Section IV. The Question of Applicable Law

3.40 The present Chapter demonstrates that when the British took possession of Pedra Branca in 1847, Johor had no prior title to the island, whether assessed under classical principles of international law or under regional custom of allegiance.

3.41 While the law applicable to the British acquisition of Pedra Branca in 1847 was clearly the law of the nations as adopted by the European powers, there is less certainty concerning the applicable law by which Malaysia's claim to an "original title" should be evaluated. This is because of Malaysia's complete failure to explain the legal basis of her alleged "original title" and also because Malaysia has not made clear how and when this alleged "original title" arose, apart from some vague hints in her Memorial that her alleged "original title" dates from the 16th century.

3.42 Malaysia's avoidance of this critical issue has made it necessary for Singapore to discuss both the regional custom of allegiance and classical principles of international law. Whether examined under the local context of allegiance or under classical international law, the evidence clearly establishes that, immediately before the British took possession of Pedra Branca in 1847, there was an absence of title on the part of Johor.

Section V. Conclusions

3.43 The following conclusions can be drawn from the discussion in this Chapter:

- (a) in the traditional Malay sultanate, which includes the Johor-Riau-Lingga Sultanate, the notion of “sovereignty” was based on personal allegiance of inhabitants and not necessarily on control of territory. This means that it was common to find territory which was not regarded as belonging to anyone. It also means that the only reliable way of finding out whether a particular territory could be said to belong to a particular ruler was to obtain the views of the inhabitants as to who they regarded as their ruler;
- (b) Pedra Branca was uninhabited before the British built a lighthouse on it. Thus, there were no people on Pedra Branca from whom any Malay ruler could claim allegiance. There was absolutely no reason or incentive for any Sultan or local *Raja* or chief to consider Pedra Branca as part of his dominion at any material time, nor did any do so. Thus, Pedra Branca could not have been a territorial possession of the Johor-Riau-Lingga Sultanate;
- (c) Malaysia’s claim that the Johor-Riau-Lingga Sultanate “was able to remain a major power in the Malay region and to survive into the modern period” is contrary to the historical evidence and is an attempt to shore up her weak case based on an alleged “original title”;
- (d) the 1824 Anglo-Dutch Treaty did not result in the transmission of the Sultanate’s title to Pedra Branca (assuming such existed, *quod non*) to the modern State of Johor. In fact, the Anglo-Dutch Treaty did not touch upon or affect the status of Pedra Branca;

- (e) neither the territorial domain of the Temenggong nor that of Sultan Hussein (and his son, Ali) ever extended to Pedra Branca. This remained the case when the British took possession of the island in 1847.

CHAPTER IV PEDRA BRANCA WAS NEVER PART OF JOHOR

4.1 In Chapter 5 of her Memorial, Malaysia seeks to show that “Pulau Batu Puteh had always been under the sovereignty of Johor”.⁷⁸

4.2 Malaysia begins by asserting that “at a time when the Johor Sultanate extended north and south of Singapore Strait, its territory included all the islands within and adjacent to the Strait”.⁷⁹ Malaysia then goes on to assert that “Johor held sovereignty over Pulau Batu Puteh in the context of its title to a wider range of islands, which the local people, subjects of the Sultan, used as part of the coastal economy”.⁸⁰ After making these bare and highly generalised assertions, Malaysia presents a number of pieces of what she calls “evidence” in an attempt to prove that Pedra Branca was part of the Johor-Riau-Lingga Sultanate, and later part of the State of Johor.

4.3 In this Chapter, Singapore will briefly address the foregoing general assertions,⁸¹ before proceeding to analyse each of Malaysia’s arguments to show that the “evidence” produced by her is entirely speculative and incapable of proving title to Pedra Branca.

⁷⁸ MM p. 37, para. 73.

⁷⁹ MM p. 37, para. 74.

⁸⁰ MM p. 37, para. 75.

⁸¹ MM p. 37, paras. 74-75.

Section I. Malaysia has Failed to Explain the Legal Basis of Her Alleged Title to Pedra Branca

4.4 The most striking feature of Malaysia’s case is that there is a complete absence in her Memorial of any attempt to explain the legal basis of her alleged “original title” over Pedra Branca (that is to say, whether it is based on effective occupation, on the principle of contiguity, or on traditional notions of title such as personal allegiance of the inhabitants). Consequently, the entire Malaysian Memorial only deals with generalities and makes vague claims about an “original title” without being able to explain the legal basis for such claims.

4.5 However, certain passages in Malaysia’s Memorial that obliquely hint at the underlying basis of her case can be dealt with quickly.

4.6 *First*, there is the hesitant attempt to hint at an argument based on proximity in the following passages:

“... Pulau Batu Puteh ... was certainly part of the territories subject to the sovereignty of the Sultanate of Johor. This certainty regarding Johor's title in 1844 *derives from the fact that, from the early 16th century, the territories of the Sultanate of Johor had extended to the islands south of and around Singapore Strait.*”⁸²

“... the Sultanate of Johor extended north and south of Singapore Strait and included many islands in and around the Strait.”⁸³

“... at a time when the Johor Sultanate extended north and south of Singapore Strait, its territory included all the islands within and adjacent to the Strait.”⁸⁴

⁸² MM p. 4, para. 8.

⁸³ MM p. 15, para. 36.

⁸⁴ MM p. 37, para. 74.

However, Malaysia stops short of expressly arguing that proximity constitutes the basis of her “original title”. Malaysia’s omission to do so is telling. It shows that she does not pin much hope on this argument.

4.7 Any argument by Malaysia based on proximity is flawed in two respects. As a matter of fact, Pedra Branca lies outside the territorial waters of Johor.⁸⁵ As a matter of law, proximity in this context is of no relevance. In the *Island of Palmas* case, Judge Huber said:

“..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)... Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.”⁸⁶ [Emphasis in underline added, italics in original]

4.8 *Secondly*, Malaysia, being fully aware of the weakness of her claim based on proximity, seeks support at various sections of her Memorial from the Court’s observations in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, concerning the exercising of State functions “in the context of the administration of a wider range of islands”.⁸⁷ Malaysia is clutching at straws. There is a fundamental difference between Pedra Branca and Ligitan/Sipadan that renders inapplicable the quoted words in the instant case.

4.9 In the *Indonesia/Malaysia* case, Malaysia was able to prove some acts of State authority on the two islands, such as the construction of navigational aids,

⁸⁵ Pedra Branca lies 7.7 nautical miles from the Johor mainland and 6.8 nautical miles from the nearest island in the Romania Group – outside the 3-nautical mile territorial sea belt of Johor in 1847 (until 1969, Malaysia and her predecessor Johor claimed only a 3-nautical mile territorial sea).

⁸⁶ See *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 24, at pp. 854-855.

⁸⁷ MM p. 37, para. 75; p. 47, para. 97; p. 80, para. 175; p. 132, para. 294 and p. 156, para. 328(h).

the regulation of turtle egg collection and the establishment of a bird sanctuary. While accepting that Malaysia's activities *on* Sipadan and Ligitan were "modest in number", the Court noted that these activities were nevertheless "diverse in character" and showed:

"... a pattern revealing an intention to exercise State functions in respect of the two islands *in the context of the administration of a wider range of islands.*"⁸⁸ [emphasis added]

4.10 In stark contrast to that case, Malaysia is unable to point to a single act of State authority *on* or in relation to Pedra Branca at all. Consequently, there is no room for applying the dicta from the *Indonesia/Malaysia* case concerning "the administration of a wider range of islands". Moreover, as shown in Chapter III above, in the mid-19th century, the Temenggong's administration effectively did not extend to the Romania islands or even to Point Romania.⁸⁹ There was a total absence of "administration of a wider range of islands" that could have had any bearing on Pedra Branca at all.

4.11 As for the claim that Pedra Branca was "used as part of the coastal economy" by "subjects of the Sultan",⁹⁰ Malaysia has provided no proof to show such usage. This is not surprising. Pedra Branca was uninhabited and barren. In the 1840s, there were no inhabitants within more than 20 miles from it⁹¹ – the island was a "great distance from inhabited places".⁹² The island was, and still

⁸⁸ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 148.

⁸⁹ *See above*, at para. 3.37 and *below*, at Chapter IV, Section II, Subsection H, *in passim*.

⁹⁰ MM p. 37, para. 75.

⁹¹ At the beginning of the 19th century, Johor was very sparsely populated as contemporary accounts given by travelers show. *See e.g.*, Thomson's Description of the Eastern Coast, *supra* note 43, at p. 84; Favre P., *A Journey in Johore*, 3 Journal of the Indian Archipelago and Eastern Asia 50 (1849), at p. 63, attached to this Counter-Memorial as Annex 14.

⁹² Thomson's Account, *supra* note 67, at p. 392 (SM Vol. 4, Annex 61, p. 493).

is, subjected to harsh weather throughout the year. During the North-East monsoon season, lasting from October to March, its accessibility was greatly limited.⁹³ During the South-West monsoon, from April to September, it was unbearably hot.⁹⁴ No vegetation could grow on Pedra Branca, even with the use of imported soil from Singapore, as Thomson's failed attempt to grow a garden on the island demonstrated.⁹⁵ Presgrave had, in his Report of 5 December 1828, compiled a detailed list of the produce of various islands in the region – no produce from Pedra Branca was recorded on this list.⁹⁶

4.12 In any event, any activities alleged by Malaysia as part of the coastal economy would have been private activities. It is a well established principle of international law that private activities do not confer title to territory.⁹⁷

4.13 These comments are sufficient to dispose of the preliminary assertions with which Malaysia began Chapter 5 of her Memorial. Singapore will now deal with the “evidence” presented by Malaysia in that Chapter.

⁹³ Thomson's Account, *supra* note 67, at p. 440 (SM Vol. 4, Annex 61, p. 543). By October 1850, work on the lighthouse had to stop because of the approach of the North-East monsoon, and the entire island evacuated. When Thomson returned on 28 March 1851, he found that the pier and houses which he had built the previous year had all been washed away by the force of the North-East monsoon (*Ibid*, at p. 442, reproduced in SM Annex 61, p. 545). Thomson has provided a detailed description of the weather patterns around Pedra Branca (*Ibid*, at p. 382, reproduced in SM Annex 61, p. 483).

⁹⁴ During the South-West monsoon season, the heat on the island was so unbearable that Thomson records: “the skin peeled off from the face and other exposed parts of the body, the lips cracked, and the heat induced a constant flow of perspiration, creating a thirst that large draughts of water could only allay.” (*Ibid*, at p. 419, reproduced in SM Annex 61, p. 522).

⁹⁵ *Ibid*, at pp. 384, 443, reproduced in SM Annex 61, pp. 485, 546.

⁹⁶ *See above*, at para. 3.10 and *below*, at para. 4.25.

⁹⁷ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 140. *See also 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 p. 86, para. 315. The Award is also published in (1998) 22 RIAA 215.

Section II. Malaysia's Historical Materials Do Not Support Her Case

A. MALAYSIA'S REFERENCES TO HISTORICAL WRITINGS

4.14 Malaysia asserts that “for centuries” the Johor-Riau-Lingga Sultanate’s territories stretched:

“... both north and south of the Singapore Strait. It covered substantial territories, including parts of the mainland of the Malay Peninsula, parts of the island of Sumatra, all islands within and at the entrance of the Singapore Strait and numerous other islands in the open China Sea including the Natunas, Anambas and the Tambelans.”⁹⁸

This assertion implies that Pedra Branca, which lies at the entrance of the Singapore Strait, was part of the Sultanate’s territories. The evidence Malaysia cites in support of this assertion is said to be found in the historical sources (in footnote 55 of her Memorial) as follows:

“See also Leonard Y. Andaya, *The Kingdom of Johor 1641 to 1728* Kuala Lumpur: Oxford University Press, 1975; E. Netscher, *De Nederlanders in Djohor en Siak, 1602 tot 1865* [The Dutch in Johor and Siak, 1602 to 1865], Batavia: Bruining & Wijt, 1870; C.A. Trocki, *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore*, Singapore: Singapore University Press, 1979.”⁹⁹

4.15 Singapore has examined these writings carefully. None of them contains a statement or supports the assertion that the Sultanate extended to “all islands within and at the entrance of Singapore Strait”.¹⁰⁰

⁹⁸ MM p. 38, para. 77.

⁹⁹ MM p. 38, note 55.

¹⁰⁰ MM p. 38, para. 77.

B. DUTCH COMMUNICATIONS OF 1655 AND 1662

4.16 Malaysia cites two 17th century Dutch letters in an attempt to demonstrate Dutch recognition of her “original title” to Pedra Branca.¹⁰¹

4.17 The first letter, dated 1 April 1655, was an internal communication from the Dutch Governor of Malacca to the Dutch Governor-General in Batavia proposing that Dutch vessels “must cruise... in the vicinity of Pedra Branca” to prevent Chinese ships from entering the Johor River.¹⁰² This proposal, if implemented, would redirect the Chinese trade from Johor to Malacca or Batavia. Nothing in this communication can remotely be interpreted as Dutch recognition of the Johor-Riau-Lingga Sultanate’s ownership of Pedra Branca.

4.18 The second letter is another internal Dutch communication dated 26 December 1662 – i.e., seven years after the first letter. This was a report by the Dutch Governor-General to the Directors of the Dutch East India Company that the Sultan of Johor had protested against the Dutch practice of diverting trade away from the Johor River to Malacca. After citing this letter, Malaysia concludes:

“Thus the Sultan of Johor *protested* at a Dutch scheme involving if not a blockade at least a form of trade diversion from his dominions, *in correspondence specifically mentioning Pedra Branca...*”¹⁰³ [emphasis added]

This passage is highly misleading in suggesting that the Sultan of Johor had *specifically mentioned* Pedra Branca in correspondence with the Dutch. In fact,

¹⁰¹ MM p. 38, para. 78.

¹⁰² See Missive from Thijssen (Governor of Melaka) to the Governor-General and Council of the Dutch East India Company in Batavia dated 1 Apr 1655 (MM Vol. 3, Annex 22).

¹⁰³ MM p. 39, para. 79.

Malaysia cited no correspondence from the Sultan at all. Nor did the Dutch report of 26 December 1662 concerning the Sultan's protest mention Pedra Branca. There was simply no evidence that the Sultan "specifically mention[ed] Pedra Branca" in any correspondence with the Dutch. Moreover, the Sultan's protest was not against any supposed incursion by the Dutch into his territories, but against the diversion of trade from the Johor River.

4.19 These two letters cannot possibly be read as Dutch recognition that Pedra Branca was a territory of the Johor-Riau-Lingga Sultanate.

C. CRAWFURD'S LETTER OF 10 JANUARY 1824 AND PRESGRAVE'S REPORT OF 5 DECEMBER 1828

4.20 After the Dutch communications, there is a lengthy gap of about 160 years in the "evidence" produced by Malaysia – Malaysia next cites two general descriptions of the extent of the Johor-Riau-Lingga Sultanate by British officials stating that certain named islands in the South China Sea belonged to the Sultanate. Presumably, the point which Malaysia wishes to make is that if the Sultanate owned certain islands in the South China Sea, then Pedra Branca, which lies at the entrance of the Singapore Strait from the South China Sea must also have belonged to the Sultanate. This is fallacious reasoning. As explained in paragraph 3.8 above, it was common in early South East Asia to find territories which did not belong to any ruler. Furthermore, the fact that an island at Point A and another island at Point B belonged to a sultanate does not mean that all islands in between *also* belonged to that sultanate, especially given the political structure of traditional Malay sultanates. With this understanding, Singapore will now examine these two sources.

4.21 The first description is found in a letter dated 10 January 1824 from Crawfurd, the British Resident in Singapore, to the Governor-General in India. Malaysia quotes the following words from the letter:

“I beg for a moment to bring to the recollection of the Right Hon’ble the Governor-General the situation of this island [i.e., Singapore] and of the other countries in its neighbourhood constituting the nominal principality of Johore, when we formed our settlement in the year 1819. This principality extends on the continent from Malacca to the extremity of the peninsula on both coasts. It had several settlements on the island of Sumatra, and embraced all the islands in the mouth of the Straits of Malacca with all those in China seas, *as far as the Natunas in the latitude of 4° N and the longitude 109° E*. These countries are all sterile, thinly inhabited here and there on the coast only...”¹⁰⁴ [emphasis added]

Malaysia then concludes that “an informed British source clearly considered *all* islands of the Strait of Malacca, through Singapore Strait and up to a specified distance into the China Seas to belong to the Sultanate of Johor.”¹⁰⁵

4.22 The following points may be noted about this passage:

- (a) Crawfurd’s description did not mention Pedra Branca;
- (b) Crawfurd’s purpose in writing the letter was to seek authorisation from the Governor-General in India to negotiate with the local chiefs for “the unequivocal cession of the island of Singapore in full sovereignty and property”.¹⁰⁶ Crawfurd’s description was

¹⁰⁴ MM p. 39, para. 80.

¹⁰⁵ MM pp. 39-40, para. 81, italics in original.

¹⁰⁶ Letter from Crawfurd J. (Resident of Singapore) to Swinton G. (Secretary to the Government in India) dated 10 Jan 1824, attached to this Counter-Memorial as Annex 2, at para. 26 of the letter.

therefore intended to provide his superiors with a broad overview of the political setting in the region, and nothing more;¹⁰⁷

- (c) the distance between the Natunas and the entrance to the Straits of Malacca is more than 400 nautical miles. Crawford could not possibly have meant that every single uninhabited island within this vast area was a territorial possession of the principality Johor.¹⁰⁸ This reading (i.e., that Crawford could not have intended to refer to every single uninhabited island) is also entirely consistent with the fact that the traditional Malay idea of sovereignty was based on allegiance of inhabitants and not on control of territory;
- (d) In spite of Malaysia's attempts to interpret Crawford's description as including Pedra Branca among Johor's territorial possessions, it is significant that Crawford did not attribute the island to Johor in the lengthy entry on Pedra Branca in his *Descriptive Dictionary of the Indian Islands and Adjacent Countries*, published in 1856.¹⁰⁹

¹⁰⁷ Malaysia refers to Crawford's letter without annexing it to her Memorial. It was therefore impossible, from reading Malaysia's Memorial, to appreciate Crawford's description in its proper context. Singapore has attached Crawford's letter in its entirety as Annex 2 to this Counter-Memorial. As can be seen from the copy annexed, Crawford's description is one short line in a long, 33-paragraph letter spanning 12 manuscript pages (or 9 type-written pages when transcribed).

¹⁰⁸ In fact, at one stage in the 18th century, certain settlements in Borneo (namely, the settlements of Calca, Seribas and Melanoege near Sambas) switched allegiance from the Sultan of Brunei to the Sultan of Johor. See Valentyn F., *Oud en Nieuw Oost-Indiën, Vervattende Een Naauwkeurige en Uitvoerige Verhandeling van Nederlands Mogentheyd in de Gewesten*, Vol. 7 Part 5 (1726, reprinted 2004), at p. 359, relevant extracts of which are attached to this Counter-Memorial as Annex 1. Even then, there was no suggestion that, by reason of the fact that the Johor-Riau-Lingga Sultanate extended to Borneo, every single island and uninhabited rock between Borneo and the Malay Peninsula belonged to the Sultanate.

¹⁰⁹ Crawford J., *A Descriptive Dictionary of the Indian Islands and Adjacent Countries* (1856, reprinted 1971), relevant extracts of which are attached to this Counter-Memorial as Annex 17, at p. 331.

4.23 For the foregoing reasons, Crawford's description does not support Malaysia's claim of original title to Pedra Branca.

4.24 Malaysia also places great reliance on the description of the Sultanate given by Presgrave in his Report on the subject of piracy. Malaysia argues:

"Crawford's description of the territorial extent of the Sultanate of Johor is confirmed in the Presgrave report of 1828. Presgrave observed that the Johor Sultanate appeared to embrace...

'the Southern part of the Malayan peninsula till joined by the Malacca territory, and principality of Pahang, a small portion of the eastern coast of Sumatra, laying between the Jambi and Siak Countries, *all* the Islands lying between the Karimons to the South – Pulau Aor to the East, at the entrance of the China Sea – and Linggin and the numerous Islands adjacent thereto, extending nearly to the Islands of Banka and Billiton.'¹¹⁰
[emphasis in italics as added in Malaysia's Memorial]

4.25 The following points may be made about this passage:

- (a) Points (a), (b) and (c) made in paragraph 4.22 above about Crawford's description apply equally to Presgrave's description;
- (b) The passage quoted by Malaysia omits important words of qualification. The full passage (with the omitted words in italics) reads:

"It is difficult to give an accurate description of the limits of what is usually termed the Johor Empire. It appears to embrace the Southern part of the Malayan peninsula till joined by the Malacca territory, and principality of Pahang, a small portion of the eastern coast of Sumatra, laying between the Jambi and Siak Countries, all the Islands lying between the Karimons to the South – Pulau Aor to the East, at the entrance of the China Sea – and Linggin and the numerous Islands adjacent thereto, extending nearly to the Islands of Banka and Billiton.

¹¹⁰ MM p. 40, para. 82.

This is a rough sketch of the boundaries of the Johor territories...”¹¹¹

It is clear from the two italicised sentences in the above passage that Presgrave himself did not know the “limits” of the Johor-Riau-Lingga Sultanate and that he could only give a very rough sketch. Again, his uncertainty is not surprising. It is consistent with the traditional Malay notion of sovereignty being based on allegiance and not on control of territory;

- (c) Presgrave provided a detailed list of the islands which he considered “to be under the authority of the Sultan of Johor” based on knowledge which he had obtained personally and from native sources. This list, entitled “A list of places under the jurisdiction of Johor with the probable number of inhabitants at each”, is mentioned in Paragraph 4 of his Report (but not annexed by Malaysia to her Memorial). The list does not refer to Pedra Branca.¹¹²

4.26 Presgrave was not alone in admitting to an inability to accurately describe the limits of the Sultanate. There were no Malay maps or other official documents which recorded the Sultanate’s territorial limits. That this was the state of knowledge (or, rather, the state of ignorance) during this period is confirmed by the views of the British and Dutch officials who negotiated the 1824 Anglo-Dutch Treaty.

4.27 The negotiators were of the view that no one could claim to be able to define the limits of the Johor-Riau-Lingga Sultanate. As Malaysia has stated,

¹¹¹ Report from Presgrave E. (Registrar of Imports and Exports) to Murchison K. (Resident Councillor) dated 5 Dec 1828 (MM Vol. 3, Annex 27).

¹¹² Attached to this Counter-Memorial as Annex 7.

quoting from pages 62 to 66 of Irwin’s *Nineteenth-Century Borneo: A Study in Diplomatic Rivalry*, the words “any of the remaining islands belonging to the ancient kingdom of Johore”,¹¹³ which appeared in the penultimate draft of the treaty, were omitted and replaced by the words “any of the other Islands South of the Straights of Singapore” at the final conference.¹¹⁴ The reason for the substitution – which Malaysia has not provided – is given in page 67 of the same book, which reads:

“Nor was the wording of Falck’s [*the Dutch Minister of the Colonies, who was the chief Dutch negotiator during the 1824 negotiations*] suggested draft, ‘islands belonging to the ancient Kingdom of Johore’, quite conclusive either, *since no one could claim to be able to define the limits of the ancient Sultanate of Johore with any degree of certainty.*”¹¹⁵
[emphasis added]

This was the state of affairs in the early 19th century: “no one could... define the limits of the ancient Sultanate of Johore with any degree of certainty”.

4.28 In any event, Crawford’s and Presgrave’s descriptions have no probative value at all. They constitute mere “assertions of sovereignty and jurisdiction that fail to mention any islands whatsoever, and with general references to ‘the islands’ with no further specificity”.¹¹⁶ They certainly do not qualify as evidence which “leave no doubt as to their specific reference to the islands in dispute as such”.¹¹⁷ For the foregoing reasons, these two descriptions provide no support for Malaysia’s claim of original title to Pedra Branca.

¹¹³ MM p. 24, para. 51, citing Irwin G., *Nineteenth Century Borneo: A Study in Diplomatic Rivalry* (1955, reprinted 1967), relevant extracts of which are attached to this Counter-Memorial as Annex 36.

¹¹⁴ In relating this incident, Malaysia cites Irwin, *supra* note 113, at pp. 62-66.

¹¹⁵ Irwin, *supra* note 113, at p. 67

¹¹⁶ *Eritrea/Yemen Arbitration* (Phase One), *supra* note 97, at para. 241.

¹¹⁷ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 136.

D. THE ORD AWARD OF 1868 AND THE REPORT OF THE JOHOR BOUNDARY
COMMISSION OF 1898

4.29 Malaysia has interpreted the Ord Award of 1868 as having attributed Pedra Branca to the State of Johor,¹¹⁸ thereby confirming the “long-standing *status quo*” that the island was “within the dominions of Johor”.¹¹⁹

4.30 This attempt at proving Malaysia’s original title is utterly devoid of merit. It has no basis whatsoever for the simple reason that the Ord Award had nothing to do with Pedra Branca.

4.31 *First*, the Ord Award was an arbitral award made by Governor Ord of the Straits Settlements to resolve a dispute between the States of Johor and Pahang over territories lying far to the north of Pedra Branca. The dispute did not concern Pedra Branca, and therefore the Ord Award could not, and did not, allocate Pedra Branca to the State of Johor. The statement in the Award that:

“all the islands to the north of this line [i.e., *latitude 2°59’20”N*] shall belong to Pahang and all to the south of this line to Johore”

clearly refers only to the cluster of islands near the 2°59’20” N parallel which were in dispute between Johor and Pahang. The Award had no relevance whatever to the status of Pedra Branca, lying 100 nautical miles south of the 2°59’20” N parallel, and which was *not* in dispute *between Pahang and Johor*. (See **Insert 6** (Chart attached to the Ord Award, 1868, *annotated* to highlight area of Johor-Pahang dispute settled by the Ord Award) opposite.¹²⁰

¹¹⁸ MM p. 43, para. 87-88; p. 46, para. 93.

¹¹⁹ MM p. 51, para. 103(e).

¹²⁰ Prior to 1862, the Sedili Besar River (the river at the southern tip of the red circle in **Insert 6**, opposite p. 41) was generally accepted as the point where Johor’s influence ends and Pahang’s influence begins. In 1862, Bendahara Tun Korais of Pahang signed a treaty with Temenggong Abu Bakar of Johor, fixing the boundary between Johor and Pahang at the River Endau (about

4.32 *Secondly*, Malaysia’s argument that, in the chart attached to the Ord Award, “the islets with ‘Horsburgh Light R’ and ‘South Rocks’ *are included and depicted as islands belonging to Johor*”,¹²¹ is completely disingenuous. Governor Ord did not get a new maritime chart prepared specially for this Award. He used a *pre-existing* admiralty chart (which was the practical thing to do) and drew on it a boundary line at 2°59’20” N to mark the arbitrated boundary between Johor and Pahang. There is nothing in the chart itself which depicts Pedra Branca and Middle Rocks (named “South Rocks” in the chart) as *belonging* to Johor. These features appeared on the chart because they happened to fall within its geographical coverage. Singapore notes that the geographical coverage of the chart also includes other islands belonging to Singapore such as Pulau Tekong Besar, Pulau Tekong Kechil and Pulau Ubin, as well as part of the main Island of Singapore. Based on Malaysia’s logic, these other islands were also depicted by Governor Ord “as islands belonging to Johor”. Malaysia’s reasoning is clearly untenable. This chart therefore cannot be and is not evidence that Pedra Branca was intended to be or was attributed to the State of Johor.

4.33 Malaysia has also argued that the Ord Award was re-confirmed by the Report of the Johor Boundary Commission of 1898 regarding the *status quo* of Pedra Branca as Johor territory.¹²² However, like the Ord Award, the 1898

60 nautical miles north of the Sedili Besar River). This treaty (a copy of which is at MM, Vol. 2, Annex 8) also ceded Pulau Tioman and some offshore islands *north* of that river to Johor. When the Pahang Civil War ended in 1864 with Bendahara Tun Korais deposed by Bendahara Wan Ahmad, the latter sought to repudiate the cession made by Tun Korais in 1862 and claim back the territories ceded by Tun Korais to Johor. This resulted in a territorial dispute between Johor and Pahang which was eventually settled by the Ord Award in 1868. The Johor-Pahang dispute settled by the Ord Award was therefore confined to the area between the Endau River and the Sedili Besar River, and to the islands between and adjacent to these two rivers. The Johor-Pahang dispute did not extend to the area around Pedra Branca.

¹²¹ MM p. 43, para. 88, emphasis added. The “South Rocks” referred to in this quotation are now called “Middle Rocks”.

¹²² MM p. 46, para. 93, read with MM p. 51, para. 103(e).

Report had nothing to do with Pedra Branca. In fact, the map attached to the 1898 Report did not even depict Pedra Branca (see **Insert 7** (Map attached to the Johore Boundaries Commission Report), opposite). This omission confirms that the Ord Award had nothing to do with Pedra Branca.

E. THE SULTAN OF JOHOR’S LETTER OF 20 MARCH 1886

4.34 Next, Malaysia refers to a letter dated 20 March 1886 from the Sultan of Johor to the British Government and claims that “[t]his provides further evidence that at the time... Pulau Batu Puteh was firmly *believed* to be under the sovereignty of the State of Johor”.¹²³ Malaysia quotes the following passage from the letter:

“2. *The Islands in question* range themselves around the Coast of Johore: all those on the Western side, and a large number on the Eastern side, being in the immediate vicinity of Johore; but of the latter a large proportion also extends farther out, stretching even as far as the neighbourhood of Borneo.”¹²⁴ [emphasis added]

and argues that:

“[i]t is evident that Pulau Batu Puteh was included in the phrase ‘a large number on the Eastern side, being in the immediate vicinity of Johore’. There is no suggestion that any particular island was exempt from the general position so described.”¹²⁵

4.35 Malaysia’s argument is a mere *petitio principii*. As the first paragraph of the Sultan’s letter (which Malaysia has omitted to quote) makes clear, the Sultan was asking for a register to be made of “the Islands in the open Seas and Straits

¹²³ MM at p. 44, para. 91, emphasis added.

¹²⁴ Letter from Sultan of Johore to Granville G.L, (Principal Secretary of State to the Colonies) dated 20 Mar 1886 (MM Vol. 3, Annex 63), *quoted in* MM p. 44, para. 90.

¹²⁵ MM p. 44, para. 90.

belonging to the State of Johore”.¹²⁶ The second paragraph of the letter (as quoted by Malaysia above), merely describes where these islands (i.e., the “Islands in question”) are geographically distributed. It is of course to be expected that some of these islands (e.g., Pulau Tinggi) would be found “on the Eastern side... in the immediate vicinity of Johore”. Such a statement is therefore unremarkable and does not help advance Malaysia’s case in any way. As a matter of simple logic, in order for such a statement to have any application to Pedra Branca, Malaysia would first have to prove that Pedra Branca was indeed an island “belonging to the State of Johore”, and this Malaysia has not done.

4.36 Three further observations can be made about this letter:

- (a) Singapore has examined the subsequent British reply to this letter and the Sultan’s response, to discover that the entire purpose of this letter was to seek the British Government’s assistance to claim the Natunas, Anambas and Tambelans (collectively called “Pulau Tujoh” in the Sultan’s letter) which were then in the possession of the Dutch. The letter had nothing to do with Pedra Branca at all;
- (b) In paragraph 5 of the letter, the Sultan stated that he would send “a detailed list of all the Islands with an alphabetical index”. This statement is particularly telling. It shows that the Sultan intended

¹²⁶ See para. 1 of the Sultan’s letter of 20 Mar 1886 (MM Vol. 3, Annex 63), which reads in full as follows:

“In view of the possibility of any other Power making, as under its protectorate, any of the Islands in the open Seas and Straits belonging to the State of Johore, I shall feel much obliged if your Lordship will kindly arrange for a Register of these appanages to be preserved by Her Majesty’s Secretary of State for the Colonies as well as by His Excellency the Governor of the Straits Settlements – By this plan the interests of [my] country will be safeguarded under the provision of the Agreements recently made.” [The word in square bracket was transcribed in MM Annex 63 as “any”. Singapore has examined the manuscript and has ascertained that the word reads “my”.]

only to claim such islands as listed, and not *all* the islands within the general description he had given in his letter. As it turned out, the Sultan did not send the list. The British had declined to assist the Sultan to claim the Natunas, Anambas and Tambelans from the Dutch, the reason being that the British had, only a few years before, acknowledged Dutch rights over the Natunas.¹²⁷ Once this was made known, the Sultan stopped all correspondence on this subject, making clear that the letter was all along about the Natunas, Anambas and Tambelans only;

- (c) Malaysia claims that among the charts submitted by the Sultan with this letter was “the same chart as used in the Ord Award”.¹²⁸ Singapore is unable to verify whether this is the case, because the chart was returned by the British Government to the Sultan and no copies of the chart can be found in the British archives.¹²⁹ Even if that were the case, the chart is irrelevant to the present dispute as the Ord Award chart had nothing to do with Pedra Branca (see paragraphs 4.29 to 4.32 above).

4.37 For the foregoing reasons, there is nothing in the Sultan’s letter of 1886 that could form the basis of any belief on the part of the Sultan of Johor that Pedra Branca was under his sovereignty when he wrote that letter.

¹²⁷ See Correspondence Concerning Claim of the Sultan of Johore to the Natuna, Anambas and Tambelan Islands: (i) File note by Herbert R. (Undersecretary, Colonial Office) of meeting with Inchi Abdul Rahman (Secretary to the Sultan of Johore) dated 23 Mar 1886; (ii) Letter from the British Colonial Office to British Foreign Office dated 25 Mar 1886; (iii) Letter from the British Colonial Office to Inchi Abdul Rahman (Secretary to the Sultan of Johore) dated 20 Apr 1886; (iv) Memorandum from Inchi Abdul Rahman (Secretary to the Sultan of Johore) to the British Colonial Office dated 5 May 1886; (v) Letter from the British Colonial Office to Inchi Abdul Rahman (Secretary to the Sultan of Johore) dated 26 May 1886, attached to this Counter-Memorial as Annex 21.

¹²⁸ MM p. 44, para. 91.

¹²⁹ See British Colonial Office Internal Minutes dated 28 Apr 1886 and 29 Apr 1886, attached to this Counter-Memorial as Annex 22.

F. THE 1843 SINGAPORE FREE PRESS ARTICLE

4.38 Malaysia asserts that an article in the *Singapore Free Press* “makes it clear that Pulau Batu Puteh belonged to Johor”.¹³⁰ Singapore notes that this is merely an anonymous article published in a privately-owned newspaper. It is not an official source, nor is there any indication that the information therein was based on any official source. Concerning the value of press articles as evidence:

“the Court has been careful to treat them with *great caution*; even if they seem to meet *high standards of objectivity*, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to *corroborating* the existence of a fact, i.e., as illustrative material *additional to other sources of evidence*.”¹³¹ [emphasis added]

4.39 The whole purpose of the article was to lobby the British authorities to put pressure on the Temenggong to stop his subjects from engaging in piracy – it can hardly be regarded as an article meeting “high standards of objectivity”. Nor is the article capable of “corroborating” other sources of evidence – apart from this one isolated reference, Singapore has not been able to find any other historical materials which attribute any “Batu Puteh” to the Temenggong. In any event, the article is inaccurate and unreliable – it erroneously states that Pulau Tinggi was within the territories of the Temenggong.¹³²

¹³⁰ MM p. 47, para. 95, emphasis added.

¹³¹ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, at p. 40, para. 62.

¹³² See Crawford J., *A Descriptive Dictionary of the Indian Islands and Adjacent Countries*, *supra* note 109, at p. 436, which attributed Pulau Tinggi to Pahang. See also Tarling N., *British Policy in the Malay Peninsula and Archipelago 1824-1871* (1969), at p. 68, note 268, where it is stated that prior to the 1862 treaty, the Johore-Pahang boundary was at Sungei Sedili. This would have placed Pulau Tinggi clearly on the Pahang side. See further Thomson’s Description of the Eastern Coast, *supra* note 43, at p. 84, where Thomson wrote :

G. THE STATE OF PUBLIC KNOWLEDGE IN MID-19TH CENTURY SINGAPORE

4.40 Contrary to Malaysia's claim that "[t]he sovereignty of Johor over Pulau Batu Puteh was public knowledge",¹³³ all available evidence of the state of public knowledge of the period shows that Pedra Branca was not regarded as a territory of Johor.

4.41 In 1847 (the year in which preparatory works for the construction of the lighthouse were undertaken by the British), J.R. Logan¹³⁴ published a detailed account of his voyage to the east coast of Johor entitled *Journal of a Voyage to the Eastern Coast and Islands of Johore*.¹³⁵ In addition, J.T. Thomson (the architect and engineer of Horsburgh Lighthouse) had, in 1851 (the year in which Horsburgh Lighthouse was commissioned), published a detailed account of his voyage entitled *Description of the Eastern Coast of Johore and Pahang, with Adjacent Islands*.¹³⁶ Both accounts gave detailed descriptions of the islands of Johor, but neither account mentioned Pedra Branca as belonging to the Temenggong of Johor. Clearly neither Logan nor Thomson thought so.

"The group of islands that extends off the coast to a distance of 30 geographical miles, commencing at *Tokong Eu* and ending at *Pulo Beralah*, undoubtedly belongs to Pahang as all the inhabitants acknowledge the Raja as their chief and pay tribute annually." [emphasis added] (*Note* : Pulau Tinggi belongs to the group of islands commencing at Tokong Eu and ending at Pulo Beralah.)

¹³³ MM p. 47, para. 96.

¹³⁴ James Richardson Logan (1819-1869) was born in Scotland, studied law in Edinburgh and was a law agent in Penang and later Singapore. He was the founding editor of the *Journal of the Indian Archipelago and Eastern Asia* (from 1847 to 1859). He was also editor of the *Pinang Gazette*. Further biographical information about him can be found in the *Oxford Dictionary of National Biography* (2004), Vol. 34, pp. 313-314.

¹³⁵ Logan J.R., *Journal of a Voyage to the Eastern Coast and Islands of Johore*, 2 *Journal of the Indian Archipelago and Eastern Asia* 616 (1848), attached to this Counter-Memorial as Annex 13.

¹³⁶ Thomson's *Description of the Eastern Coast*, *supra* note 43.

4.42 Furthermore, from the first public meeting on 22 November 1836 in Canton concerning the proposal to construct Horsburgh Lighthouse, all the European merchants, whether in Canton, Singapore or India, had acted on the basis that all that the British had to do was to take possession of Pedra Branca and build the lighthouse on it. At no time did any of them consider or express a view that the consent of either the Sultan or Temenggong of Johor was relevant to the project.¹³⁷

4.43 Neither did the British Government – when they took possession of Pedra Branca in 1847, they did it without any reference to the Temenggong – see Chapter V, below. This is confirmed by comparison with British practice in the 19th century in the region concerning the building of lighthouses on native territories. If the lighthouse was to be built on native territories, the British practice was to obtain a formal grant or cession of the land on which the lighthouse was to be built from the local chief who had authority there. For example, in the cases of Cape Rachado and Pulau Pisang, the British sought and obtained land grants from the local chief for the establishment of the lighthouse.¹³⁸ In the cases of Peak Rock and Pulau Aur, informal permission was obtained from the local chiefs, but the British did not follow up with obtaining formal land grants because the British did not proceed with either of these projects.

4.44 In the case of Pedra Branca, the British built the lighthouse but did not request a land grant. This shows that the British did not consider that they had to seek permission from the local chiefs to take possession of the island and to build a lighthouse on it. What stands out clearly from the documentary evidence

¹³⁷ The only newspaper article that had referred to permission being sought spoke of *Peak Rock*, not Pedra Branca. *See below*, at para. 5.78.

¹³⁸ MM p. 60, note 101 and 102.

is the complete absence of any discussion in British official documents indicating any necessity to seek permission to take possession of Pedra Branca and to build a lighthouse on it.¹³⁹ These facts clearly show that British officials of the time did not regard Pedra Branca as territory belonging to any native chief in the region. Similarly, when the British constructed the One Fathom Bank lighthouse, which was beyond the 3-nautical mile territorial waters of the Malay states, Britain did not seek permission from any local ruler before constructing the lighthouse.¹⁴⁰

4.45 Clearly, any notion that the state of “public knowledge” in the mid-19th century supports Malaysia’s case is completely misguided.

