

REPLY OF SINGAPORE

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2	Pre-Colonial Malay World according to Andaya	<i>after</i> p. 10
3	Extract from British Admiralty Chart of area around Labuan <i>annotated</i> by Singapore to show that there are no islands to the west and north of Labuan within 10 geographical miles	<i>after</i> p. 14
4	Toponym Map	<i>after</i> p. 20
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6	Chart of the Vicinity of Horsburgh Lighthouse and Adjacent Malayan Coast, by J.T. Thomson (1851) <i>annotated</i> to show distances from the Malayan coast	<i>after</i> p. 40
7	Photograph of Pedra Branca showing Various Structures on the Island	<i>after</i> p. 104
8	Comparison of the Johor State Flag with British Ensigns	<i>after</i> p. 148
9	Map showing Singapore Navy's Patrol Sector F5 and location of Naval Incidents Mentioned in this Chapter	<i>after</i> p. 158
10	Map showing location of Shipping Accidents mentioned in this Chapter	<i>after</i> p. 160
11	Sketch map attached to the Malaysian High Commission's letter of 26 March 1980 (SM Annex 145), <i>annotated</i> to show mainland Singapore, the approximate position of Pedra Branca, and the intended routing of the submarine cable	<i>after</i> p. 192
12	Photographs of Official Plaque at Cape Rachado Lighthouse	<i>after</i> p. 200
13	Malaysian Map Admission Against Interest (from Series L7010)	<i>after</i> p. 218
14	Extract from Map Sheet in Series L7010 showing area around Pulau Pisang	<i>after</i> p. 218
15	Dutch Chart showing Pedra Branca and Middle Rocks surrounded by a single line	<i>after</i> p. 270

CHAPTER I INTRODUCTION

1.1 This Reply is filed in accordance with the Order of the Court dated 1 February 2005. Pursuant to Article 49(3) of the Rules of Court, Singapore's Reply is directed to bringing out the issues which continue to divide the Parties. To this end, Singapore will summarise her case and will respond to arguments made by Malaysia in her Counter-Memorial.

A. The Case in Perspective

1.2 When viewed in its overall context, the present case is straightforward. The positions of the Parties have been set out in their previous pleadings and the factual record is well documented.

1.3 Singapore has shown that her predecessor in title, the United Kingdom, acquired title to Pedra Branca in the period 1847-1851 when the British Crown took lawful possession of the island in connection with building a lighthouse on it. Thereafter, the United Kingdom and, subsequently, Singapore, have engaged in the effective administration and control of the island for over 150 years in the maintenance of that title.

1.4 Malaysia bases her claim on an "original title" said to have vested in the Johor-Riau-Lingga Sultanate from "time immemorial".¹ Quite apart from the fact that there is no evidence supporting this "original title", Malaysia has not been able to point to a single sovereign act either she, or her predecessors, ever took on Pedra Branca whether before 1847 or afterwards.

¹ Following the usage in the Singapore Counter-Memorial ("SCM"), this Reply will use the term "Johor-Riau-Lingga Sultanate" to refer to the political entity which existed from 1511 to 1824 and the term "State of Johor" or "mainland Johor" to refer to the new political entity emerging in the Malay Peninsula after 1824. Unless the context indicates otherwise, the single word "Johor" is used in this Reply to refer to the State of Johor. *See also* SCM pp. 14-15, paras. 2.8-2.10.

1.5 The following Chapters will review these matters in further detail. For present purposes, it may be helpful to summarise the essential elements of each Party's case.

1. SINGAPORE'S CASE

1.6 Singapore's case is based on seven basic propositions. Each of these propositions is fully supported by the contemporaneous evidence and by the relevant legal authorities. The seven propositions are:

- (a) During the period from 1847-1851, the British Crown established sovereignty over Pedra Branca on the basis of the lawful possession and effective occupation of the island. Prior to 1847, Pedra Branca, which is a very small feature, was uninhabited and had never been the subject of a prior claim or act of State authority by any sovereign entity.
- (b) The British possession of Pedra Branca was open and peaceful. It did not depend on the permission of Johor or any other State, and it was not protested. There were no competing acts on the island by any other State.
- (c) Following the acquisition of title by the British Crown, that title has been confirmed on the ground by an open, continuous and effective display of State authority undertaken, first, by the United Kingdom and, subsequently, by Singapore. These activities have been undertaken *à titre de souverain* on and around Pedra Branca. They were adapted to the nature of the territory concerned, and they continue to the present.
- (d) At no time prior to 1979, when Malaysia advanced a claim for the first time, did Johor or Malaysia protest any of Singapore's

effectivités on Pedra Branca. Neither Johor nor Malaysia ever carried out a single sovereign act on the island.

- (e) Singapore's title was recognised by various Malaysian acts as well as by the conduct of third parties.
- (f) In 1953, Johor expressly disclaimed ownership over Pedra Branca in formal written correspondence to Singapore.
- (g) Both Middle Rocks and South Ledge, the latter of which is a low-tide elevation, are situated within Pedra Branca's territorial sea. Neither feature has been the subject of any Malaysian sovereign act, and both belong to Singapore by virtue of Singapore's sovereignty over Pedra Branca.

1.7 Singapore has thus presented a coherent case which flows naturally from the entire factual record relating to Pedra Branca. Sovereignty was acquired over Pedra Branca from 1847-1851, and Singapore has acted in her capacity as sovereign ever since. Malaysia's conduct – both her silence in the face of Singapore's activities and the disclaimer of ownership to Pedra Branca in 1953 – is fully consistent with Singapore's title. Prior to 1979, Malaysia and her predecessors never claimed the island and never acted in any way which suggested that she possessed title. Indeed, Malaysia published a series of official government maps which expressly attributed Pedra Branca to Singapore.

2. MALAYSIA'S CASE

1.8 Malaysia's case is based on a sole proposition: that Johor possessed an "original title" to Pedra Branca and that nothing has happened to change that situation. This thesis has no support on the basis of the facts. Malaysia has failed to produce any evidence of a claim by the Johor-Riau-Lingga Sultanate or the State of Johor to Pedra Branca, or any evidence of an act of sovereign

authority that Johor (or Malaysia) carried out on Pedra Branca at any time. In short, there is not a shred of evidence that Johor ever had the intention (*animus*) to claim sovereignty over Pedra Branca or engaged in State activities (*corpus*) on the ground.

1.9 Once Malaysia's plea of "original title" is dismissed – as it must be – there is nothing remaining of her case. This underscores a remarkable feature of this case. Malaysia claims title to territory on which neither she, nor her predecessor Johor, ever set foot in any sovereign capacity. She also claims title to territory as to which she expressly disclaimed ownership in 1953. At the same time, Malaysia challenges Singapore's title when that title is based on the effective occupation and possession of the island, and more than 130 years² of unimpeded administration of the territory thereafter.

1.10 Given the absence of any "original title" to Pedra Branca, Malaysia's claim to Middle Rocks and South Ledge must also fail. Malaysia strangely argues that these two features are separate and distinct from Pedra Branca, and that Singapore is simply trying to enlarge her territory as much as possible by claiming them. There is no justification for this contention, and no independent basis of title over either feature other than as a result of their appurtenance to Pedra Branca and location within Pedra Branca's territorial sea. Singapore can only surmise that Malaysia has been forced to separate Middle Rocks and South Ledge from Pedra Branca because she recognises the fundamental weakness of her claim to Pedra Branca. The effort is artificial and does nothing to advance Malaysia's case.

² Two time periods – "130 years" and "150 years" – will be referred to in this Reply. Unless the context indicates otherwise, the phrase "130 years" refers to the period from the initial occupation of Pedra Branca by the British Crown (1847) to the date Malaysia first made a paper claim to Pedra Branca (1979), while the phrase "150 years" refers to the period from the initial occupation of Pedra Branca by the British Crown to the signing of the Special Agreement to refer the present dispute to the Court (2003).

B. The Structure of this Reply

1.11 Singapore's Reply is divided into ten chapters including this introduction. The remaining chapters are organised as follows:

- (a) Chapter II will address the lack of any basis for Malaysia's claim to an "original title".
- (b) Chapter III then turns to the underlying basis of Singapore's title: the lawful possession and effective occupation of Pedra Branca by the British Crown in 1847-1851.
- (c) Chapter IV discusses the wide range of State activities that Singapore engaged in on Pedra Branca and within its territorial waters after 1851, and rebuts Malaysia's contention that these activities were not undertaken *à titre de souverain*.
- (d) Chapter V then examines the total absence of any Malaysian acts of sovereignty on Pedra Branca, in contrast to Singapore's conduct.
- (e) Chapter VI addresses Malaysia's conduct, including her own officially prepared maps, which recognised Singapore's sovereignty over Pedra Branca.
- (f) Chapter VII takes up the significance of Malaysia's specific disclaimer of ownership of Pedra Branca in 1953.
- (g) Chapter VIII reviews the practice of third States and parties which further evidences Singapore's sovereignty over Pedra Branca as a matter of general repute.
- (h) Chapter IX deals briefly with maps and shows how, with the exception of the official Malaysian maps specifically attributing

Pedra Branca to Singapore, the map evidence adds nothing to the case.

- (i) Chapter X completes Singapore's Reply by addressing the question of sovereignty over Middle Rocks and South Ledge.

1.12 A Summary of Reasoning is provided at the end of this Reply in accordance with the Court's Practice Direction II. This is followed by Singapore's Submissions.

1.13 In addition, the Reply is accompanied by 2 volumes of documentary annexes containing materials which have been recently-discovered or which are necessary to rebut new arguments in Malaysia's Counter-Memorial. Also enclosed with this Reply is a compact disc containing a sound recording of remarks made by Malaysia's Prime Minister at a press conference held on 13 May 1980.

CHAPTER II MALAYSIA HAS FAILED TO PROVE AN “ORIGINAL TITLE”

2.1 Malaysia’s entire case rests on her contention that Johor possessed an “original title” to Pedra Branca. Singapore’s Counter-Memorial has demonstrated how Malaysia has failed to produce a single piece of evidence to support that contention.³ Malaysia’s Counter-Memorial repeats the same theme of an “original title”,⁴ but adds nothing new of substance to assist her case. Thus, despite two rounds of written pleadings, Malaysia has still been unable to produce any evidence whatsoever that Johor had ever displayed an intention to claim sovereignty over Pedra Branca or ever carried out a single sovereign act on the island, whether before 1847-1851 or at any time after that.

2.2 The present Chapter will respond to the additional points raised in Chapter 2 of Malaysia’s Counter-Memorial. In particular, this Chapter:

- (a) shows once again that not only has Malaysia failed to substantiate her claim to an “original title” over Pedra Branca, she has also effectively admitted that there is no such evidence; and
- (b) reinforces Singapore’s contention, as amply demonstrated in her Counter-Memorial, that Pedra Branca had never been at any time a territorial possession of Johor.

Section I. Malaysia’s Claim that Pedra Branca “Was Not *Terra Nullius*” Has No Basis

2.3 In Chapter 2 of her Counter-Memorial (Section A), Malaysia reiterates her claim to an “original title” over Pedra Branca and, as a corollary, that Pedra Branca was not *terra nullius*. The additional elements purporting to support

³ SCM Chapter IV.

⁴ MCM Chapter 2.

Malaysia's claims are set out in paragraphs 16-26 of her Counter Memorial, and may be summarised as follows:

- (a) Pedra Branca “was part of the Malay world”,⁵ “in the centre of the region that constituted the Sultanate of Johor”⁶ and a well known geographical feature, much used by mariners as a navigational guide;⁶ and
- (b) the 1847 Anglo-Brunei treaty concerning Labuan ceded a 10-mile territorial sea, leading Malaysia to surmise that all islands within 10 miles of peninsular Johor were not *terra nullius*.⁷

2.4 The remainder of Chapter 2 of Malaysia's Counter-Memorial comprises:

- (a) a repetition of Malaysia's arguments based on the social and political consequences of the 1824 Anglo-Dutch Treaty,⁸ augmented by a totally misleading reference to an irrelevant account of a voyage by a 19th century Vietnamese envoy;⁹
- (b) a reiteration of Malaysia's arguments on the territorial limits of the Crawford Treaty;¹⁰ and
- (c) an attempt to dismiss as insignificant evidence, the attribution of Pedra Branca as a dependency of Singapore during the official ceremony for laying the Horsburgh Lighthouse foundation stone.¹¹

⁵ MCM pp. 3-4, para. 5.

⁶ MCM p. 11, para. 19.

⁷ MCM p. 16, para. 26.

⁸ MCM pp. 21-22, paras. 33-36, basically repeating arguments made earlier in MM pp. 22-24, paras. 49-53.

⁹ MCM pp. 22-23, para. 37.

¹⁰ MCM pp. 24-25, paras. 39-42, basically repeating arguments made earlier in MM pp. 24-26, paras. 54-56.

2.5 Singapore will first address Malaysia's new points as summarised in paragraph 2.3 above and then address the remaining points.

A. MALAYSIA'S ARGUMENT THAT PEDRA BRANCA WAS PART OF
THE "MALAY WORLD" IS MEANINGLESS

2.6 In her Counter-Memorial, Malaysia reasons that Pedra Branca was not *terra nullius* because it:

“was part of the Malay world; its waters were fished by Malay fishermen; Malay pilots used it for navigational purposes; it was on almost every map.”¹²

The matters mentioned in this statement have no probative value as evidence of the status of Pedra Branca, especially when Malaysia has failed to provide the relevant historical context. *First*, the expression “Malay world” has only a vague geographical connotation and no political or legal significance. It has come into general use as a convenient way to describe parts of South East Asia – i.e., most of present-day Malaysia, Singapore, Brunei, Indonesia and southern Philippines – which are inhabited by Muslim peoples with a similar life-style and speaking Malay-type languages.¹³ *Secondly*, the reference to fishing by Malay fishermen also adds nothing to Malaysia's case as Singapore has shown

¹¹ MCM pp. 26-27, paras. 43-47. This point will be addressed in Chapter III *below*.

¹² MCM p. 4, para. 5.

¹³ See Tarling N., *Piracy and Politics in the Malay World* (1962), at p. 20, where the Malay world is described as including Johor, Aceh, Brunei, Sulu and Mindanao. Relevant extracts are attached to this Reply as Annex 32. See also:

(a) the sketch map in Milner's *Kerajaan* entitled *The Malay World of the Early Nineteenth Century* (**Insert 1 overleaf**) which stretched from southern Thailand in the north to Java in the south, and from Aceh (Sumatra) in the west to beyond Borneo and includes the Sulu Sea and Celebes in the east.

(b) a similar sketch map in Andaya's *A History of Malaysia* entitled *Pre-Colonial Malay World* (**Insert 2 overleaf**) which stretches all the way to the Philippines and New Guinea.

that the waters of Pedra Branca were accessible to fishermen from all parts of the region and in any case the fishing referred to by Malaysia is of a private nature.¹⁴

2.7 *Thirdly*, the assertion that Malay pilots had used Pedra Branca as a navigational reference point has no bearing on whether the island was *terra nullius*. A navigational reference point is just that – a navigational reference point. There is no rule of international law that usage of a physical feature as a navigational reference point supports a claim to sovereignty. In any event, in the case of Pedra Branca, that island has, from the earliest times to the present day, served as a navigational reference point to mariners of *all* nations, not just subjects of Johor. Hence no conclusion concerning sovereignty can be drawn from such non-exclusive usage of Pedra Branca as a navigational reference point.

2.8 *Fourthly*, the claim that Pedra Branca “was on *almost* every map” is irrelevant, even if true. What is noteworthy for the purpose of this case is the fact that, of the many maps which depict Pedra Branca, none attributed Pedra Branca to either the Johor-Riau-Lingga Sultanate or the State of Johor.¹⁵ Malaysia’s reliance on these factors merely demonstrates the absence of evidence supporting her claim that Pedra Branca was not *terra nullius*.

2.9 Malaysia’s assertion that “[e]vidently” Pedra Branca was not *terra nullius* as it “... is clearly situated in the centre of the region that constituted the Sultanate of Johor...”¹⁶ is vague and in any case amounts to a *non sequitur* – the mere location of Pedra Branca within an ill-defined “region” has no implications for the question of sovereignty. As Singapore has pointed out in her Counter-Memorial, even where an island at Point A and another island at Point B

¹⁴ See at paras. 5.4-5.7 *below*; and SCM p. 68, para. 4.57.

¹⁵ See analysis of early maps in SCM pp. 217-219, paras. 9.7-9.11; and SCM pp. 237-238, paras. 9.42-9.44; as well as Chapter IX of this Reply *below*.

¹⁶ MCM pp. 11-12, para. 19.

belonged to a sultanate, it did not follow that all islands in between *also* belonged to that sultanate.¹⁷

2.10 Malaysia cites the cases of *Western Sahara* and *Island of Palmas*.¹⁸ However, both of these cases are entirely consistent with the notion that Pedra Branca was *terra nullius*. The *Island of Palmas* case involved an inhabited island. The *Western Sahara case* decided that “territories *inhabited* by tribes or peoples having a social and political organization were not regarded as *terra nullius*”.¹⁹ In comparison, Pedra Branca was an *uninhabited* island which had never been the subject of any prior claim or acts of ownership by any sovereign entity. It was, in the words of the Court in the *Western Sahara case*, “*terra nullius* – a territory belonging to no-one”.

2.11 For the reasons given above, Malaysia’s assertions that Pedra Branca “was part of the Malay world; its waters were fished by Malay fishermen; Malay pilots used it for navigational purposes; it was on almost every map”,²⁰ are wholly irrelevant to determining whether Pedra Branca was *terra nullius*. What is relevant is that Malaysia has been unable to point to any claim or activity which relates specifically to Pedra Branca or shows that it was not *terra nullius*.

B. THE LABUAN CESSION IS IRRELEVANT TO DETERMINING THE STATUS OF PEDRA BRANCA

2.12 Malaysia next relies on the clause confirming the cession of Labuan in the treaty of 27 May 1847 between Britain and the Sultan of Brunei (“the Brunei

¹⁷ SCM p. 48, para. 4.20.

¹⁸ MCM p. 11, paras. 17-18.

¹⁹ *Western Sahara*, Advisory Opinion [1975] ICJ Rep 6, at p. 39, para. 80, cited in MCM p. 11, para. 17.

²⁰ MCM pp. 3-4, para. 5.

Treaty”).²¹ Malaysia argues that because this clause relating to Labuan, like the Crawford Treaty in relation to Singapore, refers to the distance of 10 geographical miles:

“... it can already be concluded that *islands within ten geographical miles from the coast in this region were not considered terra nullius*. This applies as much to PBP, Middle Rocks and South Ledge and the islets and rocks around Singapore as it does to Labuan and the islets and rocks around it.”²² [emphasis added]

In this passage, Malaysia employs the vague and amorphous phrase “not considered *terra nullius*”. She appears to be suggesting that there was an established regional custom that all islands within 10 miles from an inhabited coast were not *terra nullius*. Any such suggestion would be baseless as the truth is that there was no such regional custom, and the British Government never recognised the existence of any such regional custom.

2.13 The fact that the Crawford Treaty of 1824 and the Brunei Treaty of 1847 both contain expressions referring to 10 geographical miles from the coast of Singapore and Labuan respectively does not support Malaysia’s conclusion. As the discussion which follows demonstrates:

- (a) out of the many treaties concluded by various European powers with the rulers of this region, Malaysia is able to find only two treaties which refer to the distance of 10 geographical miles – these two isolated treaties cannot support the very sweeping conclusions which Malaysia seeks to make;
- (b) the two treaties each referred to the distance of 10 miles for its own particular reasons, and not out of any general British recognition of

²¹ MCM pp. 13-16, paras. 22-26.

²² MCM p. 16, para. 26.

a regional custom concerning the distance of 10 geographical miles.

2.14 In the case of *the Crawford Treaty*, the geographical consideration was that there was a continuous chain of islets to the south of Singapore. The southern-most islets in this chain were Rabbit and Coney islets, lying 10 miles from the coast of the main Island of Singapore. As Crawford explained in his letter of 3 August 1824 to the Government in India:

“Government will have the goodness to notice that the cession made is not confined to the main island of Singapore alone, but extends to the Seas, Straits and Islets (the latter probably not less than 50 in number) within ten geographical miles of this coasts; not however including any portion of the Continent. Our limits will in this manner embrace the Old Straits of Singapore; *and the important passage of the Rabbit and Coney, the main channels through the Straits of Malacca*, and the only convenient one from thence into the China Seas.”²³ [emphasis added]

2.15 The case of *Labuan* is entirely different. The Brunei Treaty specifies a limit of 10 geographical miles to the *north* and *west* of Labuan.²⁴ However, there is *not a single island* to the north and west of Labuan within these limits.²⁵ There is therefore no basis at all for Malaysia’s assertion that the drafting of the Labuan Treaty was motivated by any thought or consideration concerning the status of *islands* within 10 miles of the mainland coast.

2.16 This conclusion is confirmed by the negotiating history of the Brunei Treaty. Prior to the signing of the treaty, the British Foreign Office gave the

²³ Letter from Crawford J. (Resident of Singapore) to Swinton G. (Secretary to the Government in India) dated 3 Aug 1824 (SCM Vol. 2, Annex 3, p. 28).

²⁴ See Treaty of Friendship and Commerce between Great Britain and Borneo (Brunei), 27 May 1847: in J. de V. Allen, A.J. Stockwell and L.R. Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963* (Oceana Publications Inc., London, 1981), vol. 11, pp. 401-405 (MCM Vol. 3, Annex 21), at Art. X.

²⁵ See extract from British Admiralty Chart in **Insert 3 overleaf**, annotated by Singapore to show that there are no islands to the west and north of Labuan within 10 geographical miles.

following instructions to Commissioner James Brooke, the official on the scene, when transmitting the draft treaty to him:

“You will observe that in the 10th article, which confirms the cession of Laboan, it is proposed that an additional district should be ceded extending to a certain distance from the coast of that Island. *The object of this cession is to prevent any interference of any kind with Laboan. The extent to be given to such additional cession is left to be fixed by you*; of course it ought to be reasonable and moderate. If however you should find it more easy to attain security for the commercial and military position of Laboan in any other way you are at liberty to make the necessary alteration in that article.”²⁶ [emphasis added]

2.17 It is significant that the letter of instructions from the Foreign Office to James Brooke *did not* mention 10 geographical miles. Instead it left the determination of the limits of the cession entirely to Brooke, the official on the scene. Brooke chose 10 geographical miles, but he did not explain why he made the choice.²⁷ Unlike Crawford who explained his decision in a letter,²⁸ Brooke did not explain his decision in any of his letters, journals or other papers. Therefore, the conclusion which Malaysia attempts to draw from Brooke’s decision is pure speculation.²⁹ What is significant is that neither Crawford nor Brooke ever indicated that their choice of 10 miles was based on or motivated by

²⁶ Letter from British Foreign Office to Brooke J. dated 25 Jan 1847, attached to this Reply as Annex 4. The draft treaty enclosed contains a blank space for James Brooke to fill in the number of miles. See pp. 13 and 16 (transcript); 28 and 38 (manuscript) in Annex 4.

²⁷ In his report to the British Foreign Office on the Brunei Treaty, *which Brooke sent from Singapore* about one month after the treaty was signed, he merely stated that: “In article X in defining the limits of our possession, I have used Captain Bethune’s chart for the purpose, as some confusion exists as to the names of the islands ceded to Her Majesty.” See Letter from Brooke J. to Viscount Palmerston dated 30 June 1847, attached to this Reply as Annex 5.

²⁸ See Letter from Crawford J. (Resident of Singapore) to Swinton G. (Secretary to the Government in India) dated 3 Aug 1824 (SCM Vol. 2, Annex 3, p. 28) quoted in para. 2.14 above.

²⁹ Singapore notes that James Brooke, far from acting on the belief that islands within 10 geographical miles were not *terra nullius*, was acting purely out of a desire to comply with his instructions to choose a “reasonable and moderate” distance. It is a known historical fact that Brooke spent a lot of his time in Singapore. An official in Brooke’s position would find less difficulty defending his choice as a “reasonable and moderate” one if he simply followed the reference to 10 geographical miles found in the Crawford Treaty, an available precedent.

any recognition of a regional custom that “islands within ten geographical miles from the coast in this region” were not *terra nullius*.

2.18 In fact, the letter of instructions from the British Foreign Office did not ascribe any significance to “ten geographical miles”. As such, it does not constitute evidence of a British policy recognising that “islands within ten geographical miles from the coast in this region” were not *terra nullius*. The British Government merely wanted a maritime security zone to protect Labuan, and left it to the official on the scene to decide how far this security zone should extend.

2.19 The fact that there was no regional custom relating to “islands within ten geographical miles”, no consistent British practice of asking for cessions of up to 10 miles, and consequently no British recognition of any such custom, is also amply demonstrated by a review of other treaties of cession in the region. Out of the many treaties concluded by various European powers with the rulers in this region, Malaysia is able to find only two isolated treaties which refer to the distance of 10 geographical miles – one with the Sultan of Johor relating to Singapore, the other with the Sultan of Brunei relating to Labuan, 600 nautical miles away. Given the historical background of these two treaties, they lend no support whatever for Malaysia’s very sweeping conclusion that:

“... islands within ten geographical miles from the coast in this region were not considered *terra nullius*. *This applies as much to PBP, Middle Rocks and South Ledge and the islets and rocks around Singapore as it does to Labuan and the islets and rocks around it.*”³⁰ [emphasis added]

2.20 Malaysia has attempted to draw another parallel between Labuan and Pedra Branca – i.e., that Labuan was also uninhabited.³¹ The evidence does not support such a sweeping assertion.³²

³⁰ MCM p. 16, para. 26.

³¹ MCM p. 13, para. 23.

2.21 Finally, even if there is any merit in Malaysia’s speculation (and there is none), it cannot form the basis of any Malaysian claim to “original title” in relation to Pedra Branca. Singapore has shown in Chapter IV of her Counter-Memorial that neither Sultan Hussein nor the Temenggong of Johor nor the State of Johor ever had any claim of title to Pedra Branca, or acted on it in any manner consistent with such a claim, prior to 1847 when the British took possession of the island. The complete lack of evidence to substantiate Johor’s “original title” *cannot* be remedied by Malaysia’s reliance on vague and amorphous expressions such as “*not considered terra nullius*” or “part of the Malay world” to describe Pedra Branca.

Section II. The 1824 Treaties Do Not Confirm Any “Original Title”

2.22 In her Counter-Memorial, Malaysia repeats her arguments concerning the 1824 Anglo-Dutch Treaty and the 1824 Crawfurd Treaty.³³ As Singapore has rebutted these arguments comprehensively in her Counter-Memorial,³⁴ this Section will deal only with the new arguments presented in Malaysia’s Counter-Memorial, in connection with these two treaties.

A. THE ANGLO-DUTCH TREATY DID NOT DEAL WITH THE TERRITORIAL STATUS OF PEDRA BRANCA

2.23 As a preface to her discussion of the Anglo-Dutch Treaty, Malaysia asserts in her Counter-Memorial that the British and the Dutch had “agreed that

³² See description of Labuan by J.A. St. John, quoted in an article *The New Colony of Labuan* dated 9 Oct 1847, attached to this Reply as Annex 6 (“The sea in the vicinity of the island abounds with fish of a superior quality, and between two and three hundred men, who subsist entirely by fishing, constituted before our arrival its only population”). See also Military Report on the Straits Settlements (1915), at p. 100, attached to this Reply as Annex 14 (“When ceded to Great Britain in 1846, the island was sparsely inhabited”).

³³ MCM pp. 21-23, paras. 33-38; and pp. 24-25, paras. 39-42 respectively.

³⁴ On the Anglo-Dutch Treaty, see SCM pp. 27-33, paras. 3.16-3.30. See also, SM p. 74, para. 5.5. On the 1824 Crawfurd Treaty, see SCM pp. 7-8, para. 1.15; p. 190, para. 7.16; and pp. 190-191, para. 7.18.

the entire passage of the Strait of Singapore would fall within the British sphere of influence”.³⁵ This is another instance of Malaysia being cavalier with the historical facts. The historical facts and indeed the text of the Anglo-Dutch Treaty itself, contradict Malaysia’s assertion that the Dutch and the British had agreed that the *entire passage* of the Strait of Singapore would fall within the British sphere of influence.

2.24 As explained in Singapore’s Counter-Memorial, the text of the Anglo-Dutch Treaty left the entire Singapore Strait undivided and open to access by both the British and the Dutch.³⁶ To quote once again the relevant text, Articles X and XII of the Anglo-Dutch Treaty provide as follows:

“10. ... His Netherlands Majesty engages for Himself and His Subjects, never to form any Establishment on any part of the Peninsula of Malacca, or to conclude any treaty with any Native Prince, Chief or State therein.

...

12. ... His Britannick Majesty, however, engages, that no British Establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintan, Lingin, or on any of the other Islands south of the Straights of Singapore, nor any Treaty conclude by British Authority with the Chiefs of those Islands.”³⁷

The language of the Treaty is clear. Nothing in the text of the Treaty provides that the parties had “agreed that the entire passage of the Strait of Singapore would fall within the British sphere of influence”.³⁸

2.25 In fact, at no stage in the negotiating history did the Dutch ever contemplate surrendering the “entire passage of the Strait of Singapore” to

³⁵ MCM p. 20, para. 32.

³⁶ SCM pp. 30-31, paras. 3.23-3.24.

³⁷ Treaty between His Britannick Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies, London, 17 Mar 1824, 74 CTS 88 (MM Vol. 2, Annex 5).

³⁸ MCM p. 20, para. 32.

British influence. Doing so would have defeated the entire objective of the Anglo-Dutch negotiations, which was to secure the mutual commercial interests of both powers in a way that would not lead to further conflict.

2.26 The *travaux préparatoires* of the treaty are instructive in this regard. When the Dutch negotiators first proposed the division of the region into two spheres of influence, they proposed it in the form of a secret article providing for a line of demarcation in the following terms:

“Et afin de mieux atteindre le principal but de la dite convention les parties contractantes ont résolu de regarder leurs possessions aux Grandes Indes comme séparées par une ligne de démarcation partant de l’entrée du détroit de Malacca à la hauteur de Queda ou du 6^{me} degré de lat. sept. et se terminant vers la mers de la Chine, à la sortie du détroit de Sincapour en laissant l’île de ce nom au nord et celles de Carimon, Battam et Bintang ou Rhio au midi. Des ordres positifs et invariables seront donnés pour que de la part des Pays Bas on s’abstienne de toute intervention dans les affaires des peuplades et princes indigènes établis à l’est et au nord de cette ligne et pourquoi réciproquement, les officiers et agents Britanniques ne s’immiscent en rien de ce qui concerne les relations ou les arrangements intérieurs des îles situées à l’ouest et au midi.”³⁹ [underlining in original]

[Singapore’s Translation, with emphasis added in italics:

“And with the objective of better attaining the principal end of the said agreement, the contracting parties have resolved to regard their possessions in the Greater Indies as separated by a line of demarcation, starting at the entrance of the Straits of Malacca at the height of Kedah or at 6 degrees Northern Latitude and *terminating toward the China Sea at the exit of the Strait of Singapore, leaving the island by that name toward the north, and those of Carimon, Batam and Bintan or Riau to the South*. Positive and invariable orders will be given to the effect that the Netherlands on its part abstain from all intervention in the affairs of the indigenous peoples and princes established to the East and the North of this line, and for this reason, reciprocally, the British officers and agents shall not in any way interfere with what concerns the internal relations or arrangements of the islands to the West and the South.”]

³⁹ Extracts from Dutch-Proposed Draft of Anglo-Dutch Treaty dated 17 Jan 1824 (Dutch Records Series “A”, XXXI, No. 9), 2nd Separate and Secret Article, attached to this Reply as Annex 1.

This proposal makes it clear that the Dutch wanted to draw a line, with the island of Singapore to one side and the islands of Carimon, Batam and Bintan on the other side, but leaving the entire passage of the Straits of Singapore, from “the entrance of the Straits of Malacca” to “the exit of the Strait of Singapore”, free for equal access by both nations.

2.27 The Dutch proposal for the secret article was rejected by the British and ultimately both agreed to the formulation set out in the text of Articles X and XII, which contain no provisions for a line of demarcation.⁴⁰ The final treaty text, when compared with the Dutch draft secret article, expresses even more clearly the parties’ intention that the entire passage of the Strait of Singapore was to be left un-demarcated, and open to navigational access by both parties.

1. *The 1833 Vietnamese Envoy’s Report is Irrelevant*

2.28 To support her claim that the 1824 Anglo-Dutch Treaty placed Pedra Branca within the British sphere of influence, Malaysia quoted a passage from an account of a mission to Batavia (now Jakarta) undertaken by a Vietnamese envoy in 1833.⁴¹ Malaysia contends that this passage shows that the Vietnamese envoy “was well aware that the island of Pedra Branca/Pulau Batu Puteh was to the north of where one enters the Dutch territory at Riau and the Lingga archipelago [*sic*]”.⁴¹

2.29 Presumably, Malaysia’s logic is that, since Pedra Branca lies “north of where one enters the Dutch territory”, it must lie north of the Dutch sphere of influence and thus fall within the British sphere of influence. This argument is

⁴⁰ SCM p. 30, para. 3.22-3.23. The reason for rejecting the proposal was the fear that any such demarcation line would invite the jealousy of other powers.

⁴¹ MCM pp. 22-23, para. 37; and Extract from Phan Huy Chú, *Un émissaire vietnamien à Batavia, Re'cit sommaire d'un voyage en mer, traduit et présenté par Phan Huy Le, Claudine Salmon & Ta Trong Hiep* (Paris: Association Archipel, 1994, original text in Sino-Vietnamese, translated into modern Vietnamese and French), p. 46 (MCM Vol. 3, Annex 9).

logically flawed. It confuses the concept of “territory” with the concept of “sphere of influence”. It does not follow that because Pedra Branca lies north of Dutch territory, it must fall within the British or any other country’s sphere of influence.

2.30 Quite apart from this logical flaw, it is clear from the quoted passage itself that it does not refer to the island which is the subject of the present dispute. A reference to the original Sino-Vietnamese text of the 1833 report will show that the passage describes a feature called “白石港”.⁴² This is a Chinese ideogram (pronounced *Bạch Thạch Cảng* in Vietnamese) which literally means *White Rock Harbour* or *White Rock Port*.⁴³ There are several reasons why “白石港” (*Bạch Thạch Cảng*) or *White Rock Port/Harbour* cannot be a reference to the Pedra Branca/Pulau Batu Puteh presently in dispute between Singapore and Malaysia. *First*, Pedra Branca is neither a port nor a harbour, nor does it resemble a port/harbour. *Secondly*, the *White Rock Port/Harbour* described in the passage was surrounded by mountains and located near wooded slopes which were lined with numerous houses. Pedra Branca is not surrounded by mountains and there were no settlements or houses near Pedra Branca.

2.31 Given this gulf between the physical characteristics of Pedra Branca and the *White Rock Port/Harbour* described in the 1833 account, the Vietnamese envoy could not have been referring to Pedra Branca. He must have been referring to some other geographical feature. As shown in **Insert 4** opposite, there were many features in the area which had the term “white rock”, “batu puteh” or a variant thereof in its name.⁴⁴

⁴² Malaysia has not annexed the original Sino-Vietnamese text of this document with Annex 9 of her Counter-Memorial. Singapore annexes the original Sino-Vietnamese text to this Reply as Annex 2, together with an English translation made directly from the original text.

⁴³ By comparison, traditional Chinese sources have, since the 14th century been referring to Pedra Branca as “白礁”, meaning *White Reef*.

⁴⁴ Singapore notes that the French and Vietnamese scholars who republished the 1833 Vietnamese

2.32 Finally, Malaysia has made a serious error when translating the passage into English. This translation error completely invalidates Malaysia’s argument. In concluding that the Vietnamese envoy located this *White Rock Port/Harbour* as lying “to the *north* of where one enters the Dutch territory at Riau and the Lingga archipalego”,⁴⁵ Malaysia is obviously relying on the following part of her translation:

“To the *south*, once past Lingga archipelago, one turns to take the maritime route to Malaka and Pinang Island.”⁴⁵ [emphasis added]

However, this is a mistranslation. The word which Malaysia translates into English as “south” actually reads “east” both in the original Sino-Vietnamese text and its 1994 French translation.⁴⁶ Since no other sentence in the passage uses the words “north” or “south”, this error goes to the heart of the argument.

2.33 In the result, Malaysia’s reliance on this irrelevant report and her erroneous translation of it fails to support her arguments in any way, and is entirely misleading.

2. The 1842 van Hinderstein Map Shows that Pedra Branca was not Regarded as Part of the Johor-Riau-Lingga Sultanate

2.34 The other document which Malaysia has sought to rely on to shore up her argument (that Pedra Branca was placed in the British sphere of influence by the

account in 1994 with an annotated translation surmised that “白石港” (*Bạch Thạch Cảng*) could have been a reference to Pedra Branca. Without intending to devalue the work of the scholars who undertook the task of producing the 1994 translation, Singapore notes that their decision to equate “白石港” (*Bạch Thạch Cảng*) with Pedra Branca is a reasonable error which any scholar, relying only on the Vietnamese text, and without the benefit of a thorough knowledge of the geography around Pedra Branca, could have easily made. It is widely recognised that the correlation of old toponyms in oriental languages with European toponyms is never an easy task.

⁴⁵ MCM pp. 22-23, para. 37.

⁴⁶ The original Sino-Vietnamese text uses the word “東” which means “east”. The 1994 French translation published by the *Association Archipel* uses the word “l’est”, also meaning “east”. Malaysia, in providing her unofficial English translation, has mistranslated this word as “south”.

Anglo-Dutch Treaty) is a map published in 1842 by G.F. von Derfelden van Hinderstein (“the van Hinderstein Map”). Malaysia asserts that the Anglo-Dutch Treaty drew an imaginary line of demarcation and that:

“This line is reflected in the map of Riau in the extensive 8-sheet Map of the Dutch East Indies issued by order of the King, which is **Map 1** in the Map section in this volume [*i.e.*, *the van Hinderstein Map*]. PBP is clearly to the north of the line, as part of the territory of Johor and within the British sphere of influence.”⁴⁷

First, Malaysia is wrong to assert that the Anglo-Dutch Treaty drew a line of demarcation. As demonstrated in paragraph 2.24 above and in Singapore’s Counter-Memorial,⁴⁸ the Anglo-Dutch Treaty did not prescribe a line of demarcation. In fact, the Dutch proposal for a line of demarcation was rejected by the British and this proposal did not form part of the final text of the Anglo-Dutch Treaty.⁴⁹

2.35 *Secondly*, Malaysia has misinterpreted the significance of the 1842 van Hinderstein Map: the red line in the map running south of Pedra Branca is not, as Malaysia claims, a line reflecting the demarcation of the Anglo-Dutch spheres of influence. Malaysia does not refer to any legend in the map explaining what the line means. However, a careful study of the map reveals that the red line merely reflects *the outer limits of the Dutch Residency of Riau*.⁵⁰ This is obvious from the fact that the line on the map curves southwards towards both ends of the Strait of Singapore to encircle the entire Riau-Lingga Archipelago – see the extract from the van Hinderstein Map, reproduced as **Insert 5** opposite. If it were a line showing the division of Anglo-Dutch spheres of influence, it would

⁴⁷ MCM pp. 21-22, para. 35.

⁴⁸ SCM pp. 30-31, paras. 3.22-3.23.

⁴⁹ See para. 2.25 above.

⁵⁰ Under the administrative system of the time in the Netherlands East Indies, the Riau-Lingga Sultanate came under the purview of the Dutch Resident in Riau.

have curved *northwards* into the Strait of Malacca instead, and extended all the way to the northern end of Sumatra.

2.36 *Thirdly*, while Pedra Branca is depicted as lying north of the red line it is certainly not true that the map depicted Pedra Branca “as part of the territory of Johor and within the British sphere of influence”. In fact, all that the map does is to show Pedra Branca as lying outside the limits of the Dutch Residency of Riau. This simply means that the Dutch did not regard Pedra Branca as forming part of the Riau Residency. It does not show nor does it imply that Pedra Branca fell within the British sphere of influence, much less that it was a territorial possession of Sultan Hussein or of the Temenggong of Johor.⁵¹ Malaysia’s assertion to the contrary is another leap in logic that is not supported by the 1842 map.

2.37 What is in fact noteworthy about the map is that the navigational passage denoted as *Straat Singapoera* (i.e., “Singapore Strait”) is located between Point Romania to the north and Pedra Branca to the south.⁵² This places Pedra Branca *south* of the Strait of Singapore.⁵³ The fact that this map (*a*) places Pedra Branca *south* of the Strait of Singapore; but (*b*) places the island outside the limits of the Riau Residency, gives rise to another important conclusion. Why would the Dutch cartographer place Pedra Branca *south* of the Strait and yet not include it with the limits of the Riau Residency? The only reasonable conclusion is that the map demonstrates that the Dutch authorities did not regard Pedra Branca as ever belonging to the Johor-Riau-Lingga Sultanate.

⁵¹ The political ramifications of the 1824 Treaty and subsequent events is discussed in SCM p. 34, para. 3.31 *et seq.*

⁵² This passage starts, at the western end, near the Carimon Islands and ends, at the eastern end, north of Pedra Branca.

