INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE

(MALAYSIA/SINGAPORE)

JUDGMENT OF 23 MAY 2008

2008

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS ET SOUTH LEDGE

(MALAISIE/SINGAPOUR)

ARRÊT DU 23 MAI 2008

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JUDGMENT

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(MALAYSIA/SINGAPORE)

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23 MAI 2008

ARRÊT

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CASE CONCERNING SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE

(MALAYSIA/SINGAPORE)

JUDGMENT

Present: *Vice-President* Al-Khasawneh, *Acting President*; *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judges* ad hoc Dugard, Sreenivasa Rao; *Registrar* Couvreur.

In the case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge,

between

Malaysia,

represented by

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

as Agent;

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

as Co-Agent;

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

H.E. Tan Sri Abdul Gani Patail, Attorney-General of Malaysia,
Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, member of the Institut de droit international, member of the Permanent Court of Arbitration,
Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international,

Mr. Nicolaas Jan Schrijver, Professor of Public International Law, Leiden University, associate member of the Institut de droit international,
Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International Studies, Geneva, associate member of the Institut de droit international,
Ms Penelope Nevill, college lecturer, Downing College, University of Cambridge,

as Counsel and Advocates;

Datuk Azailiza Mohd Ahad, Head of International Affairs Division, Chambers of the Attorney-General of Malaysia,
Datin Almalena Sharmila Johan Thambu, Deputy Head 1, International Affairs Division, Chambers of the Attorney-General of Malaysia,

Ms Suraya Harun, Senior Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,
Mr. Mohd Normusni Mustapa Albakri, Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,
Mr. Faezul Adzra Tan Sri Gani Patail, Federal Counsel, International Affairs Division, Chambers of the Attorney-General of Malaysia,
Ms Michelle Bradfield, Research Fellow, Lauterpacht Centre for International Law, University of Cambridge, Solicitor (Australia),

as Counsel;

Dato' Hamsan bin Saringat, Director, State Economic Planning Unit, Johor State,
Mr. Abd. Rahim Hussin, Under-Secretary, Maritime Security Policy Division, National Security Council, Department of the Prime Minister of Malaysia,
Mr. Raja Aznam Nazrin, Under-Secretary, Adjudication and Arbitration, Ministry of Foreign Affairs of Malaysia,
Capt. Sahak Omar, Director General, Department of Hydrography, Royal Malaysian Navy,
Mr. Tuan Haji Obet bin Tawil, Deputy Director 1, Land and Mines Office of Johor,
Dr. Hajah Samsiah Muhamad, Director of Acquisition, Documentation and Audiovisual Centre, National Archives,
Cdr. Samsuddin Yusoff, State Officer 1, Department of Hydrography, Royal Malaysian Navy,
Mr. Roslee Mat Yusof, Director of Marine, Northern Region, Marine Department Peninsular Malaysia,
Mr. Azmi Zainuddin, Minister-Counsellor, Embassy of Malaysia in the Kingdom of the Netherlands,
Ms Sarah Albakri Devadason, Principal Assistant Secretary, Adjudication and Arbitration Division, Ministry of Foreign Affairs of Malaysia,

Mr. Mohamad Razdan Jamil, Special Officer to the Minister for Foreign Affairs of Malaysia,
Ms Haznah Md. Hashim, Principal Assistant Secretary, Adjudication and Arbitration Division, Ministry of Foreign Affairs of Malaysia,

as Advisers;

Professor Dato' Dr. Shaharil Talib, Head of Special Research Unit, Chambers of the Attorney-General of Malaysia,

as Consultant;

Mr. Tan Ah Bah, Director of Survey (Boundary Affairs Section), Department of Survey and Mapping,
Professor Dr. Sharifah Mastura Syed Abdullah, Dean of the Faculty of Social Sciences and Humanities, National University of Malaysia,
Professor Dr. Nik Anuar Nik Mahmud, Director of the Institute for Malaysian and International Studies, National University of Malaysia,
Mr. Ahmad Aznan bin Zakaria, Principal Assistant Director of Survey (Boundary Affairs Section), Department of Survey and Mapping,
Mr. Hasnan bin Hussin, Senior Technical Assistant (Boundary Affairs Section), Department of Survey and Mapping,

as Technical Advisers,

and

the Republic of Singapore,

represented by

H.E. Mr. Tommy Koh, Ambassador-at-Large, Ministry of Foreign Affairs of the Republic of Singapore, Professor of Law at the National University of Singapore,

as Agent;

H.E. Mr. Anil Kumar s/o N T Nayar, Ambassador of the Republic of Singapore to the Kingdom of the Netherlands,

as Co-Agent;

H.E. Mr. S. Jayakumar, Deputy Prime Minister, Co-ordinating Minister for National Security and Minister for Law, Professor of Law at the National University of Singapore,
H.E. Mr. Chan Sek Keong, Chief Justice of the Republic of Singapore,
H.E. Mr. Chao Hick Tin, Attorney-General of the Republic of Singapore,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, Chairman of the United Nations International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Distinguished Fellow, All Souls College, Oxford,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the United Nations International Law Commission, associate member of the Institut de droit international,
Mr. Rodman R. Bundy, avocat à la Cour d'appel de Paris, member of the New York Bar, Frere Cholmeley/Eversheds, Paris,
Ms Loretta Malintoppi, avocat à la Cour d'appel de Paris, member of the Rome Bar, Frere Cholmeley/Eversheds, Paris,

as Counsel and Advocates;

Mr. S. Tiwari, Principal Senior State Counsel, Chambers of the Attorney-General of the Republic of Singapore,
Mr. Lionel Yee, Senior State Counsel, Chambers of the Attorney-General of the Republic of Singapore,
Mr. Tan Ken Hwee, Senior Assistant Registrar, Supreme Court of Singapore,
Mr. Pang Khang Chau, Deputy Senior State Counsel, Chambers of the Attorney-General of the Republic of Singapore,
Mr. Daren Tang, State Counsel, Chambers of the Attorney-General of the Republic of Singapore,
Mr. Ong Chin Heng, State Counsel, Chambers of the Attorney-General of the Republic of Singapore,
Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Counsel;

Mr. Parry Oei, Chief Hydrographer, Maritime and Port Authority of Singapore,
Ms Foo Chi Hsia, Deputy Director, Ministry of Foreign Affairs, Republic of Singapore,
Mr. Philip Ong, Assistant Director, Ministry of Foreign Affairs, Republic of Singapore,
Ms Yvonne Elizabeth Chee, Second Secretary (Political), Embassy of the Republic of Singapore in the Netherlands,
Ms Wu Ye-Min, Country Officer, Ministry of Foreign Affairs, Republic of Singapore,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By joint letter dated 24 July 2003, filed in the Registry of the Court on the same day, the Ministers for Foreign Affairs of Malaysia and the Republic of Singapore (hereinafter "Singapore") notified to the Registrar a Special Agreement between the two States, signed at Putrajaya on 6 February 2003 and having entered into force on 9 May 2003, the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

> "The Government of Malaysia and the Government of the Republic of Singapore (hereinafter referred to as 'the Parties');
>
> Considering that a dispute has arisen between them regarding sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge;
>
> Desiring that this dispute should be settled by the International Court of Justice (hereinafter referred to as 'the Court');
>
> Have agreed as follows:

Article 1

Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of Article 36 (1) of its Statute.

Article 2

Subject of the Litigation

The Court is requested to determine whether sovereignty over:

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

belongs to Malaysia or the Republic of Singapore.

Article 3

Order of Names

For the purposes of this Special Agreement the order of the use of the names Pedra Branca/Pulau Batu Puteh or vice versa shall not be treated as having any relevance to the question of sovereignty to be determined by the Court.

Article 4

Procedure

1. The proceedings shall consist of written pleadings and oral hearings.

2. Without prejudice to any question as to the burden of proof, the Parties agree, having regard to Article 46 of the Rules of Court, that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than 8 months after the notification of this Special Agreement to the Registry of the International Court of Justice;
(b) a Counter-Memorial presented by each of the Parties not later than 10 months after the date on which each has received the certified copy of the Memorial of the other Party;
(c) a Reply presented by each of the Parties not later than 10 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party;
(d) a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary, and the Court authorizes or prescribes the presentation of a Rejoinder.

3. The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the part of the proceedings corresponding to the said Party.

4. The question of the order of speaking at the oral hearings shall be decided by mutual agreement between the Parties but in all cases the order of speaking adopted shall be without prejudice to any question of the burden of proof.

Article 5

Applicable Law

The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice.

Article 6

Judgment of the Court

The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.

Article 7

Entry into Force

1. This Special Agreement shall enter into force upon the exchange of instruments of ratification on a date to be determined through diplomatic channels.

2. This Special Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the United Nations Charter, jointly or by either of the Parties.

Article 8

Notification

In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties as soon as possible after it has entered into force.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Special Agreement.

Done in triplicate at Putrajaya on the 6th day of February 2003."

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

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

5. Having regard to Article 4, paragraph 2 *(c)*, of the Special Agreement, by an Order dated 1 February 2005, the Court fixed 25 November 2005 as the time-limit for the filing by each of the Parties of a Reply. Those pleadings were duly filed within the time-limit so prescribed.

6. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, by a joint letter dated 23 January 2006, the Parties informed the Court that they had agreed that it was not necessary to exchange Rejoinders. The Court having decided that no further written pleadings were necessary, the written proceedings in the case were thus closed.

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

8. Prior to her election as President of the Court, Judge Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the present case. It therefore fell upon the Vice-President, Judge Al-Khasawneh, to exercise the functions of the presidency for the purposes of the case, in accordance with Article 13, paragraphs 1 and 2, of the Rules of Court. The Vice-President, Acting President, held a meeting on 12 April 2006 with the representatives of the Parties, in conformity with Article 31 of the Rules of Court. During that meeting the Agent of Singapore and the Co-Agent of Malaysia made known the views of their Governments with regard to various aspects relating to the organization of the oral proceedings. In particular the Parties proposed to the Court an agreed calendar for hearings and requested that the Court decide the order in which they would be heard, it being understood that the decision would not imply, that one party could be considered as an applicant and the other party as a respondent, nor that the decision would have any effect on questions concerning the burden of proof.

9. By letter dated 22 September 2006, the Deputy-Registrar informed the Parties that the Court, which did not on the basis of the pleadings see any particular reason for one Party to be heard before the other, had decided to determine the question by drawing lots. On that basis Singapore was heard first.

10. On 21 August 2007, the Agent of Singapore provided the Registry with a new document which his Government wished to produce under Article 56 of the Rules of Court. On 26 September 2007, the Co-Agent of Malaysia informed the Court that Malaysia did not object to the production of the new document by Singapore on condition that Malaysia's response to the document produced by Singapore would also be admitted into the record. The Registrar, on 11 October 2007, informed the Parties that the Court had decided to authorize the production of the document requested by Singapore and that, in accordance with Article 56, paragraph 3, of the Rules of Court, the document submitted by Malaysia in support of its comments on Singapore's new document would also be added to the case file.

11. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

12. Public hearings were held from 6 to 23 November 2007, at which the Court heard the oral arguments and replies of:

For Singapore: H.E. Mr. Tommy Koh,
H.E. Mr. Chao Hick Tin,
H.E. Mr. Chan Sek Keong,
Mr. Alain Pellet,
Mr. Ian Brownlie,
Mr. Rodman R. Bundy,
Ms Loretta Malintoppi,
H.E. Mr. S. Jayakumar.

For Malaysia: H.E. Tan Sri Abdul Kadir Mohamad,
H.E. Dato' Noor Farida Ariffin,
H.E. Tan Sri Abdul Gani Patail,
Sir Elihu Lauterpacht,
Mr. James Crawford,
Mr. Nicolaas Jan Schrijver,

Mr. Marcelo G. Kohen,
Ms Penelope Nevill.

13. At the hearings, a Member of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other and received by the Court after the closure of the oral proceedings.

*

14. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Malaysia,

in the Memorial, Counter-Memorial and Reply:

> "In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over
>
> *(a)* Pedra Branca/Pulau Batu Puteh;
> *(b)* Middle Rocks;
> *(c)* South Ledge,
>
> belongs to Malaysia."

On behalf of the Government of the Republic of Singapore,

in the Memorial, Counter-Memorial and Reply:

> "For the reasons set out in [Singapore's Memorial, Counter-Memorial and Reply], 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."

15. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Singapore,

at the hearing of 20 November 2007:

> "The Government of 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."

On behalf of the Government of Malaysia,

at the hearing of 23 November 2007:

> "In accordance with Article 60, paragraph 2, of the Rules of Court, [Malaysia] respectfully request[s] the Court to adjudge and declare that sovereignty over:

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

belongs to Malaysia."

* * *

2. Geographical Location and Characteristics

16. Pedra Branca/Pulau Batu Puteh is a granite island, measuring 137 m long, with an average width of 60 m and covering an area of about 8,560 sq. m at low tide. It is situated at the eastern entrance of the Straits of Singapore, at the point where the Straits open up into the South China Sea. Pedra Branca/Pulau Batu Puteh is located at 1° 19′ 48″ N and 104° 24′ 27″ E. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian State of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan.

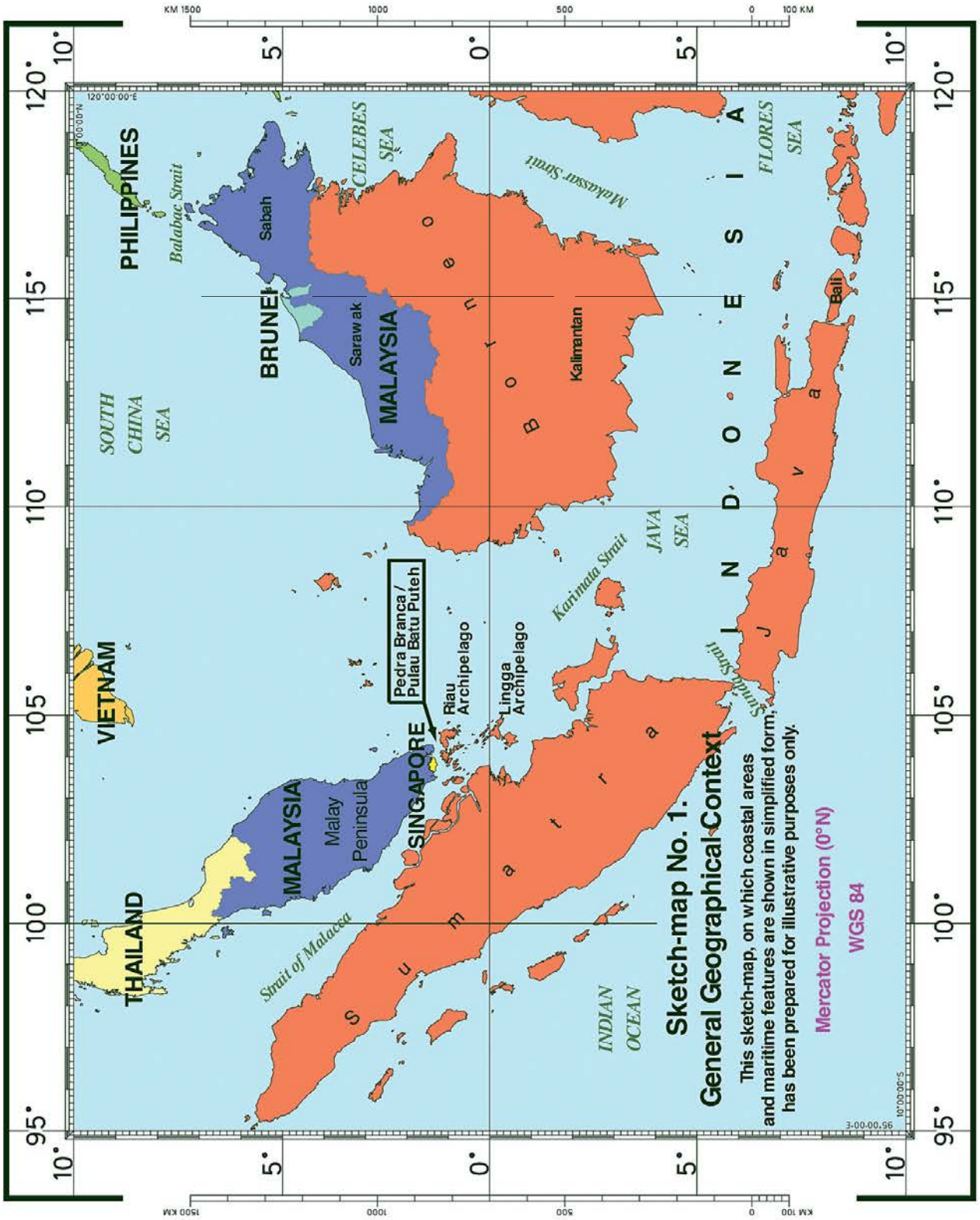
17. The names Pedra Branca and Batu Puteh mean "white rock" in Portuguese and Malay respectively. On the island stands Horsburgh lighthouse, which was erected in the middle of the nineteenth century.

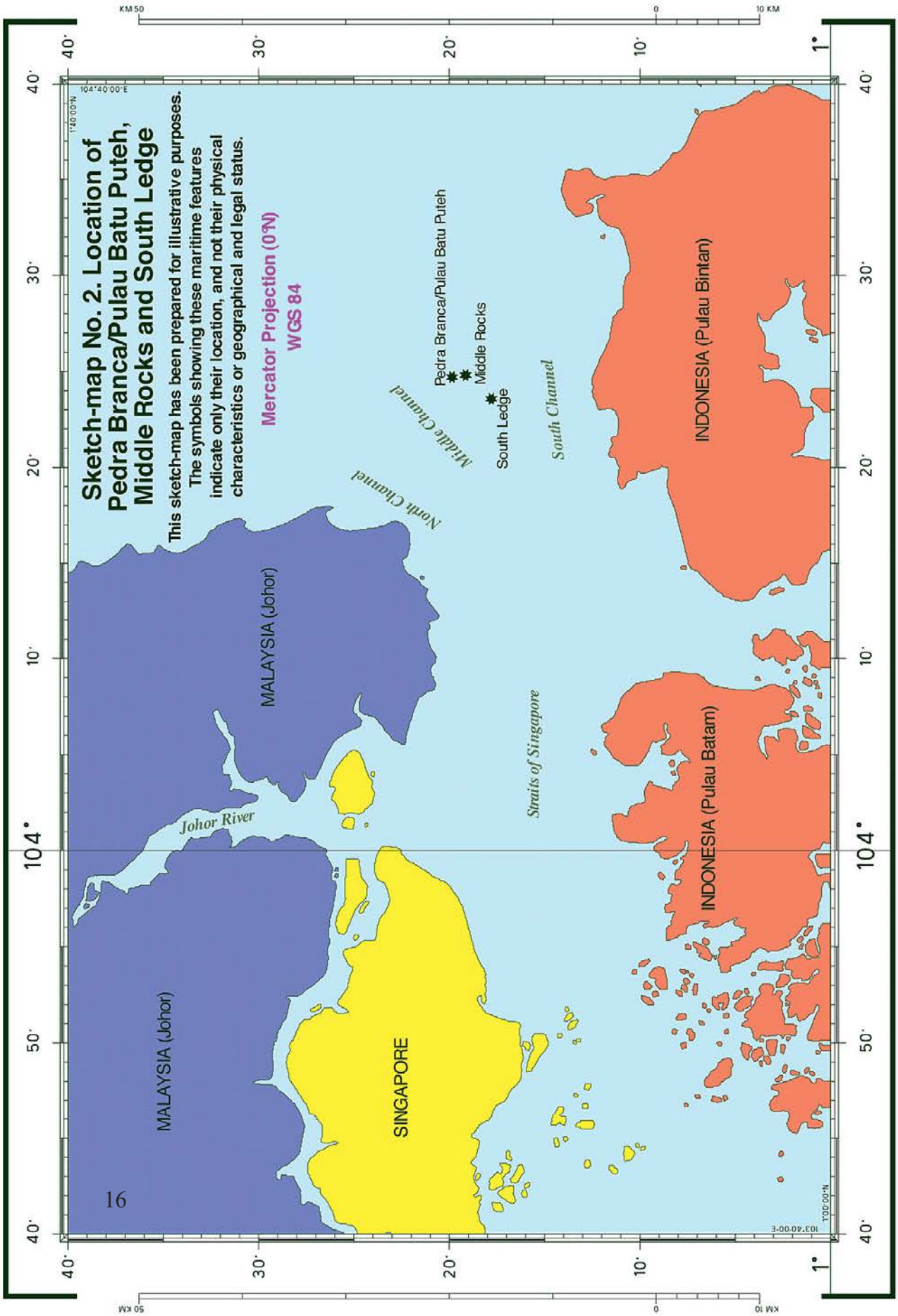
18. Middle Rocks and South Ledge are the two maritime features closest to Pedra Branca/Pulau Batu Puteh. Middle Rocks is located 0.6 nautical miles to the south and consists of two clusters of small rocks about 250 m apart that are permanently above water and stand 0.6 to 1.2 m high. South Ledge, at 2.2 nautical miles to the south-south-west of Pedra Branca/Pulau Batu Puteh, is a rock formation only visible at low-tide.

19. At the eastern entrance to the Straits of Singapore there are three navigational channels, namely North Channel, Middle Channel (which is the main shipping channel) and South Channel. Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge lie between Middle Channel and South Channel. (For the general geography of the area, see sketch-map No. 1, p. 23, and for the location of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, see sketch-map No. 2, p. 24.)