H. THE TEMENGGONG HAD NO AUTHORITY ON OR IN THE VICINITY OF PEDRA BRANCA

4.46 In Chapter 6, Section C of her Memorial, Malaysia extensively discusses the role of the Temenggong, in an attempt to show that the Temenggong’s activities “confirm that Pulau Batu Puteh was under Johor’s sovereignty”.¹⁴¹ Singapore will show in the next few paragraphs that none of these alleged activities were *à titre de souverain*, and that the Temenggong in fact exercised no authority on or in the vicinity of Pedra Branca.¹⁴²

¹³⁹ See below, Chapter V, Section V, at paras. 5.58-5.90.

¹⁴⁰ The One Fathom Bank lighthouse is located 16 nautical miles off the coast of a Malay state called Selangor. See **Insert 5** (Places Mentioned in Chapter IV), after p. 42 for the position of One Fathom Bank.

¹⁴¹ MM p. 70, para. 150.

¹⁴² See above, Chapter III, at paras. 3.36-3.37.

1. *Suppression of Piracy by the Temenggong*

4.47 Malaysia has relied on the Temenggong's role in the suppression of piracy as evidence of the effective display of authority over Pedra Branca. Malaysia refers to an event where a British gunboat proceeded to the vicinity of Pedra Branca for escort duties with four boats belonging to the Temenggong as one of "[t]he Temenggong's activities against piracy constitut[ing] a manifestation of Johor's exercise of sovereignty in the region under consideration".¹⁴³

4.48 This argument has no merit. Piracy was a crime against the law of nations long before 1819. States have routinely taken action to suppress piracy outside their territorial waters. Acts relating to suppression of piracy are not acts establishing territorial sovereignty under international law. In making this argument, Malaysia is speaking from different sides of her mouth at different times. In the *Indonesia/Malaysia* case, Indonesia sought to rely on an actual visit in 1921 by a Dutch vessel, the *Lynx*, to the island of Sipadan for the purpose of suppressing piracy, as evidence of her sovereignty over the island. Malaysia's rebuttal was that:

"Passing through or surveying a particular area, even if it is for the sake of combating piracy *jure gentium*, must not be confused with the exercise of territorial sovereignty."¹⁴⁴

Malaysia then continued:

"The incident has nothing to do with Dutch territorial jurisdiction over any islands whatever."¹⁴⁵

¹⁴³ MM pp. 67-68, paras. 142-143.

¹⁴⁴ See ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Reply of Malaysia*, at p. 35, para. 3.21.

The Court agreed, and said in its Judgment:

“In the opinion of the Court, it cannot be deduced either from the report of the commanding officer of the *Lynx* or from any other document presented by Indonesia in connection with Dutch or Indonesian naval surveillance and patrol activities that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia.”¹⁴⁶

4.49 In the incident in question, the Temenggong’s boats were in fact being escorted to the vicinity by the British gunboat.¹⁴⁷ The suppression of piracy in the Straits of Malacca and Singapore was, at that time, an essentially British enterprise, for which the British authorities sought the contribution and assistance of friendly local chiefs.¹⁴⁸ The Temenggong’s activities in relation to the suppression of piracy were carried out at the request of the British and he was merely one of several subordinate participants in a wider British undertaking.¹⁴⁹

4.50 Malaysia’s argument based on the Temenggong’s participation in the suppression of piracy fails completely to prove, and is also irrelevant to the determination of, title to Pedra Branca.

¹⁴⁵ *Ibid*, at p. 37, para. 3.26.

¹⁴⁶ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 139.

¹⁴⁷ Malaysia acknowledges that the Temenggong’s boats proceeded to the vicinity in the company of a British gunboat – *see* MM p. 67, para. 142.

¹⁴⁸ Tarling N., *Piracy and Politics in the Malay World* (1962), at pp. 67-68; Miller H., *Pirates of the Far East* (1970), at p. 41.

¹⁴⁹ *See* Speech of Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) at Ceremony for Presentation of Sword to the Temenggong *quoted in* “Presentation of a Sword to H.H. the Tomongong Sree Maharajah of Johore”, *Straits Times* (5 Sep 1846) (MM Vol. 3, Annex 52).

2. *Temenggong's Visit to Pedra Branca on 2 June 1850*

4.51 Malaysia has referred to the visit of the Temenggong to Pedra Branca on 2 June 1850 and his overnight stay on the island as “suggest[ing] that he considered himself as being on his own territory”.¹⁵⁰ Singapore will deal with this episode fully in Chapter V below. It is sufficient now to note that Malaysia’s suggestion has no factual basis and that in fact the Temenggong visited Pedra Branca with British permission, and acted throughout his stay as a guest of Thomson, a British official.¹⁵¹

3. *Alleged Activities of Orang Laut*

4.52 Another piece of “evidence” relied on by Malaysia was the piracy perpetrated by the Orang Laut in the waters of Pedra Branca.¹⁵² Malaysia asserts that “most of the pirates were considered to be subjects of Johor, in particular those who were ‘Orang Laut’ or ‘Orang Selat’ by origin”.¹⁵³

4.53 Malaysia’s argument – that the piratical acts of the Orang Laut (allegedly subjects of the Temenggong) constitutes evidence of Johor’s ownership of Pedra Branca – has no substance at all. Certainly, there is no rule of international law

¹⁵⁰ MM p. 70, para. 149.

¹⁵¹ The visit of the Temenggong is discussed in further detail below, at paras. 5.102 to 5.106.

¹⁵² The phrase “Orang Laut” literally means “sea people” in Malay, and is a generic term referring to sea dwelling peoples throughout South East Asia. They are commonly referred to by Europeans as “sea gypsies”, due to their nomadic disposition and their propensity to engage in peddling trade in a manner reminiscent of the Gypsies in Europe. These Orang Laut came from many tribes and areas in the region. For example, Orang Laut of Bajau origin, usually known as “Orang Bajau Laut” or simply “Bajau Laut” were distributed across the entire region, with a higher concentration around the coast of Borneo.

¹⁵³ MM p. 67, para. 141.

that the piratical activities of a State's subjects in a particular area can somehow confer sovereignty upon that State.

4.54 Malaysia has also argued that the *Rules for Lightkeepers* drafted by J.T. Thomson for the Horsburgh Lighthouse provides “further evidence that a clear distinction existed, in the minds of those involved, between sovereignty over the island and the ownership of the lighthouse”.¹⁵⁴ Malaysia based this argument on the observation that those rules only required lightkeepers to exclude “natives of the *Orang Laut* tribe” from the lighthouse building, but did not expressly require lightkeepers to exclude them from the island.¹⁵⁵ This is an outlandish argument made without regard to the context of the *Rules for Lightkeepers*. Nothing in the Rules implied that the British did not consider themselves sovereign over the island. The *Rules for Lightkeepers* did not expressly require the lightkeepers to actively prevent the native tribes from landing on the island for the very simple reason that the lighthouse was lightly manned and located in a very isolated and remote position. If attacked by pirates and outnumbered, it would have been imprudent for the lightkeepers to leave the lighthouse to try to expel them from the island. The best defence, and the safest course of action, was for the lightkeepers to defend themselves from inside the lighthouse. Thomson has explained this fully in his *Account*.¹⁵⁶

¹⁵⁴ MM p. 68, para. 145.

¹⁵⁵ MM p. 68, para. 143-145.

¹⁵⁶ Thomson's *Account*, *supra* note 67, at pp. 391-392 (SM Vol. 4, Annex 61, pp. 492-493), where Thomson writes:

“It is the most approved practice in modern Light-house engineering, to erect accommodation for the light-keepers *separate* from the tower or pillar that carries the lantern, for, notwithstanding the greatest precautions are adopted, the minute particles of dust that always imperceptably [*sic*] fly about the rooms of dwellings, penetrate to and affect all other parts of the same building, and which falling on and covering every article cannot but act prejudicially on the delicate apparatus now used for Light-house illumination ... *But in the position of Pedra Branca, an object more important than this seemed to consist in the safety of the light-keepers from attack by pirates and other evil-disposed persons. Its solitary position and great distance from inhabited places,*

4. Church's Letter of 7 November 1850

4.55 Malaysia next refers to Resident Councillor Church's letter of 7 November 1850. After expressing doubt on the necessity of establishing a station *on the mainland* at Point Romania to provide protection to the lighthouse and its inmates (as recommended by Thomson in his letter dated 2 November 1850), Church stated in the letter that "Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction". Malaysia extrapolates the following conclusion from these words:

"Thus for the British authorities in the Settlement of Singapore, the establishment of a naval force *in the vicinity* of Point Romania would have required the Temenggong's authorization."¹⁵⁷ [emphasis added]

Malaysia appears to be implying that because the establishment of a "naval force *in the vicinity* of Point Romania" required the Temenggong's authorisation, he must have had authority over Pedra Branca as well.

4.56 Malaysia's argument is based on a distortion of Thomson's and Church's references in their respective letters of 2 November 1850 and 7 November 1850. Thomson advocated the establishment of an aid station at Point Romania. Church described Thomson's proposal as one for "the Establishment of a *station near Point Romania*". Neither wrote about "the establishment of a *naval force*

might, were this point not attended to, have subjected the establishment to molestation, not only from the sea tribes of the immediate vicinity, who are notorious for their piratical propensities, but from the Chinese junks which in numbers annually commit depredations on all they think they can safely attack. ... Under these circumstances I considered that a tower having accommodation for the light-keepers, with rooms for stores, provisions and water for 6 months, would be the most suitable for the position; this tower to be entered by strong doors reached by a ladder, which could be drawn up inside when necessary, to prevent access. This plan, it appeared to me, would amply suffice to deter any class of natives from attacking the building, and as the establishment now consists of 8 men with fire arms for each there can be no fear of their not being able to resist any attempt made against them." [Emphasis added]

¹⁵⁷ MM p. 69, para. 147.

in the vicinity of Point Romania”, as alleged by Malaysia. Their letters addressed the proposal to establish an aid station on *mainland Johor*, not the placement of a naval force in the waters around Pedra Branca. Malaysia’s approach is no more than an exercise in linguistic gymnastics in order to hide the fact that Church’s words strongly support Singapore’s case. The real significance of Church’s letter is that he, the most senior British official in Singapore after the Governor, drew a clear distinction between mainland Johor (Point Romania) where the British possessed no legal jurisdiction, and Pedra Branca where the British had jurisdiction (and the Temenggong had none).

5. *Evidence that the Temenggong Lacked Authority in the Vicinity of Pedra Branca*

4.57 Malaysia has made much of fishing and piracy in the vicinity of Pedra Branca by people considered to be subjects of the Temenggong as evidence of the Temenggong’s jurisdiction over Pedra Branca. However, Malaysia has not produced any evidence that these fishermen and pirates were *all* subjects of the Temenggong or that the waters of Pedra Branca were frequented *exclusively* by his subjects. Thomson’s *Account* shows that the natives he encountered came from other islands that were not within the jurisdiction of the Temenggong.¹⁵⁸ Singapore has already referred to Church’s letter of 7 November 1850 which shows that the Temenggong had no authority on and in the vicinity of the Pedra Branca. In any event, as a matter of international law, fishing activities are private acts and have no legal relevance.¹⁵⁹

¹⁵⁸ Thomson’s *Account*, *supra* note 67, at p. 457 (SM Vol. 4, Annex 61, p. 560).

¹⁵⁹ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 140. *See also*, para. 3.12 above.

4.58 Further, it should be noted that the situation concerning Orang Laut in this case is in many respects the same as the situation concerning a similar tribe of sea gypsies – the Bajau Laut – that featured in the *Indonesia/Malaysia* case. The Court noted in that case:

“Malaysia relies on the ties of allegiance which allegedly existed between the Sultan of Sulu and the Bajau Laut who inhabited the islands off the coast of North Borneo and who from time to time may have made use of the two uninhabited islands [i.e., *Ligitan and Sipadan*]. The Court is of the opinion that such ties may well have existed but that they are in themselves not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to these two small islands or considered them part of his possessions. Nor is there any evidence that the Sultan actually exercised authority over Ligitan and Sipadan.”¹⁶⁰

4.59 By the same token, even if there were ties of allegiance between the Orang Laut who fished in the vicinity of Pedra Branca and the Sultan or Temenggong of Johor – and such ties have not been demonstrated by Malaysia – they would not convert the occasional presence of these Orang Laut into evidence of the Sultan’s or Temenggong’s sovereignty over the island. Just as in the *Indonesia/Malaysia* case, there is absolutely no evidence here that the Sultan or Temenggong of Johor ever exercised any authority over Pedra Branca.

4.60 It is also pertinent to note that, in the *Eritrea/Yemen* arbitration, even temporary residence of a few months at a time by fisherman on barren islands was considered insufficient to prove title.¹⁶¹ In the case of Pedra Branca, no evidence of any form of residence, however temporary, has been produced by Malaysia.

¹⁶⁰ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 110.

¹⁶¹ *Eritrea/Yemen Arbitration (Phase One)*, *supra* note 97, at paras. 347-357, in particular, paras. 353-355.

4.61 Indeed, and finally, a fully-documented incident in 1861 concerning some Singapore fishermen shows conclusively that the Temenggong had no authority whatever over the waters around Pedra Branca.¹⁶² In 1861, some Chinese fishermen resident in Singapore (and thus British subjects)¹⁶³ were attacked by some Johor Malays when fishing in waters *near the coast of mainland Johor*.¹⁶⁴ Their boats and nets were also seized and detained. The Singapore fishermen lodged a complaint with the British Resident Councillor in Singapore, claiming that they had been fishing *near Pedra Branca*, and were attacked near the Johor coast on their way back to Singapore. They sought the protection of the British authorities, which they submitted was “their right as naturalized British subjects”.¹⁶⁵ The British authorities, believing that the fishermen had been fishing near Pedra Branca, took up their complaints with the Temenggong without hesitation.¹⁶⁶ However, subsequent investigations into the complaint showed that the fishermen had not told the truth and that they had indeed been fishing in waters near the Johor coast.¹⁶⁷

4.62 The fact that the Singapore fishermen chose to lie about the location of their fishing activities gives rise to the irresistible inference that they were aware that the Temenggong exercised no authority whatever over Pedra Branca, and

¹⁶² See Letter from Cavenagh O. (Governor of the Straits Settlements) to the Secretary to the Government of India dated 17 July 1861 (with 9 enclosures), attached to this Counter-Memorial as Annex 19.

¹⁶³ *Ibid*, at pp. 2 and 6 (Annex 19, pp. 190 and 194).

¹⁶⁴ *Ibid*, at p. 2 (Annex 19, p. 190).

¹⁶⁵ See the Petition from 41 Chinese Fishermen, inhabitants of Singapore, to the Resident Councillor of Singapore (undated), attached as part of Annex 19, at pp. 193-194.

¹⁶⁶ See Letter from Cavenagh O. (Governor of the Straits Settlements) to the Temenggong of Johor dated 15 May 1861, attached as part of Annex 19, at p. 194.

¹⁶⁷ See Letter from the Temenggong of Johor to Cavenagh O. (Governor of the Straits Settlements) dated 17 July 1861, attached as part of Annex 19, at pp. 196-202. In particular, see para. 3 of the letter (Annex 19, p. 197). The various depositions attached to the letter confirm that the Singapore fishermen had been fishing near the Johor coast and not near Pedra Branca.

that the waters around Pedra Branca came under British protection and jurisdiction. This is the logical and natural explanation for their giving the false account. They were laying the foundation for the British authorities to seek redress on their behalf and retrieve their fishing equipment. As they had anticipated correctly, the British took up their complaints with the Temenggong, and the obvious conclusion from the British action is that they had jurisdiction over Pedra Branca and its territorial waters.

Section III. Conclusions

4.63 From the discussions in Chapter III and this Chapter, it can be concluded that:

- (a) Malaysia has not explained and is unable to explain how her alleged “original title” came about. When examined under classical international law concepts, Malaysia has failed to prove her title. Even when examined under traditional Malay concepts of sovereignty, Malaysia’s claim to “original title” also fails. There is clearly no such “original title” on any basis;
- (b) Malaysia’s claim to original title to Pedra Branca based on the ownership of both coasts of the Singapore Strait by the Johor-Riau-Lingga Sultanate at some time in the past is nothing more than a claim based on proximity, a claim that is of no legal relevance in this case;
- (c) Neither the Johor-Riau-Lingga Sultanate nor the State of Johor had ever displayed an intention to claim Pedra Branca, nor had they ever exercised State authority on or in relation to Pedra Branca. Malaysia has produced no evidence that points to a single exercise of State authority on or in relation to Pedra Branca either by the Johor-Riau-Lingga Sultanate or the State of Johor. The Orang

Laut activities alleged by Malaysia were private activities which could not have conferred title to territory;

- (d) No Malay ruler had taken any interest in Pedra Branca, and there is not a single historical document which has positively attributed Pedra Branca to the Johor-Riau-Lingga Sultanate or the State of Johor;
- (e) At the time when the British took possession of Pedra Branca, it was not regarded as a territorial possession of Johor.

CHAPTER V
RECAPITULATION OF THE BASIS OF TITLE TO PEDRA
BRANCA: THE TAKING OF LAWFUL POSSESSION BY AGENTS
OF THE BRITISH CROWN

Section I. Introduction

5.1 The purpose of the present Chapter is to rebut both the legal arguments and connected assertions of fact contained in Chapter 6 of the Malaysian Memorial. Whilst the apparent focus of that Chapter is the permission of Johor to build a lighthouse (allegedly on Pedra Branca), the arguments advanced involve a substratum of flawed premises and assumptions. As a consequence, Singapore has found it appropriate, in Section II of this Chapter, to recapitulate the basis of her title to Pedra Branca and the pertinence of the principles of general international law applicable at the material time.

5.2 Sections III, IV and V of the present Chapter are devoted to a detailed examination of the long sequence of the relevant British documents and the demonstration that the Malaysian Memorial has misrepresented the substance of Butterworth's letter dated 28 November 1844 by proposing that Butterworth was referring to Pedra Branca as well as Peak Rock.

Section II. The Basis of Claim

5.3 At this stage it is appropriate to recapitulate the basis of Singapore's claim (or title). The basis of claim is the taking of lawful possession of Pedra Branca by the agents of the British Crown in the period 1847 to 1851. This taking of possession was not protested by Johor and there were no competing acts of any other sovereign. In the circumstances the intention of the British Crown was to establish sovereignty, that is to say, an exclusive title under

general or customary international law to the island and its appurtenant rocks and waters.

5.4 The title to Pedra Branca was acquired by the United Kingdom in accordance with the legal principles governing acquisition of territory in the period 1847 to 1851.¹⁶⁸ In the applicable law the key legal principle was the requirement of an intention to take possession permanently and with the intention of acquiring sovereignty in terms of public international law.

5.5 The existence of intention depended on the provision of evidence but no particular formalities were called for. This was the position in the British practice of the time.

5.6 The position is set forth very lucidly in the passage from Roberts-Wray already quoted in the Singapore Memorial.¹⁶⁹ In a fuller version, the passage reads as follows:

“Annexation, in a broad sense, is a fourth method of acquisition of Colonies. 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. Even if the root of title is discovery, that, though important from the international point of view, is not *per se* a method of acquisition. In international law it must be followed by effective occupation; in municipal law ownership should somehow be asserted, preferably by formal document, such as an instrument of annexation. The first formal instrument made with respect to the Falkland Islands Dependencies and the British Antarctic Territory appears to have been Letters Patent dated July 21, 1908, providing for their government.”¹⁷⁰

¹⁶⁸ SM pp. 79-86.

¹⁶⁹ SM p. 74, para. 5.90.

¹⁷⁰ Roberts-Wray K., *Commonwealth and Colonial Law* (1966), at pp. 107-108.

5.7 This author does not indicate that an instrument of annexation is mandatory, either in international law or in municipal law. In any case, the governing principle is intention, and Roberts-Wray is clear that the unilateral manifestation of the will of the Crown is a sufficient basis of title.

5.8 In the Malaysian Memorial it is contended that the consistent British practice in the annexation of territory involved “formal and rather standardised” acts of taking of possession of territory. A passage from the work of Keller, Lissitzyn and Mann is quoted to support this thesis.¹⁷¹

5.9 The Malaysian thesis is built on sand. The standard works on British practice are ignored.¹⁷² More importantly, the applicable law is general international law and not British practice. In any event there was no distinction between the position in general international law and the standard adopted in British practice. Both eschewed any requirement of formality.

5.10 There is a further flaw in the Malaysian position. The practice relied upon relates to cases of acts of annexation *by British subjects*, and the principle here was the requirement that the will of the Crown should be operative. This is very clear from the authoritative sources. The normal practice is that when a British subject purports to acquire title over territory, this can be converted into title by occupation only upon adoption by the Crown.¹⁷³

¹⁷¹ MM pp. 73-74, paras. 158-160.

¹⁷² The standard works include the following: Hall W.E., *A Treatise on International Law* (8th ed., 1924); Smith H.A., *Great Britain and the Law of Nations*, Vol. 2 (1935); McNair, *International Law Opinions*, Vol. 1 (1956); Roberts-Wray K., *Commonwealth and Colonial Law* (1966).

¹⁷³ See McNair, *International Law Opinions*, Vol. 1 (1956), at pp. 295-298, 314-319.

5.11 The position is set out by the classical writer, W.E. Hall, as follows:

“In order that occupation shall be legally effected it is necessary, either that the person or persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or else that the occupation shall subsequently be ratified by the state. In the latter case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorised occupants. If, for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess upon which the right of property by occupation is grounded, are brought fully together. But if an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorised colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of performance, and not being permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist.”¹⁷⁴

5.12 Thus, the test remains that of the manifestation of the will of the Crown. The proposition by Keller, Lissitzyn and Mann is not relevant and has no application to the British occupation of Pedra Branca. Instead, as explained above, in some cases, symbolic acts effected by the individuals in the absence of a commission from the Crown were not sufficient in themselves to generate title, except when the ratification of the Crown had been effected. This again, is of no relevance to Pedra Branca.

¹⁷⁴ See Higgins P., *Hall's International Law* (8th ed., 1924), at p.128.

5.13 The Malaysian argument in this connection thus lacks any sound legal foundation. It also runs counter to common sense. The agents of the Crown responsible for planning and constructing the Horsburgh Lighthouse were acting upon the express mandate of the British Crown, a mandate which was the originating element of the whole enterprise. The result was in sharp contrast to the cases of acts of British subjects relied upon by Malaysia in which no title could result until ratification was forthcoming.

5.14 The Malaysian Memorial seeks to establish two propositions (intended to apply in conjunction) as follows:

First, “[i]n all the cases in which Britain’s intention was the establishment or the assertion of British sovereignty... that act was accomplished in a formal manner, involving a formal claim of sovereignty, the hoisting of the Union Jack and other manifestations of that intention, followed by some official proclamation of annexation”.¹⁷⁵

Secondly, “[t]he absence of a British act taking possession of Pulau Batu Puteh testifies to the fact that at no time did Britain have the intention of establishing sovereignty over it”.¹⁷⁶

5.15 The assertions relating to British practice have several fundamental flaws. The correct approach must involve reference to the applicable law, that is, the general international law of the relevant time. The criterion prescribed by international law was the intention of the state concerned to acquire title. As it has been demonstrated above, the British approach was essentially the same and,

¹⁷⁵ MM pp. 74-75, para. 161.

¹⁷⁶ MM p. 76, para. 164.

in particular, there was no mandatory requirement of a formal taking of possession.

5.16 The British practice must be appreciated in this general ambit. As a matter of administrative convenience, Letters Patent would be issued in some cases but such measures were not the necessary prerequisite of claiming sovereignty. Such measures were of course *sufficient* to evidence intention to claim title, but they were not the only means of evidencing such intention.

5.17 There are further flaws in the Malaysian argument. Because the Malaysian position rests on the (invented) premise that a claim had to be accomplished “in a formal manner”, it is assumed that the absence of such formality in the case of Pedra Branca is fatal to Singapore’s case. This reasoning involves the usual *non sequitur*. The criterion was the manifestation of an intention to claim sovereignty and this could constitute evidence either with or without “formalities”.

5.18 More significantly, the Malaysian Government argues that, in relation to certain other territories, British practice was different. In the words of the Malaysian Memorial:

“Nothing of this sort occurred on Pulau Batu Puteh. The absence of a British act taking possession of Pulau Batu Puteh testifies to the fact that at no time did Britain have the intention of establishing sovereignty over it. Unlike Cocos (Keeling) Islands and Christmas Island, no further incorporation of Pulau Batu Puteh into the Colony of the Straits Settlements by way of Letters Patent, Order in Council, Proclamation or otherwise occurred. At no time did Pulau Batu Puteh become part of the territory of Singapore.”¹⁷⁷

5.19 The answer to this argument is simple. There was no requirement of British practice that the cases of the Cocos Islands and Christmas Island should

¹⁷⁷ MM p. 76, para. 164.

be dealt with in the same manner as Pedra Branca. The British conduct in the period 1847 to 1851 constituted a pattern of State activities which unequivocally indicated an intention to acquire sovereignty and exclusive possession.

5.20 In this context it is instructive to examine the data presented by Malaysia in relation to the Cocos Islands, which is as follows:

“Of particular interest are the cases of the Cocos (Keeling) Islands and the Christmas Island. In 1857, Captain Fremantle in command of *HMS Juno* took possession of the Cocos Islands on behalf of the British Crown. In 1878, the British Government authorised its colonial authorities in Ceylon to exercise administrative control over the Cocos (Keeling) islands. On 1 February 1886, Letters Patent appointed the Governor of the Straits Settlements to be Governor of the Cocos (Keeling) Islands and authorised a transfer of those islands to the Colony of the Straits Settlements. Ordinance XVIII of 18 September 1903 provided that ‘for administrative purposes [the Cocos Islands] be incorporated with and form part of the Settlement of Singapore’, quoting the Proclamation of 15 July 1903, by which ‘the boundaries of the Colony of the Straits Settlements should be extended so as to include the Cocos Islands.’”¹⁷⁸ [footnotes omitted]

5.21 If these data are compared with the activities relating to Pedra Branca in the period leading up to the inauguration of the lighthouse, can it be credibly argued that the modalities of possession relating to the Cocos Islands are in any sense of superior quality, legally and politically, than those relating to Pedra Branca?

5.22 The absence of common sense from the substance of the Malaysian argument is even more apparent in relation to certain other examples. The Malaysian Memorial provides, as an example of an assertion of sovereignty “accomplished in a formal manner”, the deposit of a cylinder in which there was

¹⁷⁸ MM p. 75, para. 162.

a document taking possession of the territory.¹⁷⁹ Thus, such an act is proposed as an act more substantial in character (perhaps because it is supposedly “formal”) than the pattern of British Government activities concerning Pedra Branca which are detailed in Chapter V of the Singapore Memorial. In this context the Court is asked to consider that a process lasting more than four years, and involving the appropriation of an island and the construction of a major lighthouse for State purposes, as evidence of *animus occupandi*, should carry less weight legally than the “formal” deposit of a cylinder containing a document.

5.23 Malaysia invokes the British Applications in the *Antarctica* cases as the basis for her proposal that such an act as the deposit of the cylinder containing a document involves “a formal claim of sovereignty”.¹⁸⁰ But the Court should not be persuaded into believing that this was the British position.

5.24 The statement relied upon, indirectly and without actual quotation, by Malaysia, is as follows:

“In 1829, Captain H. Foster, R.N., in H.M.S. *Chanticleer*, effected a landing on one of the coastal islands, Hoseason Island off West Graham Land, and deposited there a copper cylinder in which was a document taking possession in the name of King George IV.”¹⁸¹

This statement appears in the United Kingdom Applications instituting proceedings against Argentina and Chile. In both Applications, the statement appears under the same heading: “Origins of the British Titles, Historic

¹⁷⁹ MM at p. 74, para. 161, referring to *ICJ Pleadings, Antarctica Cases (United Kingdom v. Argentina; United Kingdom v. Chile)*, p. 8 at p. 12; and p. 48 at p. 52 respectively (4 May 1955).

¹⁸⁰ MM pp. 74-75, para. 161.

¹⁸¹ See *ICJ Pleadings, Antarctica Cases (United Kingdom v. Argentina; United Kingdom v. Chile)*, p. 8 at p. 12, para. 10; and p. 48 at p. 52, para. 10 respectively.

Discoveries and Acts of Annexation by British Nationals in the Period 1675 – 1843”.

5.25 So much for the provenance of the statement, and now for the substance of the matter. In neither Application is it contended that such acts of themselves can confer title. The Applications rely on other elements, namely, the display of British sovereignty and recognition by the opposing party, which other elements are clearly necessary to establish title.¹⁸² As the text of these Applications shows, the United Kingdom was relying upon “long-continued and peaceful display of British sovereignty”. In the result the United Kingdom Applications provide no support for the view that “formal” acts were essential, or that they could provide sufficient basis of title without the presence of other necessary elements.

5.26 It is significant that the distinguished international lawyers who were concerned in the development of the British legal strategy regarding the Falkland Islands Dependencies insisted, in their published works, on the need for the actual display of sovereignty and maintenance of title on the basis of actual State activity.¹⁸³

5.27 In any event, even if Malaysia’s insistence on formalities was correct, *quod non*, Singapore notes that British coins, copies of the official trade and revenue figures of the Straits Settlements and a plan of the Town of Singapore

¹⁸² *Ibid*, at p. 37, paras. 45-46 and p. 74, paras. 43-44, in the concluding submissions, respectively.

¹⁸³ See Waldock H., *Disputed Sovereignty in the Falkland Island Dependencies*, 25 Brit. Yr. Bk. Int’l L. 311 (1948), at p. 322-325. (In the relevant period Sir Humphrey Waldock was known to advise the British Foreign Office. His involvement can be inferred from the referenced article); 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 (1955-56), at pp. 49-52, 66-67 and 69-70 (Sir Gerald Fitzmaurice was Legal Adviser [the senior position among the legal advisers] in the British Foreign Office from 1953 to 1960).

were deposited on Pedra Branca during the inauguration ceremony.¹⁸⁴ If, as Malaysia has argued, the deposit of a cylinder in the Antarctica case fulfils the requirements of formality, it is illogical to claim that the deposit of these items on Pedra Branca does not similarly fulfil this requirement. In the final analysis, the criterion is the existence of intention to acquire sovereignty. In the case of Pedra Branca there is a variety of proofs of intention, and these have been set forth in Singapore's Memorial.

Section III. The Question of the Permission of Johor and the Decision of the British Government on Pedra Branca as the Location of the Lighthouse

5.28 In presenting the thesis that the authorities in Johor gave permission to the British Government for the building of a lighthouse on Pedra Branca, the Malaysian Government misconstrues the key documents and also fails to give a complete picture of the process of decision-making on the part of the British Government. In order to make the necessary corrections both of general perspective and of detail, the Government of Singapore will adopt a strictly chronological account of the decision-making process.

5.29 As a preparatory step toward understanding the history it is useful to refer to Map 9 of the Singapore Memorial, entitled: "Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malayan Coast by J.T. Thomson, Government Surveyor, 1851", reproduced opposite as **Insert 8**. This Chart shows that Peak Rock, a possible site much referred to in the documents, forms part of the Romania Islands which are obviously adjacent to the Malay Peninsula. Peak Rock is near the eastern edge of the group but it is not in any way separated from the group. Pedra Branca lies 7.7 nautical miles from Point

¹⁸⁴ Thomson's Account, *supra* note 67, at p. 428 (SM Vol. 4, Annex 61, p. 531). The relevant passage from Thomson's Account is quoted in SM p. 53, para. 5.57.

Romania on the Malaysian mainland and forms an independent feature, well separated from the Romania group. This is also abundantly apparent from a perusal of the satellite photograph at **Insert 9**, after page 100 of this Counter-Memorial.

5.30 The history starts in 1836 when merchants in Canton and elsewhere resolved to raise a lighthouse on Pedra Branca in memory of the hydrographer James Horsburgh.¹⁸⁵ However, “nothing definitive was resolved on”.¹⁸⁶ Six years later Jardine Matheson & Co. wrote to the Governor of the Straits Settlements to inform him that they had collected 5,513.50 Spanish dollars for the building of a lighthouse on Pedra Branca.¹⁸⁷ The Governor, S.G. Bonham, reported this to the Government in India and recommended that a lighthouse be built on Barn Island.¹⁸⁸ The proposal was not acted upon because the British Crown was reluctant to impose port dues on vessels calling at Singapore for the maintenance of the lighthouse.¹⁸⁹ In 1844 the project to build a lighthouse received a fresh impetus and by 1846 the question of the site was finally resolved.

¹⁸⁵ See Memorial from Merchants, Mariners and others Interested in the Trade and Navigation of the Straits of Singapore to Auckland G. (Governor General of India in Council) dated 29 Dec 1836 (SM Vol. 2, Annex 6).

¹⁸⁶ See Letter from Jardine Matheson to Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) dated 1 Mar 1842 (SM Vol. 2, Annex 8).

¹⁸⁷ The amount collected by Jardine Matheson & Co. was less than one-quarter of the total cost of construction, which was 23,665.87 Spanish Dollars, or 53,134 Rupees. See SM p. 54, para. 5.60.

¹⁸⁸ 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 (SM Vol. 2, Annex 9).

¹⁸⁹ 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 (SM Vol. 2, Annex 10).

5.31 On 20 April 1844 the then Governor of the Straits Settlements, W.J. Butterworth, wrote to Captain Sir Edward Belcher asking for his advice on the most advantageous site for the erection of a lighthouse in memory of James Horsburgh. In response Belcher recommended Peak Rock as the site.¹⁹⁰ Belcher's advice was acknowledged with gratitude by Butterworth.¹⁹¹

5.32 On 3 October 1844, Butterworth wrote to Captain C.E. Faber, the Superintending Engineer, in the following terms:

“ I have the honor to forward for your information the accompanying Copy of a letter from Captⁿ. Sir Edward Belcher C.B. relative to the site for a Light House at the entrance of the China Sea.

2. I should mention that some years since, Funds were raised in China with a view of erecting a testimonial to the memory of the late celebrated Hydrographer James Horsburgh Esq^{te}.

3. At a meeting of the subscribers a wish was expressed that the contribution should be devoted to the Building of a Light House bearing the name of Horsburgh on Pedro Branco, at the entrance of China Sea, or on such other locality as might be deemed preferable by the Government.

4. The question of erecting a Light House on Barn Island was submitted to the Supreme Governm^t by the late Governor of these Settlements, but the position involved the necessity of a Military Guard, Special Superintendant and a large Establishment for this purpose, and the measure was accordingly abandoned.

5. The Funds amounting to 5513 D^{rs} are still forthcoming, and I am desirous of again submitting the question to the supreme government, backed by the approved experience and confirmed judgment of so talented an Officer as Captⁿ Sir Edward Belcher C.B. whose able letter, will prepare you for the call I am about to make on your acknowledged acquirements, for a report of the probable expenses that would be incurred in carrying out Sir Edward Belcher's views.

¹⁹⁰ 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 (SM Vol. 2, Annex 11).

¹⁹¹ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Belcher E. (Captain of H.M.S. Samarang) dated 2 Oct 1844, attached to this Counter-Memorial as Annex 9.

6. In the course of a few days I intend to visit Point Romania in the steamer when I shall request the favor of your attendance in furtherance of the Philantropic resolution of the committee for the Horsburgh testimonial.”¹⁹²

5.33 The first paragraph of the letter refers to Belcher’s letter to Butterworth, dated 1 October 1844, in which Belcher recommended Peak Rock as the most advantageous site. While paragraph 3 indicates the preference of the initial subscribers for Pedra Branca, Governor Butterworth eventually decided upon Peak Rock after receiving Captain Belcher’s recommendation on 1 October 1844.

5.34 The Malaysian Memorial refers¹⁹³ to the letter from John Purvis & Co. to Governor Butterworth dated 31 October 1844, which reads as follows:

“We have the honor to acknowledge receipt of your letter of yesterday in which you request us to inform you whether the funds subscribed in China to the Horsburgh Testimonial are still forthcoming for the purpose of aiding in the erection of a Light House in the vicinity of Pedra Branca.

In reply we beg to state the order given to us in 1842 by Messrs. Jardine Matheson & Co. to pay the amount of subscriptions into the hands of Government here, whenever they would pledge themselves to construct a Light House in the vicinity of Pedra Branca has not been rescinded.”¹⁹⁴

5.35 The Malaysian pleading invokes this letter and observes:

“Even at the time when Peak Rock was the lead contender as the site for the construction of the lighthouse, Governor Butterworth continued to refer to the plan as ‘the erection of a Light House in the vicinity of Pedra Branca’. Thus the construction on Pulau Batu Puteh of the Horsburgh

¹⁹² See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Faber C.E. (Superintending Engineer) dated 3 Oct 1844, attached to this Counter-Memorial as Annex 10.

¹⁹³ MM p. 64, para. 130.

¹⁹⁴ See Letter from John Purvis & Co. to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 31 Oct 1844 (MM Vol. 3, Annex 42).

Lighthouse was envisaged at all stages of the decision-making process, both before and after the permission of the Temenggong and the Sultan of Johor.”¹⁹⁵ [footnotes omitted]

5.36 *First*, Malaysia is *wrong* in stating that *Governor Butterworth* continued to refer to the project as “the erection of a Light House in the vicinity of Pedra Branca” during the period when he decided on Peak Rock. This phrase was not used by Butterworth, but by John Purvis, a private merchant. In fact, the actual phrase used by Butterworth, in his letter of 28 November 1844, is “in the vicinity of Singapore and the opening of the China Sea”.

5.37 *Secondly*, it is simply not correct to state that “construction on Pulau Batu Puteh of the Horsburgh Lighthouse was envisaged at all stages of the decision-making process, both before and after the permission of the Temenggong and the Sultan of Johor”.¹⁹⁵ In actual fact, Butterworth agreed on Peak Rock as soon as he received the recommendation of Captain Belcher on 2 October 1844, as can be seen from Butterworth’s letter to Belcher of that date.¹⁹⁶ Following this, Butterworth commissioned the Government Surveyor, J.T. Thomson, to produce an assessment exclusively of Peak Rock as a site together with an estimate of costs: see the following paragraph. The preference for Peak Rock was confirmed in the letter sent by Butterworth to the Government in India, dated 28 November 1844.

5.38 Following the advice received from Captain Sir Edward Belcher in his letter of 1 October 1844, Butterworth gave instructions to the Government Surveyor, Thomson, to produce an estimate of costs of a lighthouse to be built

¹⁹⁵ MM p. 64, para. 130.

¹⁹⁶ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Belcher E. (Captain of H.M.S. Samarang) dated 2 Oct 1844, attached to this Counter-Memorial as Annex 9.

on Peak Rock. Thomson reported his findings in a substantial letter to Butterworth, dated 20 November 1844.¹⁹⁷

5.39 At this point in the chronological survey of the correspondence available, there is a hiatus. On 25 November 1844, Allie wrote to Butterworth as follows:

“From Sultan Allie of Johore

I have received my friend’s letter, and in reply desire to acquaint my friend, that I perfectly understand his wishes, and I am exceedingly pleased at the intention expressed therein as it (a Light House) will enable Traders and others to enter and leave this Port with greater confidence.

Dated November 25th 1844

True Translation
(Sd) T. Church
Resident Councillor
Translation”¹⁹⁸

5.40 On the same day the Temenggong of Johor wrote to Butterworth in the following terms:

“Translation of a letter from Datto Tamengong of Johore

Compliments

I have duly received my friend’s communication, and understand the contents. My friend is desirous of erecting a Light House near Point Romania. I can have no possible objection to such a measure, indeed I am much pleased that such an understanding is in contemplation I wish to be guided in all matters by the Govt., so much so, that the company are at full liberty to put up a Light House there, or any spot deemed eligible.

¹⁹⁷ 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 (SM Vol. 2, Annex 12).

¹⁹⁸ See Letter from Allie (Sultan of Johore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 25 Nov 1844 (SM Vol. 2, Annex 13, p. 105; MM Vol. 3, Annex 44).

Myself and family for many years have derived support from Singapore, our dependence is wholly on the English Government, and we hope to merit the protection of, and be favoured by the Company on all occasions consistent with propriety.