⁵³ The Dutch understanding of what constituted the navigational passage known as the Strait of Singapore is significant as the navigational channel between Point Romania and Pedra Branca was also the channel preferred by mariners because of its depth. *See further*, SCM pp. 32-33, para. 3.27.

2.38 This conclusion is also consistent with the fact that, after 1824, the Dutch regarded the Riau Residency (as opposed to the State of Johor) as the true successor to the former Johor-Riau-Lingga Sultanate. This is confirmed by the actions of the Dutch, as well as actions taken by their vassal, Sultan Abdul Rahman, after the signing of the Anglo-Dutch Treaty. Prior to its signing, both the Dutch and Sultan Abdul Rahman (together with the Malay chiefs of the Sultanate) did not recognise Sultan Hussein as the legitimate Sultan. However, after the signing of the Treaty, Sultan Abdul Rahman's inability to rule his territories in the Malay peninsula meant that the former Johor-Riau-Lingga Sultanate was effectively divided into two political entities – with Sultan Hussein as the titular Sultan of peninsular Johor within the British sphere of influence, and with the rest of the Sultanate, now called the Riau-Lingga Sultanate, under Sultan Abdul Rahman (which later became the Dutch Residency of Riau).

2.39 As a result of this, the Dutch took the trouble to send an envoy, Christian van Angelbeek, to advise Sultan Abdul Rahman to “donate” (or cede) his possessions on the Malay peninsula to his brother Hussein to formalise the political reality.⁵⁴ The Dutch action demonstrated that they regarded Sultan Abdul Rahman as the one who had succeeded to all the possessions of the old Sultanate, including its insular possessions. Sultan Hussein would have had no claim of title whatsoever to any of these possessions but for the fact that his brother donated them to him.

2.40 If the Dutch had believed Pedra Branca to be part of the Johor-Riau-Lingga Sultanate, they would have included it as part of the Riau Residency. Yet, in preparing the 1842 map, the Dutch did not do so, even though Pedra Branca is depicted as lying *south* of the Strait. The inevitable conclusion is that Pedra Branca was not considered by the Dutch as ever forming part of the Johor-Riau-Lingga Sultanate.

⁵⁴ This episode is explained more fully in SCM pp. 34-35, paras. 3.31-3.34.

2.41 This conclusion is reinforced by an important and contemporaneous Dutch internal communication. In November 1850, eight years after the publication of the van Hinderstein Map, and six months after the Horsburgh Lighthouse foundation stone ceremony (during which Pedra Branca was described in a solemn, public ceremony as a dependency of Singapore), the Government of the Netherlands East Indies in Batavia, in a letter to the Dutch Resident in Riau, described Pedra Branca unequivocally as “British territory” (*Britsch grondgebied*). The letter reads:

“As commissioned, I have the honour of informing Your Excellency that the government has found no grounds for granting gratuities to the commanders of the cruisers stationed at Riau, as proposed in your despatch of 1 November 1850, number 649, on account of their shown dedication in patrolling the waterway between Riau and Singapore, *lending assistance to the construction of a lighthouse at **Pedra Branca on British territory***. And they deserve it so much the less because the cruiser crews have failed to perform their actual duties which is to cruise against pirates whose brutalities have been repeatedly complained of in the vicinity of Lingga.”⁵⁵ [emphasis added]

⁵⁵ Letter from C. Visscher (General Secretary, Netherlands East Indies) to Dutch Resident in Riau dated 27 Nov 1850, attached to this Reply as Annex 8. English translation provided by Singapore. The actual Dutch text reads:

“Daartoe gelast, heb ik de eer Uw.Ed.G. te kennen teg even, dat bij de regering geene termen zijn gevonden, voor de toekenning van de bij Uw.Ed.G. Schrijven van 1 November 1850, No.649, voorgestelde gratificatien aan de Gezaghebbers van de te Riouw gestationneerde kruisbooten, wegens hunnen betoonden ijver in het bekruisen van het vaarwater tusschen Riouw en Sincapore in het verleenen van hulp bij den opbouw van eenen vuurtoren te Pedro Branca op Britsch grondgebied, en zulks te minder, om dat deze opvarenden alzo geruimen tijd onttrokken zijn aan hunne eigenlijke bestemming, het kruizen vooral tegen de zeeroovers omtrent wier geweldenarijen, ook in den omtrek van Linga herhaaldelijk wordt geklaagd.” [underlining in original, emphasis in italics added]

The background to this letter is that, since May 1850, the Dutch Resident in Riau had offered Thomson the assistance of Dutch gun boats, which Thomson accepted. See Thomson J.T., *Account of the Horsburgh Light-house*, 6 Journal of the Indian Archipelago and Eastern Asia 376 (1852) (hereafter, “Thomson’s Account”), at p. 424 (SM Vol. 4, Annex 61, p. 527). On 1 Nov 1850, the Dutch Resident in Riau wrote to Batavia for additional gratuity to be paid to the commanders of these Dutch gun boats for their service in assisting the British with the construction of the lighthouse. The reply of the Netherlands East Indies Government came in the form of this 27 Nov 1850 letter, which rejected the request for additional gratuities. In the process, the Government of the Netherlands East Indies acknowledged unequivocally that Pedra Branca was British territory.

2.42 This letter expressly and unequivocally refers to Pedra Branca as British territory. To put the significance of this letter in its historical and legal perspective, it is useful to note that it was signed by C. Visscher, the Dutch General Secretary in Batavia. The General Secretary (*Algemeene Secretaris*) in Batavia was the highest ranking civil servant in the Netherlands East Indies. He was the secretary to the Governor-General of the Netherlands East Indies and his letters carried the authority of the Governor-General in Council. The General Secretary who signed this particular letter, C. Visscher, was himself a trained lawyer, having served as a member of the High Court of Netherlands East Indies in Batavia from 1834 to 1841, before being made the General Secretary. By the time he penned the 27 November 1850 letter, C. Visscher had served as the General Secretary for nine years.⁵⁶

2.43 The Dutch General Secretary's letter is direct, cogent and irrefutable evidence of Dutch recognition of British sovereignty over Pedra Branca.

⁵⁶ See List entitled "Officers at the Central Administration in the Netherlands Indies in 1837 and in 1847", attached to Note for Cornets de Groot van Kraayenburg, J. P. (Dutch Minister of Colonies) dated 15 Jan 1847, attached to this Reply as Annex 3. ("Visscher, General Secretary since 1841. In 1832 he joined service as a member of the Council of Justice, in 1834 member of the High Court.")

B. THE CRAWFURD TREATY DID NOT LIMIT BRITISH CAPACITY TO ACQUIRE ADDITIONAL TERRITORIES IN THE REGION

2.44 In her Counter-Memorial, Malaysia repeats her *idée fixe* that the territorial extent of Singapore is determined forever by the terms of the Crawford Treaty.⁵⁷ This fixation has already been rebutted in Singapore's Counter-Memorial,⁵⁸ and Singapore will not repeat what has been said there. The only point which Singapore wishes to call the Court's attention to is the misleading statement by Malaysia that "Singapore acknowledges that the Crawford Treaty precluded any assertion of title to islands beyond those within the 10 geographical mile limit of Singapore",⁵⁷ which Malaysia supports by reference to a passage in Singapore's Memorial. This is what the passage in question actually says:

5.5 It will be helpful to the Court if the basis of Singapore's claim to Pedra Branca is indicated as a preface to the present chapter. Singapore's claim is *not* based on the Treaty of Cession of 1824. That treaty dealt only with the main island of Singapore and its immediate vicinity. It did not extend to the area around Pedra Branca. *Instead, Singapore's case is that the events of 1847 to 1851 (to be elaborated in due course) constituted a taking of lawful possession of Pedra Branca by agents of the British Crown.* In the years that followed, the British Crown, and subsequently, Singapore, continually exercised acts of State authority in respect of Pedra Branca. This effective and peaceful exercise of State authority confirmed and maintained *the title gained in the period 1847 to 1851 by the taking of lawful possession on behalf of the Crown.*⁵⁹ [emphasis added, footnotes omitted]

In fact, the meaning of this paragraph is the *exact opposite* of what Malaysia claims it to be. The paragraph clearly explains that the Crawford Treaty *does not preclude* the British from asserting an independent basis of title outside the Treaty's limits. This is yet another clear instance of Malaysia's misrepresentation of Singapore's arguments.

⁵⁷ MCM pp. 24-25, paras. 39-42.

⁵⁸ SCM pp. 187-191, paras. 7.13-7.18.

⁵⁹ SM p. 30, para. 5.5.

Section III. Other Malaysian Arguments

A. CERTAIN MISCELLANEOUS DOCUMENTS WHICH DO NOT HELP MALAYSIA'S CASE

1. *Malaysia's Claim based on 17th Century Dutch Communications and the 1843 Singapore Free Press Article has been Rebutted in Singapore's Counter-Memorial*

2.45 In her Counter-Memorial, Malaysia refers once again to the Dutch communication of 1655 and the *Singapore Free Press* article of 25 May 1843 as evidence of her claim to original title to Pedra Branca.⁶⁰ Singapore has already shown in her Counter-Memorial that these two documents are of no assistance to Malaysia:

- (a) The former does not, by any stretch of the imagination, constitute recognition of Johor's title to Pedra Branca.⁶¹ If anything, it demonstrates that 17th century Dutch officials felt they were entitled to place cruisers near Pedra Branca without the need to seek permission from Johor.
- (b) The latter is an isolated newspaper article which is inaccurate and unreliable.⁶²

In contrast to the foregoing materials, Singapore draws the Court's attention to the letter dated 27 November 1850 from the Government of the Netherlands East

⁶⁰ MCM p. 12, para. 20, citing MM p. 38, para. 78 and p. 46 para. 95.

⁶¹ SCM pp. 47-48, paras. 4.16-4.19.

⁶² The article neither meets "high standards of objectivity" (to quote this Court's *dicta* concerning the probative value of newspaper articles in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep 14, at p. 40, para. 62) nor is it capable of corroborating other sources of evidence. See SCM p. 59, paras. 4.38-4.39 for full arguments, in this regard. The article also erroneously attributed Pulau Tinggi to the Temenggong of Johor at a time when it belonged to Pahang. See SCM p. 59, para. 4.39, at note 132.

Indies in Batavia to the Dutch Resident in Riau, referred to in paragraph 2.41 above. This was an official communication which expressly and unequivocally acknowledged that Pedra Branca was British territory.⁶³

2. *Raffles' Observations Do Not Prove Johor's Title*

2.46 Malaysia next refers to a note from Raffles which states, with regard to Sumatra and Borneo, that:

“The European Settlements on the Coasts of Sumatra and Borneo are confined to Commercial objects, and the interiors of these large islands, have never felt the effects of European influence. *A large portion of their Coasts and the whole of the smaller islands as well as the States on the Malay Peninsula are exclusively under Native Authority*”.⁶⁴
[emphasis added by Malaysia]

Malaysia then jumps to the completely untenable conclusion that “[o]bviously, Raffles is here referring to the authority of the Sultan and Temenggong of Johor”.⁶⁴ Raffles was just referring to native authority generally and was not attempting to link any specific island with any specific ruler. In fact, in the entire 19-page extract of the Raffles note annexed by Malaysia to her Counter-Memorial, not a single word was written by Raffles about the extent of the Johor rulers’ territory or influence.

2.47 More importantly, it is noteworthy that, apart from very large islands like Sumatra and Borneo (each of which is larger than Britain itself), this passage names no islands at all. From the overall context of the letter, there is little doubt that the “smaller islands” Raffles had in mind are islands which, although *smaller* than Sumatra and Borneo, have their own reasonably-sized populations (such as Singapore and Bintan) for the principles of feudal government to

⁶³ See note 55 and para. 2.42 *above* for the background and context of this letter.

⁶⁴ MCM p. 20, para. 32, quoting from MCM Vol. 3, Annex 8.

operate. This is evident from a later passage in the same letter, where Raffles stated:

“The Government of these states, which are established in more or less power on the different rivers, on the Eastern Coast of Sumatra, and on the Malay Peninsula, as well as on the Coast of Borneo, and *throughout the smaller islands* is founded on principles entirely feudal.”

Clearly, Raffles’ descriptions were not intended to and did not include a very small uninhabited island like Pedra Branca. Therefore, like Crawford’s description and Presgrave’s report, which were dealt with in Singapore’s Counter-Memorial,⁶⁵ Raffles’ observations offer no assistance for determining the status of Pedra Branca.

**B. MALAYSIA’S CLAIM TO ORIGINAL TITLE BASED ON
“POSSESSION IMMEMORIAL” IS AN ADMISSION THAT SHE HAS
NO EVIDENCE TO PROVE HER CLAIM**

2.48 Finally, in her Counter-Memorial, Malaysia puts forward a new argument – that Malaysia’s claim to original title existed from time immemorial.⁶⁶ In doing so, Malaysia relies on a single sentence from the *Meerauge Arbitral Award* which states:

“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”.⁶⁷

However, when the entire arbitral award is examined, it becomes obvious that Malaysia has quoted a single sentence out of context from an award which does not support her case at all.

⁶⁵ SCM pp. 48-53, paras. 4.20-4.28.

⁶⁶ MCM pp. 12-13, para. 21.

⁶⁷ MCM p. 13, para. 21, note 45 (English translation provided by Malaysia).

2.49 *First*, the tribunal in that case found that the parties had failed to demonstrate possession immemorial. *Secondly*, the *single sentence* quoted by Malaysia is part of a longer passage which supports Singapore’s case and not Malaysia’s case. The passage reads:

“Il ne serait pas possible non plus de baser la sentence sur le fait d’une possession immémoriale d’après laquelle la frontière aurait été fixée. *La possession immémoriale est celle qui dure depuis si longtemps qu’il est impossible de fournir la preuve d’une situation différente et qu’aucune personne ne se souvient d’en avoir entendu parler.* En outre cette possession doit être ininterrompue et incontestée. Il va sans dire qu’une telle possession devrait aussi avoir duré jusqu’à l’époque où il y a eu contestation et conclusion d’un compromis. Au cas présent aucune de ces circonstances ne s’est réalisée...”⁶⁸ [Footnotes omitted. *Italicised text is the single sentence quoted by Malaysia in MCM paragraph 21.*]

[Singapore’s translation, with the single sentence quote by Malaysia highlighted in italics:

“It would likewise not be possible to base the award on the fact of a possession immemorial according to which the boundary would have been established. *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.* Furthermore, this possession must be uninterrupted and not contested. It goes without saying that such possession also must have lasted up until the period when it was contested and a compromise reached. In the present case none of these circumstances occurred...”]

2.50 In the present case, possession of Pedra Branca was taken in 1847-1851 by the British Crown who went on to exercise sovereign authority on and over it for 130 years without protest from Johor or Malaysia. British sovereignty over Pedra Branca was recognised by the Dutch authorities as early as 1850, and this was never contested by Johor.⁶⁹ In fact, in 1953, the State of Johor effectively acknowledged British sovereignty over the island by issuing an unequivocal,

⁶⁸ *Meerauge Arbitral Award* (1906) 8 RDILC (2nd ser.) p. 161 at p. 207.

⁶⁹ Johor’s failure to protest supports Singapore’s contention that Pedra Branca was never regarded as part of Johor.

unconditional and binding disclaimer of title.⁷⁰ When the *Meerauge Arbitral Award* is understood in light of these facts, the conditions for Malaysia's claim of "possession immemorial" simply do not exist.

2.51 Malaysia's decision to raise the plea of immemorial possession is important in another respect. In resorting to such an argument, Malaysia is effectively conceding that she is unable to produce any evidence to prove her claim of original title to Pedra Branca. This is an admission that there is no evidence whatever to support her claim of original title.

2.52 There are thousands of archival documents in existence, in Portuguese, Dutch, French, English, Spanish and Malay, even in classical Chinese, that recorded the history of the Johor-Riau-Lingga Sultanate and its relations with outside powers. Historians have written extensively about the history of the region. Yet no evidence can be found by Malaysia to prove that Pedra Branca was ever a territorial possession of Malaysia's predecessors, or that they had ever acted in a sovereign capacity in relation to the island.

Section IV. Conclusion

2.53 In spite of Malaysia's efforts, her Counter-Memorial adds nothing to her claim based on "original title". She has found no evidence to substantiate her case. Reality has compelled her to invoke, as a last resort, the plea of immemorial possession to explain her inability to prove original title. By resorting to this plea, Malaysia has effectively admitted that she has no evidence of, and no case based on, "original title". In contrast, Singapore has produced conclusive and irrefutable evidence of British (and later, Singapore) sovereignty over the island.

⁷⁰ See SM Chapter VIII, SCM Chapter VII and Chapter VII *below*.

2.54 To sum up the arguments set out both above and in Singapore's Counter-Memorial:

- (a) Malaysia has still not explained and is unable to explain how her alleged "original title" came about. There is clearly no such "original title" on any basis.
- (b) Neither the Johor-Riau-Lingga Sultanate before 1824 nor Johor after 1824 had ever taken any interest in Pedra Branca or displayed an intention to claim the island. Neither political entity ever exercised any State authority on or in relation to Pedra Branca. Malaysia has not provided a single piece of evidence to the contrary.
- (c) At the time when the British took possession of it in 1847-1851, Pedra Branca was not regarded as a territorial possession of Johor as shown by the 1842 van Hinderstein map, by the description of Pedra Branca as a dependency of Singapore during the 1850 Horsburgh Lighthouse foundation stone ceremony, and in particular by Dutch official correspondence later in the same year describing Pedra Branca as "British territory".

CHAPTER III THE REAFFIRMATION OF THE BASIS OF SINGAPORE'S TITLE TO PEDRA BRANCA

Section I. Introduction

3.1 This Chapter responds to the sections of Malaysia's Counter-Memorial which seek to challenge the basis of Singapore's title to Pedra Branca, and, principally, to the first section of Chapter 2 (relating to *terra nullius*), and the whole of Chapter 3.

3.2 Singapore also wishes to reaffirm the statement of the case on the taking of lawful possession set forth in Chapter V of her Memorial and in Chapter V of her Counter-Memorial. In particular, Singapore reiterates the following basic elements of her case:

First: Prior to the taking of possession of in 1847-1851, the island had the status of *terra nullius*;

Second: by public activities in the period 1847-1851, the British Crown established title on the basis of lawful possession (or occupation);

Third: the British possession of Pedra Branca did not depend upon or arise from any permission from Johor; and

Fourth: the taking of possession was peaceful and was not protested by Johor. Moreover, there were no competing acts by any other sovereign.

Section II. The Status of Pedra Branca as *Terra Nullius*

3.3 It is obvious that the status of Pedra Branca in 1847 was that of *terra nullius*.⁷¹ No doubt the Malaysian pleadings contend that Malaysia had a prior original title: this is simply the counterpart of the assumption by the British in 1847 that there was no prior claimant.

3.4 In forensic terms it has been necessary to wait and see if Malaysia would satisfy the appropriate standard of proof in respect of her claim to “original title” – it is not the function of the Singapore Memorial to anticipate and rebut Malaysia’s case. This she has signally failed to do.⁷² In particular, Malaysia has failed to establish an historic title to the specific territory in question: that is, to Pedra Branca. As the Tribunal found in the *Eritrea/Yemen* case (Phase One):

“In the end neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, *of such long-established, continuous and definitive lineage to these particular islands, islets and rocks* as would be a sufficient basis for the Tribunal’s decision. And it must be said that, given the waterless and uninhabitable nature of these islands and islets and rocks, and the intermittent and kaleidoscopically changing political situation, and interests, this conclusion is hardly surprising.”⁷³
[emphasis added]

3.5 A key element in the situation is the evidence that the British officials engaged in setting the project on its feet, and selecting an appropriate site, were well aware of the question of title, and of which islands belonged to Johor. The

⁷¹ See para. 2.10 above.

⁷² See generally, Chapter II above.

⁷³ *Eritrea/Yemen Arbitration*, Award of the Arbitral Tribunal in Phase One: Territorial Sovereignty and Scope of the Dispute, dated 9 Oct 1998, 114 ILR 2, at para. 449 (the Award is also published in (1998) 22 RIAA 215).

relevant officials did not consider that Johor had title to Pedra Branca. The following documents involve references to the question of title:

- (a) the Letter from Butterworth to the Government in India, dated 28 November 1844 in which Butterworth expressly refers to the fact that Peak Rock “is part of the territories of the Rajah of Johore...”⁷⁴
- (b) the Letter from Church to Butterworth, dated 7 November 1850 in which Church rejected a proposal (from Thomson) for the building of an outstation near Point Romania, while noting that the location “belongs to the Sovereign of Johore, where the British possess no legal jurisdiction”⁷⁵.

3.6 As Singapore has observed in both her Memorial and her Counter-Memorial, once the focus had shifted to Pedra Branca, the issue of third party title became irrelevant.

3.7 In the present context, these documents relating to the sovereignty of Johor justify the inference that the British Crown proceeded on the basis that Pedra Branca, the site finally chosen, was *terra nullius*. This understanding remained unchallenged in the period 1847-1851 and, indeed, until 1980.⁷⁶

⁷⁴ See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Currie F. (Secretary to the Government of India) dated 28 Nov 1844 (SM Vol. 2, Annex 13).

⁷⁵ See Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850 (SM Vol. 3, Annex 48).

⁷⁶ See Malaysia’s Note EC 87/80 dated 14 Apr 1980 (SM Vol. 6, Annex 146) in which Malaysia advances, for the first time, the theory that “from time immemorial this island has been part of the territory of the State of Johore”. Prior to that, Malaysia’s theory appears to be that Pedra Branca formed part of Malaysia because of Malaysia’s extension of her territorial sea to 12 miles in 1969 – see *Notes of Meeting of 14 April 1978 recorded by Kishore Mahbubani, Counsellor, Singapore High Commission to Malaysia* attached to this Reply as Annex 51.

Section III. The Alleged Permission of Johor

3.8 Malaysia's Counter-Memorial, like her Memorial, maintains the fiction that the permission given by Johor in the letter dated 25 November 1844 included Pedra Branca.⁷⁷ This issue has been addressed in considerable detail in Singapore's Counter-Memorial,⁷⁸ and Singapore reaffirms this analysis, to which the Court is respectfully referred.

3.9 The central point in this controversy is that the British recognised that Peak Rock belonged to the Sovereign of Johor,⁷⁹ but the same cannot be said for Pedra Branca. Once it was decided that the site of the lighthouse would no longer be Peak Rock, the issue of permission became irrelevant.⁸⁰

3.10 This is made clear by the fact that the correspondence clearly distinguishes Peak Rock and Point Romania from Pedra Branca. See in particular:

- (a) The letter from Butterworth to the Government of India, dated 28 November 1844;⁸¹ and
- (b) The letter from Church to Butterworth dated 7 November 1850.

⁷⁷ MCM pp. 69-72, paras. 135-141.

⁷⁸ SCM pp. 82-92, paras. 5.28-5.50; and pp. 95-108, paras. 5.58-5.90.

⁷⁹ See Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850 (SM Vol. 3, Annex 48); and Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Currie F. (Secretary to the Government of India) dated 28 Nov 1844 (SM Vol. 2, Annex 13).

⁸⁰ SCM pp. 105-107, paras. 5.86-5.87; and p. 108, para. 5.90.

⁸¹ Indeed, Malaysia's Memorial expressly recognises that Butterworth, in his letter dated 28 November 1844, was referring to Peak Rock. See MM, pp. 64-65, paras. 131-132.

3.11 The picture which emerges is confirmed by the relevant documents listed in Singapore’s Counter-Memorial, which contain no reference to the question of permission.⁸²

3.12 Malaysia’s Counter-Memorial argues that as the Sultan and Temenggong’s letters only refer to permission to build a lighthouse, there is no basis for presuming that Butterworth requested a cession of sovereignty.⁸³ This is true and Singapore has accepted this. But this does not help Malaysia’s case.

3.13 Malaysia’s Counter-Memorial proceeds to argue that as neither party has been able to produce Butterworth’s letter of request, the Temenggong’s answer of 25 November 1844 furnishes the only available indication of the extent of the permission sought, viz., “*the erection of a lighthouse near Point Romania*”, and this answer does not permit Singapore to assume that the request for permission was limited only to Peak Rock.⁸⁴ Malaysia’s suggestion is that the permission extended to Pedra Branca as it was also “near Point Romania”.

3.14 Malaysia’s argument is purely speculative. Whether a feature may be described as “near” another feature depends on the context. Malaysia’s citation of descriptions given in other contexts (such as Thomson’s remark that Romania is the nearest mainland to Pedra Branca) is of no assistance in construing the meaning of “near” in the context of Butterworth’s request to the Temenggong. Singapore has shown that, in the context of Butterworth’s request, Pedra Branca was not by any measure a place “near Point Romania”.⁸⁵

⁸² See SCM pp. 106-107, para. 5.87.

⁸³ MCM p. 70, para. 137.

⁸⁴ MCM pp. 70-71, para. 138.

⁸⁵ SCM pp. 96-99, paras. 5.64-5.70. In summary, Peak Rock is, according to Thomson, located *1.5 nautical miles* from Point Romania (on the Johor mainland). It is the outermost island in the Romania group of islands. There are other islands in the Romania group, even nearer to

3.15 The only reliable evidence of the scope of Butterworth's request is his report of 28 November 1844 to the Government in India concerning his correspondence with the Temenggong.⁸⁶ This report makes it clear that Butterworth did not consider that Pedra Branca was an eligible site at this stage. The report expressly identified Peak Rock (and only Peak Rock) as the site for the lighthouse. Further confirmation of this understanding is found in Thomson's report to Butterworth dated 20 November 1844 (i.e., five days before the Temenggong's answer).⁸⁷ In it, Thomson states that his instructions were "to examine *Peak Rock Romania* in order to ascertain the probable cost of building a Light House thereon".⁸⁸ He reported that, besides Peak Rock, he also took the "opportunity of visiting other Islands and Rocks in its vicinity", including North Rock and South Island (now known as Pulau Mungging), both of the Romania Group.⁸⁹ No mention was made of Pedra Branca at all.

3.16 In paragraph 139 of her Counter-Memorial, Malaysia invokes the Higham letter of 12 June 1953 to bolster her argument that the British regarded Pedra Branca as Johor territory. This correspondence of 1953 does not provide any assistance to Malaysia and does not affect the construction of the earlier correspondence.⁹⁰

the Johor mainland than Peak Rock, which are eligible sites for establishing a light. (In fact, a light stands today on Pulau Mungging, an island in the Romania group lying 1 nautical mile off the Johor mainland.) Pedra Branca, on the other hand, is located 7.7 *nautical miles* from the Johor mainland and was rejected by Butterworth as being an unsuitable site in 1844 partly because it was "at so great a distance from the Main Land" – see Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Bushby G.A. (Secretary to the Government of Bengal) dated 26 Aug 1846 (SM Vol 2, Annex 16). **Insert 6** *opposite* illustrates the distances mentioned in this footnote.

⁸⁶ SM Vol. 2, Annex 13.

⁸⁷ SM Vol. 2, Annex 12.

⁸⁸ *Ibid*, at p. 69.

⁸⁹ *Ibid*, at p. 70, para. 2.

⁹⁰ This is fully canvassed in SCM pp. 88-92, paras. 5.43-5.50; and p. 95, para. 5.58 *et seq.*

3.17 In paragraph 140 of her Counter-Memorial, Malaysia touches upon two distinct issues. The *first* issue is raised in this way:

“As Butterworth himself explained to Mr. G.A. Bushby, the Secretary of the Government of India, in the letter of 26 August 1846, “the whole of the details for the *case* of Light Houses as set forth in my letter under dated the 28th November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new position [Pedra Branca]”.⁹¹

3.18 Malaysia’s argument is unfounded. It is premised on an incorrect transcription of the passage from Butterworth’s 1846 letter. All manuscript copies available establish that the word transcribed by Malaysia as “case” actually reads “care”. Singapore has provided copies of the different manuscript versions.⁹² The question is examined in some detail in Singapore’s Counter-Memorial.⁹³ In addition, as a matter of syntax, the phrase “details for the *case* of Light Houses” makes no sense whereas the phrase “details for the *care* of Light Houses” makes perfect sense.⁹⁴ More importantly, British officials of the time who made manuscript copies of the letter, both for retention in Singapore and for onward transmission to London, read the word as “care”.⁹⁵ Furthermore, as Singapore explains in her Counter-Memorial:

“Even if the word in Butterworth’s 1846 letter is ‘case’, this does not help Malaysia’s claim. As Singapore has shown in paragraphs 5.43 to

⁹¹ MCM p. 72, para. 140.

⁹² Three Manuscript Copies of the Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Bushby G.A. (Secretary to the Government of Bengal) dated 26 Aug 1846 (to resolve transcription discrepancy between Annex SM16 and Annex MM51) (SCM Vol. 2, Annex 12).

⁹³ SCM pp. 103-105, paras. 5.80-5.84.

⁹⁴ From a comparison of the three manuscript copies in SCM Vol. 2, Annex 12, it is clear that the final word in the quoted phrase is “Houses”, not “House”. Singapore had initially transcribed this word as “House” in SM Vol. 2, Annex 16 because that transcript was based on the manuscript copy found in the Straits Settlements Records where the faded ink made the final “s” in the word “Houses” barely discernible. See SCM Vol. 2, p. 105; and SM Vol. 2, p. 140.

⁹⁵ See SCM Vol. 2, Annex 12, at p. 105 and p. 109.

5.50 above, in the first place those letters of permission cannot be read as extending to Pedra Branca. Moreover, many aspects of Butterworth's letter of 1844 are simply not applicable to Pedra Branca, for example, Thomson's survey of Peak Rock. By making the simplistic argument that everything in the 1844 letter relating to Peak Rock applied to Pedra Branca in 1846, Malaysia is simply seeking to evade the difficulties of showing that the 1844 letters of permission applied to Pedra Branca."⁹⁶

3.19 Paragraph 140 of Malaysia's Counter-Memorial makes further assertions as follows:

"The letter of 28 November 1844 included as annexes the authorisations of the Sultan and the Temenggong. Moreover, the exchange of letters between the Government of India and the Marine Department in 1846 with regard to the request to send an iron lighthouse from England includes the reports that Pedra Branca has been approved as the position for erecting the Horsburgh Lighthouse and it too contains the permission letters of the Sultan and the Temenggong."⁹⁷

3.20 Malaysia's argument that the 1846 exchange of letters "too contains the permission letters of the Sultan and the Temenggong" is disingenuous. The permission letters are found amongst the 1846 exchange of letters for one reason only: Butterworth's letter of 28 November 1844 is enclosed in the India Office file containing the 1846 exchange of letters, and the permission letters are also enclosed because they happen to be attachments to the 28 November 1844 letter. This by itself cannot be evidence that the letters of permission operated on the minds of the British officials in approving the construction of the lighthouse on Pedra Branca two years later, in 1846.

3.21 This conclusion is confirmed by the fact that there is other correspondence enclosed with the 1846 exchange of letters for no reason other

⁹⁶ SCM p. 105, para. 5.84.

⁹⁷ MCM p. 72, para. 140.

than because they were attachments to Butterworth's 28 November 1844 letter, such as:

- (a) Belcher's letter of 1 October 1844 reporting on his survey of Peak Rock (Attachment B to the 28 November 1844 letter); and
- (b) Thomson's letter of 20 November 1844 containing an estimate of the cost of constructing a lighthouse on Peak Rock (Attachment E to the 28 November 1844 letter).

Like the permission letters, these attachments were relevant only to Peak Rock and had nothing to do with Pedra Branca.

3.22 The picture which emerges from the correspondence is clear:

- (a) from 1836 to 1844, when the proposed site for the lighthouse was Pedra Branca, no reference was made in any correspondence to any need for permission from Johor;
- (b) this changed with Belcher's recommendation in October 1844 that the lighthouse be built on *Peak Rock* instead. Once Governor Butterworth accepted Belcher's recommendation, he moved quickly in November 1844 to obtain Johor's permission for the use of Peak Rock;
- (c) when the choice of site was changed from Peak Rock back to Pedra Branca in 1846, once again no mention was made of any need for Johor's permission.

Quite clearly, the question of permission was irrelevant to Pedra Branca.

Section IV. The Taking of Possession

A. INTRODUCTION

3.23 In spite of the reiterations of her “original title” in respect of Pedra Branca, Malaysia appears to lack confidence in her claim of a prior title and in her denial of the status of Pedra Branca as a *terra nullius*. Consequently, a considerable effort is made to minimise the substantial evidence of the taking of possession by the British Crown in the period 1847-1851.

B. THE BASIS OF TITLE

3.24 The basis of claim is the taking of lawful possession of Pedra Branca by agents of the British Crown in the period 1847-1851. The intention of the British Crown was to establish sovereignty, that is to say, an exclusive title under general international law. The existence of the requisite intention was dependent upon the provision of evidence but no particular formalities were required. The taking of possession and effective occupation accompanied by the intention to establish sovereignty was sufficient to create title in accordance with the inter-temporal law.

3.25 In her Counter-Memorial, Malaysia seeks to caricature Singapore’s use of the term “lawful possession” as a “complete equivocation”,⁹⁸ and as a “hybrid”.⁹⁹ Malaysia’s argument on the nomenclature is both surprising and time-wasting. The term “lawful possession” is synonymous with effective occupation of *terra nullius*. This is perfectly clear from the quotations from the standard works set forth in the Singapore Memorial.¹⁰⁰ Singapore will not

⁹⁸ MCM p. 3, para. 4.

⁹⁹ MCM p. 4, para. 6.

¹⁰⁰ See SM, pp. 81-86, paras. 5.108-5.111.

dwell any further in this Chapter on this futile Malaysian argument. A full discussion of the issue is provided in Appendix A to this Reply.

C. THE BASELESS MALAYSIAN ASSERTION THAT THERE WAS NO INTENTION TO ESTABLISH SOVEREIGNTY ON THE PART OF THE BRITISH CROWN

3.26 Singapore’s Memorial and Counter-Memorial present the full record of the events and of the planning which led up to the selection, in 1846, of Pedra Branca as the site of the lighthouse in commemoration of James Horsburgh. As Singapore points out in her Counter-Memorial, the entire process of planning, choice of site, and construction, was subject to the exclusive control and approval of the British Crown and its representatives.¹⁰¹

3.27 In spite of the existence of such a full record of the role of the British Crown in planning and funding the construction of the lighthouse, Malaysia seeks to deny the existence of an intention to acquire sovereignty.¹⁰² This denial is based upon a number of self-serving and unrealistic suppositions.

3.28 In the *first* place, it is contrary to commonsense to suppose that the British Crown, or any other sovereign would claim only property in the lighthouse itself. In the absence of restrictions imposed by a licensor – and there was no licensor – legal and political security would demand that title and possession applied to the entire feature, given Pedra Branca’s size and location.

3.29 *Secondly*, Malaysia insists that “none of the various formalities undertaken in the course of the construction of the lighthouse or after its completion... manifested any intention to acquire sovereignty, either explicitly

¹⁰¹ SCM p. 127, para. 5.135.

¹⁰² MCM pp. 33-37, paras. 63-72.

or implicitly”.¹⁰³ This assertion is typical of the self-serving methodology adopted by Malaysia according to which each event is a “formality”, and each event is treated as being unconnected to other events, in the overall process of taking of lawful possession, the legal significance of which Malaysia ignores. On the contrary, it is evident that the *pattern* of decision-making and governmental activity presupposes an intention to acquire sovereignty, that is, a title *good against other States*. In the circumstances, this would be the assumption of a third State and this especially in the absence of any evidence of the involvement of any other claimant or licensor.

3.30 The suggestion of Malaysia that “the formalities” reveal “only an intention on the part of the East India Company to own the lighthouse” does not make political sense.

3.31 The Malaysian pleading refers to the account of the laying of the foundation stone appearing in the *Straits Times and Singapore Journal of Commerce*, in which there is a reference to “the Horsburgh Testimonial, or Lighthouse for all Nations”.¹⁰⁴ Malaysia hastens to suggest that this locution was somehow at odds with an intention to take exclusive possession on behalf of the British Crown.¹⁰⁵ This argument calls for several remarks. *First*, Malaysia fails to acknowledge that the words “Lighthouse for all Nations” came from the journalist writing the article in the *Straits Times*, and *not* from the speeches of the Governor or the Worshipful Master. *Secondly*, there is simply no contradiction between the construction of a lighthouse for the benefit of all nations, and the intention to claim exclusive possession over the site of the lighthouse. *Thirdly*, this argument is the perfect paradigm of Malaysia’s

¹⁰³ MCM pp. 34-35, para. 66.

¹⁰⁴ *The Horsburgh Lighthouse* in the *Straits Times and Singapore Journal of Commerce* (28 May 1850) (SM Vol. 3, Annex 45).

¹⁰⁵ MCM p. 34, para. 66.

style of reasoning. The substance of the matter is that the laying of the foundation stone was not an isolated event. The newspaper account relied upon by Malaysia makes it clear that the ceremony was held under the auspices of the Governor of the Straits Settlements. The Governor had requested the Worshipful Master and Brethren of the Lodge Zetland in the East to lay the Foundation Stone, and the distinguished visitors listed were there at the invitation of the Governor. In fact, the laying of the foundation stone formed part of a long process of decision-making and preparation for the construction of the lighthouse under the control of and on behalf of the British Crown.

3.32 In the context of the Malaysian focus upon the concept of activity *à titre de souverain*, there is a serious misconstruction of the concept. Malaysia argues that activity, such as the “mere” administration of a lighthouse, is somehow entirely divorced from any question of sovereignty or title.¹⁰⁶ But this is a clear deformation of thinking about sovereignty. The motivation involved in taking possession of territory may be to acquire access for space for an airfield, or port facilities, or natural resources, but the vehicle for acquiring access is the acquisition of title.

3.33 In each case the precise legal context, including the intention of the actor, is paramount, and not facile typologies about lighthouses, navigational aids, and “best practice” by lighthouse authorities. Malaysia insists, wrongly, on divorcing conduct from the legal context.

3.34 Malaysia also seeks to argue that Act No. VI of 1852, which vested the Horsburgh Lighthouse in the East India Company and vested its management and control in the Governor of the Straits Settlements, merely manifested an

¹⁰⁶ MCM pp. 99-100, para. 203. *See also* MCM pp. 121-122, para. 247.

intention to own the lighthouse.¹⁰⁷ As on other occasions, Malaysia prefers to treat the relevant evidence as a series of unconnected items. The Act of 1852 follows the taking of possession and makes provision in the normal way for the incorporation of the lighthouse into the municipal legal system.

3.35 Malaysia applies the same type of logic to the Notice to Mariners of 24 September 1851.¹⁰⁸ The Malaysian pleading denies that this constitutes evidence of title.¹⁰⁹ But, as must be obvious, the Notice to Mariners represents the end of the long chain of preparations and activities leading to the commissioning of the lighthouse as the culmination of this major project of the British Crown. The Notice was, of course, signed by the Governor and received appropriate publicity in the Singapore newspapers.

3.36 In this context it is to be noted that this well-publicised Notice to Mariners failed to attract any protest or reservation of rights by any other State in the region relating to the British title to Pedra Branca.

3.37 The logic adopted by the Malaysian pleading is artificial in the extreme, and thus it is assumed that the quality of the lighthouse as an asset is antithetical to the sovereignty already acquired in respect of the island which is the site of the lighthouse. There is no reason why it should be.

¹⁰⁷ MCM p. 35, para. 67.

¹⁰⁸ See Relevant Extracts from the Straits Times and Singapore Journal of Commerce (23 Sep 1851, 30 Sep 1851 and 7 Oct 1851), and the Singapore Free Press & Mercantile Advertiser (3 Oct 1851 and 6 Oct 1851) (SM Vol. 3, Annex 56); and SM pp. 72-73, paras. 5.87-5.88.

¹⁰⁹ MCM p. 35, para. 68; and p. 63, para. 126.

3.38 In her Counter-Memorial, Malaysia concedes that at the foundation stone laying ceremony, Pedra Branca was referred to as a dependency of Singapore in the following words:

*“The only reference in the Singapore Memorial that could possibly be construed otherwise is the passage from the speech of the Worshipful Master of the Lodge ‘Zetland and in the East’, Mr Davidson, at the ceremony laying the foundation stone that ‘this Rock is a dependency’ ...”*¹¹⁰ [emphasis added]

Malaysia then immediately seeks to minimise the significance of this statement by arguing that:

*“... As noted already, the term ‘dependency’ does not necessarily entail ‘sovereignty’. All of Johor could have been viewed as a ‘dependency’, since it was under the protection of the British Crown and within its sphere of influence.”*¹¹⁰

3.39 This ceremony is described in detail in Singapore’s Counter-Memorial.¹¹¹ As the Court will appreciate, in the context the attribution of dependency status would make sense, and Mr Davidson was well-qualified to understand the significance of the attribution. Moreover, in the context the term “dependency” *did* connote sovereignty, because what the Worshipful Master actually said was:

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

3.40 The reference to “our Island” can only be a reference to the main island of Singapore from whence the Governor’s party had just come. The standard dictionary definition of a dependency is: “The condition of being dependent,

¹¹⁰ MCM p. 36, para. 70.