3. General Historical Background

20. The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511. Portugal's dominance in the 1500s as a colonial Power in the East Indies began to wane in the 1600s. By the mid-1600s the Netherlands had wrested control over various regions in the area from Portugal. In 1795, France occupied the Netherlands which prompted the British to establish rule over several Dutch possessions in the Malay archipelago. In 1813, the French left the Netherlands. Under the terms of the Anglo-Dutch Treaty of 1814 (also known as the Conven-


KM 1500
1000
500
0
100 KM
PHILIPPINES
Balabac Strait
Sabah
CELEBES SEA
Makassar Strait
FLORES SEA
BRUNEI
Sarawak
MALAYSIA
Kalimantan
Borneo
SOUTH CHINA SEA
Bali
Java
INDONESIA
Karimata Strait
JAVA SEA
VIETNAM
Pedra Branca / Pulau Batu Puteh
Riau Archipelago
Lingga Archipelago
Sunda Strait
MALAYSIA
Malay Peninsula
SINGAPORE
Sumatra
THAILAND
Strait of Malacca
INDIAN OCEAN
Sketch-map No. 1.
General Geographical Context
This sketch-map, on which coastal areas and maritime features are shown in simplified form, has been prepared for illustrative purposes only.
Mercator Projection (0° N)
WGS 84
120°00'00"E
10°00'00"N
10°00'00"S
95°00'00"E
10°
5°
0°
95°
100°
105°
110°
115°
120°


Sketch-map No. 2. Location of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge
This sketch-map has been prepared for illustrative purposes. The symbols showing these maritime features indicate only their location, and not their physical characteristics or geographical and legal status.
Mercator Projection (0°N)
WGS 84
Pedra Branca/Pulau Batu Puteh
Middle Rocks
South Ledge
Middle Channel
South Channel
North Channel
Straits of Singapore
Johor River
MALAYSIA (Johor)
MALAYSIA (Johor)
SINGAPORE
INDONESIA (Pulau Bintan)
INDONESIA (Pulau Batam)
104°40'00"E
1°40'00"N
103°40'00"E
1°00'00"N
104°
1°
40'
30'
20'
10'
50'
KM 50
0
10 KM
50 KM
KM 10
16

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tion of London) the United Kingdom agreed to return the former Dutch possessions in the Malay archipelago to the Netherlands.

21. In 1819, on the initiative of Sir Stamford Raffles (Governor-General of Bengkulu), a British "factory" (a term used for trading stations established by the British in India and south-east Asia) was established on Singapore island (which belonged to Johor) by the East India Company, which acted as an agent of the British Government in various British possessions from the second half of the seventeenth century to the second half of the nineteenth century. Two treaties were entered into establishing this "factory", one dated 30 January 1819 between the East India Company and the Temenggong of Johor and the other dated 6 February 1819 between Sir Stamford Raffles and Sultan Hussein of Johor and the Temenggong[1] of Johor. These two Treaties further exacerbated the tension between the United Kingdom and the Netherlands arising out of their competing colonial ambitions in the region. This situation led to negotiations beginning in 1820 which culminated in the signing, on 17 March 1824, of a treaty between the United Kingdom and the Netherlands (entitled "Treaty between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies" and hereinafter referred to as "the 1824 Anglo-Dutch Treaty"). Under the terms of this Treaty, the Dutch withdrew their opposition to the occupation of Singapore by the United Kingdom and the latter agreed not to establish any trading post on any islands south of the Straits of Singapore. The Treaty had the practical effect of broadly establishing the spheres of influence of the two colonial Powers in the East Indies. As a consequence, one part of the Sultanate of Johor fell within a British sphere of influence while the other fell within a Dutch sphere of influence.

22. On 2 August 1824 a Treaty of Friendship and Alliance was signed between the East India Company and the Sultan of Johor and Temenggong of Johor (hereinafter "the Crawfurd Treaty", named after the British Resident of Singapore), providing for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore (see paragraph 102 below).

23. Since the death of Sultan Mahmud III in 1812, his two sons, Hussein and Abdul Rahman had held competing claims to succession to the Johor Sultanate. The United Kingdom had recognized as the heir the elder son Hussein (who was based in Singapore), whereas the Netherlands had recognized as the heir the younger son Abdul Rahman (who

[1] A "Temenggong" was a high-ranking official in traditional Malay states. In Johor, in the first half of the nineteenth century, as a result of the internal rivalry between the Sultan and the Temenggong, third states wishing to enter into important transactions tended to seek the consent of both. In 1855, full authority in Johor was transferred by the Sultan to the Temenggong.

was based in Riau, present day Pulau Bintan in Indonesia). Following the signing of the 1824 Anglo-Dutch Treaty, Sultan Abdul Rahman sent a letter dated 25 June 1825 to his brother, in which, "in complete agreement with the spirit and the content of the treaty concluded between their Majesties, the Kings of the Netherlands and Great Britain" whereby "the division of the lands of Johor, Pahang, Riau and Lingga [was] stipulated", he donated to Sultan Hussein "[t]he part of the lands assigned to [the latter]". Sultan Abdul Rahman wrote to his brother that:

> "Your territory, thus, extends over Johor and Pahang on the mainland or on the Malay Peninsula. The territory of Your Brother [Abdul Rahman] extends out over the islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands. Whatsoever may be in the sea, this is the territory of Your Brother, and whatever is situated on the mainland is yours."

24. In 1826 the East India Company established the Straits Settlements, a grouping of the company's territories consisting, *inter alia*, of Penang, Singapore and Malacca.

25. Between March 1850 and October 1851 a lighthouse was constructed on Pedra Branca/Pulau Batu Puteh. The circumstances of its construction will be considered later in this Judgment.

26. In 1867 the Straits Settlements became a British crown colony, making the Settlements answerable directly to the Colonial Office in London. In 1885 the British Government and the State of Johor concluded the Johor Treaty which gave the United Kingdom overland trade and transit rights through the State of Johor and responsibility for its foreign relations, as well as providing for British protection of its territorial integrity. In 1895 the British Government established the Federated Malay States, a federation of four protectorates (Selangor, Perak, Negeri Sembilan and Pahang) on the Malay peninsula. Johor formed part of the "Unfederated Malay States", an expression used not to denote a single entity but rather to describe those States which were not comprised within the Federated Malay States or the Straits Settlements.

27. In 1914, British influence in Johor was formalized and increased through the appointment of a British Adviser.

28. On 19 October 1927 the Governor of the Straits Settlements and the Sultan of Johor signed the "Straits Settlement and Johor Territorial Waters Agreement" (hereinafter "the 1927 Agreement"). This Agreement provided for the retrocession of certain "seas, straits and islets" that had originally been ceded by Johor to the East India Company under the Crawfurd Treaty.

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

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

4. History of the Dispute

30. On 21 December 1979 Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia" (published by the Director of National Mapping, Malaysia) (hereinafter "the 1979 map"), which showed the outer limits and co-ordinates of the territorial sea and continental shelf claimed by Malaysia. The map depicted the island of Pedra Branca/Pulau Batu Puteh as lying within Malaysia's territorial waters. By a diplomatic Note dated 14 February 1980 Singapore rejected Malaysia's "claim" to Pedra Branca/Pulau Batu Puteh and requested that the 1979 map be corrected.

31. Singapore's Note of 14 February 1980 led to an exchange of correspondence and subsequently to a series of intergovernmental talks in 1993-1994 which did not bring a resolution of the matter. During the first round of talks in February 1993 the question of the appurtenance of Middle Rocks and South Ledge was also raised. In view of the lack of progress in the bilateral negotiations, the Parties agreed to submit the dispute for resolution by the International Court of Justice. The Special Agreement was signed in February 2003, and notified to the Court in July 2003 (see paragraph 1 above).

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32. The Court recalls that, in the context of a dispute related to sovereignty over land such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date,

> "which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, pp. 697-698, para. 117).

As the Court explained in the *Indonesia/Malaysia* case,

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

*

33. The Parties are agreed that, with regard to Pedra Branca/Pulau Batu Puteh, the dispute crystallized in 1980, when Singapore and Malaysia formally opposed each other's claims to the island. According to Malaysia, "[t]he Protest Note of 14 February 1980 crystallized the dispute. On this basis the critical date for the dispute over Pulau Batu Puteh is 14 February 1980." For its part, Singapore claims that "it was only in 1979 that Malaysia made a formal claim to the island through the publication of its map", which Singapore protested against through its diplomatic Note of 14 February 1980. Singapore thus refers to "the 1979-1980 critical date".

34. In the view of the Court, it was on 14 February 1980, the time of Singapore's protest in response to Malaysia's publication of the 1979 map, that the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh crystallized.

35. With regard to Middle Rocks and South Ledge, the Court notes that the Parties disagree as to the date when the dispute crystallized. According to Malaysia, it was on 6 February 1993, when Singapore allegedly "for the first time during the first round of bilateral discussions between the Parties . . . included Middle Rocks and South Ledge in addition to its claim to Pulau Batu Puteh". Singapore does not deny that it asserted a claim to Middle Rocks and South Ledge on 6 February 1993 but explains that this "claim" was made in "response to *Malaysia's* statement made a day earlier describing Middle Rocks and South Ledge as two Malaysian islands" (emphasis in the original). Singapore stresses that its long held position is that Middle Rocks and South Ledge cannot be considered as distinct from Pedra Branca/Pulau Batu Puteh and thus "[i]t follows that the critical date for all three features must naturally be the same".

36. The Court observes that Singapore's Note of 14 February 1980 refers explicitly only to Pedra Branca/Pulau Batu Puteh. Moreover, Singapore has not provided any contemporaneous evidence that it intended to include Middle Rocks and South Ledge within the scope of this Note. In the circumstances, the Court concludes that the dispute as to sovereignty over Middle Rocks and South Ledge crystallized on 6 February 1993.

5. Sovereignty over Pedra Branca/Pulau Batu Puteh

5.1. Arguments of the Parties

37. Malaysia states its position on the question of title to Pedra Branca/Pulau Batu Puteh in its Memorial as follows:

> "Malaysia has an original title to Pulau Batu Puteh of long standing. Pulau Batu Puteh is, and has always been, part of the Malaysian State of Johor. Nothing has happened to displace Malaysia's sovereignty over it. Singapore's presence on the island for the sole purpose of constructing and maintaining a lighthouse there — with the permission of the territorial sovereign — is insufficient to vest sovereignty in it."

38. According to Malaysia,

> "PBP could not at any relevant time be considered as *terra nullius* and hence susceptible to acquisition through occupation. There is nothing to demonstrate that Johor had lost its title since there is no evidence that at any time it had the intention of ceding, let alone abandoning its sovereignty over the island."

39. In its Memorial Singapore formulates its case on the question of title to Pedra Branca/Pulau Batu Puteh in the following terms:

> "Singapore's case is that the events of 1847 to 1851 . . . constituted a taking of lawful possession of Pedra Branca by agents of the British Crown. In the years that followed, the British Crown, and subsequently, Singapore continually exercised acts of State authority in respect of Pedra Branca. This effective and peaceful exercise of State authority confirmed and maintained the title gained in the period 1847 to 1851 by the taking of lawful possession on behalf of the Crown."

Singapore sums up its position as follows:

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

40. It is to be noted that, initially, in Singapore's Memorial and Coun-

ter-Memorial, no reference is made expressly to the status of Pedra Branca/Pulau Batu Puteh as *terra nullius*. In its Reply Singapore expressly indicated that "[i]t is obvious that the status of Pedra Branca in 1847 was that of *terra nullius*". At the stage of the oral pleadings Singapore also referred to the legal status of Pedra Branca/Pulau Batu Puteh as *terra nullius*. In his statement, the Agent of Singapore contended as follows:

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

41. In its oral pleadings Singapore advanced, as an alternative to its claim that Pedra Branca/Pulau Batu Puteh was *terra nullius*, the argument that the legal status of the island was indeterminate at the time of the United Kingdom's taking possession of it. It did not pursue this further.

42. However put, Singapore's contentions, including its alternative argument mentioned above, are premised on its view that Malaysia's claim of title to Pedra Branca/Pulau Batu Puteh, based on its alleged ancient original title to the island since the days of the Sultanate of Johor, cannot stand. The Court notes therefore that the issue is reduced to whether Malaysia can establish its original title dating back to the period before Singapore's activities of 1847 to 1851, and conversely whether Singapore can establish its claim that it took "lawful possession of Pedra Branca/Pulau Batu Puteh" at some stage from the middle of the nineteenth century when the construction of the lighthouse by agents of the British Crown started.

5.2. The question of the burden of proof

43. On the question of the burden of proof, Singapore states:

> "The burden remains at all times on Malaysia to produce specific proof that old Johor had sovereignty over Pedra Branca and carried out acts of a sovereign nature on or over the island. Malaysia has produced no evidence whatever in this regard."

Further, citing the Judgment of this Court in the *Temple of Preah Vihear* case, Singapore argues as follows:

> "Malaysia appears to forget that 'the burden of proof in respect of [the facts and contentions on which the respective claims of the Parties are based] will of course lie on the Party asserting or putting them forward' (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 16); it is thus for Malaysia to show that Johor could demonstrate some title to Pedra Branca, yet it has done no such thing."

44. Malaysia agrees that the burden of proof lies with the Party asserting a fact. It therefore contends that Singapore must establish that the taking of possession of Pedra Branca/Pulau Batu Puteh was possible because Pedra Branca/Pulau Batu Puteh was *terra nullius* at the relevant time. Malaysia further asserts that Singapore's "*terra nullius* claim" rests on inference and that Singapore remained silent or failed to produce the "inconvertible legal evidence" in support of its claim.

45. It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 75, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101).

5.3. Legal status of Pedra Branca/Pulau Batu Puteh before the 1840s

5.3.1. Original title to Pedra Branca/Pulau Batu Puteh

46. In light of the respective claims of the Parties in the present case, the Court will first examine whether Malaysia, which contends that its predecessor — the Sultanate of Johor — held original title to Pedra Branca/Pulau Batu Puteh and retained it up to the 1840s, has established its claim.

47. Malaysia argues that

> "[t]he Sultanate [of Johor] covered all the islands within this large area, including all those in the Singapore Straits, such as Pulau Batu Puteh and the islands to the north and south of the Straits, taking in Singapore Island and the adjacent islands"

and points to the fact that "Pulau Batu Puteh, sitting at the eastern entrance of the Singapore Straits, lies right in the middle of the old Sultanate of Johor".

48. In support of its claim, Malaysia asserts that the island in question had always been part of the territory of the Sultan of Johor since the kingdom came into existence and could not at any relevant time be considered as *terra nullius* and hence susceptible of acquisition through occu-

pation. It claims that "rather it is the case that from time immemorial Pedra Branca/Pulau Batu Puteh was under the sovereignty of the Sultanate of Johor". According to Malaysia, its situation is similar to that depicted in the award rendered in the *Meerauge* arbitration, from which it quotes the following:

> "Possession immemorial is that which has lasted for such a long time that it is impossible to provide evidence of a different situation and of which anybody recalls having heard talk." (*Meerauge Arbitral Award (Austria/Hungary)*, 13 September 1902, German original text in *Nouveau recueil général de traités,* 3rd Series, Vol. III, p. 80; translation into English provided by Malaysia from the French translation in *Revue de droit international et de législation comparée*, Tome VIII, 2nd Series (1906), p. 207.)

49. By contrast, Singapore advances its contention that Pedra Branca/Pulau Batu Puteh, prior to 1847, had been *terra nullius* susceptible of the lawful taking of possession by the United Kingdom in 1847-1851. As for Malaysia's position that Pedra Branca/Pulau Batu Puteh was part of the Sultanate of "Old Johor", Singapore contends that there is no evidence that the Johor Sultanate claimed or exercised authority over Pedra Branca/Pulau Batu Puteh, during its first period (1512-1641) which began in 1512 with the fall of the Malacca Sultanate to the Portuguese, and during which Old Johor was constantly harried by the Portuguese and the Kingdom of Aceh, during its second period (1641-1699), when the Dutch, in alliance with Johor drove the Portuguese out of Malacca and when the power and influence of Johor was at its height, during its third period (1699-1784) when the death of Sultan Mahmud II without a clear heir led to a period of internal strife and instability during which many vassals broke away from the Johor Sultanate, or during the fourth period (1784-1824), when "the old empire was in a state of dissolution".

50. Thus Singapore concludes that "there is no evidence that Pedra Branca belonged to the Johor Sultanate at any point in its history and certainly not at the beginning of the nineteenth century".

51. Singapore has offered no further specific evidence to substantiate its claim relating to the status of Pedra Branca/Pulau Batu Puteh as *terra nullius* prior to the construction of the lighthouse on it in 1847. Instead, it emphasizes that Malaysia, for its part, has submitted hardly any evidence to prove that the Sultanate of Johor had indeed effective control in the region, and specifically over the island of Pedra Branca/Pulau Batu Puteh. Singapore, quoting from the official 1949 Annual Report published by the Government of the State of Johor, according to which by the beginning of the nineteenth century "the old empire was in a state of dissolution", concludes that "[t]his was the political condition

of the Sultanate in 1819 when the British arrived in Singapore, and on the eve of the signing of the Anglo-Dutch Treaty of 1824".

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52. Regarding the question as to whether "[t]he Sultanate [of Johor] covered all the islands within this large area [of its territory], including all those in the Singapore Straits, such as Pulau Batu Puteh . . .", the Court starts by observing that it is not disputed that the Sultanate of Johor, since it came into existence in 1512, established itself as a sovereign State with a certain territorial domain under its sovereignty in this part of southeast Asia.

53. Thus already at the beginning of the seventeenth century, Hugo Grotius, commenting on the military conflict between the Sultanate of Johor and Portugal, stated that:

> "There is in India a kingdom called Johore, which has long been considered a sovereign principality *[supremi principatus]*, so that its ruler clearly possessed the authority necessary to conduct a public war [against the Portuguese]." (Hugo Grotius, *De Jure Praedae*, Vol. I Translation, 1950 (Gwladys L. Williams), *Classics of International Law*, p. 314.)

54. In the middle of the seventeenth century, the Dutch Governor of Malacca wrote a letter to the Dutch East India Company proposing that the Dutch East India Company send two boats to the Straits of Singapore to "cruise to the south of Singapore Straits under the Hook of Barbukit and in the vicinity of Pedra Branca" in order to prevent Chinese traders from entering Johor River. The proposal made in the letter was pursued, and two junks were taken in the Straits and diverted to Malacca. However, this incident led to a protest from the Sultan. According to the report of the Governor-General in Batavia to the Dutch East India Company in Amsterdam:

> "The king of Johor ha[d] sent an envoy to the governor of Melaka to indicate his great displeasure regarding the seizure of the abovementioned two junks, not without using offensive and threatening terms in the event that the same thing occurs in the future."

55. It is the view of the Court that this incident is a clear indication of the Sultan of Johor's position that the seizure of the junks in the waters in question was an infringement of his right as sovereign in the area concerned.

56. Coming to the early decades of the nineteenth century, the Court notes that three letters, all from 1824, written by the British Resident in Singapore, John Crawfurd, are of particular relevance. First, in his report of 10 January 1824 to the Government of India, John Crawfurd recalled that in 1819, when the Settlement of Singapore was established, the Sultanate of Johor extended on the Continent from Malacca to the extrem-

ity of the peninsula on both coasts and embraced "*all* the islands in the Mouth of the Straits of Malacca with all those in the China Seas as far as the Natunas" (emphasis added). The Natunas islands are a long way to the east of the Straits of Singapore, at approximately 4° North and 109° East or roughly north of the west coast of Borneo. Second, in a letter of 3 August 1824 reporting on the Treaty signed the previous day, Crawfurd stated that the cession by Johor was not only of the main island "but extends to the *Seas*, *Straits* and Islets (the latter probably not less than 50 in number) within ten geographical miles of its coasts . . ." (emphasis in the original). Third, in a letter of 1 October 1824 to the Government of India, he commented on the possible inconvenience of the exclusion imposed by the 1824 Anglo-Dutch Treaty on the British Government from entering into political relations with the chiefs of all the islands lying South to the Straits of Singapore, in the following terms:

> "It does not upon the whole appear to me that the occupation of Rhio could be beneficial to the British Government, yet its retention on the part of the Netherlands Government, and our exclusion from entering into political relations with the Chiefs of *all* the islands lying South to the Straits of Singapore and between the peninsula and Sumatra may prove a matter of some inconvenience to us, as it is in fact virtually amounts to a dismemberment of the Principality of Johor, and must thus be productive of some embarrassment and confusion. This may be easily illustrated by an example. The Carimon Islands and the Malayan Settlement of Bulang are two of the principal possessions of the Tumongong of Johor or Singapore, and his claim to them is not only allowed by the rival chiefs but satisfactorily ascertained by the voluntary and cheerful allegiance yielded to him by the inhabitants. By the present Treaty, however, he must either forego all claims to these possessions, or removing to them, renounce his connection with the British Government." (Emphasis added.)

The Court observes that, as confirmed by the above documents, the senior British official in the region understood that, before it was divided, the Sultanate of Johor had an extensive maritime component which included "all" the islands in the region of the Straits of Singapore.

57. In an article from the *Singapore Free Press*, dated 25 May 1843 and reporting on "[t]he frequent and regular occurrence of acts of Piracy in the immediate neighbourhood of Singapore", it was stated as follows:

> "The places and Islands near which these piracies are most frequently committed and where the pirates go for shelter and concealment, such as Pulo Tinghie, Batu Puteh, Point Romania & c, are all

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

58. The Court notes that Singapore rejects this last piece of evidence on the grounds that "its probative value is highly suspect considering it does not indicate the source of the information or even the name of its author". However, the Court considers the probative value of this report to lie in the fact that it corroborates other evidence that Johor had sovereignty over the area in question.

59. Thus from at least the seventeenth century until early in the nineteenth it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits. Specifically, this domain included the area where Pedra Branca/Pulau Batu Puteh is located.