Dated New Harbour the 25th Nov. 1844

True Translation
(Sd) T. Church
Resident Councillor¹⁹⁹

5.41 Neither Party has been able to produce the letters from Butterworth to which these two letters respond.

5.42 There are no words in “Sultan” Allie’s reply which purports to identify the geographical scope of the permission. As for the Temenggong’s letter, the language of identification used is imprecise. The reference is to a “Light House near Point Romania”. Peak Rock, the outermost of the Romania group of islands, lies merely 1.5 nautical miles from Point Romania. Moreover, it is clear that Governor Butterworth himself did not consider Pedra Branca to be “near Point Romania”. This is clearly demonstrated by his letter of 22 August 1845, where, in response to a proposal to site the lighthouse on Pedra Branca, he indicated his preference for Peak Rock because Pedra Branca “is so remote from Singapore, at so great a distance from the Main Land...”²⁰⁰

5.43 The Temenggong’s letter does not constitute evidence at the necessary standard of proof that the permission related to Pedra Branca. From that letter, it is clear that the permission sought was only for Peak Rock. In any event, the issue can be resolved by reference to Butterworth’s letter to the Government in

¹⁹⁹ See Letter from the Tamungong of Johore to Governor W.J. Butterworth (Governor of Prince of Wales Island, Singapore and Malacca) dated 25 Nov 1844 (SM Vol. 2, Annex 13, pp. 105-106; MM Vol. 3, Annex 45).

²⁰⁰ 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 (SM Vol. 2, Annex 14).

India dated 28 November 1844.²⁰¹ In the first place the text of the letter of 28 November is to be read in the light of its antecedents, which were as follows:

- (a) Captain Sir Edward Belcher's letter to Butterworth, dated 1 October 1844, in which he recommended Peak Rock as the most advantageous site;
- (b) the instructions given by Butterworth to the Government Surveyor, Thomson, to produce an estimate of costs of a construction on Peak Rock, and Thomson's response dated 20 November 1844; and
- (c) the letters dated 25 November 1844 from Allie and the Temenggong, respectively.

5.44 In her Memorial, Malaysia herself recognises that in this period "Peak Rock was the lead contender as the site for the construction of the lighthouse..."²⁰² and refers to the letter dated 31 October 1844 from John Purvis & Co. to Butterworth.²⁰³

5.45 The letters giving permission, in very imprecise language, are dated 25 November 1844. Butterworth's letter conveying his proposal to the Government in India is dated 28 November 1844. The contents of the letter of 28 November and its antecedents indicate with certainty that the site which was the subject of his proposal was Peak Rock. The text of the letter refers expressly to the advice canvassed from Captain Sir Edward Belcher and this took the form of

²⁰¹ 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 (SM Vol. 2, Annex 13; MM Vol. 3, Annex 46).

²⁰² MM p. 64, para. 130.

²⁰³ See Letter from John Purvis & Co. to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 31 Oct 1844 (MM Vol. 3, Annex 42).

recommending Peak Rock “as the most eligible site”. Belcher’s letter was appended to Butterworth’s letter. In this connection it is to be noted that the pertinent Malaysian Annex (Annex 46) does not include this appendix, and the letter of 1 October 1844 appears separately as Annex 41. Belcher refers to “the Romania Outer Island”. The relevant passage is as follows:

“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^{re}, 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 the 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, but as is frequently practised in our recent 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’.”²⁰⁴ [underline in original]

5.46 Subsequent correspondence confirms that the Romania Outer Island referred to by Belcher is Peak Rock.²⁰⁵

²⁰⁴ 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 (SM Vol. 2, Annex 11; MM Vol. 3, Annex 41).

²⁰⁵ 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 (SM Vol. 2, Annex 14); 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 (SM Vol. 2, Annex 16).

5.47 The text of the Butterworth's letter also refers to the report and estimate of costs which the writer had commissioned from Thomson. The letter from Thomson, dated 20 November 1844, is concerned with Peak Rock, as the opening passages make clear:

“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 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.

1. 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...²⁰⁶

5.48 These incorporations by reference of the Belcher and Thomson letters are conclusive of the identification of the subject as Peak Rock. In any case, further proof emerges from the following passage in Butterworth's letter.

“... I took upon myself to submit the subject for the consideration of Captain Sir Edward Belcher C B in the hope that some site might be determined upon which would be free from the objections referred to, and meet the object in view. The report of that scientific officer I desire to lay before the Right Hon'ble the Governor General of India with the Plan and section of the Rock therein alluded to, prepared by Mr Thomson the surveyor, together with an outline chart, *showing its position with reference to Pedra Branca*, the main land of Johore, and Island of Romania situated about 32 miles in an E by N direction from

²⁰⁶ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Islands, Singapore and Malacca) dated 20 Nov 1844 (SM Vol. 2, Annex 12).

Singapore. 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.”²⁰⁷ [emphasis in italics added, underline in original]

5.49 This passage can only be understood as referring to Peak Rock and it thus confirms that the permission of “Sultan” Allie and the Temenggong related to Peak Rock and not to Pedra Branca. Of particular significance is the reference to the outline chart “showing its position with reference to Pedra Branca.”²⁰⁷

5.50 The “Rock therein alluded to” in the Butterworth letter is necessarily Peak Rock.

Section IV. The Rejection of Butterworth’s Proposal and the Sequel, 1845-1847

5.51 The proposal of Butterworth to the Government in India, to construct Horsburgh Lighthouse on Peak Rock, in the letter dated 28 November 1844, did not find favour with the Government.

5.52 In 1845, the selection of an appropriate site for the construction of a lighthouse was the subject of further exchanges between Butterworth, the Governor of the Straits Settlements, and the Government in India. In a letter dated 22 August 1845 Butterworth indicated to the Government that Peak Rock was still to be given preference over Pedra Branca. And further:

“By a letter from the Under Secy to the Government of India dated the 15th February 1845 No 121 forwarded to me with your Endorsement dated the 24th Idem No 510, it would appear that the proposition for the Erection of a Light House on the site selected by Captain Sir E. Belcher

²⁰⁷ 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 (SM Vol. 2, Annex 13). See also Thomson’s Chart at **Insert 8**, after p. 82, and the satellite photograph at **Insert 9**, after p. 100, for an illustration of the positions of the various places mentioned in this letter.

C.B. viz Peak Rock the outer Romania Island has been recommended for the favourable consideration of the Honble the Court of Directors and I trust that the time is not far distant when the Work may be commenced upon, as a light in that quarter is becoming daily of more paramount importance.”²⁰⁸

5.53 On 15 October 1845, the Court of Directors of the East India Company in London approved the levying of duties in Singapore for the construction and maintenance of a lighthouse on Peak Rock.²⁰⁹ This document also confirms that Butterworth’s letter of 28 November 1844 relates to Peak Rock.

5.54 In a significant letter to Bushby, Secretary to the Government of India, dated 26 August 1846, Butterworth changed his mind and accepted, for the first time, that Pedra Branca was the better site for a lighthouse. The key passages are as follows:

“In my letter under date the 22nd August 1845 No 139, I intimated my unqualified opinion that Pedra Branca would be the best possible position for a Light House so far as the light is concerned, but I was induced to give the preference to Peak Rock in outer Romania Island, the position selected by Captain Sir Edward Belcher C.B. in consequence of the former Island being so remote from Singapore, at so great a distance from the Main Land and so inaccessible at certain seasons of the year.

The recent Survey of the Straits made by the Government Surveyor Mr Thomson and Captain Congalton Commanding the Honble East India Company’s Steamer Hooghly has led to the discovery of so many Rocks and Shoals previously unknown, that I only waited to learn the decision of Government touching the Erection of a Light House, to institute further enquiries regarding the sites viz Pedra Branca and Peak Rock.

On receipt of Mr Melvill’s communication I forthwith called upon the above Officers for their Report which I have honor to enclose, and by which the Honble the President in Council will at once perceive that

²⁰⁸ 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 (SM Vol. 2, Annex 14).

²⁰⁹ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 15 Oct 1845 (SM Vol. 2, Annex 15).

Pedra Branca is the only true position for a Light House at the Entrance of the China Sea.”²¹⁰

5.55 This document provides yet further confirmation that until 1846 Butterworth had preferred Peak Rock as the site on the basis of the advice of Captain Sir Edward Belcher in his letter of 1 October 1844.

5.56 In a letter dated 3 October 1846, the Government in India informed Butterworth that Pedra Branca had been approved for the position of the Horsburgh Lighthouse.²¹¹ On 24 February 1847, the Court of Directors in London approved the change of site and approved the construction of the lighthouse on the condition that this should be based on the original design of a tower of masonry.²¹²

5.57 As Singapore has stated in her Memorial:

“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 Lighthouse. Thomson replied on 9 July 1847 with a description of Pedra Branca and some preliminary plans and estimates.”²¹³ [footnotes omitted]

²¹⁰ 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 (SM Vol. 2, Annex 16).

²¹¹ See 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 (SM Vol. 2, Annex 17).

²¹² See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 Feb 1847 (SM Vol. 2, Annex 18).

²¹³ SM p. 37.

Section V. The Contention of the Malaysian Memorial that the Letters of Permission Extended to Pedra Branca

5.58 The general tendency of the Malaysian Memorial is to suggest that the letters of permission addressed to Butterworth from Allie and the Temenggong of Johor on 25 November 1844 relate not only to Peak Rock but also to Pedra Branca. This distinction is critical in nature because the British Government and its successors considered that Peak Rock formed part of Johor, whilst Pedra Branca did not.

5.59 However, there is a major obstacle to the Malaysian thesis in that neither of the letters of permission refer to Pedra Branca. Consequently, Malaysia finds it necessary to produce a more diffuse and extensive thesis, as follows:

“The ordinary meaning of their answers is clear: the East India Company was free to choose between erecting the lighthouse near Point Romania, or anywhere else in the territory of Johor considered suitable for the purpose of providing guidance to shipping going to or leaving Singapore. The authorisation did not concern only Peak Rock. Moreover, the geographic area for the construction of Horsburgh Lighthouse had also been clearly established at that time: the entrance of Singapore Strait in the South China Sea. The territory in that region was under Johor’s sovereignty, as explained in Chapter 5.”²¹⁴

5.60 In this passage the Malaysian Government in effect evades the task of geographical identification of the proposed site. The location is now broadcast and is described as being “near Point Romania, or anywhere else in the territory of Johor considered suitable...”²¹⁴ In the alternative, the reference is to “the geographic area for the construction of Horsburgh Lighthouse,”²¹⁴ described as “the entrance of Singapore Strait in the South China Sea.”²¹⁴ The result is that no serious attempt at geographical location is made.

²¹⁴ MM p. 61, para. 123.

5.61 In the result, Malaysia faces the same dilemma which affects her case relating to proof of title. Her thesis that the letters of permission related also to Pedra Branca is premised on the proposition that “the territory in that region was under Johor’s sovereignty, as explained in Chapter 5 [*of the Malaysian Memorial*]”.²¹⁵ However this thesis is unsustainable because, as has been pointed out earlier in the present Counter-Memorial,²¹⁶ Malaysia has failed to provide any evidence which relates to Pedra Branca, and thus falls back upon generalised claims to all territory “in that region”, as in the paragraph quoted above.

5.62 In the final analysis this is all beside the point. Butterworth’s letter of 28 November 1844 to the Government in India refers clearly and exclusively to Peak Rock. Both the text of the letter and the related documentation establish this identification beyond any doubt. The reports by both Belcher and Thomson refer unequivocally to Peak Rock. Moreover, in his letter of 28 November 1844, Butterworth states:

“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”.²¹⁷

5.63 This statement clearly points to Peak Rock as the subject of the permission and thus provides no evidence to the effect that Johor had title in respect of Pedra Branca.

5.64 In her Memorial Malaysia seeks to establish that Pedra Branca “is undoubtedly covered by the authorisation given by the Sultan and

²¹⁵ MM p. 61, para. 123.

²¹⁶ See above, at paras. 4.10-4.11.

²¹⁷ 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 (SM Vol. 2, Annex 13).

Temenggong”.²¹⁸ Malaysia offers as a first reason the argument that Pedra Branca “is a place ‘near Point Romania’ ” and “is located only 7.7nm from Point Romania, which is the nearest mainland coast to [*Pedra Branca*]”.²¹⁹ This is disingenuous. The documentation, and, in particular, Butterworth’s letter of 28 November 1844, is unequivocal in identifying the island in question as Peak Rock.

5.65 In any event, proximity is a relative quality. The fact is that Peak Rock forms part of the Romania island group, as the charts demonstrate. Pedra Branca does not form part of the Romania group, and this is seen clearly on Thomson’s Chart of 1851 (**Insert 8**, after page 82) and from the satellite photograph at **Insert 9**, after page 100. None of this bears upon the contents of Butterworth’s letter and its reference to Peak Rock. The references in paragraph 125 of the Malaysian Memorial to the views of John Crawford and J.T. Thomson provide no assistance in the matter. Thus, Thomson is quoted to the effect that Point Romania is “the nearest land to Pedra Branca”.²²⁰ The reference is to the nearest mainland and this fact is hardly conclusive of the point in question. In any case, it is clear that the Romania Island group is well within the territorial sea of Johor.²²¹

²¹⁸ MM p. 61, para. 124.

²¹⁹ MM p. 61, para. 125.

²²⁰ *Ibid*, quoting the Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850 (SM Vol. 3, Annex 47).

²²¹ The Romania Island group is described in Singapore’s Memorial, at p. 13, para. 2.14. It is useful to reiterate here that “... [the] 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.” In fact, the outermost island in this group, Peak Rock, is only about 1.5 nautical miles away from the Johor coast.

5.66 The Malaysian Memorial, in paragraph 126, seeks to persuade the reader that the cartography supports the identification of Pedra Branca as the subject of the permission. This is done by following the proposition in the last sentence of paragraph 125, in which Thomson is quoted as referring to “Point Romania the nearest land to Pedra Branca”, with the text of paragraph 126:

“This is also evident from the *Chart of the Vicinity of the Horsbrough Lighthouse and Adjacent Malayan Coast* drawn by the same J.T. Thomson in 1851, which appears on the opposite page as **Insert 16**. From the very beginning, the cartography was consistent in showing Pedra Branca and Point Romania as the two most important geographic features, close together at the entrance of Singapore Strait.”²²²

5.67 The reference to the Chart prepared under the auspices of Thomson is the only evidence offered and the second sentence of the paragraph is question-begging. Thomson’s Chart shows Pedra Branca well-separated from the Romania group adjacent to the mainland of Johor. This is not apparent from the version of the Chart which appears as Insert 16 in the Malaysian Memorial. This Insert includes an “enlargement” box, the location of which is confusing, but which cannot obscure the fact that Pedra Branca is not part of the Romania group. The relationships can be better seen in the more useful reproduction of the Chart in this Counter-Memorial, as **Insert 8**, after page 82. It is clear that “the cartography” simply does not support Malaysia’s contention that Pedra Branca is covered by the permission. The subject of cartography is dealt with in greater detail in Chapter IX of this Counter-Memorial.

5.68 Malaysia’s alternative argument, in paragraph 127 of her Memorial, is as follows:

“Secondly, even if Pulau Batu Puteh were not considered a place ‘near Point Romania’, it would be covered by the extension of the consent to another ‘spot deemed eligible’. As stressed above, Pulau Batu Puteh

²²² MM p. 62, para. 126.

was at all times one of the spots eligible for the construction of the lighthouse. The Sultan and the Temenggong, who were both resident in Singapore, would have been aware of this.”²²³

5.69 This wording of the Temenggong’s letter hardly takes matters further. The phrase “or any spot deemed eligible” does not detract from the fact that at that time, the *only* location under consideration was Peak Rock – Pedra Branca was not regarded as an eligible spot. Indeed, Butterworth, in his letter dated 28 November 1844 reporting on the letter, considered that the Temenggong had referred to Peak Rock.

5.70 In any case, the Temenggong’s reference to “any spot deemed eligible” could not have referred to Pedra Branca because it is not a spot *near* Point Romania and there are several other islands within the Romania Group which fits that description (as shown in Thomson’s Chart at **Insert 8**, after page 82, and the satellite photograph at **Insert 9** overleaf).²²⁴

5.71 The Malaysian Memorial states that the British authorities “had in mind other possible locations”.²²⁵ This is clear from the documents. However, the Malaysian Memorial in fact asserts that: “They had in mind other possible locations *within the territory of Johor* besides Peak Rock”.²²⁶ This qualification is unjustified, and is not reflected in the documents. Given the practical

²²³ MM p. 62, para. 127.

²²⁴ In fact a light stands today on one of the Romania Islands, half a mile South-West of Peak Rock. This is the island identified as “Pulau Pemanggil” in Inserts 1, 2 and 3 of Malaysia’s Memorial. It is named “Pulau Mungging” on British Admiralty Charts (*see* Map 4 of Singapore Memorial [SM, Vol. 1, after p. 13] and Map No. 13 of the Singapore Counter-Memorial Map Atlas) and labelled as “South Island” in Thomson’s 1851 Chart at **Insert 8**, *after* page 82 above. A photograph of this light appears as an inset to **Insert 9** overleaf. For more information about the establishment of the Pulau Pemanggil/Pulau Mungging light, *see* Notice to Mariners No. 20 of 1931 from Freyberg G. (Master Attendant, Straits Settlements) attached to this Counter-Memorial as Annex 27.

²²⁵ MM p. 62, para. 128.

²²⁶ *Ibid*, emphasis added.

desiderata relating to navigation, much stressed by the Malaysian pleading, why should the Singapore officials confine the choice of site only to “locations within the territory of Johor”?²²⁷ The fact remains that at the end of the day the British officials did not choose Peak Rock or any other location within the territory of Johor. The question of permission thus became moot.

5.72 The actual evidence indicates that the British authorities were well aware of the political contingencies involved. Thus, in the letter of 28 November 1844 Butterworth expressly refers to the fact that Peak Rock “is part of the Territories of the Rajah of Johore...”. The issue of title also appears in the letter from Church to Governor Butterworth, dated 7 November 1850, in which the following passage appears:

“4. I observe Mr Thomson advocates the Establishment of a Station near Point Romania, for the purpose of affording assistance to the inmates of the Light House in case of need, and also to suppress Piracy; an armed party of the strength suggested would, doubtless, be of some Service, but I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an establishment must necessarily occasion. *Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction*; it will of course, be necessary for the Steamer or Gun Boats to visit Pedro Branca weekly; some benefits would also accrue by requesting His Highness the Tumongong to form a village at Romania under the control of a respectable Panghuloo to render assistance to the inmates of the Light House in a case of emergency.”²²⁸ [emphasis added]

²²⁷ It should be noted that one year after Horsburgh Lighthouse began operations, Britain established a second light *outside the limits of any native states*. This was the lightship *Torch* at a place known as 2½ Fathom Bank on the North Sands – See Extracts from *Travaux Préparatoires* of Indian Act No. VI of 1852, attached to this Counter-Memorial as Annex 16; and preamble to Indian Act No. XIII of 1854 (SM Vol. 5, Annex 62, p. 615). This lightship was replaced in 1904 by the One Fathom Bank Lighthouse – see Blue Book for the Colony of the Straits Settlements, 1914, p. V2 (MM, Vol. 3, Annex 66). Clearly, the British officials in Singapore did *not* confine their choice of sites to locations within the territories of native states. (For location of One Fathom Bank Lighthouse, see **Insert 5** after p. 42. Malaysia also accepts that the One Fathom Bank Lighthouse was originally located on the high seas, and only came to be within Malaysia’s territorial sea because of the extension of her territorial sea limit from 3 nautical miles to 12 nautical miles – see MM, p. 102, para. 222).

²²⁸ 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 (SM Vol. 3, Annex 48).

5.73 It is important to have regard to the overall picture and to recall the fact that at no time did the British authorities express any concern about the question of third party title over Pedra Branca.

5.74 In paragraphs 129 and 130 the Malaysian Memorial enlarges on the theme that the British authorities always had several locations under consideration, including Pedra Branca. As pointed out already, this consideration leaves the key issue unresolved. The key issue is the identification of the feature referred to by Butterworth in the letter dated 28 November 1844. This was undoubtedly Peak Rock.

5.75 In two significant passages in the Memorial the Malaysian Government expressly recognises:

First: that the Belcher letter related to Peak Rock;

Secondly: that Butterworth in his letter of 28 November 1844 was referring to Peak Rock.²²⁹

5.76 Moreover, in paragraph 132 the Malaysian Memorial quotes from the *Bombay Times and Journal of Commerce* as follows:

“The Malayan authorities of Johore, in whose territory the Romania Island is situated, not only offer the Island for a lighthouse, but express satisfaction at the prospect of its erection.”²³⁰

5.77 This newspaper source in fact provides no support for the view that the location envisaged by Butterworth was Pedra Branca. The item took the form of the report of a Committee of the Chamber of Commerce “regarding the erection

²²⁹ See MM pp. 64-65, paras. 131-132.

²³⁰ See “Erection of a Light-House on Romania Island” in *Bombay Times and Journal of Commerce* (10 Jan 1846) (MM Vol. 3, Annex 48).

of a Light-house on Romania Island.” The date of the published report was 10 January 1846.

5.78 The content of the report provides no indications that Pedra Branca was the preferred location. The report is accurate in reflecting the options which Butterworth had been examining. The report then emphasises that the opinion of Captain Sir Edward Belcher had been obtained and that he had preferred the Romania Outer Island as the most eligible site. This cannot be identified with Pedra Branca as the following passage from the newspaper report itself demonstrates:

“The Malayan Authorities in Johore, in whose territory the Romania Island is situated, not only offer the Island for a lighthouse, but express satisfaction at the prospect of its erection. The Governor mentioned to the deputation of the Chamber that he had visited the proposed site in the H.C. Steamer Diana, having with him the superintending Engineer of public works in the Straits, whom he had instructed to make an estimate of the cost of the proposed erection –This officer considered that about one, to one and a half, lacs of Rupees would be necessary to complete the work of masonry. This being beyond the sum likely to be available, the Governor instructed Mr Thomson, the Government Surveyor, to submit an estimate; which had been done by the gentleman with great care and detail, and which was accompanied by an offer from a Chinese contractor to erect a granite base of 16 feet for Drs. 2667, and further, if required, a brick tower (exclusive of lanthorn and lamps) for 4,333 Drs addition, or in all, Drs 7,000. The Governor seemed to think that an iron Tower on the granite base, would be preferable to brick, and had suggested the sending of one from England, similar to one erected at Bermuda, at a cost of £1,500. Mr Thomson describes the proposed site as being $\frac{3}{4}$ of a mile East of large Romania Island, $1\frac{1}{2}$ miles from Point Romania, and 32 miles East by North from Singapore town.”²³¹
[emphasis added]

²³¹ See “Erection of a Light-House on Romania Island” in *Bombay Times and Journal of Commerce* (10 Jan 1846) (MM Vol. 3, Annex 48). As shown in **Insert 8**, after page 82 above, the rock “ $\frac{3}{4}$ of a mile East of large Romania Island, $1\frac{1}{2}$ miles from Point Romania” can only be Peak Rock.

5.79 The report of the Government Surveyor, J.T. Thomson, referred to by the newspaper, also confirms that Peak Rock was the location in question: see the letter from Thomson to Butterworth, dated 20 November 1844.²³²

5.80 The Malaysian Memorial pursues the argument with the unfounded assertion that in retrospect “[t]he British authorities in Singapore understood the extent of the consent given by the Sultan and the Temenggong as being applicable to Pulau Batu Puteh”.²³³ In this connection the Malaysian Government refers to Butterworth’s letter to the Government in India dated 26 August 1846.²³⁴

5.81 Care is needed at this point. The language used by Butterworth gives no support to the suggestion that the consent was understood “as being applicable to Pulau Batu Puteh”. What Butterworth wrote was as follows:

“My letters under dates the 28 November 1844 No 150, and 22nd August 1845 No 139 will have pointed out the glaring necessity for a Light House in the position above indicated, but I need hardly observe that the work has not been commenced upon as anticipated by the Secretary to the Honble E.I. C°. I sincerely trust however that the question will receive early consideration, and that the accompanying Copy of a letter, with its enclosures just received from the Chamber of Commerce at Singapore will induce the Honble the President in Council to move the Honble Court of Directors to order an Iron Light House from England for erection on Pedra Branca. *The whole of the Details for the care of Light House as set forth in my letter under date 28 Nov’ 1844, with*

²³² 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 (SM Vol. 2, Annex 12). See also para. 5.38 above.

²³³ MM p. 65, para. 134.

²³⁴ 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 (SM Vol. 2, Annex 16; MM Vol. 3, Annex 51).

*reference to its being located on Peak Rock, will be equally applicable to the new Position.*²³⁵ [emphasis added]

5.82 The associated Malaysian contention is this:

“Amongst the ‘details’ of the letter of 28 November 1844 can be found the consent given by the Sultan and the Temenggong of Johor to the construction of the lighthouse. Governor Butterworth clearly explained to the Government of India that ‘*the whole* of the details’ related to Peak Rock are ‘*equally* applicable’ to Pulau Batu Puteh.”²³⁶

5.83 This passage is misleading. Butterworth (see the penultimate paragraph above) refers to “The whole of the details *for the care of Light House...*” (emphasis added). Malaysia has wrongly transcribed the word “care” as “case”.²³⁷ There are sections in his letter of 1844 which are concerned with “the care” of the lighthouse envisaged but such sections do not include the passage relating to the question of permission. The section in the letter of 1844 which deals with the “care” of the lighthouse is as follows:

“A Light House, if not properly attended, would prove infinitely more perplexing and dangerous to the Mariner, than its total absence. I am therefore of opinion that less than two European and Eight Natives would barely answer the purpose of keeping watch and working the Gun in case of need, I would therefore recommend that two steady Pensioners from the Artillery might be allowed to volunteer for the service, who should receive an additional Salary and Rations, with 8 Malays or Lascars, making the annual cost to the state including the Estimated cost of materials for feeding the light, 2856 Rupees per

²³⁵ 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 (SM Vol. 2, Annex 16; MM Vol. 3, Annex 51).

²³⁶ MM p. 66, para. 135.

²³⁷ Singapore has obtained manuscript copies of the letter of 26 Aug 1844 from three different sources (the National Archives of India, the National Archives of Singapore and the India Office Collection of the British Library) and compared these copies to ascertain the correct transcription. In Singapore’s view, it is evident from all 3 manuscripts that the word transcribed as “case” by Malaysia should read “care”. See Three Manuscript Versions of the 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 Counter-Memorial as Annex 12, where the relevant words have been magnified and highlighted in red.

annum should it be deemed advisable to employ 1st Class Convicts in place of the Malays or Lascars, the expense would be considerably reduced.”²³⁸ [underlining in original]

5.84 Even if the word in Butterworth’s 1846 letter is “case”, this does not help Malaysia’s claim. As Singapore has shown in paragraphs 5.43 to 5.50 above, in the first place those letters of permission cannot be read as extending to Pedra Branca. Moreover, many aspects of Butterworth’s letter of 1844 are simply not applicable to Pedra Branca, for example, Thomson’s survey of Peak Rock. By making the simplistic argument that everything in the 1844 letter relating to Peak Rock applied to Pedra Branca in 1846, Malaysia is simply seeking to evade the difficulties of showing that the 1844 letters of permission applied to Pedra Branca.

5.85 The relevant section of the Malaysian Memorial continues its trail of unfounded assertions with the following passages:

“136. The British authorities in India were also aware that the consent given by the Sultan and the Temenggong included Pulau Batu Puteh, as emerges from the exchange of letters between the Government of India and the Marine Department in 1846 with regard to the request to send an iron lighthouse from England. This exchange includes the reports that Pedra Branca has been approved as the position for erecting Horsburgh Lighthouse and contains the letters of the Sultan and the Temenggong referred to above.

137. The material referred to above confirms that the permission of Johor included different locations envisaged for the construction of the Horsburgh Lighthouse, amongst them Pulau Batu Puteh. There is nothing in it to show that the Sultan and the Temenggong did more than approve the building of a lighthouse on Johor’s territory.”²³⁹

5.86 In reality the British documents in the period 1845 to 1847 provide a simple and consistent picture to the effect that for practical reasons Pedra Branca

²³⁸ 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 (SM Vol. 2, Annex 13).

²³⁹ MM p. 66, paras. 136-137.

was the final choice of site and no reference was made to the issue of the permission of Johore. The following sequence of documents provides the basic materials, and it is unfortunate that the Malaysian Government cites only one document (the letter of 3 October 1846) to support the imaginative picture painted in the two paragraphs of her Memorial quoted above.

5.87 The relevant documents are as follows:

- (a) Butterworth to the Government in India, dated 22 August 1845.²⁴⁰
There is no reference to the issue of permission.
- (b) The Court of Directors of the East India Company to the Governor-General in India in Council dated 15 October 1845.²⁴¹
There is no reference to the issue of permission.
- (c) The Secretary to the Admiralty to the Secretary to the East India Company, dated 18 April 1846.²⁴² There is no reference to the issue of permission.
- (d) The Secretary to the Court of Directors to Butterworth, dated 6 May 1846.²⁴³ There is no reference to the issue of permission.
- (e) Captain Congalton and J.T. Thomson to Butterworth dated 25 August 1846.²⁴⁴ There is no reference to the issue of permission.

²⁴⁰ 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 (SM Vol. 2, Annex 14).

²⁴¹ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 15 Oct 1845 (SM Vol. 2, Annex 15).

²⁴² See Letter from Hamilton N.B. (Secretary to the Admiralty) to the Secretary to the East India Company dated 18 Apr 1846 (MM Vol. 3, Annex 50).

²⁴³ See Letter from the Secretary to the Court of Directors of the East India Company to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 6 May 1846 (MM Vol. 3, Annex 50).

- (f) Butterworth to the Government in India, dated 26 August 1846.²⁴⁵
There is no reference to the issue of permission.
- (g) The Government in India to Butterworth, dated 3 October 1846.²⁴⁶
There is no reference to the issue of permission.
- (h) The Court of Directors of the East India Company to the Governor General of India in Council, dated 24 February 1847.²⁴⁷ There is no reference to the issue of permission.
- (i) J.T. Thomson to T. Church, dated 9 July 1847.²⁴⁸ There is no reference to the issue of permission.

5.88 As Singapore pointed out in her Memorial, it is significant that Church rejected a proposal from Thomson for the building of an outstation near Point Romania on the ground that the location “belongs to the Sovereign of Johore, where the British possess no legal jurisdiction”. The proposal by Thomson

²⁴⁴ See Letter from Congalton S. (Captain of the *Hooghly*) and Thomson J.T. (Government Surveyor) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 25 Aug 1846, attached to this Counter-Memorial as Annex 11.

²⁴⁵ 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 (SM Vol. 2, Annex 16).

²⁴⁶ See 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 (SM Vol. 2, Annex 17).

²⁴⁷ See Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 Feb 1847 (SM Vol. 2, Annex 18).

²⁴⁸ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 9 July 1847 (SM Vol. 2, Annex 21).

appears in his report to Church dated 2 November 1850.²⁴⁹ The response appears in Church's letter to Butterworth dated 7 November 1850.²⁵⁰

5.89 The text of Church's response of 7 November 1850 confirms the contrast between Point Romania, which "belongs to the Sovereign of Johore, where the British possess no legal jurisdiction", and the status *a contrario* of Pedra Branca where the British *do* possess legal jurisdiction. The relevant passage is as follows:

"4. I observe Mr Thomson advocates the Establishment of a Station near Point Romania, for the purpose of affording assistance to the inmates of the Light House in case of need, and also to suppress piracy; an armed party of the strength suggested would, doubtless, be of some Service, but I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an establishment must necessarily occasion. Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction; it will, of course, be necessary for the Steamer or Gun Boats to visit Pedro Branca weekly; some benefits would also accrue by requesting His Highness the Tumongong to form a village at Romania under the control of a respectable Panghuloo to render assistance to the inmates of the Light House in a case of emergency."²⁵¹

5.90 The common sense interpretation of the British documents is that, once the focus had shifted to Pedra Branca, the issue of third party title dropped away. There is no single document extant in which the issue of Johor title is linked to Pedra Branca.

²⁴⁹ See Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850 (SM Vol. 3, Annex 47).

²⁵⁰ 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 (SM Vol. 2, Annex 48).

²⁵¹ 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 (SM Vol. 2, Annex 48).

Section VI. Rebuttal by Singapore of Various Ancillary Contentions in Chapter 6 of the Malaysian Memorial

A. PLANS FOR THE CONSTRUCTION OF A LIGHTHOUSE AT THE ENTRANCE OF THE STRAIT OF SINGAPORE

5.91 The section of the Malaysian Memorial under this rubric (at pages 54 to 59), is intended to establish certain propositions. In Malaysia's words:

“These documents demonstrate three things. First, the construction of the lighthouse was a private initiative. Second, the location of the lighthouse was an open question until 1846. Third, from the very beginning and during the entire decision-making process the site of Pulau Batu Puteh was envisaged as one of the main options for the construction of Horsburgh Lighthouse.”²⁵²

5.92 In her Memorial Singapore has given a detailed account of the origins of the project to build a lighthouse.²⁵³ The origin of the project was a private initiative, but it is somewhat confusing on the part of Malaysia to use the formulation “the construction of the lighthouse was a private initiative”.²⁵⁴ The facts are clear: the necessity of government funding was assumed on all sides.²⁵⁵ Moreover, it was the British Crown which decided whether and on what terms a lighthouse would be constructed. It was the British Crown which took the clearly political decision that the funding would involve a levy on shipping, a factor which at an earlier stage, had been the cause of official opposition. In short, the planning and the construction of the lighthouse were under the exclusive control of the British Government.

²⁵² MM p. 59, para. 116.

²⁵³ SM pp. 33-41, paras. 5.13-5.32.

²⁵⁴ MM p. 59, para. 116, also *quoted in* para. 5.91 above.

²⁵⁵ SM pp. 54-58, paras. 5.60-5.65.

5.93 All the modalities for the construction were determined by the government, including the site of the lighthouse and the ultimate method of public funding. When the lighthouse was completed, it was a government asset. Colonel Butterworth, Governor of the Straits Settlements, officiated at the commencement of construction of the lighthouse, in the presence of invited officials and guests.²⁵⁶ When the construction was complete the lighthouse was commissioned by a party led by the Governor, again accompanied by other officials and guests.

5.94 On completion of the project the Government Surveyor at Singapore, J.T. Thomson, prepared a detailed report at the request of the Governor of the Straits Settlements.²⁵⁷ The Preface of this report clearly indicates the control of the operation by the British Government.²⁵⁸ The text of Thomson’s Account itself begins by describing “[t]he rock on which *the Government determined* on placing the Horsburgh Testimonial”.²⁵⁹

5.95 The second proposition advanced by Malaysia in the passage quoted above is to the effect that “the location of the lighthouse was an open question until 1846”. This is not accurate. Governor Butterworth had decided, unequivocally, on Peak Rock in 1844, and it was in this context that permission to construct on Peak Rock was sought from the Malay rulers and granted. It was only in 1846 that Butterworth changed his mind and decided on Pedra Branca at the instigation of the British Admiralty. The issue has been examined already in

²⁵⁶ SM pp. 51-54, paras. 5.56-5.59.

²⁵⁷ SM p. 34, para. 5.16.

²⁵⁸ Thomson’s Account, *supra* note 67, preface (SM Vol. 4, Annex 61, p. 477).

²⁵⁹ *Ibid*, at p. 378, (SM Vol. 4, Annex 61, p. 479), emphasis added.

the Singapore Memorial.²⁶⁰ The chronological developments have also been examined elsewhere in the present Chapter.²⁶¹

5.96 The third proposition is reflected sufficiently in the documents and it is only necessary to stress that, at the time of the giving of permission by the Johor authorities, it was Peak Rock which was the established preference.

5.97 This section of the Malaysian Memorial closes with the following adumbrations:

“It is also clear that the choice depended mainly upon the identification of the best location from a navigational point of view. In considering the advantages and drawbacks of each site, the question of sovereignty over them was not an issue. There is not a single reference in the correspondence to the effect that the lighthouse would be built on *terra nullius* or that Pulau Batu Puteh was finally chosen because it was *terra nullius*. The lighthouse was a project in the general interest and not a matter of purely national concern.”²⁶²

5.98 This piece of reasoning is not in fact a conclusion of section A of Chapter 6 of the Malaysian Memorial but in reality constitutes an introduction to Section B, the subject of which is the permission of Johor in 1844 and its scope. In other words the argument is that sovereignty was not an issue, because the consent would be granted in respect of islands outside the limits of Singapore. As the Malaysian Memorial suggests:

“In the latter case (at least as far as concerned islands in the British sphere) no difficulty was anticipated in obtaining the consent of the relevant territorial sovereign, given the general beneficial nature of the enterprise.”²⁶²

²⁶⁰ SM pp. 42-46, paras. 5.33-5.44.

²⁶¹ See above, at para. 5.51 *et seq.*

²⁶² MM p. 59. para. 117.

5.99 This convoluted reasoning is not easy to follow. The passage contains an unproven assertion that the island in question would belong to Johor and therefore the consent of “the relevant territorial sovereign” would be required. The assertion tends to contradict the earlier passage (quoted above) in which it is stated that “the question of sovereignty... was not an issue”. But it was certainly an issue linked to the Malaysian thesis based upon the alleged permission of Johor in relation to Pedra Branca. Moreover, the assertion that sovereignty was not an issue is incompatible with the documents. In his important letter to the Government in India, dated 28 November 1844, the Governor of the Straits Settlements, in relation to Peak Rock, had observed that:

“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.”²⁶³

5.100 Moreover, in a letter to Butterworth dated 7 November 1850 (already quoted above, in paragraph 5.89) Church, who had much to do with the planning and organisation of the construction, shows a sensitivity to the issue of sovereignty. In his words:

“4. I observe Mr Thomson advocates the Establishment of a Station near Point Romania, for the purpose of affording assistance to the inmates of the Light House in case of need, and also to suppress Piracy; an armed party of the strength suggested would, doubtless, be of some Service, but I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an establishment must necessarily occasion. Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction; it will of course, be necessary for the Steamer or Gun Boats to visit Pedro Branca weekly; some benefits would also accrue by requesting His Highness the Tumongong to form a village at Romania under the control of a

²⁶³ 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 (SM Vol. 2, Annex 13).

respectable Panghuloo to render assistance to the inmates of the Light House in a case of emergency.”²⁶⁴

5.101 The content of paragraphs 107 to 117 of the Malaysian Memorial fails to produce any cogent considerations to justify either the proposition that Pedra Branca was subject to the sovereignty of Johor or the proposition that the permission accorded by Johor related to Pedra Branca as well as to Peak Rock. In any case, it is clear from all the available evidence that when the British took possession of Pedra Branca to build the lighthouse, they did not consider that Pedra Branca was a territorial possession of the Sultan or the Temenggong.²⁶⁵

B. THE VISIT OF THE TEMENGGONG TO PEDRA BRANCA ON 2 JUNE 1850

5.102 In Paragraphs 148 and 149 of her Memorial, Malaysia places great emphasis on the visit of the Temenggong to Pedra Branca on 2 June 1850. Malaysia argues that this visit “suggests that he [*the Temenggong*] considered himself as being on his own territory”.²⁶⁶ Malaysia further asserts that “[n]o objection was raised either to his presence with his followers or to their activities”²⁶⁶ and “[n]o reference is made to any permission being sought or given for the Temenggong’s presence”.²⁶⁶

5.103 Apart from mere assertion, Malaysia provides no evidence that the Temenggong “considered himself as being on his own territory”. *The fact was that the Temenggong’s visit to Pedra Branca was made with British permission.* Malaysia is only able to claim in Paragraph 149 of her Memorial that “[n]o reference is made to any permission being sought” because she has, once again,

²⁶⁴ 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 (SM Vol. 2, Annex 48).

²⁶⁵ See above, at paras. 4.40-4.45.

²⁶⁶ MM p. 70, para. 149.

omitted a vital reference from the quotation set out in Paragraph 148 of her Memorial. Singapore now sets out the passage in full, showing the words omitted by Malaysia:

**Quotation as it appears in Para.
148 of Malaysia’s Memorial**

“On the evening of the 3rd of June, the Tomungong took his departure. He came in a beautiful fast sailing sampan ... rigged with graceful latteen sails.”