¹¹¹ SCM pp. 115-119, paras. 5.107-5.117.

contingent logical or causal connection... something dependent or subordinate.”¹¹²

3.41 The connotation of the term in public international law is essentially the same. Thus, the authoritative *Dictionnaire de droit international public*, edited by Jean Salmon, provides the following guidelines:

“Dépendance: ... Partie d’un territoire se rattachant de manière subordonnée à un autre. Ainsi:

- le territoire maritime, dépendance du territoire terrestre :...
- une île, dépendance d’une autre île ou d’un groupe d’îles :

«Quand l’ambassade britannique à Paris, dans une note du 12 novembre 1869 au ministre français des Affaires étrangères, s’est plaint de prétendus vols par les pêcheurs français aux Minquiers et s’est référé à ce groupe en disant : ‘cette dépendance des Îles de la Manche’ (...)» (C.I.J. *Minquiers et Écréhous* (Grande-Bretagne/France), arrêt du 29 janvier 1953, *Rec. 1953*, p.71).

«L’exiguïté de Meanguerita, sa proximité de la plus grande île et le fait qu’elle est inhabitée permettent de la qualifier de ‘dépendance’ de Meanguera, au sens où il a été soutenu que le groupe des Minquiers était une ‘dépendance’ des îles de la Manche» (C.I.J., *Différend frontalier terrestre, insulaire et maritime*, arrêt du 11 septembre 1992, *Rec. 1992*, p.570, § 356).”¹¹³

[English translation: “Dependency: ... Part of a territory linked with another in a subordinate way. Thus:

- maritime territory, dependency of the land territory...
- an island, dependency of another island or group of islands:

‘When the British Embassy in Paris, in a Note of November 12th, 1869, to the French Foreign Minister, had complained about alleged theft by French fishermen at the Minquiers and referred to this group as “this dependency of the Channel

¹¹² Shorter Oxford English Dictionary (1974), at p. 521.

¹¹³ Salmon J., *Dictionnaire de droit international public* (2001), at. p. 322.

Islands”...’ (ICJ, *Minquiers and Ecrehos (France/United Kingdom)*, Judgment of 29 January 1953, Reports 1953, p. 71)

‘The small size of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited, allow its characterisation as a “dependency” of Meanguera, in the sense that the Minquiers group was claimed to be a “dependency of the Channel Islands”’ (ICJ, *Land, Island and Maritime Frontier Dispute*, Judgment of 11 September 1991, Reports 1992, p. 570, para. 356).”]

3.42 Malaysia makes one last thrust on the use of the term “dependency” during the laying of the foundation stone on 24 May 1850 under the supervision and control of the Governor. For this last thrust Malaysia states:

“There is further evidence of the irrelevance of the Worshipful Master’s words in the report on the ceremony sent by Governor Butterworth to the Governor of Bengal. It contains no reference at all to any acquisition of sovereignty or to the island becoming a ‘dependency of Singapore’. Rather, the report is limited to the statement that the ceremony concerned ‘the first stone... with masonic honours’.”¹¹⁴

3.43 The report referred to is Butterworth’s Report to the Government of India, dated 9 November 1850 (i.e., written six months after the ceremony),¹¹⁵ “giving cover to a Report on this Season’s operations at the Light House, under construction at Pedra Branca” from Mr Thomson, the Government Surveyor. Thomson’s Report, dated 2 November 1850, is addressed to Thomas Church.¹¹⁶ Neither the Governor’s Report to the Government of India nor Thomson’s Report to Church can be described as a report “on the ceremony” of the laying of the foundation stone. However, whilst it is true that the term “dependency” does not appear in either document, this is of no consequence whatever. Both

¹¹⁴ MCM p. 37, para. 71.

¹¹⁵ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 9 Nov 1850 (SM Vol. 3, Annex 49).

¹¹⁶ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850 (SM Vol. 3, Annex 47).

Reports confirm that the British Crown was in control of the whole enterprise and regarded the project as being of the first importance. In this same general connection, Church, in forwarding Thomson's Report to the Governor (letter dated 7 November 1850) draws a clear contrast between Pedra Branca and Point Romania, the latter belonging to the Sovereign of Johor.¹¹⁷

3.44 In a similar vein, Malaysia also argues that:

“Notably, J.T. Thomson in his long *Account on the Horsburgh Lighthouse* did not mention, either expressly or by inference, that the British Crown acquired sovereignty over PBP through the construction of the lighthouse... It is difficult to imagine that, had Thomson's first arrival on the island in 1847, or the end of the construction of the lighthouse in 1851, or indeed the whole process between 1847-1851, meant acquisition of sovereignty by Britain, Thomson would not have mentioned it at all, either in his *Account* or elsewhere.”¹¹⁸

This argument is a *non sequitur*. Singapore notes that Thomson's *Account* also did not mention any alleged prior Johor title or, for that matter, any alleged permission from Johor. By Malaysia's own logic, Thomson's silence on these issues in “his long *Account on the Horsburgh Lighthouse*” would be proof that no prior Johor title exists and that there was no permission from Johor as alleged by Malaysia. In reality, Thomson's *Account* did not expressly address the question of title because the *Account* was “intended merely for the information of the [*British*] Authorities”¹¹⁹ and therefore “confined... to giving a description of the works and a recital of the operation and occurrences connected with the construction”.¹¹⁹ Nevertheless, an indication of Thomson's

¹¹⁷ Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850 (SM Vol. 3, Annex 48).

¹¹⁸ MCM p. 64, para. 128.

¹¹⁹ Thomson's *Account*, *supra* note 55, at p. 495 (SM Vol. 4, Annex 61, p. 598).

own perception concerning the question of title may be found in his reference to the establishment on Pedra Branca as “our settlement on the rock”.¹²⁰

3.45 These are the disparate arguments offered by Malaysia in support of the proposition that the intention of the British Crown was not to acquire sovereignty but only to construct a lighthouse on Pedra Branca. These arguments are not only intrinsically weak, but Malaysia also ignores much of the evidence of British intention set forth in Singapore’s Memorial. Furthermore, Malaysia’s argument relating to intention relies additionally upon the proposition that, in the absence of certain formalities (which were alleged to be part of British practice) intention could not be proved. This aspect of the Malaysian pleading will be examined later on.¹²¹

D. THE BASELESS MALAYSIAN ASSERTION THAT THE ACTS INVOKED AS EVIDENCE OF TAKING POSSESSION “ARE NOT RELEVANT”

1. *The Methodology Adopted by Malaysia*

3.46 In a substantial section of her Counter-Memorial, Malaysia seeks to demonstrate that the acts invoked by Singapore to prove the taking of possession are “not relevant” for this purpose.¹²² Malaysia defines the task as follows:

“This section will examine whether the relevant acts leading to the construction of the lighthouse can be considered, individually or as a whole, as a taking of possession and therefore a basis for Singapore’s claim.”¹²²

¹²⁰ Thomson’s *Account*, *supra* note 55, at p. 405 (SM Vol. 4, Annex 61, p. 508).

¹²¹ See para. 3.94 *et seq.*, *below*.

¹²² MCM p. 49, paras. 94.

3.47 This definition of the task Malaysia has set herself encapsulates the essentially flawed character of her methodology. In the first place the question of intention is artificially separated from the process of the “taking of possession”. This is not the way in which the basis of Singapore’s claim has been pleaded and Malaysia’s approach is illogical. Singapore has in her Memorial pleaded the manifestation of the will of the British Crown as a sufficient mode of lawful possession.¹²³ Consequently, the element of intention and its manifestation by the conduct of the agents of the British Crown are complementary and should be viewed holistically.

3.48 It is Malaysia’s tendency to fragment the evidence and to divorce intention from the manifestation of intention. This preference for fragmentation of the evidence leads to some astonishing results. Thus the episode in which Thomson places the brick pillars on Pedra Branca is taken completely out of context.¹²⁴ Malaysia here fails to recall that the building of the brick pillars on Pedra Branca was preceded by the decision of the British Crown to select Pedra Branca as the site of the lighthouse.

3.49 In order to deal with the multifarious distortions and conundrums to be found in the pertinent section of Malaysia’s Counter-Memorial, Singapore will examine the material item by item.

2. The Process of Selection of Pedra Branca as the site for the Horsburgh Lighthouse

3.50 It was the British Crown which decided to proceed with the building of a lighthouse near the eastern entrance to the Singapore Strait and which, after considerable study of the technical requirements, selected Pedra Branca as the

¹²³ SM pp. 74-77, paras. 5.90-5.98; and pp. 86-87, para. 5.112.

¹²⁴ MCM p. 54, para. 106.

most appropriate site. The entire process of planning, choice of site and construction is examined in Singapore's Memorial.¹²⁵ The position of Singapore on the taking of possession is reaffirmed in Singapore's Counter-Memorial.¹²⁶

3.51 In face of the substantial body of evidence of the all-embracing role of the British Crown in the funding and construction of the lighthouse and the selection of Pedra Branca as the site, Malaysia is content with making a series of debating points.

3.52 First of all, Malaysia states that the idea to build a lighthouse was the *private* initiative of certain merchants in Canton to commemorate the life and achievements of James Horsburgh.¹²⁷ This is, of course, true and the background is fully described in Singapore's Memorial.¹²⁸ The point however, is that it was *the British Crown* which was responsible for taking the operational decision whether to build the lighthouse. This is accepted by Malaysia:

“In fact, the East India Company twice rejected the proposal to build the lighthouse. The Court of Directors only acted in response to repeated requests by the merchants.”¹²⁹

3.53 In fact the final decision to proceed was based upon a number of political and economic considerations connected with the issue of levying a duty on shipping. The levying of duty on shipping is of course only possible through governmental action.

¹²⁵ SM pp. 33-69, paras. 5.13-5.80.

¹²⁶ SCM Chapter V.

¹²⁷ MCM p. 50, para. 95.

¹²⁸ SM pp. 35-36, paras. 5.18-5.19.

¹²⁹ MCM p. 50, para. 95.

3.54 The next debating point presented on behalf of Malaysia is the denial that the Court of Directors of the East India Company decided on the name of the lighthouse:

“While the East India Company concurred with the name ‘Horsburgh’, it was the private merchants who thought of commemorating the name of James Horsburgh by building a lighthouse.”¹³⁰

This is pure obfuscation. It was the British Crown which commenced the project and made it a practical enterprise, and which necessarily had to approve the name of the lighthouse.¹³¹ The letter from the Governor to the Government of India, dated 13 February 1850, includes this passage:

“I have the honor to acknowledge the receipt of your letter under date the 12 November last No 784 with its enclosure from the Government of India giving cover to a despatch from the Honble the Court of Directors authorizing the immediate construction of the Light House on Pedra Branca to be called after the celebrated Hydrographer James Horsburgh Esquire.”¹³²

3.55 Malaysia, in her Counter-Memorial, then invokes the merchants again and makes the following claim:

“97. A group of Bombay merchants went even further by requesting that ‘Horsburgh’ be used as the name for the lighthouse. By letter to the Secretary of the Chamber of Commerce in Singapore, the Bombay merchants made this a condition of their financial support: ‘... we beg to acquaint you that we are willing to place the above sum (ie 4308 Rupees collected in Bombay) at the disposal of the Singapore Committee, under the proviso that the Lighthouse in question shall be called “The Horsburgh Lighthouse”.’”¹³³

¹³⁰ MCM p. 50, para. 96.

¹³¹ SM pp. 46-47, paras. 5.45-5.46.

¹³² See Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 13 Feb 1850 (SM Vol. 3, Annex 39).

¹³³ MCM pp. 50-51, para. 97.

3.56 When the letter is read as a piece it can be seen that the merchants had not been a part of the decision-making process:

“We are (*sic*) undersigned are the remaining members of a committee formed in 1837 to receive subscriptions towards erecting a Testimonial of respect in Bombay to the memory of the late James Horsburgh Esq. The sum collected for this purpose having only amounted to Rupees (4308) four thousand three hundred and eight, the idea of erecting such testimonial was abandoned but observing by the papers that there is to be a Lighthouse erected at Singapore to commemorate the deceased, and that you are the Channel of communication: we beg to acquaint you that we are willing to place that above sum at the disposal of the Singapore Committee, under the proviso that the lighthouse shall be called the ‘The Horsburgh Light’.

If this proposition is complied with you can communicate same to Messrs. Pinnington & Co., the treasurer for the subscription, and who have been requested to pay the above sum. We would suggest that such be drawn for the Singapore and our xxx [*sic*] authorised by your Committee.”¹³⁴

3.57 Notwithstanding this letter, it was clear that the Government at all times retained the right to name the lighthouse. The name of the lighthouse is not a result of the letter, as Malaysia suggests. The letter is dated 22 January 1846. The name “Horsburgh Lighthouse” was already used by Governor Butterworth to describe the project as early as 1844.¹³⁵

3.58 The next item of obfuscation is the complaint by Malaysia that:

“It is incorrect to say that the construction work was financed by the East India Company.”¹³⁶

¹³⁴ Letter from the remaining members of a Committee of Merchants formed in 1837 to the Secretary of the Singapore Chamber of Commerce dated 22 Jan 1846 (MCM Vol. 3, Annex 14). The sum of 4,308 rupees offered in this letter did not even cover one-tenth of the cost of Horsburgh Lighthouse. (The cost of construction was 53,134 rupees – see SM p. 54, para. 5.60.)

¹³⁵ See e.g., Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Belcher E. (Captain of H.M.S. *Samarang*) dated 2 Oct 1844 (SCM Vol. 2, Annex 9).

¹³⁶ MCM p. 51, para. 98.

The Malaysian pleading first argues that:

“The Court of Directors of the East India Company was reluctant to advance funds and referred to the funding deficit that the Company would cover for the construction of the lighthouse as a ‘loan’.”¹³⁷

And then concludes that:

“This opposition by the Court of Directors to any public spending on the lighthouse is inconsistent with Singapore’s argument that public financing is evidence of the intention to acquire territorial sovereignty.”¹³⁸

3.59 The Malaysian argument is self-contradictory. Malaysia admits that funds for construction of the lighthouse were advanced by the Court of Directors of the East India Company, and yet she claims that the construction work was not financed by the East India Company. Similarly, Malaysia admits that a tax, in the form of light dues, was levied with the approval of the Court of Directors to defray the costs of the construction of the lighthouse, and yet she claims that the Court of Directors was opposed to “any public spending on the lighthouse”. This self-contradiction in the Malaysian pleading is a natural consequence of her attempt to distort the actual funding situation.

3.60 *First*, on the question of the “loan”, it is abundantly clear from the letter relied on by Malaysia that this was a loan from a superior government to a subordinate government to fund the financial needs of the subordinate government.¹³⁹ An intra-governmental loan of this nature does not detract from

¹³⁷ MCM p. 51, para. 98.

¹³⁸ MCM p. 52, para. 99.

¹³⁹ Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 Sep 1849 (SM Vol. 3, Annex 31), quoted in SM p. 39, para. 5.27. Paragraph 3 of the letter reads:

“3. The subscriptions hitherto received for the Light House amount to R^S. 22,194 leaving a deficit of R^S. 28,723, which you proposed should be advanced by Government, and to ensure payment of this loan, you further propose that the duty authorised by us to be levied on Vessels touching at Singapore or clearing out from

the public character of the funding arrangement. This point appears even more clearly from an earlier letter in which the Government of Bengal informs the Government of India that:

“3. It will be observed that in his present report, Col Butterworth has submitted an estimate which with the addition of a Cupola for the Light House, and the extra allowance for the Superintendents of the work during the period of two years, will rather exceed the sum of Rs 50,000.

4. To meet this *the Governor of the Straits has only the Sum of Rs 22,196-6-7*, or not quite one half of the estimated expense.

5. It would thus be necessary for the completion of this work, so long delayed, but so urgently required for the preservation of our Shipping *to advance the requisite funds from the Revenues of India, and afterwards seek repayments from the Light House dues.*”¹⁴⁰ [emphasis added]

3.61 *Secondly*, on the question of “public spending”, it is disingenuous of Malaysia to suggest that funding through a special tax on shipping, as opposed to funding from the general tax revenues of India, is not “public spending”. The choice between funding through a shipping levy (where the tax burden falls on shipowners only) and funding through the general revenue (where the tax burden falls on the general population) is simply a policy choice between using different public means to meet the same public end. Both methods require the use of government authority to levy taxes and both are equally methods of public finance.

3.62 What was clear throughout the debate about the method of funding and the wisdom of a levy was that the project was to be controlled and financed by the Government of India. Contrary to the impression that Malaysia’s Counter-Memorial seeks to foster, the private interests fully recognised these realities.

Indian ports to China or the Eastward of Singapore, should be raised from one rupee to two dollars or 4½ rupees per 100 tons.” [emphasis added]

¹⁴⁰ Letter from Seton Karr W. (Under-Secretary to the Government of Bengal) to Grey W. (Under-Secretary to the Government of India) dated 6 Oct 1848 (SM Vol. 2, Annex 28).

Thus, in the letter dated 1 March 1842, in which Jardine Matheson reports the proposal to the then Governor, Bonham, the following appears:

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

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

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

The amount is far from adequate, but we trust the well known munificence of the Hon'ble Company will supply what additional funds may be wanting for an object of such eminent public utility intended at the same time, to do Honour to the memory of one of the most meritorious of their Servants.”¹⁴¹ [emphasis added]

3.63 In her Counter-Memorial Malaysia relies upon the alleged reluctance of the Court of Directors (in 1847) to agree to public spending as the basis for saying that this is inconsistent with Singapore’s argument “that public financing is evidence of the intention to acquire territorial sovereignty” (this is Malaysia’s wording of the argument).¹⁴² Of course, Singapore does not express an argument in such terms. The position of Singapore is that the public funding is a significant part of the *overall pattern* of government planning and control.

¹⁴¹ Letter from Jardine Matheson to Bonham S.G. (Governor of Prince of Wales Island, Singapore and Malacca) dated 1 Mar 1842 (SM Vol. 2, Annex 8).

¹⁴² MCM pp. 51-52, para. 99.

3.64 When Malaysia finally deals with the process of the selection of the site for the lighthouse, she suggests that the selection of Pedra Branca “had nothing to do with concerns about sovereignty”.¹⁴³ This fragmented analysis ignores the fact that the selection formed part of the process of the appropriation of the island for the purposes of the British Crown.¹⁴⁴

3. The Construction of the Lighthouse was not (according to Malaysia) a Taking of Possession

3.65 Malaysia’s arguments disputing that the British took possession of Pedra Branca in 1847 provide further examples of the eccentric mode of argument relating to the substantial pattern of evidence of the acquisition of title by the British Crown.¹⁴⁵ One good example of the genre is this paragraph:

“The point at issue here is not who constructed the lighthouse and operated it, but whether this construction can be considered as an act of taking of possession of the island. There is no question that Horsburgh Lighthouse was constructed by the East India Company and that it belonged to it. *Understandably, this construction was carried out and supervised by British authorities.* The question at issue is whether the construction was conducted with the intention to acquire sovereignty over PBP.”¹⁴⁶ [emphasis added]

3.66 This passage involves a series of helpful admissions to the effect that the “construction was carried out and supervised by British authorities”. Precisely so: the whole process involved the British Crown. The defensive move by Malaysia is then to propose that the construction was not accompanied by an intention to acquire sovereignty. This is yet another example of the device of fragmentation, which is accompanied by the highly artificial concept that each

¹⁴³ MCM p. 52, para. 100.

¹⁴⁴ See para. 3.50 above.

¹⁴⁵ See MCM pp. 53-54, paras. 103-107.

¹⁴⁶ MCM p. 53, para. 103.

factual element must have a title badge. Thus, Malaysia states that the selection of Pedra Branca as the site of the lighthouse, “is not, *as such*, evidence of an intention to acquire sovereignty over it”.¹⁴⁷ But this assertion has no logical value, because the legal significance of any particular act will *inevitably* depend upon the context, the relevant documents, the reactions of other sovereigns, and so forth. Furthermore, in the real situation of Pedra Branca, it is ludicrous to treat the lighthouse project in isolation from the lengthy and detailed documentary record of British intentions.

3.67 Another striking example of the strange logic adopted by Malaysia can be found in her treatment of the activities of the Government Surveyor, Thomson. Malaysia makes strenuous efforts to minimise the significance of his activities. Thus, her Counter-Memorial contains the following assertions:

“Singapore’s attempts to attribute a sovereign quality to the enterprise of J.T. Thomson, Government Surveyor at Singapore, during the construction of the Horsburgh Lighthouse is contradicted by the facts. In particular, Thomson received remuneration for the construction of the lighthouse independently of his salary as Government Surveyor.”¹⁴⁸

3.68 This reasoning is extraordinary. Thomson, it is suggested, was some kind of interloper. The Malaysian technique of fragmentation is thus applied to the individual officials. As Singapore has explained in her Memorial:

“5.13 ... As a preliminary, it is necessary to describe the general character of the evidence. This consists, to a very great extent, of correspondence between three linked pairs of officials of the Government of India, who were instrumental in the planning of the enterprise and, in due course, in the execution of the instructions of the Court of Directors of the East India Company when these were issued in 1847.

5.14 The three pairs of officials functioned in this way:

¹⁴⁷ MCM p. 53, para. 104, emphasis added.

¹⁴⁸ MCM p. 54, para. 105.

- (a) The Government of India, through the Bengal Presidency, had authority over, and corresponded with, Colonel W.J. Butterworth, Governor of the Straits Settlements (hereinafter referred to as “Governor Butterworth”);
- (b) Governor Butterworth had authority over, and corresponded with, Thomas Church, Resident Councillor at Singapore; and
- (c) Thomas Church had authority over, and corresponded with, J.T. Thomson, the Government Surveyor at Singapore, who was the architect and engineer responsible for planning and constructing the lighthouse on Pedra Branca (hereinafter referred to as “Thomson”).

5.15 Governor Butterworth was directly involved from early on, and it is recorded that he visited Pedra Branca in 1847. Governor Butterworth was present at the formal laying of the Foundation Stone on 24 May 1850; his name appears on the panel in the Visitors Room of the lighthouse; and he it was who signed the British *Notice to Mariners* dated 24 September 1851. It was also Governor Butterworth who was in charge of the final commissioning ceremony on 27 September 1851.

5.16 But the authoritative witness is clearly Thomson. Apart from the correspondence involving Thomson, a major resource is the *Account of the Horsburgh Light-house*, written by Thomson and published, in 1852, in the *Journal of the Indian Archipelago and Eastern Asia*. This is in fact the text of the official report prepared by Thomson, in his role as Government Surveyor at Singapore, after completion of the project. It is dated 14 August 1852. As the preface explains, the account had been prepared at the wish of Governor Butterworth. On the panel in the Visitors Room, Thomson is described as the “Architect” and it was Governor Butterworth who selected Thomson for that position.”¹⁴⁹

3.69 It is hardly surprising that Malaysia should seek to minimise the role of Thomson, who was directly involved in the planning of the construction on Pedra Branca, and the preparation of estimates. The issues raised by Malaysia are all clarified in the letter from Governor Butterworth to the Government of

¹⁴⁹ SM pp. 33-35, paras. 5.13-5.16.

India, dated 12 June 1848, which Malaysia could have quoted, but did not. The letter reads, in material part, as follows:

“With reference to the several communications noted in the margin regarding the construction of a Light House on Pedra Branca at the entrance of the China Sea to the memory of the celebrated Hydrographer James Horburgh Esquire, I have now the honour to submit the accompanying full Report on the subject for the final orders of the Right Honble the Governor of Bengal.

2. In accordance with the views stated in the 3rd Para of my letter dated the 1st October 1847 and approved of by the Honble the Governor of Bengal, Brick Pillars were erected on Pedra Branca, the site determined upon for the Horsburgh Light House, for the purpose of ascertaining the effect of the waves on the Rock during the N.E. Monsoon which usually prevails here from October to Feby the result is detailed in Mr Thomson’s Report a copy of which is herewith transmitted.

3. The exposed position of Pedra Branca renders it subject to the full force of the N.E. Monsoon, and the heavy swell which rolls in from that side, causes the waves to beat over the Rock to the height of 15 feet above the level of high Water Mark, whilst the spray rises therefrom to so great an elevation as to make a structure of Granite set in Cement for a facing with a backwork of Brick, imperatively necessary to the security of its inmates and the permanency of the Light House.

4. Having satisfied himself on this point I directed that indefatigable and valuable public Servant Mr Thomson to prepare a Plan, Specification and Estimate, for a Building of the description proposed, which with this Gentleman’s observations therein I beg to enclose for the favorable consideration and sanction of the Right Honble the Governor of Bengal in the hope that I may receive timely instructions, so as to enable the Contractor to send to China for Stone Masons, and to make such other preparations as will ensure this important work to the safety of the mariner in these Seas, being commenced upon, at the earliest practicable period.”¹⁵⁰

¹⁵⁰ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848 (SM Vol. 2, Annex 27).

3.70 This letter, along with much other documentation, establishes the central role of Thomson. The same letter also contradicts the assertion in Malaysia's Counter-Memorial that:

“What is presented by Singapore as either the beginning of the taking of possession of PBP, or the completed act of ‘taking of lawful possession’ in 1847, was nothing more than Thomson’s visit to study the feasibility of the construction of the lighthouse and place seven brick pillars to test the strength of the waves.”¹⁵¹

3.71 As the letter of 12 June 1848 makes clear, the placing of the brick pillars related to the modalities of construction and not to the selection of the site. This had already taken place. The same letter (in paragraph 6) explains why the Government was pleased to pay Thomson a special remuneration for the management of the construction, as well as other ancillary needs:

“6. In a work of such vast importance, so far removed from all resources, requiring such constant supervision, and involving so much anxiety and responsibility, I am persuaded that the remuneration solicited by Mr Thomson for himself viz 150 Rupees per mensem in addition to his salary of 350 Rs as Govt Surveyor, the general duties of which Office he undertakes to perform also, making 500 Rupees per mensem whilst employed on the Light House, will be cheerfully granted. To this I think may fairly be added Table Allowance at the Rate of 5 Rupees per Diem whilst on board the Steamer when proceeding to and from Pedra Branca, the total amount to be so drawn, during the period the Light House is under construction being limited to 500 Rupees – an Overseer on 100 Rupees per Mensem will also be necessary. Mr Thomson suggests in lieu of the latter an allowance of 50 Rupees to the Commander of the Gunboat, but as this vessel and all the limited marine resources of this Settlement will be required in aid of this humane undertaking, I would prefer the former being at once allowed.”¹⁵²

¹⁵¹ MCM p. 54, para. 106.

¹⁵² Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848 (SM Vol. 2, Annex 27).

3.72 Malaysia’s Counter-Memorial contends that a visit or a “mere landing” by an official “does not constitute taking of possession”.¹⁵³ But this is not what Singapore has contended in her pleadings. Once again Malaysia refers to an episode in isolation and then observes that this does not constitute a taking of possession. This is, as usual, to miss the point. The placing of the brick pillars, as the documents reveal, formed an important constituent in the process of planning and in determining the modalities of the construction of the lighthouse. The various activities were part of an ongoing pattern of activity carried out on the instructions of the British Crown and its agents. The brick pillars are referred to in the following documents.

- (a) Thomson to Church, 8 March 1848;¹⁵⁴
- (b) Letter from Butterworth to Seton Karr, dated 12 June 1848;¹⁵⁵
- (c) Letter from Butterworth to C. Beadon, dated 1 October 1847;¹⁵⁶

3.73 To sum up, Thomson’s additional remuneration does not detract from the governmental character of his duties. The additional remuneration was paid by the Government, and had to be specifically approved by the Government in India. Moreover, Thomson’s action in the construction of the lighthouse was at all times done under the direction of Governor Butterworth, either personally or through the agency of Resident Councillor Church.

¹⁵³ MCM pp. 54, paras. 106-107.

¹⁵⁴ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 8 Mar 1848, attached to this Reply as Annex 7.

¹⁵⁵ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 12 June 1848 (SM Vol. 2, Annex 27).

¹⁵⁶ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Beadon C. (Under Secretary to the Government of Bengal) dated 1 Oct 1847 (SM Vol. 2, Annex 24).

4. *Malaysia asserts that the activity of gunboats does not constitute a manifestation of sovereignty*

3.74 The precise assertion on the part of Malaysia is that “[t]he activity of gunboats or the presence of a gun does not *in itself* constitute a manifestation of sovereignty”.¹⁵⁷ But Singapore has not expressed such a view in her pleadings. In her Memorial, Singapore describes the logistical support provided by Government vessels.¹⁵⁸ The Memorial also refers to the provision of protection by gunboats and makes the following key point:

“The provision of a government steamer and gunboats to assist in the movement of building materials and to provide protection against pirates formed a regular feature of the consecutive plans and financial estimates relating to the construction of the lighthouse. The relevant documents are as follows:

- (a) 20 November 1844 letter from Thomson to Governor Butterworth;¹⁵⁹
- (b) 9 July 1847 letter from Thomson to Church (three references to the gunboats);¹⁶⁰
- (c) 20 May 1848 letter from Thomson to Church;¹⁶¹
- (d) 12 June 1848 letter from Governor Butterworth to W. Seton Karr;¹⁶²
- (e) 3 March 1849 letter from the Government of India;¹⁶³
- (f) 20 December 1849 letter from Thomson to Church (a detailed account of the arrangements);¹⁶⁴

¹⁵⁷ MCM p. 55, para. 108, emphasis added.

¹⁵⁸ SM pp. 61-62, paras. 5.69-5.70.

¹⁵⁹ SM Vol. 2, Annex 12.

¹⁶⁰ SM Vol. 2, Annex 21.

¹⁶¹ SM Vol. 2, Annex 26.

¹⁶² SM Vol. 2, Annex 27. *See, in particular*, para. 6.

¹⁶³ SM Vol. 2, Annex 30. *See, in particular*, para. 2 of the letter.

- (g) 24 December 1849 letter from Governor Butterworth to Church;¹⁶⁵
- (h) 29 December 1849 letter from Governor Butterworth to Church;¹⁶⁶
- (i) 22 February 1850 letter from Governor Butterworth to Church;¹⁶⁷
- (j) 4 April 1850 letter from Governor to the Resident Councillor at Malacca;¹⁶⁸
- (k) 19 April 1850 letter from Governor Butterworth to the Resident Councillor at Malacca;¹⁶⁹ and
- (l) 2 November 1850 letter from Thomson to Church.^{170,,171}

3.75 As on other occasions, Malaysia only sees the gunboats in isolation and observes:

“In no way did these activities manifest the exercise of sovereign functions”¹⁷².

3.76 The context is ignored, and the relation of the special provision of gunboats to the overall planning and execution of the lighthouse project is not recognised as an exercise of sovereign functions. And yet Malaysia’s Counter-Memorial expressly accepts the ancillary functions performed by the

¹⁶⁴ SM Vol. 3, Annex 34.

¹⁶⁵ SM Vol. 3, Annex 35.

¹⁶⁶ SM Vol. 3, Annex 38.

¹⁶⁷ SM Vol. 3, Annex 40.

¹⁶⁸ SM Vol. 3, Annex 43.

¹⁶⁹ SM Vol. 3, Annex 44.

¹⁷⁰ SM Vol. 3, Annex 47.

¹⁷¹ SM pp. 62-64, para. 5.72, with consequential amendments to the footnotes to facilitate location of Annexes.

¹⁷² MCM p. 55, para. 108.

gunboats.¹⁷³ An observer not cabined within the logic of the Malaysian argument would find this argument impossible to follow.

5. *The Control of Public Order in the Region*

3.77 In her Counter-Memorial, Malaysia responds to the relevant section of the Singapore Memorial¹⁷⁴ with the following commentary:

“What is presented by Singapore as the maintenance by J.T. Thomson of ‘public order’ on PBP was nothing but the control of the builders’ performance of their contractual engagements and the exercise of the normal authority of the master architect or engineer of a construction work. Singapore provides no evidence that Thomson ‘had general authority to maintain public order in the vicinity’. The one incident related in support of the contention in its Memorial concerned the wish of the commander and crew of the *Nancy* to leave the service and return to Singapore. The decision of Thomson to wait until the arrival of the *Hooghly* instead shows that he was not invested with any public authority. As stated in his *Account*, Thomson requested the Captain of the *Hooghly* to place his gunner and some of his crew in charge of the *Nancy* ‘until the orders of the Resident Councillor were obtained as to the disposal of the mutineers’.”¹⁷⁵

3.78 This description reflects, yet again, the tendency of the Malaysian pleading to ignore the context. As the documentary record shows in abundance, Thomson’s operations were carried out under the orders of Church, the Resident Councillor, and the Governor, Butterworth. It is ludicrous to suggest that Thomson was just another “master architect or engineer of a construction work”. He was the agent of the British Crown and was acting exclusively under its authority. In relation to the incident involving the *Hooghly*, as Malaysia’s Counter-Memorial accepts, Thomson was acting under the authority of the Crown in the person of Church, the Resident Councillor.

¹⁷³ MCM p. 55, para. 108.

¹⁷⁴ SM pp. 68-69, para. 5.79.

¹⁷⁵ MCM p. 56, para. 110, footnotes omitted.

The very fact that Thomson was in a position to detain the commander and crew of the *Nancy* until the *Hooghly* arrived was evidence that Thomson had the necessary public authority. That Thomson described the commander and crew who disobeyed his orders as “mutineers” showed that he believed that his authority was of a public character.

3.79 Malaysia’s Counter-Memorial then embarks on a misconstruction of two series of correspondence in an attempt to show that it was the Temenggong who was responsible for controlling public order around Pedra Branca. In neither case does Malaysia’s attempt stand up to scrutiny.

3.80 The *first* series of correspondence concerns Thomson’s suggestion to establish an aid station at Point Romania, described in Resident Councillor T. Church’s letter of 7 November 1850.¹⁷⁶ Malaysia misconstrues Church’s letter as suggesting that “it was for the Temenggong to establish a station in Point Romania to protect the light-keepers and bring them assistance in case of emergency”.¹⁷⁷ Building on this misconstruction, Malaysia jumps to the conclusion that “the recognised authority to ‘control public order’ was Johor and not the Straits Settlements”.¹⁷⁷ But it is clear from the letter that Church never suggested that it was the Temenggong’s responsibility to “establish a station in Point Romania to protect the light-keepers”. In fact, Church never suggested the establishment of any such *station* by the Temenggong.¹⁷⁸

¹⁷⁶ Letter from Church T. (Resident Councillor at Singapore) to Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) dated 7 Nov 1850 (SM Vol. 3, Annex 48; MM Vol. 3, Annex 59).

¹⁷⁷ MCM pp. 56-57, para. 111.

¹⁷⁸ The actual words used by Church were:

“... I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an establishment must necessarily occasion. Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction; it will, of course be necessary for the Steamer or Gun boats to visit Pedro Branca weekly; some benefit would also accrue by requesting His

3.81 The true purport of Church’s letter is as follows. The responsibility for protecting the light-keepers lay with the British authorities, not the Temenggong. One way of discharging this responsibility was to establish a *British* station at Point Romania, but this would have been costly, and Point Romania was under the Temenggong’s jurisdiction. It was therefore better to rely on weekly visits by British gun boats to Pedra Branca. However, if the Temenggong could be persuaded to form a village at Romania to provide assistance when called upon, “some benefit would also accrue”. As explained above and in Singapore’s Memorial and Counter-Memorial,¹⁷⁹ Church’s letter is clear evidence that the Temenggong possessed no jurisdiction on or around Pedra Branca.

3.82 The *second* series of correspondence concerns certain conflicts in 1861 between Chinese fishermen from Singapore and Malay fishermen from Johor.¹⁸⁰ Malaysia interprets the correspondence as indicating that the Temenggong controlled fishing in the neighbourhood of Pedra Branca.¹⁸¹ Singapore has referred to the same series of correspondence in her Counter-Memorial and demonstrated how the correspondence actually reveals that both the Singapore fishermen and the Singapore authorities did *not* regard the Temenggong as having any authority on or around Pedra Branca.¹⁸² There is no need to repeat those arguments here. However, since Malaysia has devoted six pages in her Counter-Memorial to discuss this episode, Singapore will examine the correspondence in detail in **Appendix B** of this Reply to point out how Malaysia has misconstrued the correspondence.

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.” [emphasis added]

¹⁷⁹ See paras. 3.5, 3.6 and 3.10 *above*; SCM pp. 67-68, paras. 4.55-4.56; SM p. 77, para. 5.99.

¹⁸⁰ MCM Vol. 3, Annex 24; SCM Vol. 2, Annex 19.

¹⁸¹ MCM pp. 57-62, paras. 112-122.

¹⁸² SCM pp. 70-71, paras. 4.61-4.62.

6. *Malaysia asserts that the visits of British officials are not evidence of sovereignty in respect of Pedra Branca*

3.83 Malaysia contends that the visits of the British officials to Pedra Branca during the relevant period “are not evidence of sovereignty over the island”.¹⁸³ In the well-documented record it can be readily seen that the visits were an integral part of the process of construction and the exercise of the authority of the British Crown. The visits were by officials and for the purposes of the British Crown.

3.84 In a section of the Singapore Memorial not referred to or examined in Malaysia’s Counter-Memorial, details are provided about 19 visits.¹⁸⁴ In addition, Singapore’s Memorial includes the section entitled “Official Visits to Pedra Branca after the Completion of the Construction: the Commissioning of the Lighthouse”.¹⁸⁵ As the Memorial points out, these official acts constituted the final acts in the process of taking lawful possession of the rock and the installation, at Government expense and for Government purposes, of the lighthouse.

3.85 The Malaysian approach, as so often before, is to treat the visits in isolation from the general pattern of planning, of instructions from the British Crown, and the construction of the lighthouse. The visits were the necessary and natural part of a process. In these circumstances the Malaysian reference to *Minquiers and Ecrehos* does not help her case.¹⁸⁶ It is the *overall evidence*

¹⁸³ MCM p. 62, para. 123.

¹⁸⁴ SM pp. 58-61, paras. 5.66-5.68.

¹⁸⁵ SM pp. 70-71, paras. 5.81-5.84.

¹⁸⁶ *Minquiers and Ecrehos* [1953] ICJ Rep 47, at p. 71, cited by Malaysia in MCM p. 63, para. 124.

of intention which is significant, and that, in fact, is what the Court is saying in the passage quoted by Malaysia.

7. *The Cutting of Rain Channels on Pedra Branca*

3.86 Singapore's Memorial records the cutting of rain channels around the higher rocks.¹⁸⁷ The proposal to make the rain channels is documented in Thomson's letter to Church, dated 2 November 1850,¹⁸⁸ and the proposal was approved by Governor Butterworth, in his Report dated 9 November 1850, to the Government of Bengal.¹⁸⁹ Malaysia's response is to assert that the cutting of rain channels had no bearing on the question of sovereignty and to claim that:

“Permission for the construction of the lighthouse extended to all necessary measures related to it.”¹⁹⁰

3.87 This observation is erroneous on two counts. *First*, it wrongly assumes that the lighthouse was constructed with the permission of local rulers. *Secondly*, it ignores the reality that Thomson himself did not regard his mandate to construct the lighthouse as encompassing the digging of rain channels, and thus had to obtain specific permission from the Resident Councillor of Singapore to do so.¹⁹¹

¹⁸⁷ SM p. 69, para. 5.80.

¹⁸⁸ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850 (SM Vol. 3, Annex 47).

¹⁸⁹ Letter from Butterworth W.J. (Governor of Prince of Wales Island, Singapore and Malacca) to Seton Karr W. (Under Secretary to the Government of Bengal) dated 9 Nov 1850 (SM Vol. 3, Annex 49).

¹⁹⁰ MCM p. 63, para. 125.

¹⁹¹ Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 2 Nov 1850 (SM Vol. 3, Annex 47, pp. 361-362).

8. *The Display of the Marine Ensign on Pedra Branca*

3.88 In the Singapore Memorial, as part of the substantial body of evidence of the taking of lawful possession of Pedra Branca, reference is made to the practice, since the lighthouse began to function, of flying the marine ensign.¹⁹² Malaysia has made a considerable issue of this fact in her Counter-Memorial, devoting no less than five pages to this single issue. Malaysia begins by arguing that:

“... in actual cases of taking of possession by Great Britain of different kinds of territories, including uninhabited islands, a formal raising of the British flag, i.e., the Union Jack, was involved. This formality – accompanied by others – was explicitly recorded, either in the legal instruments related to the act of taking possession, i.e. the proclamation, or in the reports of the event made later to the relevant authorities. There is not one single reported case in which the flag displayed *as part of the act of taking possession* was a Marine Ensign.”¹⁹³ [emphasis added]

Malaysia’s argument misses the point. Singapore has never argued that the Marine Ensign was displayed as part of *the act* of taking possession. Instead, Singapore’s argument is that the *subsequent* flying of the Marine Ensign is evidence that possession had *already* been taken – a manifestation of sovereignty *already* acquired.¹⁹⁴ This is consistent with Singapore’s point (to be developed in detail below) that neither public international law nor “British

¹⁹² SM pp. 73-74, para. 5.89.

¹⁹³ MCM p. 64, para. 129.

¹⁹⁴ For ease of reference, the full text of SM pp. 73-74, para. 5.89 is reproduced here:

“5.89 The practice *since the lighthouse first began to function* was for the marine ensign to be flown: *see further*, Chapter VI, *below*. This was adverted to in Thomson’s letter to Church dated 20 July 1851, in which he wrote: ‘The Lighthouse flag I presume is different from the national one’. The use of the marine ensign was in accordance with contemporary British practice. *See overleaf*, for a painting showing the flying of the ensign at Pedra Branca (Image 15). *See also*, the images after page 10 (Image 2), and after page 61 (Image 3).”

practice” requires the hoisting of the national flag “as part of the act of taking possession”.