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60. It now falls to the Court, after having described the general understanding at the relevant time of the extent of Johor, to ascertain whether the original title to Pedra Branca/Pulau Batu Puteh claimed by Malaysia is founded in law.

61. Of significance in the present context is the fact that Pedra Branca/Pulau Batu Puteh had always been known as a navigational hazard in the Straits of Singapore, an important channel for international navigation in east-west trade connecting the Indian Ocean with the South China Sea. It is therefore impossible that the island could have remained unknown or undiscovered by the local community. Pedra Branca/Pulau Batu Puteh evidently was not *terra incognita*. It is thus reasonable to infer that Pedra Branca/Pulau Batu Puteh was viewed as one of the islands lying within the general geographical scope of the Sultanate of Johor.

62. Another factor of significance which the Court has to take into consideration in assessing the issue of the original title in the present case is the fact that throughout the entire history of the old Sultanate of Johor, there is no evidence that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore.

63. It is appropriate to recall the pronouncement made by the Permanent Court of International Justice in the case concerning the *Legal Status of Eastern Greenland*, on the significance of the absence of rival claims. In that case it was the Danish contention that "Denmark possessed full and entire sovereignty over the whole of Greenland and that Norway had recognized that sovereignty", whereas the Norwegian contention was that all the parts of Greenland "which had not been occupied in such a manner as to bring them effectively under the administration of the Danish Government" were "*terrae nullius*, and that if they ceased to

be *terrae nullius* they must pass under Norwegian sovereignty" (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 39).

64. Against this background the Court stated:

> "Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty." (*Ibid.*, p. 46.)

65. On this basis, the Court came to the following conclusion:

> "bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed . . . in 1721 to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area" (*ibid.*, pp. 50-51).

66. If this conclusion was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also apply to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.

67. The Court further recalls that, as expounded in the *Eastern Greenland* case (see paragraph 64 above), international law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case.

Moreover, as pointed out in the *Island of Palmas* case, State authority should not necessarily be displayed "in fact at every moment on every point of a territory" (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II (1949), p. 840). It was further stated in the Award that:

> "[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space . . . The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that

> sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances." (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II (1949), p. 855.)

68. Having considered the actual historical and geographical context of the present case relating to the old Sultanate of Johor, the Court concludes that as far as the territorial domain of the Sultanate of Johor was concerned, it did cover in principle all the islands and islets within the Straits of Singapore, which lay in the middle of this kingdom, and did thus include the island of Pedra Branca/Pulau Batu Puteh. This possession of the islands by the old Sultanate of Johor was never challenged by any other Power in the region and can in all the circumstances be seen as satisfying the condition of "continuous and peaceful display of territorial sovereignty (peaceful in relation to other States)" (*ibid.*, p. 839).

69. The Court thus concludes that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh.

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70. Malaysia further argues that the title of the Sultanate of Johor to Pedra Branca/Pulau Batu Puteh is confirmed by the ties of loyalty that existed between the Sultanate and the Orang Laut, "the people of the sea". The Orang Laut were engaged in various activities such as fishing and piratical activities in the waters in the Straits of Singapore, including in the area of Pedra Branca/Pulau Batu Puteh.

71. Malaysia has provided evidence from the nineteenth century which shows that the Orang Laut, a nomadic people of the sea, made the maritime areas in the Straits of Singapore their habitat and quite frequently visited the island, as appears from the following letter from J. T. Thomson, the Government Surveyor of Singapore, reporting in November 1850 after the first year of construction of Horsburgh lighthouse on the need to exclude the Orang Laut from the construction site:

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

72. Furthermore John Crawfurd, the British Resident of Singapore, recorded in his journal of 1828 a visit he had received from "some individuals of the race of Malays, called Orang Laut, — that is, 'men of the sea'", and stated as follows:

> "They have a rough exterior, and their speech is awkward and un-

couth, but, in other respects, I could observe little essential difference between them and other Malays. These people have adopted the Mohammedan religion. They are divided into, at least, twenty tribes, distinguished usually by the straits or narrow seas they principally frequent. A few of them have habitations on shore, but by far the greater number live constantly in their boats, and nearly their sole occupation is fishing . . . *They are subjects of the King of Johore*, and the same people who have been called Orang Selat or, 'men of the Straits' — the straits here alluded to being, not the great Straits of Malacca, which are extensive beyond their comprehension, but the narrow guts running among the little islets that are so abundantly strewed over its eastern entrance. Under this appellation they have been notorious for their piracies, from the earliest knowledge of Europeans respecting these countries." (Emphasis added.)

73. Another British official in Singapore and contemporary of John Crawfurd, Edward Presgrave, the Registrar of Imports and Exports of the British administration in Singapore, also stated in his Report of 1828 on the subject of piracy to the Resident Counsellor as follows:

"The subjects of the Sultan of Johor who inhabit the Islands are usually by the Malays termed Orang Rayat — the common oriental word signifying a subject generally, but is here restricted to *one class of the Sultan's subjects*. They live in small and detached communities or settlements on the several islands under the immediate control of two officers called Orang Kaya and Batin, the latter being subordinate to the former, *these officers are appointed by the Sultan of Johore*.

. . . . . .

Differences arising among the parties which cannot be settled by the Panglima [i.e., Captain] are reserved for the decision of the Chief, or of the Sultan himself on their return . . .

Such are the habits and mode of life of the Rayats of Johor. *The Sultan of Johor can on emergency (such as a war with a neighbouring Chief) command their services*. On such an occasion it is said he can assemble from the several Islands and places under his authority from three hundred to four hundred prows." (Emphasis added.)

74. The Court considers that these descriptions of the nature and the level of the ties of relationship between the Sultan of Johor and the Orang Laut in contemporary official reports by British officials operating in the region have a high probative value in establishing the existence of sufficient political authority by the Sultan of Johor to qualify him as exercising sovereign authority over the Orang Laut. The Court observes that these statements showed an understanding by the responsible British

officials in Singapore that the Orang Laut were subjects of the Sultan of Johor and acted under his authority when need arose.

75. Given the above, the Court finds that the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut who inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh.

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76. Singapore, in support of its assertion that the Sultan of Johor did not have sovereignty over Pedra Branca/Pulau Batu Puteh, advances another argument based on what it describes as "the traditional Malay concept of sovereignty". Thus it contends:

> "Malaysia has glossed over . . . the traditional Malay concept of sovereignty. This concept undermines Malaysia's claim to an original title. It is based mainly on control over people, and not control over territory. Traditional Malay sovereignty is people-centric and not territory-centric."

77. Relying on some writings of scholars on Malay political culture, Singapore develops this argument into the following assertion:

> "What it means is that the only reliable way to determine whether a particular territory belonged to a ruler is to find out whether the inhabitants pledged allegiance to that ruler . . .
>
> . . . the concept also means that it was difficult to determine with accuracy the territorial extent of the Johor Sultanate at any time . . .
>
> This would certainly be the case with regard to barren, isolated and uninhabited islands, such as Pedra Branca. Therefore, unless Malaysia can produce clear evidence of a direct claim to or the actual exercise of sovereign authority over Pedra Branca, any attempt to argue that the island belonged to old Johor is totally devoid of merit."

78. Malaysia disputes this argument even as a valid theory applicable to Malay political history. It states as follows:

> "Authority in States throughout the world has characteristically been based on a combination of control over people and over territory. This applies to the Malay States as well as any other. The fact that Singapore can demonstrate shifting political fortunes and even division within the royal household of Johor does not undermine conceptions of continuity in a Malay polity . . . Ever since the estab-

> lishment of the Sultanate of Johor in the early 16th century, there have always been rulers who were recognized as such and who commanded the allegiance of the people accordingly and thereby held sway over the territory where those people lived."

79. With regard to Singapore's assertion about the existence of a "traditional Malay concept of sovereignty" based on control over people rather than on control over territory, the Court observes that sovereignty comprises both elements, personal and territorial. In any event, it need not deal with this matter any further as the Court has already found that Johor had territorial sovereignty over Pedra Branca/Pulau Batu Puteh (see paragraph 69 above), and has found confirmation of this title in the Sultan of Johor's exercise of authority over the Orang Laut, who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh (see paragraph 75 above).

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80. The Court, having found that in 1824 the Sultan of Johor had title to Pedra Branca/Pulau Batu Puteh, will now turn to the question whether this title was affected by the developments in the period 1824 to 1840.

5.3.2. The legal significance of the 1824 Anglo-Dutch Treaty

81. An argument advanced by Singapore against Johor's sovereignty over Pedra Branca/Pulau Batu Puteh is that "in the period relevant to Malaysia's claim, there were two different political entities in the region that were called 'Johor'".

82. Singapore argues that Malaysia's claim to Pedra Branca/Pulau Batu Puteh, which is based on two propositions — the first that Pedra Branca/Pulau Batu Puteh had belonged to old Johor, and the second that Pedra Branca/Pulau Batu Puteh became part of new Johor — cannot be accepted, since "[t]he first proposition is not supported by any evidence", and "[t]he second proposition is therefore irrelevant".

83. On this second proposition of Malaysia, namely that Pedra Branca/Pulau Batu Puteh became part of the new Johor, Singapore contends that:

> "Malaysia tries to prove this proposition by arguing that the effect of the Anglo-Dutch Treaty was to split the Johor Sultanate into two parts and to place Pedra Branca in the northern part within the British sphere of influence, thus allocating it to new Johor. This is a misrepresentation of the Treaty."

84. Thus, Singapore disputes that the Sultanate of Johor had continued since 1512 through the whole period relevant to the present case as the same sovereign entity. It claims that the "new Sultanate of Johor", which came into existence in the context of the division of the "old Sultanate of Johor", is to be distinguished from the "old Sultanate of Johor" (alias the "Sultanate of Johor-Riau-Lingga"). In support of this argument, Singapore, quoting a historian of the region, argues that old Johor, the maritime Malay empire that succeeded Malacca, began in 1512 when the defeated Sultan of Malacca established a capital on the Johor River, and gradually disintegrated in the eighteenth century, whereas modern Johor occupies the southern tip of the Malay Peninsula, is one of the 11 states of the Federation of Malaysia, and dates from the mid-nineteenth century.

85. In assessing the relevance of the argument thus presented by Singapore to the issue of title to Pedra Branca/Pulau Batu Puteh, it is necessary to distinguish two different issues: one is whether the sovereign entity of the Sultanate of Johor continued to exist as the same legal entity after the division; and the other whether the territorial domain of the "new Sultanate of Johor" included Pedra Branca/Pulau Batu Puteh.

86. In relation to the first question, the Court concludes from the documentary evidence submitted by Malaysia, that the Sultanate of Johor continued to exist as the same sovereign entity throughout the period 1512 to 1824, in spite of changes in the precise geographical scope of its territorial domain and vicissitudes of fortune in the Sultanate through the ages, and that these changes and vicissitudes did not affect the legal situation in relation to the area of the Singapore Straits, which always remained within the territorial domain of the Sultanate of Johor.

87. On that basis the Court observes that as long as it is established that the old Sultanate of Johor continued as the same legal entity that became the subject of the division in 1824, the issue of whether the new Sultanate of Johor under Sultan Hussein and the Temenggong or the new Sultanate in Riau under Sultan Abdul Rahman was the legal continuator in title of the "old Sultanate of Johor" before the break, is immaterial in the present case. Whatever position the Parties may take in this respect, the island in question, i.e., Pedra Branca/Pulau Batu Puteh, had to come under the sovereignty of one or other of the Sultanates (see paragraph 100 below).

88. In relation to the second question, the Court notes that it is common ground between the Parties that the "old Sultanate of Johor" came to be divided in the context of the dynastic rivalry between the two sons of the late Sultan Mahmud III (see paragraph 23 above) and the competing interests of the United Kingdom and the Netherlands in the region.

89. It is also common ground between Singapore and Malaysia that

the 1824 Treaty had the effect, according to Singapore, of "divid[ing] the region into two spheres of influence" or, according to Malaysia, of "divid[ing] the Sultanate of Johor into two separate spheres of influence" — one belonging to the Dutch sphere of influence covering the territorial domain of the Riau-Lingga Sultanate under Abdul Rahman, and the other falling under the British sphere of influence covering the territorial domain of the Sultanate of Johor under Hussein.

90. However, upon closer examination of this apparent agreement between Malaysia and Singapore, there emerges a fundamental divergence of views between them concerning the legal significance of the relevant provisions of the 1824 Treaty.

91. The 1824 Anglo-Dutch Treaty, concluded on 17 March 1824, provided in its Article 12 as follows:

> "His Netherlands Majesty withdraws the objections which have been made to the occupation of the Island of Singapore, by the Subjects of His Britannick Majesty.
>
> His Britannick Majesty, however, engages, 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, nor any Treaty concluded by British Authority with the Chiefs of those Islands."

92. The conclusion to be drawn from this provision, according to counsel for Malaysia, is that:

> "The Anglo-Dutch Treaty of 17 March 1824 resulted in the split of the Johor-Riau-Lingga Sultanate. It divided the Sultanate of Johor into two separate spheres of influence: islands south of the Straits of Singapore were left within the Dutch sphere of influence — that was the Riau-Lingga Sultanate — while the territory and all islands in the Straits of Singapore and to the north of the Straits were placed within the British sphere of influence — and that was the Johor Sultanate."

93. By contrast, the interpretation advanced by Singapore of Article 12 is the following:

> "the Anglo-Dutch Treaty did not contemplate any demarcation line. This is clear from the negotiating history of the Treaty. An earlier draft of the Treaty inserted an article providing for a demarcation line. But this article was omitted when the text of the Treaty was finalized.
>
> The text of the Anglo-Dutch Treaty also confirms that there is no line . . . Article X excludes the Dutch from 'any part of the Peninsula of Malacca', that is the Malay Peninsula, while Article XII excludes the British from 'any of the islands South of the Straights of Singapore'. There is no provision excluding either State from any part of the straits or any islands within the Strait. In other words, the Treaty did not divide up the Strait between the two Powers. The width of

> the entire Strait was left open for access by both States, as was intended."

94. In sum, the argument that Singapore is advancing is that the 1824 Anglo-Dutch Treaty left the entire Straits, including the islands and islets therein, except for the islands specifically referred to in Article 12, open for access, and that since Pedra Branca/Pulau Batu Puteh, according to Singapore, had always remained *terra nullius* or had become *terra nullius* as a result of the disappearance of the "old Sultanate of Johor" by the division of the kingdom, there was a legal vacuum with regard to sovereignty over Pedra Branca/Pulau Batu Puteh, thus leaving room for the "lawful possession" of Pedra Branca/Pulau Batu Puteh by the British during the period 1847-1851.

95. The object and purpose of the 1824 Anglo-Dutch Treaty are stated in its Preamble. The two Sovereigns of the United Kingdom and the Netherlands,

> "desiring to place upon a footing, mutually beneficial, *Their respective 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, without those differences and jealousies which have, in former times, interrupted the harmony which ought always to subsist between Them; . . . and *in order to determine certain questions which have occurred in the execution of the Convention* made at London on the 13th of August, 1814, *in so far as it respects the Possessions His Netherlands Majesty in the East*" (emphasis added),

came to conclude this Treaty.

In the view of the Court it is difficult to read this language to signify that the Parties intended the 1824 Anglo-Dutch Treaty to leave certain areas of the Straits of Singapore, which had been part of the territorial and maritime domain of the old Sultanate of Johor, undetermined in their legal status and thus open for occupation.

96. The Court observes from the reading of this preambular language, as well as the substantive provisions of Articles 8 to 12 which provide for a set of mutual territorial adjustments, that the 1824 Anglo-Dutch Treaty was concluded to settle once and for all the disputes that had developed between the United Kingdom and the Netherlands relating to their respective possessions as well as commercial interests in the East Indies during and in the aftermath of the Napoleonic Wars in Europe. What emerges from this overall picture is that whereas the earlier Convention of 13 August 1814 between the United Kingdom and the Netherlands relative to the Dutch Colonies was somewhat general in its treatment of the territorial possessions of the two Powers, the settlement reached in this 1824 Treaty is much more specific, covering all the territories thus far

claimed to be in the possession or under the sphere of influence of one or the other of these two Powers and identifying their respective spheres of influence in this part of the East Indies. Against this background, it is most unlikely that the parties intentionally left these maritime features within the Straits of Singapore outside the sphere of influence of either of the two parties and open for eventual occupation by one of the parties or another power.

97. Furthermore, when the whole arrangement contained in this Treaty is read against the background of the feud which had developed between the two brothers, sons of the late Sultan Mahmud III of the old Sultanate of Johor, it is contrary to common sense to suppose that the two rival Sultanates of Johor and of Riau-Lingga, competing for sovereignty over certain territories in the region, decided to leave this area in the Straits on their border undivided and unclaimed. The Court is of the view that whatever may have been the legal effect of the 1824 Anglo-Dutch Treaty upon the concrete issue of where the dividing line between the respective spheres of influence of the United Kingdom and the Netherlands might lie in the region, it is impossible to accept that the treaty had left the issue of the territorial title to the islands lying in the Straits totally unaffected.

98. In light of this analysis, in the context of the history surrounding the conclusion of the 1824 Anglo-Dutch Treaty, the Court is led to conclude that the division of the old Sultanate of Johor and the creation of the two Sultanates of Johor and of Riau-Lingga were part of the overall scheme agreed upon by the United Kingdom and the Netherlands that came to be reflected in the 1824 Anglo-Dutch Treaty. In other words, the Treaty was the legal reflection of a political settlement reached between the two colonial Powers, vying for hegemony for many years in this part of the world, to divide the territorial domain of the old Sultanate of Johor into two sultanates to be placed under their respective spheres of influence. Thus in this scheme there was no possibility for any legal vacuum left for freedom of action to take lawful possession of an island in between these two spheres of influence. This political settlement signified at the same time that the territorial division between the two Sultanates of Johor and of Riau-Lingga was made definitive by the conclusion of this Anglo-Dutch Treaty.

99. The question as to which side of the dividing line any particular island or other maritime feature in the Straits of Singapore came to fall as a result was a matter that the 1824 Anglo-Dutch Treaty did not find it necessary to specify, other than those islands expressly mentioned in Article 12 of the Treaty.

100. The general reference in Article 12 of the 1824 Anglo-Dutch Treaty to "the other Islands south of the Straights of Singapore" would suggest that all the islands and islets within the Straits fell on the British side of the dividing line of the spheres of influence. This naturally covered the island of Pedra Branca/Pulau Batu Puteh whose legal status thus

remained as it had been, i.e. part of the territorial domain of what continued to be called the "Sultanate of Johor" after the division of the old Sultanate.

101. A letter from the Government of India to John Crawfurd dated 4 March 1825, following the conclusion of the Crawfurd Treaty of 1824, can be taken as a confirmation by the British side of this interpretation, namely that all the islands within the Straits of Singapore fell within the British sphere of influence and not of the Dutch. The letter states as follows:

> "[O]ur acquisition of these Islets [under the Crawfurd Treaty] is not at variance with the obligations of the Treaty concluded at London in March last [i.e., the Anglo-Dutch Treaty of 1824], as *they are all situated North of the Southern limits of the Straights of Singapore* . . ." (Emphasis added.)

It is clear from this sentence that the British Government of India thought that the dividing line between what belonged to the sphere of influence of the United Kingdom and what belonged to that of the Netherlands in accordance with the 1824 Anglo-Dutch Treaty was "the Southern limits *of* the Straits of Singapore" (emphasis added) and that every island north of that line came within the territorial domain belonging to the sphere of influence of the United Kingdom.

5.3.3. The relevance of the 1824 Crawfurd Treaty

102. A few months after the conclusion of the 1824 Anglo-Dutch Treaty, the East India Company and the Sultan and the Temenggong of Johor entered into a new Treaty of Friendship and Alliance of 2 August 1824, known as the "Crawfurd Treaty". By this Treaty the Sultan and Temenggong of Johor ceded the island of Singapore to the East India Company. The Crawfurd Treaty specifies the geographical scope of the cession of the island of Singapore, together with adjacent seas, straits and islets, to the extent of 10 geographical miles from the coast of Singapore.

103. Specifically, Article II of the Crawfurd Treaty provided as follows:

> "Their Highnesses the Sultan Hussain Mahomed Shah and Datu Tumungong Abdul Rahman Sri Maharajah hereby cede in full sovereignty and property to the Honourable the English East India Company, their heirs and successors for ever, the Island of Singapore, situated in the Straits of Malacca, together with the adjacent seas, straits, and islets, to the extent of ten geographical miles, from the coast of the said main Island of Singapore."

104. On the basis of this provision, Malaysia argues that "Johor could not have ceded the territory of Singapore Island and islets situated within ten geographical (i.e. nautical) miles to the English East India Company

if Johor did not have title to it". Thus, according to Malaysia, "the fact that it had a title which it was capable of ceding shows that the Johor title to the area before 1824 included both PBP and sovereignty over Singapore".

105. In the view of Malaysia, even though Singapore agrees that the cession of Singapore by the Sultan and Temenggong of Johor was effected by the Crawfurd Treaty, Singapore nevertheless fails to appreciate that this important constitutive document on the establishment of Singapore also confirms formal British recognition of prior and continuing sovereignty of the Sultanate of Johor over all other islands in and around the Straits of Singapore. The Crawfurd Treaty provides, in unequivocal terms, that the cession is confined to the islands of Singapore itself and the area, including seas, straits and islets, within 10 geographical miles of the mainland of Singapore. Malaysia thus contends that title to other territories and sea areas remained where it was, namely with the Sultanate of Johor.