**Actual Passage
from Thomson’s Account**

“On the evening of the 3rd of June, the Tomungong took his departure. He came in a beautiful fast sailing sampan *belonging to the Governor of the Straits Settlements* rigged with graceful latteen sails.”²⁶⁷

[*Words in italics were omitted by Malaysia from para. 148 of her Memorial.*]

5.104 Thomson’s *Account* is clear. The Temenggong arrived in the *British Governor’s boat*. This could only have been done with the Governor’s permission – the Temenggong was on the island at the British Governor’s invitation. The Temenggong was at that time residing in Singapore, and given his friendly relations with the British government in Singapore,²⁶⁷ it was not surprising that he was invited to visit Pedra Branca. As Thomson points out, the Temenggong was “allied to British interests”.²⁶⁷

5.105 There was no evidence that either Thomson or the Temenggong considered that the visit related to any question of title. The Temenggong spent his time fishing and left after one night because he could not tolerate the mosquitoes. Malaysia emphasises that the Temenggong stayed in Thomson’s house during the one night he was on Pedra Branca. Since the Temenggong was Thomson’s guest on Pedra Branca, it was only natural that Thomson did his duty as host to a visiting friendly native chief, by letting the Temenggong stay in his house.

²⁶⁷ Thomson’s *Account*, *supra* note 67, at p. 430 (SM Vol. 4, Annex 61, p. 533).

5.106 The Temenggong's visit on 2 June 1850 took place nine days after the laying of the foundation stone.²⁶⁸ Thomson's house was already erected on Pedra Branca (the Temenggong stayed in it). Contemporaneous paintings by Thomson show that the British marine ensign was flying on Pedra Branca soon after the completion of Thomson's house, even before any significant construction work on the lighthouse began (see Image 13, *after* page 62 of Singapore's Memorial). The Temenggong's visit thus came at a time when the bases of the title of the British Crown were already established. Moreover, the British activities relating to Pedra Branca had involved repeated public activities under the control of British officials and with the assistance of British government vessels. The Temenggong's visit formed a part of these activities, and took place under the auspices of the Governor of the Straits Settlements.

C. MALAYSIAN CLAIMS THAT THE INAUGURATION OF THE LIGHTHOUSE DID NOT INVOLVE A CESSION OR CLAIM OF SOVEREIGNTY

5.107 As a subsidiary argument Malaysia makes the following assertions:

“Further evidence that the British authorities in Singapore did not consider that it had acquired sovereignty over Pulau Batu Puteh can be derived from the form of the ceremonies that took place for the construction and operation of the Horsburgh Lighthouse. This section will demonstrate that the ceremonies that took place for the construction and operation of the Horsburgh Lighthouse were of a completely different kind from those which involved the assumption of sovereignty in British practice.”²⁶⁹

²⁶⁸ The foundation stone ceremony took place on 24 May 1850. The Temenggong was not amongst the invited guests at the ceremony. The ceremony was however publicised in local newspapers a few days later. *See* SM Vol. 3, Annex 45, which is an account of the ceremony in the 28 May 1850 edition of the *Straits Times and Singapore Journal of Commerce*.

²⁶⁹ MM p. 71, para. 151.

5.108 The essence of the argument involves two elements: *First*, that the ceremony did not relate to sovereignty; and, *second*, that the ceremony did not conform with British practice in claiming sovereignty. As with other Malaysian arguments the legal foundation is flawed and consists of a questionable premiss. The questionable premiss is that the applicable law in this case is “British practice” and that British practice involved a ceremonial.

5.109 The applicable law in this case is the principles of general international law of the material time and the criterion which emerges from these principles. The pertinent criterion is the intention of the claimant State evidenced by her conduct. Such conduct may or may not involve a ceremony but the leading element is the existence of clear evidence of intention to acquire sovereignty. The inauguration ceremony was part of a well-developed and impressive pattern of evidence of the intention of the British Crown which evidence began to appear in 1847. This evidence took various forms and has been examined in detail in Chapter V of Singapore’s Memorial.

5.110 The Malaysian position is wrong-footed in another way. As has been demonstrated above, the British practice does not depend on the existence of formalities in any case.²⁷⁰

5.111 The Malaysian argument seeks to play down the official elements in the inauguration of the lighthouse and yet by the time of the inauguration the intention of the British Crown had been manifested in a long sequence of decisions and actions. The inauguration took place on 24 May 1850 and the British activities prior to that date are set forth in Singapore’s Memorial.²⁷¹

²⁷⁰ See above, at paras. 5.5 to 5.27.

²⁷¹ SM pp. 42-69, paras. 5.33-5.79.

5.112 When the sequence of planning and preparation is appreciated properly it becomes clear that it would have been unnecessary to use the inauguration ceremony as the juncture at which sovereignty would be claimed. Sovereignty already existed. The first unequivocal acts of possession occurred in 1847 when Thomson placed the brick pillars on Pedra Branca.

5.113 The inauguration ceremony has been described in detail in Singapore's Memorial.²⁷² The ceremonial took place under the control and auspices of the British Crown, in the person of Colonel W.J. Butterworth, the Governor of the Straits Settlements. The party were taken to Pedra Branca in Government-provided vessels, that is, the Honourable Company's Steamer Hooghly, and the barque Ayrshire in tow of Her Majesty's Steamer Fury. To appear to insist, as Malaysia does, that the Masonic element was dominant is to distort the realities. The official character of the occasion appears from both the account in the *Straits Times and Singapore Journal of Commerce*²⁷³ and in the official account produced by Thomson, the Government Surveyor.²⁷⁴

5.114 In this general context it comes as no surprise that the participation of the Worshipful Master, and the Members of the Lodge "Zetland in the East", was at the express invitation of the Governor of the Straits Settlements. The Governor wrote to M.F. Davidson, the Worshipful Master, on 23 April 1850. Referring to the impending erection of the lighthouse, the Governor made his request in the following terms:

"The philanthropic justification for which this building is to be erected viz the safety of the mariner appears to render the occasion most fitting for the exercise of your craft and I shall esteem it a favour if you the

²⁷² SM pp. 51-54, paras. 5.56-5.59.

²⁷³ See "The Horsburgh Lighthouse" in the *Straits Times and Singapore Journal of Commerce* (28 May 1850) (SM Vol. 3, Annex 45).

²⁷⁴ Thomson's Account, *supra* note 67, at p. 427-428 (SM Vol. 4, Annex 61, p. 530-531).

worshipful Master and the members of the Lodge Zetland in the East will take upon yourselves the pleasing task of laying the foundation stone of the light house at Pedra Branca.

The architect of this most useful work reports that measures will be so far in progress that the foundation stone of the light house may be laid on the anniversary of the Birthday of our Most Gracious Majesty the Queen, when should you consent to meet my wishes I shall be prepared to carry to Pedra Branca as many officers and members of the Lodge Zetland in the East as may desire to be in attendance on that auspicious occasion.”²⁷⁵

5.115 During the ceremony the Worshipful Master made an appropriate address to the company and, in response, the Governor expressed his gratitude, saying:

“Worshipful Master and Gentlemen of the Lodge Zetland in the East;

I thank you for the able manner in which you have been pleased to perform this day’s most interesting ceremony. I have ever honored the Craft of Masonry and the solemnity which has characterized this day’s proceedings has made me feel the deepest respect for what I had previously honored.”²⁷⁶

5.116 As the Singapore Government had occasion to point out in her Memorial, during the ceremony the senior Masonic official made the following political attribution in the presence of Governor Butterworth and the invited officials and guests:

“May the All Bounteous Author of Nature bless our Island, of which this Rock is a dependency ...”²⁷⁶

This political attribution was reported verbatim in both the Singapore Free Press and the Straits Times, two English language Singapore newspapers of the day.

²⁷⁵ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Davidson M.F. (Worshipful Master of Lodge “Zetland in the East”) dated 23 Apr 1850, (MM Vol. 3, Annex 56).

²⁷⁶ See “The Horsburgh Lighthouse” in *Straits Times and Singapore Journal of Commerce* (28 May 1850) (SM Vol. 3, Annex 45).

Neither “Sultan” Allie nor the Temenggong – both of whom were residing in Singapore – objected to this attribution.

5.117 The Malaysian Memorial labours the point that “[a] Masonic ceremony does not constitute an official act...”,²⁷⁷ and this very abstract statement is no doubt true. But the nature of the exercise as a whole was to celebrate the commencement of the construction of a lighthouse, for public purposes, planned and funded by the British Government. It is to be recalled that the proceedings also involved a chaplain, who took part, as the newspaper report makes clear. The analogy is useful because, whilst it is clear that a religious element is not *as such* “an official act”, prayers are a normal concomitant of official ceremonies in many parts of the world.

5.118 Malaysia next argues, in paragraph 156 of her Memorial, that:

“It may be noted that an identical Masonic ceremony took place in the course of building the Raffles Lighthouse on Coney Island (Pulau Satumu) in 1854. This uninhabited island had undoubtedly been ceded by Johor to the East India Company in 1824. It is located more than three miles further south from the main Island of Singapore, but within the ten-mile radius. On that occasion, a ceremony which was in all essentials the same as that conducted for the Horsburgh Lighthouse was celebrated, and this was done on an island already under British sovereignty. This is a further indication that the Masonic ceremony in Pulau Batu Puteh in 1850 was not conducted with the intention of either establishing or confirming British sovereignty.”²⁷⁸

5.119 The reference to Raffles Lighthouse is a mere distraction precisely because in that case sovereignty was not involved. As a matter of law, the criterion for establishing sovereignty is the intention of the British Government as this appears in the particular context and from all the surrounding circumstances. The laying of the foundation stone on Pedra Branca formed part

²⁷⁷ MM p. 73, para. 155.

²⁷⁸ MM p. 73, para. 156.

of a series of events indicating the intention of the Crown to take possession of Pedra Branca in order to build a lighthouse.

5.120 In respect of both Horsburgh Lighthouse and Raffles Lighthouse, the Masonic element in the laying of the foundation stone was not in anyway instrumental in relation to sovereignty over Pedra Branca and Coney Island respectively. The ceremonies merely underscored the solemnity of the occasion. Moreover, the ceremony on Pedra Branca took place in May 1850, by which time the British Crown had already taken possession of Pedra Branca. It was thus entirely in keeping with this that the Worshipful Master referred to “our Island [i.e., *Singapore*], of which this Rock [i.e., *Pedra Branca*] is a dependency” in the presence of Governor Butterworth.

D. MALAYSIA CONTENDS THAT THE CONSTRUCTION OF THE HORSBURGH LIGHTHOUSE DID NOT CONSTITUTE AN ACQUISITION OF SOVEREIGNTY

5.121 The Malaysian Memorial advances the argument “that the construction and maintenance of lighthouses or other aids to navigation are not *per se* considered manifestations of sovereignty”.²⁷⁹ On this basis the assertion is made that the construction of Pedra Branca did not involve an exercise of sovereignty but simply the acquisition of ownership by the East India Company of a lighthouse on the territory of the sovereign, Johor.²⁸⁰

5.122 This argument rests on an erroneous characterisation of the legal criterion. The criterion is not based upon an abstract proposition to the effect that navigational aids are, or are not, manifestations of sovereignty, but consists of the intention to acquire sovereignty as revealed in the relevant circumstances.

²⁷⁹ MM pp. 76-79, paras. 165-175, and, in particular, at p. 78, para. 171.

²⁸⁰ MM p. 80, para. 175, and the conclusions, at p. 81, para. 177.

5.123 The jurisprudence invoked by Malaysia does no more than demonstrate that each case depends on the legal and historical circumstances. Thus, in the *Minquiers and Ecrehos* case the Court examined the evidence of competing State activity as a whole and found that the British activities on the Minquiers predominated.²⁸¹ As the excerpts from the Judgment offered by Malaysia show, in the circumstances the lighting and buoying carried out by France “can hardly be considered as sufficient evidence of *the intention of that Government*, to act as a sovereign over the islets...”.²⁸² Thus the criterion was the intention of the Government concerned in the light of the evidence generally. On the other hand, in appropriate circumstances the construction and maintenance of lighthouses may constitute evidence of sovereignty, as in the cases of *Qatar v Bahrain*²⁸³ and *Indonesia/Malaysia*.²⁸⁴ In the latter case, it was Malaysia who invoked this proposition in her favour.²⁸⁵

5.124 In addition, Malaysia invokes the Award in the first phase of the *Eritrea/Yemen* arbitration.²⁸⁶ The Malaysian Memorial asserts that: “The Arbitral Tribunal... rejected the assertions that the establishment or maintenance of lighthouses constituted acts of sovereignty”.²⁸⁷ But this categorical statement

²⁸¹ *Minquiers and Ecrehos*, *supra* note 6, at p. 67.

²⁸² MM p. 79, para. 172, emphasis added.

²⁸³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *supra* note 13, at para. 197.

²⁸⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 147.

²⁸⁵ ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *Memorial of Malaysia*, at pp. 69-70, paras. 6.25-6.29; *Counter-Memorial of Malaysia*, at p. 83, para. 4.24; *Reply of Malaysia*, at pp. 74-75, paras. 5.23-5.26; *Oral Arguments*, 7 June 2002, CR 2002/32, at p. 19, para. 26 (Sir Elihu Lauterpacht).

²⁸⁶ *Eritrea/Yemen Arbitration (Phase One)*, *supra* note 97, at para. 328.

²⁸⁷ MM p. 79, para. 173.

does not reflect the language of the Award. The quotation given by Malaysia states that:

“The operation or maintenance of lighthouses and navigational aids is *normally* connected to the preservation of safe navigation, and not *normally* taken as a test of sovereignty.”²⁸⁷ [emphasis added]

5.125 Moreover, the quotation continues:

“Maintenance *on these islands of lighthouses by British and Italian companies and authorities* gave rise to no sovereign claim or conclusions. The relevance of these activities and of Yemen’s presence at the 1989 Red Sea Lights Conference are examined in Chapter VI.”²⁸⁶ [emphasis added]

5.126 Both the content of this statement by the Tribunal and the content of Chapter VI of the Award confirm that the legal significance of the operation of lighthouses depended on the particular historical circumstances and, in particular, *the overall evidence of intention to claim*. The criterion was thus the intention of the States concerned, as the following paragraphs of the Award demonstrate:

“216. The Pro-Memoria can only be read as a claim to sovereignty over South West Haycock by Italy (while at the same time agreeing that the erection of the lighthouse was to be treated as a commercial rather than a sovereign act) and a failure to advance a comparable claim to title over the Hanish group. The internal evidence shows that this was an assessment that Great Britain was at the time inclined to accept, and with which it was satisfied; although in other documents Great Britain treats South West Haycock as part of the Hanish group, and as having been Ottoman. In the event, all fell to be treated as provided by article 16 of the Treaty of Lausanne, which was reinforced by the understanding reached in the Rome Conversations.

217. The South West Haycock lighthouse was extinguished in 1940. It was abandoned after 1945. When the 1930 Convention failed to come into effect the British authorities were left with the sole financial burden of the existing lights. It decided to abandon the Centre Peak light (in the Zubayr group) from September 1932 and Italy (which had been notified, along with France) reactivated the Centre Peak light in 1933. The decision was taken in Italy to inform the “interested powers” that this was being done for reasons of navigational necessity, and that the Imam “who lays claim to rights over the islands” should be “informed of the

provisional nature of the occupation and the usefulness to himself in having the lighthouse reactivated.” It was apparently originally intended to ask for contributions, but in the event this was not done.

218. The British authorities were notified by Note Verbale on October 4, 1933 of the anxieties of the Captain of the Port at Massawa as to safety on the Massawa-Hodeidah route, in the absence of the Centre Peak light, and of Italy’s decision to take over the lighthouse. The Note Verbale expressly stated:

...the Royal Ministry for Foreign Affairs need hardly add that the presence of an Italian staff on the Island of Zebair (Centre Peak), which will ensure the operation of the light, implies no modification of the international judicial status of the island itself, which, together with the islands of Abu Ail and Gebel Taiz [sic], was considered by the Italian and British governments in 1928 during the negotiations for the Red Sea Lights Convention, when the conclusion was reached that the question of sovereignty of those islands should remain in suspense.

219. Thus in the northern islands, too, Italy had established a navigational interest but affirmed that it had no implications for sovereignty. The British decided this was a sufficient comfort not to have to pursue this matter further with the Italians.

220. The situation remained essentially unchanged by the 1938 agreement. Article 4(2) of Annex 3 again affirmed that neither Great Britain nor Italy would establish sovereignty over the renounced islands, following Article 16 of the Treaty of Lausanne, and that no objections would be raised to lighthouse personnel.

221. By the outbreak of the Second World War it may be said that the maintenance of the lights is seen as a non-sovereign act and there is agreement that the underlying title to the islands concerned was left in abeyance – though Italy had asserted title (even if choosing not to press it) to South West Haycock. But this turned upon a perception of South West Haycock as being part of the Mohabbakahs, rather than upon any suggestion that the erection of a lighthouse thereon itself had a role in establishing sovereignty. In the course of the Second World War, the South West Haycock and the Centre Peak lights were extinguished.

222. In June 1948 the British Military Authority (BMA) in Eritrea sought legal advice as to whether it was liable under any international conventions for the re-establishment of various lights previously operated by the Government of Italy. These included those at South West Haycock and at Centre Peak. The advice (which eventually came from the Ministry of Transport) was that there was no obligation under any convention.

223. The decision by the BMA that it had no responsibility for the lights at South West Haycock and Centre Peak was not because it thought those islands were not Italian. No particular attention seems to have been given to that aspect. Rather, it was decided that as long as the Abu Ali light was maintained there was no real danger to shipping. Further, the Admiralty advised that a state was under no obligation to light its coasts. Thus even if South West Haycock and Centre Peak had been Italian (and neither was addressed in the 1948 correspondence nor is there any evidence that Zubayr was ever regarded by the British as Italian), no obligation was passed to the BMA as the occupying power.”²⁸⁸

5.127 These passages constitute a sufficient sample of the reasoning of the Tribunal in Chapter VI of the Award in phase one. They establish, without any shadow of doubt, that the significance of the lighthouses was assessed in the precise historical context, and in relation to the evidence of the intention and attitude of each Government at the material time, as evidenced by available documents and the general circumstances. The implications for sovereignty or not, as the case might be, was intention-related.²⁸⁹

5.128 In this context it is useful to recall a part of Malaysia’s argument in the *Indonesia/Malaysia* case:

“5.25 The second part of the Indonesian response draws upon two cases – the *Eritrea/Yemen* case and the *Minquiers and Ecrehos* case – to support the contention that the establishment of lights and buoys is not normally taken as a test of sovereignty and does not constitute proof of occupation *à titre de souverain*. It is true that in those two cases the Arbitral Tribunal and this Court respectively did not find that the construction of the light was sufficient evidence of the intention of the Government concerned to act as sovereign over the territorial location of the lights. But that conclusion was reached on the basis of the facts particular to each of the two cases, and cannot be applied to the two islands here.

5.26 The circumstances in which the Tribunal in the *Eritrea/Yemen* case made its remarks about the effect of the establishment of

²⁸⁸ *Ibid*, at paras. 216-223.

²⁸⁹ *Ibid*, at paras. 219-223, *passim*.

lighthouses are peculiar to that case, whereas a reading of the whole of the relevant part of the Award, and not merely the lifting of a line out of context, shows that the States concerned did not, in their special situation, regard the construction of a lighthouse with the knowledge and consent of other interested States as leading to the conclusion that the State constructing the light thereby intended to act *à titre de souverain* in respect of the location of the light.”²⁹⁰ [underline in original]

5.129 In any event it is the historical and political circumstances that determine the nature of the intention. The evidence concerning the intention of the British Crown in respect of Pedra Branca is voluminous and definitive. There is no evidence to support the Malaysian assertion of a permission in the case of Pedra Branca. There is a great deal of evidence to show that the British Government selected Pedra Branca, funded the construction and provided every kind of logistical support and protection during the process. Moreover, given the physical circumstances of Pedra Branca and the purpose of the appropriation, to suggest that there was no appropriation of the rock as a whole is to defy common sense.

5.130 The fact remains that Johor made no protest or reservation of its position during the process of construction or afterwards. Moreover, at no stage has Johor or its successors sought to treat the lighthouse as a privately owned asset sited on the territory of Johor.

Section VII. Conclusions

5.131 The Malaysian case on title lacks substance and this at several levels. In the first place, the quantity of British documents relating to the planning and construction of the lighthouse is impressive. Most, if not all, of the documents are available. The Malaysian Government has relied upon some thirty

²⁹⁰ See ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Reply of Malaysia, at pp. 74-75, paras. 5.25-5.26.

documents.²⁹¹ The Singapore Government has relied upon fifty-two.²⁹² When the documents are properly studied, and effectively related to each other, a clear and convincing picture emerges. In spite of the richness of the documentation, Malaysia trades in elisions and ambiguities.

5.132 The cavalier approach to the documents does not serve Malaysia well. The key document, Butterworth's letter dated 28 November 1844, which is the centrepiece of the argument based upon the permission of Johor, is spectacularly misconstrued. It concerns Peak Rock, and the documents to which it refers also relate to Peak Rock. The permission given in the Johor letters does not refer to Pedra Branca.

5.133 The weakness of the Malaysian case is compounded by other elements. The Malaysian claim to a prior title is based, or so it appears, upon a traditional title, but no adequate case is advanced, and no evidence is elicited, which refers specifically to Pedra Branca.²⁹³

5.134 The Malaysian Government seeks to augment a weak case by certain weak ancillary contentions: see above for Singapore's rebuttal. As an example, Malaysia relies upon the visit of the Temenggong to Pedra Branca on 2 June 1850, but fails to adduce any evidence that he made any protest or reservation of the position of Johor. Moreover, Malaysia appears to have little confidence in the argument and thus finds it necessary to edit the supporting quotation by omitting a key phrase.

²⁹¹ MM Volume 3 (Historical and Legal Documents), Part A.

²⁹² SM Volumes 2 to 3.

²⁹³ *See above*, at Chapter III and Chapter IV of this Counter-Memorial.

5.135 Singapore will now reiterate her conclusions on the basis of her claim to sovereignty in respect of Pedra Branca.

- (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 its maintenance on a permanent basis.

5.136 The particular manifestations of the intention of the British Crown to take lawful possession of Pedra Branca include the following:

- (a) The ceremonial laying of the foundation stone in 1850 under the control and auspices of the Governor of the Straits Settlements and in the presence of other senior officials.

- (b) The logistical support and protection provided by British Government vessels during the preparation for construction and the construction itself.
- (c) The maintenance of public order by the British Crown during the process of preparation and construction.
- (d) The official commissioning of the lighthouse on 27 September 1851 which involved a visit by the Governor of the Straits Settlements and other officials.
- (e) The panel placed in the Visitors' room within the lighthouse confirms its official character and bears the names of the Governor and of J.T. Thomson, the Government Surveyor.
- (f) The flying of the marine ensign in accordance with contemporary British practice. It is also clear that the marine ensign was flown during the process of construction, 1850-51, and then, of course, after completion.

5.137 In addition: The acts of taking possession were peaceful and public and elicited no opposition from other powers.

5.138 In consequence, title to Pedra Branca was acquired by the British Crown in accordance with the legal principles governing acquisition of territory at the material time.

5.139 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 of the Memorial of Singapore, and in Chapter VI of the present Counter-Memorial.

CHAPTER VI THE PARTIES' CONDUCT CONFIRMS SINGAPORE'S TITLE TO PEDRA BRANCA

Section I. Introduction – The Applicable Principles

6.1 The basis of Malaysia's arguments in Chapter 7 of her Memorial entirely rests on Johor's alleged “title to the island and Malaysia's succession thereto”²⁹⁴ and supposed “granting of permission... to the British authorities in Singapore to build a lighthouse on Pulau Patu Puteh”.²⁹⁵ As Singapore has shown above,²⁹⁶ those assertions are ill-founded and erroneous. Similarly (and consequently), Malaysia's allegation that Singapore's Diplomatic Note of 14 February 1980²⁹⁷ “was the first time that Singapore asserted a claim of title of its own”²⁹⁸ is misplaced. Singapore “claimed” nothing under the Diplomatic Note; she protested against Malaysia's map issued the previous year which had asserted, *for the first time*, Malaysia's claim over Pedra Branca.

6.2 Moreover, it goes without saying that there was no need for Singapore to protest against Malaysia's prior conduct *vis-à-vis* Pedra Branca because there

²⁹⁴ MM p. 83, para. 178.

²⁹⁵ MM p. 84, para. 182. *See also* MM p. 83, paras. 179-180.

²⁹⁶ *See above*, Chapters III and IV of this Counter-Memorial.

²⁹⁷ *See* Singapore's Note MFA 30/80 dated 14 Feb 1980 (SM Vol. 6, Annex 144; MM Vol. 3, Annex 80).

²⁹⁸ MM p. 84, para. 181.

was none at all, as Singapore has shown in her Memorial²⁹⁹ and will show again in this Chapter.

6.3 There are crucial differences between the Parties on the actual state of affairs. However, there are no differences between them as to the basic applicable *legal* principles that Malaysia has referred to in paragraphs 186-187 of her Memorial. In particular, the Parties agree that:

- (a) “there is a presumption against the easy abandonment or displacement of title to territory”³⁰⁰ – although it goes without saying that title can only be abandoned or displaced if it existed to begin with;
- (b) a title to territory can only be established by conduct *à titre de souverain*³⁰⁰ – but, very evidently, *a fortiori*, a total absence of conduct cannot give rise to or confirm any claim.

6.4 However, these principles do not avail Malaysia in the instant case as she cannot prove any original title to Pedra Branca. She has not protested against Singapore’s consistent conduct *à titre de souverain* since the British authorities took possession of the island in 1847. Neither has Malaysia acted in a way that manifests her alleged title to Pedra Branca.

6.5 For these reasons, Singapore notes that the case law invoked by Malaysia does not help her. Moreover, Malaysia omits important aspects of the decisions that she quotes. Thus, she attaches great importance to the Court's Judgment concerning *Sovereignty over Certain Frontier Land* in order to show that “[i]nternational law will be slow to presume either the abandonment of title or

²⁹⁹ See SM pp. 132-136, paras. 6.112-6.121.

³⁰⁰ MM pp. 85-86, para. 187.

the displacement of the sovereignty of the original titleholder in the absence of clear evidence to this effect”.³⁰¹ As Malaysia rightly points out, in that case, the Court found that the acts relied upon by the Netherlands “are insufficient to displace Belgian sovereignty established by that Convention” of 1843; but what she omits to stress (although she quotes this very extract of the Judgment),³⁰¹ is that the Court noted:

“The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest.”³⁰²

6.6 There are no such difficulties in the present case. Singapore's display of sovereignty over Pedra Branca has always been “open and public”.³⁰³ Not only did Great Britain, her predecessor in title, take possession of the island, build and maintain the lighthouse (without any kind of opposition, let alone authorization from Johor), but she also continuously exercised activities *à titre de souverain* on Pedra Branca and its surrounding waters.³⁰⁴ Had Malaysia or her predecessor considered that such acts were encroachments on her sovereignty, they would (and should) have reacted,³⁰⁵ but they *never* did. And, to adopt Judge Huber's reasoning in his Award in the *Island of Palmas* case,

“[t]here is moreover no evidence which would establish any act of display of sovereignty over the island by [*Johor, Malaysia*] or another

³⁰¹ MM p. 85, para. 186.

³⁰² *Case concerning Sovereignty over certain Frontier Land (Belgium/Netherlands)*, Judgment of 20 June 1959, [1959] ICJ Rep 209, at p. 229.

³⁰³ *See Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 24, at p. 868.

³⁰⁴ *See* SM pp. 89-137, paras. 6.1-6.122 (Chapter VI).

³⁰⁵ *See e.g., Dubai-Sharjah Border Arbitration*, 91 ILR 543 (1993), at p. 622. The Tribunal was presided by Philippe Cahier and composed of John L. Simpson and Kenneth R. Simmonds. *See also* SM pp. 148-150, paras 7.24-7.28 and the numerous authorities cited and quoted thereat.

Power, such as might counter-balance or annihilate the manifestations of [Singapore] sovereignty”.³⁰⁶

6.7 Malaysia also refers to the finding of the Arbitrator in the *Clipperton Island* case,³⁰⁷ that France had “never had the *animus* of abandoning the island”.³⁰⁸ Neither, it should be added, has Singapore, after title was acquired in 1847-1851. Other parts of that Award are also worth noting as they are relevant to the present case. In particular, just as the Arbitrator emphasized that, “to establish the contention of Mexico [...it is necessary] to prove that Spain not only had the right, as a state, to incorporate the island in her possessions, but also had effectively exercised the right”,³⁰⁹ similarly, in the present case, Malaysia’s claim rests on her ability to show that she effectively exercised territorial sovereignty over Pedra Branca – this she does not, and cannot do. In contrast, Great Britain took possession of Pedra Branca as early as 1847 and, together with her successor in title, Singapore, continuously exercised sovereignty over the island. As the Arbitrator said in the *Clipperton Island* case, “[t]hus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state... and the occupation is thereby complete”.³¹⁰

6.8 The previous Chapter of this Counter-Memorial reiterates that this is precisely what happened in the present case: Singapore’s title over Pedra Branca

³⁰⁶ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 24, at p. 868.

³⁰⁷ MM p. 85, footnote 158.

³⁰⁸ English translation of *Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, Arbitral Award dated 28 Jan 1931, 26 Am. J. Int’l L. 390 (1932), at p. 394 (or in (1928) 2 RIAA 1107, at pp. 1110-1111 for the original French text).

³⁰⁹ *Ibid*, at 393 (or in 2 RIAA 1107, at p. 1109 for the original French text).

³¹⁰ *Ibid*, at 394 (or in 2 RIAA 1107, at p. 1110 for the original French text).

stems from the British Crown's taking of possession of the island in 1847. This Chapter will show that this title has been confirmed since then by the peaceful and repeated exercise of State authority over Pedra Branca and the adjacent waters by Singapore and her predecessor in title, without any challenge by Malaysia until 1979.

6.9 As Singapore has made the foregoing points in Chapters VI and VII of her Memorial,³¹¹ she will, in this Chapter, confine her remarks to answering Malaysia's allegations and showing that:

- (a) the constitutional developments and official descriptions of Singapore and Malaysia lend no support to Malaysia's case (Section II);
- (b) Singapore's conduct confirms her title to Pedra Branca (Section III);
- (c) Malaysia's conduct does not establish her title to Pedra Branca (Section IV); and
- (d) the bilateral conduct of the Parties invoked by Malaysia has no bearing on title over Pedra Branca (Section V).

Section II. The Constitutional Developments and Official Descriptions of Singapore and Malaysia Lend No Support to Malaysia's Case

6.10 Malaysia argues that the constitutional developments and official descriptions of Singapore and Malaysia demonstrate that Singapore never considered Pedra Branca to be part of Singapore and that the island remained

³¹¹ SM pp. 89-160.

part of the Federation of Malaysia.³¹² As the present section will show, this contention is unsustainable.

6.11 With respect to Malaysia's own conduct, at no point prior to the issuance of her 1979 map did Malaysia ever suggest that Pedra Branca formed part of the territory of either Johor or Malaysia. Indeed, as Singapore will discuss in the next Chapter, in 1953 the Acting State Secretary of Johor expressly stated that “the Johor Government does not claim ownership of Pedra Branca”.³¹³ Malaysia's constitutional developments must be seen in the light of that explicit disclaimer, and in the light of the total absence of any *effectivités* on Pedra Branca, or claim to the island, whether by Malaysia or by Johor, and whether before the United Kingdom acquired title in 1847-1851 or afterwards.

6.12 In contrast, the activities of Singapore are fully consistent with her pre-existing title. Not only did Singapore, and her predecessor in title, the United Kingdom, carry out a steady stream of official activities on Pedra Branca and within its territorial waters, her legislative measures and constitutional developments confirmed that title.

A. MALAYSIA'S CONSTITUTIONAL DEVELOPMENTS DO NOT POINT TO THE EXISTENCE OF MALAYSIAN SOVEREIGNTY OVER PEDRA BRANCA

6.13 In support of her case, Malaysia refers to the establishment of the Malayan Union under the Malayan Union Order in Council 1946.³¹⁴ That Order simply referred to the Malayan Union as comprising, *inter alia*, the “Malay States”, which in turn were defined as including Johor. Based on this non-

³¹² MM pp. 91-94, paras. 198-206; p. 99, para. 218.

³¹³ See Chapter VII below, and SM pp. 161-178, paras. 8.1-8.41 (Chapter VIII).

³¹⁴ MM p. 91, para. 198.

contentious fact, the Malaysian Memorial jumps to the conclusion that Pedra Branca, which it claims formed part of Johor, thus “became part of the Malayan Union”.³¹⁵

6.14 As Singapore has shown in Chapter IV, there is no support for this line of argument. Pedra Branca has never formed part of Johor, and the Sultan of Johor never claimed the island or exercised any authority over it. On the contrary, title was already vested in Singapore by virtue of the taking of lawful possession of the island by the British Crown during the period 1847-1851 discussed in the previous Chapter. This title was subsequently maintained by the United Kingdom’s and Singapore’s uninterrupted administration of Pedra Branca to the present. The 1946 Malayan Union Order in Council could not and did not change this situation. Malaysia’s reliance on the Order in Council simply begs the question and is consequently irrelevant.

6.15 Malaysia next refers to the 1948 Federation of Malaya Agreement pursuant to which the Malayan Union was replaced by the Federation of Malaya. The Federation of Malaya was defined as comprising the Malay States including Johor, “and all dependencies, islands and places which, on the first day of December, 1941, were administered as part thereof, and the territorial waters adjacent thereto”.³¹⁶

6.16 On 1 December 1941, Pedra Branca was *not* administered as part of Johor. Put in its simplest terms, Malaysia has not referred, and cannot refer, to a single act of administration that either Johor or Malaysia ever carried out with respect to Pedra Branca.³¹⁷ As such, the island could not have been considered

³¹⁵ MM p. 91, para. 198.

³¹⁶ MM p. 92, para. 199.

³¹⁷ SM pp. 132-136, paras. 6.112-6.121.

to be part of Johor or, under the Federation of Malaya Agreement, part of the Malayan Federation.

6.17 Lastly, Malaysia argues that, by virtue of the Federation of Malaya Agreement of 5 August 1957, “Johor (including Pulau Batu Puteh) remained part of the Federation of Malaya”.³¹⁸ Once again, this assertion is a mere *petitio principii*. The 1957 Federation of Malaya Agreement again defined the expression the “Malay States” as including:

“all dependencies, islands and places which, immediately before the thirty-first day of August, nineteen hundred and fifty-seven, are administered as part thereof, and the territorial waters adjacent thereto”.³¹⁹

6.18 Clearly, Pedra Branca had not been, and was not then being, administered by the State of Johor. The assertion that Pedra Branca thus remained part of the Federation of Malaya rests on the totally unproven assumption that it had hitherto formed part of the territory of Johor. Moreover, the fact that Pedra Branca could not have been included in the 1957 Federation of Malaya Agreement is confirmed – if further confirmation is necessary – by the express disclaimer that the Acting State Secretary of the State of Johor had made *four years earlier* when he stated that the “Johor Government does not claim ownership of Pedra Branca”.³²⁰ Since Malaysia’s predecessor, the State of Johor, carried out no activities with respect to Pedra Branca, nor made any claim to the island prior to the date when the 1957 Federation of Malaya Agreement came into force, it follows that Pedra Branca could not have “remained” part of the Federation by virtue of that Agreement.

³¹⁸ MM p. 92, para. 200.

³¹⁹ See Federation of Malaya Agreement 1957, Art. 2 (MM Vol. 3, Annex 100), *cited at* MM p. 92, para. 200.

³²⁰ See Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96; MM Vol. 3, Annex 69).

B. SINGAPORE'S CONSTITUTIONAL AND LEGISLATIVE DEVELOPMENTS

6.19 With respect to Singapore's own conduct, the Malaysian Memorial asserts that this conduct “never manifested a conviction that Pulau Batu Puteh was anything other than Malaysian”.³²¹ This argument is pure wishful thinking. It ignores the fact that Great Britain took possession of the island in 1847-1851 as well as the well-documented record of State functions that Singapore and Great Britain continuously exercised on and around Pedra Branca since 1851. As Singapore demonstrated in Chapter VI of her Memorial, Singapore's administration of the island included both legislative acts specifically referring to the island and actual displays of authority on the island itself. None of these have been contested by Malaysia. All of them were consistent with Singapore's pre-existing title to Pedra Branca acquired in 1847-1851.

1. The Straits Settlements and Johore Territorial Waters Agreement, 1927

6.20 Instead of focusing on the character of Singapore's activities as a whole, the Malaysian Memorial targets a number of disparate legislative measures enacted by Singapore in an attempt to argue that they do not evidence sovereignty over Pedra Branca. The first act mentioned in the Malaysian Memorial is the 1927 Straits Settlements and Johor Territorial Waters Agreement.³²² There is nothing in this Agreement which even remotely called into question Singapore's sovereignty over Pedra Branca.

³²¹ MM p. 124, para. 283.

³²² MM pp. 87-88, paras. 190-192.

6.21 The object of the 1927 Agreement is clearly set out in the Agreement's Preamble.³²³ The Preamble first recalls the 1824 Crawford Treaty by which Sultan Hussein and the Temenggong of Johor had ceded the island of Singapore, together with “the adjacent seas, straits and islands” up to a distance of ten miles. It then states that the British Crown was:

“... desirous that certain of the said seas, straits and islets [i.e., *the seas, straits and islets ceded in the 1824 Crawford Treaty*] shall be *retroceded and shall again form part of the State and Territory of Johore*”.³²⁴
[emphasis added]

According to its very purpose, the 1927 Agreement had nothing to do with Pedra Branca, which both Parties recognise to fall outside the scope of the 1824 Crawford Treaty. It was concerned with a retrocession to Johor of *other islands and waters*.³²⁵

6.22 To accomplish this purpose, the 1927 Agreement delimited a boundary line in the Johor Strait based on the thalweg line. Because both Singapore and Johor claimed three-mile territorial seas at the time, to the west and east of the main island of Singapore the line set out in Article 1 of the Agreement terminated at the limits of the three-mile territorial sea drawn from the relevant coastal territory of each of the parties. Under Articles 2 and 3 of the Agreement, all waters and islets lying within three miles of the low-water mark of the mainland of Johor – which had previously appertained to Singapore under the 1824 Crawford Treaty – were retroceded to Johor subject to the boundary delimitation established under Article 1.

³²³ MM p. 87, para. 190.

³²⁴ See *Straits Settlements and Johore Territorial Waters Agreement* dated 19 Oct 1927, reprinted in Allen, Stockwell & Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia, 1761-1963* (1981), pp. 114-116 (MM Vol. 2, Annex 12).

³²⁵ The significance of the 1824 Treaty is discussed *above*, at para. 1.15, and *below*, at para. 7.13 *et seq.*

6.23 The background and purpose of the 1927 Agreement was addressed in the British Parliamentary debates of 1928 where the Under-Secretary of State for the Colonies, Mr. Ormsby-Gore, explained the situation as follows:

“The old Treaty whereby Great Britain obtained possession of the Island of Singapore, which was drawn up by Sir Stamford Raffles and finally ratified in 1824, had the effect, if strictly construed, of claiming for the Colony of the Straits Settlements not merely the whole of the water of the Island of Singapore, but of islands which really are part of the State of Johore. One of these islands [*Pulau Nenas*] is 100 yards from Johore and two or three miles from Singapore. It is a small island of 26 acres and according to the Treaty of 1824, was regarded as part of the Colony of the Straits Settlements but, according to justice and equity, and according to intention it ought to be part of the State of Johore.”³²⁶

6.24 That the 1927 Agreement was only intended to effectuate a transfer of certain islands and waters in the immediate vicinity of the main island of Singapore – particularly the island of Pulau Nenas – to the Sultan of Johor was further confirmed by internal British correspondence dated 30 January 1928 which forwarded copies of the Agreement to the colonies. The relevant part of the transmittal letter reads as follows:

“The effect of this agreement [*the 1927 Agreement*] is to convert certain islands and waters which formerly formed part of the Colony of the Straits Settlements into territory under His Majesty’s protection and territorial waters thereof.”³²⁷

6.25 Because Pedra Branca lies more than six nautical miles from the coast of Johor, there was no need for the 1927 Agreement to address the territorial sea boundary around the island or the issue of its ownership, and the Agreement did not do so. By that time, Singapore had been in sovereign possession of Pedra

³²⁶ See U.K. Parliamentary Debates (House of Commons), Second reading of the Straits Settlements and Johore Territorial Water (Agreement) Bill, 16 July 1928 attached to this Counter-Memorial as Annex 26. For the location of P. Nenas, see **Insert 10**, after p. 130.