3.89 Malaysia is clearly uncomfortable about Singapore’s arguments concerning the display of the British (and, subsequently, Singapore) Marine Ensign on Pedra Branca. This can be seen from her Counter Memorial, where she incorrectly asserts that “the only evidence provided by Singapore of the raising of the Marine Ensign over PBP *is a single drawing*”.¹⁹⁵ The plain fact is that Singapore’s Memorial referred to *three* drawings.¹⁹⁶ Furthermore, these are supplemented by other evidence such as photographs and the lighthouse Standing Orders.¹⁹⁷ Another sign of Malaysia’s discomfort appears when she argues that:

“Moreover, contrary to what is stated by Singapore, there was no flag of any kind flying over PBP in 1847.[†] The only things that J. T. Thomson planted on PBP in November 1847 were the seven brick pillars to test the strength of the waves.”¹⁹⁸

This is nitpicking. The reference to “1847” in paragraph 7.12 of Singapore’s Memorial is an inconsequential error – Image 15 in Singapore’s Memorial (after page 74) shows that the flag was flown during the construction of the lighthouse. Other parts of the Singapore Memorial make this very clear.¹⁹⁹

¹⁹⁵ MCM pp. 68-69, para. 133.

¹⁹⁶ See SM p. 74, para. 5.89, extracted in full in note 194 above.

¹⁹⁷ SM pp. 107-108, paras 6.47-6.51.

¹⁹⁸ MCM, p. 69, para. 133. A footnote at † refers to SM p. 143, para. 7.12.

¹⁹⁹ SM p. 143, para. 7.12 reads:

“7.12 Moreover, Malaysia’s long silence regarding this clear and public manifestation of Singapore’s sovereignty over Pedra Branca since 1847 is in sharp contrast to Malaysia’s response to the flying of the Singapore marine ensign on the lighthouse administered by Singapore at Pulau Pisang, an island which belongs to Malaysia. In 1968, Malaysia objected to the flying of the Singapore flag over Pulau Pisang Lighthouse. Following Malaysia’s objection, Singapore ceased flying her flag

The nub of the matter is simply that the Ensign was flown for more than a century without any reaction from Malaysia. This is a point which Malaysia has not addressed.

3.90 Malaysia's discomfort is understandable, given that, Malaysia's own State practice concerning the flying of the Singapore Marine Ensign on Pulau Pisang confirms that Malaysia regarded the flying of the Marine Ensign as an unequivocal display of sovereignty.²⁰⁰ This inconsistency between her written pleadings and her own State practice is something from which Malaysia no doubt wishes to divert the Court's attention.

Section V. Ancillary Questions Raised by Malaysia Relating to the Legal Basis of Title

A. MALAYSIA CONTENTS THAT THE TAKING OF POSSESSION REQUIRES A FORMAL ACT

1. The Malaysian Contention and the Applicable Law

3.91 Malaysia's Memorial adopts the position that the absence of any formal act of possession of Pedra Branca constituted evidence to the effect that Britain had no intention of establishing sovereignty over it.²⁰¹ It is significant that Malaysia makes no reference to the contemporary principles of public international law, although these principles constitute the applicable law. The

on the Lighthouse. In contrast, at no time had Malaysia ever protested against Singapore's flying of her flag over Pedra Branca."

The reference to "1847" in this paragraph is an obvious, but inconsequential error. This is clear from SM pp. 73-74, para. 5.89 and p. 107, para. 6.47. (SM para. 5.89 states: "The practice *since the lighthouse first began to function* was for the marine ensign to be flown...". SM para. 6.47 states: "*During the construction of Horsburgh Lighthouse, and subsequently for more than a century*, a British Marine Ensign flew continuously over Pedra Branca...", emphasis added)

²⁰⁰ See paras. 4.132-4.137 *below*.

²⁰¹ MM pp. 73-76, paras. 157-164.

reference is exclusively to what is described as “the traditional and consistent British practice of formally taking possession of territories under its sovereignty”.²⁰²

3.92 This position is adhered to in Malaysia’s Counter-Memorial.²⁰³ At this stage also, no reference is made to the general principles of public international law but exclusively to “the British practice” of taking possession.

3.93 The unwillingness of Malaysia to relate this matter to the pertinent inter-temporal law is odd and the explanation must be that the general principles in question do not support the Malaysian thesis.

2. Malaysia Provides No Evidence of a Requirement of a Formal Act of Taking Possession Either in British Practice or in General International Law

3.94 The remarkable fact which emerges from the lengthy exposition in Malaysia’s Counter-Memorial is that no source is indicated which recites the alleged requirement of a formal act of taking. The standard sources are invoked in Singapore’s Counter-Memorial.²⁰⁴ The sources quoted by Malaysia are as follows:

- (a) Lord McNair, *International Law Opinions* (1956) Vol. 1, p. 285;²⁰⁵ and
- (b) T.J. Lawrence, *The Principles of International Law* (1895), p. 147.²⁰⁶

²⁰² MM p. 73, paras. 157.

²⁰³ MCM pp. 37-49, paras. 73-92.

²⁰⁴ SCM pp. 74-75, paras. 5.5-5.9.

²⁰⁵ Cited by Malaysia at MCM p. 43, para. 84.

3.95 However, neither of these works indicates that a formal taking is necessary. Like the doctrine generally, these sources make the assumption that a formal taking is only a *sufficient* (but not necessary) proof of intention. As explained by Waldock, the requirement of “intention and will to act as sovereign” in public international law:

“... seems to mean no more than that there must be positive evidence of the pretensions of the particular state to be the sovereign of the territory. This evidence may consist either of published assertions of title *or of acts of sovereignty*.”²⁰⁷ [emphasis added]

3.96 Singapore, in her Memorial, quotes Sir Kenneth Roberts-Wray, a leading authority.²⁰⁸ This is dismissed in Malaysia’s Counter-Memorial as a “doctrinal quotation”, whatever that might mean.²⁰⁹ But the passage from Roberts-Wray makes the position absolutely clear: the unilateral manifestation of the will of the Crown is sufficient. Roberts-Wray then adds:

“... in municipal law ownership should somehow be asserted, *preferably* by formal document, such as an instrument of annexation.”²¹⁰ [emphasis added]

3.97 Therefore the municipal law position is related to what is only “preferable”. There was no general requirement of formality in the “British practice”. There is no evidence to support Malaysia’s position that formality is a *legal requirement*. Roberts-Wray, the source of the “doctrinal” quotation, was a distinguished lawyer in the Colonial Office, and Legal Adviser in the Commonwealth Relations Office. Can Malaysia find a more authoritative source in order to assist the Court?

²⁰⁶ Cited by Malaysia at MCM p. 44, para. 85.

²⁰⁷ Waldock H., *Disputed Sovereignty in the Falkland Island Dependencies*, 25 Brit. Yr. Bk. Int’l L. 311 (1948), at p. 334.

²⁰⁸ SM p. 74, para. 5.90.

²⁰⁹ MCM p. 38, para. 74.

²¹⁰ Roberts-Wray K., *Commonwealth and Colonial Law* (1966), at pp. 107-108.

3. *The Examples Cited by Malaysia are Irrelevant*

3.98 Malaysia has provided examples of allegedly relevant cases in her Memorial, and does so again in her Counter-Memorial. According to her Counter-Memorial these cases:

“... demonstrate that the British practice of taking of possession included certain formalities which were the concrete manifestation of the intention to acquire sovereignty, and that these practices extended to small, isolated and/or uninhabited islands akin to PBP. The further examples provided below confirm that the formal taking of possession of small uninhabited islands, including rocks, followed by some public declaration of British sovereignty, was standard practice.”²¹¹

Amidst all the assertions and the verbiage, it is necessary to identify some firm ground. Malaysia’s argument is studiously vague, and the locutions chosen are vague: “certain formalities”, “these practices”, “standard practice”. Thus, in this passage introducing the “actual cases”, Malaysia does not insist that formality is necessary, only that it is “standard practice”.

3.99 Moreover, the evidence is not even presented as evidence of a *legal* principle. No suggestion is made that third States would accept these “practices” as reflecting a principle of general international law.

3.100 When the various actual cases are examined, it will be seen that they are inconclusive. The sources contain no evidence of a conscious compliance with an alleged requirement of formality and, in particular, the practice is entirely compatible with the understanding that the particular formality is *sufficient* to establish intention, *but not necessary*.

²¹¹ MCM p. 38-39, para. 76.

3.101 While many examples can be found of British officials performing some formalities, this does not prove that, in the absence of formalities, an acquisition of territory will somehow be regarded as defective. What is legally relevant is the actual display of State authority. The available evidence does not suggest that British officials considered formalities to be always “necessary” or “required”.

3.102 The example of Pitcairn Island is a case in point. In 1893, a British Foreign Office official made the following note regarding Pitcairn Island:

“Settled by the mutineers of the ‘Bounty’, 1789. No record of the hoisting of the British flag, or of its having been declared British territory, but so considered.”²¹²

Earlier on, when the inhabitants of Pitcairn Island petitioned the Queen for a document confirming the status of the island as British territory, the British Colonial Office expressed the view that:

“there is no need for, but on the contrary would be some inconvenience in, any further measure to declare Pitcairn’s Island a British possession. *It might suggest a doubt where none at present exists.*”²¹³
[emphasis added]

Following this decision of the British Colonial Office, the Pitcairn Islanders were informed by the relevant British Consul that:

“The Earl of Clarendon [*i.e.*, *the Foreign Secretary*] had lately received the copy of a Memorial addressed by the Pitcairn Islanders to the Queen requesting to be furnished with a Document declaring them to be under Her Majesty’s protection and constituting Pitcairn’s Island a British possession.

²¹² The British official who prepared this note had some of his facts wrong (a flag-hoisting ceremony did take place in 1839 on Pitcairn Island). However, notwithstanding this factual error, the note serves as clear evidence that British officials considered that an island could become British territory even if there was no hoisting of flag and no formal declaration. See British Foreign Office Internal Minute on Pitcairn Island dated 19 May 1902, attached to this Reply as Annex 13.

²¹³ Letter from British Colonial Office to British Foreign Office dated 6 Apr 1854, (FO 58/80 Folio 272), attached to this Reply as Annex 9.

The manner in which England has always responded to the Pitcairn Islanders, when she was claimed and claimed justly by them, as their Fatherland, is the best proof that no doubt has ever existed as to the Sovereignty of your Island, and I will trust be accepted by you as a sufficient answer”.²¹⁴

3.103 Sir Kenneth Roberts-Wray, the leading authority on British colonial practice, described the foregoing episode in the following words:

“But in 1853, after a visit by a Frenchman, they [*the Pitcairn Islanders*] sent a petition to the Queen, asking for a document confirming the status of Pitcairn Island as part of Her Majesty’s dominions and that of themselves as British subjects. *The reply gave the necessary assurance but did not send a formal document since it might imply a doubt where there was none. While there is no good ground to question the validity of these conclusions*, it is surprising that nothing was then done to place Pitcairn on a sound constitutional foundation.”²¹⁵ [emphasis added]

The example of Pitcairn Island provides clear evidence that British officials never regarded formalities as either “necessary” or “required” for the acquisition of territory. As the passage from Roberts-Wray quoted above makes clear, “there is no good ground to question the validity of” the conclusion that territory can be acquired without the need for formalities.

3.104 On other occasions the British Crown decided that a formal incorporation was desirable and, for example, promulgated an Order in Council in the case of Christmas Island in 1919. Malaysia’s Counter-Memorial considers that the formal incorporation took place in 1888, when the British flag was raised on Christmas Island.²¹⁶ However, the relativism and legal ambiguity of the so-called “British practice” is highlighted by the reaction of

²¹⁴ Letter from British Consulate of the Society Islands to The Pitcairn Islanders dated 6 Oct 1854, attached to this Reply as Annex 10.

²¹⁵ Roberts-Wray, *supra* note 210, at p. 908.

²¹⁶ MCM p. 67, para. 130.

the United States Department of State to the British claim to Christmas Island. This reaction had two facets. *First*, the United States ignored the flag-raising altogether. *Secondly*, the British Order in Council of 1919 was categorised as a formal incorporation *but* such formal acts were not regarded as conclusive of the question of title by the United States.

3.105 The Christmas Island case indicates the problematical nature of the Malaysian examples in the context of general international law. Thus, in Hackworth's *Digest* the other side of the history is set forth as follows:

“On July 30, 1925 a geographic publishing firm was informed by the Department [*of State*] that –

the title to Christmas Island, as between Great Britain and the United States, may be regarded as somewhat uncertain. Christmas Island was bonded as an American Guano Island December 29, 1859 ...

According to information available to the Department, Christmas Island has been occupied at one time or another by American citizens and by British subjects. By a British Order in Council, made public on November 28, 1919, it was set forth that from and after the proclamation of the Order by publication in Western Pacific Gazette, the boundaries of the Gilbert and Ellice Islands Colony shall be extended to include Christmas Island. The Department has not made any formal protest or claim in respect of the British Order in Council of November 28, 1919. On the other hand, this Government has never relinquished such claims as it may have by virtue of the former occupancy of Christmas Island by American citizens.

You are further informed that on a map which was compiled for the Department in 1921, Christmas Island was indicated as ‘Status undetermined – U.S., Br.’

The Assistant Secretary of State (Harrison) to A.J. Nystrom and Company, July 30, 1925, MS. Department of State, file 841.014/27.

Later on October 12, 1929 the Department said:

... Christmas Island, however, has formally been incorporated in the Gilbert and Ellice Islands Colony by an Order-in-Council issued in 1919 and the Department understands that the Island was leased to the Central Pacific Coconut Plantations, Limited, for a term of eighty-seven years beginning in January, 1914. The United States has neither admitted nor questioned this latest claim of British Sovereignty of Christmas Island, although as stated in the account of the Island, contained in Moore's International Law Digest, Volume I, page 573, the United States by formal communications addressed to the British Government in 1879 and 1888 reserved all questions which might grow out of the occupation of the Island by Great Britain.

The Assistant Secretary of State (Johnson) to William Hard, Oct. 12 1929. MS. Department of State, file 811.014/167."²¹⁷

3.106 The cases of Pitcairn and Christmas Island are helpful in emphasising that the resort to formalities was not regarded as a necessary basis of title in British practice and, furthermore, that the presence of a formal taking of possession, when this occurred, was not regarded as conclusive by third States. In relation to Pitcairn Island, the absence of formalities did not prevent British officials from regarding the island as British territory. In relation to Christmas Island, the presence of formalities was not regarded as conclusive by the United States Department of State. In relation to Pedra Branca, the Dutch authorities had no difficulty in according recognition of Pedra Branca as British territory.²¹⁸

3.107 The specific examples invoked by Malaysia in this regard are examined in detail in **Appendix C** to this Reply. As the Court will see, these cases simply confirm the view that British practice was pragmatic.

²¹⁷ See Hackworth G.H., *Digest of International Law* (Vol. 1, 1940), pp. 507-8.

²¹⁸ See paras. 2.41-2.43 *above*; and paras. 3.128-3.129; 8.13-8.15 *below*.

4. Conclusions: There was No Legal Condition of Formality in Taking Possession Either in Municipal Law or in the Principles of General International Law

3.108 A range of significant factors strongly militate against the Malaysian thesis that formality was the British “standard practice” in taking possession (or occupation of territory).

First: the available evidence contradicts the assertion that there was any such consistent practice in the context of municipal law.

Secondly: the principle in question is not plausible as a political concept. Formality appears only when there is a practical and political reason. Thus, for example, formality is necessary, as a practical matter, to mark the transfer of possession and control subsequent to a treaty of cession, as in the case of Labuan. Another reason would be to advertise the change of sovereignty in the case of relatively remote features in face of an expectation of competing claims.

Thirdly: the “British practice” as alleged by Malaysia would have been incompatible with the principles of general international law at the material time. Acts of formal taking by the British Government were not automatically opposable to third States.

3.109 The attempt by Malaysia to conjure up a “British practice” out of the pragmatic conduct of the British Crown in the colonial era is hollow. None of the instruments invoked refer to the alleged practice. A further source of confusion is the failure to distinguish between symbolic acts, such as raising a flag, and the taking of possession which would create title in accordance with the principles of general international law.

3.110 It is to be emphasised, for the benefit of the Court, that the key sources on the subject of territorial status during the colonial period make no reference to a legal requirement of formality. Thus, the authoritative opinion of Roberts-Wray may be quoted once again. Under the heading “Annexation of Ceded Colonies”, he states the position thus:

“When a territory is ceded by treaty or formal agreement, an instrument of annexation is not necessary. Cession consists of transfer by the former owners and acceptance by the Crown and these together complete the transaction. It is, however, probable that nowadays it would always be perfected by a unilateral instrument annexing the territory to Her Majesty’s dominions. That course was adopted in 1946, when agreements ceding Sarawak and British North Borneo to the Crown were immediately followed by Orders in Council annexing the territories.

In a case of less formal cession, not evidenced by treaty or agreement, e.g. Malta and Basutoland, annexation or some similar formal act would normally be advisable as evidence of the fact and the date, and as manifestation of the intention of the Crown to accept the cession.”²¹⁹

3.111 Thus, Roberts-Wray, the authority who examines these issues, and does so in the context of international law, regards resort to a formal document as merely advisable or preferable in terms of municipal law. The standard works on British constitutional or colonial law do not espouse the view that formalities were either “necessary” or constituted a “standard practice”. Apart from Roberts-Wray, the following authorities confirm this position:

- (a) Anson W.R., *The Law and Custom of the Constitution* (Part II, 4th Edition, 1935), at pp. 61-67;
- (b) Holdsworth W.S., *A History of English Law* (Vol. XI, 1938), *passim*;
- (c) Tarring C.J., *Chapters on the Law Relating to the Colonies* (4th Edition, 1913), *passim*.

²¹⁹ Roberts-Wray, *supra* note 210, at pp. 104-105.

B. THE CRITERIA OF POSSESSION OR EFFECTIVE OCCUPATION

3.112 In the course of an argument to the effect that the British Crown never “took possession” of Pedra Branca, Malaysia produces a subsidiary thesis. This takes the form essentially of the assertion that if the date of the taking of possession is not precisely determined, this constitutes evidence that the taking of possession was not accomplished.²²⁰

3.113 As a preliminary matter, the Malaysian argument has weak legal foundations. In this part of the written pleading Malaysia insists on a wholly artificial dichotomy between the taking of control of territory (physical possession) and the intention to acquire sovereignty (*animus*). This analysis is flawed. The key point is the assessment of the evidence *as a whole*. In the result the physical and administrative actions of the officials of the British Crown form a part of the evidence of intention. The evidence of intention is also, and perhaps primarily, available in the ample documentary record.

3.114 There can be no doubt that the process of acquisition began *at least* in 1847 when Thomson began operations which involved the assumption that the island as a *terra nullius* was available for the exclusive use of the Crown. The first evidence of such occupation was reinforced and confirmed by the subsequent and entirely logical sequence of acts of use and possession.

3.115 In reality there is no reason whatsoever why the taking of possession should not be “a complex act”, contrary to what Malaysia suggests.²²¹ In the *Clipperton Island Arbitration* the Award contains the following passage:

“Il est hors de doute que par un usage immémorial ayant force de loi juridique, outre *l’animus occupandi*, la prise de possession matérielle et non fictive est une condition nécessaire de l’occupation. Cette prise

²²⁰ MCM pp. 31-32, paras. 59-61.

²²¹ MCM p. 32, para. 61.

de possession consiste dans l'acte *ou la série d'actes* par lesquels l'État occupant réduit à sa disposition le territoire en question et se met en mesure d'y faire valoir son autorité exclusive.”

[*English translation*: “It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, *or series of acts*, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.”]²²²

3.116 The normal aspect of cases relating to possession (or effective occupation) is the evidence of a pattern of activities and administration which, even apart from explicit expressions of intention, create the strong inference that a title has been created. In the absence of such evidence of title, the incidence of symbolic acts such as burying cylinders or raising flags, will create merely contingent titles which other States will be reluctant to recognise.

3.117 In many cases involving title the critical evidence includes patterns of evidence of acts of jurisdiction. Thus, in the *Beagle Channel Arbitration* the issue of interpretation of the 1881 Treaty was addressed in part on the basis of the evidence of the acts of jurisdiction performed by Chile.²²³ In that case, as in many others, there was competing activity by another State. In the present case, the activities of the British Crown evinced no opposition.

²²² *Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, Arbitral Award dated 28 Jan 1931, (1928) 2 RIAA 1107, at p. 1110 (for the original French text) and 26 Am. J. Int'l L. 390 (1932), at p. 393 (for the English translation), emphasis added.

²²³ *See Beagle Channel Arbitration (Argentina v. Chile)* (Award of 18 Feb 1977), 52 ILR 97, at pp. 220-226, paras. 164-175.

C. THE ASSERTION OF MALAYSIA THAT NO PROTEST OR RESERVATION OF RIGHTS WAS CALLED FOR

3.118 In her Memorial, Singapore made the point that the taking of possession by the British Crown elicited no opposition from other powers.²²⁴ This point was reiterated in Singapore's Counter-Memorial.²²⁵

3.119 The response of Malaysia is as follows:

“Singapore remarks that ‘[t]here is no record of any opposition to the British taking of possession of Pedra Branca’ nor any ‘protest or reservation of rights’. It has been shown that there was no formal or informal taking of possession of PBP on behalf of the British Crown at all. Consequently, there was nothing to protest and no need to make any reservation of rights. Johor not only did not protest against the construction of the lighthouse; it gave the British authorities the required permission to do it.”²²⁶

3.120 This is a very limited response, which relies on unproven assumptions that there was no taking of possession or that the British authorities had the permission of Johor. Apart from these elisions, Malaysia accepts that there was no protest and no reservation of rights.

3.121 The failure to protest in face of the flow of public activity, and especially the continuous operations attending the construction of the lighthouse, must cast a deep shadow upon Malaysia's claim to “original title”. Johor had very complete knowledge of the intentions of the British Crown through the correspondence concerning the site for a lighthouse. The visit of the Temenggong is significant in this respect, and the laying of the foundation stone was reported in the local press. As Malaysia has herself indicated, the time frame was a period of four years.²²⁷

²²⁴ SM p. 77, paras. 5.99-5.100.

²²⁵ SCM p. 125, para. 5.130; p. 126, para. 5.134; and p. 128, para. 5.137.

²²⁶ MCM p. 69, para. 134.

²²⁷ MCM p. 32, para. 61.

3.122 The criteria indicating that a protest is called for have been stated succinctly by Sir Gerald Fitzmaurice:

“There must of course be knowledge, actual or presumptive, of the events or circumstances calling for a protest... Subject to that, it might be said generally that a protest is called for whenever failure to make it will, in the circumstances, justify the inference that the party concerned is indifferent to the question of title, or does not wish to assert title, or is unwilling to contest the claim of the other party.”²²⁸

3.123 And Fitzmaurice describes the consequences of silence:

“... a *failure* to protest, where a protest is called for, must have a detrimental effect on the position of the party concerned and may afford evidence of non-existence of title.”²²⁹

3.124 In this context the absence of any protest or reservation either during the Temenggong’s visit to Pedra Branca in 1850 or subsequent to it provides a confirmation of the indifference of Johor in relation to title. It was above all clear that the host was the British Crown. The transport for the distinguished visitor had been provided by the Governor of the Straits Settlements and the host was Thomson, acting on behalf of the British authorities. The situation is in its essentials a reflection of the visit of Prince Damrong to the Temple in the *Case Concerning the Temple of Preah Vihear*. The relevant passages in the Judgment are these:

“With one or two important exceptions to be mentioned presently, the acts concerned were exclusively the acts of local, provincial, authorities. To the extent that these activities took place, it is not clear that they had reference to the summit of Mount Preah Vihear and the Temple area itself, rather than to places somewhere in the vicinity. But however that may be, the Court finds it difficult to regard such local acts as overriding and negating the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped.

²²⁸ Fitzmaurice G., *The Law and Procedure of the International Court of Justice* (Vol. 1, 1986), at p. 299, note 3.

²²⁹ *Ibid.*

In this connection, much the most significant episode consisted of the visit paid to the Temple in 1930 by Prince Damrong, formerly Minister of the Interior, and at this time President of the Royal Institute of Siam, charged with duties in connection with the National Library and with archaeological monuments. The visit was part of an archaeological tour made by the Prince with the permission of the King of Siam, and it clearly had a quasi-official character. When the Prince arrived at Preah Vihear, he was officially received there by the French Resident for the adjoining Cambodian province, on behalf of the Resident Superior, with the French flag flying. The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French Resident some photographs of the occasion, he used language which seems to admit that France, through her Resident, had acted as the host country.

The explanations regarding Prince Damrong's visit given on behalf of Thailand have not been found convincing by the Court. Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title – and this would be wholly consistent with her attitude all along, and thereafter, to the Annex I map and line – or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.²³⁰

3.125 In the circumstances this visit had adverse legal consequences for Thailand. There is no reason to assume that the silence of the Temenggong in the present case should be accorded less significance. The Memorial of Malaysia reports that at the relevant period “the office of the Temenggong came to be more important than that of Sultan”.²³¹ Moreover, the Temenggong's visit took place nine days after the laying of the foundation stone.²³²

²³⁰ *Temple of Preah Vihear (Cambodia v. Thailand) (Merits)* [1962] ICJ Rep 6, at pp. 30-31.

²³¹ MM p. 61, para. 123.

²³² SCM pp. 113-115, paras. 5.102-5.106.

D. NAVIGATIONAL AIDS AS EVIDENCE OF SOVEREIGNTY

3.126 In her Counter-Memorial, in the discussion on “the subsequent conduct of the parties”,²³³ Malaysia makes a general assertion “that conduct relating to lighthouses has special features which mean that it is not a reliable indicator of sovereignty”.²³⁴ The issue had already been raised in Malaysia’s Memorial and Singapore has presented a substantial response in her Counter-Memorial,²³⁵ to which the Court is respectfully referred.

3.127 The basic element in this context is the characterisation of the legal criterion concerning acquisition of sovereignty. This criterion is not based on abstract propositions as to whether navigational aids are, or are not, manifestations of sovereignty *per se*, but consists of the intention to acquire sovereignty as revealed by all the relevant circumstances, including the documentary record.

Section VI. The Contemporary Attitude of Johor and the Dutch Government

3.128 In order to complete the general picture of events in the years 1847-1851 it is necessary to refer to the attitude of third States. No other State expressed any reservation in face of the continuous public activities of the British Crown over a period of four years. In particular, no reservation of any kind was made by Johor.

²³³ MCM, Chapter 5.

²³⁴ MCM pp. 85-86, para. 172.

²³⁵ SCM p. 120-125, paras. 5.121-5.130.

3.129 In this same context it was natural that the Dutch General Secretary in Batavia, in November 1850, writing to the Dutch resident in Riau, should refer to “the construction of a lighthouse at Pedra Branca on *British territory*”.²³⁶

Section VII. Conclusion

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

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

²³⁶ Letter from C. Visscher (General Secretary, Netherlands East Indies) to Dutch Resident in Riau dated 27 Nov 1850, attached to this Reply as Annex 8, emphasis added. See detailed discussion at paras. 2.41-2.43 *above*, and paras. 8.13-8.15 *below*.

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

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

3.132 In addition, the *acts* of taking possession were peaceful and public and elicited no opposition from other powers.

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

3.134 The evidence and relevant legal considerations establish that the British Crown acquired sovereignty in the period 1847-1851, an entitlement subsequently inherited by the Republic of Singapore. The maintenance of this title, on the basis of the effective and peaceful exercise of State authority since 1851, is described in Chapter VI of Singapore's Memorial, Chapter VI of her Counter-Memorial, and in Chapter IV of the present Reply.

CHAPTER IV

SINGAPORE'S CONTINUOUS, PEACEFUL AND EFFECTIVE EXERCISE OF STATE AUTHORITY OVER PEDRA BRANCA

Section I. Introduction

4.1 Chapter VI of Singapore's Memorial documented the extensive ways in which Singapore and her predecessor in title, the United Kingdom, have exercised continuous sovereignty over Pedra Branca from 1847-1851, when the British Crown acquired possession of the island for purposes of constructing a lighthouse on it, to the present. By any standard, and bearing in mind the nature of Pedra Branca and its small size, the acts of State authority performed by Singapore on Pedra Branca in confirmation of her pre-existing title are impressive. This is so whether such acts are measured by their scope (which included both lighthouse and non-lighthouse related activities), their long duration (over 150 years), and their open and notorious nature, or in the light of the fact that such activities went totally unopposed by Malaysia until 1979 when Malaysia belatedly raised a claim to the island for the first time.

4.2 Malaysia's Counter-Memorial exhibits considerable sensitivity to Singapore's long-standing and extensive conduct carried out on and around Pedra Branca. This sensitivity is illustrated by the extravagant language that Malaysia employs in an attempt to denigrate the obvious significance of Singapore's conduct. In a statement which aptly sums up Malaysia's attitude towards acts of administration and control on the disputed territory in this case, Malaysia asserts:

“The essential proposition concerning Singapore's conduct is straightforward: there is nothing – not a single item – in the conduct on which Singapore relies that is capable of sustaining Singapore's claim to sovereignty.”²³⁷

²³⁷ MCM p. 164, para. 339.

4.3 This is a very bold statement coming from a Party which has been unable to document *a single claim of her own* to Pedra Branca at any time prior to 1979 or a single sovereign act that she took on the island *at any time*. It is also a bold statement coming from a Party which, in 1953, *expressly disclaimed ownership* over the very island presently in dispute.²³⁸

4.4 Reduced to its essentials, Malaysia's Counter-Memorial has attempted to rebut the significance of Singapore's conduct undertaken on Pedra Branca by advancing the following propositions:

- (a) Acts of administration and control on a territory in dispute cannot be divorced from the legal status of that territory, in particular from considerations of whether there exists a prior title to the territory. In this case, Malaysia claims to have sovereignty over Pedra Branca based on an alleged, but totally unproven, "original title" of Johor. Malaysia argues that this title cannot be "displaced" by any subsequent activities of Singapore or her predecessor.
- (b) The conduct of Singapore on Pedra Branca was limited to the administration of the lighthouse and nothing more, and was consistent with the kind of activities that any lighthouse operator would have undertaken regardless of the question of sovereignty. Administration of a lighthouse cannot be equated with conduct *à titre de souverain* — a conclusion which is said to be supported by the fact that there are other instances around the world where lighthouses are administered by a State or entity which is not the title holder to the territory on which the lighthouse is situated.

²³⁸ See Chapter VII below. See also SCM Chapter VII; and SM Chapter VIII.

- (c) In the present case, Singapore also fails to appreciate the significance of the Straits' Lights System which, Malaysia contends, demonstrates that administration of a lighthouse in the Singapore Straits was not determinative of the issue of sovereignty over the underlying territory.

4.5 In this Chapter, Singapore will respond to these Malaysian contentions. In so doing, Singapore will once again demonstrate that her conduct on Pedra Branca was entirely consistent with, and confirmatory of, the sovereignty she had acquired over Pedra Branca in the period 1847-1851. The numerous State activities undertaken by Singapore with respect to Pedra Branca were precisely the kinds of activities that any title holder would have performed on territory having the characteristics of Pedra Branca. These activities went *far beyond* the scope of conduct that this Court and other tribunals have found legally relevant when considering questions of title over small islands in the past. Furthermore, the fact that Malaysia explicitly disclaimed ownership over Pedra Branca in 1953, and never raised the slightest objection to any of Singapore's activities until well after the dispute had crystallised in 1980, is entirely consistent with the conclusion that Singapore possessed sovereignty over Pedra Branca and acted accordingly.

4.6 In Section II, Singapore will once again place her conduct in the proper legal context in order to reply to the ill-conceived arguments advanced in Malaysia's Counter-Memorial on this point.

4.7 In Section III, Singapore will show that none of the examples cited by Malaysia in Chapter 6 of her Counter-Memorial, where lighthouses have been operated by a private or public entity which is not the sovereign over the underlying territory, are analogous to the situation regarding Pedra Branca. Singapore will also recanvass the legal authorities which support her position and which Malaysia has attempted to distinguish.

4.8 In Section IV, Singapore will again demonstrate, in response to Chapter 8 of Malaysia’s Counter-Memorial, that the activities she performed on Pedra Branca were undertaken *à titre de souverain*, and that such activities confirmed and maintained the title that had been acquired in 1847-1851.

4.9 In Chapter VI of this Reply, Singapore will respond to Malaysia’s comments advanced in Chapter 7 of her Counter-Memorial on the relevance of the Straits’ Lights System for purposes of this case. As Singapore will show, while the mere funding of the Straits’ Lights System may have been without prejudice to the question of sovereignty, Malaysia made it clear at various times which islands she possessed. Those islands included Pulau Pisang, but not Pedra Branca.

Section II. The Exercise by Singapore of State Functions on Pedra Branca Was Undertaken in Confirmation of Singapore’s Pre-Existing Title

A. THE RELATIONSHIP BETWEEN SINGAPORE’S ACTS OF ADMINISTRATION AND CONTROL AND ISSUES OF TITLE

4.10 In her Memorial, Singapore pointed out that the significance to be attributed to the *effectivités* of the Parties on Pedra Branca (or lack thereof, in Malaysia’s case) should be assessed in the light of the Chamber’s well-known *dictum* in the *Burkina Faso/Mali* judgment. To recall what the Chamber said in that case:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the

holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration.”²³⁹

4.11 Malaysia professes to fully accept this analysis.²⁴⁰ However, her Counter-Memorial then goes on to accuse Singapore of disjoining her “effective administration of the lighthouse” from any consideration of title.²⁴⁰ In Malaysia’s view, Singapore’s acts of administration and control over Pedra Branca cannot displace a prior Malaysian (Johor) title which is said to have existed.

4.12 In effect, what Malaysia argues is that the consideration of Singapore’s *effectivités* over Pedra Branca falls within the second category addressed by the Chamber in the *Burkina Faso/Mali* case – situations where the acts concerned are carried out by a State other than the one possessing the legal title. The notion that Malaysia has even begun to demonstrate that Johor possessed an “original title” to Pedra Branca has been thoroughly rebutted in Singapore’s Counter-Memorial (Chapters III and IV) and in Chapter II of this Reply. Suffice it to recall that there is not a shred of evidence that Johor ever had the intention (*animus*) to claim sovereignty over Pedra Branca or carried out any acts of sovereignty (*corpus*) on the ground. In short, there was no Malaysian title which could in any way be displaced.

4.13 At the same time, Malaysia’s Counter-Memorial also accuses Singapore of failing “to state a coherent legal basis for its claim of sovereignty”,²⁴¹ and of equivocating on the relevance of subsequent conduct.²⁴² This is an unfortunate mischaracterisation of Singapore’s case. Far from addressing the role of her

²³⁹ *Frontier Dispute (Burkina Faso/Mali) (Merits)* [1986] ICJ Rep 554, at pp. 586-587, para. 63.

²⁴⁰ MCM pp. 5-6, para. 9.

²⁴¹ MCM p. 5, para. 7.

²⁴² MCM p. 84, para. 169.

continuous and unopposed administration of Pedra Branca in a legal vacuum, Singapore's position on the legal relevance of her conduct could not be clearer. In order to avoid any further misunderstanding, Singapore will briefly restate her position here.

4.14 Prior to 1847, there was no territorial sovereign over Pedra Branca. The island was barren and had not been occupied, claimed or administered by anyone. As explained in Singapore's previous pleadings and again in Chapter III above, from 1847-1851 the British Crown took lawful possession of the island for purposes of building a lighthouse on it. Indeed, there was little room for anything else on the island. After 1851, the United Kingdom and, subsequently, Singapore engaged in a constant stream of State (as opposed to private) activities on the island and within her territorial waters as part of the natural administration of territory over which Singapore possessed lawful title. These activities were of a varied and far reaching nature and were entirely commensurate with the nature of the territory on which they were performed. They had the legal effect of maintaining and confirming Singapore's previously acquired sovereignty on the ground, and they were unopposed by Malaysia or anyone else until Malaysia raised a claim in 1979.

4.15 It is thus apparent that the role of Singapore's *effectivités* over the island after 1851 falls within the first category discussed by the Chamber in the *Burkina Faso/Mali* case.²⁴³ The acts of Singapore and her predecessor in title were acts which corresponded exactly with the law. They were confirmatory acts – acts of administration and control fully consistent with the possession of title that had been acquired in 1847-1851.

²⁴³ *Frontier Dispute (Burkina Faso/Mali) (Merits)*, *supra* note 239.

4.16 Yet even if this had not been the case – even if, *arguendo*, it could be assumed that the British Crown had not taken possession of Pedra Branca by virtue of its official acts performed from 1847-1851 – Singapore’s subsequent conduct would still be legally relevant. In that situation, the third category articulated by the Chamber would come into play. Singapore’s *effectivités* would have to be taken into account and balanced against any competing Malaysian acts on the island. In any balancing of competing acts, Malaysia would still face an insurmountable task. Not only would Malaysia be confronted with the fact that neither she nor her predecessor, Johor, ever carried out a single sovereign act on Pedra Branca, she would continue to be bound by the clear-cut admission made in 1953 that Johor did not claim ownership over the island.

4.17 In the light of the above, Singapore trusts that the Court will appreciate that there is no confusion as to the role of Singapore’s conduct on Pedra Branca in this case. Singapore has not “disjoined” the issue of its effective administration of Pedra Branca from the consideration of title, but has specifically taken that title into account in discussing her conduct. Any confusion in the mind of Malaysia is entirely self-induced and a product of the impossible situation Malaysia finds herself in when forced to address the question of actual State activities on the island – she has performed none.

B. SINGAPORE’S CONDUCT ON PEDRA BRANCA IN THE CONTEXT OF THE CASE

4.18 Malaysia’s principal argument in response to the continuous display by Singapore and her predecessor of State authority over Pedra Branca is that such activities are no more than what would be expected from any administrator of a lighthouse regardless of title. Significantly, Malaysia does not challenge the accuracy of most of the facts adduced in Singapore’s Memorial documenting the actions that the United Kingdom and Singapore undertook on Pedra Branca or within its territorial waters. Instead, Malaysia contends that “the practice

cited by Singapore concerns its administration of Horsburgh Lighthouse which has nothing whatever to do with sovereignty over PBP [*Pedra Branca*].”²⁴⁴

4.19 There are three fundamental flaws to this line of reasoning.

4.20 *First*, Malaysia addresses the issue of Singapore’s conduct on Pedra Branca in isolation from the fact that sovereignty over the island had *already* been acquired by the United Kingdom in 1847-1851. This aspect of the matter has been discussed in Chapter III of this Reply.

4.21 *Secondly*, Malaysia simply assumes that just because in certain instances, which are not applicable here (as will be seen in Section III of this Chapter), lighthouses are operated by an entity which is not the sovereign over the territory where the lighthouse is situated, the same situation must apply to Pedra Branca. This is nothing more than a *non sequitur*. In the overwhelming majority of cases, States administer lighthouses that *are* located within their own territory. Even Malaysia’s Counter-Memorial is forced to concede that “the administration of a lighthouse may coexist with sovereignty over the territory on which the lighthouse is located”.²⁴⁵ In such circumstances – and this is the case with Pedra Branca – the administration of a lighthouse, and other non-lighthouse related activities, are a perfectly normal display of State authority, in the same manner that State functions carried out over other parts of a State’s territory constitute the ordinary exercise of sovereign authority over such territory.

4.22 *Thirdly*, in her discussion of the significance of Singapore’s control of access to Pedra Branca, Malaysia purports to attach significance to the nature of the territory in question. However, Malaysia then fails to take this element

²⁴⁴ MCM p. 89, para. 177.

²⁴⁵ MCM p. 88, para. 175.

into account in her appreciation of the facts. For example, her Counter-Memorial states that, “the character of PBP [*Pedra Branca*] cannot be ignored in this discussion.”²⁴⁶ This is a proposition with which Singapore fully agrees. However, Malaysia then goes on to assert that:

“Singapore advances its claims as if the island was inhabited and had something on it other than the lighthouse for which Singapore alone is responsible.”²⁴⁶

The first part of Malaysia’s comment is completely misplaced. *Pedra Branca* was uninhabited, at least until the island began to be staffed from Singapore following the completion of Horsburgh Lighthouse in 1851. Singapore has never suggested the contrary. The second part of Malaysia’s assertion – that Singapore acts as if there was something else on the island besides the lighthouse structures – is also misleading, and must be placed in proper context.

4.23 If the Court refers to the photograph that appears overleaf (**Insert 7**),²⁴⁷ it will see that there is virtually no room on the island to construct any additional facilities or to carry out any other functions other than those that can be accommodated within the structures that Singapore built, maintained and administered. In short, Singapore has already made the absolute maximum use of the island that is possible, given *Pedra Branca*’s physical characteristics. Singapore’s administration and control of *Pedra Branca* was adapted to the nature and physical extent of the island, and a natural consequence of the title she had acquired in 1847-1851.

²⁴⁶ MCM p. 196, para. 401.

²⁴⁷ This photograph was also produced in larger format as SM Image 16, after p. 102. *See also* the photographs in SM, after p. 10.