106. Singapore accepts that its claim to sovereignty over Pedra Branca/Pulau Batu Puteh "is *not* based on the Treaty of Cession of 1824" since "[t]hat Treaty dealt only with the main island of Singapore and its immediate vicinity [and] did not extend to the area around Pedra Branca" (emphasis in the original). However, Singapore dismisses the Crawfurd Treaty of 1824 as simply "irrelevant" to the issue of title to Pedra Branca/Pulau Batu Puteh, rejecting the argument advanced by Malaysia that by accepting this cession the British recognized the authority of the Sultan and the Temenggong of Johor to effect a transfer of title in relation to islands in the Straits of Singapore.

107. The Court agrees that the Crawfurd Treaty cannot be relied on as establishing "British recognition of prior and continuing sovereignty of the Sultanate of Johor over all other islands in and around the Strait of Singapore" as Malaysia claims. Article II speaks only of the cession of "the Island of Singapore . . . together with the adjacent seas, straits, and islets to the extent of ten geographical miles" and cannot, in and by itself, be interpreted as formal recognition by the United Kingdom that the Sultan and the Temenggong of Johor had "prior and continuing sovereignty" over any and all of the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh. On the other hand neither does this finding signify *a contrario* that the islands in the Straits of Singapore falling outside the scope of Article II of this Treaty were *terrae nullius* and could be subject to appropriation through "lawful occupation". This latter point can only be judged in the context of what legal effect the division of the old Sultanate of Johor had upon the islands in the area of the Straits of Singapore, in particular in light of the 1824 Anglo-Dutch Treaty (see above, paragraphs 95-101) and in light of the legal relevance, *vel non*, of the so-called letter "of donation" of 1825 sent from Sul-

tan Abdul Rahman of Riau-Lingga to his brother Sultan Hussein of Johor (see below, paragraphs 108-116).

5.3.4. The legal significance of the letter "of donation" of 1825

108. Singapore claims that "The Anglo-Dutch Treaty did not, by its terms, effect a division of the Johor-Riau-Lingga Sultanate." According to Singapore,

> "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) . . . could no longer exert effective power in the Malay Peninsula (which had fallen within the British sphere) . . . 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."

109. Singapore argues that instead of the 1824 Anglo-Dutch Treaty, it was the letter "of donation" (see paragraph 23 above) from Sultan Abdul Rahman to his brother Hussein which had the legal effect of transferring the title to the territory included in that letter "of donation". Thus it claims:

> "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 . . . 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."

110. Sultan Abdul Rahman's letter reads as follows:

> "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."

111. On this basis, Singapore argues that

> "[t]he 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".

The argument of Singapore is that from the terms of that letter, it is clear that Sultan Abdul Rahman donated only the mainland territories to his brother Sultan Hussein, and retained for himself all islands in the sea. Singapore further argues that "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".

112. Malaysia challenges this argument as follows:

> "In its Counter-Memorial Singapore suggests that it was not the Anglo-Dutch Treaty that determined the extent of the Johor Sultanate but instead the donation by Sultan Abdul Rahman by letter of 25 June 1825 of mainland territories in peninsular Malaya to his brother Sultan Hussain in 1825 . . .
>
> The 'donation' of Sultan Abdul Rahman must be read in the context of what is stipulated under Article XII of the Anglo-Dutch Treaty of 1824. By no means does it serve as Johor's title to its territory. The territories specified by Sultan Abdul Rahman to be his own (the one under the Dutch sphere of influence) in the letter of 25 June 1825 comprise 'the Islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands'. Out of these five specified islands, three were mentioned in Article XII of the Anglo-Dutch Treaty of 1824 (namely, the Carimon Islands, Bintang and Lingga) while the remaining two (Galang and Bulan) are islands clearly lying south of the Strait of Singapore. The phrase 'all other islands' refers to all other islands lying within the Dutch sphere of influence and not named explicitly in the letter, e.g. Batam and Singkep. To sum up, this letter was not a 'donation' but was instead a formal recognition that Sultan Abdul Rahman did not claim sovereignty over Johor."

113. The Court considers the fundamental question to be whether the "donation" described in the letter of Sultan Abdul Rahman can be

regarded as having the legal effect of conveying title to the territories referred to therein. In order for this to be the case, it has to be established that the territories in question had been under the sovereignty of the Sultan of Riau-Lingga. In this respect, Singapore claims that Sultan Abdul Rahman "in the eyes of the locals was the legitimate ruler of the Johor-Riau-Lingga Sultanate" and that he followed the advice of a Dutch official "to formally cede the mainland territories of Johor and Pahang to his brother Hussein".

114. The letter no doubt was an expression of Sultan Abdul Rahman's definitive intention to renounce his claim to title to these territories and as such could produce that legal effect. However, with regard to territories referred to expressly or by implication in his letter "of donation", but over which he held no title proven to the satisfaction of the Court, his donation was without effect.

115. The Court concludes that the old Sultanate of Johor was divided in 1824 into the Sultanate of Johor with Sultan Hussein as its sovereign and the Sultanate of Riau-Lingga with Sultan Abdul Rahman as its sovereign although the dividing line between them remained somewhat unclear. The 1824 Anglo-Dutch Treaty reflected the division as between the United Kingdom and the Netherlands in the form of their respective spheres of influence (see paragraphs 81-101 above). The so-called letter "of donation" from Sultan Abdul Rahman to his brother Hussein confirmed that division.

116. Moreover, the cession of Singapore and the other islands by the Sultan and the Temenggong of Johor in 1824 would have been possible only if the Sultanate of Johor had had valid title to them. This act of cession took place soon after the conclusion of the 1824 Anglo-Dutch Treaty, but before the act of "donation" of the territories that included those referred to in the Crawfurd Treaty as the object of the cession. This sequence of events can only be understood as reinforcing the interpretation of the act of "donation" given above. Were the Court to accept Singapore's argument (see paragraph 109 above) there would have been no legal basis on which Sultan Hussein and the Temenggong of Johor could have ceded the island of Singapore to the East India Company in 1824.

5.3.5. Conclusion

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

5.4. Legal status of Pedra Branca/Pulau Batu Puteh after the 1840s

5.4.1. Applicable law

118. As the Court has shown in the preceding part of this Judgment, Johor had sovereignty over Pedra Branca/Pulau Batu Puteh at the time the planning for the construction of the lighthouse on the island began. Singapore does not contend that anything had happened before then which could provide any basis for an argument that it or its predecessors had acquired sovereignty. But Singapore does of course contend that it has acquired sovereignty over Pedra Branca/Pulau Batu Puteh since 1844. The Singapore argument is based on the construction and operation of Horsburgh lighthouse and the many other actions it took on, and in relation to Pedra Branca/Pulau Batu Puteh, as well as on the conduct of Johor and its successors. By contrast, Malaysia contends that all of those actions of the United Kingdom were simply actions of the operator of the lighthouse, being carried out precisely in terms of the permission which Johor granted in the circumstances which the Court will soon consider.

119. Whether Malaysia has retained sovereignty over Pedra Branca/Pulau Batu Puteh following 1844 or whether sovereignty has since passed to Singapore can be determined only on the basis of the Court's assessment of the relevant facts as they occurred since 1844 by reference to the governing principles and rules of international law. The relevant facts consist mainly of the conduct of the Parties during that period.

120. Any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty, as with the 1824 Crawfurd Treaty and the 1927 Agreement referred to earlier (paragraphs 22, 28 and 102). The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions (cf. e.g. *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, I.C.J. Reports 1961*, pp. 17, 31).

121. Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence

> "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent . . ." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 305, para. 130).

That is to say, silence may also speak, but only if the conduct of the other State calls for a response.

122. Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.

123. One feature of the arguments on the law presented by the Parties should be mentioned at this point. Singapore, as has already been discussed, contended that Pedra Branca/Pulau Batu Puteh was *terra nullius* in 1847 (see paragraph 40 above). Recognizing however that the Court might reject that contention, Singapore submitted that even in that event, that is to say on the basis that "Malaysia could somehow show an historic title over the island, Singapore would still possess sovereignty over Pedra Branca since Singapore has exercised continuous sovereignty over the island while Malaysia has done nothing". It is true that it had shortly before said that "the notion of prescription . . . has no role to play in the present case" but that was said on the basis that, as Singapore saw the case, Malaysia had not made out its historic title.

124. Malaysia, in response to this argument on prescription, recognized that Singapore may have been intending to give the impression that there was "still some way in which the Court can override Johor's title on the basis of Britain's post-1851 conduct". While Malaysia considered that that conduct could not properly be taken into account — Johor had the historic title and Singapore "quite properly acknowledge[d] that 'an argument . . . predicated on the notion of prescription . . . has no role to play in the present case'" — Malaysia in its oral argument, as in its written pleadings, nevertheless addressed that post-1851 conduct at length, as of course did Singapore for which it was an essential part of its case, whatever the outcome of the submissions about historic title and *terra nullius*. And the "acknowledgment" by Singapore, to which Malaysia referred, was stated on the hypothesis that Pedra Branca/Pulau Batu Puteh was *terra nullius*.

125. The Court accordingly will now examine the relevant facts, par-

ticularly the conduct of the Parties, relating to Pedra Branca/Pulau Batu Puteh, to determine whether or not sovereignty over it has passed and is now with Singapore.

5.4.2. The process for the selection of the site for Horsburgh lighthouse

126. James Horsburgh, who as hydrographer to the East Indies Company had prepared many charts and sailing instructions for the East Indies, China, New Holland, the Cape of Good Hope and intermediate ports, died in May 1836. Merchants and mariners resolved, initially in Canton, that the appropriate memorial and testimony of gratitude would be the construction and operation of one or more lighthouses. As early as November 1836 "Pedra Branca" was identified as a preferred location and, although other possibilities were mentioned in the following years, when Jardine Matheson & Co., Treasurer to the China Fund for a testimonial of the late James Horsburgh, first wrote to the Governor of Singapore, on 1 March 1842, "Pedra Branca" was the only locality they specifically mentioned. That letter is the first formal communication on behalf of the subscribers to the British authorities. The Treasurer advised the Governor that:

> "At a general meeting of the subscribers, a wish was expressed that the contributions should, if possible, be devoted to the building of a Light House, bearing the name of Horsburgh, on Pedra Branca, at the entrance of the China Sea, but nothing definitive was resolved on.
>
> As this is a design which can only be carried into effect and maintained under the immediate auspices of the British Government, we beg to express our readiness to hand over the above amount to you in the hope that you will have the goodness to cause a Light House (called after Horsburgh) to be erected either on Pedra Branca, or on such other locality as the Government of the Hon'ble East India Company may deem preferable.
>
> The amount is far from adequate; but we trust the well known munificience of the Hon'ble Company will supply what additional funds may be wanting for an object of such eminent public utility, intended at the same time, to do Honor to the memory of one of the most meritorious of their servants."

The Court notes the recognition by the private commercial interests that the British Government would have to carry the proposal into effect and provide the further funds.

127. In his reply of 4 April 1842, the Governor indicated his preference, which he had recommended to the Governor-General of India Council, for Tree Island or such other locality as the East India Company may deem feasible. (Tree Island, at the western end of the Straits,

had been suggested in December 1836 by a number of merchants and mariners, along with Pedra Branca, in a memorial to the Government of India.) By July 1842 his preferred location was Barn Island, which was about 16 miles from Singapore, on the basis of a proposal by John Thomson, the newly appointed Government Surveyor at Singapore. That proposal, as recommended to the Government of India, had associated with it the imposition of a charge on vessels anchoring in Singapore Roads. Because the East India Company opposed the levying of harbour and anchorage duties and the British mercantile community, with the Company, attached importance to the preservation of the perfect freedom of trade at Singapore, the proposal was not even considered.

128. October and November of 1844 saw a number of significant developments. On 1 October Captain Sir Edward Belcher reported to W. J. Butterworth, who had become Governor of the Straits Settlements in 1843, his firm opinion that the Romania Outer Island was the most eligible site. The Parties agree that the island so identified is Peak Rock. On 20 November, Thomson reported in detail to the Governor on the structure of a lighthouse on Peak Rock, the method of constructing it, an estimate of the cost and an undertaking by a contractor to build the lighthouse according to the plan. Just days later Governor Butterworth received replies to letters which he had written to the Sultan and Temenggong of Johor. Notwithstanding the Parties' extensive research, the Governor's letters have not been found, but the Parties did provide to the Court copies of the translations of the replies, both dated 25 November 1844. The Sultan wrote as follows:

> "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."

The Temenggong said rather more:

> "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 undertaking is in contemplation. I wish to be guided in all matters by the Government, so much so, that the company are at full liberty to put up a Light House there, or any spot deemed eligible.
>
> 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."

129. Three days later, on 28 November 1844, the Governor wrote to the Secretary of the Government of India. He recalled the rejection of the Barn Island proposal because of the "restrictive measure on the freedom of the Port" involved in the proposed charges. The Governor then referred to the Belcher and Thomson reports, which he enclosed:

> "The funds adverted to, amounting to 5513 Dollars or 12,978.84 Company's Rupees, being still forthcoming, as will be perceived by the enclosed copy of a letter from Messrs. John Purvis & Co. (A), and feeling persuaded of the very great necessity for a Light House and the advantage it would prove to the growing Trade with China, 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 (B) 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, shewing 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 Singapore. This Rock is part of the Territories of the Rajah of Johore, who with the Tamongong (C) have willingly consented to cede it gratuitously to the East India Company."

The two replies from the Sultan and Temenggong of 25 November were also enclosed.

130. The Governor then listed vessels "Lost or injured by touching on the Rock in the vicinity of the site selected", summarized the enclosed report from his Government Surveyor, mentioned the "opening of the four Ports in China and the Establishment of a Colony at Hong Kong", discussed the arrangements for and costs of the operation of the lighthouse and concluded as follows:

> "Trusting I have said sufficient to interest the Right Hon'ble the Governor General on a subject of such vast importance to the Trade of our country and the safety of the mariner, European and native, I venture most respectfully to entreat His Honor's support to the measure with the Hon'ble Court of Directors, who may then be induced probably in conjunction with Her Majesty's Govt, to furnish the additional sum required and order a Lantern to be at once constructed. In the meantime, if permitted, I will move the Trading Community in aid of a work which will perpetuate their gratitude, for the facilities afforded to the Navigation of these seas, by the indefatigable researches of James Horsburgh Esquire."

131. Two central issues arise from this correspondence. The first is whether the correspondence extended to Pedra Branca/Pulau Batu Puteh or was limited to Peak Rock. The second is whether, in terms of the

replies, the sovereignty of Johor over any place under its sovereignty which was chosen for the lighthouse was ceded or only a permission to build, maintain and operate a lighthouse was granted.

132. The Parties do agree that Peak Rock is "the Rock" referred to in the last paragraph of the Governor's letter to the Government of India quoted in paragraph 129 above. But, Malaysia says, the consent by the Johor authorities was not limited to that Rock alone. Rather the responses, particularly from the Temenggong, were in general terms: the lighthouse might be erected near Point Romania or any spot deemed eligible. The East India Company, according to Malaysia's reading of the correspondence, was free to choose between erecting the lighthouse near Point Romania or anywhere else on the territory of Johor considered suitable by the Singapore authorities for the purpose of providing guidance to shipping going to or leaving Singapore. Singapore responds that the contents of the Governor's letter of 28 November 1844 and its antecedents indicate with certainty that the site which was the subject of his proposal was Peak Rock.

133. The Court is in no doubt that the proposal which the Governor put to the Government of India related to Peak Rock. Without knowing the contents of the Governor's earlier letters to the Sultan and Temenggong, the Court is however left in real doubt about what the Governor proposed. Judging from the two replies, it would appear more likely than not that his letters were in general terms. While Peak Rock was clearly the site he and his advisers had in mind, the final site of the lighthouse had yet to be decided upon. That decision was to be taken in due course by the Government of India and the Court of Directors of the East India Company, following such further consultation as they considered appropriate. And, as Singapore accepts in its Reply, the British authorities had in mind possible locations other than Peak Rock.

134. Given the conclusion which the Court has already reached earlier in this Judgment — that Johor was sovereign over Pedra Branca/Pulau Batu Puteh in the period before the planning for and construction of the lighthouse began — it does not consider it need rule on Malaysia's argument that in the 1844 correspondence the Governor acknowledged Johor's sovereignty over the island. That sovereignty rests on the evidence of earlier periods which the Court has already reviewed (see in particular paragraphs 52-69 above). The Court would note in any event that the Malaysian contention about that acknowledgment faces the difficulty that the correspondence appears to be in the most general terms, in all likelihood without specifically identifying Pedra Branca/Pulau Batu Puteh.

135. The Court accordingly turns to the second issue it identified

above (see paragraph 131) which is whether Johor ceded sovereignty over the particular piece of territory which the United Kingdom would select for the construction and operation of the lighthouse for the stated purpose or granted permission only to that construction and operation. The correspondence could not be more inconclusive. The Sultan is "exceedingly pleased at the intention expressed [by Governor Butterworth]" because a lighthouse will allow for greater confidence; and the Temenggong had "no possible objection to" the erecting of a lighthouse; "wishing to be guided in all matters by the Government, so much so, that the Company are at full liberty to put up a Light House . . .". That wording may be read, as Malaysia would have the Court read it, as limited to a permission to build and operate. The Sultan simply expresses pleasure and, so far as the Temenggong is concerned, the East India Company is at "full liberty" to put up a lighthouse.

136. While Governor Butterworth understood that the letters amounted to a gratuitous "cession" (see paragraph 129 above), the Court observes that that understanding was not communicated to the Sultan and Temenggong. Further, the Court would not give significant weight to the choice of just one word in the present context.

137. The Court notes, however, that, by the time of the correspondence, State practice in the South East Asian region, as beyond, recognized the various legal rights and interests that could be held over land and the associated maritime areas. The Court now gives some instances of that recognition.

138. Under the 1819 Agreements between Sir Stamford Raffles and the Temenggong and the Sultan of Johor for the establishment of a "factory" at Singapore, the East India Company agreed to pay 8,000 Spanish dollars annually so long as it maintained a "factory" on any part of the Sultan's hereditary dominions; and arrangements were made or contemplated for the government and administration of justice over those belonging to the English factory or those settling in its vicinity, for the protection and regulation of the Port, and for the distribution of certain duties. It is apparent that the Johor authorities retained their sovereignty over all of the island of Singapore (see paragraph 21 above). Five years later, under the Crawfurd Treaty, they "ceded . . . in full sovereignty and property" to the East India Company the island of Singapore (see paragraph 22 above). The arrangements made in the Treaty in respect of the rights of the property held by the Sultan and Temenggong on the island, their followers and retainers also recognize the distinction between sovereignty and regular rights of property. Such distinctions are recognized as well in the final article of the Crawfurd Treaty which "abrogate[s] and annul[s] all earlier Conventions, Treaties and Agreements" between the parties, "with the exception of such prior conditions as have conferred on the Honourable the English East India Company any right or title to the occupation or pos-

session of the Island of Singapore and its dependencies, as above-mentioned".

139. The long established distinction between sovereignty and property rights was also to be found in nineteenth century arrangements made in respect of lighthouses. The arrangements relating to lighthouses to which the Court was referred related to those on Cape Rachado (1860) and on Pulau Pisang (1885/1900) and that proposed for Pulau Aur (1901) (not in fact constructed), all involving the Governor of the Straits Settlements and the Sultan concerned. For Malaysia, the permission in those cases, including Pedra Branca/Pulau Batu Puteh, all shared a similar pattern. The Governor wrote to the authorities having sovereignty over the envisaged territory and those authorities gave permission. Malaysia argues that the exchanges cannot be called "informal" permissions, as Singapore characterizes them. These lighthouse arrangements characterized by Malaysia as "formalities" are the same in all four instances. They constituted an adequate basis for the construction of lighthouses by the United Kingdom in foreign territory. "They were not subordinated to any other formality." For Singapore, by contrast a sharp division is to be made between the Rachado and Pulau Pisang cases on the one side and the Peak Rock and Pulau Aur cases on the other, with land grants being obtained in the former, but informal permissions in the latter not being followed up by formal grants because the British did not proceed with those two projects.

140. The Court observes that the documentation for the Cape Rachado and Pulau Pisang lighthouses is much more elaborate and precise than in the other cases. The first was the subject of a series of exchanges, including a proclamation of 23 August 1860, which has a formal style in which the Sultan of Selangor under his Royal Seal made over to the British Government Cape Rachado within his territory. That grant was matched by this reciprocal undertaking:

> "That the English Government do covenant and agree to build and keep a Light house for the benefit of all nations in relation to their ships or boats upon the said Cape Rachado (commonly called Tanjong Tuan) and in the event of the English Government failing to abide by the said agreement, then and in such case, the cession upon my part to be null and void."

141. The arrangements for Pulau Pisang consist of an agreement of 1885 between the Sultan of Johor and the Governor of the Straits Settlements followed by a five page Indenture of 1900 signed, sealed and delivered by the Sultan and Governor and registered in the Johor Registry of Deeds. The Sultan had earlier in the year, at the time of the correspondence relating to Pulau Aur discussed in the next paragraph, informed the Governor that he would be glad to execute the necessary formal

grant, which should have been made under the terms of the 1885 Agreement. The preamble to the 1900 Indenture, making the formal grant, recalls that:

> "Whereas in or about the month of February, 1885, it was agreed by and between His late Highness Abu Bakar, then Maharajah of Johore, and the Governor of the Straits Settlements that the said Maharajah should grant to the Government of the Straits Settlements a plot of ground in the Island of Pulau Pisang in the Straits of Malacca as a site for a Lighthouse and a roadway thereto from the beach and that the said Government should build and effectively maintain a Lighthouse upon the said Island, such grant as aforesaid to be void if a lighthouse was not erected within a reasonable time from the date of such grant or if the said Government neglected properly to keep and maintain such lighthouse when it was built."