³²⁷ Letter from Lovat (Secretary of State for Dominion Affairs) to Governments of Canada, Australia, New Zealand, South Africa, Irish Free State and Newfoundland dated 30 Jan 1928, attached to this Counter-Memorial as Annex 25. At the time, Johor was ostensibly under British protection.

Branca for some 80 years. It follows that nothing in the 1927 Agreement lends any credence to Malaysia's argument that it “is evidence of the continuing appreciation that Pulau Batu Puteh and its surrounding waters were not part of the territory of Singapore”.³²⁸

2. *Establishment of the Colony of Singapore, 27 March 1946*

6.26 The next act referred to in the Malaysian Memorial is the Singapore Colony Order in Council, 1946. This instrument defined “the Settlement of Singapore” as “the Island of Singapore *and its dependencies*, Christmas Island, the Cocos or Keeling Islands, *and all islands and places which, on the fifteenth day of February, 1942, were known and administered as part of such Settlement, and the territorial waters adjacent thereto*”, and established these localities as the Colony of Singapore.³²⁹

6.27 After also proceeding to discuss the descriptions of the “Settlement of Singapore” in the 1946 Transfer of Powers and Interpretation Ordinance and the 1948 amendment thereto,³³⁰ Malaysia argues that these descriptions were no different from those set out in Article 1 of the 1927 Agreement and, for that reason, Pedra Branca was not in any way part of the Settlement of Singapore.³³¹

³²⁸ MM p. 88, para. 192.

³²⁹ Singapore Colony Order in Council, 1946 (United Kingdom) (SM Vol. 5, Annex 86; MM Vol. 3, Annex 92), *emphasis added*.

³³⁰ Transfer of Powers and Interpretation Ordinance, 1946 (Malayan Union) (MM Vol. 3, Annex 93); Transfer of Powers and Interpretation Amendment Ordinance (No. 11 of 1948) (Federation of Malaya) (MM Vol. 3, Annex 94).

³³¹ MM p. 88, para. 193.

6.28 This contention is incorrect for two reasons. *First*, the expression “Settlement of Singapore” was not defined in the 1927 Agreement. That Agreement, as has been seen above, was not concerned with defining the places which comprised the Settlement of Singapore, but rather with the retrocession to Johor of certain islets and waters situated in the immediate vicinity of the main island of Singapore within three miles of the Johor coast. The 1927 Agreement thus had nothing to do with Pedra Branca. *Secondly*, the 1946 Order in Council defined the Settlement of Singapore as including not only “its dependencies”, but also “all places which, as of 15 February 1942, were known and administered as part of such Settlement, and the territorial waters adjacent thereto”. From the materials that Singapore furnished with her Memorial, it is clear that, as of 15 February 1942, Pedra Branca was not only a dependency of the Island of Singapore, it was also – and had been for some 90 years – administered as part of Singapore. Contrary to Malaysia's assertions, therefore, the 1946 Order in Council confirmed that Pedra Branca was part of Singapore.

6.29 It is also significant that the “Settlement of Singapore” as defined included both its dependencies *and* “the territorial waters adjacent thereto”. As Singapore has shown in Chapter IX of her Memorial, both Middle Rocks and South Ledge fell within the three-mile territorial waters adjacent to Pedra Branca.³³² Thus, the 1946 Order in Council confirmed that these features formed part of the Settlement of Singapore as well.

6.30 Neither the 1946 Transfer of Powers and Interpretation Ordinance nor the 1948 amendment thereto, both of which are referred to in the Malaysian Memorial, changed the picture. In Section 2 of the 1946 Ordinance, the “Settlement of Singapore” was defined as:

“[T]he towns and island of Singapore, all other islands heretofore administered as part of the Settlement of Singapore and all British

³³² SM pp. 184-190, paras. 9.18-9.33.

waters adjacent thereto, but does not include the Cocos Islands and North Keeling Island.”³³³

Under the 1948 Amendment, the “Colony of Singapore” included “the Island of Singapore and its dependencies”.³³⁴ Pedra Branca continued to be administered as part of the Settlement of Singapore and was a dependency of the Island of Singapore. It follows that both acts cited by Malaysia were fully consistent with Singapore's title over Pedra Branca.

3. The Curfew Order of 1948

6.31 Malaysia's Memorial also seeks to find support for its contention that Pedra Branca did not form part of the territory of Singapore in the 1948 Curfew Order issued by the Commissioner of Police of Singapore.³³⁵ This effort is futile.

6.32 The Curfew Order was designed to prevent smuggling of supplies by communist insurgents between Singapore and Johor across the narrow Johor Straits.³³⁶ It prohibited persons from being in an area lying within the boundary of the territorial waters of “the Island of Singapore” during night-time hours. The territorial waters of “the Island of Singapore” were defined in essentially the same terms as in the 1927 Agreement.

³³³ See Transfer of Powers and Interpretation Ordinance, 1946 (Malayan Union) (MM Vol. 3, Annex 93).

³³⁴ See Transfer of Powers and Interpretation Amendment Ordinance No. 11 of 1948 (Federation of Malaya) (MM Vol. 3, Annex 94).

³³⁵ MM pp. 90-91, paras. 194-197; The Curfew (Johore Straits) (Singapore) Order 1948 (Colony of Singapore) (MM Vol. 3, Annex 95).

³³⁶ Minute from Barry J.C. (Deputy Commissioner of Police, Singapore) to Foulger R.E. (Commissioner of Police, Singapore) dated 27 Sep 1948 and Reply from Foulger R.E. (Commissioner of Police, Singapore) to Barry J.C. (Deputy Commissioner of Police, Singapore) dated 29 Sep 1948, attached as Annex 31 to this Counter-Memorial.

6.33 The Order had nothing to do with Pedra Branca for two reasons. *First*, it only applied to areas falling within the territorial waters of “the Island of Singapore” in the vicinity of the Johor Straits. This was confirmed by a memorandum sent by the Deputy Commissioner of Police of Singapore to the Chief Police Officer of Johor on 2 July 1948, which described the area to be covered by the curfew as follows:

“At a Meeting of the Defence Committee this morning it was decided to impose a Curfew on the Johore Straits between Singapore Island and the mainland, following the Johore-Singapore boundary line from Terawang to the West of Singapore Island to a point North of a line drawn between Changi Point and Penggarang.”³³⁷

Obviously, neither the territorial waters of the main Island of Singapore nor the Johor Straits extended as far as Pedra Branca – which lies more than three miles from the Island of Singapore – any more than they extended to the Cocos Islands or North Keeling Island which, at the time, were part of the Colony of Singapore. By its very terms, therefore, the Curfew Order did not extend to Pedra Branca.

6.34 *Secondly*, there was no reason why Pedra Branca should have been included in an Order imposing a curfew. Access to the island was already controlled by the Singapore authorities, and the only residents were the Singaporean staff who manned and maintained the lighthouse. It goes without saying that there were no communist insurgents on Pedra Branca to benefit from the smuggling of supplies from Johor, nor could Pedra Branca (given its physical condition and location) serve as a staging point for the smuggling of supplies to communist insurgents in Johor.

³³⁷ See Letter from the Singapore Deputy Commissioner of Police to the Chief Police Officer, dated 2 Jul 1948, attached to this Counter-Memorial as Annex 30.

4. *Establishment of the State of Singapore, 1 August 1958*

6.35 The Malaysian Memorial also refers to the definition of the “Colony of Singapore” set forth in the 1951 Interpretation and General Clauses Ordinance and its amendments in 1952, 1960 and 1965.³³⁸ In the first two instruments, the “Colony of Singapore” was defined as “the Island of Singapore and its dependencies...”. As already demonstrated, Pedra Branca was a dependency of the Island of Singapore and thus fell within the ambit of this legislation.

6.36 In the Interpretation and General Clauses (Amendments) Ordinance of 1960, the reference to the “Colony of Singapore” was changed to “the State of Singapore”. It was defined as including “the Island of Singapore and all islands and places which on the 2nd day of June, 1959, were administered as part of the Colony of Singapore and all territorial waters adjacent thereto”.³³⁹ Pedra Branca, as previously shown, was unquestionably being administered by Singapore at the relevant time and thus fell within this definition as well.

(a) *Malaysia's Attempt To Diminish the Importance of Singapore's Administration of Pedra Branca*

6.37 Malaysia is understandably sensitive about the references to “islands administered as part of the Colony of Singapore” in the various instruments referred to above. As the Malaysian Memorial concedes, “it might be argued that the reference to ‘islands... administered as part of the Colony of Singapore’

³³⁸ MM pp. 93-94, paras. 201-204; *See* ss. 1-2 of the Interpretation and General Clauses Ordinance (No. 4 of 1951) (Colony of Singapore) (MM Vol. 3, Annex 97); and Interpretation and General Clauses (Amendment) Ordinance (No. 18 of 1952) (Colony of Singapore) (MM Vol. 3, Annex 98).

³³⁹ *See* Interpretation and General Clauses (Amendment) Ordinance (No. 2 of 1960) (State of Singapore) (MM Vol. 3, Annex 104); Extract from Interpretation Act (No. 10 of 1965) (Republic of Singapore) (MM Vol. 3, Annex 109). The 1965 amendment repeated the same definition.

in the various instruments cited must be read to include Pulau Batu Puteh [*Pedra Branca*] as Singapore operated the Horsburgh Lighthouse.”³⁴⁰ However, Malaysia then goes on to assert that Singapore did not administer the island – she only managed and controlled the lighthouse – and that even if Singapore did administer *Pedra Branca*, she did so as a consequence of her management of the lighthouse not as part of her territory.³⁴¹

6.38 These arguments are completely misplaced. In the first place, Singapore already possessed a prior title to the island as a result of the events of 1847-1851. Secondly, that title was confirmed and maintained by a constant stream of State activities that Singapore and her predecessor in title carried out on the island as a whole and within its territorial waters. Chapter VI of Singapore's Memorial documented the many ways in which Singapore has administered *Pedra Branca* for over 150 years. It is true that an important part of this administration involved the lighthouse. After all, the lighthouse is the most important structure on what is a very small island. Singapore and her predecessor, the United Kingdom, enacted legislation and issued Notices to Mariners specifically dealing with the lighthouse.³⁴² Moreover, Singapore staffed, maintained and improved the lighthouse throughout this period.

6.39 Equally important, however, is the fact that Singapore's administration of *Pedra Branca* and its territorial waters was of a far reaching nature and involved a wide variety of activities carried out *à titre de souverain* that went well beyond simply managing the lighthouse. Singapore built, maintained and extended a

³⁴⁰ MM p. 95, para. 207.

³⁴¹ MM p. 95, paras. 208-209.

³⁴² See e.g., Act No. VI of 1852 (India) (SM Vol. 3, Annex 59); Act No. XIII of 1854 (India) (SM Vol. 5, Annex 62); Light Dues Ordinance, 1957 (Colony of Singapore) (SM Vol. 6, Annex 99); Light Dues (Repeal) Act, 1973 (Republic of Singapore) (SM Vol. 6, Annex 118); and Singapore, Protected Places (No. 10) Order 1991 (SM Vol. 7, Annex 178).

jetty on the island.³⁴³ She consistently flew the British Marine Ensign and, after independence, the Singapore Ensign over the island.³⁴⁴ She carried out meteorological observations on Pedra Branca.³⁴⁵ She exercised exclusive control over visits to Pedra Branca and the waters around it, including by Malaysian nationals, and vetted applications to visit the island.³⁴⁶ She oversaw and authorized scores of official visits by Singapore civil and military officials to the island.³⁴⁷ She granted permission to Malaysian authorities to undertake scientific and technical surveys on Pedra Branca and within Pedra Branca's territorial waters and prohibited Malaysian officials from visiting the island when not in possession of a Singapore permit.³⁴⁸ She installed military communications equipment on the island,³⁴⁹ and carried out naval patrols and naval exercises within Pedra Branca's territorial waters.³⁵⁰ She investigated and reported on hazards to navigation and shipwrecks around the island,³⁵¹ and Singapore authorities investigated accidental deaths off Pedra Branca.³⁵² Finally, Singapore considered and invited public tenders for land reclamation projects involving the island itself.³⁵³

³⁴³ See Extracts from the Annual Reports of the Marine Department of the Straits Settlements and the Colony of Singapore from 1937 to 1971 (SM Vol. 5, Annex 82).

³⁴⁴ SM pp. 107-109, paras. 6.47-6.53.

³⁴⁵ SM pp. 105-107, paras. 6.42-6.46.

³⁴⁶ SM pp. 109-114, paras. 6.54-6.67.

³⁴⁷ SM p. 110, paras. 6.56-6.57, and Selected Entries from the Horsburgh Lighthouse Visitors Logbook (including transcriptions) (SM Vol. 5, Annex 87).

³⁴⁸ SM pp. 111-112, paras. 6.60-6.63.

³⁴⁹ SM pp. 116-118, paras. 6.72-6.75.

³⁵⁰ SM pp. 114-116, paras. 6.68-6.71.

³⁵¹ SM pp. 118-122, paras. 6.76-6.83.

³⁵² SM pp. 122-123, paras. 6.84-6.87.

³⁵³ SM pp. 123-124, paras. 6.88-6.90.

6.40 These extensive activities, all of which were of an open, notorious and official nature and none of which were carried out with Malaysia's permission or ever protested by Malaysia until after the dispute emerged in 1979–1980, went far beyond simply managing the lighthouse. They were classic State activities undertaken on the island *à titre de souverain* and fully in conformity with the fact that Pedra Branca was regarded as part of Singapore's territory.

6.41 Once again, the Malaysian Memorial passes over these activities in complete silence. Instead, it attempts to parse miscellaneous publications periodically issued in Singapore in an attempt to show that Singapore did not consider Pedra Branca to form part of her territory. As Singapore will presently show, this highly selective approach is unpersuasive.

6.42 One such publication relied on by Malaysia is a booklet entitled *Singapore Facts and Pictures* issued by the then Singapore Ministry of Culture.³⁵⁴ The Malaysian Memorial points out that the 1972 edition of this booklet notes that “Singapore consists of the Island of Singapore and some 54 small islands within its territorial waters”, but that Pedra Branca is not included in the list of such islands.³⁵⁵ It was only in 1992, Malaysia argues, that Pedra Branca was added to the list.³⁵⁶

6.43 The publication in question was published by the Singapore Ministry of Culture (later, renamed as the Ministry of Information and the Arts). Far from being a legally comprehensive description of Singapore's territory, *Singapore*

³⁵⁴ MM pp. 95-97, paras. 211-212, *citing* Singapore Ministry of Culture, *Singapore Facts and Pictures 1972*, pp. 1-3, 148-150 (MM Vol. 3, Annex 79); and Singapore Ministry of Information and the Arts, *Singapore Facts and Pictures 1992*, pp. 1, 178 (MM Vol. 3, Annex 83).

³⁵⁵ MM pp. 95-96, paras. 211-212.

³⁵⁶ MM pp. 96-97, para. 212.

Facts and Pictures, as can be seen from the copy that Singapore is depositing with the Registry, is a publication of general information. It provides a broad overview of Singapore, her people, infrastructure and places of interest. Neither the 1972 nor the 1992 editions were comprehensive.

6.44 In the 1972 edition, for example, the text quoted by Malaysia refers to the Main Island of Singapore and some 54 small islands within its territorial waters. Leaving aside the fact that Pedra Branca does not fall within the territorial waters of the Main Island of Singapore, the list included in Appendix I to the booklet lists 59 islands, not 54. Similar discrepancies may be found in the 1992 edition. Moreover, the 1972 edition omitted at least eight other islands that belong to Singapore.³⁵⁷ Most of these, but not all, were included in the 1992 edition including Pedra Branca.

6.45 In the same vein, Malaysia also refers to the 1953 and 1956 editions of the *Annual Report of the Rural Board of Singapore*, a publication issued by the Rural Board as its title suggests.³⁵⁸ Once again, Malaysia seeks to find significance in the fact that these publications did not list Pedra Branca.

6.46 This fact is unremarkable. *First*, contrary to Malaysia's claim that “the intention behind the enlarged geographical competence of the Rural Board in 1953 was to include all the islands falling within the territorial waters of the Colony of Singapore”,³⁵⁹ the 1953 *Annual Report of the Rural Board* explained very clearly that it was merely intended to include “all the other small *neighbouring* islands” (emphasis added). Pedra Branca, situated more than 24

³⁵⁷ The following were other Singapore islands omitted in the 1972 list: Pulau Buloh, Pulau Chichir, Pulau Merlimau, Pulau Renget Besar, Pulau Renget Kechil, Pulau Renggis, Pulau Sakeng and Pulau Sarimbun.

³⁵⁸ MM pp. 97-98, paras. 213-216.

³⁵⁹ MM p. 98, para. 216.

nautical miles from Singapore, is clearly not a “neighbouring island”. It is therefore not surprising that the list of “neighbouring islands” in the 1953 *Annual Report* does not include an outlying island like Pedra Branca.

6.47 *Secondly*, even some neighbouring islands which undisputedly belonged to Singapore were omitted from the list.³⁶⁰ It is therefore wrong for Malaysia to conclude that the omission of any island from this list indicates a lack of belief by Singapore that she owns such an island.

6.48 Finally, it is clear from the internal documents of the Rural Board that the impetus behind the 1953 extension of the Rural Board's jurisdiction was the revision of electoral boundaries.³⁶¹ The 1953 extension sought to achieve two objectives – (i) previously uninhabited islands which were inhabited in 1953 should be included within the Rural Board's jurisdiction; and (ii) uninhabited islands which may be inhabited in the future should also be included. These considerations have no application to Pedra Branca, which was inhabited only by the lighthouse crew, who did not permanently reside on the island, but were stationed there on rotation for one month at a time. In any event, the functions of the Rural Board (such as street works, building control, public health, supply of water and other utilities) were not relevant to Pedra Branca, which was only inhabited by a small lighthouse crew whose needs in all these areas were being met adequately by the Marine Department of the Singapore Government. As the Malaysian Memorial itself acknowledges, “[t]he Rural Board of Singapore was

³⁶⁰ E.g., Pulau Ayer Merbau and Pulau Bakau.

³⁶¹ See Minutes of a Meeting of the Ad Hoc Committee appointed by the Rural Board, Singapore, to revise the Rural District Boundaries, 10 July 1952, attached to this Counter-Memorial as Annex 33; Minutes of a Meeting of the Rural Board, Singapore, 21 Aug 1952, attached to this Counter-Memorial as Annex 34.

not responsible for the management of lighthouses within the Colony of Singapore.”³⁶²

6.49 It is thus irrelevant whether the Annual Reports of the Rural Board referred to Pedra Branca or not. These Reports did not concern islands falling outside the authority of the Board or not germane to the revision of electoral boundaries, and were thus not comprehensive in detailing the extent of Singapore's territory.

6.50 What is striking, on the other hand, is the double standard that Malaysia applies to the treatment of this kind of publication. Malaysia purports to find significance in the fact that Pedra Branca is not listed in certain Singapore publications when there was no reason why the island should have been so listed. *At the same time, Malaysia conveniently overlooks the fact that she cannot point to any contemporaneous, official Malaysian document in which Pedra Branca is listed as belonging to her.* On the contrary, in 1953, the very year for which Malaysia cites the Singapore Rural Board's Report, Malaysia's predecessor, Johor, expressly disclaimed ownership of Pedra Branca in official correspondence.³⁶³ In addition, Malaysia simply ignores the many and varied examples of Singapore's on-going administration of the island – acts which were clearly carried out *à titre de souverain* and which were entirely consistent with Singapore's own constitutional acts relating to the extent of her territory.

³⁶² MM p. 98, para. 216.

³⁶³ This was discussed in SM Chapter VIII, and also in this Counter-Memorial, at Chapter VII *below*.

Section III. Singapore's Conduct Confirms Singapore's Title to Pedra Branca

6.51 Rather than focusing on the long-standing pattern of Singapore administration of Pedra Branca as a whole, the Malaysian Memorial takes aim at three isolated items of Singapore's conduct in an effort to show that these examples support Malaysia's case.³⁶⁴ This very cavalier treatment of the relevant facts is unimpressive as Singapore will now show.

A. SINGAPORE'S LIGHT DUES LEGISLATION

6.52 The first instruments referred to by the Malaysian Memorial are the 1957 Lights Dues Ordinance, pursuant to which Singapore established a Lights Dues Board, and the 1958 Amendment to that Ordinance. Malaysia purports to find significance in the fact that the 1957 Ordinance referred to the duty of the Board to expend funds on the maintenance and improvement of navigational aids “in the waters of the Colony” which the 1958 Amendment changed by replacing the words quoted above with the words “in Singapore including those at Pedra Branca (Horsburgh) and at Pulau Pisang”. According to Malaysia, given that there is no dispute that Pulau Pisang belongs to Malaysia, the fact that both Pedra Branca and Pulau Pisang were mentioned in the same breath demonstrates that the islands “had a common status, namely, that both islands fell outside of the territory of Singapore notwithstanding Singapore's management and control of the lighthouses situated thereon.”³⁶⁵

³⁶⁴ MM pp. 110-116, paras. 245-267.

³⁶⁵ MM p. 112, para. 250.

6.53 Neither the language of the legislation referred to nor the parliamentary debates which accompanied the 1958 amendments provide any support for this argument. Under the provisions of Section 6(4) of the 1957 Ordinance, the Board was only authorized to spend money for the maintenance of navigational aids in the “waters of the Colony” (a term defined in the Ordinance to mean territorial waters of the Colony *excluding* waters within the port limits). Nothing in this legislation indicated that Pedra Branca did not belong to Singapore or that it was outside Singapore territorial waters. It is therefore disingenuous for Malaysia to try to draw unwarranted conclusions from the mere appearance of the words “Pedra Branca” in a provision which also mentions Pulau Pisang.

6.54 This was made very clear by the speech of Singapore's Minister for Commerce and Industry made to the Legislative Assembly during the second reading of the 1958 amendments. He stated:

“Sir, fifteen months of operation of the Light Dues Ordinance 1957 has disclosed the necessity for a number of amendments to the Ordinance which are contained in this Bill. All the amendments have been agreed to by the Singapore Shipowners' Association.

The definition of the ‘waters of the Colony’ in section 2 of the Ordinance is deleted by clause 2 of the Bill. This definition refers to territorial waters excluding the port limits. This deletion is effected because the intention now, as reflected in clause 3 of the Bill, is that the light dues are to be paid by ships which call at the port or place within the Colony and not by ships which are in transit in the waters of the Colony and which do not call here. The deletion of the definition would also enable the Light Dues Board to expend monies from the Light Dues Fund on the maintenance of lights and navigational aids within the port limits and on the maintenance of the light at Pulau Pisang which is not within territorial waters.

...

Clause 4 of the Bill gives effect to the intention I referred to earlier of enabling the Light Dues Board to provide navigational aids within the

port limits *and at Pulau Pisang which is outside our territorial waters.*”³⁶⁶ [emphasis added]

6.55 The Minister's speech only referred to Pulau Pisang as falling outside of Singapore's territorial waters, but did not do so in respect of Pedra Branca. This was a clear recognition by the Minister that Singapore had no sovereignty over Pulau Pisang. In contrast, Singapore both possessed and exercised sovereignty over Pedra Branca. Accordingly, the Minister made no reference to Pedra Branca in his speech.

6.56 Far from supporting Malaysia's case, the 1957 and 1958 Ordinances and the Parliamentary debates clearly show that Pedra Branca and Pulau Pisang were not regarded as having “a common status”. Unlike Pulau Pisang, there was absolutely no suggestion, either in the text of the Ordinance or in the Minister’s Parliamentary speech, that Pedra Branca did not belong to Singapore.

6.57 Malaysia's reliance on the Singapore Light Dues Act 1969 is also misplaced for the same reasons. In the first place, section 2 of the 1969 Act defined Singapore as including:

“the Island of Singapore and all the islands and places which on the 2nd day of June 1959, were administered as part of Singapore and all territorial waters adjacent thereto.”³⁶⁷

Singapore has already shown that she was administering Pedra Branca at the relevant date and that the island and its territorial waters consequently fell squarely within the definition of “Singapore” in the Act.

³⁶⁶ See Singapore Legislative Assembly Debates, Second Reading of the Light Dues (Amendment) Bill, 16 July 1958, attached to this Counter-Memorial as Annex 38. In Singapore's parliamentary practice, the second reading is the occasion for the Minister moving a particular bill to explain the object of the legislation.

³⁶⁷ MM p. 112, para. 252; Light Dues Act (No. 12 of 1969) (Republic of Singapore) (extracts) (MM Vol. 3, Annex 112).

6.58 Secondly, Section 7 of the Act, which is cited at paragraph 253 of the Malaysian Memorial, does no more than repeat essentially the same language that had been adopted in the 1958 Amended Light Dues Ordinance. It adds nothing to Malaysia's case. The fact that the lighthouses at Pedra Branca and Pulau Pisang were mentioned in addition to the navigational aids “in Singapore and the approaches thereto” reflected no more than a recognition of a geographic fact – namely, that both Pedra Branca and Pulau Pisang lay beyond the immediate approaches to the main island and port of Singapore.

B. J.A.L. PAVITT'S COMMENTS REGARDING PEDRA BRANCA

6.59 Malaysia's Memorial refers to a statement of J.A.L. Pavitt, the former Director of Marine, Singapore, as expressed in his book entitled *First Pharos of the Eastern Seas: Horsburgh Lighthouse*.³⁶⁸ As will be seen, this adds nothing to the points that have already been dealt with in the previous sections and do not advance the Malaysian thesis.

6.60 Malaysia cites the following passage from the book:

“Horsburgh is one of the group of 5 lighthouses operated by the Singapore Light Dues Board.

The Board, formed by Statute in 1957, is responsible for the provision and upkeep of all ship navigational aids in Singapore waters, *and for the outlying stations at Pedra Branca (Horsburgh) in the South China Sea and Pulau Pisang in the Malacca Strait. Within Singapore waters, the Board maintains Raffles, Sultan Shoal and Fullerton Lighthouses, 33 light beacons, 29 unlit beacons, 15 light buoys, and 8 unlit buoys.*”³⁶⁹
[emphasis added in Malaysia's Memorial]

³⁶⁸ MM pp. 114-115, paras. 257-263.

³⁶⁹ MM p. 114, para. 259, citing Pavitt J.A.L., *First Pharos of the Eastern Seas: Horsburgh Lighthouse* (1966), at p. 51 (MM Vol. 3, Annex 74). For the location of the various lighthouses mentioned, see **Insert 10 above**, after p. 130.

Malaysia seeks to find significance in the fact that Pavitt distinguished between the navigational aids “in Singapore waters” and the “outlying stations” of Pedra Branca and Pulau Pisang. According to Malaysia, “[t]he unavoidable implication is that Horsburgh and Pulau Pisang do not fall within Singapore waters.”³⁷⁰ This may be correct as far as it goes, but it adds nothing to Malaysia's case.

6.61 Malaysia's argument simply begs the question as to what Pavitt meant in referring to “Singapore waters”, which in normal parlance, simply refers to the waters around the Island of Singapore. The key statement in Pavitt's account is that both Pedra Branca and Pulau Pisang were considered to be “outlying stations”. As pointed out above, as a matter of pure geography, both islands do not lie within “Singapore waters”, since both are located more than three miles (which was the limit of Singapore's territorial waters at the time) from the nearest land territory of the main island of Singapore and its immediately adjacent islands.³⁷¹ This is why they were distinguished as “outlying stations” in contrast to the Raffles, Sultan Shoal and Fullerton lighthouses. Pulau Pisang belonged to Malaysia. Pedra Branca belonged to Singapore. Pedra Branca generated its own territorial waters, within which both Middle Rocks and South Ledge are situated, but it would not, in normal parlance, be described as falling within “Singapore waters”.

6.62 All this, however, has no bearing on Pedra Branca's attribution. Pedra Branca belongs to Singapore, not by virtue of the fact that it lay within Singapore's waters, but rather because it had been lawfully possessed, occupied and administered by Great Britain and Singapore for over 100 years. Pavitt's account is a correct factual description of the geographical location of the

³⁷⁰ MM pp. 114-115, para. 260.

³⁷¹ See above, at paras. 6.33.

lighthouses which in no way implies that Pedra Branca and Pulau Pisang were under the same sovereign. For the reasons that Singapore has already explained, it simply does not follow that because Pavitt mentioned both Pedra Branca and Pulau Pisang, on both of which Singapore maintained lighthouses, he thereby “considered that they had a common status”.³⁷² The misguided nature of Malaysia’s conclusions regarding Pavitt’s account is further underlined by the fact that, in the following year (1967), a letter was written *on his behalf* by one of his officials to the Singapore Foreign Ministry, stating that:

“I have been advised that the waters within 3 miles of Horsburgh Lighthouse (at the eastern entrance of the Singapore Strait) may be considered to be Singapore *territorial* waters.”³⁷³ [emphasis added]

This letter, written at a time when Pavitt was the head of the Singapore Marine Department,³⁷⁴ demonstrate that, while Pedra Branca may be described as outside “Singapore waters” as a matter of geography, Singapore officials regard the island as subject to Singapore’s sovereignty and capable of generating its own three-mile belt of territorial waters.

C. PULAU PISANG AND PEDRA BRANCA WERE SUBJECT TO DIFFERENT LEGAL REGIMES

6.63 It is a *non sequitur* for Malaysia to suggest that each time Pedra Branca and Pulau Pisang were mentioned together, this meant that both were under the same sovereign status. The historical record shows that each island had a very

³⁷² MM p. 115, para. 261.

³⁷³ Letter from Brown D.T. on behalf of Director of Marine, Singapore to Permanent Secretary, Ministry of Foreign Affairs, dated 14 Sep 1967 attached to this Counter-Memorial as Annex 42.

³⁷⁴ J.A.L. Pavitt was Director of Marine, Singapore until 1 Mar 1968, when he was succeeded by D. T. Brown, the author of this letter, as Director of Marine, Singapore – *see* Extract from Annual Report of the Marine Department, 1968 attached to this Counter-Memorial as Annex 43.

different legal and factual history – a fact that is borne out by the Minister's speech referred to in paragraph 6.54 above.

6.64 Pulau Pisang was subject to a written grant from the Ruler of Johor pursuant to which Singapore had the right to operate and maintain a lighthouse on a specific plot of ground on the island which remained under the Ruler's sovereignty. The original grant by the Sultan of Johor to the Governor of the Straits Settlements to build and operate the lighthouse on Pulau Pisang was made in 1885.³⁷⁵ This grant was confirmed by a written Indenture dated 6 October 1900 which covered both the plot of land on which the lighthouse was constructed and a roadway to the beach for landing supplies.³⁷⁶ The grant was to last in perpetuity so long as the lighthouse was maintained in good order and properly managed. The grant was also subject to the specific proviso that the Governor of the Strait Settlements would not use any of the lands granted except for purposes of maintaining and working the lighthouse. In contrast, Pedra Branca was subject to no such grant. It had been lawfully possessed by Great Britain in the years 1847-1851 and constantly administered as such thereafter by both Great Britain and, subsequently, Singapore, without Malaysia claiming any rights thereto until the dispute emerged in 1979-1980.

6.65 The extent of Singapore's "control" over Pulau Pisang was limited to the lighthouse and the roadway. In contrast, on Pedra Branca, Singapore exercised full sovereign authority over the entire island and carried out numerous acts of administration over both the lighthouse and on the island as a whole, as well as

³⁷⁵ MM p. 91, para. 197.

³⁷⁶ See Indenture between Ibrahim (Sultan of Johore) and Sir James Alexander Swettenham, (Officer Administering the Government of the Colony of the Straits Settlements) dated 6 October 1900 (MM Vol. 3, Annex 89). See also Letter from Sultan Ibrahim of Johore to the Officiating Secretary of the Straits Settlements dated 25 Apr 1900, attached to this Counter-Memorial at Annex 24.

within its territorial waters.³⁷⁷ Malaysian officials could travel freely to Pulau Pisang. In contrast, when they wished to visit Pedra Branca, they were obliged to, and did, seek specific permission from the authorities of Singapore.³⁷⁸ In 1968, the Director of Marine, Singapore instructed his department to “ensure that all staff proceeding to Pulau Pisang possess valid travel documents”.³⁷⁹ No such instructions were given in relation to Pedra Branca. On Pulau Pisang, Malaysia insisted that Singapore not fly her Marine Ensign.³⁸⁰ With respect to Pedra Branca, Malaysia made no such demand, and the British and, subsequently, Singapore Marine Ensign flew continuously and without protest for more than 150 years.³⁸¹

6.66 These are just a few representative examples which show that the two islands were subject to entirely different legal regimes and that Malaysia recognised as much. In short, all of Singapore's activities, whether legislative or administrative, were entirely consistent with the fact that Singapore possessed sovereignty over Pedra Branca while she had none over Pulau Pisang.

³⁷⁷ SM pp. 89-137, paras. 6.1-6.122.

³⁷⁸ SM pp. 109-113, paras. 6.54-6.64.

³⁷⁹ See Minute from Brown D.T. (Director of Marine, Singapore) to Marine Department Engineer dated 27 May 1968, attached to this Counter-Memorial as Annex 45.

³⁸⁰ SM p. 109, para. 6.53.

³⁸¹ SM pp. 107-109, paras. 6.47-6.53.

D. THE INDONESIA-SINGAPORE TERRITORIAL SEA AGREEMENT 1973

6.67 The last item of unilateral Singapore conduct referred to in the Malaysian Memorial is the 1973 Indonesia-Singapore Territorial Sea Agreement.³⁸² Malaysia's arguments with respect to this agreement are very tentative. In the words of the Malaysian Memorial:

“If Singapore had considered at this time that it had sovereignty over Pulau Batu Puteh [*Pedra Branca*], it *might* have been expected that some reference would have been made in the Agreement to the waters around the island, in particular given the proximity of Pulau Batu Puteh to the Indonesian island of Pulau Bintan, which lies 7.5 nm to its south.”³⁸³ [emphasis added]

6.68 The Indonesia-Singapore Territorial Sea Agreement provides no support at all to Malaysia's contention that it amounted to recognition that Singapore did not have sovereignty over Pedra Branca. The Agreement was specifically designed to deal with delimitation within the Singapore Strait, one of the busiest shipping channels in the world, rather than to effectuate a complete delimitation of the two States' maritime zones. The position is accurately summed up in the well-known study of maritime boundaries published by Charney and Alexander, *International Maritime Boundaries* (Vol. 1) in the following way:

“Indonesia and Singapore border on one of the world's most critical navigational bottlenecks, namely the Straits of Malacca and Singapore. The boundary in this agreement runs through an area where unimpeded transit of vessels is fundamentally important for the three coastal states, including Malaysia. Although their territorial sea boundary would eventually require two tri-junctions on both ends of the Singapore Strait, their immediate concern is the safety of navigation in the Straits of Malacca and Singapore rather than extension of their territorial sea boundary around Singapore. *Hence the delimitation in this agreement*

³⁸² MM pp. 115-116, paras. 264-266; *Agreement Stipulating the Territorial Sea Boundary Lines between Indonesia and the Republic of Singapore in the Strait of Singapore* dated 25 May 1973, reprinted in U.S. Department of State, *Limits in the Sea* (No. 60, 1974) (MM Vol. 3, Annex 18).

³⁸³ MM p. 116, para. 266.

*has been left 'unfinished' except in the heavily navigated portion of the Strait of Singapore.*³⁸⁴ [emphasis added]

6.69 There is another reason why the 1973 Agreement did not and could not deal with the delimitation between Pedra Branca and Indonesia. Due to the geography of the area, any delimitation in the vicinity of Pedra Branca would have been impractical without the participation of all three States – Singapore, Indonesia and Malaysia. In this respect, Malaysia's own conduct is significant. The 1970 Indonesia-Malaysia Territorial Sea Agreement,³⁸⁵ which was confined to the busy Malacca Strait, did not deal with the area around Pedra Branca which would have been expected had Malaysia genuinely considered that Pedra Branca was part of its territory.³⁸⁶ In other words, the Indonesia-Malaysia Territorial Sea Agreement was also a limited delimitation which did not deal with the entire delimitation situation between the two States. Thus, the same argument that Malaysia now raises against Singapore can be used against her with respect to her own practice.

6.70 The Charney and Alexander study also notes that the 1973 Indonesia-Singapore Territorial Sea Agreement will eventually have to be extended:

“The present boundary line would have to be extended on both sides, in order to complete the circle of the island republic's [i.e., *Singapore's*] maritime jurisdiction. In this regard, it should be noted that Horsburgh, Singapore's isolated territory situated on the eastern approach to the Strait of Singapore, was placed within Malaysian jurisdiction in an official Malaysia map of 1979. Singapore regards this as an innocent error that would cause no ‘territorial dispute’ with Malaysia.”³⁸⁷

³⁸⁴ Charney J. and Alexander L. (eds.), *International Maritime Boundaries*, Vol. 1 (1993), at p. 1052.

³⁸⁵ MM Vol. 2, Annex 17.

³⁸⁶ Charney J. and Alexander L. (eds.), *supra* note 384, at pp. 1025-1034.

³⁸⁷ *Ibid*, at p. 1050.

E. CONCLUSIONS AS TO SINGAPORE'S CONDUCT

6.71 From the foregoing, it can be seen that Malaysia's attempt to pick and choose from isolated acts of Singapore's conduct, far from supporting her own case that Singapore did not consider that she possessed sovereignty over Pedra Branca and that title to the island vested in Malaysia, actually confirms Singapore's sovereignty over Pedra Branca. Malaysia's attempt to draw adverse inferences from Singapore's conduct is quite extraordinary when it is remembered that Malaysia cannot point to a single act of administration that she has undertaken on Pedra Branca at any time. This is a matter that will be discussed in the next section. For present purposes, it bears recalling, as Singapore documented in her Memorial,³⁸⁸ that in addition to taking possession of Pedra Branca and building the lighthouse in 1847-1851, Singapore has carried out a steady stream of official State functions and administered and controlled the island for over 150 years. To recapitulate, these activities included:

- (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;

³⁸⁸ See generally SM pp. 89-137, paras. 6.1-6.122 (Chapter VI).

- (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) inviting public tenders for sea reclamation works to extend the island.

6.72 This is the proper context within which any examination of the Parties' conduct must be undertaken. When considering this conduct, it is instructive to recall what Malaysia had to say about her own administration and control of the islands of Ligitan and Sipadan in the *Indonesia/Malaysia* case – administration and control which was not accompanied by the prior lawful possession of the islands, as is the case here, and which was far less extensive than that of Singapore over Pedra Branca. In the words of Malaysia's Counsel:

“But first I must stress again a basic and inescapable historical fact. These islands are now in the possession of Malaysia, subject to its

control and administration, and they have been so at all material times for more than a century and a half. There is not a glimmer of actual display of Indonesian State authority on the islands. Indonesia is effectively a claimant attempting to oust the State in Possession from its long-possessed territory.”³⁸⁹

6.73 Needless to say, this comment is entirely apposite to the present case. Taken as a whole – and it is an impressive "whole" – and compared to the complete absence of any competing Malaysian activities, Singapore's conduct fully confirms that she is the lawful owner of Pedra Branca.

Section IV. Malaysia's Conduct Does Not Evidence Malaysia's Title to Pedra Branca

6.74 In the conclusion of Section E of Chapter 7 of her Memorial, Malaysia asserts that her conduct demonstrates her “consistently held position regarding her title to Pulau Batu Puteh and surrounding waters”.³⁹⁰ To that end, she invokes four (and only four) “examples” of such alleged conduct:

- (a) Malaysian naval charts showing Malaysian territorial waters;
- (b) the 1968 Petroleum Agreement Between the Government of Malaysia and Continental Oil Company of Malaysia;
- (c) the delimitation of Malaysia's territorial sea in the area around Pedra Branca; and
- (d) the Indonesia-Malaysia Continental Shelf Agreement of 1969.