4.24 This does not mean, as Singapore has previously shown,²⁴⁸ that her acts on Pedra Branca were limited to the operation and upkeep of the lighthouse. Singapore's conduct embraced many other non-lighthouse related activities as well. Nonetheless, Singapore's conduct must be viewed in relation to the actual characteristics of Pedra Branca. It is obvious that the nature of the functions that Singapore carried out on Pedra Branca had to be tailored to the physical characteristics of the island and the facilities it could accommodate.

4.25 The proposition that the degree of State authority which is required to establish or maintain a legal title to territory depends on the nature of the territory in question is uncontroversial in international law. The point was put in the following way by Judge Max Huber in the *Island of Palmas* case:

“Manifestations of sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestedly displayed or again regions accessible from, for instance, the high seas.”²⁴⁹

4.26 The Tribunal in the *Eritrea/Yemen* case made a similar observation in connection with determining sovereignty over small islands in the Red Sea. The Tribunal stated:

“The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.”²⁵⁰

²⁴⁸ SM pp. 109-124, paras. 6.54-6.90.

²⁴⁹ See *Island of Palmas Arbitration (Netherlands v. U.S.)* (1928) 2 RIAA 829, at p. 840.

²⁵⁰ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 239.

4.27 In addressing Singapore’s *effectivités* performed on Pedra Branca, it is also appropriate to recall what the Permanent Court had to say in the *Legal Status of Eastern Greenland* case where the Court observed:

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”²⁵¹

4.28 Malaysia’s failure to appreciate these considerations gives rise to a fundamental contradiction in Malaysia’s case:

On the one hand, Malaysia argues that all of Singapore’s *effectivités* on Pedra Branca were no more than normal activities associated with running a lighthouse and were without prejudice to the question of sovereignty. As Malaysia’s Counter-Memorial asserts, “conduct in the administration of a lighthouse cannot, in the absence of other factors, be taken as evidence of sovereignty.”²⁵² This argument fails to take account of the fact that Singapore’s conduct maintained and confirmed a pre-existing title. It also contains an implicit criticism that Singapore should have done more on the island.

On the other hand, Malaysia herself agrees that the character of Pedra Branca cannot be ignored. In fact, Malaysia goes so far as to argue that given Pedra Branca’s “tiny surface”, the only conduct that could have been expected of *Malaysia* would be conduct within the island’s maritime spaces, not conduct on the island itself.²⁵³

²⁵¹ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, Judgment (1933) P.C.I.J. Reports, Ser. A/B, No. 53, at pp. 45-46.

²⁵² MCM p. 99, para. 201.

²⁵³ MCM p. 229, para. 489.

4.29 Apparently, Malaysia expects much more from Singapore in terms of conduct than she does from herself. Yet, it is precisely the character of the island which dictated the uses to which Singapore could put it. Given the fact that Pedra Branca is an extremely modest feature, the nature and extent of Singapore's conduct thereon was extensive in the circumstances and clear evidence of Singapore's sovereignty.

4.30 Any assessment of the legal value of State conduct with respect to Pedra Branca depends on the overall context of the case, not on a fragmented approach to the evidence as adopted by Malaysia. It is not enough for Malaysia to provide affidavits from outside consultants discussing the tasks that might, in any given situation, be entrusted to the administrator of a lighthouse. The facts must be viewed in the light of all the relevant circumstances. In the present case, the overall context within which Singapore's conduct falls to be considered encompasses the following key elements:

- (a) Prior to 1847, sovereignty over Pedra Branca was not vested in any power. Notwithstanding her invocation of an "original title", Malaysia has not and cannot point to a single claim to the island on the part of Johor (or anyone else) or a single act of administration and control on the island.
- (b) From 1847-1851, the British Crown took lawful possession of Pedra Branca in connection with the building of a lighthouse. This act of possession did not require, and was not accompanied by, the permission of any other power, including Johor. Unlike the situation that existed with respect to the lighthouses on Pulau Pisang and Cape Rachado, where the local Malay rulers granted their express permission to the British authorities to construct a lighthouse, there is no indenture, deed or treaty from Johor

granting the British Crown the right to construct the lighthouse on Pedra Branca. None was needed.

- (c) Neither in 1851, nor at any time afterwards, did Johor or Malaysia ever so much as intimate that sovereignty over Pedra Branca rested with them or that the lighthouse was being operated under an indenture or servitude. Malaysia's claim to the island only surfaced in 1979, and even then it was no more than a paper claim in the true sense of the word, given that it was based on a unilaterally promulgated map.
- (d) Following the completion of the lighthouse in 1851, the United Kingdom and Singapore maintained the sovereignty that had been acquired over the island, by means of a constant, open and peaceful display of official State authority. That administration and control continues to this day.
- (e) These activities were undertaken in a manner that was entirely consistent with, and adapted to, the nature of the territory on which they were performed. They included both lighthouse and non-lighthouse related acts.
- (f) For more than 130 years, neither Johor nor Malaysia protested any of Singapore's activities on or around Pedra Branca.
- (g) Quite to the contrary, in 1953 Johor specifically disclaimed ownership over Pedra Branca in written correspondence to Singapore governmental authorities.
- (h) Throughout this period, and consistent with all of the factors mentioned above, neither Johor nor Malaysia ever carried out any sovereign act of their own on the island.

4.31 In these circumstances, and with all due respect to the experts who have filed written statements appended to Malaysia’s Counter-Memorial, the practice of third States or private parties in other parts of the world relating to lighthouses which operate under entirely different legal regimes is of no relevance to the circumstances of this case. What matters is the nature of Singapore’s (and Malaysia’s) conduct in relation to Pedra Branca. And what is also revealing is the fundamentally different position that Malaysia adopted with respect to lighthouses on islands such as Pulau Pisang, where Malaysia *did* possess sovereignty, when compared with Malaysia’s attitude vis-à-vis Pedra Branca.²⁵⁴ As Singapore will continue to show, her own conduct on Pedra Branca was carried out *à titre de souverain*, as a natural part of the administration of her own territory.

Section III. The Legal Relevance of Lighthouse Activities

4.32 Chapter 6 of Malaysia’s Counter-Memorial is entitled “The Law and Practice Concerning Lighthouses”. This ambitious title implies that there is an established body of international law and State practice relating to lighthouses which has a bearing on the present case. The main thrust of Malaysia’s argument is that there are many instances of lighthouses constructed on the territory of one State that are administered by an authority other than the territorial sovereign, and that this practice somehow applies to the situation concerning Pedra Branca.²⁵⁵

4.33 As Singapore will show in Subsection A below, the impression that Malaysia seeks to convey by her reliance on examples of “State practice” is seriously misleading. Not only does Malaysia pass over in silence the hundreds, perhaps thousands, of examples of State practice where a State, in

²⁵⁴ See paras. 6.32-6.43 below.

²⁵⁵ MCM p. 99, para. 201.

the normal course of business, administers a lighthouse which *is* situated on its own territory as part of its inherent sovereign prerogatives, but also the examples that Malaysia does cite bear no resemblance to the facts relating to Pedra Branca.

4.34 Before embarking on details, a preliminary comment is in order. When it comes to State practice, caution has to be exercised as to how such practice is deployed. With respect to the administration of lighthouses, there is no “settled practice” which is “virtually uniform”, to use the terms employed by the Court in the *North Sea Continental Shelf Cases* to identify one of the essential criteria that has to be met for State practice to be legally relevant.²⁵⁶ Nor is there any indication that States which engage in lighthouse administration, whether on their own territory or on the territory of others, consider themselves bound to a pre-existing rule of law regulating such administration. This, of course, is the other condition that the Court identified in the *North Sea Cases* as a prerequisite for State practice to be legally germane.²⁵⁷ The examples of State practice upon which Malaysia relies must be analysed with these caveats in mind.

4.35 The second leg of Malaysia’s argument consists of trying to distinguish the judicial precedents which have held that the construction and maintenance of a lighthouse can be legally relevant for purposes of assessing questions of sovereignty especially where small islands are concerned. Singapore will address these authorities in Subsection B below.

²⁵⁶ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3.

²⁵⁷ *Ibid*, at p. 45, para. 77.

A. THE EXAMPLES OF STATE PRACTICE RELIED UPON BY MALAYSIA

4.36 Malaysia's Counter-Memorial prefaces its discussion of State practice in the following way:

“... although the construction and administration of lighthouses was usually a matter for the State on whose territory the lighthouse was to be located, this was not always the case.”²⁵⁸

4.37 This statement contains an important admission. It is that the *construction and administration of lighthouses is usually* a matter for the State on whose territory the lighthouse is located. In other words, Malaysia recognises that in *most* cases it is the State which is sovereign over a particular piece of territory that carries out the construction, maintenance and administration of a lighthouse situated on that territory. Pedra Branca falls within this category. The lighthouse was built, staffed, maintained and administered by first, the United Kingdom and, subsequently, Singapore. The effective occupation of Pedra Branca by the British Crown in 1847-1851 forms the basis of Singapore's title which was thereafter maintained by sovereign acts performed on the ground.

4.38 Malaysia tries to place the lighthouse on Pedra Branca in the exceptional category – the category where ownership of the underlying territory is divorced from the State or entity that constructs and administers the light. Since she relies on exceptional practice, Malaysia bears a heavy burden to prove that Pedra Branca is such an exception – a burden she has not even begun to discharge.

4.39 Malaysia next quotes from the concurring opinion of Judge van Eysinga in the *Lighthouses in Crete and Samos* case.²⁵⁸ The first part of the passage

²⁵⁸ MCM p. 103, para. 212.

from Judge van Eysinga's opinion cited by Malaysia deserves to be reproduced:

“The administration of lighthouses is a service which in most States belongs to their domestic jurisdiction.

But there are cases in which, on the one hand, lighthouses are imperatively demanded in the interest of international navigation, while, on the other hand, the State in whose territory the lighthouse would have to be operated, is not in a position to provide for its administration and maintenance. As a result of this situation, *it sometimes happens that the Maritime Powers come to an agreement with the territorial State in regard to the operating of a lighthouse*. A classic example is the light on Cape Spartel which marks the entrance to the Mediterranean for ships coming from the Atlantic; *the operation of that light was regulated under a Convention concluded at Tangiers in 1865 between the Maritime Powers and Morocco.*”²⁵⁹ [emphasis added]

4.40 Judge van Eysinga's observations contain three important points which Malaysia has chosen to ignore. *First*, Judge van Eysinga affirmed at the outset that the administration of lighthouses is a service which *in most States* belongs to their domestic jurisdiction. This was precisely the manner in which the United Kingdom and Singapore acted with respect to the construction, maintenance and administration of the lighthouse and other facilities on Pedra Branca. It was the normal situation.

4.41 *Secondly*, Judge van Eysinga alluded to other cases where a State might not be in a position to operate a light on its own. In these circumstances, Judge van Eysinga pointed out that other maritime powers would *come to an agreement* with the territorial State regarding the operation of the lighthouse. The crucial point is that, in these exceptional cases, an agreement with the

²⁵⁹ *Lighthouses in Crete and Samos (France v. Greece)*, Judgment (1937) P.C.I.J. Reports, Ser A/B No. 71, at pp. 23-24 (concurring opinion of Judge van Eysinga), cited at MCM pp. 103-104, para. 212, emphasis added.

sovereign on whose territory a lighthouse was to be built and administered by others was sought and concluded.²⁶⁰

4.42 In the present case, the United Kingdom was in a position to build and operate the lighthouse on Pedra Branca on her own, and she sought no agreement from Johor when she took possession of Pedra Branca and constructed the Horsburgh Lighthouse. As Chapter III of this Reply has discussed, the British Crown saw no need for such an agreement since Johor did not possess sovereignty over Pedra Branca, and Johor did not solicit such an agreement or protest the United Kingdom's actions.

4.43 At the same time, both the United Kingdom and Malaysia's predecessors knew how to enter into such agreements when they were necessary. In other words, whenever it was recognised that permission was required for the British to construct a lighthouse on territory which was under Malay sovereignty, that permission was sought and obtained. As Malaysia notes in her own Memorial:

“Indeed, there was a consistent pattern: whenever the British authorities wanted to construct a lighthouse outside the territory of the Straits Settlements, they sought the permission of the relevant Malay rulers.”²⁶¹

4.44 For example, in 1860 the Sultan of Selangor wrote to the Governor of the Straits Settlements expressly consenting to the construction of a lighthouse by the British at Cape Rachado.²⁶² Similarly, when it was proposed in 1885 to build a lighthouse on the island of Pulau Pisang – an island which unquestionably fell under Johor's sovereignty – the specific permission of the

²⁶⁰ See para. 4.45 below.

²⁶¹ MM p. 60, para. 119.

²⁶² See Sultan of Selangor - Governor of the Straits Settlements, correspondence concerning Cape Rachado lighthouse, Oct-Nov 1860 (MM Vol. 3, Annex 62).

Sultan was obtained and a written Indenture signed between the Sultan of Johor and the Government of the Colony of the Straits Settlements.²⁶³ Nothing of the kind ever occurred with respect to the construction of the lighthouse on Pedra Branca. This is a fundamental weakness in the Malaysian case.²⁶⁴

4.45 The *third* point that stands out from Judge van Eysinga's opinion is his reference to the light at Cape Spartel off the coast of Morocco. The Cape Spartel lighthouse is given pride of place in Malaysia's Counter-Memorial as a prime example of a light which was built and operated by someone other than the title holder to the territory where the light was located.²⁶⁵ The necessary implication is that Malaysia considers the Cape Spartel situation to be analogous to that concerning Pedra Branca.

4.46 Nothing could be further from the truth. As Judge van Eysinga observed, and as the Cape Spartel Convention of 31 May 1865 clearly records, the International Commission which undertook the construction and administration of the lighthouse on Cape Spartel did so with the specific agreement of the State possessing sovereignty over the territory where the light was placed (Morocco). Since Malaysia has not annexed a copy of the Cape Spartel Convention to her Counter-Memorial, Singapore is providing a copy in Annex 11 of this Reply. Article I of the Convention clearly records the fact that the Sultan of Morocco expressly consented to the construction by the other

²⁶³ See Indenture between Ibrahim, Sultan of Johore, and Sir James Alexander Swettenham, Officer Administering the Government of the Colony of the Straits Settlements, 6 Oct 1900 (MM Vol. 3, Annex 89), and Letter from Ibrahim (Sultan of Johore) to the Officer Administering the Government, Straits Settlements dated 25 Apr 1900 (SCM Vol. 3, Annex 24).

²⁶⁴ When the British considered lighthouses on Pulau Aur, permission was sought from local chiefs, but formal land grants were not sought because the British did not proceed with the project. See SCM p. 61, para. 4.43.

²⁶⁵ MCM pp. 105-106, para. 214.

Contracting Parties of a lighthouse at Cape Spartel and that this consent was given subject to the following proviso:

“It is well understood that this delegation does not import any encroachment on the rights proprietary and of sovereignty of the Sultan whose flag alone shall be hoisted on the tower of the Pharos.”

4.47 Malaysia can point to no similar agreement regarding Pedra Branca. Obviously, there is a world of difference *between* a situation where a sovereign State takes possession of an island not hitherto claimed or possessed by another State and builds, operates, and maintains a lighthouse and carries out non-lighthouse related activities for over 150 years, *and* the situation where a third party builds a lighthouse on the territory of a State with the specific consent of that State.

4.48 It is in this same context that Malaysia’s reference to the Cape Race Lighthouse in Newfoundland falls to be examined.²⁶⁶ Malaysia raises this as an example of “a lighthouse which was administered sequentially by the authorities of *two States*, neither of which was the territorial State”.²⁶⁷ The key point, however, noted by Malaysia herself, is that “the lighthouse was administered by Britain with the consent of Newfoundland”.²⁶⁸ Moreover, the Cape Race example is completely irrelevant because, contrary to Malaysia’s assertion, it was not a transaction which involved “two States”. At the relevant time, Newfoundland was a *British colony*.²⁶⁹ The “consent” which the metropolitan (or central) government in London sought from the British colonial government in Newfoundland was one which operated strictly within the context of the United Kingdom’s constitutional order. It was not an

²⁶⁶ MCM pp. 102-103, paras. 210-211.

²⁶⁷ *Ibid*, emphasis added.

²⁶⁸ MCM p. 103, para. 211.

²⁶⁹ See Roberts-Wray K., *Commonwealth and Colonial Law* (1966), at pp. 830-831, attached to this Reply as Annex 34.

international transaction. Such “consent” presupposes that Cape Race was already part of the British colony of Newfoundland and thus already under British sovereignty. The Cape Race lighthouse is in fact yet another example of a territorial sovereign building and maintaining a lighthouse on its *own* territory.

4.49 If the Cape Race example had any relevance at all, it is in the *difference* between that case and Pedra Branca. In the case of Cape Race, where the consent of another authority was felt to be necessary (albeit, in this case, as a requirement of domestic law), the consent was granted in a formal and explicit manner (in this case, by way of legislative acts).²⁷⁰ The difference between the Cape Race lighthouse and the lighthouse on Pedra Branca is self evident; in the case of Pedra Branca, the issue of consent never arose.

4.50 Malaysia also points to examples of lighthouses that are administered by private parties under a concession from the sovereign State to support her argument that the administration of a lighthouse does not necessarily coincide with sovereignty over the territory on which the lighthouse is situated. The particular example cited by Malaysia concerns a private concession granted by the Ottoman Empire to the French firm Collas & Michelle.²⁷¹ Once again, the example cited bears no similarity with Pedra Branca. *First*, the private firm in question, the *Administration générale des Phares de l’Empire ottoman*, enjoyed its rights of administration as a result of a specific concession granted by the sovereign State – the Ottoman Empire. *Secondly*, a private entity was in no position to claim sovereignty over an island in any event. The example is simply irrelevant to the present case.

²⁷⁰ See the Preamble of the 1886 Act for the transfer of the Cape Race Lighthouse to the Dominion of Canada (MCM Vol. 3, Annex 26).

²⁷¹ MCM p. 106, para. 215. This concession resulted in the *Lighthouse Case between France and Greece* (*France v. Greece*), Judgment (1934) P.C.I.J. Reports, Ser. A/B, No. 62.

4.51 A similar comment can be made regarding Malaysia's reliance on certain lighthouses operated in the Arabian/Persian Gulf by the private company MENAS.²⁷² With respect to a number of these lights, Malaysia herself admits that they were constructed with the permission of the local rulers.²⁷³ This was certainly the case with respect to the light on the island of Tunb – a specific example cited by Malaysia. An official memorandum prepared by the India Office in 1928 reveals that, with respect to this light, the consent of the Sheikh of Sharjah was obtained.²⁷⁴ As for other lights in the Gulf, Malaysia is equivocal. Her Counter-Memorial simply states that: “[i]n other cases, no such permission seems to be given”, without providing any of the essential factual or legal background.

4.52 Nor is Malaysia's case advanced by her reference to the British practice of assuming administration of various lighthouses in the Red Sea in the 1930s.²⁷⁵ The danger of simply citing a series of examples without analysing their legal context, as Malaysia does, is highlighted by this example. Malaysia argues that the United Kingdom's administration of various Red Sea lighthouses after 1930 is another example of lighthouses administered by the authorities of a State other than the territorial sovereign. Malaysia fails to disclose, however, that this administration was specifically agreed by the relevant States to be without prejudice to the question of sovereignty.

4.53 In actual fact, under Article 5 of an agreement that had been reached in 1927 between Great Britain and Italy – the two colonial powers with interests

²⁷² MCM p. 106, para. 216.

²⁷³ MCM p. 109, para. 223.

²⁷⁴ See Letter from Seymour H.J. to Parr R.C. dated 30 Aug 1928, enclosing an India Office Memorandum on the Status of the Islands of Tamb, Little Tamb, Abu Musa and Sirri, published in *Islands and Maritime Boundaries of the Gulf, 1920-1930*, (Schofield R., ed.) (1990), at p. 331, attached to this Reply as Annex 15.

²⁷⁵ MCM p. 107, para. 217.

on both sides of the Red Sea – both parties agreed that none of their acts undertaken on islands in the Red Sea, including the operation of lighthouses, would assume a political character. As the Tribunal in the *Eritrea/Yemen* case noted:

“This article [*of the 1927 agreement*] can only be understood to mean that acts which might otherwise be construed as providing an incremental acquisition of sovereignty were by the agreement of the parties not to be so construed.”²⁷⁶

In other words, the administration of lighthouses in the Red Sea during this period could well have been construed as having implications for sovereignty *but for* the fact that such acts were *expressly* recognised to be without prejudice to the question of sovereignty, which was left in abeyance following the break-up of the Ottoman Empire. As the Tribunal noted in these particular circumstances: “To seek to identify acts ‘having a sovereign character’ thus became without legal purpose”.²⁷⁶

4.54 From the foregoing, it can readily be seen that any attempt to draw sweeping conclusions as to issues of sovereignty relating to Pedra Branca, from isolated examples of State practice relating to the construction and administration of lighthouses elsewhere in the world, is misplaced. Each case has to be examined on its own facts. In the overwhelming majority of cases, a State constructs and administers a lighthouse on its territory in precisely the same way it carries out State functions on any other part of its territory. Where the administration of a lighthouse is separate from the entity which possesses sovereignty over the territory in question, this is the result of agreement with the sovereign State (as was the case, for example, with the lighthouse on Pulau Pisang), or on the basis of an agreement that such acts are not sovereignty-related (as was the case with the Red Sea lights).

²⁷⁶ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 171.

4.55 In the present case, there is no evidence that either Johor or Great Britain considered Pedra Branca to be subject to Johor's jurisdiction or that it was necessary for Britain to obtain the consent of Johor for the occupation of Pedra Branca and construction of the Horsburgh Lighthouse. The discussion in Malaysia's Counter-Memorial rests at a highly generalised level without taking into account the pre-existing title acquired by the British Crown during the period 1847-1851; the subsequent maintenance and confirmation of that title on the ground by the United Kingdom and Singapore; the failure of Johor or Malaysia ever to object to Singapore's activities on Pedra Branca; or the specific disclaimer of ownership proffered by the authorities of Johor in 1953.

B. LEGAL AUTHORITIES SUPPORTING SINGAPORE'S CASE

4.56 There is ample legal authority supporting the proposition that the construction and maintenance of lighthouses or similar structures on small islands is relevant when it comes to determining sovereignty over the territory where such facilities are located. Malaysia has attempted to distinguish a number of these authorities in her Counter-Memorial.²⁷⁷ The present section will review the relevant precedents once more, and will show that the exercise by Singapore of an unopposed and wide range of State activities on Pedra Branca is an important element confirming Singapore's sovereignty over Pedra Branca.

4.57 Before addressing the case-law, a preliminary point deserves mention. In most of the cases where sovereignty over small islands has been submitted to third party adjudication, the tribunals have been unable to make a firm finding concerning pre-existing title against which the subsequent conduct (or lack thereof) of the parties fell to be considered. Thus, in cases such as

²⁷⁷ MCM pp. 111-116, paras. 228-237.

Minquiers and Ecrehos,²⁷⁸ *Indonesia/Malaysia* (dealing with the islands of Ligitan and Sipadan),²⁷⁹ *Qatar/Bahrain* (dealing with the island of Qit'at Jaradah),²⁸⁰ and *Eritrea/Yemen* (dealing with the Red Sea Islands),²⁸¹ the Court or arbitral tribunal had to assess the relative weight of the official functions carried out by the contesting parties on the disputed territory. The issue was essentially which party could show the better title.

4.58 The present case is fundamentally different in as much as Singapore has demonstrated a pre-existing title based on the activities of the British Crown during the period from 1847-1851. This aspect of the case has been addressed in Chapter III of this Reply, and need not be repeated here.²⁸² The significance of this fact is that Singapore's *effectivités* over Pedra Branca carried out from 1851 to the present must be viewed as acts which confirmed and maintained its pre-existing title.

4.59 Seen in this light, Singapore's case is much stronger than those in other disputes where a party's *effectivités* were dispositive of the question of title because of their greater intensity or weight. Singapore's continuous exercise of State authority over Pedra Branca for over 150 years was not undertaken in isolation, but rather as a natural consequence of the acts of the British Crown from 1847-1851.

²⁷⁸ *Minquiers and Ecrehos (United Kingdom v. France)*, *supra* note 186.

²⁷⁹ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment 17 Dec 2002.

²⁸⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 Mar 2001.

²⁸¹ *Eritrea/Yemen Arbitration*, *supra* note 73.

²⁸² *See also*, SM Chapter V; and SCM Chapter V.

4.60 As the Permanent Court stated in the *Legal Status of Eastern Greenland* case, a claim to sovereignty involves two elements which must be shown to exist: “the intention and will to act as sovereign, and some actual exercise or display of such authority”.²⁸³ This Court has specifically endorsed this approach, most notably in its recent decision in the *Indonesia/Malaysia* case where it recalled this same passage from the Permanent Court’s Judgment.²⁸⁴

4.61 In assessing the conduct of the Parties in this case, it is instructive to apply this test to their respective claims and conduct. *On the one hand*, Singapore has shown both the intention of the British Crown to acquire sovereignty over Pedra Branca in 1847-1851, and the actual exercise and display of State authority on an open, continuous and unopposed basis for more than 150 years afterwards. *On the other hand*, Malaysia has shown neither the intention on the part of Johor ever to acquire sovereignty over Pedra Branca, nor the slightest evidence of any actual display of authority on the island, whether before 1851 or subsequently. In fact, the intention and will of Malaysia (and Johor) are evidenced by:

- (a) Johor’s express disclaimer of ownership over Pedra Branca in official correspondence in 1953; and
- (b) the absence of any protest or reservation of rights in the face of Singapore’s unimpeded administration of the island for over 130 years from 1847.²⁸⁵

²⁸³ *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment (1933) P.C.I.J. Reports, Ser. A/B, No. 53, at pp. 45-56.

²⁸⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 134.

²⁸⁵ These aspects are discussed in Chapters VI and VII *below*.

4.62 Turning to the cases cited in Malaysia's Counter-Memorial, the first two precedents referred to are the Permanent Court's decisions in the *Lighthouses Case between France and Greece* and the *Lighthouses in Crete and Samos* case discussed above.²⁸⁶ These are curious authorities for Malaysia to rely on. Neither of them was concerned with questions of sovereignty, and neither of them addressed the role of conduct for purposes of establishing or maintaining sovereignty over disputed territory. They are utterly irrelevant to the question of sovereignty over Pedra Branca, which is the subject matter of this case.

4.63 The *Indonesia/Malaysia* case is obviously highly problematic for Malaysia. In the present case, Malaysia completely disowns the position that she had previously adopted in the *Indonesia/Malaysia* case regarding the legal relevance of the construction, notification and administration of lights on small, uninhabited islands.

4.64 In her written pleadings in the *Indonesia/Malaysia* case, Malaysia went to considerable lengths to emphasise that her actions with respect to light structures that the North Borneo Government built on both islands were important evidence of her governmental presence on, and administration over, the islands in dispute. Malaysia maintained that the construction and maintenance of such lighthouses is "a part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved".²⁸⁷ Two quotes from the Malaysian Reply in that case further illustrate the point. First, Malaysia stressed that:

"As further evidence of British/Malaysian governmental activity in relation to Sipadan and Ligitan, Malaysia refers to the construction, notification and maintenance by the North Borneo Government of navigational aids and lights on the islands from 1962 onwards."²⁸⁸

²⁸⁶ Paras. 4.50 and 4.39 *above*, responding to MCM pp. 111-112, para. 228.

²⁸⁷ See the Court's Judgment in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 146.

²⁸⁸ ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan, Reply of Malaysia*, at p. 74, para. 5.23.

Next, Malaysia concluded:

“The construction of the lights was a straightforward reflection of the sovereign authority of Britain/Malaysia. That authority was duly publicised and was never challenged by Indonesia.”²⁸⁹

4.65 Why these considerations are any less applicable in the present case goes unexplained by Malaysia. To adopt Malaysia’s terminology, the construction and administration of the lighthouse on Pedra Branca was a straightforward reflection of the sovereign authority of the British Crown. That authority was duly publicised and was never challenged by Malaysia.

4.66 Whatever the shifts in position that Malaysia now elects to embrace for purposes of expediency, the fact remains that the Court in the *Indonesia/Malaysia* case *did* find that the construction and maintenance of the lights on Ligitan and Sipadan was legally relevant. While the Court observed that the construction and operation of lighthouses and navigational aids are not normally considered as manifestations of State authority, the Court recalled its Judgment in the *Qatar/Bahrain* case, where it had held that in the case of very small islands the construction of navigational aids “can be legally relevant”, and concluded that the same considerations applied with respect to the question of the light structures on Ligitan and Sipadan.²⁹⁰ Pedra Branca is also a very small island to which this ruling must apply.²⁹¹

²⁸⁹ ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan, Reply of Malaysia*, at p. 75, para. 5.26.

²⁹⁰ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 147. Para. 14 of the Judgment describes Ligitan as “a very small island” while Sipadan is described as “bigger than Ligitan” and “having an area of 0.13 sq. km”.

²⁹¹ Thomson’s *Account*, *supra* note 55, at p. 383 (SM Vol. 4, Annex 61, p. 484), states that (a) at low tide, Pedra Branca measures 450 feet (or 137 metres) at its longest with an average breadth of 200 feet (or 61 metres), (b) at high tide, it measures 140 feet (or 43 metres) by 90 feet (or 27 metres).

4.67 As noted above, it is apparent that the *Qatar/Bahrain* case also undermines Malaysia’s argument as to the role of lights in the assessment of title. The feature in issue in that case, Qit’at Jaradah, was another very small island.²⁹² Although Bahrain had advanced private activities, such as the drilling of artesian wells on the island, as conduct evidencing its sovereignty, the Court was skeptical of this evidence. The Court noted that these acts, taken by themselves, would be considered controversial as acts performed *à titre de souverain*. However, in referring to the erection by Bahrain of a light beacon on the island, the Court took a different view. It stated:

“The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands.”²⁹²

4.68 Unlike the situation regarding Pedra Branca, the light fixture on Qit’at Jaradah was an unmanned facility of modest size and recent construction. There was no evidence of conduct relating to the island or the light fixture remotely comparable to that in the present case. In particular, and unlike in the present case, there was no evidence that the island had been effectively occupied and possessed in the past, that the light fixture had been the focus of 150 years of extensive administration, that non-light related governmental activities had taken place on the island, that the island had been the subject of official visits by Bahrain governmental authorities, that it had been used to collect meteorological data, that a Bahraini flag flew over it, that there was a jetty, helicopter pad or any other structures on the island, that it had been the subject of internal Bahraini laws and regulations, that it had been used for military, scientific and search and rescue purposes, or that Qatar had expressly disclaimed ownership of the island in official correspondence addressed to Bahrain. There was simply a light. Nonetheless, the Court found this

²⁹² Concerning the size of Qit’at Jaradah, the Court’s Judgment states: “at high tide its length and breadth are about 12 by 4 metres, whereas at low tide they are 600 and 75 metres. At high tide, its altitude is approximately 0.4 metres.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 280, at para. 197.)

sufficient for the purpose of determining that Bahrain possessed sovereignty over the island.

4.69 Notwithstanding these factors, Malaysia advances the following contention in connection with the Court's finding in the *Qatar/Bahrain* case:

“Read in context, and against the background of earlier jurisprudence, this [*the Court's*] observation underscores the point that the construction of aids to navigation may be relevant to questions of sovereignty in cases where there is no other basis of title and the construction and administration of the aids to navigation evidence the intention of the State concerned to act *à titre de souverain*.”²⁹³

4.70 Two comments can be made in response to this argument. *First*, in the present case there *is* a prior basis of title. This is the lawful possession of Pedra Branca by the British authorities during the period 1847-1851. *Secondly*, Malaysia is unable to explain why Bahrain's conduct with respect to the light structure on Qit'at Jaradah, which involved no more than building the structure with no associated acts of administration or control over the island generally, can be viewed as conduct *à titre de souverain*, whereas Singapore's far more extensive conduct performed over a period of 150 years on Pedra Branca is not.

4.71 What is significant is that in the two most recent cases decided by the Court involving sovereignty over islands on which lighthouses were located, the Court has had no hesitation in finding that the construction and maintenance of such facilities was a legally relevant factor for purposes of determining sovereignty.

4.72 Malaysia's reliance on the Court's decision in the *Minquiers and Ecrehos* case also merits comment. Malaysia relies on the part of the Court's Judgment where the Court found that the placing of buoys by France outside

²⁹³ MCM p. 115, para. 234.

the reefs of the island group could not be considered as a manifestation of State authority in respect of the islets.²⁹⁴

4.73 This finding must be viewed in context. As the passage from the Court’s Judgment quoted by Malaysia makes clear, what the Court dismissed as irrelevant was buoying undertaken by France *outside* of the reefs of the Minquiers and Ecrehos group. In other words, the French buoying did not take place on the islets or within their reefs. When it came to assessing the conduct of the United Kingdom, on the other hand, the Court did place significance on the fact that the Jersey authorities had carried out various works and constructions on both island groups, including “a slipway in 1907, a mooring buoy in 1913, a number of beacons and buoys in 1931 and later years and a winch in 1933”.²⁹⁵ The case therefore hardly stands for the blanket proposition that navigational aids are invariably considered as irrelevant for sovereignty purposes. The navigational aids established by the Jersey authorities *were* considered by the Court to be pertinent.

4.74 Malaysia has been similarly selective in the manner she has treated the Arbitral Tribunal’s Award in the first (sovereignty) stage of the *Eritrea/Yemen* case. Malaysia’s citation to that case is based solely on what the Tribunal had to say regarding the question of lighthouses in the Red Sea *during the 1930s*.²⁹⁶ Singapore has pointed out earlier in this Chapter how the lighthouse activities of the colonial powers in the Red Sea in the 1930s were specifically agreed to

²⁹⁴ MCM p. 112, para. 229, citing *Minquiers and Ecrehos (France/United Kingdom)*, *supra* note 186, at p. 71.

²⁹⁵ *Minquiers and Ecrehos (France/United Kingdom)*, *supra* note 186, at p. 66 and p. 69.

²⁹⁶ MCM p. 113, para. 230.

be without prejudice to questions of sovereignty, which remained to be determined in the light of Article 16 of the 1923 Treaty of Lausanne.²⁹⁷

4.75 While it is true that the Tribunal in *Eritrea/Yemen* indicated that the operation and maintenance of lighthouses is normally connected with the preservation of safe navigation and not normally taken as a test of sovereignty,²⁹⁸ the Tribunal added a number of further observations which indicate that lighthouses did have a role to play in the final disposition of sovereignty.

4.76 For example, the Tribunal drew attention to the fact that Yemen relit the lighthouse on Centre Peak (one of the islands ultimately awarded to Yemen) in 1987, and that this action “appears to have occasioned no protest by Ethiopia, which could not have assumed that such acts were rendered without significance...”.²⁹⁹ Although Eritrea maintained that Ethiopia was under no duty to protest given that Yemen’s actions were said to be simply a continuation of prior British practice, the Tribunal disagreed. It noted the following:

“But Yemen was not in the same legal relationship with Ethiopia over the matter of lights as had been Great Britain and, if such was the reasoning for a failure to reserve claimed Ethiopian sovereignty, it was misplaced.”³⁰⁰

4.77 Elsewhere in its Award, the Tribunal pointed to the fact that Yemen had maintained lighthouses on the islands of Greater Hanish and Jabal Zuqar - two other islands which were awarded to Yemen. As the Tribunal stated:

²⁹⁷ See paras. 4.52-4.53 above.

²⁹⁸ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 328.

²⁹⁹ *Ibid*, at para. 231.

³⁰⁰ *Ibid*, at para. 238.

“It can hardly be denied that these lights, clearly intended to be permanent installations, are cogent evidence of some form of Yemeni presence in all these islands.”³⁰¹

4.78 Similarly, the fact that Yemen offered to take responsibility for the lighthouses on Jabal al-Tayr (a further island awarded to Yemen) at an international conference convened in 1989 to discuss the lighthouses (but not entrusted to deal with matters of sovereignty) was considered to be significant by the Tribunal. It stated:

“Nevertheless, the decision of the conference to accept the Yemeni offer over the lights does reflect a confidence and expectation of the member governments of the conference of a continued Yemeni presence on these lighthouse islands for, at any rate, the foreseeable future. Repute is also an important ingredient for the consolidation of title.”³⁰²

4.79 Malaysia’s current reliance on the previous decisions in the *Minquiers and Ecrehos* and *Eritrea/Yemen* cases, to support the proposition that navigational aids are invariably without prejudice to questions of sovereignty, stands in stark contrast to the position that Malaysia adopted in the *Indonesia/Malaysia* case. Malaysia conveniently forgets that in that case she had emphasised the following:

“It is true that in those two cases the Arbitral Tribunal and this Court respectively did not find that the construction of the lights was sufficient evidence of the intention of the Government concerned to act as sovereign over the territorial location of the lights. But that conclusion was reached on the basis of the facts particular to each of the two cases, and cannot be applied to the two islands here.”³⁰³

This is correct. Each case, including the present one, must be assessed on the basis of its own particular facts. When Singapore’s conduct with respect to

³⁰¹ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 492.

³⁰² *Ibid*, at para. 516.

³⁰³ ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *Reply of Malaysia*, at pp. 74-75, para. 5.25.

Pedra Branca is viewed in the context of all the surrounding circumstances, it is clear that such conduct manifested the continuous intention of Singapore to act as sovereign over the island.

4.80 The recent legal authorities clearly endorse the legal significance of the construction and administration of lighthouses in assessing questions of disputed sovereignty, especially where small islands are involved. In the present case, the legal significance of Singapore's acts is heightened by the fact that they were performed in the maintenance of a pre-existing title acquired in 1847-1851. Even those decisions referred to by Malaysia, where the Court or arbitral tribunals have taken a more cautious approach to the role of lighthouses, do not contradict this position; nor do they deal with the situation where there was a pre-existing title by the party that performed the acts in question.

Section IV. The Sovereign Nature of Singapore's Continuous Exercise of Authority over Pedra Branca

4.81 In Chapter VI of Singapore's Memorial, Singapore documented the extensive array of State activities that Singapore and her predecessors carried out on Pedra Branca starting in 1851 and continuing to the present. Those activities include the following:

- (a) enacting legislation specifically referring to Pedra Branca and the Horsburgh Lighthouse;
- (b) assuming sole responsibility for the maintenance and improvement of the lighthouse and other facilities on the island;
- (c) exercising regulatory authority and jurisdiction over personnel residing on the island and maintaining peace and good order thereon;
- (d) collecting meteorological information from Pedra Branca;

- (e) building and upgrading a jetty on Pedra Branca;
- (f) flying the British and, subsequently, the Singapore Marine Ensign on the island;
- (g) vetting applications for persons (including Malaysian nationals) to visit Pedra Branca and otherwise controlling access to the island;
- (h) regular visits by civil and military officials from Singapore to the island without seeking any permission from Malaysia;
- (i) granting permission for Malaysian authorities to undertake scientific and technical surveys on Pedra Branca and within Pedra Branca's territorial waters;
- (j) carrying out naval patrols and conducting naval exercises within Pedra Branca's territorial waters;
- (k) investigating and reporting on hazards to navigation and shipwrecks in the waters around the island;
- (l) investigating incidents of accidental death in the waters of Pedra Branca; and
- (m) considering sea reclamation plans to extend the island.

4.82 Singapore does not propose to re-canvass the details relating to these activities here. The Court will find full documentary support for all of them in Singapore's Memorial.³⁰⁴ However, there are several important characteristics

³⁰⁴ See SM Chapter VI, Section II (pp. 93-124, paras. 6.10-6.90) and the documentary materials cited there.

of this conduct which deserve to be briefly recalled. These include the fact that:

- (a) Singapore has only relied on acts of State authority performed by government representatives or having an official character. Singapore does not rely on any acts of a private nature to support her position.
- (b) Singapore's conduct on Pedra Branca has been open, continuous and peaceful and has lasted for over 150 years.
- (c) The conduct undertaken was of a remarkable breadth and scope given the nature and size of the island on which it was performed.
- (d) For more than 130 years, Malaysia never protested any of this conduct.
- (e) Malaysia never carried out a single competing act on the island at any time.

4.83 Chapter 8 of Malaysia's Counter-Memorial addresses this conduct and makes a vain attempt to play down its significance. As previously noted, Malaysia advances the extraordinary contention that:

“there is nothing – not a single item – in the conduct on which Singapore relies that is capable of sustaining Singapore's claim to sovereignty”.³⁰⁵

Apparently, in Malaysia's view, a State which never claims a particular territory, never carries out a single sovereign act on that territory, never protests the activities of another State on the same territory, and expressly disclaims ownership over the territory in question, *somehow* possesses a superior claim to the territory than one which takes lawful possession of the territory, and

³⁰⁵ MCM p. 164, para. 339.

administers and controls that territory in an unimpeded and unopposed manner for over one and one-half centuries. The absurdity of the proposition speaks for itself.

4.84 Much of Malaysia's attack on Singapore's conduct rests on statements provided to Malaysia by outside consultants whose basic premise is that Singapore's conduct is no more than that which any operator of a lighthouse would undertake regardless of who owns the territory where the lighthouse is located. The conclusion Malaysia seeks to draw from these statements is that Singapore's conduct is not conduct *à titre de souverain* because some of that conduct involved the administration of a lighthouse.