The preamble then recites that the Singapore Government in pursuance of the Agreement had built the lighthouse and had properly kept and maintained it but no grant had been made and that it was expedient that a grant be made. The Indenture accordingly proceeded to make the grant and set out the conditions which, among other things, required the Government to use the land only for the operation of the lighthouse and accorded the Sultan a right to repossess the land if the Government ceased to keep the lighthouse in good order and properly managed and worked.

142. The Pulau Aur proposal was raised in February 1900 by the Government of the Straits Settlements with the Sultan of Johor with the alternative proposals that, as that island lay within his territory of Johor, the Sultan would either erect a lighthouse there or permit the Straits Settlements Government (if the Secretary of State for the Colonies and the legislature agreed) to take that action. The Sultan supported the second option, and suggested that the arrangement should be the same as for the Pulau Pisang lighthouse. That arrangement and a deed of indenture were in fact not concluded since the British authorities decided not to proceed with the construction.

143. The Court was also referred to the Convention for the Cape Spartel lighthouse concluded in 1865 between Morocco and a number of maritime Powers which regulates in some detail the rights and obligations of the parties. Article I distinguishes between the Sultan's sovereignty and proprietary right, on the one hand, and the direction of administration of the lighthouse by the other parties, on the other. The Convention was to continue in force for ten years and thereafter year by year, subject to a right of withdrawal on notice.

144. Against that background of extensive legal regulation in agreements between the sovereign of the territory where the lighthouse was to

operate and European States, the Court observes the lack, in the case of Pedra Branca/Pulau Batu Puteh, of any written agreement between the Johor and the British authorities regulating in some detail the relationship between them and their related rights and obligations. The Johor authorities did not provide for instance for the maintenance of their sovereignty and their rights to repossess the land in the event that conditions relating to the operation of the lighthouse were not satisfied. Further, while at the hearing before the Court the Agent of Malaysia stated that "Malaysia has always respected the position of Singapore as operator of Horsburgh lighthouse and I would like to place formally on record that Malaysia will continue to do so", Malaysia has at no time attempted to spell out in any detail at all the rights and obligations of "Singapore as operator".

145. Given the lack of a written agreement relating to the lighthouse and the island on which it was to be constructed, the Court is not in a position to resolve the second issue raised in paragraph 131 above about the content of any agreement reached in November 1844. In any event, as will appear, what is decisive for the Court is the conduct of the authorities in Singapore (and India) and in Johor following the 1844 exchanges of correspondence.

146. In 1845 the choice of the site for the lighthouse was the subject of a further exchange between Singapore and the Government of India. On 22 August 1845 Governor Butterworth, referring to earlier correspondence which indicated support by the Government of India in a recommendation to the Court of Directors of the East India Company for the Peak Rock proposal, confirmed that preference and, given the number of vessels that had been wrecked in the vicinity of Pedra Branca/Pulau Batu Puteh and Point Romania, trusted that construction would soon begin "as a light in that quarters is becoming daily of more paramount importance". On 15 October 1845 the Court of Directors of the Company authorized the Governor General of India in Council to provide for the levying of lighthouse dues at Singapore in support of a lighthouse on Peak Rock and in January 1846 Thomson attempted to land there to build brick pillars to help determine the method of constructing a lighthouse, but the violence of the seas prevented his landing.

147. But later in 1846 things changed. In April of that year the Court of Directors of the East India Company was informed that the Lords of the Admiralty in London were inclined to think that Pedra Branca/Pulau Batu Puteh was the best point for the lighthouse for reasons they stated. The Government Surveyor and Captain S. Congalton, commander of the East India Company's steamer, the *Hooghly,* undertook surveys in May and August, the latter following receipt of the letter setting out the Admiralty's opinion. In their report of 25 August they said they were "decidedly of opinion that Pedra Branca is the only proper position for a Light to be placed . . . for the safety of Shipping whether entering or departing

for the Straits of Singapore . . .". The following day the Governor in a handwritten letter to the Government of India stated that the Government "will at once perceive that Pedra Branca is the only true position" for the lighthouse. One word in this letter is unclear and was the subject of opposing expert opinions submitted by each of the Parties. The disputed word is either "care" or "case" and appears in the following sentence, in which the Governor stated that "the whole of the details for the care/case of Light Houses as set forth" in his letter of 28 November 1844 relating to the proposal for a lighthouse on Peak Rock (paragraphs 129-130 above) "will be equally applicable to the new Position". As mentioned, the Parties disagree on their reading of the word "care" or "case". Did the Governor refer to the whole of the details "for the care" of the lighthouse or "for the case" of the lighthouse? Singapore supports the former reading and Malaysia the latter. For Singapore the word "care" carries the implication that it was only the details of the earlier despatch relating to the care, maintenance and operation of the lighthouse that would apply to Pedra Branca/Pulau Batu Puteh, now that it had been chosen. Malaysia, by contrast, considers that the "whole of the details for the case of Light Houses" includes the permission granted by the Johor authorities for the construction of the lighthouse. The Court does not find it necessary to resolve the clash of expert opinions on this matter. On 30 October 1846, the President in Council in India approved Pedra Branca/Pulau Batu Puteh as the site, on 24 February 1847 the Court of Directors informed the Indian Government of its approval, and on 10 May 1847 the Government of India requested Governor Butterworth to take measures for the construction of a lighthouse on Pedra Branca/Pulau Batu Puteh according to the Plan and Estimates submitted with the letter of 28 November 1844.

148. The Court observes that there is nothing at all in the record before it to suggest that the authorities in Singapore considered it necessary or even desirable to inform the Johor authorities of the decision about the siting of the lighthouse or to seek any consent in respect of it. That conduct may be interpreted in one of two ways: it may indicate, as Malaysia contends, that what it sees as Johor's 1844 consent to the building and operation of a lighthouse on one of its islands simply applied to Pedra Branca/Pulau Batu Puteh as it would have to any of its islands. Or it may indicate, as Singapore contends, that the Johor authorities had no rights in respect of this project and that such was the perception in 1847 of the responsible British authorities. On the basis of the case file, the Court is not in a position to reach a conclusion on that issue.

5.4.3. The construction and commissioning of Horsburgh lighthouse, 1850-1851

149. The facts about the construction and commissioning of the lighthouse on Pedra Branca/Pulau Batu Puteh — and indeed for the most part its operation over the many years since — are not themselves the subject of significant dispute between the Parties. They also agree on the law: it "requires an intention to acquire sovereignty, a permanent intention to do so and overt action to implement the intention and to make the intention to acquire manifest to other States". There is some disagreement on whether practice also requires elements of formality. Symbolic acts accompanying the acquisition of territory are very common both generally and in British practice. They are not however always present. The Court does not consider that the practice demonstrates a requirement that there be a symbolic act. Rather the intention to acquire sovereignty may appear from the conduct of the Parties, particularly conduct occurring over a long period.

150. The Parties do however dispute the evaluation of the facts. Malaysia's basic position is that essentially everything that the United Kingdom and Singapore did was no more than constructing and commissioning the lighthouse and later operating it, within the very consent conferred by the Sultan of Johor and the Temenggong in November 1844. They were not actions on the basis of which Singapore could claim sovereignty over Pedra Branca/Pulau Batu Puteh. There is no evidence, says Malaysia, of a British intention to acquire sovereignty and it did not claim sovereignty during the construction of the lighthouse at its commissioning and or at any time during its operation. Singapore, by contrast, says that the United Kingdom acquired title to Pedra Branca/Pulau Batu Puteh in the period of 1847-1851 when it took lawful possession of the island in connection with building the lighthouse on it. According to Singapore, thereafter, for over 150 years the United Kingdom and later Singapore engaged in the effective administration and control of Pedra Branca/Pulau Batu Puteh as sovereign and not simply as the operator of the lighthouse for over 150 years. The Court now turns to the facts.

151. The planning for the construction and the construction itself were in the hands of the Government Surveyor of Singapore, John Thomson, who was appointed as Architect of the project by Governor Butterworth. To meet the deficiency in the funds available in Singapore, the Government of India, in agreement with the Court of Directors of the East India Company, on 12 November 1849 authorized the preparation of a law by Governor Butterworth imposing a duty on shipping and requested him to take immediate measures to begin constructing the lighthouse. It will be observed that the opposition to the levying of the harbour and anchorage

duties expressed in 1842 and earlier (see paragraph 127 above) was no longer an issue, and had not been for some years (see paragraph 146 above); indeed as early as 1842, when the Horsburgh lighthouse proposal was first raised with the Government, it was contemplated that government money would be needed (see paragraph 126 above).

152. In December 1849 the Government Surveyor began organizing the construction which was to begin on Pedra Branca/Pulau Batu Puteh in late March or early April 1850 and to continue with a break over the following monsoon season into 1851. In the course of the construction up to 50 workmen were to be on the island. The organization included arranging shipping to supply the island and to protect the supplies from pirates, the quarrying of the granite and other stone needed, and arranging the construction and shipping of the lantern and related equipment.

153. In February 1850 Governor Butterworth forwarded to the Government of India a draft Act for the levy of dues on vessels entering Singapore alone (but not other ports). That statute was enacted by the Governor-General of India in Council on 30 January 1852 and is discussed later (see paragraphs 170-172 below). The Preamble to the Act recites that the sums of money subscribed by private individuals were insufficient to defray the costs of the building, that the East India Company agreed to build the lighthouse and to advance certain sums to complete it on condition that they were repaid by a levy on ships entering Singapore harbour, that the lighthouse had been built and it was desirable that the expense of building it and maintaining the light should be defrayed out of the monies arising from the toll, and that other lights or beacons might be established in the Straits of Malacca or nearby. The Act provided for the payment of the toll by ship owners and operators, the ownership and management of the lighthouse, and the prospect of the building of further lights or beacons and their operation from the toll once the advance from the East India Company had been repaid and after the current expenses of maintaining Horsburgh lighthouse had been met.

154. The work had progressed to the point that on 24 May 1850, Queen Victoria's birthday, the foundation stone was laid. Malaysia stresses that it was the Master of the Masonic Lodge Zetland in the East No. 749 who with his brethren laid the stone, it was not an official governmental occasion and there was no proclamation of British sovereignty or any other formal act. Singapore, by contrast, emphasizes that it was the Governor who invited the Master and members of the Lodge to undertake the task and who arranged their transport from Singapore to the Rock. Governor Butterworth also invited the Naval Commander in Chief of the East India Station and Thomas Church, the Resident Councillor at Singapore and Thomson's immediate supervisor, to accompany

him. Also present, at the Governor's invitation, were several foreign consuls, merchants and civil and military members of the Singapore community. The members of the Lodge were received on Pedra Branca/Pulau Batu Puteh by the Governor who requested them to proceed with the ceremony which they did. The Master in his address praised the Governor, the merchants and mariners who had provided the nucleus of the fund, the East India Company for advancing the balance and James Horsburgh. The opening lines of the inscription on the plate gave the date by reference to the year of the Queen's reign, named the Governor-General, recorded that the Foundation Stone was laid by the Master and Brethren of the Lodge in the presence of the Governor and others and ends with "J. T. Thomson, *Architect*".

155. The Court observes that no Johor authorities were present at the ceremony. There is no indication that they were even invited by the Governor to attend. That might suggest — the Court puts it no higher than that — consistently with the references to the Queen and the role of the Singapore Governor, Architect and the East India Company, that the British and Singapore authorities did not consider it necessary to apprise Johor of their activities on Pedra Branca/Pulau Batu Puteh. That they were alert to matters of Johor sovereignty at that very time appears from the rejection of a proposal made by Thomson to Church later in November 1850. In his report of 2 November 1850 on the completion of the season's operations on Pedra Branca/Pulau Batu Puteh for the construction of the lighthouse, which had now reached a height of 64 feet, Thomson proposed, referring to shore support arrangements for British lighthouse keepers and the local threat of piracy, the establishment of a station near Point Romania. Church, in reporting to the Governor, doubted that:

> "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."

The matter was not taken any further, with Thomson communicating to Church the following July that access to Pedra Branca/Pulau Batu Puteh was not going to be closed for four or five months, as earlier supposed, and that the establishment of a station at Point Romania was consequently unnecessary.

156. Nine days after the laying of the foundation stone on 24 May 1850

the Temenggong of Johor did visit the rock, accompanied by 30 of his followers. Thomson referred to him as "the most powerful native chief in these parts, allied to British interests. He remained at my house for two days, employing his leisure in fishing . . ." That is the only visit by either the Sultan or the Temenggong and their successors recorded in the evidence before the Court.

157. The building of the lighthouse continued through the middle of 1850 until 21 October. After the monsoon, work resumed in April 1851. On 8 July the Resident Councillor in Singapore and his party "minutely" inspected all the works, and during August the lantern, machinery and apparatus arrived in Singapore and in September were hoisted to the top of the tower which was about 95 feet high.

158. Thomson gave this account of the final official act on Pedra Branca/Pulau Batu Puteh before the permanent lighting of Horsburgh lighthouse on 15 October 1851:

> "On the 27th September, the Honorable Colonel Butterworth C.B., Governor of the Straits Settlements, with a party consisting of Sir William Jeffcott, Recorder of the Straits Settlements, Colonel Messitter, commanding the troops, Captain Barker, H.M.S. 'Amazon', Mr. Purvis and the principal merchants of Singapore, together with several military officers, arrived off the rock at 1 p.m. when they landed and minutely inspected the Pharos."

159. On 15 October the light was shown, as had been advertised in two Singapore newspapers by way of a Notice to Mariners which set out the specification of the lighthouse by "Mr. J. T. Thomson, Government Surveyor" and which was signed by W. J. Butterworth as Governor. By 2 November the two gun boats had provided the lighthouse with stores to last until the end of March and on 17 November the *Hooghly* arrived and Thomson departed on it for Singapore on 18 November 1851. He had been on Pedra Branca/Pulau Batu Puteh supervising the construction of the lighthouse for much of the periods from April to October 1850 and from April to November 1851. When the construction was underway in the course of those periods, supplies, especially of building materials, were brought by the *Hooghly*, the two gun boats and two lighters. From time to time, particularly when Thomson was needed elsewhere, for instance at the quarry, his roles were taken over by his foreman, Mr. Bennett.

160. Thomson concluded his *Account of the Horsburgh Lighthouse* (1852), published in the *Journal of the Indian Archipelago and Eastern Asia* (Vol. 6, p. 376), with an appendix "particularly [about] the measures taken by Government to advance the views of the promoters of this public work". He mentioned the principal subscribers and said this in the final paragraph of Appendix VII to his *Account*:

> "The remainder of the funds necessary to the completion of the Testimonial was advanced by the Government, to be repaid by a Light-house due on shipping. There was otherwise extensive aid afforded in the employment of their Steamers, gun-boats and officers, none of the expense of which was charged against the works. I have already had the pleasure of mentioning the highly gratifying assistance of the Dutch Authorities of Rhio, in placing gun-boats as tenders to the operations."

161. Again it may be said that these actions, too, are primarily directed at the construction of the lighthouse, but the "extensive aid" mentioned in the Appendix VII of Thomson's *Account* quoted above may be seen as having a sovereign character — British Government vessels made a major contribution to the whole process of the construction of the lighthouse, a contribution which was at no charge to the potential commercial users of the light. That sovereign characterization may also be applied to the tablet in the Visitors Room on which is inscribed the names of W. J. Butterworth as "Governor" and J. T. Thomson as "Architect". John Horsburgh is also mentioned and again reference is made to "the enterprize of British merchants and . . . the liberal aid of the East India Company". As at the laying of the foundation stone, the Sultan of Johor and Temenggong of Johor had no role. But, as also on that occasion, no specific acts of proclamation of sovereignty, as frequently appeared in British practice, were to be seen.

162. The Court does not draw any conclusions about sovereignty based on the construction and commissioning of the lighthouse. Rather it sees those events as bearing on the issue of the evolving views of the authorities in Johor and in Singapore about sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia contends that Johor, having permitted the building of the lighthouse, had no reason to have any involvement in its construction and commissioning. The Court however notes that the only time the Johor authorities were present throughout that process was the two-day visit of the Temenggong and his followers in early June 1850.

163. In light of the above, the Court will now consider the conduct of the Parties after the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh to ascertain whether this provides a basis for concluding that sovereignty over the island was passed from Johor to the United Kingdom, Singapore's predecessor.

5.4.4. The conduct of the Parties, 1852-1952

164. The Parties refer to activities undertaken by them and their predecessors in title between 1852 and 1980, and indeed beyond. Given the nature of the conduct, the changing constitutional position of the Parties

and their predecessors and an exchange of correspondence in 1953 to which the Parties have given a great deal of attention, the Court finds it convenient to divide the conduct between events occurring before 1953 and those occurring after. The division is not precise since some conduct runs through the whole period.

165. At this stage it is also convenient for the Court to put to one side as not relevant to sovereignty over Pedra Branca/Pulau Batu Puteh a number of matters mentioned by Singapore but which relate essentially to the maintenance and operation of the lighthouse and nothing more — the improvement of the lighthouse, the exercise of authority over its personnel, and the collection of meteorological information (on the last matter see also paragraph 265).

(a) *Straits lights system and related British and Singapore legislation*

166. The British and Singapore legislation relating to Horsburgh lighthouse and others in the region is to be seen in the broader context of the law and practice relating to lighthouses and in the more specific context of the Straits lights system. As a matter of law, a lighthouse may be built on the territory of one State and administered by another State — with the consent of the first State. As a matter of fact that has happened not infrequently, as instanced by the Middle East Navigation Aids Service, a non-profit corporation registered in the United Kingdom, which owns and administers lighthouses and other aids to navigation in Kuwait, the United Arab Emirates, Qatar and elsewhere in the region, and the Cape Spartel Treaty and the Pulau Pisang and Cape Rachado lighthouses discussed earlier in this Judgment (see paragraphs 139-143 above).

167. As indicated, a central element in Malaysia's argument is that because Horsburgh lighthouse was built on an island over which Johor was sovereign — a proposition which the Court accepts, as appears earlier in this Judgment — all the actions of the British authorities and, following them, the Singaporean authorities are simply actions pursued in the normal course of the operation of the lighthouse. Malaysia includes among such actions the investigation of marine hazards and the publication of notices to mariners, regulation of activities associated with the lighthouse, adding additional structures and facilities, permission to undertake scientific and technical surveys, control of access to lighthouses and their associated facilities, and the flying of ensigns. Singapore, by contrast, says that some of the actions are not matters simply of the operation of the lighthouse but are, in whole or part, acts *à titre de souverain*. The Court considers them in following sections of this Judgment. First, it turns its attention to the legislation, invoked by Singapore, relating to the lighthouses in the Straits area, particularly Horsburgh lighthouse.

168. Singapore, in support of its contention that it has continuously exercised state and sovereign authority over Pedra Branca/Pulau Batu Puteh, refers to legislation which it and its predecessors in title enacted specifically relating to the island. The legislation regulated the defraying of costs of establishing and operating the lighthouse, vesting control of it under various governmental bodies, and regulating the activities of persons residing, visiting and working on Pedra Branca/Pulau Batu Puteh. All the measures were open and notorious and drew no protests from Malaysia.

169. Malaysia replies that it and its predecessors had no need to respond. The actions to which Singapore refers are yet again an aspect of the Straits lights system administered by Singapore, a system which included lights which had no territorial connection with Singapore. The system was not about sovereignty but about the maintenance and operation of the lights system. Moreover, the legislation was about private law matters and not about sovereignty over Pedra Branca/Pulau Batu Puteh as a matter of international law. And in some respects, says Malaysia, the enactments are a recognition by Singapore that it does not have jurisdiction over the island.

170. Singapore refers to the Light Dues Act 1852 (India), the Light Dues Act 1854 (India) which replaced that of 1852, the Light-Houses Ordinance 1912 (Straits Settlements) which repealed the 1854 Act and an amendment to it, the Light Dues Ordinance 1957 (Singapore) establishing the Singapore Light Dues Board and the Light Dues Repeal Act 1973 which transferred the assets, liabilities and employees of the Board to the Port of Singapore Authority and repealed the 1957 ordinance.

171. The 1852, 1854 and 1912 enactments expressly mention the lighthouse at Pedra Branca/Pulau Batu Puteh. They deal with property in the lighthouse and the 1912 measure adds "all such lighthouses as are now established in or near to the Straits of Malacca or Singapore". The lighthouses and appurtenances were the property of and vested in the East India Company (1852 and 1854) and Singapore (1912). The statutes also dealt with the management and control not only of the lighthouses but also of the Straits lights such as that on the 2.5 fathom bank in the Malacca Strait (1854 Act): management and control were vested in and maintained by the Government. The enactments are exercises of wide law-making power which, it was understood, could extend to such matters of property, management and control beyond the territories of India and Singapore.

172. Taken as a whole, the enactments do not, in the Court's view, demonstrate British sovereignty over the areas to which they apply. For

one thing the ownership provision in the 1912 ordinance applies equally to the lighthouses on Pulau Pisang and at Cape Rachado — both undoubtedly on Johor territory — as it does to that on Pedra Branca/Pulau Batu Puteh. For another, they extend to lights operating on the high seas. And the provisions say nothing expressly about sovereignty as opposed to ownership and management and control, each of which they specifically regulate.

173. Malaysia, the Court recalls, contends that the legislation supports its position for two reasons. The first relates to a 1958 amendment to the 1957 Ordinance and the 1969 Light Dues Act which incorporated the same provisions. The 1957 Ordinance required the Light Dues Board to spend money from the fund it administered on the maintenance and improvement of "navigational aids in the waters of the Colony", defined as "those parts of the territorial waters of the Colony which are outside the limits of any port". In 1958, the definition of "waters of the colony" was deleted and the phrase just quoted from the 1957 provision was replaced by "lighthouses, buoys, beacons and other navigational aids in Singapore including those at Pedra Branca (Horsburgh) and at Pulau Pisang". For Malaysia, the references to the lighthouse at Pedra Branca/Pulau Batu Puteh along with that on Pulau Pisang indicate that Singapore recognized that the former island is not part of Singapore. Singapore replies that under the 1957 Ordinance the Board had been authorized to spend moneys on the maintenance of navigational aids only if they were in the waters of the colony but not within any port. The purpose of the amendment was to remove that limit, enabling the Board to spend moneys on "lights and navigational aids within the port limits and *on the maintenance of the light at Pulau Pisang which is not within territorial waters*" (emphasis added). Further, the drafting history includes an express statement that Pedra Branca/Pulau Batu Puteh is Singapore's.