Singapore now deals with each of these so-called "assertions of sovereignty".

³⁸⁹ See ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Oral Arguments, 6 June 2002, CR 2002/30, at p. 30, para. 12.

³⁹⁰ MM p. 124, para. 282.

6.75 However, two general preliminary remarks must be made:

- (a) Malaysia insistently alleges that she “consistently” exercised sovereignty over Pedra Branca during:

“the 136 years between the 1844 granting of permission by Johor to the British authorities in Singapore to build a lighthouse on Pulau Batu Puteh and Singapore's Note of 1980”.³⁹¹

However, the four acts she availed herself of only date back to 1968 at best – that is twelve years before the publication of her 1979 map. The acts also all relate to the determination of her maritime spaces, not to the island itself;

- (b) Malaysia herself is conscious of the weaknesses in her case, since she tries to justify them by invoking “the tiny surface of the island and the permission given for its use as the location of the Horsburgh lighthouse”.³⁹² But this is no excuse. Besides the fact that the “permission” she claims to have given to Great Britain is a pure product of her imagination as has been shown earlier in this Counter-Memorial,³⁹³ it is most relevant to note that *none* of the alleged acts relates to or even mentions Pedra Branca. More than that: not only has Malaysia never protested against Singapore's acts of sovereignty over the island, but also, when Malaysian officials sought access, for whatever reason, to Pedra Branca and its waters, she formally requested authorisation from Singapore.³⁹⁴

³⁹¹ MM p. 84, para. 182; and at p. 117, para. 269.

³⁹² MM p. 117, para. 269.

³⁹³ *See above*, at paras. 5.43-5.50, 5.58-5.90.

³⁹⁴ *See e.g.*, SM pp. 151-154, paras. 7.31-7.37; pp. 111-113, paras. 6.60-6.64.

6.76 It is against this background that the alleged Malaysian conduct in respect of Pedra Branca and its surrounding waters must be examined.

A. MALAYSIAN NAVAL CHARTS OF 1968

6.77 Malaysia's first argument in respect of her alleged acts relating to waters around Pedra Branca concerns a *confidential* "Letter of Promulgation" addressed on 18 July 1968 by Commodore K. Thanabalasingham of the Royal Malaysian Navy to the Naval Staff Division of the Ministry of Defence in Kuala Lumpur.³⁹⁵ In reality, this letter can have no legal effect *vis-à-vis* Singapore and does not prove any *animus occupandi* on the part of Malaysia, contrary to her assertions.³⁹⁶

6.78 Malaysia refers to Charts N° 2403 and 3839, which, according to her, would "show Pulau Batu Puteh (as well as South Ledge and Middle Rocks) as falling clearly within Malaysian territorial waters".³⁹⁷ This might be so. But it is troubling that Malaysia does not expressly refer to any annexed maps. If Singapore's understanding is correct, those Charts are Maps 20 and 25 in Malaysia's Map Atlas, the significance of which is discussed elsewhere in this Counter-Memorial.³⁹⁸ It can, however be noted that:

- (a) curiously enough, none of those charts has ever been shown by Malaysia during previous negotiations between the Parties; and

³⁹⁵ MM p. 118, para. 270; Letter from Thanabalasingham K. (Commodore, Royal Malaysian Navy) to Naval Staff Division (Ministry of Defence, Malaysia) dated 16 July 1968 (MM Vol. 3, Annex 76).

³⁹⁶ MM pp. 118-119, paras. 270-273.

³⁹⁷ MM p. 118, para. 272.

³⁹⁸ *See below*, at para. 9.21.

(b) moreover, it seems that, at least with respect to Map 25 the territorial waters around Pedra Branca were not contained in the original map,³⁹⁹ but appears to have been added later by hand,⁴⁰⁰ probably for the purpose of the 18 July 1968 letter.⁴⁰¹

6.79 As Malaysia herself acknowledges, this confidential letter and the attached chartlets, which were only “for the information of Senior and Commanding Officers”,⁴⁰² belongs to Malaysian “*internal practice*”⁴⁰³ which, in the circumstances, cannot have any probative value — both the letter and Charts N° 2403 and 3839, which had not been communicated to Singapore before the filing of Malaysia’s Memorial, are clearly of an exclusively preparatory nature. These documents are in no way dispositive and are not opposable to Singapore.⁴⁰⁴

6.80 In any case, this point does not help Malaysia since it is made crystal clear in Commodore Thanabalasingham's letter itself that:

“As can be seen, there are certain areas in which these limits have never been properly determined or negotiated and those promulgated are basically a determination with strict regard to the 1958 Geneva Convention.”⁴⁰⁵

³⁹⁹ See the original Admiralty Chart 2403 (1936), attached as Map No. 13 of the Singapore Counter-Memorial Map Atlas.

⁴⁰⁰ See below, at para. 9.21.

⁴⁰¹ See above, at para. 6.77 *et seq.*

⁴⁰² Letter from Thanabalasingham K. (Commodore, Royal Malaysian Navy) to Naval Staff Division (Ministry of Defence, Malaysia) dated 16 July 1968 (MM Vol. 3, Annex 76).

⁴⁰³ MM p. 118, para. 273, emphasis added.

⁴⁰⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 48; *Eritrea/Yemen Arbitration (Phase One)*, *supra* note 97, at para. 94.

⁴⁰⁵ MM p. 118, para. 270; Letter from Thanabalasingham K. (Commodore, Royal Malaysian Navy) to Naval Staff Division (Ministry of Defence, Malaysia) dated 16 July 1968 (MM Vol. 3, Annex 76).

In other words, this internal document was nothing but a "projection" of the rules of the 1958 Convention on the Territorial Sea, as the Malaysian Navy interpreted it and without regard to the legal boundaries between the concerned States in the area. It did not necessarily reflect the views of the Malaysian Government as a whole, as demonstrated by the fact that in that very same year (1968), Malaysia asked Singapore to stop flying the Singapore marine ensign at Pulau Pisang, but did not ask for the same to be done in respect of same marine ensign at Horsburgh Lighthouse on Pedra Branca.⁴⁰⁶

6.81 Finally, whatever value Commodore Thanabalasingham's internal confidential letter of 18 July 1968 may have as evidence, it certainly cannot outweigh *internal* statements by Singapore officials asserting *Singapore's* right to claim a territorial sea around Pedra Branca.⁴⁰⁷ It clearly stems from all these reasons that this internal document cannot "confirm" or "assert" any Malaysian title over the island, let alone create a new title or displace Singapore's title.

B. THE 1968 PETROLEUM AGREEMENT WITH THE CONTINENTAL OIL COMPANY OF MALAYSIA

6.82 The Malaysian Memorial relies on the grant of an offshore oil agreement by Malaysia to the Continental Oil Company ("Continental") on 16 April 1968

⁴⁰⁶ See *above*, at para. 6.65. See also, SM p. 109, para. 6.53.

⁴⁰⁷ See Letter from Brown D.T. on behalf of Director of Marine, Singapore to Permanent Secretary, Ministry of Foreign Affairs, dated 14 Sep 1967 attached to this Counter-Memorial as Annex 42, which advised that "... the waters within 3 miles of Horsburgh Lighthouse (at the eastern entrance of the Singapore Strait) may be considered to be Singapore territorial waters."; See also opinion of Chief Surveyor, Singapore dated 7 Oct 1952 that "... Singapore should claim a 3 mile limit around this point [i.e., *Pedra Branca*]", quoted in Letter from Master Attendant, Singapore to Colonial Secretary, Singapore dated 6 Feb 1953 (SM Vol. 6, Annex 91, p.855). (It was this opinion by the Chief Surveyor, Singapore which led to the enquiry of 21 Sep 1953 by J.D. Higham of the Singapore Colonial Secretary's Office, resulting in the formal disclaimer of title over Pedra Branca by the Acting State Secretary of Johor – see SM p. 175, para. 8.35, note 376.)

to support her case. According to Malaysia, the existence of that agreement, and Singapore's failure to protest it, evidences a “clear understanding”⁴⁰⁸ that Malaysia considered that she had sovereign authority over the area covered by the Agreement (which is said to have extended beyond Pedra Branca), and that Singapore “was content in the knowledge that it had no territorial interests in the area...”.⁴⁰⁹ As Singapore will show, these contentions are misplaced.

6.83 The first thing to note about the concession agreement with Continental is that it did not encompass the island of Pedra Branca. The First Schedule to the agreement stipulated that the concession was being awarded over “Scheduled Lands” which included the whole area of the continental shelf “extending to the International Boundaries *wherever they may be established*”.⁴¹⁰ Since there was no established international boundary around Pedra Branca, the precise extent of the concession was speculative – it left open the fact that international boundaries “may be established” in the future. The concession agreement was thus without prejudice to the question of boundaries and, necessarily, of sovereignty over islands located where boundaries had not been agreed.

6.84 In this respect, it is worth noting that Article 8 of the Agreement reinforces the point raised in the previous paragraph. It provided:

“In the event of the inclusion by inadvertence in the Scheduled Lands of any area or areas over which it may subsequently be proved that the Government is not entitled to the petroleum rights or of lands or areas in respect of which the petroleum rights have already been granted to other individuals or companies, this Agreement shall be deemed to have been

⁴⁰⁸ MM p. 119, para. 274.

⁴⁰⁹ MM p. 121, para. 278.

⁴¹⁰ *Petroleum Agreement Under Section 9 of the Petroleum Mining Act, 1966 in Respect of Off-shore Lands between the Government of Malaysia and Continental Oil Company of Malaysia Concerning 24,000 (Approximate) Square Miles of the Continental Shelf Adjacent to the East Coast of West Malaysia* dated 16 Apr 1968 (extracts) (MM Vol. 3, Annex 110), at p. 31, emphasis added.

amended by the exclusion from the Scheduled Lands of any such lands or areas from the date of such proof or grant.”⁴¹¹

6.85 In addition, as Malaysia herself concedes, islands, including three-mile belts of territorial sea around them, were expressly *excluded* from the concession agreement.⁴¹² By definition, therefore, Pedra Branca could not have been encompassed by the concession. Moreover, neither Malaysia nor her concession holder ever carried out any petroleum operations either on Pedra Branca or within its territorial waters. Thus, the concession agreement had nothing to do with Pedra Branca, which was excluded from its scope, and the agreement simply does not impact on the sovereign rights of Singapore over the island.

6.86 Once again,⁴¹³ Malaysia adopts a fundamentally different position in the present case from its position in the *Indonesia/Malaysia* case when it comes to the relevance of these kinds of activities. In *Indonesia/Malaysia*, Malaysia was at pains to downplay the significance of the parties' oil concession practice. This was because the concessions in issue in that case did not encompass the disputed islands of Ligitan and Sipadan. As the Court observed in its Judgment:

“For its part, Malaysia notes that the oil concessions in the 1960s did not concern territorial delimitation and that the islands of Ligitan and Sipidan were never included in the concession perimeters. It adds that ‘[n]o activity pursuant to the Indonesian concessions had any relation to the islands’.”⁴¹⁴

⁴¹¹ Although Malaysia provided a copy of the full Agreement to the Court, she did not annex Art. 8 of the Agreement to her Memorial. Singapore does so in this Counter-Memorial for ease of reference. See Additional Extracts from *Petroleum Agreement Under Section 9 of the Petroleum Mining Act, 1966 in Respect of Off-shore Lands between the Government of Malaysia and Continental Oil Company of Malaysia Concerning 24,000 (Approximate) Square Miles of the Continental Shelf Adjacent to the East Coast of West Malaysia* dated 16 Apr 1968, attached to this Counter-Memorial as Annex 44.

⁴¹² MM p. 119, para. 274.

⁴¹³ See e.g., paras. 4.48, 6.72 above.

⁴¹⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, supra note 13, at para. 78.

And the Court concluded:

“The Court cannot therefore draw any conclusion... from the practice of the Parties in awarding oil concessions.”⁴¹⁵

6.87 Obviously, the same remarks apply here with respect to the Continental oil concession. *First*, Pedra Branca was not included in the concessions perimeters. *Secondly*, neither Malaysia nor her concessionaire carried out any activities in relation to the island. It follows that just as the oil concessions in the *Indonesia/Malaysia* case were irrelevant for purposes of determining sovereignty, the Continental concession is also irrelevant in the present case.⁴¹⁶

6.88 Malaysia also argues that the existence of her oil concession with Continental was public knowledge at the time and that Singapore did not protest. However, Malaysia does not provide any evidence that the actual co-ordinates of the concession were made public at the time. The press extracts quoted in her Memorial did not provide any coordinates nor did the article in the *Bulletin of the American Association of Petroleum Geologists*, reproduced as Annex 77 to the Malaysian Memorial.⁴¹⁷ In fact, the map attached to that article shows the southern limit of the concession to be a line due east from Point Romania: Pedra Branca lies south of Point Romania, clearly outside this area. There was simply no cause for Singapore to protest.

6.89 It also appears that a few years after the agreement was signed, Continental relinquished a large portion of its concession including the entire

⁴¹⁵ *Ibid*, at para. 79.

⁴¹⁶ *See also Eritrea/Yemen Arbitration* (Phase One), *supra* note 97, at paras. 389-437, and, in particular, para. 437 (the conclusion of the Tribunal), which applies *mutatis mutandis* in the present case.

⁴¹⁷ MM p. 121, paras. 276-277.

southern area off the coast of Johor in the vicinity of Pedra Branca.⁴¹⁸ The Malaysian Memorial fails to mention this development. In the light of this relinquishment and the fact that Continental never carried out any petroleum activities on Pedra Branca or within its territorial waters (whether drilling or even seismic surveys), Singapore scarcely had any duty to react. The concession as such is irrelevant for the present proceedings and provides absolutely no evidence supporting Malaysia's contention that she held title to Pedra Branca.

C. THE DELIMITATION OF MALAYSIA'S TERRITORIAL SEA IN THE AREA AROUND PEDRA BRANCA

6.90 In paragraph 279 of her Memorial, Malaysia recalls that, “[b]y the Emergency (Essential Powers) Ordinance 1969, Malaysia extended its territorial waters to a distance of 12 nm”.⁴¹⁹ This is an obvious fact. But, contrary to Malaysia's assertion, this legislation did not extend “Malaysian territorial waters to and beyond Pulau Batu Puteh”.⁴¹⁹ Not only did the Ordinance not name Pedra Branca (or any other place), it also expressly left open the question of the delimitation between Malaysia and her neighbours.⁴²⁰ The fact is that the Ordinance does no more than to re-enact the methodological provisions of the Geneva Convention on the Territorial Sea and the Contiguous Zone to which she became a Party on 21 December 1960.

⁴¹⁸ See Extracts from Bowman J.D., *Petroleum Developments in Far East in 1973*, 58 American Association of Petroleum Geologists Bulletin 2124 (1974), attached to this Counter-Memorial as Annex 47, referring to this relinquishment.

⁴¹⁹ MM p. 123, paras. 279.

⁴²⁰ See Federation of Malaysia, Emergency (Essential Powers) Ordinance, No. 7 1969, section 3 (SM Vol. 6, Annex 114; MM Vol. 3, Annex 111).

6.91 Section 12, paragraph 1, of the said Ordinance provides:

“Where the coast of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.”⁴²¹

This provision clearly cannot prejudice sovereignty over any land territory or island (including of course, Pedra Branca). On the contrary, it leaves the question open and confines itself to indicating the method which Malaysia might adopt in any negotiations with her neighbours for the delimitation of their respective territorial seas. It goes without saying that Singapore did not have the slightest reason to raise an objection or a commentary concerning such an expression of intention, especially since the Charts first referred to in Section 5 of the Ordinance were not published until 1979 – whereupon it was met by a prompt protest from Singapore.

D. THE INDONESIA-MALAYSIA CONTINENTAL SHELF AGREEMENT OF 1969

6.92 There are two reasons why Singapore was not obliged to react to the conclusion of the Agreement between Indonesia and Malaysia of 27 October 1969 relating to the delimitation of their respective continental shelves.⁴²² *First,*

⁴²¹ See Federation of Malaysia, Emergency (Essential Powers) Ordinance, No. 7 1969, section 3 (SM Vol. 6, Annex 114; MM Vol. 3, Annex 111).

⁴²² See *Indonesia-Malaysia: Agreement between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental Shelves between the Two Countries* dated 27 Oct 1969 (MM Vol. 2, Annex 16).

this Agreement is *res inter alios acta* and could, by no means, have encroached upon Singapore's rights.

6.93 *Secondly* – and this is even more significant – this Agreement carefully avoided any intrusion into the area in the vicinity of Pedra Branca. This is apparent from the coordinates in Article I, Section B as illustrated on the map reproduced in Malaysia's Memorial.⁴²³ By not including that sector under the treaty, Indonesia and Malaysia clearly showed the conviction that the island was under the sovereignty of neither of them.

6.94 This is confirmed by the joint press statement issued by Indonesia and Malaysia of 22 September 1969 in which the two delegations indicate that “their two countries have reached agreement on the delimitation of the continental shelf boundaries between the two countries in the Straits of Malacca, off the East Coast of West Malaysia and off the Coast of Sarawak”.⁴²⁴ This statement clearly excludes the Strait of Singapore, and for a good reason: it was not possible for Indonesia and Malaysia to delimit their respective maritime areas in the Straits of Singapore without the participation of Singapore, which has sovereignty over Pedra Branca and the adjacent features.

⁴²³ MM p. 122 (Insert 20).

⁴²⁴ See Press Statement by the Indonesian and Malaysian Delegations to the Talks on the Delimitation of the Continental Shelves Between Malaysia and the Republic of Indonesia dated 22 Sep 1969 (MM Vol. 3, Annex 78).

Section V. Bilateral Conduct of the Parties Invoked by Malaysia Has No Bearing on Title on Pedra Branca

6.95 In her desperate effort to establish her alleged title over Pedra Branca, Malaysia also invokes “[t]hree examples of the conduct of the Parties in a bilateral context”⁴²⁵:

- (a) the Straits Settlements and Johor Territorial Waters Agreement of 1927;
- (b) the Straits Lights System; and
- (c) the 1953 exchange of correspondence between the Colonial Secretary, Singapore, and the Acting State Secretary, Johor.

6.96 Given the importance of the last point, which Malaysia grossly underestimates in her Memorial, Singapore will deal with it separately in the next Chapter of this Counter-Memorial. In this Section, Singapore will only briefly answer Malaysia's arguments concerning the 1927 Agreement and the Straits Light System.

A. THE STRAITS SETTLEMENTS AND JOHOR TERRITORIAL WATERS AGREEMENT OF 1927

6.97 Malaysia sought to make arguments based on the Straits Settlements and Johor Territorial Waters Agreement of 19 October 1927⁴²⁶ at two places in her Memorial – first, in Section B of Chapter 7 of her Memorial, as part of her

⁴²⁵ MM p. 99, para. 219.

⁴²⁶ See *Straits Settlements and Johore Territorial Waters Agreement* dated 19 Oct 1927, reprinted in Allen, Stockwell & Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia, 1761-1963* (1981), pp. 114-116 (MM Vol. 2, Annex 12).

arguments concerning the constitutional development of Singapore and Malaysia,⁴²⁷ and again in Section C of the same Chapter as part of her arguments concerning bilateral conduct between the Parties.⁴²⁸ Singapore has already dealt fully in Section II (B) (1) of the present Chapter⁴²⁹ with the arguments in Section B of Chapter 7 of Malaysia’s Memorial. The only additional point Malaysia made in Section C of Chapter 7 of her Memorial is that the 1927 Agreement does not operate merely as a delimitation agreement, but in fact “defines an arc within which falls the land territory and territorial waters of Singapore and outside of which falls the land territory and territorial waters of Johor or third States.”⁴³⁰

6.98 Malaysia’s argument is untenable once the 1927 Agreement is understood in its proper context. As pointed out earlier in this Chapter, the purpose of this Agreement was a *retrocession* by Britain to Johor of certain Singapore islands and waters *within the Johor Strait*.⁴³¹ The purpose of the Agreement was *not* the comprehensive definition of “the limits of the land territory and territorial waters of Singapore”.⁴³⁰ Contrary to Malaysia’s assertion, the delimitation was effected in the 1927 Agreement by the simple process of tracing “an imaginary line following the centre of the deep-water channel in the Johor Strait”⁴³² and *not*, as Malaysia alleges, by “a detailed description of the territory and waters of Singapore”.⁴³³

⁴²⁷ MM pp. 87-88, paras. 190-192.

⁴²⁸ MM p. 100, paras. 220-221.

⁴²⁹ *See above*, at paras. 6.20-6.25.

⁴³⁰ MM p. 100, para. 220.

⁴³¹ *See* paras. 6.20-6.25 above.

⁴³² Article I of the Straits Settlements and Johore Territorial Waters Agreement (MM Vol. 2, Annex 12).

⁴³³ MM p. 100, para. 220.

6.99 As for Malaysia's reliance on the absence of any mention of Pedra Branca in the 1927 Agreement, Singapore makes two observations:

- (a) given that the whole purpose of the Agreement was the retrocession of certain islands and waters *within the Johor Strait*, there was no need for the Agreement to refer to Pedra Branca, which lies more than 20 nautical miles *outside* the Johor Strait;
- (b) As the breadth of the territorial sea was three nautical miles for both Great Britain and Johor in 1927,⁴³⁴ and Pedra Branca lies more than six nautical miles from Johor's coast, there could have been no common territorial sea boundary between Johor and Pedra Branca and the question of dealing with Pedra Branca in the 1927 delimitation exercise simply did not arise.

B. THE STRAITS LIGHTS SYSTEM

6.100 Malaysia devotes considerable space to trying to interpret the Straits Lights System, in an attempt to imply that Singapore had no sovereignty over Pedra Branca.

6.101 Malaysia cites several Straits Lights situated in Malaysian territory, such as Pulau Pisang lighthouse, Cape Rachado lighthouse and One Fathom Bank lighthouse to argue that:

“The fact that a lighthouse was managed by the Governor of the Straits Settlements thus had no bearing on the sovereignty over the territory on which the lighthouse was situated.”⁴³⁵

⁴³⁴ SM pp. 188-190, paras. 9.29-9.33.

⁴³⁵ MM p. 102, para. 222.

As Malaysia has acknowledged, the Straits Lights are located on British/Singapore territories as well as territories belonging to the Malay states.⁴³⁶ Therefore, the inclusion of a lighthouse within the Straits Lights system has no impact on territorial sovereignty. It is untenable for Malaysia to argue that, just because Horsburgh Lighthouse is part of the Straits Light system, it is not situated in British/Singapore territory.

6.102 Malaysia next seeks support in the text of the Ordinance of 1912.⁴³⁷ She attempts to find significance in the fact that Horsburgh Lighthouse was the only lighthouse mentioned by name in Sections 3 and 5(1) of the 1912 Ordinance, and argues:

“225. ... the formulation in section 3 of the Ordinance, in which explicit reference is made only to the Horsburgh Lighthouse, is such as to leave little doubt that the proprietary interest of the Straits Settlements in Horsburgh was limited to the ‘light-house... together with the appurtenances thereof and all the fixtures apparatus and furniture belonging thereto’ and not to sovereignty over the island as such.”⁴³⁸

In doing so, Malaysia fails to explain this Ordinance in its proper context. This Ordinance gave effect to a new arrangement whereby the Straits Light Fund would be funded through direct contributions from the Governments of the Straits Settlements and the Federated Malay States, instead of through the levy of tolls. With the Federated Malay States now contributing to the Straits Lights Fund, the question naturally arose as to what rights the Federated Malay States would have over the Straits Lights. Sections 3 and 5(1) of the Ordinance therefore clarified that, despite this new arrangement, property in the Straits Lights as well as management and control of the lights will be retained by the

⁴³⁶ MM p. 102, para. 222. For the location of the various lighthouses mentioned, see **Insert 10**, *above*, after p. 130.

⁴³⁷ See The Light-Houses Ordinance (No. XVII of 1912) (Straits Settlements) (MM Vol. 3, Annex 90).

⁴³⁸ MM p. 103, para. 225.

Straits Settlements Government. Nothing was said or implied in the Ordinance about sovereignty over the territories on which the Straits Lights stood.

6.103 Malaysia next argues that:

“226. This understanding of the limited nature of the interest of the Straits Settlements in the Horsburgh Lighthouse receives further support from the language of section 5(1) of the Ordinance which refers to ‘[t]he management and control of the Horsburgh Light- house’, again singling out Horsburgh for explicit reference. *The evident object of this reference appears to have been to guard against the risk of the new arrangements in respect of Straits Lights being taken to have affected a transfer of the management and control of the lighthouse back to Johor as the territorial sovereign.*”⁴³⁹ [emphasis added]

This argument ignores the fact that Johor was *not* part of the Federated Malay States,⁴⁴⁰ and thus was not a contributor to the Straits Lights Fund. It is therefore impossible to see how the new funding arrangement might be “taken to have affected a transfer of the *management and control* of the lighthouse back to Johor”.⁴⁴¹ Quite clearly, the provision was to prevent the Federated Malay States from interfering with the management and control of the lighthouse, and had nothing to do with Johor or the question of sovereignty.

⁴³⁹ MM p. 104, para. 226.

⁴⁴⁰ The Federated Malay States were formed in 1896 and comprised Negri Sembilan, Pahang, Perak and Selangor. Johor, Kedah, Kelantan, Perlis and Trengganu, although under British protection, were not part of the Federated Malay States. It was only in 1946 that both the Federated Malay States and the Unfederated Malay States came together to form the Malayan Union.

⁴⁴¹ MM p. 104, para. 226 – italics in original.

6.104 Neither can Malaysia find any support in Mr. Pavitt's letter of 13 May 1964.⁴⁴² Malaysia indulges in a lengthy discussion⁴⁴³ to argue:

“The reference to the Pulau Pisang lighthouse in Pavitt's response, alongside reference to the Raffles and Sultan Shoal lighthouses, both situated on Singapore territory, attests that the management of these lighthouses had no bearing on the sovereignty of the territory on which they were located.”⁴⁴⁴

Malaysia's attempt to squeeze conclusions concerning sovereignty from this letter cannot be taken seriously. The letter was in fact a response to a query, made for the purpose of budgetary estimates, concerning *television sets* in lighthouses operated by the Singapore Marine Department – this clearly necessitated a discussion of television sets in all such lighthouses, including Raffles, Sultan Shoal, Pulau Pisang and Horsburgh Lighthouse. Furthermore, this letter was written in 1964, when Singapore was part of the Federation of Malaysia.

6.105 In any event, Malaysia's conclusion is unremarkable. Singapore does not claim that her sovereignty over Pedra Branca is grounded on the management of the lighthouse. Instead, her sovereignty is based on the taking of possession of the island as a whole and its constant and exclusive occupation, control and administration for more than 150 years.

6.106 A final observation may be made. Malaysia has presented these arguments in a Section of her Memorial entitled: “Bilateral Conduct

⁴⁴² See Letter from Gee R.E. (Director of Marine, Malaya) to Director of Marine, Singapore dated 1 May 1964, and reply from Pavitt J.A.L. (Director of Marine, Singapore) to The Director of Marine, Marine Headquarters, Malaysia dated 13 May 1964 (MM Vol. 3, Annex 73).

⁴⁴³ MM pp. 104-106, paras. 227-234.

⁴⁴⁴ MM p. 106, para. 234.

Confirmatory of *Malaysian Title*".⁴⁴⁵ It is clear that neither the Straits Lights System as a whole, nor the correspondence of 1964, is able to "confirm" any title – and certainly not a supposed "Malaysian title".

Section VI. Conclusions

6.107 A review of the Parties' conduct with respect to Pedra Branca leads to the following conclusions:

- (a) Malaysia has been unable to point to a single act of administration or control that she has performed on the island of Pedra Branca;
- (b) Singapore, in contrast, has documented a steady stream of open, peaceful and public displays of authority she and her predecessor in title, Great Britain, had undertaken on Pedra Branca for over 150 years in the maintenance of the title she acquired in 1847-1851;
- (c) none of these displays of sovereignty were ever protested by Malaysia until well after the dispute had emerged in 1979-1980; and
- (d) Malaysia has recognized Singapore's sovereignty over Pedra Branca not only by her persistent silence, but also by her express acts and conduct, notably in seeking Singapore's permission to visit the island.

⁴⁴⁵ MM pp. 99-110, paras. 219-244 (Chapter VII, Section C), emphasis added.

CHAPTER VII THE 1953 CORRESPONDENCE CONFIRMS SINGAPORE'S TITLE

Section I. Introduction

7.1 In her Memorial, Malaysia gives little importance to the exchange of correspondence of 1953 between the British colonial authorities and the Government of the State of Johor. She limits herself to including it as a Sub-Section of Chapter 7 of her Memorial as part of “Bilateral conduct confirmatory of Malaysian title”.⁴⁴⁶ This discreet and understated way of dealing with this point is understandable: contrary to Malaysia’s audacious assumption, the 1953 correspondence, far from confirming Malaysian title, constitutes an express disclaimer by Johor of any title to Pedra Branca.

7.2 Singapore has dealt with this subject-matter extensively in her Memorial.⁴⁴⁷ She will not repeat what has already been said there. The sole purpose of the present Chapter is to refute the erroneous interpretation by Malaysia of the 1953 correspondence.

⁴⁴⁶ MM pp. 107-110, paras. 235-243.

⁴⁴⁷ See SM Chapter VIII.

7.3 It should be recalled that the correspondence in question consists of a number of documents, of which Malaysia has chosen to cite only the following:

- (a) a letter of 12 June 1953 from the Colonial Secretary, Singapore, to the British Adviser to the Sultan of Johor;⁴⁴⁸ and
- (b) a “reply” from the Acting State Secretary, Johor, of 21 September 1953.⁴⁴⁹

Malaysia also mentions two internal memoranda – one dated July and the other October 1953. The former is from the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore⁴⁵⁰ whilst the latter consists of various handwritten annotations.⁴⁵¹ Also relevant, but not mentioned by Malaysia, are:

- (a) a letter from the Director of Marine of the Federation of Malaya to the Master Attendant of Singapore and the reply from the Master Attendant;⁴⁵²

⁴⁴⁸ Letter from Higham J.D., on behalf of the 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) (SM Vol. 6, Annex 93; MM Vol. 3, Annex 67).

⁴⁴⁹ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96; MM Vol. 3, Annex 69).

⁴⁵⁰ Letter and attachments from Colton A.G.B., on behalf of the Colonial Secretary, Singapore to the Deputy Commissioner General for Colonial Affairs of Singapore dated July 1953 (MM Vol. 3, Annex 68).

⁴⁵¹ Internal Memorandum from the Colonial Secretary, Singapore to the Attorney-General, Singapore dated 2 Oct 1953, and reply from the Attorney-General, Singapore to the Colonial Secretary, Singapore dated 7 Oct 1953 (MM Vol. 3, Annex 70).

⁴⁵² Letter from the Director of Marine, Federation of Malaya to the Master Attendant, Singapore dated 23 Sep 1952 and letter from the Master Attendant, Singapore to the Director of Marine, Federation of Malaya dated 29 Sep 1952 (SM Vol. 6, Annex 89 and Annex 90 respectively).

- (b) a letter of June 1953 from the Secretary to the British Adviser, Johor, to the Colonial Secretary, Singapore;⁴⁵³ and
- (c) a Memorandum from the Colonial Secretary, Singapore, to the Acting Master Attendant, Singapore, of 13 October 1953.⁴⁵⁴

7.4 Malaysia makes six points in respect of the documents she cites:

First, the Singapore Colonial Secretary’s letter of 12 June 1953 “stands as evidence of Singapore’s recognition of Johor’s original title to Pulau Batu Puteh”;⁴⁵⁵

Second, “the Singapore Colonial Secretary understood very clearly that the extent of Singapore’s sovereignty over nearby islands was determined by the Anglo-Dutch and Crawford treaties of 1824 and the 1927 Agreement” as shown by the contemporary process of delimitation of Singapore’s territorial waters;⁴⁵⁶

Third, the reference to Pulau Pisang shows that the Colonial Secretary understood “that the management of a lighthouse was distinct from and was not determinative of the sovereign status of the territory on which the lighthouse was constructed”;⁴⁵⁷

Fourth, the language of the Singapore internal memoranda (in particular the word “claim”) “clearly implies that Singapore had not

⁴⁵³ Letter from Turner J.D. (Secretary to the British Adviser, Johor) to the Colonial Secretary, Singapore, received on 18 June 1953 (SM Vol. 6, Annex 95).

⁴⁵⁴ Letter from Colonial Secretary, Singapore to Acting Master Attendant, Singapore dated 13 Oct 1953 (SM Vol. 6, Annex 97).

⁴⁵⁵ MM p. 108, para. 237.

⁴⁵⁶ MM p. 108, para. 238.

⁴⁵⁷ MM p. 109, para. 240.

previously made a claim to, or had any sense that it was sovereign over, Pedra Branca”;⁴⁵⁸

Fifth, following the 1953 correspondence, “Singapore at no time prior to 1980 expressed any conviction that Pulau Batu Puteh was part of its territory”;⁴⁵⁹ and

Sixth, “while the letter from the Acting State Secretary, Johor, of 21 September 1953 is not a model of clarity, it does not refer to sovereignty over Pulau Batu Puteh but to ownership”.⁴⁶⁰

7.5 Singapore will deal in turn with each of these allegations.

Section II. The Singapore Colonial Secretary’s Letter of 12 June 1953 is Not “Evidence of Singapore’s Recognition of Johor’s Original Title” to Pedra Branca

7.6 The operative part of the Singapore Colonial Secretary’s letter of 12 June 1953 to the British Adviser to the Sultan of Johor has been reproduced verbatim in both Memorials.⁴⁶¹ It is evident from its terms that the letter in no way shows that Singapore recognised Johor’s title to Pedra Branca.

7.7 As Malaysia rightly points out, the letter clearly appears to be an “enquiry”.⁴⁶² Its language is crystal clear in this respect: “I am directed *to ask*

⁴⁵⁸ MM p. 109, para. 241.

⁴⁵⁹ MM p. 110, para. 242.

⁴⁶⁰ MM p. 110, para. 243.

⁴⁶¹ See SM pp. 163-164, paras. 8.5-8.8; and MM p. 107, para. 235.

⁴⁶² MM p. 108, para. 237.

*for information...*⁴⁶³ and “It is now desired to clarify the status of Pedra Branca...”.⁴⁶³ This language certainly does not constitute a disclaimer of title by Singapore, let alone recognition of any Johor title to Pedra Branca. It simply asked whether there are any documents showing a lease or grant of the island, or if the island had been in any other way disposed of.

7.8 The underlying premise of the author of the letter is that the character of Singapore’s presence on Pedra Branca “by international usage no doubt confers some rights and obligations to the Colony”.⁴⁶³ The use of the term “international usage” can be seen as a reference to international law. The reference to “rights and obligations”, when the enquiry was for “the determination of the boundaries of the Colony’s territorial waters”, shows that the Colonial Secretary believed that, in the absence of any treaty or agreement to the contrary, Singapore would have sovereignty over Pedra Branca. The enquiry was to determine whether any such treaty or agreement existed – probably because the Colonial Secretary could not be sure that his documentary records were complete, given that many records were destroyed during the Second World War.⁴⁶⁴

7.9 Further proof of this can be found in how the author proceeded, in his letter, to draw a clear distinction between the situation of Pedra Branca and that of Pulau Pisang. Of the latter, the author stated clearly that:

“Certain conditions were attached and it is clear that there was no abrogation of the sovereignty of Johore.”⁴⁶³

⁴⁶³ Letter from Higham J.D., on behalf of the 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) (SM Vol. 6, Annex 93; MM Vol. 3, Annex 67), emphasis added.

⁴⁶⁴ It is a well-documented fact that many records in Singapore were lost in the Second World War. See e.g., Letter from the Director of Marine, Singapore to the Hydrographic Department in London dated 18 Mar 1966, attached to this Counter-Memorial as Annex 41.

7.10 It is to be recalled in this respect that the enquiry by the Colonial Secretary, Singapore, was a follow-up⁴⁶⁵ to a previous investigation of “the facts of the position regarding the erection of lighthouses by the Straits Settlements Government on Pulau Pisang” initiated by the Director of Marine of the Federation of Malaya.⁴⁶⁶ The letter of 12 June 1953 explained the outcome of that previous investigation:

“In the case of Pulau Pisang which is also outside the Treaty limits of the Colony it has been possible to trace an indenture in the Johore Registry of Deeds dated 6th October, 1900.”⁴⁶⁷

7.11 Clearly, no such document had been found in respect of Pedra Branca – and for good reason: no such deed or grant exists.⁴⁶⁸

7.12 Moreover, contrary to Malaysia’s implied assertion,⁴⁶⁹ nothing can be inferred in this respect from the references, made in the documents attached to the letter of 12 June 1953, to the Crawford Treaty of 1824 and the 1844 despatch from the Governor of Straits Settlements. Where the Crawford Treaty is concerned, Singapore has shown that it is of no relevance in the present dispute.⁴⁷⁰ As for the 1844 despatch, Singapore has established that it is

⁴⁶⁵ See Letter from the Master Attendant, Singapore to the Director of Marine, Federation of Malaya dated 29 Sep 1952 (SM Vol. 6, Annex 90).

⁴⁶⁶ Letter from the Director of Marine, Federation of Malaya to the Master Attendant, Singapore dated 23 Sep 1952 (SM Vol. 6, Annex 89).

⁴⁶⁷ Letter from Higham J.D., on behalf of the Colonial Secretary, Singapore to the British Adviser, Johor dated 12 June 1953 (SM Vol. 6, Annex 93).

⁴⁶⁸ See *above*, at para. 6.64.

⁴⁶⁹ MM p. 108, para 237. Malaysia mentions the Crawford Treaty and the despatch from the Governor of the Straits Settlements of 28 Nov 1844, but she does not explain why they would prove her case.

⁴⁷⁰ See *above*, at para. 1.15, and Subsection B below. See also SM para. 5.5.

untenable to interpret it as showing that “permission” was sought from the Sultan and Temenggong of Johor to build a lighthouse on Pedra Branca.⁴⁷¹

A. THE IRRELEVANCE OF THE TREATIES OF 1824 AND OF THE 1927 AGREEMENT

7.13 Malaysia attaches great importance to the Anglo-Dutch and Crawford Treaties of 1824, and the 1927 Agreement on the Delimitation of Territorial Waters between Johor and the Straits Settlements.⁴⁷² As has been shown in other parts of this Counter-Memorial, these instruments are irrelevant to the present dispute.⁴⁷³ For easy reference, these instruments are described briefly here:

- (a) the 1824 Anglo-Dutch Treaty defines the respective spheres of influence of Great Britain and the Netherlands in the region; Article XII expressly states that “His Britannick Majesty... engages that no British Establishment shall be made... on any of the other Islands South of the Straights of Singapore”;⁴⁷⁴
- (b) by the Crawford Treaty, concluded that same year, the Sultan and Temenggong of Johor ceded to the East India Company “the Island of Singapore, situated in the Straits of Malacca, together with the

⁴⁷¹ See above, at paras. 5.43-5.50, 5.58 *et seq.*, in particular, the conclusions at paras. 5.88-5.90.

⁴⁷² See, for example, MM pp. 21-26, paras. 48-56; pp. 87-88, paras. 190-192; and p. 100, paras. 220-221.

⁴⁷³ See above, at para. 3.30 (concerning the 1824 Anglo-Dutch Treaty); para. 1.15 above, and Subsection B below, and SM para. 5.5 (concerning the 1824 Crawford Treaty); and paras. 6.20-6.25 above (concerning the 1927 Agreement).