4.85 Singapore has previously explained that these views disregard two fundamental points. *First*, Singapore's conduct is precisely what would be expected from any State in the "usual" situation – that is, in a situation where the State concerned administers facilities and undertakes sovereign activities on its own territory. In such circumstances, the State's conduct *is* conduct *à titre de souverain*. *Secondly*, generalised statements about lighthouse practice elsewhere in the world have no relevance to this case when they do not take into account the specific legal and factual circumstances regarding Pedra Branca. This aspect of the matter is not even considered by Malaysia's consultants. Moreover, there is a *third* point that also warrants mention. It is that none of Malaysia's consultants have identified an example taken from "State practice" where the non-sovereign administrator of a lighthouse carried out the full panoply of activities over a similar period of time that Singapore undertook on Pedra Branca. Malaysia picks and chooses from other examples around the world to show that various individual activities carried out by Singapore were routine. But nowhere does Malaysia cite an example of lighthouse practice undertaken by an entity, which does not hold title to the underlying territory, where the scope, intensity or duration of the activities

undertaken without obtaining the consent of the title holder are comparable with the activities undertaken by Singapore.

4.86 Having made these introductory points, Singapore will now turn to some of the individual examples of State conduct addressed in Malaysia's Counter-Memorial.

A. LEGISLATIVE ACTIVITY UNDERTAKEN WITH RESPECT TO PEDRA BRANCA

4.87 Unlike Malaysia, which has been unable to cite a single example of legislative authority she carried out specifically relating to, or mentioning, Pedra Branca, Singapore has pointed to several such measures adopted by her predecessor, the United Kingdom, and herself. Such measures or, in Malaysia's case the lack thereof, are legally important. As Singapore has noted in her Memorial, the Permanent Court has made it clear that "[l]egislation is one of the most obvious forms of the exercise of State power".³⁰⁶ This is especially the case where the legislation in question refers to the precise territory in question, as it does in this case with respect to Pedra Branca.

4.88 Singapore has already explained how the British Crown acquired lawful possession of Pedra Branca in the years 1847-1851.³⁰⁷ Just four months after the lighthouse at Pedra Branca was commissioned by the Governor of the Straits Settlements, the Government of India enacted Act No. VI of 1852 which was specifically concerned with the lighthouse at Pedra Branca. Section I of the Act provided:

"The Light-House on Pedra Branca aforesaid shall be called 'The Horsburgh Light-House', and the said Light-House, and the appurtenances thereunto belonging or occupied for the purpose thereof, and all fixtures, apparatus, and furniture belonging thereto, shall

³⁰⁶ SM p. 128, para. 6.102, citing *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment (1933) P.C.I.J. Reports, Ser. A/B, No. 53, at p. 48.

³⁰⁷ See SM Chapter V; SCM Chapter V; and, in this Reply, Chapter III *above*.

become the property of, and absolutely vest in, the East India Company and their successors.”³⁰⁸

4.89 As Singapore’s Memorial explained, this was a straightforward example of territorial legislation expressly concerned with Pedra Branca. The 1852 Act makes no mention that the lighthouse on Pedra Branca was subject to an indenture granted by the Sultan of Johor as would be expected if such a grant had existed. It was an act undertaken in consequence of the lawful possession of Pedra Branca by the British Crown, and it represented a quintessentially sovereign act undertaken on territory which appertained to the British Crown. The Government in India had no authority to pass extra-territorial legislation, as was made clear by the intervention of the Advocate General of India during the *travaux préparatoires* of the 1852 Act when he indicated that the Indian Legislature “has no power to legislate for the high seas”.³⁰⁹

4.90 The Malaysian Counter-Memorial has no response to the territorial nature of the 1852 Act. Instead, it advances the woolly and essentially meaningless argument that the 1852 Act focused on the ownership and control of the lighthouse as a matter of “private law”.³¹⁰

4.91 This contention is unfounded. The 1852 Act was a public act taken by the Indian Government directly vesting the lighthouse in the East India Company. Contrary to Malaysia’s suggestion,³¹¹ the 1852 Act was not the beginning of the Straits’ Lights System, but a piece of legislation dealing solely with Horsburgh Lighthouse on Pedra Branca. The vesting of property on Pedra Branca was a sovereign act undertaken *à titre de souverain*. This contrasts, for

³⁰⁸ See Act No. VI of 1852 (India) (SM Vol. 3, Annex 59).

³⁰⁹ See Extracts from *travaux préparatoires* of Indian Act No. VI of 1852 (SCM Vol. 2, Annex 16), at p. 149. See also SM p. 96, paras. 6.17-6.19.

³¹⁰ MCM p. 168, para. 349.

³¹¹ MCM p. 167, para. 347.

example, with the 1886 Canadian legislation concerning the transfer of Cape Race Lighthouse, referred to by Malaysia.³¹² Obviously, the Canadian legislature had no jurisdiction over Cape Race which was part of Newfoundland.³¹³ Thus, the Canadian legislation contains no vesting language along the lines found in India's Act VI of 1852, but merely authorised the Government of Canada to "accept the transfer" of the lighthouse.

4.92 At the relevant time, all property of the East India Company was held in trust for the British Crown for the service of the Government of India.³¹⁴ The status of the East India Company was similar to that of the former Dutch East India Company, as to which Judge Huber in the *Island of Palmas* case had the following to say:

"The acts of the *East India Company*... in view of occupying or colonising the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself."³¹⁵

Whether the rights transferred to the East India Company were "private law rights of ownership" as maintained by Malaysia,³¹⁶ or not, the transfer of these rights *by legislation emanating from the Government in India* was the exercise of rights of a sovereign nature. The Government in India assumed the power to legislate on the status of the Horsburgh Lighthouse precisely because it considered Pedra Branca to be British territory.

³¹² Act of the Government of Canada, respecting the transfer of the Lighthouse at Cape Race, Newfoundland, and its appurtenances, to the Dominion of Canada, 49 Vict. c.20 (1886) (MCM Vol. 3, Annex 27).

³¹³ At the relevant time (1886), Newfoundland was a separate British colony. It became part of Canada only in 1949. See Roberts-Wray K., *Commonwealth and Colonial Law* (1966), at pp. 830-831, attached to this Reply as Annex 34.

³¹⁴ SM p. 95, para. 6.15.

³¹⁵ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 858.

³¹⁶ MCM p. 168, para. 350.

4.93 In considering the legal effects of the 1852 Act, as well as the other *effectivités* Singapore has referred to in her pleadings, it is important to bear in mind that Pedra Branca was the subject of the measures in question and was expressly referred to. Malaysia’s Counter-Memorial quotes with approval the Court’s ruling in the *Indonesia/Malaysia* case where the Court stated that it “can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such.”³¹⁷

4.94 Singapore invites the Court to apply this test to the evidence adduced by the Parties in this case. Not only did the 1852 Act make specific reference to Pedra Branca, the numerous other examples of State conduct on Pedra Branca produced by Singapore are equally specific as to their reference to the island. Malaysia, in contrast, cannot refer to a single sovereign act she undertook which makes any reference to Pedra Branca itself.

4.95 It is also instructive to compare the legal situation concerning Pedra Branca in 1852 with that pertaining to another light fixture – the 2½ Fathom Bank light – that was established by the British at the same time in the region.

4.96 The “2½ Fathom Bank Light” was originally established in 1852 by the placing of the light vessel *Torch* at a location on the North Sands known as 2½ Fathom Bank. Contrary to Malaysia’s assertion, the British sought no permission from local Malay rulers to establish this light because the site of the light was some 15 nautical miles off the mainland coast and the light was

³¹⁷ MM p. 225, para. 483, citing *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 136.

placed on top of a submerged bank not susceptible to appropriation at the time.³¹⁸

4.97 As described in Singapore's Memorial, Act No. XIII of 1854 was passed two years later.³¹⁹ Amongst other things, the 1854 Act provided only for the management and control of the floating light at 2½ Fathom Bank to be vested in the Governor of the Straits Settlements. In contrast, the 1854 Act provided that the lighthouse and all its appurtenances on Pedra Branca would continue to be vested in the East India Company.

4.98 Other aspects of the Straits lighthouses addressed by Malaysia will be dealt with in Subsection D below. For present purposes, it is only necessary to respond to what Malaysia's Counter-Memorial has to say about another example of legislative authority that Singapore has introduced dealing with Pedra Branca – Singapore's Protected Places (No. 10) Order 1991. As Singapore has shown, this Order represented a clear example of a legislative measure adopted by Singapore directly concerning Pedra Branca.³²⁰

4.99 It will be recalled that under the 1991 Protected Places Order, Singapore designated several additional places in Singapore as Protected Areas. Two of those places were the Port of Singapore on the main island of Singapore and

³¹⁸ The light vessel was later moved to another location in the North Sands called "One Fathom Bank" and was replaced, in 1874, by a screw pile lighthouse which was named the "One Fathom Bank Lighthouse". Malaysia has asserted in MCM p. 155, para. 325, without any evidence, that in the case of One Fathom Bank lighthouse "permission from the local Malay Ruler for the construction and/or administration of the lighthouse was apparent".

³¹⁹ SM pp. 96-97, paras. 6.20-6.21.

³²⁰ SM pp. 98-99, para. 6.25; and Singapore's Protected Places (No. 10) Order 1991 (SM Vol. 7, Annex 178).

the island of Pedra Branca. A sketch map was appended to the Order showing the limits of both Protected Places.³²¹

4.100 Malaysia is dismissive of this Order. Malaysia's Counter-Memorial argues that the Order post-dates the critical date and was adopted in a self-serving manner after Singapore and Malaysia had already commenced negotiations over the matter. Malaysia then concludes by accusing Singapore of "casting around for ways in which to advance its claims by reference to conduct in the absence of any other reliable practice."³²²

4.101 There are several responses to these contentions. With respect to the critical date, the Court has made it clear that it will take acts performed after the date on which the dispute crystallises between the parties into account if such acts are the "normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them."³²³

4.102 In the present case, Singapore's 1991 Order must be viewed against a backdrop of what was, at the time, at least 140 years of prior, unimpeded State conduct on Pedra Branca. Singapore's administration of all forms of activity that took place on the island was clearly continuous. The issuance of the 1991 Order was simply one more element in what was a long string of governmental authority exercised over the island. It was, to use the Court's words, a normal continuation of prior acts on the island.

³²¹ The sketch map may be found attached to Singapore's Protected Places (No. 10) Order 1991 (SM Vol. 7, Annex 178).

³²² MCM p. 170, para. 353.

³²³ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 135.

4.103 There was also nothing self-serving about the 1991 Order. Malaysia neglects to mention that the 1991 Order did not concern Pedra Branca alone. It also covered the Port of Singapore which was similarly designated a Protected Place. Pedra Branca was hardly singled out for special treatment. The Order was issued in the normal course of business and was not protested by Malaysia. Moreover, the suggestion that Singapore has to “cast about” for *effectivités* on the island is nonsense. Singapore has documented a large number of official actions of various types on and with respect to Pedra Branca. She did not need to manufacture another.

B. ISSUANCE OF NOTICES TO MARINERS REGARDING PEDRA BRANCA

4.104 Singapore has documented the fact that on numerous occasions she issued Notices to Mariners regarding Pedra Branca. Such Notices were published in 1851, 1887, and 1981.³²⁴ Malaysia’s response is that Notices to Mariners are normally issued by any entity in charge of a lighthouse, but that they are without relevance to issues of sovereignty.³²⁵ But this general observation, as Singapore has already explained, does not mean that when a State issues such Notices concerning parts of its own territory, those Notices are not regarded as normal State activities undertaken *à titre de souverain*.

4.105 Once again, Malaysia appears to have a short memory. In the *Indonesia/Malaysia* case, Malaysia herself considered the issuance of Notices to Mariners – in that case by Malaysia’s predecessor in connection with the lights on the islands of Ligitan and Sipadan – to be legally significant.

³²⁴ See Relevant Extracts from the Straits Times and Singapore Journal of Commerce (23 Sep 1851, 30 Sep 1851 and 7 Oct 1851), and the Singapore Free Press & Mercantile Advertiser (3 Oct 1851 and 6 Oct 1851) (SM Vol. 3, Annex 56); “Notice to Mariners”, Straits Settlements Government Notification No. 321 dated 29 June 1887 (SM Vol. 5, Annex 72); and Singapore Notices to Mariners dated 1 Jan 1981 and Singapore Notices to Mariners dated 1 Oct 1981 (SM Vol. 7, Annex 150).

³²⁵ MCM pp. 179-181, paras. 366-371.

Malaysia annexed Notices for the lights at both islands to her pleadings, and she drew attention to the fact that such Notices “elicited no reaction from Indonesia”.³²⁶ Malaysia obviously viewed the “notification” of navigational aids and lights as evidence of Malaysian governmental activity in relation to the islands in dispute.³²⁷

4.106 At the very minimum, Malaysia (or Johor) should have reacted to the Notices concerning Pedra Branca, if only to reserve her position, if she truly considered that they related to territory over which she possessed sovereignty. This was certainly Malaysia’s view in the *Indonesia/Malaysia* case with respect to Indonesia’s silence.

C. SINGAPORE’S CONSTANT MAINTENANCE, UPGRADING AND IMPROVEMENT OF THE LIGHTHOUSE AND THE JETTY ON PEDRA BRANCA

4.107 As set out in Singapore’s Memorial, Singapore and her predecessors engaged in a long-standing series of activities concerned with the maintenance, upgrading and improvement of the lighthouse and jetty on Pedra Branca.³²⁸ Singapore also provided for the stationing of personnel on the island to operate the lighthouse and regulated their activities. Prior to the taking of possession of Pedra Branca and the undertaking of these measures, no one had ever lived on the island and no structures had been built on it.

4.108 Malaysia’s Counter-Memorial makes the facile comment that these activities, while seemingly impressive, are all “smoke and mirrors”.³²⁹ This

³²⁶ ICJ Pleadings, *Sovereignty over Pulau Ligitan and Pulau Sipadan, Malaysia’s Memorial*, at p. 70.

³²⁷ See also, paras. 4.63-4.65 above.

³²⁸ SM pp. 99-102, paras. 6.28-6.32.

³²⁹ MCM p. 172, para. 355.

comment ignores the obvious point that the actions concerned all represented concrete examples of State authority taken on the ground, i.e., on the territory presently in dispute. Malaysia cannot point to any similar activities of her own on Pedra Branca.

4.109 On another note, Malaysia raises three arguments in response to Singapore's manifestation of sovereign authority. *First*, Malaysia repeats her constant theme that such activities fell within the ordinary tasks that any lighthouse administrator would undertake.³³⁰ However, this does not detract from their sovereign nature in this case.

4.110 *Secondly*, Malaysia complains that certain of Singapore's activities took place after the critical date. In particular, Malaysia points to the automation of the lighthouse performed by Singapore in 1988, the installation of radar for tracking vessels in 1989, the construction of a helicopter landing platform on the island in 1992, and further upgrades made to the light in 1996 as post-critical date activities.³³¹

4.111 Once again, all of these activities represented a perfectly normal continuation of the kind of actions Singapore had taken on Pedra Branca well before 1979. The automation of the lighthouse in 1988, and its upgrade in 1996, were natural steps in keeping with previous improvements to the technical capabilities of the light. They were no different in character from the new lighting equipment that the United Kingdom had installed on Pedra Branca in 1887.³³² The installation of vessel tracking radar was also a technical

³³⁰ MCM pp. 173-174, paras. 356-358.

³³¹ MCM pp. 178-179, paras. 363-365.

³³² See "Notice to Mariners", Straits Settlements Government Notification No. 321 dated 29 June 1887 (SM Vol. 5, Annex 72); "Notice to Mariners", Straits Settlements Government Notification No. 449 dated 2 Sep 1887 (SM Vol. 5, Annex 73).

upgrade over the manual surveillance of maritime traffic in the Singapore Straits which had been carried out from Pedra Branca since 1851. And the construction of a helicopter landing pad was similar in character to the original building of a jetty on the island in the 19th Century. Both installations facilitated transportation to Pedra Branca. Even Malaysia's outside consultants confirm that lighthouse development commonly includes the erection of helidecks and vessel traffic service (VTS) towers.³³³ One wonders why Malaysia felt obliged to protest such "normal" activities after 1979, when she did not do so beforehand. All of these activities were practical in nature, represented a normal continuation of previous works carried out by Singapore on the island, and were not self-serving in any way.

4.112 In fact, if there was any conduct that was self-serving, it was that of Malaysia – Malaysia's Counter-Memorial points out that she protested aspects of these post-1979 events.³³⁴ But these are nothing more than efforts to build up a paper claim to the island after the critical date.

4.113 Malaysia's *third* argument is that many of Singapore's acts, particularly in so far as they related to the maintenance of the facilities on Pedra Branca, were identical to the kinds of work that Singapore carried out on the lighthouse on Pulau Pisang where Singapore did not possess sovereignty.³³⁵ This may be so, but as will be discussed more fully in Chapter VI of this Reply, they do not detract from the sovereign nature of the acts undertaken on Pedra Branca.

³³³ See Conduct Forming Part of the Normal Administrative Responsibilities of a Lighthouse Operator and Singapore's Claims in Respect of the Horsburgh Lighthouse and Pulau Batu Puteh, Report by Captain Duncan Glass and David Brewer (MCM Vol. 2, Annex 1), at paras. 34-37; and MCM p. 134, para. 279.

³³⁴ MCM p. 178, para. 364.

³³⁵ MCM pp. 174-176, paras. 359-360.

4.114 It was recognised by Great Britain, Singapore, Johor and Malaysia that Pulau Pisang was under an entirely different legal regime from that of Pedra Branca.³³⁶ Pulau Pisang was subject to Malaysian sovereignty, and the lighthouse there had been erected with the permission of the Sultan of Johor. That permission only extended to the lighthouse and a roadway to the beach for landing supplies, but not to the island as a whole. In contrast, Pedra Branca was under the sovereignty of Singapore. This was well-established even before 1953, and it was certainly uncontested afterwards given that Johor disclaimed ownership over the island in that year. Many of the references cited by Malaysia to Singapore's acts date from after 1953. In short, Singapore's activities undertaken on Pedra Branca were of a fundamentally different nature than those on Pulau Pisang. The former were sovereign in character; the latter were not.

D. USE OF PEDRA BRANCA FOR THE COLLECTION OF METEOROLOGICAL DATA AND MALAYSIA'S ADMISSIONS AGAINST INTEREST IN THIS RESPECT

4.115 Malaysia does not take issue with the evidence that Singapore has produced showing that one of the non-lighthouse uses to which Singapore put Pedra Branca was for the collection and dissemination of meteorological information.³³⁷ Instead, Malaysia argues that such activities are routinely undertaken by lighthouse operators.³³⁸ Malaysia's Counter-Memorial adds that

³³⁶ See SCM pp. 156-158, paras. 6.63-6.66; and paras. 6.32-6.43 *below*.

³³⁷ See SM pp. 105-107, paras. 6.42-6.46; Letter from Thomson J.T. (Government Surveyor at Singapore) to Church T. (Resident Councillor at Singapore) dated 20 July 1851 (SM Vol. 5, Annex 54); Extracts from the Straits Settlements Government Gazette, 1865 to 1867, showing Meteorological Data Taken from Horsburgh Lighthouse (SM Vol. 5, Annex 66); Rainfall records of Pedra Branca from 1953 to 1988 (SM Vol. 6, Annex 92).

³³⁸ MCM p. 184, para. 376.

until 1965, these kinds of matters were addressed on a cooperative “pan-Malayan-Singapore” basis.³³⁹

4.116 Malaysia’s Counter-Memorial is striking for what it omits. *First*, Malaysia fails to mention that pan-Malayan³⁴⁰ meteorological cooperation began only in the 1920s.³⁴¹ Before that, meteorological observations were undertaken by individual governments on their own territories without coordination with other governments in Malaya³⁴² – in this regard, it is relevant to note that the Straits Settlements Government began meteorological observations on Pedra Branca in 1851. *Secondly*, even after pan-Malayan cooperation began, the Malayan Meteorological Service was divided into a Singapore branch and a Federation of Malaya branch. More importantly, the Malayan Meteorological Service collected and recorded their data *on a territorial basis*.

4.117 In Annex 16 to this Reply, the Court will find the Annual Report of the Malayan Meteorological Service for 1948 which explains the organisation of the Service and its division into Singapore and Federation of Malaya branches. If the Court then turns to the *Summary of Observations* published by the Malayan Meteorological Service for the year 1959, a representative example of

³³⁹ MCM p. 201, para. 413.

³⁴⁰ The term “pan-Malayan” was used by local officials of the relevant period to refer to matters which involved the whole of British Malaya, i.e., the entire Malayan Peninsula including Singapore. See Singapore Legislative Assembly Debates on the Immigration (Amendment) Bill 1959, attached to this Reply as Annex 26, which refers to “pan-Malayan” immigration arrangements.

³⁴¹ See *Annual Report of the Malayan Meteorological Service*, 1949, at p. 8, attached to this Reply as Annex 19 (“The first active steps towards unifying meteorological work in the Peninsula were taken about 1920 or 1921...”).

³⁴² *Ibid.* (“In addition to these stations which were maintained by different Governments, numbers of rainfall stations were established privately, principally on the rubber estates. While this network of observing stations represented a very considerable effort in establishment and maintenance, it could not by any means be described as a meteorological service. Each administration carried on its observation without reference to any other: it may almost be said, in fact, that each station was carried on independently of any other.”)

this publication from before the formation of Malaysia, attached in Annex 28 hereto, it will see that the various reporting stations are listed on a territorial basis. Horsburgh Lighthouse is specifically listed as one of “29 Rainfall Stations in Singapore”. The 17 First Order Stations and 43 Auxiliary Stations stated to be “in the Federation of Malaya” are listed separately and do not include Horsburgh Lighthouse.

4.118 After Singapore’s independence from Malaysia in 1965, the 1966 *Summary of Observations*, now published jointly by the Meteorological Services of Malaysia and Singapore, maintains the same presentation of listing Horsburgh Lighthouse as one of “29 Rainfall Stations in Singapore”.³⁴³ This was a clear admission by an official Malaysian institution that Horsburgh Lighthouse, and by necessary implication Pedra Branca, was located “in Singapore”.

4.119 If the Court next refers to the 1967 *Summary of Observations* published two years after Singapore’s independence by the Meteorological Service of Malaysia, it will see that meteorological data is no longer listed from locations in Singapore.³⁴⁴ This *Summary* lists readings from Malaysia only. Significantly, there is *no* listing for Horsburgh Lighthouse. This was for the obvious reason that Horsburgh Lighthouse was not considered to be located on Malaysian territory.

4.120 The evidence, coming as it does from an official Malaysian governmental source, could not be more compelling. It clearly demonstrates that Malaysia was under no doubt that Horsburgh Lighthouse was situated on

³⁴³ Extracts from Meteorological Services Malaysia and Singapore, *Summary of Observations for 1966*, attached to this Reply as Annex 35.

³⁴⁴ Extracts from Meteorological Service Malaysia, *Summary of Observations for 1967*, attached to this Reply as Annex 36.

Singapore territory. Of course, this fact is entirely consistent with the famous 1953 disclaimer by Johor that it did not claim ownership over Pedra Branca. But it totally contradicts the contentions that Malaysia now tries to advance in this case regarding her claim over Pedra Branca. And it also demonstrates that Singapore's conduct in using Pedra Branca for meteorological purposes was conduct *à titre de souverain*.

E. THE FLYING OF THE BRITISH AND SINGAPORE ENSIGN ON PEDRA BRANCA

4.121 Malaysia exhibits considerable sensitivity over the fact that, ever since Horsburgh Lighthouse was completed in 1851, a British and, subsequently, Singapore Marine Ensign has flown over the island. As Singapore has previously explained, this was a clear display of sovereign ownership over Pedra Branca.³⁴⁵ Needless to say, no Johor or Malaysian flag has ever been raised on the island, whether before 1847 or afterwards.

4.122 Malaysia's Counter-Memorial tries to play down the significance of this fact by advancing two main arguments. The first is legal, and consists of trying to distinguish the *Temple* case where the flying of a flag was viewed by this Court as legally relevant for purposes of attributing sovereignty over the temple. The second is general, and consists of asserting, based once again on the views of Malaysia's outside consultants, that the flying of an ensign over a lighthouse is a normal occurrence. Malaysia also tries to explain away her reaction to the Singapore Ensign which flew over Pulau Pisang until 1968, when it was protested by Malaysia and lowered by Singapore, as compared with her complete silence with respect to the same Ensign which flew at Pedra Branca.³⁴⁶ As will be presently seen, this attempt is totally unavailing.

³⁴⁵ SM pp. 107-109, paras. 6.47-6.53.

³⁴⁶ MCM pp. 185-195, paras. 378-399.

4.123 With respect to the significance of flags, Malaysia’s principal contention is the following:

“The significance of the flying of flags or the display of national emblems in territorial disputes hinges on the conduct in question being open and notorious and demanding of a reaction: it is not, in the abstract, evidence of sovereignty.”³⁴⁷

4.124 Before addressing Malaysia’s reasoning, it is worth mentioning that the *Temple* case does not stand alone when it comes to the relevance of flags or national emblems in sovereignty disputes. In the *Island of Palmas* case, the arbitrator, in ruling in favour of the Netherlands, attached importance to the fact that “external signs of sovereignty, e.g., flags and coats of arms” had been proved by the Netherlands on the island.³⁴⁸

4.125 The totality of the evidence in this case, including (i) the evidence demonstrating the British Crown’s intention to acquire sovereignty over Pedra Branca in 1847-1851, (ii) the subsequent display of State authority on Pedra Branca by the United Kingdom and Singapore, (iii) Malaysia’s silence in the face of such conduct, and (iv) Johor’s express disclaimer of ownership, supports the conclusion that the display of the Ensign on Pedra Branca was intended as an act *à titre de souverain*. The question, to use Malaysia’s formulation, is whether the display of a Singapore Ensign in these circumstances demanded a reaction.

4.126 In her discussion of the *Temple* case, Malaysia refers to the visit paid in 1930 by a Siamese Prince to Preah Vihear where the French flag was on display, and quotes from the Court’s Judgment where the Court stated: “The Prince could not possibly have failed to see the implications of a reception of

³⁴⁷ MCM p. 185, para. 379.

³⁴⁸ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 870.

this character.”³⁴⁹ Malaysia then tries to distinguish the *Temple* case from the situation on Pedra Branca by arguing that Singapore’s Marine Ensign, apparently in contrast to the French flag at Preah Vihear, was not displayed in an open and notorious manner. In particular, Malaysia contends that the Singapore Ensign looks similar to the Johor State flag, is small and is difficult to see or identify.³⁵⁰

4.127 There are several deficiencies in this line of argument. *First*, the flying of the British and Singapore Ensigns over Pedra Branca was not an isolated occurrence. The Ensign has been on display for over 150 years without eliciting any reaction from Johor or Malaysia. Johor, which Malaysia claims held a long-standing historical title to Pedra Branca, could not have been unaware of the Ensign unless, of course, the authorities of Johor had no interest in the island, which was undoubtedly the truth of the matter. Malaysia’s argument that the Singapore Ensign looks similar to the Johor state flag does not explain why Johor took no action during the years before Singapore’s independence when the flag used was the *British* Ensign, which bore no similarity with the Johor State flag. See, in this connection, **Insert 8** overleaf, showing the Johor state flag and the various British ensigns.

4.128 *Secondly*, relying on an affidavit supplied by Rear-Admiral Thanabalasingam, Malaysia maintains that her navy “patrolled this area [*i.e., in the vicinity of Pedra Branca*] routinely from the very first days following independence in 1957”.³⁵¹ If this was the case, then there would have been no excuse for Malaysia not noticing the Singapore Ensign. Yet Malaysia made no reaction.

³⁴⁹ *Temple of Preah Vihear*, *supra* note 230, at p. 30. The relevant passages are extracted and quoted at para. 3.124 *above*.

³⁵⁰ MCM p. 189, para. 385.

³⁵¹ MCM p. 252, para. 541.

4.129 *Thirdly*, Rear-Admiral Thanabalasingam also claims that he personally landed on Pedra Branca in 1962. Just as the Siamese Prince who visited the temple at Preah Vihear could not have failed to notice the French flag displayed there, Rear-Admiral Thanabalasingam could not have failed to see the Singapore Ensign flying over the lighthouse. Nonetheless, there was still no reaction from Malaysia.

4.130 Rear-Admiral Thanabalasingam tries to excuse this silence by stating that, while he is not an expert on lighthouses, as a naval officer he would have understood the flying of the Ensign only as an indication that Singapore managed the lighthouse, not that Singapore had sovereignty over the island.³⁵² This explanation does not bear up to scrutiny when it is compared with how Malaysia reacted to the flying of an identical Singapore Ensign over Pulau Pisang.

4.131 Pulau Pisang is Malaysian territory. Nonetheless, pursuant to a written Indenture agreed between the Sultan of Johor and the Governor of the Straits Settlements in 1900, the lighthouse on Pulau Pisang was operated by British authorities and subsequently by Singapore. Until 1968, Singapore flew her Marine Ensign over the lighthouse at Pulau Pisang.

4.132 Singapore's Memorial recounted the fact that, on 3 September 1968, a Singapore diplomat from the Singapore High Commission in Malaysia was summoned to the Malaysian Foreign Ministry, where he was requested to communicate to the Government of Singapore, Malaysia's request that Singapore issue instructions to bring down the flag as soon as possible.³⁵³

³⁵² MCM p. 192, para. 391.

³⁵³ See Letter from Ministry for Foreign Affairs, Singapore to Attorney-General, Singapore dated 4 Sep 1968 (SM Vol. 6, Annex 113).

4.133 Malaysia's Counter-Memorial now seeks to convey the impression that this request had nothing to do with issues of sovereignty, and that Malaysia did not view the flag on Pulau Pisang as a mark of sovereignty. Instead, Malaysia suggests that she was only acting under pressure from an internal Malaysian Youth Movement.³⁵⁴

4.134 This explanation is unconvincing. The letter from the Malaysian Youth Movement to the Permanent Secretary of the Malaysian Ministry of Foreign Affairs urged the Government of Malaysia "to bring down the Singapore flag from Malaysian soil at Pulau Pisang".³⁵⁵ Clearly, the concern of the Youth Movement was cast in terms of sovereignty. Moreover, Singapore's internal memorandum on the incident records the fact that Malaysia's representations to Singapore were directly premised on an explanation from Malaysia's point of view as to what the status of sovereignty was over Pulau Pisang.³⁵⁶

4.135 Singapore's written record of the 3 September 1968 meeting also reveals that one of the arguments raised by Malaysia's representative was that in 1951, the British had reaffirmed that sovereignty over Pulau Pisang remained with Johor.³⁵⁷ It is not known to which document Malaysia's representative was referring, although in all probability it was to the 1953 correspondence which dealt with both Pulau Pisang and Pedra Branca.³⁵⁸ What is clear is that, if

³⁵⁴ MCM p. 193, paras. 395-396.

³⁵⁵ MCM, Annex 40.

³⁵⁶ See Letter from Ministry for Foreign Affairs, Singapore to Attorney-General, Singapore dated 4 Sep 1968 (SM Vol. 6, Annex 113).

³⁵⁷ Note by Kajapathy A. (First Secretary, Singapore High Commission in Malaysia) regarding meeting with Hamzah bin Majeed (Assistant Secretary, Ministry of Foreign Affairs, Malaysia) on 3 Sep 1968, attached to this Reply as Annex 40.

³⁵⁸ See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953 (SM Vol. 6, Annex 93) which states: "... Pulau Pisang was granted to the Crown for the purposes of building a lighthouse. Certain conditions were

Malaysia was at the time conversant with the 1953 documentation relating to Pulau Pisang, she would also have been well aware of the letter of 21 September 1953 in which Johor disclaimed ownership over Pedra Branca.³⁵⁹

4.136 Remarkably Malaysia's Counter-Memorial fails to explain why, if there was a danger that internal constituencies in Malaysia might misunderstand the Singapore Ensign flying at Pulau Pisang to represent a display of sovereignty, such constituencies would not have had exactly the same concerns with respect to the Ensign flying at Pedra Branca. Normal prudence would have dictated that Malaysia, if she genuinely considered that she possessed sovereignty over Pedra Branca, make the same request to Singapore to lower her flag there, so as to avoid any similar complaints from the Malaysian Youth Movement or anyone else in Malaysia. After all, the Malaysian Government viewed the matter concerning Pulau Pisang with sufficient seriousness to warrant the making of representations to Singapore at the diplomatic level. Yet, Malaysia made no representations whatsoever about the Singapore Ensign at Pedra Branca, which continues to be displayed.

4.137 This incident illustrates the manner in which Malaysia herself viewed flags and ensigns as external manifestations of sovereignty. With respect to the Ensign at Pulau Pisang, Malaysia felt compelled to protest. With respect to the Ensign at Pedra Branca, Malaysia did nothing. The obvious implication is that, consistent with her 1953 correspondence, Malaysia considered Pedra Branca to be Singapore territory.

attached and *it is clear that there was no abrogation of the sovereignty of Johore*. The status of Pisang is quite clear." [emphasis added]

³⁵⁹ See Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96).

F. SINGAPORE'S CONTROL OF ACCESS TO PEDRA BRANCA,
OFFICIAL VISITS BY SINGAPORE OFFICIALS AND
GRANTS OF PERMISSION TO CARRY OUT SURVEYS

4.138 Singapore's Memorial contains considerable documentary evidence demonstrating that Singapore was the sole Party responsible for vetting and controlling access to Pedra Branca, that numerous Singapore government officials visited the island, that Malaysian nationals were excluded from Pedra Branca unless expressly authorised by Singapore, and that Singapore was the only Party to regulate and issue grants for carrying out surveys around the island. As Chapter V will show, Malaysia carried out no similar activities.

4.139 Malaysia attempts to dismiss the relevance of these acts in a number of ways. Without re-canvassing all of the details previously set out in Singapore's Memorial, Singapore will deal in this section with Malaysia's main contentions.

4.140 To the extent that Malaysia repeats her argument that many of Singapore's actions, such as regulating activities on Pedra Branca, were standard activities undertaken by most lighthouse operators,³⁶⁰ Singapore reiterates that this in no way detracts from their sovereign nature. A State which carries out even routine functions on its own territory acts in the capacity of sovereign. A State that does absolutely nothing with respect to a piece of disputed territory does not. There is no need to belabour the point.

³⁶⁰ MCM pp. 196-199, paras. 402-410.

1. Official Visits to Pedra Branca

4.141 What is striking from the evidence on the record, including the logbooks produced by Singapore with her Memorial,³⁶¹ is the number of visits that were paid by Singapore officials to Pedra Branca over the years and the broad scope of their authority. In addition to Singapore staff who constantly travelled to the island to inspect, maintain, and upgrade the facilities, the island was the subject of visits by:

- (a) the Minister for Communications;
- (b) the Minister for Home Affairs;
- (c) a Member of Parliament;
- (d) police officials; and
- (e) military personnel.

4.142 Whether it is normal for lighthouse keepers to maintain a logbook of visits, as Malaysia's consultants suggest,³⁶² the fact remains that Singapore officials conducted themselves on the basis that Pedra Branca was Singapore territory. Not once did anyone seek permission from Malaysia to visit Pedra Branca. Malaysia has not adduced any evidence that Malaysian Ministers or other senior officials visited the island. There is only an alleged landing by Thanabalasingam in 1962.³⁶³ Over the course of 150 years, the least that would be expected from a party that considers it holds title would be to

³⁶¹ See Selected Entries from the Horsburgh Lighthouse Visitors Logbook (including transcriptions) (SM Vol. 5, Annex 87).

³⁶² MCM p. 199, para. 410.

³⁶³ See para. 5.16 *below*. Thanabalasingam's alleged landing was based solely on his own affidavit and not substantiated by any documentary evidence. This is to be contrasted with the Singapore Navy's well documented activities on and around Pedra Branca – see paras. 4.149-4.158 *below*.

visit its territory and express some interest in it. Neither Johor nor Malaysia took such steps, at least not until a paper claim was made to the island in 1979.

4.143 With respect to visits to *Pulau Pisang*, research by Singapore has revealed that only one Singapore Minister, the Minister for Communications, made a visit to that island. The circumstances surrounding this visit are revealing when compared to the manner in which Singapore officials acted when visiting Pedra Branca. Before embarking on his visit, the Minister inquired internally as to whether it was necessary to obtain a visa given that the lighthouse on Pulau Pisang was situated on Malaysian territory. The response provided was that there was no immigration or customs checkpoint on Pulau Pisang. Nonetheless, the Minister was advised to carry a passport.³⁶⁴ In contrast, with respect to visits to Pedra Branca, there was never any suggestion that Singaporean officials or visitors should carry their passports.

2. *Control of Visits by Malaysian Nationals*

4.144 Singapore's Memorial also shows that when Malaysian nationals wished to visit Pedra Branca, such visits entailed permission from the Singapore authorities.³⁶⁵ One such example was a joint survey undertaken in 1974 with representatives from Malaysia, Indonesia and Japan to make tidal observations. In that case, a Commanding Officer of the Malaysian Navy complied with Singapore's request to furnish the particulars of the individuals concerned before permission could be given.³⁶⁶

³⁶⁴ See Correspondence concerning Visit of Minister for Communications (Singapore) to Pulau Pisang in Sep 1971, attached to this Reply as Annex 41.

³⁶⁵ SM pp. 111-113, paras. 6.60-6.64. For the attitudes of third parties, see Chapter VIII *below*.

³⁶⁶ See Letter from Lieutenant Commander Mak S.W., KD Perantau to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974 (SM Vol. 6, Annex 122).

4.145 Malaysia's Counter-Memorial points out that Singapore's original request for the details of the members of the survey team was issued to the Commanding Officer of the survey vessel, and that it was entirely fortuitous that the survey wound up having Malaysian members on it. This argument misses the point, which is that Singapore controlled access to Pedra Branca by foreigners no matter what their nationality.³⁶⁷ In acting in this way, Singapore was exercising sovereign authority. Malaysia also advances the argument that permission was only sought to stay at the lighthouse and that "[t]his had nothing whatever to do with access to the island".³⁶⁸ The argument is ill-conceived. The letter of the Singapore hydrographic officer and that of the Malaysian naval officer both referred to individuals who were "to land at Horsburgh Lighthouse".³⁶⁹ The phrase "to land at Horsburgh Lighthouse" was obviously a reference to landing at Pedra Branca since it was not possible to land "at the lighthouse".

4.146 Malaysia also tries to minimise the significance of the fact that, when two of her officials landed on Pedra Branca four years later in 1978 without prior authorisation from Singapore, they were sent off.³⁷⁰ Once again, Malaysia offers the facile comment that it was not landing at Pedra Branca that was the problem, but rather access to the lighthouse.³⁷¹ Unfortunately for Malaysia, her own official has expressly admitted that the problem was the

³⁶⁷ As will be discussed in Chapter VIII of this Reply, the event in question is also relevant as evidence of general repute that Pedra Branca fell under Singapore's sovereignty. In addition to representatives from Singapore, three other countries were involved in the project, and all three had to furnish the particulars of their delegates to Singapore to obtain authorisation.

³⁶⁸ MCM pp. 202-203, paras. 418-419.

³⁶⁹ See Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer, K.D. Perantau dated 26 Mar 1974 (SM Vol. 6, Annex 120); Letter from Lieutenant Commander Mak S.W., KD Perantau to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974 (SM Vol. 6, Annex 122).

³⁷⁰ SM p. 112, para. 6.63.

³⁷¹ MCM p. 205, para. 425.

“refusal of Singapore authorities to allow a Malaysian Survey team *to land on Pulau Batu Puteh on which the Lighthouse is situated*”.³⁷² This is confirmed by the corresponding Singapore internal note of the same conversation, which explained that the Malaysian side was upset by the fact that, “when certain Malaysian marine boats tried to dock *on the island* recently for some survey work, they were refused permission to land”.³⁷³ The documentary record makes clear that the issue was access to the island, not access to the lighthouse. The lighthouse keepers promptly expelled the two Malaysian officials from the island and the Malaysian officials complied.

4.147 A further episode evidencing Singapore’s control over matters involving Pedra Branca concerned Malaysia’s proposal in 1980 to undertake a hydrographic survey within Pedra Branca’s waters. The details of this event were recounted in Singapore’s Memorial³⁷⁴ and are addressed again in Chapter VI below.

3. *Permissions Granted by Singapore to Third Parties*

4.148 Malaysia also tries to pass over the significance of two instances where Singapore granted permission to third parties to carry out research on Pedra Branca and salvage operations within its territorial waters. These events concerned an application from a member of the American Piscatorial Society to

³⁷² Notes on Discussion Between Mr. M. Kishore, Counsellor, Singapore High Commission and PAS (Principal Assistant Secretary) Southeast Asia on 13 Apr 1978 at Wisma Putra, 14 Apr 1978 (MCM Vol. 3, Annex 45), at pp. 1-2, emphasis added. Mr. Halim Ali was the Principal Assistant Secretary in charge of the South-East Asia desk at Malaysia’s Ministry of Foreign Affairs (Wisma Putra).

³⁷³ See Note by Kishore Mahbubani (Counsellor, Singapore High Commission in Malaysia) regarding meeting with Halim Ali (Principal Assistant Secretary, South East Asia, Ministry of Foreign Affairs, Malaysia) on 13 Apr 1978, attached to this Reply as Annex 51, emphasis added.