174. In the Court's view, the original 1957 wording is not clear in respect of the present issue since it appears to include both lighthouses "in Singapore" and that is wrong at least so far as Pulau Pisang is concerned. The 1958 wording, by contrast, gradually expands its geographical scope, from the port of Singapore, to its approaches, and to the two named lighthouses. The Court considers that the change, particularly given the express reference to Pulau Pisang in the statement of purpose and the statement that Pedra Branca/Pulau Batu Puteh is Singapore's in the drafting history, does give support to Singapore's contentions.

175. Malaysia's second reason for contending that in its legislation Singapore recognizes that Pedra Branca/Pulau Batu Puteh is not within its sovereignty turns on the Foreign Jurisdiction Act of 1843, the first in

a series of Foreign Jurisdiction Acts — Acts which were invoked only at the oral stage of the proceedings. These statutes of the Imperial Parliament at Westminster were enacted "to remove doubts as to the exercise of Power and Jurisdiction by Her Majesty within diverse Countries and Places out of Her Majesty's Dominions, and to render the same more effectual". Those powers and jurisdictions, the 1843 Act recites, were conferred "by treaty, capitulation, grant, usage, sufferance and any other lawful means". In terms of the Act and later Acts it was

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

Malaysia contends that the Indian and Singapore statutes, in so far as they relate to Horsburgh lighthouse, were enacted under that authority and accordingly they recognize that Pedra Branca/Pulau Batu Puteh was "out of Her Majesty's Dominions"; while they do not expressly refer to that authority, a point made by Singapore in response, British law, says Malaysia, does not require such reference. Singapore also argues that no instrument — treaty, capitulation — of the kind referred to in the 1843 and following Acts exists.

176. The 1843 Foreign Jurisdiction Act, the Court understands, was particularly directed at doubts which had arisen in respect of the powers of British consuls in the Ottoman Empire and especially about the limits that might be imposed by English law on the powers, rather than about the existence of the powers themselves. The Court's understanding is also that the power conferred by the 1843 and later Acts was exercised, not by an enactment of a particular colonial legislature, but by some formal Royal instrument such as an Order in Council or Letters Patent. There is no indication at all that the Crown delegated to the Indian or Straits Settlements legislature, under the 1843 or later Acts, the powers in issue here. Further, there is strong support for the proposition that the Act did not extend the jurisdiction of the Crown at all; it provided only for the manner of exercising it. (See the authorities, including *Sobhuza II* v. *Miller* [1926] AC 518 and *Secretary of State* v. *Sardar Rustan Khan* (1941) LR 68 IA 109, decisions of the British Privy Council, and *Nyali* v. *Attorney-General* [1956] 1 QB 1, a decision of the English Court of Appeal, as well as the official Report which appears to have led to the enactment of the 1843 Statute, conveniently gathered by Sir Kenneth Roberts-Wray, Q.C., in *Commonwealth and Colonial Law* (1966), pp. 185-203.)

177. Accordingly the Court is unable to see any sufficient basis for

Malaysia's contentions based on the 1843 Act and later Acts.

178. The Court does however see some significance in one proposal relating to the funding and administration of the lights. After 1912 the duties levied on ships passing through the Straits were abolished and the States concerned defrayed the costs of the lights on a co-operative basis. Singapore refers to the fact that in 1913 the Chief Secretary of the Government of the Federated Malay States proposed an appropriation to meet a share of the costs of the Cape Rachado Light and the One Fathom Bank Light but not for Horsburgh lighthouse. But, as Malaysia points out, Johor was not at that time one of those States. What is of some significance however is that in 1952 the Director of Marine of the Federation of Malaya of which Johor was then a part raised the question whether the Federation should assume responsibility for the Pulau Pisang lighthouse, "as it is close to the coast of the Federation" but made no such suggestion in respect of Pedra Branca/Pulau Batu Puteh.

179. Singapore, when referring to legislation relating to Pedra Branca/Pulau Batu Puteh, also cites the Protected Places Order 1991 which prohibits entry, without permit, to that island. According to Malaysia this action comes long after the critical date and is not "a normal continuation of prior acts" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135). Singapore contends that it is a "normal continuation" since it is simply one more element in a long stream of governmental authority exercised over Pedra Branca/Pulau Batu Puteh.

180. In the Court's opinion, Singapore puts the matter far too broadly when it contends it may rely on what it characterizes as one more element of the exercise of governmental authority occurring after the date the dispute crystallized. The conduct in question must be the same as, or of the same kind as, the prior acts which are being invoked. The 1991 Order is clearly distinct from the other conduct on which Singapore relies occurring before the date the dispute crystallized. Accordingly, the Court does not give any weight to the 1991 Order.

(b) *Constitutional developments and official descriptions of Singapore and Malaysia*

181. In terms of constitutional developments, Malaysia begins with the 1927 Straits Settlement and Johor Territorial Waters Agreement between the Straits Settlements and Johor. The 1927 Agreement amends the 1824 Crawfurd Treaty concluded soon after the Settlement of Singapore was established and discussed earlier in this Judgment (see paragraphs 102-107 above); and it is convenient to begin a brief account of the constitutional development from that time. In 1826 Singapore and the other British Settlements in the Malay Peninsula were amalgamated into a single unit known as the Strait Settlements (see paragraph 24

above). It was governed by the East India Company as a dependency of the Bengal Government of India. In 1867 the responsibility passed to the Colonial Office in London, with the Straits Settlements becoming a Crown Colony. The statutory territorial description of the Colony included "and their Dependencies".

182. The 1927 Agreement had as its stated purpose to "retrocede" to the Sultan of Johor certain of the seas, straits and islets which had been ceded to the East India Company in 1824. The boundary between the territorial waters of the Settlement of Singapore and those of the State and Territory of Johor was to be the line following the centre of the deep-water channel between the mainland of Johor and the northern shore of the island of Singapore and three smaller named islands immediately to its north and east. Islands on the Johor side of the line were retroceded if they were under British sovereignty. Malaysia contends that the retrocession arrangements did not concern Pedra Branca/Pulau Batu Puteh since it was never part of the territory of Singapore. The 1927 Agreement, with its link back to that of 1824, is evidence of the continuing appreciation that Pedra Branca/Pulau Batu Puteh and its surrounding waters were not part of the territory of Singapore.

183. The creation of the separate Colony of Singapore in 1946 (also described as including "its dependencies"), with the other Straits Settlements joining the Malay States to form the Malayan Union (from 1948 the Malayan Federation), made no changes, according to Malaysia, in respect of territory and in particular in respect of Pedra Branca/Pulau Batu Puteh; it remained part of Johor and accordingly of the new Union and the Federation which became independent in 1957.

184. In 1959 the Colony of Singapore was granted self government as the State of Singapore, comprising the territories included in the Colony of Singapore immediately before the passing of the Act.

185. In 1963 Singapore became part of the newly formed Federation of Malaysia. It withdrew in 1965. The Parties agree that these changes are of no consequence for the present proceedings.

186. The Court considers that the various constitutional changes do not help resolve the question of sovereignty over Pedra Branca/Pulau Batu Puteh. The constitutional documents refer to the island of Singapore and "its dependencies" or to "all islands and places which on [a specific date] were administered as part of [the Colony of] Singapore". That wording refers the Court back to the question of whether Pedra Branca/Pulau Batu Puteh may be seen as a dependency of Singapore or administered by it. It does not assist in finding the answer to those questions.

187. The geographical description in the 1927 Agreement is of course specific and it does not expressly mention Pedra Branca/Pulau Batu Puteh. Malaysia contends that that provides a significant recognition at that time by Singapore that it (or the United Kingdom) did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

188. The Court observes that the Agreement has to be read as a whole and in context. As its preamble says the purpose was to "retrocede" certain of the said seas, straits and islets to Johor, that is certain of the areas that were ceded by Johor to the East India Company in 1824, and those areas were all within 10 miles of the main island of Singapore. They could not have included Pedra Branca/Pulau Batu Puteh; it was simply not within the scope of the Agreement. Accordingly the Court concludes that the 1927 Agreement does not assist the Malaysian case.

189. Malaysia also refers the Court to a Curfew Order made in Singapore in 1948 in response to civil unrest in the Colony. No one was to be in the specified area between 6.30 p.m. and 6.30 a.m. without a police permit. The specified area was defined in the same terms as in the 1927 Agreement, that is without including Pedra Branca/Pulau Batu Puteh. But as Singapore points out, there was no reason in terms of its purpose for extending the ban to such a distant island anymore than there was for extending it to the Cocos and Christmas Islands, some great distance away in the Indian Ocean, which at the time were part of the Colony of Singapore.

(c) *Johor regulation of fisheries in the 1860s*

190. Malaysia contends that the Temenggong continued to control fishing in the neighbourhood of Pedra Branca/Pulau Batu Puteh after the construction of the lighthouse, granting licences and exercising criminal jurisdiction there, and that that exercise of authority showed the island was Johor's territory. The Parties refer in particular to an exchange of correspondence between Johor and the British authorities in Singapore in 1861.

191. The Court observes that the exchange relates in part to events occurring within 10 miles of the island of Singapore and nothing can be made of the fact that the Singapore authorities did not in that context refer to jurisdiction over the waters of Pedra Branca/Pulau Batu Puteh. Another incident occurred further along the Johor coast and involved Singapore fishermen returning from fishing in the neighbourhood of Horsburgh lighthouse. In the Court's opinion, on the basis of the available records, the facts cannot be clearly established and the wording of the Singapore reports are too vague to provide any assistance in determining the understanding at that time by the authorities in Singapore of sovereignty over Pedra Branca/Pulau Batu Puteh.

5.4.5. The 1953 correspondence

192. On 12 June 1953 the Colonial Secretary of Singapore wrote as follows to the British Adviser to the Sultan of Johor:

> "I am directed to ask for information about the rock some 40 miles from Singapore known as Pedra Branca on which the Horsburgh Lighthouse stands. The matter is relevant to the determination of the boundaries of the Colony's territorial waters. It appears this rock is outside the limits ceded by Sultan Hussain and the Dato Tumunggong to the East India Company with the island of Singapore in the Treaty of 1824 (extract at 'A'). It was however mentioned in a despatch from the Governor of Singapore on 28th November 1844 (extract at 'B'). The lighthouse was built in 1850 by the Colony Government who have maintained it ever since. This by international usage no doubt confers some rights and obligations on the Colony.
>
> 2. 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. This shows that a part of Pulau Pisang was granted to the Crown for the purposes of building a lighthouse. Certain conditions were attached and it is clear that there was no abrogation of the sovereignty of Johore. The status of Pisang is quite clear.
>
> 3. It is how [now] desired to clarify the status of Pedra Branca. I would therefore be most grateful to know whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of.
>
> 4. A copy of this letter is being sent to the Chief Secretary, Kuala Lumpur."

193. The extract from the 1824 Treaty which was attached to the letter set out the title and Article II. Under that Article, Johor ceded the island of Singapore to the East India Company "together with adjacent seas, straits and islets, to the extent of ten geographical miles, from the coast of the said main island of Singapore" (see paragraph 102 above). The extract from the despatch of 28 November 1844 (see paragraph 129 above), as attached, read as follows: "This Rock [i.e. Pedra Branca] is part of a territory of the Rajah of Johore who with the Tumunggong has willingly consented to cede it gratuitously to the East India Company."

194. The expression "[i.e. Pedra Branca]" appeared in handwriting in the attached typewritten copy of the extract from the 1844 despatch. That explains why the letter of 12 June expressly says that "Pedra Branca" was mentioned in the 1844 despatch.

195. Later in June 1953 the Secretary to the British Adviser to the Sul-

tan of Johor advised the Colonial Secretary that the Adviser had passed the letter to the State Secretary of Johor who would

> "doubtless wish to consult with the Commissioner for Lands and Mines and Chief Surveyor and any existing archives before forwarding the views of the State Government to the Chief Secretary".

196. Three months later, in a letter dated 21 September 1953, the Acting State Secretary of Johor replied as follows:

> "I have the honour to refer to your letter . . . 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."

No further correspondence followed and the Singapore authorities took no public action. That was so although, as mentioned later, officials of Singapore did consider the matter in an internal memorandum (see paragraph 224 below).

197. In their pleadings before the Court the Parties take sharply different positions on the significance of this correspondence. Malaysia places most emphasis on the initial Singapore letter. According to Malaysia, the enquiry in that letter indicated the absence of any conviction on Singapore's part that Pedra Branca/Pulau Batu Puteh was part of its territory; it wished to clarify Singapore's rights and obligations regarding the management and control of the lighthouse. The letter, Malaysia continues, "clearly references the Crawfurd Treaty of 1824 as determining the relevant territorial limits of Singapore, and the 1844 permission of Johor to the building of the lighthouse". Malaysia also calls attention to virtually contemporaneous correspondence between Singapore officials about territorial waters, referring to the 1824 Treaties and the 1927 Agreement, as showing that the Singapore authorities had a very precise understanding of the extent of the Colony's sovereignty, that this flowed from the 1824 Treaties, and that it did not extend to Pedra Branca/Pulau Batu Puteh. Next, the reference to the position of Pulau Pisang indicates, Malaysia says, an understanding on the part of the Colonial Secretary that the management of the lighthouse was distinct from and not determinative of the sovereign status on the territory on which is was constructed.

198. The reply from Johor, Malaysia continues, is not "a model of clarity". In any event it is about ownership, not about sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia also contends that the Acting State Secretary was "definitely not authorized" and did not have "the legal capacity to write the 1953 letter".

199. Finally, Malaysia calls attention to the actions of the Singapore authorities following the receipt of the Johor letter and particularly their failure to take steps to claim Pedra Branca/Pulau Batu Puteh.

200. Singapore sees the correspondence quite differently. It admits that in its initial letter it was seeking information to assist it to clarify the status of Pedra Branca/Pulau Batu Puteh. The enquiry concerned the determination of the colony's territorial waters. The Treaties of 1824 and the 1927 Agreement were irrelevant to that matter. The 1844 despatch could not be read as a showing that permission was sought from Johor to build a lighthouse on the island. So far as the reference to Pulau Pisang was concerned, Singapore accepts that the management of the lighthouse and the status of the territory on which it is built can be different, but the author of the Singapore letter was making a comparison in which he acknowledges Johor's sovereignty over Pulau Pisang but not over Pedra Branca/Pulau Batu Puteh.

201. For Singapore the Johor reply is crystal clear and straightforward. In the context it is clear that ownership refers to title. Singapore rejects Malaysia's argument that the Acting Secretary of State of Johor did not have authority to write the letter.

202. The internal Singapore correspondence, after the Johor letter was received, simply meant that Singapore could now authoritatively regard Pedra Branca/Pulau Batu Puteh as Singapore territory since Johor's "express disclaimer of title" had removed all doubts arising from the incomplete state of the Singapore archives.

203. The Court considers that this correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh. The Court gives its primary attention to those matters of which they both had notice — the initial letter, the interim reply and the final reply.

204. The Singapore letter of 12 June 1953 seeks information about "the rock" as a whole and not simply about the lighthouse. The information, the letter says, is relevant to the determination of the Colony's territorial waters, a matter, the Court observes, which is dependent on sovereignty over the island.

205. The immediately following reference to the Crawfurd Treaty shows the same focus on sovereignty: the rock appears not to be among the territories ceded by the Treaty by the Sultan and Temenggong. The apparent irrelevance of the Treaty provides one reason for seeking information. The next sentence says that the rock was however mentioned in the 1844 despatch, in the extract attached to the letter. That statement is not accurate (see paragraphs 129-132 above) but whether it is accurate or not the Johor authorities were put on notice that in 1953 the Singapore

authorities understood, as indicated in the annotated extract from the 1844 letter which was attached (see paragraph 193 above), that their predecessors thought that Pedra Branca/Pulau Batu Puteh had been ceded "gratuitously" by the Sultan and the Temenggong to the East India Company.

206. The letter next calls attention to the building in 1850 and maintaining ever since of the lighthouse, this activity by "international usage no doubt conferr[ing] some rights and obligations on the Colony". That comment appears to the Court to be equivocal since, as Singapore accepts, a distinction is to be drawn between the maintenance and operation of a lighthouse and the sovereignty over the territory on which it stands.

207. More significant is the following particular reference to Pulau Pisang where the same distinction is at play. The Singapore authorities report that they have traced in the Johor Registry of Deeds the indenture of 1900 relating to the lighthouse on that island. Under that indenture, or, as already discussed, under the agreement of 1885 which preceded it, part of the island was granted to the Crown for the purpose of building a lighthouse; it is clear, says Singapore in its 1953 letter, "that there was no abrogation of the sovereignty of Johore. The status of [Pulau] Pisang is quite clear." That is, it remained under Johor's sovereignty.

208. It was against that background that Singapore decided to clarify the status of Pedra Branca/Pulau Batu Puteh and accordingly asked the Johor Government whether there was "any document showing a lease or grant of the rock or whether it had been ceded by the Government of the State of Johore or in any other way disposed of".

209. The Court recalls that, according to Malaysia, the Singapore enquiry implied the absence of any conviction on its part that Pedra Branca/Pulau Batu Puteh was part of its territory. The Court reads the letter of enquiry about the status of the island as showing that the Singapore authorities were not clear about events occurring over a century earlier and that they were not sure that their records were complete, a caution which is understandable in the circumstances.

210. The interim reply from the British Adviser anticipates that the State Secretary of Johor, the senior official in its Government, would consult with the Commissioner for Lands and Mines and the Chief Surveyor and research the matter in any existing archives. While Malaysia submits that the two officers would be concerned with such matters as leases and property under local law, the Court attaches little significance to that, given Singapore's reference to the Pulau Pisang indenture and its request for any document showing a lease or grant of the rock; further, the archives which would also be consulted might well have thrown light not only on those issues but also on the matter of any ces-

sion or other disposal of Pedra Branca/Pulau Batu Puteh. It will be noted that the Singapore letter gives no indication at all that the initial letters from Governor Butterworth to the Sultan and Temenggong had been located.

211. The Court now turns to the reply from the Acting State Secretary of Johor. It first considers the Malaysian contention that the Acting State Secretary "was definitely not authorized" and did not have

> "the legal capacity to write the 1953 letter, or to renounce, disclaim, or confirm title of any part of the territories of Johore".

Malaysia invokes provisions of two Agreements of 21 January 1948 which were in force in 1953: the Johor Agreement between the British Crown and the Sultan of Johor (one of nine almost identical treaties with each of the Malay States) and the Federation of Malaya Agreement between the British Crown and nine Malay States (including Johor). Under the 1948 treaties, says Malaysia, "Johor, a sovereign State, transferred to Great Britain all its rights, powers and jurisdiction on matters relating to defence and external affairs". Those powers and authorities rested only with the (federal) High Commissioner, appointed by the United Kingdom, and not with the State Secretary. Under Clause 3 of the Johor Agreement the British Crown had complete control of the defence and of all the external affairs of the State of Johor and the Sultan undertook that:

> "without the knowledge and consent of His Majesty's Government, he will not make any treaty, enter into any engagement, deal in or correspond on political matters with, or send envoys to, any foreign State".

Clause 15, entitled "Sovereignty of the Ruler", provided that:

> "The prerogatives, power and jurisdiction of His Highness within the State of Johore shall be those which His Highness the Sultan of Johore possessed on the first day of December, 1941, subject nevertheless to the provisions of the Federation Agreement and this Agreement."

212. Malaysia indicates that Clause 4 of the Federation of Malaya Agreement, like Clause 3 of the Johor Agreement, provided that the British Crown had "complete control of the defence and of all the external affairs of the Federation". Clause 16 of the Federation of Malaya Agree-

ment provided that the executive authority of the Federation extended among their matters to "external affairs" including:

> "*(a)* the implementing of treaties, conventions and agreements with other countries or international organizations;
> *(b)* obligations of the Federation in relation to the British Empire and any part thereof".

Malaysia adds that the legislative power of the (Federal) Legislative Council also included those matters. Under Clause 48 it had power "to make laws for the peace, order and good government of the Federation with respect to the matters set out in the Second Schedule to this Agreement and subject to any qualifications therein".

213. Malaysia emphasizes the final phrase of this provision and the fact that the schedule in its second column does not provide for the conferral on the States or Settlements of authority in respect of external affairs. For Malaysia, these provisions meant that Johor "had no power, no competence to deal with matters pertaining to external affairs or to promulgate such laws".

214. For Singapore the issue is not whether the Acting State Secretary had the power to renounce, disclaim, or confirm title of any part of the territories of Johor. Rather its contention is "simply that, by declaring that Johor did not claim Pedra Branca, the . . . letter had the effect of confirming Singapore's title to Pedra Branca and of confirming that Johor had no title, historic or otherwise, to the island". It recalls that, as it said in its Memorial the "disclaimer" to which it refers can only be regarded as unequivocal recognition by Johor of Singapore's title. The solemn declaration by Johor was clear evidence supporting Singapore's sovereignty.