⁴⁷⁴ *Treaty between His Britannick Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies* dated 17 Mar 1824 (MM Vol. 2, Annex 5).

adjacent seas, straits, and islets, to the extent of ten geographical miles, from the coast of the said main island of Singapore”,⁴⁷⁵ and

- (c) the 1927 Agreement deals with the retrocession of certain islands to Johor and the consequent delimitation of the territorial waters of Johor and the Straits Settlements in the Straits of Johor.⁴⁷⁶

7.14 It is not disputed that all three treaties are closely inter-related: the 1824 Anglo-Dutch Treaty provided legitimacy for the continued British presence in Singapore; the Crawford Treaty transferred full sovereignty in the island of Singapore and all the islands within ten geographical miles of its coast to the British, while the 1927 Agreement retroceded to Johor some of these islands in the Straits of Johor to create a new territorial boundary between Singapore and Johor in the Straits of Johor. As was made very clear in the letter of July 1953 of Mr. A.G.B. Colton from the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore⁴⁷⁷ – extensively quoted by Malaysia⁴⁷⁸ – the delimitation line determined by the 1927 Agreement applied only to the Straits of Johor. None of these documents had anything to do with Pedra Branca:

- (a) the Anglo-Dutch Treaty, contrary to Malaysia’s assertions, did not result in a delimitation line.⁴⁷⁹ Instead, it merely established

⁴⁷⁵ *Treaty of Friendship and Alliance between the Honourable East India Company, and the Sultan and the Temenggong of Johore* dated 2 Aug 1824 (SM Vol. 2, Annex 4; MM Vol. 2, Annex 6).

⁴⁷⁶ *Straits Settlements and Johore Territorial Waters Agreement* dated 19 Oct 1927, reprinted in Allen, Stockwell & Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia, 1761 – 1963* (1981), p. 114-116 (MM Vol. 2, Annex 12).

⁴⁷⁷ Letter and attachments from Colton A.G.B., on behalf of the Colonial Secretary, Singapore to the Deputy Commissioner General for Colonial Affairs of Singapore dated July 1953 (MM Vol. 3, Annex 68).

⁴⁷⁸ MM pp. 108-109, para. 238.

⁴⁷⁹ *See above*, at paras. 3.20-3.24.

British and Dutch spheres of influence in the region. Pedra Branca was not mentioned, nor addressed in the Treaty. In any event, the island is more proximate to Bintan (which was expressly mentioned as falling into the Dutch sphere of influence in Article XII of the Treaty) than to Johor;⁴⁸⁰

- (b) the Crawford Treaty does not extend beyond ten geographical miles from the coast of the main island of Singapore; Pedra Branca lies 40 English miles (i.e., 25 geographical miles) away; and
- (c) the 1927 Agreement deals with the delimitation of territorial waters between Johor and Singapore and there was no need (at that time, when a three-mile territorial sea was the norm) for such delimitation around Pedra Branca, since the island lies more than six nautical miles from the Johor coast.⁴⁸¹

7.15 Malaysia's reliance on Mr. Colton's letter of July 1953 is also misguided. The letter was a report on the applicability of the "new methods of defining the limits of territorial waters" (i.e., Norway's straight baseline method for deeply indented coastlines approved by the Court in the *Fisheries* case). Since the considerations relating to use of straight baselines for deeply indented coastlines would not apply to Pedra Branca, it is not surprising that Mr. Colton's letter does not mention Pedra Branca. However, this does not mean that Singapore officials did not regard Pedra Branca as Singapore territory. In fact, the file which contains Mr. Colton's letter of July 1953 (i.e., file reference "C.S.O.11293/52") also contains an earlier advice from the Chief Surveyor of Singapore to Mr.

⁴⁸⁰ In this respect, it must be noted that Insert 6 of Malaysia's Memorial (inserted at p. 23) is grossly misleading: it puts Pedra Branca under the "area of British Influence" without any justification whatsoever – *see above*, at paras. 3.25-3.30.

⁴⁸¹ *See above*, at paras. 6.20-6.25.

Colton that Singapore should claim a 3-nautical mile territorial sea around Pedra Branca.⁴⁸²

7.16 Even more importantly, the whole Malaysian argument is vitiated by the fundamentally erroneous postulate on which it is based. It starts off with the wrong premise that Singapore was defined forever and confined to the limits in the 1824 Crawford Treaty. This is simply fallacious. The territory of Singapore is the result of a complex history, of which the Crawford Treaty is an important part, but certainly not the sole element. As a matter of fact, Singapore was able to acquire new territories outside the scope of the 1824 Crawford Treaty, such as Christmas Island and the Cocos (Keeling) Islands. Similarly, the taking of possession and constant administration of Pedra Branca is also part of the history of Singapore, leading to the current territorial extent of Singapore.

7.17 Therefore the concluding remarks of Malaysia in respect of the 1953 exchange of correspondence – are substantially flawed. Malaysia argues that:

“... there can be no doubt that (a) the Singapore authorities had a very precise understanding of the extent of the Colony’s sovereignty, (b) that this flowed from the Anglo-Dutch and Crawford treaties, and (c) that it did not extend to Pulau Batu Puteh”⁴⁸³

7.18 These three points are in substance only one argument – that Singapore’s sovereignty did not extend to Pedra Branca because these two treaties have permanently circumscribed her extent. However, both the 1824 Anglo-Dutch Treaty and the Crawford Treaty are simply irrelevant in respect of Pedra Branca. As explained above, at paragraph 7.13 *et seq*, Singapore is not asserting that her sovereignty over Pedra Branca is a result of either Treaty. Singapore has

⁴⁸² See SM Vol. 6, Annex 91, p. 855, where the Chief Surveyor was quoted as stating that: “in a minute of 14.7.52 to S[ecretary for] E[conomic] A[ffairs] in CSO. 11293/52 I gave my opinion that Singapore should claim a 3 mile limit round this point [i.e., *Pedra Branca*]”.

⁴⁸³ MM p. 109, para. 239(a).

explained in Chapter V that title to Pedra Branca was acquired by virtue of official acts in 1847-1851, when the British authorities in Singapore took possession of Pedra Branca. As a result, whilst it is true that the limits of the Crawford treaty (which did not extend to Pedra Branca) were known by the Singapore authorities, this has absolutely no relevance to Singapore's capacity to acquire sovereignty over any other island, including Pedra Branca.

B. THE REFERENCE TO PULAU PISANG AND THE RELATIONSHIP BETWEEN THE MANAGEMENT OF A LIGHTHOUSE AND THE ISSUE OF SOVEREIGNTY

7.19 In his letter of 12 June 1953 to the British Adviser, Johore, Mr. Higham referred to Pulau Pisang. According to Malaysia, this reference:

“... indicates an understanding on the part of the Colonial Secretary that the management of a lighthouse was distinct from and not determinative of the sovereign status of the territory on which the lighthouse was constructed.”⁴⁸⁴

7.20 As a general proposition, it is certainly true that the management of a lighthouse and the status of the territory on which the lighthouse is built can be distinct. However, in her pleadings against Indonesia in the *Indonesia/Malaysia* case, Malaysia insistently stressed that the construction and maintenance of lighthouses were evidence of her continuous exercise of sovereignty over the disputed islands.⁴⁸⁵ In its Judgment of 17 December 2002, the Court observed “that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority (*Minquiers and Ecrehos*,

⁴⁸⁴ MM p. 109, para. 240.

⁴⁸⁵ See ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Memorial of Malaysia*, at pp. 69-70, para. 6.25-6.29; *Counter-Memorial*, at p. 83, para. 4.24; *Reply*, at pp. 74-75, para. 5.23-5.26 and *Oral Arguments*, CR 2002/32, 7 June 2002, p. 19, para. 26 (Sir Elihu Lauterpacht). See also text accompanying note 285 above.

Judgment, I.C.J. Reports 1953, p. 71)”.⁴⁸⁶ However, the Court went on to recall that:

“... in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* it stated as follows:

‘Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit’at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain’s claim that it has sovereignty over it.’ (*Judgment, Merits, I.C.J. Reports 2001, para. 197*).”⁴⁸⁷

and concluded that “the same considerations apply in the present case”.⁴⁸⁷

7.21 It must however be recalled that, in the present case, Singapore’s title is not based on the role of the lighthouse as an *effectivité per se*. As explained in Singapore’s Memorial,⁴⁸⁸ Singapore’s title is based on the lawful taking of possession of the island. This title is confirmed by the administration and control of the island and the maintenance of the facilities on it for more than 150 years without any dispute or contention by Johor or Malaysia or any third State.

7.22 With this in mind, Mr. Higham’s letter can be properly understood. Indeed, he clearly understood the distinction between the construction and maintenance of the lighthouse on the one hand and the sovereignty over islands on the other hand. This is precisely the reason why he mentioned the position of

⁴⁸⁶ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 13, at para. 147.

⁴⁸⁷ *Ibid*, at para. 147, italics in original.

⁴⁸⁸ See SM p. 78, para. 5.101.

Pulau Pisang. Regarding *that* island, he declared that it was “clear that there was no abrogation of the sovereignty of Johore”.⁴⁸⁹

7.23 Here again, Malaysia’s argument turns against her: far from being evidence of an acknowledgement or recognition of a supposed “Johor’s title” over the island, the comparison made by the author of the letter of 12 June 1953 between Pulau Pisang (whose “status is quite clear”) and Pedra Branca, shows that while he acknowledged Johor’s sovereignty over the former island, he did not as far as the latter was concerned.

Section III. The Internal Singapore Correspondence Confirms Singapore’s Ownership of the Island

7.24 In his answer to Mr. Higham’s letter, the Acting State Secretary, Johor, informed the Colonial Secretary, Singapore, “that the Johore Government does not claim ownership of Pedra Branca”.⁴⁹⁰ In view of this answer, the Colonial Secretary, Singapore, informed the Acting Master Attendant, Singapore, that:

“ 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.

⁴⁸⁹ Letter from Higham J.D., on behalf of the 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) (SM Vol. 6, Annex 93; MM Vol. 3, Annex 67).

⁴⁹⁰ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96; MM Vol. 3, Annex 69).

2. On the strength of this, the Attorney General agrees that we can claim it as Singapore territory.”⁴⁹¹

7.25 According to Malaysia, this language “clearly implies that Singapore had not previously made a claim to, or had any sense that it was sovereign over, Pedra Branca”.⁴⁹² On the contrary, this language implies nothing of the kind. It simply means that the Colonial Administration in Singapore could now authoritatively regard the island as Singapore territory since Johor’s express disclaimer of title had removed all doubts which had arisen from the incomplete state of the Singapore archives resulting from destruction of documents during the Second World War.⁴⁹³

7.26 Malaysia makes a tenuous argument based on the internal minute from the Colonial Secretary to the Attorney-General that Singapore can “claim” Pedra Branca as Singapore territory.⁴⁹⁴ In the present context, the word “claim” was entirely appropriate as a reaction to Johor’s answer. Given Johor’s answer, there was no doubt that Singapore had a “claim” over Pedra Branca – in other words that she was fully justified in regarding Pedra Branca as Singapore territory.

7.27 In any event, Johor’s letter of 21 September 1953 constituted a clear disclaimer as Singapore has explained at length in her Memorial,⁴⁹⁵ a disclaimer which, in any case, precludes any “counter-claim” from Malaysia as Johor’s successor.

⁴⁹¹ Letter from Colonial Secretary, Singapore to Acting Master Attendant, Singapore dated 13 Oct 1953 (SM Vol. 6, Annex 97). *See also* Internal Memorandum from the Colonial Secretary, Singapore to the Attorney-General, Singapore dated 2 Oct 1953, and reply from the Attorney-General, Singapore to the Colonial Secretary, Singapore dated 7 Oct 1953 (MM Vol. 3, Annex 70). In this Annex, there appears a manuscript note from J.D. Higham to the Attorney-General stating : “I think, on the strength of (14) [*i.e., the letter from the Acting State Secretary, Johor*], we can claim Pedra Branca as Singapore territory”, to which the Acting Attorney-General replied: “I agree”.

⁴⁹² MM p. 109, para. 241.

⁴⁹³ *See* note 464 above.

⁴⁹⁴ MM p. 109, para. 241.

⁴⁹⁵ SM pp. 166-178, paras. 8.12-8.40.

Section IV. Singapore Consistently and Constantly Reconfirmed her Ownership of Pedra Branca

7.28 Malaysia's assertion that "Singapore at no time subsequent to this correspondence took any steps to claim Pulau Batu Puteh"⁴⁹⁶ is simply untrue.

7.29 In the first place, it must be noted that, since Pedra Branca *was* under Singapore's sovereignty and Johor had formally recognized this fact, there was no need for Singapore to constantly make "claims" in this respect: States do not make formal "claims" of sovereignty on their undisputed territory; they simply administer it *à titre de souverain*. And this is exactly what happened with Pedra Branca, which remained under Singapore's administration and exclusive control as had been the case for more than a hundred years before.

7.30 Malaysia mentions however two episodes which she claims would prove "Singapore's perception that the island was not in its territory"⁴⁹⁶:

- (a) the Singapore Rural Board's Annual Reports of 1953 to 1956 did not include Pedra Branca;
- (b) the island was not mentioned in the 1972 *Singapore Facts and Pictures*.

7.31 Singapore has dealt elsewhere with these allegations. Suffice it to recall that:

- (a) if Pedra Branca was not mentioned in the *Rural Board* reports it was for the simple reason that it was not administered by that Board,⁴⁹⁷

⁴⁹⁶ MM p. 109, para. 242.

- (b) as for the 1972 *Singapore Facts and Pictures* it is a booklet providing general information about Singapore and has no pretension to (and does not) describe Singapore territory in an exhaustive manner.⁴⁹⁸

Moreover, it is recalled that, contrary to Malaysia's assertion, Singapore has constantly and consistently acted on Pedra Branca in a way which demonstrates her clear intent to act as sovereign, including during the period between 1953 and 1980.⁴⁹⁹

Section V. The letter from the Acting State Secretary, Johor, of 21 September 1953 is a Clear Disclaimer of Sovereignty Over Pedra Branca

7.32 In her attempt to discredit the letter of the Acting State Secretary, Johor, of 21 September 1953, Malaysia asserts that it "is not a model of clarity".⁵⁰⁰ In fact, it is crystal-clear and straightforward:

"I have the honour to refer to your letter No.CSO.11692/52 dated 12th June 1953, addressed to the British Adviser, Johore, on the question of the status of Pedra Branca Rock some 40 miles from Singapore and to inform you that the Johore Government does not claim ownership of Pedra Branca."⁵⁰¹

7.33 It would have been difficult to be clearer. Questioned on the issue of the legal status of an island administered by Singapore but in the vicinity of the

⁴⁹⁷ See above, at paras. 6.45-6.49 .

⁴⁹⁸ See above, at paras. 6.42-6.44.

⁴⁹⁹ See e.g., SM Chapter VI, *passim*.

⁵⁰⁰ MM p. 110, para. 243.

⁵⁰¹ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96; MM Vol. 3, Annex 69).

Johor's coasts, the Acting State Secretary, Johor, gives a prudent but clear answer: Johor "does not claim ownership of Pedra Branca".

7.34 Malaysia tries to exploit the use of the word "ownership" to argue that the letter of 21 September 1953 is not concerned with sovereignty over the island. This attempt calls for four remarks:

- (a) the letter answers a request for information made in order to "clarify the status of Pedra Branca"⁵⁰² with a view to determining "the boundaries of the Colony's territorial waters"⁵⁰² – this is clearly a request concerning sovereignty;
- (b) the Johor authorities evidently understood that the request was about sovereignty – Johor's reply refers to "the status of Pedra Branca Rock" and disclaims ownership of the entire island (not just the lighthouse). For a State to disclaim "ownership" of an entire island is to disclaim sovereignty over it;
- (c) there is little doubt that this answer was made after consultations with the Commissioner for Lands and Mines and the Chief Surveyor in Johor,⁵⁰³ who was the officer in charge of land matters in Johor; and
- (d) the answer of the Acting State Secretary, Johor, was immediately understood by Singapore officials as referring to sovereignty, Their immediate reaction was that, since "the Johore Government

⁵⁰² Letter from Higham J.D., on behalf of the 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) (SM Vol. 6, Annex 93; MM Vol. 3, Annex 67).

⁵⁰³ See Letter from Turner J.D. (Secretary to the British Adviser, Johor) to the Colonial Secretary, Singapore, received on 18 June 1953 (SM Vol. 6, Annex 95).

does not claim the ownership of Pedra Branca Rock on which the Horsburgh Lighthouse stands”, it could be claimed “as Singapore territory”.⁵⁰⁴

The conclusion is inescapable: in the context, it is clear that “ownership” refers to title.

7.35 It is also to be noted that Johor’s disclaimer contradicts and undermines completely Malaysia’s principal argument that Pedra Branca had always belonged to the Johor-Riau-Lingga Sultanate.⁵⁰⁵

7.36 There is no room for doubt: by indicating in unambiguous terms that she did not “claim ownership of Pedra Branca”, Johor clearly disclaimed sovereignty over the island. Moreover, since the Singapore authorities relied on this disclaimer, which confirmed their conviction that Singapore had sovereignty on Pedra Branca, Johor’s formal declaration must be seen 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”.⁵⁰⁶ This is the definition of estoppel in the strictest sense, and there can be no doubt that, as the successor of Johor, Malaysia is now estopped from putting this disclaimer into question.

⁵⁰⁴ See the Internal Memorandum from the Colonial Secretary, Singapore, of Oct 1953 (MM Vol. 2, Annex 6); and the Letter from Colonial Secretary, Singapore, to Master Attendant, Singapore dated 13 Oct 1953 (SM Vol. 6, Annex 97).

⁵⁰⁵ See above, at paras. 3.4-3.15, and the summary at para. 3.43.

⁵⁰⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application by Nicaragua to Intervene)*, [1990] ICJ Rep 3, at p. 118, para. 63. This was cited and discussed at para. 8.31 of Singapore’s Memorial.

Section VI. Conclusions

7.37 In conclusion:

- (a) the Singapore Colonial Secretary's letter of 12 June 1953 is by no means evidence of Singapore's recognition of Johor's original title to Pedra Branca;
- (b) the reference made in this letter to Pulau Pisang shows, by contrast, that Singapore drew a distinction between the two islands;
- (c) the letter from the Acting State Secretary, Johor, of 21 September 1953 is a clear disclaimer of sovereignty over Pedra Branca;
- (d) the internal Singapore correspondence confirms Singapore's title; and
- (e) Singapore has consistently and constantly reconfirmed her ownership of Pedra Branca, including in the period following the 1953 correspondence.

CHAPTER VIII MIDDLE ROCKS AND SOUTH LEDGE

Section I. Introduction

8.1 Malaysia has erroneously asserted that:

“[d]uring the first round of its talks, held in Kuala Lumpur on 5 February 1993, Singapore made it clear for the first time that the dispute was not limited to Pulau Batu Puteh (to which it had referred exclusively up to that point) but extended to Middle Rocks and South Ledge.”⁵⁰⁷

As a matter of fact, the assertion is simply not true. Furthermore, as a matter of law, it is based on the erroneous assumption that sovereignty over Middle Rocks and South Ledge can be determined separately from that over Pedra Branca.

8.2 Factually, it is worth recalling that Singapore has always adopted the position that the legal fate of the three features must be the same. When Singapore lodged a protest in 1980 against Malaysia’s 1979 map, she stated that “Pedra Branca *and the waters around it*” belonged to Singapore.⁵⁰⁸ What Malaysia describes as Singapore’s “claim” over Middle Rocks and South Ledge on 6 February 1993, was, in reality, a response to *Malaysia’s claim* made the day before by the Leader of the Malaysian Delegation, who, in his opening speech, had described South Ledge and Middle Rocks as two *Malaysian islands*. This was immediately refuted by the Leader of the Singapore Delegation.

8.3 Legally speaking, Malaysia’s claim over the two features is untenable: as explained in Singapore’s Memorial, both sets of features lie within Pedra

⁵⁰⁷ MM p. 6, para. 14; p. 129, para. 286 and p. 134, para. 299.

⁵⁰⁸ Singapore’s Note MFA 30/80 dated 14 Feb 1980 (SM Vol. 6, Annex 144), emphasis added.

Branca’s territorial sea and neither set of features is capable of independent appropriation – Middle Rocks forms a single group with Pedra Branca while South Ledge is but a low-tide elevation, incapable of being subjected to an independent claim of sovereignty.⁵⁰⁹ For her part, Malaysia asserts that:

- (a) the three features are independent from one another; and
- (b) she exercised “consistent acts of sovereignty over them”.⁵¹⁰

Both assertions are ill founded.

Section II. The Relationship Between Pedra Branca and the Two Features

8.4 Both Parties are in agreement with regard to the geomorphological characterization of Middle Rocks and South Ledge. In particular, they both recognize that South Ledge is a low-tide elevation which partly dries at low tide.⁵¹¹ As such, it is not “capable of appropriation”⁵¹² separately from the “main land” (whether a continental land or an island): sovereignty over a low-tide elevation belongs to the coastal State which has sovereignty over the territorial sea surrounding it⁵¹³ as Singapore has shown in her Memorial.⁵¹⁴ Consequently, it does not matter whether or not South Ledge forms a group with Pedra Branca and Middle Rocks.

⁵⁰⁹ SM pp. 179-198.

⁵¹⁰ MM p. 132, para. 295.

⁵¹¹ MM p. 131, para. 289; SM p. 179, para. 9.4.

⁵¹² See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Merits)* [1992] ICJ Rep 351, at p. 570, para. 356.

⁵¹³ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 Mar 2001, at p. 101, para. 204.

⁵¹⁴ SM pp. 190-194, paras. 9.35-9.42.

8.5 Malaysia’s depiction of the Pedra Branca group in sketch maps included with her Memorial gives (and is clearly aimed at giving) a misleading impression. Insert 21⁵¹⁵ of her Memorial is intended to stress that the three features are more remote from Singapore than from the Malaysian coast. This is true but irrelevant. The key point, which Malaysia has chosen to ignore, is that both South Ledge and Middle Rocks lie within the territorial sea of Pedra Branca itself.⁵¹⁶ As Singapore has explained in her Memorial,⁵¹⁷ this alone makes their fate inseparable from that of Pedra Branca.

8.6 Next, in Insert 22 of Malaysia’s Memorial (reproduced overleaf as **Insert 11** of this Counter-Memorial), she provides a cross-sectional sketch of the seabed around the three features and argues that:

“As this [*the sketch in Insert 22*] shows, Pulau Batu Puteh, Middle Rocks and South Ledge are separated by navigational channels, do not have similar structures and are not standing on a single raised section of the seabed.”⁵¹⁸

First, it is not entirely clear what Malaysia means by the phrase “do not have similar structures”. In determining whether a particular cluster of maritime features ought to be treated as a group, it is irrelevant whether or not they “have similar structures” (whatever that phrase means). Even if it were relevant, Singapore has noted in her Memorial that the three features are constituted of the

⁵¹⁵ MM p. 128 (Insert 21).

⁵¹⁶ Malaysia gives the distance of South Ledge from Pedra Branca as 2.2 nautical miles (MM at p. 129, para. 288) while Singapore gives this distance as 2.1 nautical miles (SM at p. 179, para. 9.4). Singapore has rechecked the measurements and confirmed that the distance of 2.1 nautical miles is correct. In any event, whether the correct distance is 2.1 or 2.2 nautical miles, what is of legal relevance is the fact that South Ledge lies less than 3 nautical miles from Pedra Branca.

⁵¹⁷ SM pp. 184-190, paras. 9.18-9.33.

⁵¹⁸ MM p. 131, para. 290.

same coarse-grained biotite granite⁵¹⁹ and, further, that a detailed hydrographic survey conducted by the Maritime and Port Authority of Singapore from 8 to 13 April 2003 concluded that:

“a. 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 that curved southward from east of Pedra Branca linking with Middle Rocks; and

b. Although the South Ledge and Middle Rocks are separated by a channel measuring 30 to 40 metres at its deepest, this channel is much shallower than the Middle Channel, which runs to the north-west of both Middle Rocks and South Ledge.”⁵²⁰

8.7 *Secondly*, Malaysia’s assertion that the three features “are not standing on a single raised section of the seabed”⁵²¹ is far from convincing. It is apparent from careful study of Malaysia’s Insert 22 that:

(a) the seabed between the features is extremely shallow: the deepest point between Pedra Branca and Middle Rocks is 32 metres and that between Pedra Branca and South Ledge is 36 metres;

(b) all three features are separated from Malaysia by a broad and deep channel of about 70-metre depth, Middle Channel, which is the main navigational route to and from the Straits of Singapore; and

(c) the three features constitute the external margin (from the south) of the sea-bed before it falls deeper to form the Middle Channel.

In fact, Malaysia’s Insert 22 demonstrates very clearly that Pedra Branca and Middle Rocks are, in Malaysia’s own words, “standing on a single raised section

⁵¹⁹ SM p. 183, para. 9.16.

⁵²⁰ Report on Hydrographic Survey around the Waters of Pedra Branca, Middle Rocks and South Ledge (2003) (SM Vol. 7, Annex 201).

⁵²¹ MM p. 131, para. 290.

of the seabed”⁵²² – as the red circle drawn by Singapore on **Insert 11** above illustrates. This unequivocally supports Singapore’s conclusion that “Pedra Branca and Middle Rocks are in fact one single rock formation, standing apart from the surrounding seabed”.⁵²³ This conclusion is shared by various sailing directions.⁵²⁴

8.8 *Lastly*, Malaysia’s argument that “Pulau Batu Puteh, Middle Rocks and South Ledge *are separated by navigational channels*”⁵²⁵ is yet another absurd argument based merely on vague and meaningless semantics. Malaysia has not explained what she means by “navigational channels” (e.g., navigation by what types of vessels and under what conditions?). In relation to this argument, Singapore notes that:

- (a) As a matter of fact, although South Ledge is separated from Middle Rocks by a very shallow passable channel of about 20-metre depth,⁵²⁶ no reasonable ship master would, under normal circumstances, sail his ship between Middle Rocks and South Ledge. This shallow channel, while passable by small boats when South Ledge is visible above water (during low tide), can hardly be regarded as a “navigational channel” – the only recognised navigational channels in this area are Middle Channel (which

⁵²² MM p. 131, para. 290.

⁵²³ SM p. 195, para. 9.46.

⁵²⁴ See e.g., Malacca Strait Pilot (2nd ed.) (1934) p. 213 (SM Vol. 5, Annex 79, p. 686): “Middle Rocks... lie about half a mile southward of the lighthouse, and *on the south-western edge of the bank on which Pedra Branca lies*”, emphasis added.

⁵²⁵ MM p. 131, para. 290, emphasis added.

⁵²⁶ The channel between Middle Rocks and South Ledge is about 30 metres at its deepest. However, for navigational purposes, it is not the greatest depth of the channel, but the shallowest passable depth of the channel which is relevant.

passes between Pedra Branca and Johor) and South Channel (which passes between South Ledge and Indonesia).

- (b) As for the area between Pedra Branca and Middle Rocks, Malaysia's Insert 22⁵²⁷ gives a completely misleading impression about whether a navigable channel of any description actually exists between these two features. As the diagram opposite (**Insert 12**) shows, the cross-sectional line chosen by Malaysia (i.e., the line bearing 163° from Pedra Branca to Middle Rocks) in fact cuts through the deepest parts of the seabed between Pedra Branca and Middle Rocks, thus ignoring the reality that, to the east of this cross-sectional line, there is a shallow bank linking Pedra Branca to Middle Rocks, making the area non-navigable. The fact that there is simply no navigational channel between Pedra Branca and Middle Rocks is also apparent from two investigation reports annexed to Singapore's Memorial: in both of these incidents, the vessels ran aground between Pedra Branca and Middle Rocks.⁵²⁸ One of these, *M.V. Kota Angkasa*, was in fact a small vessel with a draught of only 6.45 metres.
- (c) In any case, there is no principle of law that the existence of a navigational channel between maritime features precludes them from being regarded as a group.

8.9 Malaysia places great reliance on the fact that “the three features have [*never*] been referred to as a group or have been given a collective name such as

⁵²⁷ MM p. 130, reproduced above as **Insert 11**, after p. 204.

⁵²⁸ See Investigation Report on Grounding of *MV Kota Angkasa* on 22 Aug 1985 (SM Vol. 7, Annex 157); Investigation Report on Grounding of *MV Bintar'adua* on 20 June 1988 (SM Vol. 7, Annex 159).

the ‘Pedra Branca Rocks’ or the ‘Horsburgh Rocks’.”⁵²⁹ This assertion calls for several remarks:

- (a) even though they seem not to have been specifically called “a group” in sailing directions, the three features have usually – and certainly Pedra Branca and Middle Rocks have always – been described together⁵³⁰ and Malaysia herself has treated them as a unit,⁵³¹
- (b) and more importantly, in a study reproduced as a preparatory document for UNCLOS I, Commander R.H. Kennedy, referred to Pedra Branca and Middle Rocks collectively as the “Horsburgh group”, “Horsburgh group of rocks” and “group of rocks on which stands Horsburgh Light”:

“Towards the eastern end [*of the Singapore Strait*], the *group of rocks on which stands Horsburgh Light* divides the Strait into two. South Channel, the southern part, is 5½ miles wide between the north coast of Pulau Bintan and a drying rock [i.e., *South Ledge*] 1½ miles south-west of the *Horsburgh group*, and 9¾ miles wide between the *group* and Tanjong Berakit [i.e., *the north-eastern point of Pulau Bintan*]. Middle Channel, the northern part, is 5¾ miles wide between the *Horsburgh group of rocks* and a drying reef [i.e., *Stork Reef*] 2 miles off the south-eastern point of Johore”⁵³² [emphasis added];

⁵²⁹ MM at p. 131, para. 291. *See also* p. 132, para. 293, where Malaysia asserts that “these three features were never formally described as a group or as an island and its appurtenant rocks, nor were they ever given a collective title”.

⁵³⁰ SM pp. 196-198, para. 9.48-9.49.

⁵³¹ *See below*, at paras. 8.14–8.15.

⁵³² Extracts from United Nations Conference on the Law of the Sea, Official Records, Volume I: Preparatory Documents, Geneva 24 February-27 Apr 1958, A/CONF.13/6 and Add.1 (Preparatory Document No. 6), attached to this Counter-Memorial as Annex 37.

- (c) it is also noteworthy that a number of maps have adopted the composite label “Pedra Branca Horsburgh (Middle Rock)”, clearly treating Pedra Branca and Middle Rocks as one single group;⁵³³
- (d) in spite of Malaysia’s assertions, the toponymy is highly significant in the present case – it is extremely relevant that both Middle Rocks and South Ledge, are named in clear relation to Pedra Branca: *South Ledge* lies to the South of the island and marks the southern extremity of the group of maritime features formed by Pedra Branca, Middle Rocks and South Ledge, while *Middle Rocks* lie between Pedra Branca and South Ledge, just as, for example, “North Rock” and “South Rocks” mark the northern and southern limits of the Romania Group;⁵³⁴
- (e) as aptly noted by Judge Levi Carneiro in his individual opinion appended to the Court’s Judgment in the *Minquiers and Ecrehos* case, the mention of the principal island is “sufficient to designate [an] archipelago as a whole”.⁵³⁵

8.10 For these reasons, as well as for those given in Singapore’s Memorial, there can be no doubt that Middle Rocks form a single group of maritime features with Pedra Branca – of which they are mere dependencies – and that

⁵³³ See e.g., Maps 27, 28 and 29 in the Map Atlas attached to Malaysia’s Memorial.

⁵³⁴ See J.T. Thomson’s Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malayan Coast (1851) reproduced above as **Insert 8** after p. 82, discussed at para. 5.29 above.

⁵³⁵ See *Minquiers and Ecrehos*, supra note 6, at p. 100. See also, the Court’s Judgment of 17 Nov 1953, at p. 55.

sovereignty over Pedra Branca necessarily encompasses Middle Rocks.⁵³⁶ As for South Ledge, whether or not it is part of this group does not really matter: as a low-tide elevation, the sovereignty over it depends on the territorial sea in which it is situated and there can be no doubt that South Ledge lies within the territorial sea appertaining to Pedra Branca and Middle Rocks.

Section III. The Conduct of the Parties Supports Singapore’s Title over the Two Features

8.11 The conclusions above are confirmed by the conduct of the Parties in not having treated the three features separately.

A. ABSENCE OF ANY ACTS OF SOVEREIGNTY BY MALAYSIA OVER THE TWO FEATURES

8.12 Where Middle Rocks and South Ledge are concerned, Malaysia notes that “as minor features not much separate attention was paid to them”.⁵³⁷ She should have gone further than that: in reality Malaysia is unable to avail herself of any distinct acts of sovereignty, unlike Singapore, which has demonstrated that she – in contrast with Malaysia – has exercised sovereign authority in respect of Middle Rocks, South Ledge, and the territorial waters appertaining to these features.⁵³⁸

⁵³⁶ In the case concerning the *Land, Island and Maritime Frontier Dispute*, the Chamber of the Court accepted that “[t]he small size of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited, allow its characterization as a ‘dependency’ of Meanguera...”. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Merits)*, *supra* note 512, at p. 570, para. 356.

⁵³⁷ MM p. 132, para. 294.

⁵³⁸ SM pp. 113-116, paras. 6.68-6.71; pp. 118-124, paras. 6.76-6.90; pp. 129-132, paras. 6.105-6.111; and *below*, at paras. 8.18–8.20.

8.13 Malaysia tries to prove the contrary by invoking what she calls her “consistent acts of sovereignty over them”.⁵³⁹ However, she has listed only three:

- (a) the Letter of Promulgation by Commodore K. Thanabalasingam of 16 July 1968;
- (b) the Petroleum Agreement between Malaysia and the Continental Oil Company of Malaysia signed on 16 April 1968; and
- (c) the Malaysian 1985 Fisheries Act.⁵⁴⁰

8.14 These three acts are also relied on by Malaysia in Chapter 7 of her Memorial to support her claim to Pedra Branca. Clearly, the only “evidence” that Malaysia is able to produce in relation to her claim for Middle Rocks and South Ledge are the same meagre offerings she has used in relation to Pedra Branca. This supports Singapore’s point that the three features have a common destiny and that both Malaysia and Singapore have consistently considered the three features as a group.

⁵³⁹ MM p. 132, para. 295.

⁵⁴⁰ *Ibid.* Malaysia also asserts at p. 132, para. 294 of her Memorial that “[t]raditional fishermen from Johor had been fishing the inshore waters around these features for as long as records show” and footnotes for this proposition, other paragraphs (namely paras. 142, 143 and 148) of her Memorial. However, those paragraphs are of no relevance to the proposition that is asserted, and no passage in Malaysia’s Memorial establishes or provides support for the proposition.

8.15 This is particularly striking in the letter of 16 July 1968. As recalled by Malaysia,⁵⁴¹ the line drawn on Chart 2403⁵⁴² is introduced by a note according to which:

“The pecked line south of the Horsburgh Light represents the outer limit of Malaysian Territorial Waters as authorised by the 1958 Geneva Convention i.e. a three mile circle around South Ledge...”⁵⁴³

In other words, Commodore Thanabalasingam’s letter of 16 July 1968 treats South Ledge together with Pedra Branca and purports to use South Ledge as the relevant feature to delimit Malaysia’s alleged territorial waters south of Horsburgh Light.

8.16 As for the 1968 Oil Concessions and the 1985 Fisheries Act, neither of them mentions Middle Rocks or South Ledge, nor was there any mention of Pedra Branca in these two documents.⁵⁴⁴

8.17 Moreover, as shown above in the present Counter-Memorial,⁵⁴⁵ all these “acts” are devoid of any probative value in relation to any claim of sovereignty of Malaysia over Pedra Branca and its appurtenant features.

⁵⁴¹ MM p. 118, para. 271.

⁵⁴² See Map 25 in the Map Atlas attached to Malaysia’s Memorial.

⁵⁴³ Letter from Thanabalasingham K. (Commodore, Royal Malaysian Navy) to Naval Staff Division (Ministry of Defence, Malaysia) dated 16 July 1968 (MM Vol. 3, Annex 76).

⁵⁴⁴ See *Petroleum Agreement Under Section 9 of the Petroleum Mining Act, 1966 in Respect of Off-shore Lands between the Government of Malaysia and Continental Oil Company of Malaysia Concerning 24,000 (Approximate) Square Miles of the Continental Shelf Adjacent to the East Coast of West Malaysia* of dated 16 Apr 1968 (extracts) (MM Vol. 3, Annex 110); Fisheries Act (Act 317 of 1985) (Malaysia) (extracts) (MM Vol. 3, Annex 113).

⁵⁴⁵ See paras. 6.77-6.89 above.

B. SINGAPORE HAS CONSISTENTLY TREATED THE THREE FEATURES AS A
GROUP

8.18 In contrast, it is worth noting that, on her part, Singapore can avail herself not only of regular and routine naval patrols in the waters around Pedra Branca and its dependencies,⁵⁴⁶ but also of investigations of navigational hazards and accidents in places very close to, or on, the three features.⁵⁴⁷ See **Insert 13**, opposite, showing the locations of various accidents investigated by Singapore authorities.

8.19 Moreover, if it were assumed that the “critical date” with respect to Middle Rocks and South Ledge is 6 February 1993, as Malaysia alleges,⁵⁴⁸ at least three investigations listed in Singapore Memorial would have taken place before that date. These were in respect of the following vessels and accidents:

- (a) the Singapore ship *MV Kota Angkasa*, on 22 June 1985 – about 200 metres (i.e., about 0.1 nautical miles) from Middle Rocks;
- (b) the Nigerian ship *MV Binta Yar’adua*, on 20 June 1988 – about 400 metres (i.e., about 0.2 nautical miles) from Middle Rocks; and
- (c) the Norwegian ship *MV Martha II*, on 17 September 1992 – about 100 metres (i.e., about 0.05 nautical miles) from South Ledge.⁵⁴⁹

⁵⁴⁶ SM pp. 114-116, paras. 6.68-6.71.

⁵⁴⁷ SM pp. 118-123, paras. 6.76-6.87.

⁵⁴⁸ See above, at para. 8.1.

⁵⁴⁹ SM p. 121, para. 6.82.

Malaysia has never protested against the investigations. She also did not do so in October 1996 or in August 1998, when the Singapore Authorities investigated on the sinking of the Malaysian ship *MV Gichoon* or the grounding of the Singapore ship *MT Ocean Gurnard*, both occurring on South Ledge itself.⁵⁵⁰

8.20 Furthermore, Singapore officials have conducted routine landings on Middle Rocks as part and parcel of their administration of Pedra Branca and its waters. For example, in 1977, and later in 1991, Singapore officials landed on Middle Rocks in the course of conducting surveys of Pedra Branca and the surrounding waters.⁵⁵¹ (The 1977 survey was done for the purpose of the proposed reclamation of Pedra Branca which was not proceeded with.⁵⁵² The 1991 survey was done for the purposes of building the helipad on Pedra Branca.) An even earlier example is found in a painting by J.T. Thomson himself, which recorded his own landing on Middle Rocks in the course of supervising the construction of the lighthouse on Pedra Branca.⁵⁵³

⁵⁵⁰ See Investigation Report on Grounding of *MV Gichoon* on 14 Oct 1996 and Investigation Report on Grounding of *MT Ocean Gurnard* on 6 Aug 1998 (SM Vol. 7, Annex 198 and Annex 200 respectively).

⁵⁵¹ See Records of Survey Conducted on Pedra Branca and Middle Rocks from 28 June to 1 July 1977, attached to this Counter-Memorial as Annex 49; and Report of Survey of Pedra Branca (Horsburgh) from 10 Sep to 12 Sep 1991, attached to this Counter-Memorial as Annex 51.

⁵⁵² An account of this project can be found in SM pp. 123-124, paras. 6.88-6.90. The relevant documents are attached as Annex 135 to Singapore's Memorial.

⁵⁵³ SM, Image 11, after p. 62.

Section IV. Conclusions

8.21 In conclusion, for the reasons in the present Chapter as well as for those in Chapter IX of her Memorial, Singapore maintains that:

- (a) all three features have always been treated together;
- (b) Middle Rocks and South Ledge fall within the territorial sea appertaining to Pedra Branca;
- (c) Middle Rocks, located only 0.6 nautical miles from Pedra Branca, are merely geomorphological extensions of the main island (Pedra Branca). They undoubtedly belong to, and form, a single group with Pedra Branca;
- (d) South Ledge, being a low-tide elevation, is not susceptible to independent appropriation. Its fate must follow that of Pedra Branca and Middle Rocks;
- (e) since sovereignty over Pedra Branca clearly belongs to Singapore, the same necessarily holds true with regards to Middle Rocks and South Ledge.