³⁷⁴ SM p. 153, para. 7.34.

land at Pedra Branca to study the migratory habits of fish and an application from a British firm, Regis Ltd, to make a sonar scan of undersea areas lying off Pedra Branca. Both are discussed in further detail in Chapter VIII below. For present purposes, their significance lies in the fact that they provide further evidence that Singapore acted in a sovereign capacity with respect to Pedra Branca.³⁷⁵

G. SINGAPORE'S NAVAL PATROLS AND THE INSTALLATION BY SINGAPORE OF MILITARY COMMUNICATIONS EQUIPMENT ON PEDRA BRANCA

1. *Naval Patrols*

4.149 Both Parties have argued that they carried out naval patrols in the vicinity of Pedra Branca. Malaysia is forced to rely on this kind of indirect evidence relating to Pedra Branca because she has nothing to show in terms of activities on Pedra Branca itself. This aspect of Malaysia's case will be addressed in Chapter V of this Reply. As for Singapore, she has introduced evidence of naval patrolling as simply one of *many* State actions she undertook with respect to Pedra Branca.

4.150 There is a basic qualitative difference with respect to the evidence the Parties have introduced on naval patrols. As Chapter V will show, Malaysia's arguments rely on highly generalised assertions of patrolling discussed primarily in the affidavit of Rear-Admiral Thanabalasingam.³⁷⁶ Singapore, on the other hand, has produced documentary evidence that her naval patrols took

³⁷⁵ See paras. 8.21-8.26 *below*. See also SM p. 111, para. 6.59; and p. 113, para. 6.66.

³⁷⁶ See para. 5.13 *below*.

place within a designated area circumscribed by specific coordinates and can point to actual examples of enforcement in the vicinity of Pedra Branca.³⁷⁷

4.151 Singapore's naval patrols took place within an area designated as "Area F5" set out in Operating Instructions issued in 1975 – four years before the dispute emerged. In defining Singapore's patrol areas, the Operating Instructions make specific reference to Horsburgh Light in two places. If **Insert 9** overleaf is consulted, it will be seen that the southern limits of Area F5 passed less than 0.4 nautical miles from Pedra Branca. The designation of a naval patrol area so close to Pedra Branca was a clear indication that Singapore considered herself to possess sovereignty over the island and its territorial waters. Prior to 2003, Malaysia did not protest those patrols – a reaction that would have been called for if Malaysia considered that she held title to Pedra Branca and had sovereign rights over her territorial waters.

4.152 A specific example of enforcement activities undertaken by Singapore naval vessels in the waters around Pedra Branca is provided by an incident that occurred on 26 June 1977. On that day, a Republic of Singapore naval vessel, the *RSS Sea Lion*, was on patrol about two miles north of Pedra Branca when it received reports from Singapore fishing vessels that they had been robbed by personnel on board an Indonesian boat.³⁷⁸ The *RSS Sea Lion* gave chase and apprehended a small Indonesian craft which had been involved in the incident. The boat was detained and brought back to Singapore where the crew was handed over to the Singapore Marine Police. The incident demonstrates that Singapore actively patrolled the areas around Pedra Branca and that Singapore

³⁷⁷ See Republic of Singapore Navy Operations Instruction No. 10/75 dated 18 Sep 1975 (SM Vol. 6, Annex 123), and see Map 10 facing SM p. 116, where these coordinates have been plotted on a maritime chart of the area (also reproduced in this Reply as **Insert 9**).

³⁷⁸ See Report from Singapore Police Force concerning Arrest of 3 Indonesians by Singapore Navy Vessel *RSS Sea Lion* for Committing Piracy on Singapore Fishing Vessels Near Horsburgh Lighthouse on 26 June 1977, attached to this Reply as Annex 50.

fishermen regularly fished in these waters. (See **Insert 9** for the location of this incident as juxtaposed against patrol sector F5).

4.153 Another example of Singapore's State activity undertaken with respect to Pedra Branca and its territorial waters concerns the visit by Singapore's Minister of State for Communications to the island in September 1974. On this occasion, the Minister was accompanied by a naval patrol craft, the *RSS Justice*.³⁷⁹ The same arrangements were repeated when the Senior Minister of State for Communications visited Pedra Branca two years later – the Minister was conveyed to Pedra Branca by the *RSS Sea Scorpion*, a missile gun boat, which remained in the vicinity of Pedra Branca throughout the Minister's visit, which lasted 22 hours. Following this visit, a letter was written to the commander of the Singapore Navy on behalf of the Minister, expressing the Minister's appreciation for the arrangements made for his visit to the island.³⁸⁰

4.154 Finally, two instances of evacuation of personnel from Pedra Branca by Singapore navy ships may also be mentioned. On 18 June 1975, a contractor was injured while installing new generators for the Horsburgh Lighthouse. He was promptly evacuated from Pedra Branca by *RSS Sovereignty*, a Singapore Navy patrol craft, which was patrolling in the vicinity. On 3 November 1975, four distressed Singapore fishermen landed at Pedra Branca to seek help and were evacuated from the island by another Singapore Navy ship, the *RSS Sea Dragon*. These were yet further acts undertaken *à titre de souverain* by Singapore with respect to Pedra Branca.³⁸¹

³⁷⁹ See Correspondence concerning Visit of Minister of State for Communications (Singapore) to Pedra Branca in Sep 1974, attached to this Reply as Annex 43.

³⁸⁰ See Correspondence concerning Visit of Senior Minister of State for Communications (Singapore) to Pedra Branca in May 1976, attached to this Reply as Annex 49.

³⁸¹ See Letter from Ravendran T. (on behalf of Controller of Navigational Aids) to Director Engineering Services Division, Port of Singapore Authority dated 19 June 1975, attached to this Reply as Annex 45; and Letter from Ravendran T. (on behalf of Controller of Navigational Aids) to Hydrographer, Port of Singapore Authority dated 4 Nov 1975, attached to this Reply as Annex 48.

2. *The Installation of Military Communications Equipment on Pedra Branca*

4.155 Singapore's Memorial described how, in 1977, Singapore installed military communications equipment on Pedra Branca. No less than nine documents were provided in support.³⁸² This action was obviously a display of State authority. It was equally obviously disassociated with the operation or maintenance of the lighthouse – in other words, it was a non-lighthouse activity. In fact, the Port of Singapore Authority approved the proposal on the express condition that the communications relay station should *not* interfere with the operation of the light and that the Authority would have no responsibility for the operation or maintenance of the equipment.³⁸³

4.156 Malaysia obviously cannot allege that this activity was a self-serving act taken after the critical date. In 1977, Malaysia had advanced no claim to Pedra Branca. Instead, Malaysia's Counter-Memorial complains that the act was undertaken secretly.³⁸⁴ Malaysia also attempts to raise a spectre of menace with respect to Singapore's conduct. Her Counter-Memorial asserts that the installation of such equipment raises "serious concerns about Singapore's use of Horsburgh Lighthouse for non-light (and especially military) purposes."³⁸⁵

4.157 Malaysia's alleged "concerns" are a regrettable red-herring. Indeed, they run counter to the very report filed by Malaysia's own consultants who indicate that amongst the "traditional non-light uses of lighthouse property" is

³⁸² See SM pp. 116-118, paras. 6.72-6.75. The source documents cited there include SM Vol. 6, Annexes 124-132.

³⁸³ Letter from Hydrographic Department, Port of Singapore Authority to the Head of Operations Department, Ministry of Defence dated 8 July 1976 (SM Vol. 6, Annex 125).

³⁸⁴ MCM p. 213, para. 449.

³⁸⁵ *Ibid.* See also MCM p. 92, para. 185 where a similar false alarm is raised.

the installation of antenna and transponder locations and military outposts.³⁸⁶ Thus, while elsewhere in her Counter-Memorial, Malaysia argues that Singapore made the same use of the facilities on Pedra Branca that any lighthouse operator would, in this instance, she argues that such uses somehow constitute a threat.

4.158 It is patently obvious that nothing Singapore has done on Pedra Branca is remotely threatening to Malaysia. All that was involved in this particular project was the installation of communications equipment – a perfectly ordinary act according to Malaysia’s consultants – and an act that was in keeping with Singapore’s sovereignty over the island.

H. SINGAPORE’S INVESTIGATION OF NAVIGATIONAL HAZARDS, SHIPWRECKS AND INCIDENTS OF ACCIDENTAL DEATH AROUND PEDRA BRANCA

4.159 Singapore has previously documented her investigation of a number of shipwrecks that occurred in Pedra Branca’s territorial waters.³⁸⁷ In as much as Malaysia’s Counter-Memorial takes issue with the legal implications of these events, Singapore will discuss their relevance again here.

4.160 Malaysia starts out by referring to a Tripartite Technical Experts Group Meeting that was convened in May 1983 amongst representatives of Singapore, Malaysia and Indonesia. Singapore’s Memorial pointed out that, at this meeting, Singapore informed the Group that two wrecks had been identified in the vicinity of Horsburgh Lighthouse and that Singapore had issued Notices to Mariners notifying the position of the wrecks.³⁸⁸ While further details of this

³⁸⁶ MCM p. 136, para. 283.

³⁸⁷ SM pp. 118-122, paras. 6.76-6.83.

³⁸⁸ Report made by Singapore to Twelfth Tripartite Technical Experts Group Meeting on Safety of Navigation in the Straits of Malacca and Singapore dated 5-6 May 1983 (SM Vol. 7, Annex 156).

incident will be discussed in Chapter VIII, dealing with general repute, the evidence is clear that Singapore took an active role in investigating shipping incidents that occurred within Pedra Branca's territorial waters.

4.161 The next incident taken up by Malaysia's Counter-Memorial concerns the investigation carried out by a Court of Investigation sitting in Singapore into a collision in 1920 between a British vessel *SS Chak Sang* and a Dutch vessel *SS Ban Fo Soon* some 1½ miles north of Pedra Branca. Malaysia contests this example of the exercise of territorial jurisdiction by the authorities in Singapore on the grounds that the jurisdictional basis of the inquiry had nothing to do with sovereignty over Pedra Branca.³⁸⁹

4.162 While the report of the investigation does not state the exact basis on which it was convened, the significance of Singapore's investigation of an accident occurring so near (i.e., 1½ miles) to Pedra Branca is undeniable. The incident further illustrates that Singapore authorities were diligent in investigating incidents of this kind which took place in Pedra Branca's territorial waters while Malaysia, and her predecessor Johor, were not.

4.163 Similar remarks can be made about another two shipping incidents that occurred in the territorial waters of Pedra Branca. These involved the stranding of the British vessel *MV Woodburn* on a reef adjacent to Pedra Branca in 1963, and the running aground of the Panamanian cargo vessel *MV Yu Seung Ho* off Pedra Branca in 1979.³⁹⁰ In both cases the investigation was carried out by Singapore, not Johor. With respect to the stranding of the *MV Woodburn*,

³⁸⁹ MCM pp. 216-217, para. 457.

³⁹⁰ See SM pp. 119-120, paras. 6.77-6.80; Preliminary inquiry conducted by Master Attendant, Singapore dated 14 Nov 1963 (SM Vol. 6, Annex 109); Letter of Appointment of Court of Investigation under Merchant Shipping Ordinance (Cap. 207) regarding "MV Woodburn" by Deputy Prime Minister dated 4 Dec 1963 (SM Vol. 6, Annex 110); and Letters from Director of Marine, Singapore, to Bang No Hyeon and Bak Jong Hak, dated 8 Jan 1980 (SM Vol. 6, Annex 142).

Singapore's Master Attendant prepared a report in addition to the report issued by the Court of Investigation. In the latter case, Singapore's Minister for Communications ruled that two officers on the *MV Yu Seung Ho* would henceforth be unfit for employment on a Singapore vessel.

4.164 Malaysia's Counter-Memorial provides no response to Singapore's arguments concerning the *Woodburn* incident. As explained in paragraph 6.78 of Singapore's Memorial, a proviso in section 315 of the Singapore Merchant Shipping Ordinance places *express limits* on the Minister's powers to appoint a Court of Investigation to investigate shipping casualties. This proviso reads as follows:

“Provided that a Court of Investigation *shall not* be appointed for the purpose of holding a formal investigation into *any shipping casualty* occurring to a ship *not registered in the Colony*, unless either the casualty occurs *on or near the coast of the Colony* or whilst the ship is wholly engaged in the coasting trade of the Colony, or the appointment of the Court is requested or consented to by the Government of that part of the British Commonwealth in which the ship is registered.”³⁹¹
[emphasis added]

In other words, in respect of a shipping casualty which does not concern a ship registered in Singapore, a Court of Investigation may be convened *only* if: (a) the casualty occurs on or near the coast of Singapore; (b) the ship is wholly engaged in the coasting trade of Singapore; or (c) the government of the ship's registry agrees to jurisdiction being exercised.

4.165 The Court of Investigation for the *Woodburn* incident could only have been appointed on the basis that Pedra Branca is Singapore territory. The *Woodburn* – a vessel registered in the United Kingdom³⁹² – was bound for Japan at the time of the incident.³⁹² It was thus not “engaged in the coasting

³⁹¹ Section 315(1) of the Merchant Shipping Ordinance (SM Vol. 6, Annex 98), at p. 943.

³⁹² See Preliminary inquiry conducted by Master Attendant, Singapore dated 14 Nov 1963 (SM Vol. 6, Annex 109), at p. 988.

trade of the Colony”. The appointment of the Court of Investigation was not “requested or consented to by the Government of” the United Kingdom. Therefore the only basis of jurisdiction was that the incident had occurred “on or near the coast of [*Singapore*]”. In this connection, it should be pointed out that this phrase (“on or near the coast”) has been interpreted as *not* extending to any distance of upwards of 20 miles.³⁹³ The *Woodburn* incident occurred less than a mile from Pedra Branca but *more* than 25 miles from the main island of Singapore.³⁹⁴

4.166 Malaysia does not confront this argument in her Counter-Memorial. Instead, she seeks to dismiss the *Woodburn* incident on the grounds that: (a) Singapore was part of the Federation of Malaysia at the relevant time, and (b) Singapore exercised jurisdiction because the expression “shipping casualty” in the Singapore Merchant Shipping Ordinance was defined so widely that “jurisdiction can be exercised in a wide range of cases”.³⁹⁵ Neither argument is correct or relevant.

4.167 *First*, the fact that Singapore was (at the time) part of the Federation of Malaysia does not detract from the fact that the incident was investigated by

³⁹³ See *The Fulham* [1898] P 206 (High Court of England & Wales), attached to this Reply as Annex 12, discussing the UK Merchant Shipping Act which is in this regard, *in pari materia*. The UK High Court held at p. 214 that:

“I cannot, however, read the words ‘near the coasts’ as covering a place twenty miles off the coasts... Some limits must be placed on the term, and having regard to all the sections dealing with wreck and salvage, as at present advised, I think the limit should be the territorial limit, though it is not necessary in this case to express a final opinion on the point.”

The *Fulham* case was still cited in the 1963 edition of *Temperley on the Merchant Shipping Acts* as authority for the interpretation for the phrase “on or near the coast” – see Extracts from *Temperley on The Merchant Shipping Acts* (6th ed., 1963), attached to this Reply as Annex 31.

³⁹⁴ *Woodburn* “struck one of the off-lying rocks adjacent to the lighthouse” (SM Vol. 6, Annex 109), at p. 989.

³⁹⁵ MCM pp. 217-218, paras. 459-460.

Singapore and not by Johor. The only reasonable explanation is that, even when Singapore was part of the Federation, Malaysia regarded Pedra Branca as part of the territory of Singapore and not Johor. *Secondly*, the fact that “shipping casualty” was widely defined in the Singapore Merchant Shipping Ordinance does not detract from the fact that not all “shipping casualties” were subject to the jurisdiction of a Court of Investigation. The real issue is not whether *Woodburn* was or was not a “shipping casualty”, but whether *Woodburn* was a shipping casualty coming within the limited class set out in the proviso to Section 315(1) of the Merchant Shipping Ordinance. In short, jurisdiction was exercised because a shipping casualty had occurred “on or near the coast of [*Singapore*]”. In failing to address the relevant legal point, Malaysia has implicitly accepted that there is no rebuttal to Singapore’s arguments.

4.168 With respect to the incident involving the *MV Yu Seung Ho*, surprisingly, Malaysia’s Counter-Memorial criticises Singapore for only providing three documents about the incident involving the *MV Yu Seung Ho* and for not making clear whether the vessel involved was a Singapore-registered vessel or whether there was any other connection to Singapore. Malaysia’s Counter-Memorial then asserts that, “the information provided by Singapore is so sketchy and so lacking in precision that it should be disregarded.”³⁹⁶

4.169 Malaysia’s complaints are as surprising as they are misplaced. As Singapore’s Memorial clearly shows, the *MV Yu Seung Ho* was a Panamanian-registered vessel with no particular connection to Singapore.³⁹⁷ To supplement the file on this matter, Singapore is producing in Annex 52 of this Reply a copy

³⁹⁶ MCM p. 219, para. 462.

³⁹⁷ See SM p. 120, para. 6.79; and SM Vol. 6, Annex 139.

of the Investigation Report which her authorities prepared in connection with the incident. This Report also confirms that the vessel was Panamanian and *none* of the crew members were of Singaporean nationality. The significance of any “connection” to Singapore lies in the fact that Singapore fully investigated the vessel’s grounding, which took place near Pedra Branca, and subsequently issued orders that the senior officers on the vessel be prohibited from serving on Singapore-registered ships due to their irresponsible conduct.

4.170 These examples attest to Singapore’s continued vigilance over accidents occurring in Pedra Branca’s territorial waters and her assumption of jurisdiction to investigate such incidents. Malaysia may now try to question the jurisdictional basis for Singapore’s actions, but she cannot avoid the fact that Singapore consistently took responsibility for these kinds of incidents occurring around Pedra Branca while Malaysia simply did not.

4.171 Singapore’s Memorial also referred to five more examples of cases where Singapore exercised exclusive jurisdiction for investigating shipping accidents in the vicinity of Pedra Branca and disciplining, where necessary, members of the crew.³⁹⁸ Malaysia elects not to discuss these events other than to say that they post-date the critical date and that they do not constitute continuity of pre-critical date conduct. Malaysia adds that each of the incidents had some connection to Singapore.³⁹⁹

4.172 These explanations do not help Malaysia, given the pre-1979 examples that Singapore has cited where she exercised the same State authority. After 1979, Singapore simply continued her practice of investigating all accidents taking place within Pedra Branca’s territorial waters that came to her attention.

³⁹⁸ SM p. 121, para. 6.82; and SM Vol. 7, Annexes 157, 159, 184, 198 and 200.

³⁹⁹ MCM pp. 219, paras. 463-465.

The fact that each of the incidents took place in Pedra Branca's waters was precisely the essential link to Singapore.

4.173 In this connection, it is also appropriate to mention the investigation that Singapore conducted into the accidental drowning off Pedra Branca in 1980 of three of her military personnel who were on a mission to maintain military equipment there.⁴⁰⁰ Singapore's Memorial pointed out that, according to applicable Singapore legislation, in a case where a body cannot be found, the authority of the Singapore Coroner's Court, which investigated the matter, only extended to deaths which occurred within Singapore's jurisdiction.⁴⁰¹ Clearly, the Coroner's Court considered the waters off Pedra Branca to meet this requirement since it exercised jurisdiction over the matter.

4.174 Malaysia's Counter-Memorial asserts in response that it is a long-established principle under international law that warships – and Malaysia assumes that the individuals who died were on such a warship – have absolute immunity from the jurisdiction of the foreign State within whose waters they are found.⁴⁰² Malaysia seeks to invoke this principle to explain why she did nothing to investigate these deaths.

4.175 The striking aspect of this argument is that it is entirely inconsistent with Malaysia's own subsequent conduct when she sought, belatedly, to bolster her claim. In January 2003, a Singapore Naval vessel *RSS Courageous* collided with a Dutch-registered vessel *ANL Indonesia* within the territorial waters of Pedra Branca, resulting in the deaths of four Singapore naval personnel. Under

⁴⁰⁰ SM pp. 122-123, paras. 6.84-6.87.

⁴⁰¹ SM p. 123, para. 6.85, referring to Criminal Procedure Code (Singapore), sections 270-278 (SM Vol. 7, Annex 149). *See also* newspaper reports of the incident and the Coroner's Court's findings, attached to this Reply as Annex 55.

⁴⁰² MCM p. 221, para. 468.

Malaysia's theory, the Singapore warship should have enjoyed absolute immunity from foreign States. Yet, Malaysia, through a Note Verbale dated 14 January 2003, insisted that Singapore "declare the circumstances leading to the collision" and fill out a Report of Shipping Casualty.⁴⁰³ Had Malaysia genuinely considered that Pedra Branca fell within her sovereignty 23 years earlier, she should have demanded the same thing with respect to the earlier incident. In fact, at no time prior to 2003 did Malaysia attempt to investigate any shipping accident in Pedra Branca's waters.

4.176 These events underscore the difficult situation in which Malaysia found herself after she decided to claim Pedra Branca. Malaysia obviously considered that she had to make up for 150 years of inaction by seeking to assert jurisdiction over exactly the same kind of matter which she, in her pleadings, now inconsistently claims properly belonged to Singapore. As has been seen, many of Malaysia's other protests after 1979 concerned the same kinds of activity that Singapore had been carrying out for decades before.

4.177 Lastly, in this connection, reference must be made to a recent maritime accident which occurred in the vicinity of Pedra Branca. On 4 June 2005, the Maritime and Port Authority of Singapore received a report from a Taiwan-registered container ship, *Uni Concord*, that she had collided with the Malaysian bulk carrier, *Everise Glory*, about 7.5 nautical miles northeast of Pedra Branca. The *Uni Concord* was able to proceed to Singapore while the *Everise Glory* sank. As with previous incidents of this nature, the Singapore Maritime and Port Authority coordinated the search and rescue operations. Of the 24 crew members on board the *Everise Glory*, 23 were rescued by vessels belonging to the Republic of Singapore Navy and the Singapore Police Coast

⁴⁰³ Malaysia's Note EC 8/2003 dated 14 Jan 2003, attached to this Reply as Annex 57.

Guard.⁴⁰⁴ Regrettably, one crew member – a Philippine national – died.⁴⁰⁵ The Maritime and Port Authority issued navigational warnings on the position of the sunken ship.

4.178 After being informed by Singapore of the incident, Malaysia also launched an investigation into the matter. A number of issues then arose between Singapore and Malaysia over whether the sunken vessel should be fully or only partially removed. Fortunately, the two Parties were able to agree on the full removal of the wreck without prejudice to the matters raised in the current proceedings before this Court. The full removal of the wreck was completed on 30 October 2005. A copy of the Joint Statement issued by Singapore and Malaysia reflecting this agreement, as well as the full diplomatic file relating to the incident, is included in Annexes 58 to 66 of this Reply.

I. SINGAPORE'S RECLAMATION PLANS AROUND PEDRA BRANCA

4.179 The final *effectivité* addressed by Malaysia concerns Singapore's study of the feasibility of reclaiming sea areas around Pedra Branca in 1978, and Singapore's publication of an invitation to tender for such plans.⁴⁰⁶ Malaysia raises a number of issues relating to this proposal which merit comment.

4.180 Malaysia's principal complaint seems to be that this plan was nothing more than a self-serving action undertaken after "Singapore initiated an internal process to begin to prepare its claim to PBP" sometime in 1977.⁴⁰⁷ This argument is clearly untenable. As early as 9 May 1973, Singapore had already

⁴⁰⁴ See Maritime and Port Authority of Singapore Press Release on Collision between *M.V. Everise Glory* and *M.V. Uni Concord* dated 4 June 2005, attached to this Reply as Annex 58.

⁴⁰⁵ For further details relating to the reaction of the Philippines Government to the incident, see para. 8.27 *below*.

⁴⁰⁶ SM pp. 123-124, paras. 6.88-6.89.

⁴⁰⁷ MCM p. 222, para. 472.

considered reclamation projects around Pedra Branca, or “Horsburgh Island”, the term used in the 1973 memorandum.⁴⁰⁸ The idea of reclaiming the sea area around Pedra Branca was brought up again in 1974.⁴⁰⁸ The 1978 public invitation to tender for a feasibility study regarding reclamation of the low-lying areas off Pedra Branca merely evidences the long-standing belief on the part of Singapore that she is entitled to undertake land reclamation in those areas.

4.181 The reclamation project was clearly a continuation of the kind of improvements that Singapore had undertaken on Pedra Branca since the lighthouse was completed in 1851. By any measure, the proposal represented another action taken at the State level evidencing Singapore’s sovereignty over Pedra Branca. It was classic conduct *à titre de souverain*.

Section V. Conclusions as to Singapore’s Conduct

4.182 The extensive evidence on the record demonstrates that Singapore has exercised a steady stream of State activities in the confirmation and maintenance of the title she acquired over Pedra Branca in 1847-1851. In her Counter-Memorial, Malaysia has attempted to diminish the significance of Singapore’s actions by treating them as discrete events. The foregoing discussion has shown that these attempts are doomed to fail. As Singapore has demonstrated:

- (a) The exercise of State authority on and with respect to Pedra Branca by Singapore spans a period of over 150 years.
- (b) The activities in question were undertaken *à titre de souverain* in the maintenance of Singapore’s pre-existing title.

⁴⁰⁸ See Correspondence from 1972 to 1974 concerning plans for land reclamation in the sea areas off Pedra Branca, attached to this Reply as Annex 42.

- (c) Singapore's activities were open and notorious, and they went totally unopposed by Malaysia for 130 years until Malaysia belatedly raised a claim to the island in 1979.
- (d) Singapore's activities comprised both lighthouse and non-lighthouse related conduct, and were commensurate with, and adapted to, the nature of the territory concerned.

4.183 In contrast, Malaysia not only carried out no competing activities on Pedra Branca of any kind, she also expressly and through her conduct recognised Singapore's title to the island on numerous occasions. This will be elaborated upon in Chapters V, VI and VII.

CHAPTER V ABSENCE OF ANY MALAYSIAN ACTS OF SOVEREIGNTY

Section I. Introduction

5.1 In Chapter 9, Section C, and Chapter 10, Section B of her Counter-Memorial, Malaysia argues that the various activities described therein are “confirmatory” of an alleged original title.

5.2 This argument has no merit. As established in Chapter II of this Reply, Malaysia has failed to prove an original title, and indeed has acknowledged that she has no evidence in that respect.⁴⁰⁹ The activities that Malaysia claims to be “confirmatory” are not only incapable of confirming any original title (assuming that such title existed in the first place, *quod non*), they instead demonstrate that Malaysia and her predecessors were never the sovereign owner of Pedra Branca or had any belief that they were such.⁴¹⁰

5.3 Malaysia invokes the following activities as confirmatory acts of sovereignty:

- (a) Johor fishermen fishing in the waters around Pedra Branca;
- (b) Royal Malaysian Navy vessels patrolling in the waters around Pedra Branca; and
- (c) a so-called “Malaysian practice” in relation to the “maritime context”.

Singapore will address each of these points in turn.

⁴⁰⁹ MCM p 13, para. 21.

⁴¹⁰ As for the previous argument of Singapore on this point, *see* SM pp. 132-136, paras. 6.112-6.121; and SCM pp. 163-173, paras. 6.74-6.94.

Section II. Fishing in Waters around Pedra Branca

5.4 Malaysia has alleged, relying solely on affidavits from two Johor fishermen,⁴¹¹ that “the waters around PBP have been traditional fishing waters for Johor fishermen for generations.”⁴¹²

5.5 This claim that the waters around Pedra Branca have been the “traditional” fishing waters for Johor fishermen (including those from a village named “Sungei Rengit”) for “generations” is not only vague, but extravagant. Apart from the affidavits, Malaysia has provided no evidence for the assertion. To put this matter in its proper perspective, Thomson, in his *Account of the Horsburgh Light-house*, recorded that there were no villages within 20 miles of Pedra Branca.⁴¹³ Sungei Rengit is only *ten nautical miles*⁴¹⁴ from Pedra Branca and therefore the village could not have been in existence when Thomson wrote his *Account*. In other words, the purported fishing activities from that village cannot be used to prove a pre-existing Johor title.

5.6 In any event, Singapore has no quarrel with the assertion that fishermen from Malaysia have fished in the waters surrounding Pedra Branca. However, no legal conclusion can be inferred from this. Malaysia admits that these fishing activities were “private acts”.⁴¹⁵ Such fishing therefore has no bearing on the question of *sovereignty* in respect of Pedra Branca and does not advance

⁴¹¹ Affidavits of Idris Bin Yusof and Saban Bin Ahmad, MCM Vol. 2, Annexes 5 and 6 respectively.

⁴¹² MCM p. 240, para. 517.

⁴¹³ Thomson’s *Account*, *supra* note 55, at p. 379 (SM Vol. 4, Annex 61, p. 480). It is not clear whether Thomson was referring to 20 English miles or 20 nautical miles. Singapore’s argument remains valid either way since both are more than ten nautical miles.

⁴¹⁴ MCM p. 240, para. 517.

⁴¹⁵ MCM p. 246, para. 530.

Malaysia's case at all. The Court has explained in the case concerning *Sovereignty over Pulau Sipadan and Pulau Ligitan (Indonesia/Malaysia)* that:

“... activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.”⁴¹⁶

Malaysia has herself acknowledged that private acts are incapable of evidencing “conduct *à titre de souverain* by Malaysia as regards PBP”.⁴¹⁷ It should be noted that Malaysia has not alleged, still less provided any evidence, that the fishing activities of these fishermen, in the vicinity of Pedra Branca, were based on “official regulations or under governmental authority.” Neither has Malaysia established that fishing in the vicinity of Pedra Branca was exclusive to Malaysian fishermen. In fact, the evidence shows otherwise.⁴¹⁸

5.7 Neither can it be inferred that because they fished in those waters, the fishermen had any belief that Pedra Branca belonged to Malaysia.⁴¹⁹ Fishermen fish where there are fish. It is not unusual for fishermen to fish in the waters of neighbouring countries. Contemporaneous documents establish that Malaysian fishermen are known to have fished in the territorial waters of other States.⁴²⁰

⁴¹⁶ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at p. 683, para. 141.

⁴¹⁷ MCM p. 246, para. 530.

⁴¹⁸ For evidence that Singapore fishermen fish at Pedra Branca, *see* Annexes 50 and 48. For evidence that Indonesian fishermen also fish at Pedra Branca, *see* Thomson's *Account*, *supra* note 55, at p. 457 (SM Vol. 4, Annex 61, p. 560), where he mentions the visit of five fishing boats from Bintan (an Indonesian island) to Pedra Branca.

⁴¹⁹ Malaysia tangentially argues that Johor fishermen “had an appreciation... of the limits of Malaysian waters”. *See* MCM p. 247, para. 530.

⁴²⁰ In a document issued by the Royal Navy and the Royal Malaysian Navy in 1965, it is recorded that:

“Most fishing fleets that fish in International and Malaysian Territorial waters leave for the fishing grounds at about 1600 [*i.e.*, 4:00pm]... There are a few boats that prefer to fish in Indonesian claimed waters, these boats stay out for about 6 days; and

Section III. Royal Malaysian Navy Patrols in Waters around Pedra Branca

5.8 Malaysia also relies on the alleged patrols of the Royal Malaysian Navy around the waters of Pedra Branca, said to have started from 1957,⁴²¹ as being evidence confirmatory of her claim to sovereignty.

5.9 It would not escape the Court's notice that this argument is based entirely on the recollections of Rear-Admiral Thanabalasingam ("Thanabalasingam").⁴²² He was formerly the Chief of the Royal Malaysian Navy, the highest ranking officer in the naval arm of the Malaysian armed forces. It is therefore appropriate to bear in mind what the Court said in *Military and Paramilitary Activities in and against Nicaragua*:

"A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require to treat such evidence with great reserve."⁴²³

usually go out twice a month, within periods to coincide with the rising of the new and full moon. There is all year round fishing in Indonesian claimed waters, International and Malaysian Territorial waters but the monsoons do have an effect on the catch in International and Malaysian Territorial waters."

See Extracts from Orders for Ships Patrolling in Defence of West Malaysian Seaboard, 2nd Edition, promulgated by the Naval Officer-in-Charge, West Malaysia of the Royal Malaysian Navy and the Commander, Far East Fleet of the Royal Navy on 25 Mar 1965 (MALPOS II), at p. K.4, para. 2, attached to this Reply as Annex 33.

⁴²¹ MCM p. 252, para. 541.

⁴²² Affidavit of Rear Admiral (Rtd) Dato' Karalasingam Thanabalasingam dated 9 Dec 2004 (MCM Vol. 2, Annex 4), (hereafter, "Affidavit of Thanabalasingam").

⁴²³ *Nicaragua v. United States of America*, *supra* note 62, at p. 43, para. 69.

Whilst this case does not involve armed conflict, and Thanabalasingam was not a Minister, the fact that he admits that he “reported directly to the Minister of Defence”,⁴²⁴ makes it clear that the same caution should be applied in considering and assessing the credibility of his evidence. In this instance, he is called upon to recall events going back more than 40 years in a situation where he would very clearly tend “to identify himself with the interests of his country”.

5.10 The *first* observation to be made concerning Thanabalasingam’s affidavit is that its sole purpose is to justify his confidential “Letter of Promulgation” dated 16 July 1968 and the attached Charts No. 2403 and 3839 purporting to show Pedra Branca and its dependencies as being within Malaysian territorial waters. The affidavit is nothing more than the expression of an opinion, and, as explained by the Court in its 1986 Judgment:

“[t]estimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact.”⁴²⁵

5.11 *Secondly*, as regards the alleged patrols around the waters of Pedra Branca, the following relevant background is instructive:

- (a) In 1948 Singapore was a British colony while the Federation of Malaya (which became independent in 1957) was a British Protectorate. The Federation did not have a navy, but the British colonial Government in Singapore established the *Malayan Naval Force* “for the defence of *the Colony* within its territorial waters”.⁴²⁶

⁴²⁴ See Affidavit of Thanabalasingam, *supra* note 422, at p. 10, para. 27 (MCM Vol. 2, Annex 4).

⁴²⁵ *Nicaragua v. United States of America*, *supra* note 62, at p. 42, para. 68.

⁴²⁶ Section 3 of the Malayan Naval Force Ordinance 1948 (Colony of Singapore), attached to this Reply as Annex 17, emphasis added. As was the common practice during this period, the

- (b) In 1949, the Legislative Council of the Colony of Singapore extended the scope of the activities of the Malayan Naval Force, by enacting the Malayan Naval Force and Defence Ordinance 1949, to “operate within *or without* the limits of Singapore”.⁴²⁷
- (c) In 1952, the Malayan Naval Force changed its name to the Royal Malayan Navy.⁴²⁸ It was based in Singapore and financed entirely by Singapore until it was transferred to the Federation of Malaya in 1958,⁴²⁹ following the grant of independence to the Federation in 1957.
- (d) During this period, the (British) Royal Navy was also based in Singapore which was the headquarters of the British Far East Command and the British Pacific Fleet. As such, when the Royal Malayan Navy was transferred to the Federation, Singapore continued to be protected by the Royal Navy based in Singapore.

term “Malayan” was used in this context to describe the entire Malay Peninsula *including Singapore*.

⁴²⁷ Section 4 of the Malayan Naval Force and Defence Ordinance 1949 (Colony of Singapore), attached to this Reply as Annex 18, emphasis added.

⁴²⁸ Malayan Naval Force (Change of Name) Ordinance 1952 (Colony of Singapore), attached to this Reply as Annex 22.

⁴²⁹ See Legislative Council Debates (Federation of Malaya) on the Navy Bill 1958, attached to this Reply as Annex 25, where the Defence Minister of the Federation of Malaya stated that “it is proposed that the present Royal Malayan Navy raised in Singapore should be transferred to the Federation”. The Minister also thanked the “Singapore Government for the very generous contribution which they are making” and went on to remark that:

“The Singapore Government is transferring to us a trained Navy, which has been built up in the years since the war as Singapore’s contribution towards the defence of the Malayan area, (*Applause*) and I would like to point out to Honourable Members that if the Federation had had to start its own Navy from scratch, it would have cost us a considerable sum of money to have established and trained a comparable force. I would like, Sir, to take this opportunity to pay particular tribute to the Chief Minister of Singapore, the Honourable Mr. Lim Yew Hock, who has been largely responsible for this generous gesture, which will go a long way towards maintaining the good relations and co-operation between our Government and the Singapore Government. (*Applause*)”.

- (e) After the Federation gained independence, she entered into a security agreement with Britain, viz., the Anglo-Malayan Defence Agreement of 12 October 1957, which provided for cooperation with Britain to protect Britain's territories in the Far East, including Singapore.⁴³⁰ In this capacity, the Royal Malayan Navy continued to patrol the territorial waters of Singapore.⁴³¹
- (f) Singapore also had a volunteer naval force called the Straits Settlements Royal Naval Volunteer Reserve, formed in 1934 when Singapore was part of the Straits Settlements.⁴³² The name was changed to "Malayan Royal Naval Volunteer Reserve" in 1941. In 1952, this volunteer naval force was divided into a Federation Division and a Singapore Division, reflecting its dual responsibilities.⁴³³
- (g) Singapore obtained internal self-government in 1959, whilst responsibility for external affairs and defence remained with Britain. On 23 August 1961,⁴³⁴ Singapore and the Federation

⁴³⁰ Anglo-Malayan Defence Agreement (12 Oct 1957), attached to this Reply as Annex 23, which obliged the Government of the Federation of Malaya to cooperate with the United Kingdom in the event of any armed attack or threat of armed attack against "any territories or protectorates of the United Kingdom in the Far East" (i.e., including Singapore).

⁴³¹ See Letter from Ministry of Defence (Federation of Malaya) to Ministry of Home Affairs (Singapore) dated 27 Aug 1959, attached to this Reply as Annex 27, stating that "in accordance with the agreement between our two Governments, the Royal Malayan Navy has been carrying out patrols of the territorial waters of Singapore".

⁴³² It is interesting to note that, while Rear-Admiral Thanabalasingam made the effort to mention the establishment of the Straits Settlements Royal Naval Volunteer Reserve in his affidavit, he failed completely to acknowledge that the Royal Malayan Navy was *raised and solely maintained by the Colony of Singapore from 1948 to 1958*.

⁴³³ See Malayan Royal Naval Volunteer Reserve Ordinance 1952 (Federation of Malaya), attached to this Reply as Annex 20. The preamble of the Ordinance recounts the history of the Volunteer Reserve. See also Malayan Royal Naval Volunteer Reserve Ordinance 1952 (Colony of Singapore), attached to this Reply as Annex 21.

⁴³⁴ This was well *before* Thanabalasingam's purported landing on Pedra Branca in 1962. See MCM p. 250, para. 538.

agreed to merge into a federal State and Britain sanctioned the merger in November 1961, resulting in the formation of *Malaysia* on 16 September 1963.⁴³⁵

- (h) Upon merger, control over the Singapore Division of the Malayan Royal Naval Volunteer Reserve was transferred to the Royal Malaysian Navy, with the Royal Malaysian Navy defending Singapore's territorial waters by virtue of Singapore being a constituent state of Malaysia.⁴³⁶
- (i) Singapore separated from Malaysia in August 1965,⁴³⁷ following which Malaysia transferred to Singapore command and control of the Singapore Division of the Malayan Royal Naval Volunteer Reserve. This naval force was renamed "Singapore Naval Volunteer Force" in 1966.⁴³⁸
- (j) The Separation Agreement of 1965 underscored the inter-related nature of the defence of Singapore and Malaysia. It created a Joint Defence Council "for the purposes of external defence and mutual assistance"⁴³⁹ and required Malaysia to render to

⁴³⁵ On that date, the Federation also included Sabah and Sarawak. See Malaysia Act 1963 (United Kingdom) (SM Vol. 6, Annex 107); and the corresponding Malaysia Act 1963 (Federation of Malaysia) (SM Vol. 6, Annex 108). For the 23 Aug 1961 agreement in principle between Singapore and the Federation, see Annex 29 of this Reply, p. 202, para. 2. For the British sanction of Nov 1961, see Annex 30 of this Reply.

⁴³⁶ *The Republic of Singapore Navy*, Naval Archives (Singapore) (1988), at p. 5, attached to this Reply as Annex 56.

⁴³⁷ Separation Agreement between Malaysia and Singapore dated 7 Aug 1965 (SM Vol. 6, Annex 111).

⁴³⁸ *The Republic of Singapore Navy*, *supra* note 436, at p. 6, attached to this Reply as Annex 56.

⁴³⁹ Separation Agreement between Malaysia and Singapore dated 7 Aug 1965 (SM Vol. 6, Annex 111), at Art. 5(1).