215. Nothing, says Singapore, turns on the Johor Agreement since the United Kingdom was not a "foreign State" in terms of its Clause 3 (2) and it would be absurd to require Johor to seek Britain's permission to correspond with Britain itself. Nor did the external affairs provision of Clause 4 of, and the second schedule to, the Federation of Malaya Agreement assist: there was no authoritative interpretation of the expression "external affairs" and in practice during the period of the Agreement Johor officials continued to correspond routinely with their counterparts in Singapore on matters under their charge. "By the same token, the 1953 letter did not encroach on the external affairs power of the Federation". Nor could it be seen as an exercise of "executive authority" over "External Affairs". None of the five high officials involved saw any problem with the Acting State Secretary handling the matter;

the maxim *omnia praesumuntur rite esse acta* applies to the 1953 letter.

216. Singapore also calls attention to the decision in 1952 of the Judicial Committee of the British Privy Council given on appeal from the Court of Appeal of Singapore based on a letter from the responsible British Minister, in which the Minister "categorically asserted" that the Rulers of the Malay States, including the Sultan of Johor, were independent sovereigns (*Sultan of Johor* v. *Tunku Abubakar* [1952] AC 318) and to Clause 155 of the Federation of Malaya Agreement which, like Clause 15 of the Johor Agreement (see paragraph 211 above), contains a provision about the "Sovereignty and jurisdiction of their Highnesses the Rulers": "Save as expressed herein, this Agreement shall not affect the sovereignty and jurisdiction of Their Highnesses the Rulers in their several States."

217. Malaysia's argument did not make it clear, according to Singapore, whether Malaysia was relying on the Federation of Malaya Agreement as a constitution or treaty. In either event, says Singapore, the effect of the 1953 letter in international law remains unchanged.

218. The Court considers that the Johor Agreement is not relevant since the correspondence was initiated by a representative of Her Britannic Majesty's Government which at that time was not to be seen as a foreign State and no question of its having to consent could arise; further, it was the British Adviser to the Sultan of Johor who passed the initial letter on to the Secretary of State of the Sultanate.

219. The Court is also of the view that the Federation of Malaya Agreement does not assist the Malaysian argument because the action of responding to a request for information is not an "exercise" of "executive authority". Moreover, the failure of Malaysia to invoke this argument, both throughout the whole period of bilateral negotiations with Singapore and in the present proceedings until late in the oral phase, lends support to the presumption of regularity invoked by Singapore.

220. As a consequence, the Court cannot uphold the Malaysian argument that the Acting State Secretary did not have the authority and capacity to write the 1953 letter. The Court now turns its attention to the contents of that letter.

221. The reply of Johor does not provide any document "relevant to the determination of the boundaries of the Colony's territorial waters" — the very reason, the Court recalls, for Singapore's request. In particular, Johor does not provide any documents relating to Pedra Branca/Pulau Batu Puteh or the lighthouse, specifically of lease, grant, cession or disposal. It does not challenge in any way whatever action the Colony might have been contemplating to propose in relation to the determination of its territorial waters around Pedra Branca/Pulau Batu Puteh. Rather it

refers to the rock (7.7 miles from its coast) as some 40 miles from Singapore (words used in Singapore's letter). It then, crucially, "inform[s]" the Colonial Secretary "that the Johore Government does not claim ownership of Pedra Branca".

222. It is true of course that in law "ownership" is distinct from "sovereignty", but the enquiry here was directed at Singapore's sovereignty over Pedra Branca/Pulau Batu Puteh. Johor does not put that matter in doubt in any way at all. In international litigation "ownership" over territory has sometimes been used as equivalent to "sovereignty" (see, e.g. *Territorial Sovereignty and Scope of the Dispute, Eritrea/Yemen* (1998) 22 *RIAA*, pp. 209, 219, para. 19 and pp. 317-318, para. 474).

223. In the Court's view, the Johor reply is clear in its meaning: Johor does not claim ownership over Pedra Branca/Pulau Batu Puteh. That response relates to the island as a whole and not simply to the lighthouse. When the Johor letter is read in the context of the request by Singapore for elements of information bearing on the status of Pedra Branca/Pulau Batu Puteh, as discussed above (see paragraphs 204-209), it becomes evident that the letter addresses the issue of sovereignty over the island. The Court accordingly concludes that Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.

224. As already indicated, the Court has given its primary attention in considering the 1953 correspondence to those matters of which both Parties had notice at the time — the Singapore request, the interim reply and the final Johor response. The steps taken by the Singapore authorities in reaction to the final response were not known to the Johor authorities and have limited significance for the Court's assessment of any evolving understanding shared by the Parties. The case file shows that, on receipt of the Johor reply, the Colonial Secretary of Singapore, on 1 October 1953, sent an internal memorandum to the Attorney-General saying that he thought that "[o]n the strength of [the reply], we can claim Pedra Branca . . .". The Attorney-General stated that he agreed and the Master Attendant, Marine, who had raised the issue on 6 February 1953, following earlier internal memoranda of 1952, was informed. The Singapore authorities, so far as the case file shows, took no further action. They had already received related communications from London, to which the Court now turns.

225. Internal Singapore correspondence of July 1953 indicates that the Foreign Office and Colonial Office in London were involved in a wider examination of issues relating to territorial waters, with the then recent Judgment of this Court in the *Fisheries* case *(United Kingdom* v. *Norway)*

(*Judgment, I.C.J. Reports 1951*, p. 116) constituting an important element (that Judgment was rendered on 11 December 1951). The conclusion reached in Singapore by the Colonial Secretary was that because of geographical circumstances, the colony would gain very little from the new methods of defining territorial waters. On the other hand, "an application of the new principles by neighbouring countries" could "only result in an undesirable restriction to fishing grounds normally used by Singapore fishermen". "For general reasons also any enclosure of the high seas by foreign States is contrary to the interest of this densely populated maritime Colony dependent on sea-borne trade." The internal letter of July 1953 concluded by mentioning an understanding reached on the former methods of defining territorial waters with Indonesia in July 1951, and a concern not to disturb the relationship which then existed between the Colony and Indonesia. In all the circumstances, the fact that the authorities in Singapore — or in London for that is where the final decision-making power lay — took no action at that time is not at all surprising.

226. To conclude its consideration of the 1953 correspondence, the Court refers to three related aspects of the way in which counsel for Singapore presented its submissions based on it. First, Singapore referred to the Johor reply as a "formal" or "express disclaimer of title"; second, it invoked estoppel; and, third, it contended that the reply was a binding unilateral undertaking.

227. Regarding the first submission, the Court does not consider the Johor reply as having a constitutive character in the sense that it had a conclusive legal effect on Johor. Rather it is a response to an enquiry seeking information. It will be seen that, in the circumstances, this submission is closely related to the third.

228. Regarding the second submission, the Court points out that a party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party's statement (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30). The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behaviour; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century. While some of the conduct in the 1970s, which the Court next reviews, has a different character, Singapore does not contend that those actions were taken in reliance on the Johor response given in its letter of 1953. The Court accordingly need not consider whether other requirements of estoppel are met.

229. Finally, on the third submission about the Johor reply amounting to a binding unilateral undertaking, the Court recalls that when it is claimed that "States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47). The Court also observes that the statement was not made in response to a claim made by Singapore or in the context of a dispute between them, as was the case in the authorities on which Singapore relies. To return to the discussion of the first submission, Johor was simply asked for information. Its denial of ownership was made in that context. That denial cannot be interpreted as a binding undertaking.

230. The above findings on Singapore's three additional arguments relating to the 1953 correspondence do not affect the Court's conclusion stated in paragraph 223 that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh and that in light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.

5.4.6. The conduct of the Parties after 1953

(a) *Investigation by Singapore of shipwrecks in the waters around Pedra Branca/Pulau Batu Puteh*

231. Singapore contends that it and its predecessors have exercised sovereign authority over Pedra Branca/Pulau Batu Puteh by investigating and reporting on maritime hazards and shipwrecks within the island's territorial waters. It says that the only Malaysian protest against this conduct was in 2003. It also refers to two notices to mariners issued in 1981 and 1983.

232. Malaysia responds that the United Nations Convention on the Law of the Sea and the Convention on the Safety of Life at Sea impose duties in respect of the investigation of hazards to the safety of navigation and the publication of information about such hazards. Inasmuch as Singapore acted to investigate and publish, it was acting in accordance with best practice and not *à titre de souverain* in respect of the island. Further, a lighthouse operator has certain responsibilities in those matters. Next, the circumstances of the particular investigations meant that the ability of Singapore to carry them out was not based on its sovereignty over the island. Finally, a number of the investigations occurred after 1980, when the dispute crystallized, and given the insubstantial nature of the earlier practice they cannot provide a foundation for Singapore's claim.

233. The first investigation to which Singapore refers was into a colli-

sion within 2 miles of the island in 1920 between British and Dutch vessels. (This is one of the instances referred to in paragraph 164 above where it is convenient to consider pre-1953 conduct at this stage.) The report of the investigation does not identify the jurisdictional basis on which it was undertaken. Of some significance for the Court is that the enquiry was undertaken by Singapore and not Johor. The next investigation Singapore invokes was into the grounding of a British vessel on a reef adjacent to the island in 1963, when, it will be recalled, Singapore was part of the Federation of Malaysia. According to Singapore, the only basis on which it could undertake the enquiry under its Merchant Shipping Ordinance was that the shipping casualty had occurred "on or near the coast of [Singapore]" which must be understood to be the island, given the distance from the grounding to the main island of Singapore. Malaysia responds in a general way, mentioning that the Ordinance provides other grounds of jurisdiction. While the points of Singapore law may be subject to dispute, again the Court would note that it was the authorities in Singapore, rather than those in Johor, that undertook the investigation. The last marine casualty occurring before 1980 and investigated by Singapore was the running aground of a Panamanian vessel off the island in 1979. The Court considers that this enquiry in particular assists Singapore's contention that it was acting *à titre de souverain*. This conduct, supported to some extent by that of 1920 and 1963, provides a proper basis for the Court also to have regard to the enquiries into the grounding of five vessels (three of foreign registry) between 1985 and 1993, all within 1,000 m of the island.

234. The Court accordingly concludes that this conduct gives significant support to the Singapore case. It also recalls that it was only in June 2003, after the Special Agreement submitting the dispute to the Court had come into force, that Malaysia protested against this category of Singapore conduct.

(b) *Visits to Pedra Branca/Pulau Batu Puteh*

235. Singapore invokes in support of its claim its exercise of exclusive control over visits to Pedra Branca/Pulau Batu Puteh and the use of the island. When appropriate, it has authorized access to the island by officials from Singapore as well as from other States including Malaysia. Among those visiting from Singapore were ministers, including the Minister of Communications and the Minister of Home Affairs, a member of Parliament, and military and police officials, activities which took place without any objection from Malaysia. Singapore gives particular emphasis to visits by Malaysian officials wishing to conduct scientific surveys. At no point, says Singapore, did Malaysia protest against Singapore's requiring those officials to obtain permits from it. Malaysia responds that this control is no more than the control regularly and properly exercised

by a lighthouse keeper over access to the lighthouse and its environs. The Standing Orders and Instructions relating to access to which Singapore refers are, Malaysia emphasizes, Orders and Instructions relating to every lighthouse operated by Singapore, including, for instance, that on Pulau Pisang.

236. The Court agrees with Malaysia that many of the visits by Singaporean personnel related to the maintenance and operation of the lighthouse and are not significant in the present case. As indicated, however, Singapore gives emphasis to visits by Malaysian officials, particularly in 1974 and 1978.

237. The 1974 case concerned a tidal survey by a team from Indonesia, Japan, Malaysia and Singapore over a seven to eight week period. An officer of the Port of Singapore Authority wrote to the Commanding Officer of the Royal Malaysian Navy survey vessel, K.D. *Perantau*. "In order to facilitate the necessary approval from the various government ministries concerned . . .", he asked for a list of the Malaysian members who would be staying at the lighthouse, seeking their names, passport numbers, nationality and the duration of their stay. They had in fact already arrived and interim permission was granted in the letter. The Malaysian Commanding Officer provided four names and their details. They would be at the lighthouse for another three months and were manning the Responder and Auditor and carrying out tide readings. Others would come for brief periods to replenish the Tide Team with food and water, to provide emergency repairs for the Responder and to carry out triangulation. Since it was a joint survey, a participant from the Port of Singapore Authority would be present at all times.

238. In 1978 the Malaysian High Commission in Singapore sought clearance for a Government vessel "to enter Singapore territorial waters" and inspect tide gauges over the course of three weeks. Among the points identified was Horsburgh lighthouse station. The project was consonant with the memorandum of understanding between Malaysia, Indonesia and Singapore on joint studies in the Straits of Malacca and Singapore. The Singapore Ministry of Foreign Affairs acceded to the request. Just a few weeks earlier, the light keeper "politely informed" two people who claimed to be from the Survey Department, West Malaysia and whose purpose was to carry out triangulation observations that they could not remain unless prior permission had been obtained from the Port of Singapore Authority. They left. Malaysia made no protest. The action did however cause concern in Kuala Lumpur. On 13 April 1978 the Counsellor in the Singapore High Commission there reported to his Ministry that a Principal Assistant Secretary at the Malaysian Ministry of Foreign Affairs had informed him that the Malaysian Government was "some-

what upset" over certain actions of Singapore concerning Horsburgh lighthouse island: "Firstly, Singapore had flown the Singapore flag over the island. Secondly, when certain Malaysian marine boats tried to dock on the island recently for some survey work, they were refused permission to land." The Malaysian official told his counterpart that his Government would be writing officially claiming sovereignty over Pedra Branca/Pulau Batu Puteh. As the Singapore Counsellor mentioned to his Ministry, this communication followed Singapore's agreement to the conduct of the joint survey.

239. In the Court's opinion, this Singaporean conduct is to be seen as conduct *à titre de souverain*. The permission granted or not granted by Singapore to Malaysian officials was not simply about the maintenance and operation of the lighthouse and in particular its protection. Singapore's decisions in these cases related to the survey by Malaysian officials of the waters surrounding the island. The conduct of Singapore in giving permission for these visits does give significant support to Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh.

(c) *Naval patrols and exercises around Pedra Branca/Pulau Batu Puteh by Malaysia and Singapore*

240. Both Parties contend that their naval patrols and exercises around Pedra Branca/Pulau Batu Puteh since the formation of their respective navies constitute displays of their sovereign rights over the island. Malaysia and Singapore both argue that these activities demonstrate each Party's understanding that the island was under its respective sovereignty. The Royal Malayan Navy, later to become the Royal Malaysian Navy, came under the control of the Malayan Government in 1958 following the independence of Malaya in the previous year. It continued to be based at the Woodlands Naval Base in Singapore Harbour until 1997. The Republic of Singapore Navy was formed in 1975 from units of the Maritime Command of the Singapore Armed Forces. Ships from both navies patrolled in the area of Pedra Branca/Pulau Batu Puteh.

241. The Court does not see this activity as significant on one side or the other. It first observes that naval vessels operating from Singapore harbour would as a matter of geographical necessity often have to pass near Pedra Branca/Pulau Batu Puteh. Next, patrols would frequently have been undertaken under (1) the 1957 Agreement between the United Kingdom and Malaya, with which Australia and New Zealand were associated, and under which Malaya had responsibilities in respect of the

defence of Singapore, (2) the 1965 Agreement relating to the Separation of Singapore from Malaysia under which Malaysia would afford reasonable and adequate assistance to the external defence of Singapore which in turn would afford to Malaysia its right to operate its bases in Singapore, and (3) the five power arrangements between Malaysia, Singapore, the United Kingdom, Australia and New Zealand. The integrated co-operative nature of this naval and other military activity is illustrated by the communiqué of the 1968 Conference of those five States which was called following the United Kingdom's decision to withdraw its troops from Malaysia and Singapore by 31 December 1971. It included this declaration:

> "The representatives of Singapore and Malaysia declared that the defence of the two countries was indivisible and required close and continuing co-operation between them. This declaration was welcomed by the representatives of the other three Governments. All representatives at the Conference regarded it as an indispensable basis for future defence co-operation. The representative of Malaysia and Singapore said that their Governments were resolved to do their utmost for their own defence and they would welcome the co-operation and assistance of the other three Governments."

The Court observes that patrols by the navies of both States and others which are described by the Parties only in general terms, cannot in these circumstances assist the one or the other in support of its position.

242. Malaysia also placed weight on an internal confidential document entitled "Letter of Promulgation" issued on 16 July 1968 by the Chief of the Malaysian navy, attached to which were charts indicating the outer limits of Malaysian territorial waters. One of the charts attached to the letter showed Pedra Branca/Pulau Batu Puteh and also Middle Rocks and South Ledge as within Malaysia's territorial waters. Singapore made a related reference to the 1975 Operations Instructions of the Singapore navy designating a patrol area in the vicinity of Pedra Branca/Pulau Batu Puteh.

243. The Court observes that the Malaysian chart and the Singaporean Instructions were acts of one Party, which were unknown to the other Party, the documents were classified and they were not made public until these proceedings were brought. The Court considers that, like the patrols themselves, neither can be given weight.

(d) *The display of the British and Singapore ensigns on Pedra Branca/Pulau Batu Puteh*

244. For Singapore, the flying of the British and Singapore ensigns

from Horsburgh lighthouse from the time of its commissioning to the present day is a clear display of sovereignty. This contention is supported, it says, by its positive response to a request in 1968 made by Malaysia that it "bring down the Singapore flag from Malaysian soil at Pulau Pisang". By contrast, no such request was made in respect of the flag on Pedra Branca/Pulau Batu Puteh.

245. Malaysia responds that the flying of an ensign, associated with maritime matters, is to be distinguished from the flying of the national flag. Ensigns are not marks of sovereignty but of nationality. Moreover, there must also be a showing of sovereign intent and Singapore has not demonstrated that here. The Pulau Pisang incident involved a matter of domestic political sensibility and it was resolved between the two Parties. It was not an acknowledgment of sovereignty in relation to an issue not under dispute, far removed from the location. Malaysia also makes the point that Pulau Pisang is much larger than Pedra Branca/Pulau Batu Puteh and has a small local population.

246. The Court accepts the argument of Malaysia that the flying of an ensign is not in the usual case a manifestation of sovereignty and that the difference in size of the two islands must be taken into account. It considers that some weight may nevertheless be given to the fact that Malaysia, having been alerted to the issue of the flying of ensigns by the Pulau Pisang incident, did not make a parallel request in respect of the ensign flying at Horsburgh lighthouse. As already mentioned the Malaysian authorities did in 1978 express concern about the flag at Horsburgh lighthouse (see paragraph 238 above).

(e) *The installation by Singapore of military communications equipment on the island in 1977*

247. In July 1976 the Singapore Navy explained to the Port of Singapore Authority its need, shared by the Singapore Air Force, for a military rebroadcast station on Pedra Branca/Pulau Batu Puteh to overcome communication difficulties. It wished to install two radio sets in the lighthouse, with a power source, and requested the co-operation of the Authority "in order that communications needs for both security and defence could be met". The Port Authority responded positively, making it clear that it had no responsibility for operating or maintaining the relay station: the station was exclusively for the use of the Navy which was responsible for its establishment and maintenance. The relay station was installed on 30 May 1977. Singapore says that the installation was carried out openly, involving the transportation of equipment by military helicopters which have also been involved in the maintenance of the station. This action, says Singapore, was obviously an exercise of their authority

disconnected from the operation of the lighthouse. Malaysia does not dispute that characterization; on the contrary this conduct by Singapore, in Malaysia's opinion "has raised serious concerns about Singapore's use of Horsburgh lighthouse for non-light (and especially military) purposes". In its Agent's words "[t]his conduct does not fall within the consent given for the construction and operation of the lighthouse". Malaysia also says that the installation was undertaken secretly and that it became aware of it only on receipt of Singapore's Memorial.

248. The Court is not able to assess the strength of the assertions made on the two sides about Malaysia's knowledge of the installation. What is significant for the Court is that Singapore's action is an act *à titre de souverain*. The conduct is inconsistent with Singapore recognizing any limit on its freedom of action.

(f) *Proposed reclamation by Singapore to extend the island*

249. In 1978 the Port of Singapore Authority, on the direction of the Government of Singapore studied the possibilities, which had also been considered in 1972, 1973 and 1974, of reclaiming areas around Pedra Branca/Pulau Batu Puteh. The Authority's survey contemplated a reclamation of 5,000 sq m of land — the island is about 8,560 sq m at low tide. At that time the communications tower for the Vessel Traffic Information System (VTIS) and the helipad which today occupy much of the eastern half of the island had not been constructed. The Authority sought tenders for "Reclamation and Shore Protection works at Horsburgh lighthouse" in a newspaper advertisement. Although three companies tendered for the project, the proposal was not taken further. According to Singapore, this was classic conduct *à titre de souverain*. Malaysia emphasizes the fact that the proposal was not taken further and the fact that some of the documentation on which Singapore relies was secret and could not have prompted any reaction from Malaysia. The Malaysian Agent makes the point that Singapore "does not need a bigger island for a better lighthouse. What does it need a bigger island for?" He then raises questions about the effect on the environment and on navigation and especially about security arrangements at the eastern entry to the Straits.

250. The Court observes that while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was public and attracted replies. Further, as the Malaysian Agent

recognizes, the proposed action, as advertised, did go beyond the maintenance and operation of the lighthouse. It is conduct which supports Singapore's case.

(g) *A Malaysian Petroleum Agreement 1968*

251. In 1968 the Government of Malaysia and the Continental Oil Company of Malaysia concluded an agreement which authorized the Company to explore for petroleum in the whole of the area of the continental shelf off the east coast of West Malaysia south of latitude 5° 00′ 00″ North "extending to the International Boundaries wherever they may be established"; the southern limits of the area were defined at "1° 13′" and "1° 17′ (approx.)", "but excluding the islands of the States [of Johore, Pahang and Trengganu] and an area three miles from the base lines from which the territorial waters of such islands are measured". According to counsel for Malaysia, the limits broadly followed the anticipated boundaries of the 1969 Indonesia-Malaysia Continental Shelf Agreement.