CHAPTER IX THE MAP EVIDENCE

Section I. Introduction

9.1 Malaysia has devoted an entire Chapter of her Memorial to the map evidence (Chapter 9) and filed a Map Atlas containing 49 maps. It is thus clear that the cartography forms a significant part of Malaysia's case despite the fact that Malaysia recognises that the Court has treated maps which are not annexed to, or an integral part of, a boundary treaty with considerable caution.⁵⁵⁴

9.2 The *leitmotif* of Chapter 9 of Malaysia's Memorial is that, while Malaysian maps have consistently showed Pedra Branca as part of Johor (which, as will be seen, is not the case), Singapore never produced any cartography showing the island as appertaining to Singapore prior to 1994. In more general terms, Malaysia's argument is that the preponderance of the map evidence supports her claim.

9.3 Although Malaysia acknowledges that there are no maps in this case which possess legal force for the purpose of establishing sovereign rights, she maintains that there exists a "substantial record of depictions of the three features on maps from the 17th century onwards."⁵⁵⁵ Chapter 9 of Malaysia's Memorial is cryptic as to what such record actually proves, and the map evidence presented there and in Malaysia's Map Atlas does not provide any further assistance in this regard. As will be demonstrated below, the map

⁵⁵⁴ See e.g., MM p. 135, para. 302, where Malaysia cites the Court's Judgment in the *Frontier Dispute (Burkina Faso/Mali) (Merits)* [1986] ICJ Rep 554, at p. 582, para. 54.

⁵⁵⁵ MM p. 137, para. 304.

evidence submitted by Malaysia is inconclusive and, except for certain official maps expressly identifying Pedra Branca as belonging to Singapore, it is irrelevant. To recall what the Court stated in the *Frontier Dispute* case:

“... maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps.”⁵⁵⁶

9.4 In the present case, there simply is no Malaysian title to Pedra Branca which the maps introduced by Malaysia can even remotely endorse or confirm. By contrast, what is relevant is the fact that Malaysia has been unable to produce a single published map attributing Pedra Branca, Middle Rocks or South Ledge to herself or to her predecessors. Indeed, *none* of the 49 maps contained in Malaysia’s Atlas supports the Malaysian position. On the contrary, Malaysia has published official maps prior to the emergence of the dispute that unambiguously depicted the island as belonging to Singapore.⁵⁵⁷ These maps have been discussed in Singapore’s Memorial.⁵⁵⁸ Suffice it to recall here that these maps constitute clear admissions against interest from official Malaysian sources demonstrating that, prior to the critical date in 1979-1980, Malaysia regarded Pedra Branca as forming part of Singapore’s territory.

9.5 The Map Atlas filed by Singapore with this Counter-Memorial demonstrates that there are maps which clearly undermine every single argument that Malaysia seeks to make on the basis of her Map Atlas. These maps include:

- (a) numerous historical maps ranging from the late 16th century to the early 19th century showing that Pedra Branca was not considered

⁵⁵⁶ *Frontier Dispute*, *supra* note 554, at p. 583, para. 56, cited with approval in *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep. 14, at para. 87.

⁵⁵⁷ SM p. 158, paras. 7.47-7.50, where official Malaysian maps are discussed.

⁵⁵⁸ SM pp. 155-160, paras. 7.38-7.50.

to have any connection with the Johor mainland or to be part of Johor's dominions; and

- (b) numerous official maps of the State of Johor, starting from the first official map published by it in 1887, which show that Pedra Branca was not considered to be part of the State of Johor.

A full description of each Map in the Singapore Map Atlas, and its significance *vis-à-vis* the Maps adduced by Malaysia in her Memorial can be found within the Singapore Map Atlas itself. These descriptions and comments are also reproduced in the List of Maps at page 269 below.

9.6 Singapore considers that the maps introduced by Malaysia are totally unpersuasive in supporting Malaysia's case. Nevertheless, for the sake of completeness, Singapore will comment on each of the maps below by reference to the period in which they were drafted.

Section II. Analysis of the Maps Presented in Malaysia's Map Atlas

A. THE EARLY MAPS SUBMITTED BY MALAYSIA

9.7 Malaysia has referred to six maps published between 1620 and 1826, ostensibly in support of her claim of an historic title, although this is not a point expressly argued by Malaysia and Malaysia's Memorial merely observes that the pre-1824 maps "show how the political geography of the region was viewed prior to the two Treaties of that year".⁵⁵⁹

⁵⁵⁹ MM p. 137, para. 305.

9.8 These maps are of no use in the present case. None of the six maps dating from this early period contained in Malaysia's Atlas identify the disputed features as pertaining to any particular territory, nor do they purport to show any attribution of territory at all. In particular, the early 19th century maritime charts produced by Malaysia (Maps 4, 5 and 6 of the Malaysian Map Atlas) appear to depict Pedra Branca as one of the relevant features in the Singapore Strait merely for purposes of navigation in the area.

9.9 Malaysia contends that maps of this period show that there was a close connection between Pedra Branca and the Johor mainland. In reality, these maps prove nothing, since the cartographic depiction of physical proximity to the mainland of an island has no relevance for purposes of attribution of that island to a State. In any event, even assuming – *arguendo* – that Malaysia's position has some merit, there are many historical maps published throughout an extended period of time, from 1595 to 1851, which depict Pedra Branca as considerably removed from the mainland. Accordingly, contrary to the impression that Malaysia has sought to create, the maps of this period do not show a close connection between Pedra Branca and the Johor mainland.

9.10 As for the colour-coding appearing on the earliest of Malaysia's maps, a Dutch map of Sumatra, dated 1620, drawn by Hessel Gerritz, (Insert 23 at p. 136 of Malaysia's Memorial and Map 1 in the Malaysian Map Atlas), it is virtually impossible to discern whether any of the islands and other features are coloured differently from the mainland. However, even if that were the case, this would not amount to even a perception that title to territory rested with one or the other ruler. In this respect, reference may be made to the Award in *Eritrea-Yemen Arbitration*, where the Tribunal stated:

“... it is not possible to evaluate the *colour* of maps produced during periods when hand-colouring had to be applied to maps at a second stage. These factors are therefore not determinative with regard to the issue of reversionary historic title. Moreover, there is no evidence that Southern Arabian rulers themselves ever saw or authorized these maps.

Conclusions based on this material would be tenuous at best.”⁵⁶⁰
[emphasis in original]

9.11 In any event, even taking, *arguendo*, Malaysia’s arguments at face value, there exist historical maps which show exactly the opposite of this map *i.e.*, maps that clearly depict Pedra Branca in a different colour from the Johor mainland. This can be seen from some of the maps that Singapore is furnishing with this Counter-Memorial.⁵⁶¹

B. 19TH CENTURY MAPS SUBMITTED BY MALAYSIA

9.12 Similarly, the maps published in the 19th century discussed in Malaysia’s Memorial are neither indicative, nor dispositive, of the issue of title. With respect to the Map of the Dutch East Indies of 1842 (Map 7) and the Dutch maps dated 1882-1883, 1929 and 1934 (Maps 11, 22 and 24), they merely illustrate Dutch perceptions of where the limits of the Riau-Lingga Sultanate lay.

9.13 With regard to Maps 7, 11, 22 and 24, Malaysia contends that they show that the islands situated at the entrance of Singapore Strait “were always considered as within the British sphere.”⁵⁶² In actual fact, nothing in these maps indicates an attribution of sovereignty, but, even if they could be interpreted – as Malaysia does – in the sense of showing that the Dutch Government did not claim Pedra Branca as part of its sphere of influence, this does not mean that it considered that Pedra Branca belonged to the Sultan of Johor. *In short, these maps do not, in any way, contradict the fact that, until the British authorities in*

⁵⁶⁰ *Eritrea/Yemen Arbitration* (Phase One), *supra* note 97, at para. 370.

⁵⁶¹ See e.g., Singapore Counter-Memorial Map Atlas, Maps No. 3 and No. 4.

⁵⁶² MM p. 138, para. 310.

Singapore took lawful possession of Pedra Branca in the period 1847-1851, sovereignty over the island was undetermined.

9.14 This reasoning is not inconsistent with Thomson's map of 1849 showing a boundary drawn around Singapore (Map 8, Malaysian Map Atlas). For Malaysia, the fact that Pedra Branca was not included amongst Singapore's dependencies on this map means that this island was not considered as belonging to Singapore. In reality, by Malaysia's own admission,⁵⁶³ this map deals only with islands lying within 10 miles of Singapore and thus did not encompass Pedra Branca for obvious reasons. In any event, the British authorities did not consider it to be authoritative as to Singapore's territorial extent. In 1861, when a dispute arose on whether British jurisdiction in the Johor Strait extended all the way to the Johor coast or only up to the median line between Johor and Singapore, the Johor authorities pointed to the median line drawn in the Johor Strait on this map as "evidence" that British jurisdiction extended only to mid-channel.⁵⁶⁴ This argument was not accepted by the British.⁵⁶⁵ More importantly, whatever the evidentiary value of this map, it certainly does not detract from the fact that, during the period 1847-1851, title to Pedra Branca was acquired by Britain by the taking of lawful possession, through a series of official acts, in accordance with the legal principles governing the acquisition of territory at the time.⁵⁶⁶

9.15 As for the maps showing Singapore's dependencies drawn by J. Van Cylenberg of the Surveyor General's Office in Singapore and dated 1885, 1898

⁵⁶³ MM p. 140, para. 312.

⁵⁶⁴ See paragraph 17 of Letter from His Highness Daing Ibrahim Maharajah (Tumongong of Johore) to Cavenagh O. (Governor of Princes of Wales Island, Singapore and Malacca) dated 8 Aug 1861 (SM Vol. 5, Annex 63, p. 625).

⁵⁶⁵ This dispute eventually resulted in the conclusion of the 1927 Agreement where the British agreed to retrocede to Johor part of the territorial waters in the Strait of Johor. See above, at paras. 6.20-6.25.

⁵⁶⁶ SM Chapter V.

and 1911 (Maps 12, 13 and 14 of the Malaysian Map Atlas), they, too, contain no attribution of sovereignty. Malaysia's arguments are based on the fact that Pedra Branca does not figure amongst Singapore's dependencies shown in these maps. However, Singapore notes that, during the same period, official maps published by Johor also fail to depict Pedra Branca amongst Johor's dependencies.⁵⁶⁷ Singapore has demonstrated that, by the time these maps were issued, sovereignty over Pedra Branca lay with Great Britain and these maps do not contradict that legal conclusion nor are they inconsistent with it. In any event, the maps in question are at most neutral for purposes of attribution of sovereignty, and they certainly do not support Malaysia's argument that the State of Johor held sovereign title over the island.

C. 20TH CENTURY MAPS SUBMITTED BY MALAYSIA

1. *Maps 15 to 31 and 35 to 36 of Malaysia's Map Atlas*

9.16 Reproduced as Maps 15 and 16 of the Malaysian Map Atlas are two sheets of a map of Singapore which was part of a compilation of 16 sheets. Malaysia asserts that this set of map sheets was published in 1923-1924 by the Surveyor General of the Federated Malay States and Straits Settlements and concludes that, since the series of maps did not include Pedra Branca, Middle Rocks and South Ledge, these islands were not considered at the time to be dependencies of Singapore. In reality, these sheets show nothing relating to the legal status of the islands. Furthermore, Malaysia has failed to provide the legend or any other source for either of these sheets other than her own assertion that they were published "under the direction of the Surveyor General F.M.S. &

⁵⁶⁷ See Singapore Counter-Memorial Map Atlas, Maps No. 9 (1887) and No. 10 (1893).

S.S.”.⁵⁶⁸ In the absence of such information, it is impossible to establish the purpose of these maps.

9.17 In Malaysia’s view, the maps of Malaya dated 1925 and 1928 (Maps 17 and 21 of the Malaysian Map Atlas), which were published by the Surveyor General of the Federated Malay States and Straits Settlements, do not show Pedra Branca in the same colour as the Strait Settlements. Malaysia’s argument seems to be that this shows that Pedra Branca did not belong to the Straits Settlements. This is disingenuous because careful examination reveals that whilst the Straits Settlements are shown in one colour (pink), and Johor in another (yellow), Pedra Branca is totally devoid of colour, probably due to its small size and the quality of the reproduction. As such, these maps simply cannot be interpreted as having attributed Pedra Branca to Johor.

9.18 Map 19 is a map of Johor dated 1926 and published by the Surveyor General of the Federated Malay States and Straits Settlements. According to Malaysia, the map is based on new surveys, but no evidence is provided in support of this assertion. In any event, the map is interesting for other reasons. Although the original map is in colour, it has been inexplicably reproduced in black and white in Malaysia’s Map Atlas. In the coloured original (reproduced by Singapore as Map No. 11 in the Singapore Counter-Memorial Map Atlas) Johor’s territories are depicted in different colours, while everything outside Johor, including notably Singapore *and* Pedra Branca, is left in white. It is therefore entirely unclear how Malaysia can attempt to draw any support from this map.

9.19 Map 18 in the Malaysia Map Atlas is a 1926 map of part of the Kota Tingi district of Johor published by the Surveyor General of the Federated Malay

⁵⁶⁸ See the Divider Sheets for Maps 15 and 16 of the Malaysian Map Atlas.

States and Straits Settlements and shows Pedra Branca with the denomination “Pedra Branca Horsburgh”. Malaysia argues that, since the island is included in a map of Johor, it was part of Johor’s Kota Tinggi district. This is pure speculation given that there is no indication that Pedra Branca was shown for any purpose other than to illustrate the presence of the lighthouse.

9.20 Moreover, Map 18 is contradicted by the maps enclosed with the Johor Annual Reports published from 1931 to 1939 which do not include Pedra Branca within Johor’s dependencies. These maps are attached as Maps No. 15-23 of the Singapore Counter-Memorial Map Atlas. The omission of Pedra Branca from these maps is especially significant given that the maps in the 1928 to 1930 Johor Annual Reports did depict Pedra Branca. Johor’s selective inclusion of Pedra Branca in this series of maps is wholly inconsistent, and does nothing to advance the Malaysian case. The same reasoning applies to Map 23 of the Malaysian Map Atlas, which is a 1932 reprint of Map 18.

9.21 Map 20 is an admiralty chart entitled “Horsburgh Light to Jason Bay”. Malaysia claims that it “shows Pedra Branca just below the bottom (southern) border of the map, with no indication of its pertaining to Singapore.”⁵⁶⁹ Singapore notes that, being a maritime chart, it only purports to assist navigation in the relevant area and not to reflect political boundaries or the attribution of territory. The chart similarly does *not* attribute Pedra Branca in any way to Johor, as can be seen more clearly in the original British Admiralty Chart No. 3839 reproduced as Map No. 12 of the Singapore Counter-Memorial Map Atlas. Therefore, it scarcely supports a claim of sovereignty.

9.22 Malaysia then claims that this chart was subsequently used by Commodore Thanabalasingham of the Malaysian Navy “to indicate maritime

⁵⁶⁹ MM p. 146, para. 316.

boundaries, including around Pedra Branca”.⁵⁷⁰ She then proceeds to assert that “[e]vidently, Commodore Thanabalasingham believed Pulau Batu Puteh, Middle Rocks and South Ledge to belong to Johor”.⁵⁷⁰ She further argues that “[t]he same is true” of Map 25 of her Map Atlas.⁵⁷⁰ It would therefore appear, from the foregoing discussion, that Maps 20 and 25 in Malaysia’s Map Atlas are in fact copies of the chartlets attached to a confidential letter addressed on 18 July 1968 by Commodore K. Thanabalasingham of the Royal Malaysian Navy to the Naval Staff Division of the Ministry of Defence in Kuala Lumpur.⁵⁷¹ However, it is troubling that Malaysia has not explained this connection clearly in her Memorial. If Singapore’s understanding is correct, and the lines on Maps 20 and 25 were indeed added by hand for the purposes of the letter of 18 July 1968, then, these maps can have no greater significance than the letter itself. As Singapore noted in Chapter VI above, this letter (and consequently Maps 20 and 25) cannot have any probative value:

- (a) since the letter was a confidential and internal document, it was, together with the attached charts, unknown to Singapore and was never brought to her attention in the course of negotiations or otherwise;⁵⁷²
- (b) they represent merely a technical “projection” of the rules of the 1958 Convention on the Territorial Sea, without regard to legal boundaries between concerned States in the area;⁵⁷³

⁵⁷⁰ MM p. 146, para. 316.

⁵⁷¹ See Letter from Thanabalasingham K. (Commodore, Royal Malaysian Navy) to Naval Staff Division (Ministry of Defence, Malaysia) dated 16 July 1968 (MM Vol. 3, Annex 76).

⁵⁷² See above, at paras. 6.78-6.79

⁵⁷³ See above, at para. 6.80

- (c) they certainly cannot outweigh similar *internal* statements by Singapore officials asserting a contrary right on *Singapore's* behalf.⁵⁷⁴

9.23 Map 26 is a map of the region described by Malaysia in her Map Atlas as:

“Singapore, On a Scale of 1:1,000,000, GSGS 4204, Sheet NA-48, published by the War Office 1941, Reprinted from Third Edition HIND 5000, 1944, Reproduced by War Office 1946”

The map shows several lines in the Singapore Strait, the purpose of which is not clear. According to Malaysia, these lines allocate Pedra Branca to Malaysia but no explanation is given to support this assertion. Singapore notes that Pedra Branca is not even named or labelled on this map. Singapore further notes that the words “Pulau Batu Puteh” in the enlargement of this map found on p. 147 of her Memorial as Insert 29 were added by Malaysia for the purpose of her Memorial and not found in the original map. This map also contains a number of curious features:

- (a) Although Malaysia describes this map as “GSGS 4204, Sheet NA-48, ... Third Edition HIND 5000”, the box on the top right hand corner of the map states “Refer to this map as :- *GSGS 4646*, Sheet NA-48, *Edition 5*” [emphasis in italics added], while the box at the bottom left hand corner of the map states : “REFER TO THIS MAP AS :- HIND 5000 GSGS 4204 *SHEET SA-48* THIRD EDITION...” [emphasis in italics added]. It would appear that Map 26 of Malaysia’s Map Atlas is formed by hand-taping two or more printed maps together. It is not clear whether any pertinent information on the map has been omitted or lost as a result;

⁵⁷⁴ See above, at paras. 6.62, 6.81.

- (b) It would appear that some items on the map had been highlighted by hand using a green highlighter or crayon, thus making it difficult to discern what features on the map (as reproduced in Malaysia's Map Atlas) are from the printed original and what have been added later by hand.

9.24 Grouped in the same category by Malaysia with Map 26 is Map 31 of the Malaysian Map Atlas. Singapore notes that this is an aeronautical chart published in 1959 by D. Survey, War Office and Air Ministry, and is presumably intended to provide guidance for navigation by air. As such, this map can hardly be accepted as an authority in matters of attribution of sovereignty. This is spelt out in the map, which contains the following, rather emphatic, disclaimer, which Malaysia has overlooked: "THIS MAP IS NOT AN AUTHORITY ON INTERNATIONAL BOUNDARIES" (emphasis in original).

9.25 The Boundary Commission in the *Eritrea-Ethiopia* case had occasion to consider the effect that disclaimers may have on the evidentiary value on maps and noted in that respect that the presence of a disclaimer indicates that:

"... the body making the map (or its Government) is not to be treated as having accorded legal recognition to the boundaries marked thereon or to the title to territory of the States concerned as indicated by the marked boundary."⁵⁷⁵

Thus, when a map carries a disclaimer, the map simply reflects the particular view of a geographical situation taken by the cartographer and cannot be interpreted as attributing any legal recognition to that geographical situation for purposes of territorial attribution.

⁵⁷⁵ *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 p. 28, para. 3.27.

9.26 Like the previous maps, Map 27 of the Malaysian Map Atlas was issued for military purposes. The map – entitled “Sedili Besar” and published in 1944 – depicts a line in the sea dividing “British Malaya” from “Netherlands East Indies”. Malaysia points out that “Pedra Branca Horsburgh (Middle Rocks) is clearly indicated as falling within British Malaya”.⁵⁷⁶ But at that time, British Malaya encompassed both the Malay States (which included Johor) and the Straits Settlements (which included Singapore). This is also evident from the legend appearing at the bottom of the map, which employs the labels “Johore (Malaya)” and “Singapore (Malaya)”. This map therefore provides no information about whether Pedra Branca belonged to Singapore or Johor.⁵⁷⁷

9.27 Maps 28 and 29 bear the same title and are later editions of Map 27, both published in 1950. The *only* noticeable change from Map 27 is the replacement of the words “British Malaya” with the label “Federation of Malaya”. This appears to be a simple update to reflect the formation of the Federation of Malaya in 1948. It would appear that, as with previous editions, the line drawn in the sea continues to be for the purpose of differentiating between the British and Dutch possessions/protectorates (or, in the case of Map 29, between British possessions/protectorates and Indonesia). There are no indications on these maps that this update was done with the intention of authoritatively attributing territories between those elements of British Malaya which became part of the Federation of Malaya in 1948 (i.e. Johor and other Malay states) and those

⁵⁷⁶ MM p. 146, para. 318.

⁵⁷⁷ It may be noted that Malaysia’s Map 27 is based on an earlier map in which a similar line is drawn across the South China Sea but labelled as “Unfederated Malay States-Straits Settlements” (*see* Map No. 24 of the Singapore Counter-Memorial Map Atlas). Johor was an Unfederated Malay State while Singapore was part of the Straits Settlements. The earlier map, in using the composite label “Unfederated Malay States-Straits Settlements” (instead of the simple label “Unfederated Malay States”) seems to imply that the mapmaker considered that there were territories belonging to the Straits Settlements in the vicinity of the South China Sea, which is where Pedra Branca, Middle Rocks and South Ledge are sited on the map.

which did not join the Federation (i.e. the Colony of Singapore and its dependencies). In fact, the disclaimers contained on both maps clearly suggest otherwise. The general unreliability of the map as a source for the attribution of territory is also underscored by the fact that South Ledge is shown as lying on the Netherlands East Indies' or Indonesian side of the line.

9.28 Grouped in the same category by Malaysia with Maps 27 to 29 are Maps 35 and 36 of Malaysia Map Atlas entitled, respectively, "Johor Baharu and Singapore" and "Tandjunguban". These were published by the U.K. Ministry of Defence in 1967 and 1968. As Malaysia has conceded, these maps contain relevant disclaimers.⁵⁷⁸ They show a sporadic, dotted line going between Pedra Branca and Indonesia, labelled "Malaysia" on one side and "Indonesia" on the other side. As is the case with other maps produced by Malaysia, it is not clear what these lines were intended to represent and the maps' legends shed no light on this point.

9.29 Malaysia refers to a compilation sheet prepared in 1957 (reproduced as Map 30 in the Malaysian Map Atlas) and claims that it "was evidently carefully drawn and checked".⁵⁷⁹ There is no way of knowing what Malaysia's grounds are for advancing such an assertion. This compilation sheet depicts Pedra Branca (labelled as "Batu Puteh") *solely* with the triangular symbol representing a trigonometric (or triangulation) station, without tracing the outline of the island as an area of land. This is despite the fact that the outline of various islands within the Romania Group which are comparable in size with Pedra Branca have been traced out in detail. A table to the right of the compilation sheet lists Pedra

⁵⁷⁸ MM p. 146, para. 318.

⁵⁷⁹ MM p. 148, para. 319.

Branca as one of 10 Plan Control Points. Singapore makes the following observations about this compilation sheet:

- (a) Nothing in this compilation sheet attributes Pedra Branca politically to Johor or the Federation of Malaya.
- (b) Technical experts of Singapore have reviewed this compilation sheet and have come to the conclusion that it was drawn for verification of the results of an air photo survey⁵⁸⁰ and that Pedra Branca appeared in this compilation sheet because its prominent position made it a convenient triangulation point. However, a geographical feature can serve as a triangulation point without the need for the surveyor to actually travel to the feature. Nor does the usage of a feature as a triangulation point imply any claim as to sovereignty over the feature – it is perfectly possible for a surveyor in one country to use a prominent feature in another country as a triangulation point.⁵⁸¹
- (c) Technical experts of Singapore are also of the view that this compilation sheet in fact formed the basis on which the 1962 admission against interest map was drawn (this is the official Federation of Malaya map attributing Pedra Branca to Singapore, discussed further in sub-section (2) below and reproduced as Map

⁵⁸⁰ See also Annual Reports of the Survey Department for the Federation of Malaya (extracts) for the years 1954, 1956, 1957, 1958-1961, and 1962, attached to this Counter-Memorial as Annex 35.

⁵⁸¹ See e.g., Records of Survey Conducted on Pedra Branca and Middle Rocks from 28 June to 1 July 1977, attached to this Counter-Memorial as Annex 49 (in particular, Vol. 3, pp. 420-421) and Report of Survey of Pedra Branca (Horsburgh) from 10 Sep to 12 Sep 1991, attached to this Counter-Memorial as Annex 51 (in particular, Vol. 3, p. 452), where Singapore surveyors on Pedra Branca made use of islands in the Romania group as triangulation points.

32 of Malaysia's Atlas, as Map No. 26 of the Singapore Counter-Memorial Map Atlas, and as **Insert 14** opposite).⁵⁸²

**2. Malaysian Official Maps Constituting Admission against Interest
(Maps 32 to 34, 38, 39 and 41 of Malaysia's Map Atlas)**

9.30 With respect to various official Malaysian maps which represent admissions against interest, Malaysia has reproduced them as Maps 32, 33, 34, 38, 39 and 41 of her Atlas. Maps 32, 33, 34 and 39 were presented and discussed by Singapore as Maps 12 to 15 of the Singapore Memorial. Map 38 (Series L8010, 1970) and Map 41 (Series L7010, 1975) are maps which Singapore was previously not aware of. Map 41 is merely a reprint of Map 39 (Series L7010, 1974), while Map 38 simply reproduces the materials from the L7010 series of maps (scale 1:63,360) in a larger scale (1:25,000). These two maps tell the same story as the other four – they all unequivocally attribute Pedra Branca to Singapore. Malaysia has made no attempt to explain them other than to point out that they contain a disclaimer and that “the emphasis here is *entirely* on the lighthouse rather than the island – the feature shown as a symbol and *not as an area of land*”.⁵⁸³

⁵⁸² The compilation sheet under discussion (Map 30, Malaysian Map Atlas) states on the top right hand corner that it is prepared for the revision of Sheet 135. According to the 1954 Annual Report of the Survey Department of the Federation of Malaya (attached to this Counter-Memorial as part of Annex 35), the implementation of a new national grid system resulted in a redesign of the topographical sheet layout – see para. 31 on pp. 89, Annex 35 (pp. 297-298). Sheet number “135” was assigned to the south-eastern corner of Johor – see Annex 35 (p. 305). The first topographical map known to have been published by the Surveyor-General of the Federation of Malaya with the sheet number “135” is the sheet entitled *Pengerang*, Sheet 135, Series L7010 Edition 1-SDFM (i.e., Map 32 of the Malaysian Map Atlas and Map No. 26 of the Singapore Counter-Memorial Map Atlas).

⁵⁸³ MM p. 148, para. 321, emphasis added.

9.31 *First*, concerning the effect of the disclaimer, Singapore has already highlighted in her Memorial the observation by the *Eritrea/Ethiopia* Boundary Commission that, despite the disclaimer:

“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.”⁵⁸⁴

Secondly, the argument that the emphasis is “*entirely* on the lighthouse rather than the island” has no merit at all :

- (a) contrary to Malaysia’s assertions, Pedra Branca is not just shown as a lighthouse, but also as an area of land. This is readily apparent by comparing the lighthouse symbol in the legend of the map with how the island is depicted on the map (see **Insert 14**, opposite page 230; and **Insert 15**, overleaf). The bottom of the lighthouse symbol, as depicted in the legend of the map, is a flat straight line. In contrast, Pedra Branca is depicted with a small circle protruding from under the lighthouse symbol. In other words, Pedra Branca is depicted on the map by a small circle denoting an area of land, with a lighthouse symbol placed on top of this circle;
- (b) a number “28” appears next to the island which, according to the legend in the map, denotes height in feet above mean sea level. This is clearly a reference to the height of the *island* and not the lighthouse (which is more than 100 feet tall). This further undermines Malaysia’s argument that the emphasis was “*entirely* on the lighthouse rather than the island”.

⁵⁸⁴ *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 p. 28, para. 3.27

- (c) Malaysia does not even attempt to explain what the bracketed word “Singapore” appearing under the island stands for. Obviously the word was to indicate that the island belonged to Singapore, just as Pulau Tekong Besar, which is undisputedly Singapore territory, is also labelled with the bracketed word “Singapore” on the same map. It is to be noted that, on a different sheet within the same series of maps published just one year before, Pulau Pisang is depicted *without* the word “Singapore” even though the lighthouse on Pulau Pisang is operated by Singapore (See Map No. 25, Singapore Counter-Memorial Map Atlas).

3. *Other 20th Century Maps Submitted by Malaysia (Maps 40 and 42 to 48 of Malaysia’s Map Atlas)*

9.32 With respect to the illustrative map accompanying the publication *Limits in the Sea* No. 60 (1974) issued by the Geographer of the United States Department of State, reproduced as Map 40 of Malaysia’s Atlas, Malaysia points to the absence of a boundary line between Singapore and Malaysia around Pedra Branca in this map, and argues that:

“The median line drawn by the Geographer in the Singapore Strait to the south of Pulau Batu Puteh, Middle Rocks and South Ledge suggests that these features were considered as Malaysian”⁵⁸⁵

This argument is without merit. While the drawing of a median line between Pedra Branca and Indonesia on this map might imply a belief that Pedra Branca does not belong to *Indonesia*, such a line clearly does not prejudice the status of Pedra Branca as between *Malaysia and Singapore*. After all, this map was

⁵⁸⁵ MM p. 150, para. 322.

drawn solely for the purpose of analysing the *Indonesia-Singapore* boundary. Moreover, Malaysia failed to refer to the actual text of the U.S. publication *Limits in the Seas* No. 60, which contains a disclaimer drafted in the following terms:

“Intended for background use only, this research document does not represent an official acceptance of the United States Government of the line or lines represented on the charts or, necessarily, of the specific principles involved, if any, in the original drafting of the lines.”⁵⁸⁶

In any event, the conclusion which Malaysia tries to draw from this map is belied by the fact that the database on toponyms maintained by the U.S. Board on Geographic Names (whose members include the Geographer, U.S. Department of State) has, since 1970, shown (and continues today to show) Pedra Branca as belonging to Singapore.⁵⁸⁷

9.33 Map 42 is a geological map of Singapore whilst Maps 43, 45 and 46 are topographical maps. They show the main island of Singapore and neighbouring islands. There is no indication that these maps are intended to exhaustively encompass all Singapore territories. Nothing in these maps contradict the fact that Singapore’s sovereignty extended to Pedra Branca.

9.34 Map 44 is the well-known map issued by the Director of National Mapping of Malaysia in 1979 showing the limits of Malaysia’s continental shelf

⁵⁸⁶ *Limits in the Seas No. 60 - Territorial Sea Boundary: Indonesia-Singapore, November 11, 1974*, attached to this Counter-Memorial as Annex 48.

⁵⁸⁷ See Gazetteer No. 10, *Malaysia, Singapore and Brunei*, second edition, Official Standard Names approved by the U.S. Board on Geographic names, prepared by the Geographic Division, U.S. Army Topographic Command, Washington, D.C., November 1970, attached to this Counter-Memorial as Annex 46. See also, extracts from the web site of the U.S. Board on Geographic Names (July 2004), attached to this Counter-Memorial as Annex 57. (Like *Limits in the Sea No. 60*, Gazetteer No. 10 contains a disclaimer. However, this does not detract from the fact that Gazetteer No. 10 positively attributed Pedra Branca to Singapore, while *Limits in the Sea No. 60*, which Malaysia is relying on, made no positive attribution of Pedra Branca to either country.)

boundaries through which Malaysia unilaterally defined, for the first time, some of her boundaries with Singapore and third States. The map shows Pedra Branca within Malaysia's territorial waters. As the Court will recall, Singapore formally protested this map on 14 February 1980.⁵⁸⁸ In her note of protest, Singapore rejected Malaysia's purported claim and requested that the map be amended to reflect Singapore's sovereignty over Pedra Branca.⁵⁸⁹

9.35 The map entitled "Joint Operations Graphic" (Map 47 in Malaysia's Map Atlas) is the *fifth* edition of a series produced under the direction of the Director General of Military Survey of the British Ministry of Defence. The map, which was issued in 1994 – in other words, well after the dispute had crystallised – contains a broken dotted line on which the words "Malaysia-Indonesia" appear south of Pedra Branca, Middle Rocks and South Ledge. Pedra Branca is identified by the legend "Pulau Batu Puteh (Horsburgh)". However, the map does not explicitly attribute Pedra Branca to any country. The first to third editions of this map all contained a similar dotted, broken line on which also appear the words "Malaysia-Indonesia", but without explicitly attributing Pedra Branca to any country. This series of maps also contains a disclaimer that they "are not to be taken as necessarily representing the view of the UK Government on boundaries or political status".⁵⁹⁰

9.36 In 1993, the U.K. Ministry of Defence sent a draft (or proof) of the fourth edition of this "Joint Operations Graphic" map to Singapore for comments. This draft omitted the dotted line found in previous editions, and added the word "Malaysia" under the legend "Pulau Batu Puteh (Horsburgh)". As this is the first time a political attribution of Pedra Branca appeared in this series of maps,

⁵⁸⁸ See Singapore's Memorial, at pp. 21-25, paras. 4.2-4.6.

⁵⁸⁹ See Singapore's Note MFA 30/80 dated 14 February 1980 (SM Vol. 6, Annex 144).

⁵⁹⁰ See lower right corner of Map 47, Malaysian Map Atlas.

the Ministry of Foreign Affairs of Singapore protested to the High Commission of the United Kingdom on 14 December 1993 and – as a result of this protest – the United Kingdom decided to reprint the map without the word “Malaysia”.⁵⁹¹ At a meeting which also took place on 14 December 1993, Singapore also obtained a verbal assurance from the British High Commissioner in Singapore, Mr. Gordon Duggan (the head of the United Kingdom diplomatic mission in Singapore), that the map did not represent the official views of the British Government.⁵⁹² The fourth edition map was withdrawn and never formally published.⁵⁹³ The following year (1994), the U.K. Ministry of Defence published the fifth edition “Joint Operations Graphics” map, which reverts to the format used in the first to third editions. It is this fifth edition map which Malaysia has included as Map 47 of her Map Atlas.

9.37 Map 48 is a map of Singapore published by the Singapore Ministry of Information and the Arts in 1995. The map is reproduced from the inside cover of the 1995 edition of the Singapore Yearbook. This publication provides general information about Singapore and, as such, it includes a reference to Pedra Branca. Malaysia states that the map cannot “produce any effect on the situation”.⁵⁹⁴ Singapore agrees. This map was produced as part of a normal routine for the purposes of the Singapore Yearbook. Singapore’s title to Pedra Branca is not based on this or any other map, but on the lawful taking of

⁵⁹¹ See Diplomatic Note from the Ministry of Foreign Affairs of Singapore to the High Commission of the United Kingdom of 14 Dec 1993 and the United Kingdom’s Reply dated 28 Apr 1994, attached to this Counter-Memorial as Annex 52 and 54 respectively.

⁵⁹² See Notes of Conversation at the Singapore Ministry of Foreign Affairs between the U.K. High Commissioner, Mr. Gordon Duggan and the Singapore Ministry of Foreign Affairs Deputy Secretary (South-East Asia) on 14 December 1993 at 4:00 p.m., attached to this Counter-Memorial as Annex 53.

⁵⁹³ See United Kingdom’s Note 79/94 to the Ministry of Foreign Affairs of Singapore dated 28 Apr 1994 attached to this Counter-Memorial as Annex 54.

⁵⁹⁴ MM p. 150, para. 324.

possession of Pedra Branca in the period 1847-1851, and on the uninterrupted maintenance of her title through administration of the island and the waters around it for more than 150 years.

Section III. Conclusions

9.38 It is an established principle in international law that maps are seldom considered as primary evidence of title. Certain exceptions are made to this principle, particularly when maps are attached to a treaty and made an integral part of it. Otherwise, maps which cannot be characterised as primary evidence are examined with the utmost caution by international courts and tribunals if they are used in support of a claim of sovereignty over disputed territory.

9.39 For instance, in the *Island of Palmas* case, Judge Huber stated that, when dealing with the attribution of territory, maps can only provide indirect evidence of sovereignty and, unless annexed to a treaty, they do not have the legal weight of an instrument implying recognition of legal rights.⁵⁹⁵ According to the *dictum* in the *Island of Palmas* case, therefore, maps normally play a minor role and cannot be conclusive as to the recognition or abandonment of rights unless they represent the title of territorial sovereignty itself by virtue of being annexed to a boundary treaty. This distinction was maintained by the Court in the *Frontier Dispute (Burkina Faso/Mali) Case* and in the *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* and by the arbitral tribunal in the *Eritrea-Yemen* arbitration.

9.40 It is also recognised that maps having an official character, i.e., maps issued by governmental agencies or otherwise endorsed by a government, are

⁵⁹⁵ See *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 24, at 852-854.

often viewed as having a higher probative value than maps published by private entities.

9.41 The vast majority of the maps produced by Malaysia in the present case were not published for the purpose of indicating sovereignty, but, rather, for purely illustrative purposes or to assist navigation in the area. They thus cannot be given any probative weight or legal significance for the purposes of assessing sovereignty over Pedra Branca. Furthermore, a number of these maps contain disclaimers, which indicate – as noted by the Boundary Commission in the *Ethiopia-Eritrea* case - that the cartographer “is not to be treated as having accorded legal recognition to the boundaries marked thereon or to the title to territory of the States concerned as indicated by the marked boundary”.⁵⁹⁶

9.42 This is all the more true since there exists a number of official Malaysian maps, issued before the dispute emerged in 1979-1980, depicting the island of Pedra Branca as belonging to Singapore. As Singapore has discussed at paragraphs 7.38-7.50 of her Memorial, these maps provide evidence that Malaysia’s official view at the time was that the island belonged to Singapore, not Malaysia. International doctrine and case law support the proposition that official maps issued by one government which are consistent with the position expressed by another government can be treated as admissions against the interests of the former and have significant probative value.⁵⁹⁷

⁵⁹⁶ *Decision of the Eritrea-Ethiopia Boundary Commission*, *supra* note 575, at p. 28, para. 3.27.

⁵⁹⁷ *Minquiers and Ecrehos*, *supra* note 6, at pp. 66-67, 71; *Island of Palmas*, *supra* note 24, at p. 852; *Honduras Border Award*, *Reports of International Arbitration Awards*, Vol. II, p. 1307, at pp. 1330-1331, 1336, 1360-1361; *Beagle Channel Arbitration (Argentina v. Chile)* (Award of 18 February 1977), 52 *ILR* 97, at 205; *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* 187, at 199, *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. *See also*, Brownlie, I., “International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law”, in 255 *Académie de Droit International (ed.) Recueil des Cours* (1995), at p. 161.

9.43 In conclusion, apart from the 1979 Continental Shelf Boundaries map (Map 44, Malaysian Map Atlas) which triggered the present dispute, and against which Singapore promptly protested, Malaysia has not been able to introduce a single published map, whether emanating from Malaysia, Johor or any other country, which positively and unequivocally attributed Pedra Branca to Malaysia (or Johor). The kind of cartographic materials produced by Malaysia does not assist the Court to reach a decision with respect to sovereignty over Pedra Branca.

9.44 Singapore's title to Pedra Branca is rooted in the lawful possession of the island and is confirmed by the open, peaceful and continuous exercise of State authority subsequently exercised on it. The inconsistent and inconclusive cartography presented by Malaysia does not even begin to put this title in question. To the extent that any maps are relevant in the present case, they are limited to the official maps issued by Malaysia prior to the emergence of the dispute which showed that the Malaysian government itself regarded the island as Singapore's territory.

SUBMISSIONS

For the reasons set out in this Counter-Memorial and in Singapore's 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.

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