252. Malaysia submits that the Agreement is evidence of its appreciation that the entire concession area fell within its continental shelf, that it is actual conduct, conduct *à titre de souverain*, and that the agreement was concluded openly and was widely published; Singapore nevertheless made no protest. Singapore replies that it had no reason to protest. The map did not show Pedra Branca/Pulau Batu Puteh, not a matter of surprise since islands and their territorial waters were expressly excluded. Moreover, the description of the area covered was without prejudice to the question of boundaries where they had not been agreed. Further, the co-ordinates were not published and no exploration ever occurred in the area near Pedra Branca/Pulau Batu Puteh, an area which was part of a larger portion of the concession relinquished by the oil company.

253. Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight can be given to the concession.

(h) *The delimitation of Malaysia's territorial sea 1969*

254. By legislation of 1969 Malaysia extended its territorial waters from 3 to 12 nautical miles. The Ordinance declared that breadth was to be measured in accordance with provisions of the 1958 Geneva Convention on the Territorial Sea which were scheduled. Provisions were made for the publication by the Government of a large scale map indicating the low water marks, the base lines, the outer limits and the areas of territorial water of Malaysia, and for the modification of the areas of territorial waters in accordance with

any agreement concluded between Malaysia and any other coastal State.

255. Malaysia says that the legislation

> "extended Malaysian territorial waters to and beyond Pulau Batu Puteh. There was no sense at the time that Pulau Batu Puteh and its surrounding waters were anything other than Malaysian territory. The legislation drew no protest from Singapore."

Singapore answers that it had absolutely no reason to protest since the legislation did not identify in any way the territories, baselines, outer limits and areas of territorial waters. As soon as a chart was published, in 1979, relating in fact to the continental shelf rather than the territorial sea, Singapore did protest.

256. In the Court's opinion the very generality of the 1969 legislation means that Malaysia's argument based on it must fail. It does not identify the areas to which it is to apply except in the most general sense: it says only that it applies "throughout Malaysia". In terms of the legislation, necessary precision would come only with the publication "as soon hereafter as may be possible" of the large-scale map for which the legislation provided.

(i) *Indonesia-Malaysia Continental Shelf Agreement 1969 and Territorial Sea Agreement 1970*

257. Malaysia calls attention to the fact that one of the agreed boundary points in the 1969 Indonesia-Malaysia Continental Shelf Agreement was only 6.4 nautical miles from Pedra Branca/Pulau Batu Puteh. In a related press release the delegations of the two States recognized the need for their governments to discuss related problems of territorial sea boundaries, a matter the subject of a Territorial Sea Agreement concluded the following year. Singapore, Malaysia continues, did not at any point assert any interest in or raise any objection to this maritime delimitation. Singapore again says it was not obliged to react: the Agreement was *res inter alios acta* and, more significantly, the Agreement "carefully avoided any intrusion into the area in the vicinity of [Pedra Branca/Pulau Batu Puteh]". It also emphasizes that the press release clearly excludes the Strait of Singapore and for good reason: it was not possible for Indonesia and Malaysia to delimit their respective maritime areas in the Strait without the participation of Singapore "which has sovereignty over [Pedra Branca/Pulau Batu Puteh] and the adjacent features".

258. While Malaysia had, very recently, extended its territorial waters to 12 nautical miles, Singapore had not yet taken that step. Given that fact and the fact that the line stops 6.4 nautical miles to the east of Pedra Branca/Pulau Batu Puteh and begins again beyond the western end of the

Straits of Singapore, the Court does not consider that the 1970 Territorial Sea Agreement can have any significance in this case.

(j) *The Indonesia-Singapore Territorial Sea Agreement 1973*

259. The 1973 Indonesia-Singapore Territorial Sea Agreement determines a boundary line in the Straits of Singapore in the area south of the main island of Singapore but not extending for its full length. It does not refer to Pedra Branca/Pulau Batu Puteh or delimit the territorial sea between it and the Indonesian island of Pulau Bintan which lies 7.5 nautical miles to its south. For Malaysia this Agreement supports the conclusion that in 1973 Singapore did not consider it had sovereignty over Pedra Branca/Pulau Batu Puteh. It took no steps in the Agreement or by way of any statement to reserve its position in respect of the island. Singapore in reply contends that the agreement affects only a partial delimitation within the Straits of Singapore, one of the busiest shipping channels in the world. Further, a full delimitation would have required tripartite negotiations, involving Malaysia as well, and it was significant that the 1970 Indonesia-Malaysia Territorial Sea Agreement similarly did not deal with the area around Pedra Branca/Pulau Batu Puteh, as would have been expected had Malaysia considered the island to be part of its territory. The Court does not consider that the 1973 Agreement can be given any weight in respect of sovereignty over Pedra Branca/Pulau Batu Puteh. Like the Malaysia-Indonesia Agreements in 1969 and 1970, the issue is not covered in the 1973 Indonesia-Singapore Territorial Sea Agreement.

(k) *Inter-State co-operation in the Straits of Singapore*

260. Singapore invokes the joint statement relating to co-operation in the Straits of Malacca and Singapore adopted in 1971 by Indonesia, Malaysia and Singapore, and the new routing system adopted in 1977 by the Assembly of the Intergovernmental Maritime Consultative Organization. Singapore contends that the failure of Malaysia, when those documents were adopted, to express or reserve a claim to Pedra Branca/Pulau Batu Puteh is significant. The Court agrees with Malaysia's submission that the documents are not concerned with territorial rights but with the facilitation and safety of navigation through the Straits as a whole. The Court similarly does not see as significant for the purposes of the present proceedings the co-operation of the two Parties, in some cases with Indonesia and other States, in the Straits of Singapore, in implementing the traffic separation scheme, conducting joint hydrographic surveys, and promoting environ-

mental protection; that is not conduct concerned with territorial rights.

(l) *Official publications*

261. According to Malaysia, official publications of the Government of Singapore which describe its territory are notable for their absence of any reference to Pedra Branca/Pulau Batu Puteh among the approximately 60 islands that are included in those descriptions. The lists in *Singapore Facts and Pictures 1972* include islands which are even smaller, are uninhabited and which have lighthouses on them. It was not until 1992 that Pedra Branca/Pulau Batu Puteh was first included in that publication. Similarly the Annual Reports of the Rural Board of Singapore from 1953 to 1956 did not include it. In the 1927 Agreement, the Curfew Order of 1948 and the published lists, all official texts extending over 53 years to the critical date, when the Singapore authorities have evidently paid very close attention to the extent of their territory, there was never any indication that Pedra Branca/Pulau Batu Puteh was part of Singapore. Singapore replies that *Singapore Facts and Pictures* does not provide a legally comprehensive description of its territory but is a publication giving general information, providing a broad overview. Neither the 1972 nor 1992 editions were comprehensive, nor are they designed to be authoritative; they are for reference rather than having an administrative effect. Further, the 1972 list was of small islands "within the territorial waters" of the island of Singapore and omitted at least eight other islands which belonged to Singapore. The Rural Board Report of 1953 was intended to include all the neighbouring islands, some neighbouring islands were in fact omitted, and the impetus for the 1953 extension of the Board's jurisdiction was the revision of electoral boundaries. That was not relevant for the lighthouse crew who were stationed on Pedra Branca/Pulau Batu Puteh on rotation, a month at a time; and the other functions of the Rural Board were also not relevant to the island. Singapore points out in addition that Malaysia conveniently overlooks the fact that it cannot point to any contemporaneous official document in which Pedra Branca/Pulau Batu Puteh is listed as belonging to it. On the contrary, in 1953, the very year of the Rural Board's report which, Malaysia cites, its predecessor, Johor, expressly disclaimed ownership of Pedra Branca/Pulau Batu Puteh in official correspondence.

262. Given the purpose of the publications and their non-authoritative and essentially descriptive character, even if official, the Court does not consider that they can be given any weight.

263. The same is also true of a passage which Malaysia quotes from a monograph by J. A. L. Pavitt who was for many years the Director of Marine, Singapore. The book is *First Pharos of the Eastern Seas: Horsburgh Lighthouse*, published by the Singapore Light Dues Board in 1966. The passage reads in part as follows:

> "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."

Malaysia stresses that this undoubted authority distinguished between "aids 'in Singapore waters'" and "'the outlying stations'" of Horsburgh and Pulau Pisang and that he linked together those two lighthouses, suggesting they have a common status.

264. The Court agrees with Singapore's reading of the passage that the descriptions are simply geographical, the aids in "Singapore waters", are those in territorial and internal waters of the main island of Singapore, and they are contrasted with "outlying" stations, an apt description for facilities which are 33 and 43 miles distant from Singapore by contrast to Raffles and Sultan Shoal which are only 11 and 13 miles distant.

265. Singapore calls to the Court's attention the way in which Malaya and Malaysia referred in official publications to Singapore's collection of meteorological information on Pedra Branca/Pulau Batu Puteh. The Court has already observed that the fact of collection is no more than an aspect of the administration of a lighthouse (see paragraph 165 above). As Singapore points out, Malaya in 1959 listed Horsburgh lighthouse as one of the "Singapore" Stations, along with the Sultan Shoal and Raffles lighthouses. It further adds that Malaysia and Singapore listed Horsburgh lighthouse in the same way in a joint publication in 1966 (the year after Singapore had withdrawn from the Federation). By contrast Malaysia omitted any reference to it in 1967 when the two Parties began reporting meteorological information separately. The three reports list a number of stations in Johor. (Pulau Pisang does not appear in any of the lists.) Malaysia responds that Horsburgh lighthouse was a Singapore rainfall station; this is not an acknowledgment of sovereignty.

266. The Court does consider as significant in Singapore's favour the inclusion of Horsburgh lighthouse as a "Singapore" Station in the

1959 and 1966 reports and its omission from the 1967 Malaysian report.

(m) *Official maps*

267. The Parties referred the Court to nearly 100 maps. They agreed that none of the maps establish title in the way, for instance, that a map attached to a boundary delimitation agreement may. They do contend however that some of the maps issued by the two Parties or their predecessors have a role as indicating their views about sovereignty or as confirming their claims.

268. Malaysia emphasizes that of all the maps before the Court only one published by the Singapore Government included Pedra Branca/Pulau Batu Puteh as within its territory and that map was not published until 1995. Malaysia also refers to three maps published in 1926 and 1932 by the Surveyor-General of the Federation of Malay States and Straits Settlements which may indicate that the island is within Johor. If those maps have any significance, which the Court is inclined to doubt, that significance is by far outweighed by the more recent maps published by Malaya and Malaysia to which the Court now turns.

269. Singapore places considerable weight on six maps published by the Malayan and Malaysian Surveyor General and Director of National Mapping in 1962 (two maps), 1965, 1970, 1974 and 1975. Those maps include Pedra Branca/Pulau Batu Puteh with four lines of information under it:

> "Lighthouse 28,
> P. Batu Puteh,
> (Horsburgh),
> (SINGAPORE) or (SINGAPURA)."

Exactly the same designation "(SINGAPORE)" or "(SINGAPURA)" appears on the maps under the name of another island which unquestionably is under Singapore's sovereignty. Further, in a map in the same series relating to Pulau Pisang, the site of the other Singapore administered lighthouse, no similar annotation appears, that omission indicating that its inclusion has nothing to do with ownership or management of the lighthouse. Singapore argues that the six maps are significant admissions against interest by Malaysia.

270. Malaysia responds that (1) the annotating may be assessed differently, (2) maps do not create title, (3) maps can never amount to admissions except when incorporated in treaties or used in inter-State negotiations and (4) the maps in issue contained a disclaimer.

271. On Malaysia's first contention it does appear to the Court that the annotations are clear and support Singapore's position. On the second point, the Court sees strength in Singapore's more limited argument that the maps give a good indication of Malaysia's official position rather than being creative of title. On the third there is authority for the proposition that admissions may appear in other circumstances (e.g. *Frontier Dispute (Benin/Niger), I.C.J. Report 2005*, p. 119, para. 44). The disclaimer, the subject of the fourth Malaysian contention, says that the map must not be considered an authority on the delimitation of international or other boundaries. (The 1974 formula is a little different.) The Court is not here concerned with a boundary but with a distinct island and in any event as the Boundary Commission in the *Eritrea/Ethiopia* case said:

> "The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest." (Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002, p. 28, para. 3.28.)

272. The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.

5.5. Conclusion

273. The question to which the Court must now respond is whether in the light of the principles and rules of international law it stated earlier and of the assessment it has undertaken of the relevant facts, particularly the conduct of the Parties, sovereignty over Pedra Branca/Pulau Batu Puteh passed to the United Kingdom or Singapore.

274. The conduct of the United Kingdom and Singapore was, in many respects, conduct as operator of Horsburgh lighthouse, but that was not the case in all respects. Without being exhaustive, the Court recalls their investigation of marine accidents, their control over visits, Singapore's installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de souverain*, the bulk of them after 1953. Malaysia and its predecessors did not respond in any way to that conduct, or the other conduct with that character identified earlier in this

Judgment, of all of which (but for the installation of the naval communication equipment) it had notice.

275. Further, the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more. And, when official visits (in the 1970s for instance) were made, they were subject to express Singapore permission. Malaysia's official maps of the 1960s and 1970s also indicate an appreciation by it that Singapore had sovereignty. Those maps, like the conduct of both Parties which the Court has briefly recalled, are fully consistent with the final matter the Court recalls. It is the clearly stated position of the Acting Secretary of the State of Johor in 1953 that Johor did not claim ownership of Pedra Branca/Pulau Batu Puteh. That statement has major significance.

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

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

6. Sovereignty over Middle Rocks and South Ledge

6.1. Arguments of the Parties

278. As stated earlier (see paragraph 18 above), Middle Rocks and South Ledge are maritime features located respectively at 0.6 and 2.2 nautical miles from Pedra Branca/Pulau Batu Puteh and 8.0 and 7.9 nautical miles from the Malaysian mainland. It is common ground between the Parties that Middle Rocks consist of some rocks that are permanently above water and stand 0.6 to 1.2 m high, whereas South Ledge is a low-tide elevation.

279. Singapore's position is that sovereignty in respect of Middle Rocks and South Ledge goes together with sovereignty over Pedra Branca/Pulau Batu Puteh. Thus, according to Singapore, whoever owns Pedra Branca/Pulau Batu Puteh owns Middle Rocks and South Ledge, which, it claims, are dependencies of the island of Pedra Branca/Pulau

Batu Puteh and form with the latter a single group of maritime features. Singapore advances specifically the following two theses:

> "*(a)* first, both Middle Rocks and South Ledge form geographically and morphologically a single group of maritime features; and
>
> *(b)* second, Malaysia is unable to show that it has appropriated these maritime features through any acts of sovereignty. Since these uninhabited, unoccupied reefs have never been independently appropriated by Malaysia, they belong to Singapore by virtue of them falling within Singapore's territorial waters generated by Pedra Branca."

280. In support of the first argument, Singapore quotes the following dictum from the *Island of Palmas* case:

> "As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest." (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II (1949), p. 855.)

281. It further cites the Judgment of a Chamber of this Court in the *El Salvador/Honduras* case, where the Chamber stated, in applying the test of "effective possession and control", that:

> "As regards Meanguerita the Chamber does not consider it possible, in the absence of evidence on the point, that the legal position of that island could have been other than identical with that of Meanguera." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 579, para. 367.)

282. As a further justification for treating Pedra Branca/Pulau Batu Puteh and its dependencies as a group, Singapore relies upon the geomorphological evidence that the three features of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge form a single physical unit. It claims that geological examination of rock samples taken from Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge shows that the three features are constituted with the same rock type (namely, a light, coarse-grained biotite granite), which shows that the three features belong to the same rock body.

283. In support of the second argument, Singapore argues that both Middle Rocks and South Ledge are not capable of independent appropriation, and that even if Middle Rocks can be regarded as "islands capable of autonomous appropriation, *quod non*", Malaysia is "unable to show any exercise of sovereignty over Middle Rocks to establish a title to them", while Singapore claims that it has constantly and consistently

exercised sovereign authority in the surrounding waters. In such circumstances, Singapore concludes that as sovereignty over Pedra Branca/Pulau Batu Puteh clearly belongs to Singapore, so does sovereignty over Middle Rocks and South Ledge which fall within the territorial waters of Pedra Branca/Pulau Batu Puteh.

284. Malaysia on the other hand argues that these three features of Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge do not constitute one identifiable group of islands in historical or geomorphological terms. It specifically claims that the historical record shows 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, while the three features were identified as a danger to shipping which should be avoided by sailing well to the north or south.

285. On this basis, Malaysia claims that Middle Rocks and South Ledge have always been considered as features falling within Johor/Malaysian jurisdiction. According to Malaysia, they were under Johor sovereignty at the time of the 1824 Anglo-Dutch Treaty and fell within the British sphere of influence under that Treaty.

286. With regard to the exercise of sovereignty over them by Malaysia, Malaysia argues that it exercised consistent acts of sovereignty over them, within the limits of their character. By way of illustration, it refers to the use of and the granting of oil concessions by the Malaysian Government in 1968 which extended to the area of South Ledge and Middle Rocks, to the fact that South Ledge was taken as a base point in defining the outer limit of Malaysian territorial waters in the chartlet attached to the Letter of Promulgation dated 16 July 1968 by the Chief of Navy (see paragraphs 242 and 251-252 above). It also refers to the fact that the features were included within Malaysian fisheries waters under the 1985 Fisheries Act.

287. Malaysia contends that by contrast Singapore not only failed to protest against Malaysia's manifestations of sovereignty, as mentioned above, but did not advance any claims of its own to Middle Rocks and South Ledge either, even after Singapore began to assert that Pedra Branca/Pulau Batu Puteh was Singaporean. Thus it argues that on the occasion when Singapore claimed sovereignty over Pedra Branca/Pulau Batu Puteh for the first time in 1980, no reference was made to South Ledge and Middle Rocks — although both features clearly appeared within Malaysian territorial waters in the map published by Malaysia on 21 December 1979 — and that as the same situation was repeated later when Malaysia issued a reprint of the same map in 1984, Singapore's protest against the map in 1989 was exclusively limited to Pedra Branca/Pulau Batu Puteh.

6.2. Legal status of Middle Rocks

288. With respect to these contentions of the two sides, the Court wishes to observe first of all that the issue of the legal status of Middle Rocks is to be assessed in the context of the Court's reasoning on the principal issue in the present case, namely the legal grounds on which the Court has come to decide on the issue of title to Pedra Branca/Pulau Batu Puteh, as stated above.

289. As the Court has stated above (see paragraphs 273-277), it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the present case. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct reviewed in the preceding part of the Judgment which has led the Court to the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh passed to Singapore or its predecessor before 1980 has any application to the cases of Middle Rocks and South Ledge.

290. Since Middle Rocks should be understood to have had the same legal status as Pedra Branca/Pulau Batu Puteh as far as the ancient original title held by the Sultan of Johor was concerned, and since the particular circumstances which have come to effect the passing of title to Pedra Branca/Pulau Batu Puteh to Singapore do not apply to this maritime feature, original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor, unless proven otherwise, which the Court finds Singapore has not done.

6.3. Legal status of South Ledge

291. With regard to South Ledge, however, there are special problems to be considered, inasmuch as South Ledge, as distinct from Middle Rocks, presents a special geographical feature as a low-tide elevation.

292. Article 13 of the United Nations Convention on the Law of the Sea provides as follows:

> "1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

293. Malaysia asserts the fact that South Ledge, which lies 1.7 nautical

miles from Middle Rocks and 2.2 miles from Pedra Branca/Pulau Batu Puteh, would attach to Middle Rocks rather than to Pedra Branca/Pulau Batu Puteh, for the simple reason that it is located within the territorial sea appertaining to Middle Rocks. Malaysia, citing the following passage from the Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*: "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself . . ." (*Merits, Judgment, I.C.J. Reports 2001*, p. 101, para. 204), claims that it has sovereignty over South Ledge.

294. Singapore argues that "contrary to Middle Rocks, South Ledge is a low-tide elevation which, as such, cannot be subject to separate appropriation". In its support, Singapore also cites a passage from the Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, as confirmed in the recent Judgment of the Court in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*Judgment, I.C.J. Reports 2007*, p. 704, para. 144).

295. The Court notes that the issue of whether a low-tide elevation is susceptible of appropriation or not has come up in its jurisprudence in the past. Thus in the *Qatar* v. *Bahrain* case, the Court made the following observation:

> "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself . . . The decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 101, para. 204.)

296. The Court went on to say as follows:

> "International treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations . . .
>
> The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-

> tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 101-102, paras. 205-206.)

297. In view of its previous jurisprudence and the arguments of the Parties, as well as the evidence presented before it, the Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia. In this regard the Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks.

298. The Court recalls that in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.

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

* * *

7. Operative Clause

300. For these reasons,

THE COURT,

(1) By twelve votes to four,

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

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

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

(2) By fifteen votes to one,

Finds that sovereignty over Middle Rocks belongs to Malaysia;

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

AGAINST: *Judge* ad hoc Sreenivasa Rao;

(3) By fifteen votes to one,

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

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

AGAINST: *Judge* Parra-Aranguren.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-third day of May, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Malaysia and the Government of the Republic of Singapore, respectively.

(Signed) Awn Shawkat AL-KHASAWNEH,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge RANJEVA appends a declaration to the Judgment of the Court; Judge PARRA-ARANGUREN appends a separate opinion to the Judgment of the Court; Judges SIMMA and ABRAHAM append a joint dissenting opinion to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* SREENIVASA RAO appends a separate opinion to the Judgment of the Court.

(Initialled) A.K.
(Initialled) Ph.C.