Singapore “such assistance as may be considered reasonable and adequate for external defence”.⁴⁴⁰

- (k) Singapore’s naval force was renamed “Sea Defence Command” in 1968 and further renamed the “Maritime Command” later that year.⁴⁴¹ In April 1975, it became the Republic of Singapore Navy.⁴⁴² The last British naval units withdrew from Singapore in September 1975,⁴⁴³ and in the same month the Republic of Singapore Navy formally established five patrol sectors, one of which was Sector F5 (Horsburgh Lt extending North-East).⁴⁴⁴

5.12 It can be seen from the above account that after World War II, the defence of Singapore and Malaysia and their respective territorial waters was inextricably linked. As late as June 1968, the governments of Malaysia and Singapore formally declared in a joint communiqué that “the defence of the two countries was indivisible and required close and continuing co-operation between them”.⁴⁴⁵ The same communiqué also recorded that Malaysia and Singapore “would cooperate effectively on coastal defence”. Later in the same month, the Malaysian Minister of Defence told the Malaysian Parliament that “the defence of Malaysia and Singapore is a matter that cannot be separated

⁴⁴⁰ Separation Agreement between Malaysia and Singapore dated 7 Aug 1965 (SM Vol. 6, Annex 111), at Art. 5(2).

⁴⁴¹ *The Republic of Singapore Navy*, *supra* note 436, at p. 7, attached to this Reply as Annex 56.

⁴⁴² *Ibid*, at p. 11.

⁴⁴³ *See Royal Navy says goodbye to Singapore* in Times of London dated 25 Sep 1975, attached to this Reply as Annex 47.

⁴⁴⁴ Republic of Singapore Navy Operations Instruction No. 10/75 dated 18 Sep 1975 (SM Vol. 6, Annex 123).

⁴⁴⁵ Communiqué on the Five-Power Conference on Far East Defence dated 11 June 1968, attached to this Reply as Annex 37.

from the geographical viewpoint”.⁴⁴⁶ Rear-Admiral Thanabalasingam’s Letter of Promulgation of 16 July 1968 should therefore be understood in light of the cooperative atmosphere in defence matters that was prevailing at the time.

5.13 Given the historical background outlined above, two observations may be made about Thanabalasingam’s claims concerning patrol activities of the Royal Malayan Navy/Royal Malaysian Navy. *First*, vessels of the Royal Malayan Navy (and, subsequently, the Royal Malaysian Navy) were based at the Woodlands Naval Base *in Singapore*.⁴⁴⁷ For these vessels to reach Malaysia’s eastern seaboard from their Singapore base, it would be necessary for them to transit the area around Pedra Branca. Transit of this nature can hardly be described as “patrols” in the vicinity of Pedra Branca.⁴⁴⁸

5.14 *Secondly*, apart from statements in his own affidavit (on which little weight can be placed⁴⁴⁹), the documentary evidence which Thanabalasingam relied on is highly generalised and equivocal. Except for one example, no specific co-ordinates were given in any of the ships’ logs he relied on – they used vague terms like “off Horsburgh”, “Horsburgh Light to Jason Bay”, “Pu. Yu to Horsburgh Light House area” and “area from Horsburgh Lighthouse to Tanjung Gelang”, without indicating how closely the vessels approached Pedra

⁴⁴⁶ Malaysia Parliamentary Debates, Dewan Rakyat, 14 June 1968, at cols. 1441-2, attached to this Reply as Annex 38. *See also* the article *Singapore Orders Six Fast Patrol Boats* in Straits Times dated 19 June 1968, attached to this Reply as Annex 39, in which the question of the Singapore Navy conducting “joint defence operations with the Royal Malaysian Navy” was discussed.

⁴⁴⁷ MCM p. 249, paras. 535-536.

⁴⁴⁸ For example, MCM p. 255, para. 544(d) quotes the following passage from the log of *K.D. Sri Trengganu*: “... the ship sailed MBJ under the Tactical Command of K.D. SRI NEGRI SEMBILAN (LT. CDR. PANG MENG KUNG, RMN, Senior Officer Second Patrol Craft Squadron) at 1725. On arrival at Horsbrough [*sic*] Light at 2050, *the ship was detached* to proceed for patrol *north of Pulau Aur*” (emphasis added). This passage shows that Pedra Branca was only used as a navigational reference point to mark where *K.D. Sri Trengganu* should leave *K.D. Sri Negri Sembilan* to begin its patrol of the Malaysian eastern seaboard *north of Pulau Aur* (which is itself more than 65 nautical miles north of Pedra Branca). *K.D. Sri Trengganu* sailed through the Horsburgh Light area *only in transit*.

⁴⁴⁹ *See* paras. 5.9-5.10 *above*.

Branca on such “patrols”.⁴⁵⁰ The only document which provided specific coordinates is Attachment 2 to Thanabalasingam’s affidavit. This referred to a rendezvous at “position 063 Horsburgh Light 15.5” – i.e., 15.5 nautical miles north east of Pedra Branca.⁴⁵¹ Obviously this position is too far away to be of any relevance to the question of sovereignty. The Horsburgh Lighthouse was merely used as a navigational reference point to identify the position of the vessel.

5.15 *Even if* Thanabalasingam conducted naval patrols around the waters of Pedra Branca, such patrolling would not be helpful to Malaysia’s case. Patrolling during this period was a pan-Malayan affair that was dictated by, among other things, the Federation’s obligation under the Anglo-Malayan Defence Agreement (and, later, Malaysia’s obligation under the Separation Agreement) to protect Singapore’s territorial waters.

5.16 A specific episode plays an important part in Rear-Admiral Thanabasingam’s affidavit and in Malaysia’s Counter-Memorial: his alleged landing on Pedra Branca in 1962.⁴⁵² In itself, this is a very banal episode: the Commander of a small ship makes a short, one-off, stop on the island since, exceptionally, weather conditions allow. It should be remembered that this “incident” occurred when the Anglo-Malayan Defence Agreement was in full force and there was close cooperation between the British Royal Navy and the Royal Malayan Navy, the latter only having been recently transferred from the Colony of Singapore Government to the Federation of Malaya Government.⁴⁵³

⁴⁵⁰ In order to understand the generalised nature of these descriptions, it is useful to note that the approximate distance from Pedra Branca to Jason Bay is 35 nautical miles; to Pulau Yu, 47 nautical miles; and to Tanjung Gelang, more than 160 nautical miles.

⁴⁵¹ The relevant passage is quoted in MCM p. 255, para. 544(a).

⁴⁵² See MCM p. 250, para. 538; and Affidavit of Thanabalasingam, *supra* note 422, at pp. 17-18, paras. 52-56.

⁴⁵³ See, para. 5.11 (c) and (e) *above*.

5.17 Therefore, it is rather disingenuous of Thanabalasingam to claim that he would not have landed on Pedra Branca in 1962 “if [he] thought, even for a moment, that Pulau Batu Puteh was not Malayan territory.”⁴⁵⁴ It is simply not credible and further illustrates why his statements must be viewed with the greatest caution. Moreover, during this period, residents in Singapore and the Federation were free to move between the two territories without the need for passports or visas.⁴⁵⁵ In the circumstances, it could not have been expected of Singapore to protest an innocuous episode which (a) was in line with the patrolling arrangements then in place,⁴⁵⁶ (b) lasted for merely “a short while”,⁴⁵⁷ and (c) caused no tension or inconvenience with the light-keepers.⁴⁵⁸

5.18 Equally incredible is Thanabalasingam’s suggestion that he had used Pedra Branca as a navigational point to plot his way back to the Naval Base and that he would *not* have used Pedra Branca – a prominent landmark used by mariners as a navigational aid for centuries – if the island had not been “Malayan territory”.⁴⁵⁹ This assertion becomes even more absurd in the light of Thanabalasingam’s own admission that during his navigational exercises, “[w]e were not directly concerned with the status of the island”.⁴⁵⁹

5.19 Next, Thanabalasingam refers to a survey done by the British Royal Navy’s ship, *HMS Dampier*.⁴⁶⁰ He claims that the Royal Navy requested permission from Malaysia to survey the waters off Pedra Branca. Reliance is

⁴⁵⁴ See Affidavit of Thanabalasingam, *supra* note 422, at p. 18, para. 52.

⁴⁵⁵ See Singapore Legislative Assembly Debates on the Immigration (Amendment) Bill 1959, attached to this Reply as Annex 26.

⁴⁵⁶ See para. 5.11-5.15 *above*.

⁴⁵⁷ See Affidavit of Thanabalasingam, *supra* note 422, at p. 18, para. 56 (“After a short while, I returned to my ship and continued patrolling”).

⁴⁵⁸ *Ibid*, where Thanabalasingam said that: “When I was on the rocks, I recall looking up at the lighthouse and seeing a man on the viewing platform above looking at me. He was evidently the lighthouse keeper. I waved to him and he waved back”.

⁴⁵⁹ *Ibid*, at p. 20, para. 61.

⁴⁶⁰ *Ibid*, at p. 21, para. 63.

placed on Attachment 6 (the letter of request which sets out the co-ordinates of the proposed survey) and the survey fair sheet (which sets out the areas actually surveyed) annexed to his affidavit. Thanabalasingam is very careful in not actually *saying* that the co-ordinates given in the letter of request covered Pedra Branca. Indeed, they *do not* as the letter gives only two co-ordinates of points situated *along* the Malaysian coast without specifying any area of sea near to Pedra Branca. However, just because *HMS Dampier* happened to subsequently survey the waters around Pedra Branca, Malaysia conveniently makes the claim that the request necessarily covered Pedra Branca.

5.20 This claim has no merit for the following reasons. *First*, nothing in the request shows that the Royal Navy actually sought Malaysia's permission to survey the territorial waters around Pedra Branca. As explained above, the co-ordinates provided do not approach the proximity of Pedra Branca. Any *ex post facto* supposition that the scope of the permission sought was intended to include Pedra Branca is clearly speculative. *Secondly*, the fact that *HMS Dampier* surveyed the waters around Pedra Branca does not lead to the conclusion that the Royal Navy actually sought permission to do so. *HMS Dampier* was part of the British Fleet that was protecting Singapore and her territorial waters. The Fleet, based in Singapore, was always at liberty to travel to and from, and within Singapore territorial waters. *Finally*, the survey fair sheet shows that *HMS Dampier* also surveyed waters that were clearly high seas or Indonesian waters. Obviously, the *Dampier* did not restrict herself to the areas for which permission was sought from Malaysia.

5.21 Before leaving the subject of Thanabalasingam's affidavit, it may be usefully noted that his strangely firm belief in Malaysia's title to Pedra Branca is in stark contrast with the circumspection and hesitation displayed by his own Prime Minister when the latter was questioned about Malaysia's claim to Pedra Branca during a press conference held on 13 May 1980. During that press conference, the Prime Minister of Malaysia stated that the question of sovereignty over Pedra Branca "is a question of going back to whatever documents there are to prove who, to which nation, to which country this island

really belong” and that “[w]e [*i.e.*, *Malaysia*] are also looking into the question because *it is not very clear to us with regard to this island*”.⁴⁶¹

Section IV. Other Aspects of Alleged Malaysian Practice in the “Maritime Context”

5.22 In her Counter-Memorial, Malaysia first referred to a list of “items of unilateral Malaysian conduct... also confirmatory of Malaysia’s title”,⁴⁶² and again referred to the same list as constituting Malaysia’s practice in the “maritime context”. Singapore does not find it necessary to re-canvass in detail the rebuttal which has been made in her Counter-Memorial.

5.23 However, it is worthwhile to reiterate, briefly, Singapore’s response to three of Malaysia’s arguments:

- (a) in respect of the 1968 petroleum concession to the Continental Oil Company of Malaysia, Singapore has shown conclusively that the concession area does not encompass Pedra Branca and no exploration was done within its waters. On the contrary, the concession expressly *excluded* islands and also contained a without prejudice clause on international boundaries “wherever they may be established”;⁴⁶³
- (b) in respect of the 1969 delimitation of Malaysia’s territorial sea in the area around Pedra Branca, Singapore has shown that the Malaysian Ordinance only set out the *method* of delimitation for her future negotiations and that it expressly left open the question

⁴⁶¹ Emphasis added. A sound recording of excerpts from this press conference is provided with this Reply. The transcript of these excerpts is attached to this Reply as Annex 54.

⁴⁶² MCM p. 235, para. 502.

⁴⁶³ SCM pp. 167-171, paras. 6.82-6.89.

of the delimitation between Malaysia, Singapore and her neighbours,⁴⁶⁴

- (c) in respect of the 1969 Continental Shelf Agreement with Indonesia, Singapore has shown that the agreement *carefully* avoided any intrusion into the waters around Pedra Branca, and that the agreement is, in any case, *res inter alios acta* as far as Singapore is concerned.⁴⁶⁵

Section V. Conclusion

5.24 In conclusion, the very few alleged “acts of sovereignty” invoked by Malaysia are:

- (a) fishing in the vicinity of Pedra Branca by Johor fishermen, done on a purely *private* and *non-exclusive* basis, and without any form of governmental regulation;
- (b) Rear-Admiral Thanabalasingam’s actions in the vicinity of, and an alleged isolated landing on, Pedra Branca, at a time when there was *full cooperation* between the navies of the United Kingdom and the Federation of Malaya for the defence of Singapore waters and when there was *freedom of movement* by the residents of Singapore and the Federation between the two territories; and
- (c) other conduct said to be in the “maritime context” (i.e., the 1968 Petroleum Concession, the 1969 Ordinance extending Malaysian territorial waters to 12 miles, and her 1969 Continental Shelf Agreement with Indonesia), all of which have been shown by

⁴⁶⁴ SCM pp. 171-172, paras. 6.90-6.91; and SM p. 21, note 33.

⁴⁶⁵ SCM pp. 172-173, paras. 6.92-6.94.

Singapore in her Counter-Memorial to neither create nor confirm title for Malaysia.

5.25 These alleged “acts of sovereignty” are incapable of establishing Malaysia’s “original title” to Pedra Branca – much less capable of neutralising Singapore’s well-established title. Moreover, they do not even qualify as *effectivités* which this Court considers to be “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction”.⁴⁶⁶ In the final analysis, these acts have no bearing on the question of sovereignty in respect of Pedra Branca and do not advance Malaysia’s case at all.

⁴⁶⁶ See e.g., *Frontier Dispute (Burkina Faso/Mali) (Merits)* [1986] ICJ Rep 554, at p. 586, para. 63; See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Merits)* [1992] ICJ Rep 351, at p. 389, para. 45.

CHAPTER VI SINGAPORE'S SOVEREIGNTY HAS BEEN RECOGNISED BY MALAYSIAN CONDUCT

Section I. Introduction

6.1 As can be seen in the previous Chapters of this Reply, not only has Malaysia been unable to rebut the overwhelming evidence of Singapore's acts of State authority over Pedra Branca, she has also, both expressly and implicitly, recognised Singapore's sovereignty over the island.

6.2 This was indeed the case in 1953, when the State of Johor, Malaysia's predecessor, formally acknowledged that "the Johore Government does not claim ownership of Pedra Branca".⁴⁶⁷ However, given the special significance of this formal disclaimer in the present case, Singapore will again deal with it briefly in the next Chapter of this Reply.

6.3 The present Chapter will confine itself to recalling⁴⁶⁸ that both by her actions (Section II) and her omissions or inactions (Section III), Malaysia has recognised Singapore's sovereignty over Pedra Branca. This conclusion is also confirmed by other materials, including several maps issued by Malaysia, which constitute clear admissions against interest (Section IV).

Section II. Malaysia's Recognition of Singapore's Sovereignty over Pedra Branca

6.4 In her Memorial, Singapore has shown that, Malaysia has, on several occasions, clearly behaved in such a way as to leave no doubt that she

⁴⁶⁷ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96).

⁴⁶⁸ See in particular SM pp. 139-160 (Chapter VII, "Malaysia's Recognition of Singapore's Sovereignty over Pedra Branca").

considered Pedra Branca to be under Singapore's sovereignty.⁴⁶⁹ In her Counter-Memorial, Malaysia tries to show that her requests for permission to visit Pedra Branca did not amount to recognition of Singapore's sovereignty.⁴⁷⁰ Malaysia is wrong. These requests follow a pattern of recognition of Singapore's sovereignty (see Subsection A below), as does her conduct under the Straits' Lights System (see Subsection B below).

A. MALAYSIA'S REQUESTS FOR PERMISSION TO VISIT PEDRA BRANCA

1. *Malaysia's Request for Permission to Visit by Malaysian Personnel as Part of a Joint Hydrographic Survey in 1974*

6.5 In 1974, the Malaysian Navy requested permission for several officers to stay on Pedra Branca as part of a joint survey team wishing to undertake tidal observations. In response, the Singapore authorities asked for the particulars of the personnel involved.⁴⁷¹ The Commanding Officer of the survey vessel, *K.D. Perantau*, complied with Singapore's request, and provided information about his personnel.⁴⁷² These facts are agreed by both Parties.⁴⁷³

6.6 Malaysia tries to downplay the significance of this request by submitting that it was merely accidental that the persons wishing to stay on Pedra Branca were of Malaysian nationality⁴⁷⁴ and that the survey team included Japanese,

⁴⁶⁹ See e.g., SM pp. 111-112, paras. 6.61-6.62; and pp. 151-154, paras. 7.31-7.37.

⁴⁷⁰ See e.g., MCM pp. 202-208, paras. 416-435.

⁴⁷¹ Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer, *K.D. Perantau* dated 26 Mar 1974 (SM Vol. 6, Annex 120, p. 1027).

⁴⁷² Letter from Lieutenant Commander Mak S.W., *KD Perantau* to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974 (SM Vol. 6, Annex 122, p. 1031).

⁴⁷³ See SM pp. 111-112, para. 6.61; and MCM pp. 202-203, paras. 417-418.

⁴⁷⁴ MCM p. 203, para. 419.

Indonesian and Singapore nationals as well. The presence of persons of other nationalities in the survey team does not detract from the fact that this was a survey done under the auspices of the Malaysian Navy. It was the Malaysian Navy which made the request to the competent Singapore authorities. This is a clear recognition of the controlling authority of Singapore over Pedra Branca. It is Singapore, not Malaysia, which regulated access to the island regardless of the nationality of the visitors.⁴⁷⁵ It was in order to comply with these controls that Malaysia sought authorisation for the joint survey team members – and she never objected to Singapore’s requirement for permission.⁴⁷⁶

6.7 Malaysia further tries to downplay the implications of the 1974 request to stay on the island by alleging that “the permission was sought and granted to members of the joint survey team to *stay at the lighthouse*”.⁴⁷⁷ However, a closer look at the correspondence between the Hydrographic Department of the Port of Singapore and Lieutenant Commander Mak S.W., the Commanding Officer of *K.D. Perantau*, clearly shows that this allegation is incorrect. While the introductory paragraph of the letter of 26 March 1974 from Singapore’s Hydrographic Department noted that the Malaysian-led joint survey team wished “to stay at Horsburgh Lighthouse for tidal observations”,⁴⁷⁸ the second paragraph of the letter asked for particulars of the members of the team “who will be *landing* on Horsburgh Lighthouse”.⁴⁷⁹ Singapore’s Hydrographic Department gave permission to the team to land on Pedra Branca, and as

⁴⁷⁵ See para. 8.26 below.

⁴⁷⁶ See SM p. 152, para. 7.31.

⁴⁷⁷ MCM p. 203, para. 419.

⁴⁷⁸ Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer, *K.D. Perantau* dated 26 Mar 1974 (SM Vol. 6, Annex 120, p. 1027), at para. 1.

⁴⁷⁹ *Ibid*, at para. 2, emphasis added.

further confirmation of its effective control of the island, also requested “a proposed programme of [*the team’s*] survey”.⁴⁸⁰

6.8 In his response, the Malaysian Commanding Officer of *K.D. Perantau* not only provided the names, passport numbers, nationality and duration of stay of the Malaysian personnel involved, but also, in full compliance with the request, gave information concerning the operations to be carried out. In this regard it needs to be highlighted that the Commanding Officer informed the Singapore Port Authority that “[o]ther personnel will likely to [*sic*] land at Horsburgh Lighthouse”⁴⁸¹ and he continued: “It is proposed that list of personnel carrying out on and off landing at Horsburgh Lighthouse be exempted and each landing will be escorted by your representative as the landing will normally be a few hours”.⁴⁸¹ In the context of this request, both Parties clearly equated Horsburgh Lighthouse with Pedra Branca, as is often the case.⁴⁸²

6.9 It is absolutely clear that this request in 1974 implied much more than mere access to the island or to be housed in the lighthouse. It went far beyond the “standard procedure for anyone going to Horsburgh Lighthouse”, as Malaysia alleges.⁴⁸³ The request concerned the entire programme of research activities to be carried out on Pedra Branca in addition to permission to use the facilities of the lighthouse. This is confirmed by the wording of the letter issued by the Singapore Hydrographic Department which makes clear that, apart from the approval which that Department could give, other approvals had

⁴⁸⁰ Letter from Hydrographic Department, Port of Singapore Authority to Commanding Officer, *K.D. Perantau* dated 26 Mar 1974 (SM Vol. 6, Annex 120, p. 1027), at para. 4.

⁴⁸¹ Letter from Lieutenant Commander Mak S.W., *KD Perantau* to Hydrographic Department, Port of Singapore Authority dated 22 Apr 1974 (SM Vol. 6, Annex 122, p. 1031), at para. 2, emphasis added.

⁴⁸² See paras. 4.145-4.146 *above*.

⁴⁸³ MCM p. 204, para. 423.

to be given “by various governmental ministries concerned”, and not only by the Port of Singapore Authority as alleged by Malaysia.

*2. Malaysia’s Request for Clearance of Malaysian Vessel
M.V. Pedoman for Tide Gauges Inspection
in May-June 1978*

6.10 Malaysia’s argument concerning the Malaysian High Commission’s request for clearance “for the Malaysian Government vessel MV ‘Pedoman’ to enter Singapore territorial waters” and to carry out inspections of tide gauges therein is equally ill-founded.⁴⁸⁴ According to Malaysia, this request did not relate to the territorial waters accruing to Pedra Branca but was formulated in general terms and “included areas which fell within the territorial waters of Malaysia, Indonesia and Singapore”⁴⁸⁵ with several stops being made on the main island of Singapore. Consequently, Malaysia suggests that this request cannot be considered as recognition of Singapore’s sovereignty over Pedra Branca and its waters.

6.11 Once again, Malaysia tries to avoid the legal implications of her request for permission by presenting a partial picture. What is significant is the timing of the request to “enter Singapore territorial waters”. The request is dated 9 May 1978.⁴⁸⁶ On that date, *M.V. Pedoman* was already within the territorial waters around the main island of Singapore.⁴⁸⁶ Singapore’s permission was granted on 12 May 1978, the date on which *M.V. Pedoman* was scheduled to go to Pedra Branca.⁴⁸⁷

⁴⁸⁴ MCM p. 203, para. 421.

⁴⁸⁵ MCM p. 204, para. 422.

⁴⁸⁶ Malaysia Note EC 219/78 dated 9 May 1978 (SM Vol. 6, Annex 137).

⁴⁸⁷ Singapore Note MFA 115/78 dated 12 May 1978 (SM Vol. 6, Annex 138).

3. *Request for Permission to Enter the Waters around Pedra Branca with regard to the Underwater Power Cable Project in 1980*

6.12 The 1980 request for access to Singapore territorial waters to conduct survey and feasibility studies concerning Malaysia's underwater power cable project is also presented in a distorted way by Malaysia.⁴⁸⁸ The significance of this episode lies not in the *actual* route of the hydrographic survey that was eventually undertaken two years after the request.⁴⁸⁹ Instead, the crucial point is that, at the time the request for permission was made, Malaysian officials assumed that there were Singapore territorial waters somewhere between Peninsular Malaysia and Sarawak – the permission was sought because “the above project will covers [sic] also your [i.e., Singapore's] territorial waters”.⁴⁹⁰ As has been shown in Singapore's Memorial,⁴⁹¹ this could only be a reference to the waters around Pedra Branca. (See **Insert 11** opposite, which is the sketch map attached to the Malaysian High Commission's letter of 26 March 1980 (SM Vol. 6, Annex 145), annotated in red to show the approximate location of Pedra Branca.)

6.13 Malaysia's Counter-Memorial attempts to explain the reference to Singapore territorial waters on the basis that “various legs of the survey ended in Singapore, the port at which the survey vessel was based”.⁴⁹² Nothing in the correspondence supports this contrived interpretation. At the time the request for permission was made (28 January 1980), the terms of reference for the

⁴⁸⁸ MCM pp. 205-208, paras. 426-434.

⁴⁸⁹ *Ibid*, at para. 433.

⁴⁹⁰ Letter from the Malaysian High Commission to the Singapore Ministry of Foreign Affairs dated 28 Jan 1980 (SM Vol. 6, Annex 143), at p. 1095.

⁴⁹¹ SM p. 153, para. 7.34.

⁴⁹² MCM p. 208, para. 434.

proposed hydrographic survey were still in draft form.⁴⁹³ It is inconceivable that, at that time, the Malaysian authorities could have predicted that the survey vessel to be used two years later for the survey would be a vessel based in Singapore.⁴⁹⁴

6.14 Malaysia next refers to the letter of 26 March 1980⁴⁹⁵ to which was appended a map indicating the “likely point [*sic*] where the survey would take place”.⁴⁹⁶ She argues that the 26 March 1980 letter does not refer to Singapore territorial waters but seeks clearance for a power market survey in Singapore to examine the possibilities of onward transmission of power to Singapore.⁴⁹⁷ This argument ignores entirely the fact that the March letter is simply a sequel to the 28 January 1980 letter which expressly refers to the terms of reference for a hydrographic survey.⁴⁹⁸ The argument also ignores the purpose of the map attached to the 26 March 1980 letter and its significance in showing the “likely point where the survey would take place” – this is clearly a reference to the proposed hydrographic survey. Singapore’s interpretation is also corroborated by the cross reference, at the head of the 26 March letter, to the letter of 28 January.

6.15 Malaysia also refers to a letter dated 26 February 1980 from the Economic Planning Unit of Malaysia to the Malaysian Ministry of Foreign Affairs. This letter quotes a telex from the Sarawak Electricity Supply

⁴⁹³ See Letter from the Malaysian High Commission to the Singapore Ministry of Foreign Affairs dated 28 Jan 1980 (SM Vol. 6, Annex 143), at p. 1096.

⁴⁹⁴ The hydrographic survey was eventually conducted in 1982. See MCM p. 208, para. 433.

⁴⁹⁵ Letter from the Malaysian High Commission to the Singapore Ministry of Foreign Affairs dated 26 Mar 1980 (SM Vol. 6, Annex 145), at pp. 1101-1102.

⁴⁹⁶ *Ibid*, at p. 1101 (second paragraph).

⁴⁹⁷ MCM p. 206, para. 430.

⁴⁹⁸ Letter from the Malaysian High Commission to the Singapore Ministry of Foreign Affairs dated 26 Mar 1980 (SM Vol. 6, Annex 145), at p. 1101 (first para).

Corporation which states that “it is envisaged that only Indonesian water would be involved”.⁴⁹⁹ The same telex also seeks to explain the objective of the hydrographic survey. It is not clear why this explanation was needed by the Malaysian Ministry of Foreign Affairs when the objective was already explained in the Terms of Reference attached to the 28 January 1980 letter sent by Malaysia’s High Commission to the Singapore Ministry of Foreign Affairs. The letter of 26 February 1980, written two months after the publication of the 1979 Map and barely two weeks after Singapore’s protest Note of 14 February 1980, can only be seen in self-serving terms. It does not detract from the fact that Malaysia *did* seek Singapore’s permission in January 1980.

6.16 Finally, and again contrary to Malaysia’s contention, Singapore has never been “unclear which of its territorial waters would be the subject of the survey”.⁵⁰⁰ What the letter of permission does is to ask Malaysia to provide exact coordinates of Singapore territorial waters to be surveyed⁵⁰¹ – and it must be kept in mind that these waters were not and could not have been those around the Island of Singapore.

4. *Conclusion on Malaysian Requests for Permission*

6.17 The cases discussed above, dating from 1974 up to 1980 (that is, *after* the publication of the 1979 Malaysian Map), clearly show a consistent pattern of Malaysian recognition of Singapore’s sovereignty over Pedra Branca. It cannot be credibly argued that the authorities of a State would act so ludicrously as to request permission to land on, or to make surveys in the

⁴⁹⁹ MCM p. 207, para. 431. *See also* MCM Vol. 3, Annex 47.

⁵⁰⁰ MCM p. 208, para. 432.

⁵⁰¹ Letter from the Singapore Ministry of Foreign Affairs to the Malaysian High Commission dated 7 June 1980 (SM Vol. 6, Annex 147).

surrounding waters of, an island coming under its sovereignty. If Malaysia had really believed that Pedra Branca were hers, she would not have requested permission to carry out these activities, notwithstanding the fact that Singapore was administering the lighthouse on the island.

B. MALAYSIA'S CONDUCT UNDER THE STRAITS' LIGHTS SYSTEM RECOGNISED SINGAPORE'S SOVEREIGNTY OVER PEDRA BRANCA

6.18 Another aspect of Malaysia's conduct which warrants discussion concerns the arrangements made for the financing and operation of lighthouses under the Straits' Lights System. Malaysia devotes an entire chapter to this topic⁵⁰² to make the point that the "establishment and administration of the Straits' Lights was not regarded as determinative of the sovereignty of the underlying territory".⁵⁰³

6.19 Malaysia's treatment of this issue is incomplete and misleading. There is no dispute between the Parties that Singapore and her predecessors built and operated certain lighthouses situated on the territory of Malaysia. However, the conduct of Malaysia and her predecessor in this respect shows beyond any doubt that Malaysia treated the lighthouses built on her own territory, and, in particular, Pulau Pisang (where she possessed sovereignty), in a fundamentally different way from what she did with respect to the lighthouse on Pedra Branca (where she did not possess sovereignty). This difference of treatment will be discussed in the following sections.

⁵⁰² MCM Chapter 7.

⁵⁰³ MCM p. 143, para. 298.

1. Malaysia's Conduct under the Straits' Lights System

6.20 Singapore has previously described how the 1852 Act vested the Horsburgh Lighthouse and its appurtenances in the East India Company in trust for the British Crown, and that this was maintained under the 1854 Act.⁵⁰⁴ The lighthouse on Pedra Branca was the first to be built in the area and was singled out for special treatment in this manner.

6.21 In contrast, when the Cape Rachado lighthouse was constructed on the coast of Malaysia in 1860, no legislation was enacted vesting property rights in this lighthouse in Great Britain as had been done with respect to the Horsburgh Lighthouse under the 1852 and 1854 Acts. The Cape Rachado light was built with the written permission of the local ruler, the Sultan of Selangor.⁵⁰⁵ Similarly, when the floating light at One Fathom Bank was replaced by a permanent structure in 1874, no similar legislation was enacted. And, by the same token, when the lighthouse at Pulau Pisang was established in 1886, no legislation was enacted vesting property rights in Great Britain. The light was constructed with the permission of the Sultan of Johor in 1885, as confirmed by an Indenture in 1900.⁵⁰⁶ There was no such permission or Indenture with respect to the lighthouse at Pedra Branca.

6.22 The 1854 Act was repealed in part by Ordinance No. XVII of 1912.⁵⁰⁷ That Ordinance abolished light dues and provided for funding through direct contributions from the Governments of the Straits Settlements (which included

⁵⁰⁴ See paras. 4.88-4.97 above. See also SM pp. 94-98, paras. 6.11-6.22.

⁵⁰⁵ Sultan of Selangor - Governor of the Straits Settlements, correspondence concerning Cape Rachado lighthouse, Oct-Nov 1860 (MM Vol. 3, Annex 62).

⁵⁰⁶ Indenture between Ibrahim, Sultan of Johore, and Sir James Alexander Swettenham, Officer Administering the Government of the Colony of the Straits Settlements, 6 Oct 1900 (MM Vol. 3, Annex 89).

⁵⁰⁷ The Light-Houses Ordinance No. XVII of 1912 (Singapore) (MM Vol. 3, Annex 90).

Singapore) and the Federated Malay States. What is significant about this Ordinance was the reaction of the Federated Malay States to the funding arrangements for the maintenance of the lights.

6.23 On 13 July 1913, the Chief Secretary to the Government of the Federated Malay States tabled a motion before the Federal Council for a special appropriation of \$20,000 “to meet a share of the cost of maintaining One Fathom Light, off the coast of Selangor, and Cape Rachado on the coast of Negri Sembilan”.⁵⁰⁸ The Chief Secretary explained the position in the following way:

“I think it is an international obligation that each country should bear the cost of maintaining all lights considered necessary on its coasts, and I think there can hardly be any question now that we should not be doing our duty if we did not come forward and offer to maintain these two very useful light-houses.”⁵⁰⁹

6.24 The motion was agreed to, and it was also agreed that such funding would not change the management of the lights which continued to be carried out from the Straits Settlements. What is striking is that the funding proposal was confined to the lighthouses along the coasts of the Federated Malay States. The two lighthouses concerned were the One Fathom Bank lighthouse and the lighthouse at Cape Rachado. The Straits Settlements government never claimed to exercise sovereign authority over either of these features. No offer was made to fund the lighthouse at Pedra Branca.

6.25 Malaysia’s Counter-Memorial has attempted to argue that, at the time, Johor was not one of the Federated Malay States and that Horsburgh Lighthouse was situated on the territory of Johor. It then states that “it is not

⁵⁰⁸ MCM pp. 149-150, para. 313. *See also* Federated Malay States, Proceedings of the Federal Council, 8 July 1913, pp. A1-A2, B8 (MM Vol. 3, Annex 65).

⁵⁰⁹ Federated Malay States, Proceedings of the Federal Council, 8 July 1913, pp. A1-A2, B8 (MM Vol. 3, Annex 65), at p. 8.

clear” whether Johor made any contribution to the funding of the lighthouses on Pedra Branca *or Pulau Pisang*.⁵¹⁰

6.26 On the contrary, the facts are very clear. Malaysia has failed to disclose that she *did* subsequently make an offer to fund *the lighthouse at Pulau Pisang*, but made *no similar offer* with respect to Horsburgh Lighthouse on Pedra Branca. This is clear from the proposal that was sent on 23 September 1952 from the Director of Marine of the Federation of Malaya to the Master Attendant of Singapore. The relevant part of this letter reads as follows:

“I have the honour to raise the subject of maintenance of the Pulau Pisang Lighthouse and to say that as it is close to the coast of the Federation it would seem appropriate that it should be a commitment of this Government, and to suggest that responsibility for it should be assumed by us, in the same way as we have assumed responsibility for Pulau Merambong.”⁵¹¹

6.27 It can thus be seen that at various times, Malaysia made proposals to assume responsibility for the funding of lighthouses that fell within her jurisdiction and off her coasts. This was the case with respect to the lights at Cape Rachado, One Fathom Bank and Pulau Pisang. In contrast, Malaysia never made such a proposal concerning the lighthouse on Pedra Branca. This is further evidence that Malaysia did not consider that she possessed sovereignty over Pedra Branca, but rather that she regarded Pedra Branca as being vested in Singapore.

6.28 The foregoing discussion also underscores the point that, regardless of the fact that the operation of the Straits’ Lights remained under Singapore’s

⁵¹⁰ MCM p. 150, para. 315.

⁵¹¹ Letter from the Director of Marine, Federation of Malaya to the Master Attendant, Singapore dated 23 Sep 1952 (SM Vol. 6, Annex 89). Merambong is a small island at the western entrance of the Johor Strait lying close to the Singapore-Johor boundary. It was one of the islands retroceded to Johor by the 1927 Agreement and is therefore indisputably Malaysian territory.

responsibility, the interested parties had a clear idea as to where sovereignty lay with respect to the *territory* where each individual light was located. Pulau Pisang and Cape Rachado were part of Malaysia's territory and Malaysia therefore offered to fund the lights thereon; Pedra Branca belonged to Singapore, and Malaysia made *no offer* to fund the light thereon.

2. Conclusion on Malaysia's Conduct under the Straits' Lights System

6.29 Just like her requests for permission to act on or around Pedra Branca, Malaysia's and her predecessor Johor's conduct in respect of the Straits' Lights System is clear evidence of her firm and consistent belief that the island was under Singapore's sovereignty.

6.30 This is also confirmed by Malaysia's attitude vis-à-vis the Cape Rachado lighthouse, now called the Tanjung Tuan Lighthouse. An inscription on an official plaque put up at the entrance of that lighthouse, and shown *overleaf* as **Insert 12**, reads:

“Tanjung Tuan Lighthouse (Rumah Api Tanjung Tuan) is *the oldest lighthouse in Malaysia*. It stands on the highest point of the cape and was built in 1860 after the original was destroyed during a war in the 16th century”. [emphasis added]

As Horsburgh Lighthouse is older than the Tanjung Tuan Lighthouse, Malaysia's description of the latter as the “oldest lighthouse in Malaysia” contradicts her “belief” that Horsburgh Lighthouse is on Malaysian territory.

6.31 Malaysia has amply demonstrated that she has acted consistently with her sovereignty over Pulau Pisang, Cape Rachado and the One Fathom light. In contrast, she has clearly acted in a contrary manner where Pedra Branca and its lighthouse are concerned. This difference is further acknowledgement of Singapore's sovereignty over Pedra Branca.

C. BASIC DIFFERENCES BETWEEN PEDRA BRANCA AND PULAU PISANG

6.32 At this juncture, it is helpful to recall numerous differences between the way in which the administration of Pedra Branca was undertaken and the way in which the lighthouse on Pulau Pisang was managed. Singapore's Counter-Memorial touched upon some of these differences,⁵¹² but in the light of the contentions raised in Malaysia's Counter-Memorial,⁵¹³ a systematic recapitulation is in order. The matters that will be highlighted below confirm that the two islands were under entirely different legal regimes, and that Singapore and Malaysia have always regarded Pulau Pisang as subject to Malaysia's sovereignty and Pedra Branca as subject to Singapore's sovereignty.

Different Legal Regimes

6.33 The lighthouse on Pulau Pisang, just as the light at Cape Rachado, was subject to a written grant by the local ruler. There is no such grant or lease for the lighthouse on Pedra Branca. As Singapore's Master Attendant explained:

“Horsburgh Lighthouse, some 35 miles to the eastward, is Colony territory whereas at Pulau Pisang, some 50 miles to the north-westward, Singapore has only a lease of the land on which the lighthouse is built.”⁵¹⁴

This is a point that has been fully established in Singapore's Memorial and Counter-Memorial.⁵¹⁵

⁵¹² See SCM pp. 151-153, paras. 6.52-6.56; and pp. 156-158, paras. 6.63-6.66.

⁵¹³ MCM pp.175- 176, para. 360. These arguments have been dealt with by Singapore. See SCM pp. 156-158, paras. 6.63-6.66.

⁵¹⁴ Letter from Rickard R.L. (Master Attendant, Singapore) to Permanent Secretary of the Ministry of Commerce & Industry dated 15 Feb 1958, attached to this Reply as Annex 24.

⁵¹⁵ SM pp. 36-37, paras. 5.20-5.24; and SCM pp. 82-108, paras. 5.28-5.90.

Disclaimer of Ownership

6.34 Malaysia (Johor) expressly disclaimed ownership over Pedra Branca, but she has never disclaimed ownership over Pulau Pisang. Singapore never disclaimed ownership over Pedra Branca, and she has always recognised Malaysia's sovereignty over Pulau Pisang.

Marine Ensigns

6.35 Malaysia protested the flying of the Singapore Marine Ensign at Pulau Pisang. Because Singapore did not possess sovereignty over Pulau Pisang, Singapore lowered her flag. Malaysia made no similar request with respect to the same Singapore Ensign on Pedra Branca, and the flag continues to be displayed there just as it has for over 150 years.

Control of Access to the Islands

6.36 Singapore has consistently controlled access to Pedra Branca both in relation to Malaysian nationals and nationals of third States. When Malaysian nationals arrived at Pedra Branca without a Singapore permit, they were sent off. Singapore exercises no similar control over access to Pulau Pisang.

Visits by Singapore Officials and Passports Control

6.37 Singapore government officials made frequent visits to Pedra Branca. They did so in the normal course of business and without needing passports. Only once did a Singapore Minister visit Pulau Pisang, and on that occasion he was advised to take his passport with him. In fact, soon after the introduction of passport control and hence immigration procedures between Malaysia and Singapore in 1967, the Singapore Director of Marine instructed all Marine

Department staff to carry valid travel documents when travelling to Pulau Pisang.⁵¹⁶ No such instructions were ever issued in respect of Pedra Branca.

Approval of Surveys and Issuance of other Permits

6.38 Singapore routinely controlled the issuance of permits to individuals or companies wishing to carry out surveys on Pedra Branca or within its territorial waters. These were not protested by Malaysia. Singapore took no similar steps regarding surveys on or around Pulau Pisang.

Meteorological Data

6.39 Singapore routinely collected rainfall and other meteorological information from Pedra Branca since 1851.⁵¹⁷ She undertook no similar activity on Pulau Pisang. Malaysia, on the other hand, expressly listed the rainfall station situated at Pedra Branca as being located “in Singapore”. Following Singapore’s independence, Malaysia discontinued the compilation and publication of meteorological readings from Pedra Branca.

Installation of Military Equipment and Naval Patrols

6.40 Singapore installed non-lighthouse military communications equipment on Pedra Branca. She took no such action on Pulau Pisang. Singapore also conducted naval patrols around Pedra Branca and specifically designated a patrol area just off Pedra Branca. No such patrols were conducted by Singapore off Pulau Pisang and no patrol areas were designated there.

⁵¹⁶ Minute from Brown D.T. (Director of Marine, Singapore) to Marine Department Engineer dated 27 May 1968 (SCM Vol. 3, Annex 45).

⁵¹⁷ SM p. 106, para. 6.43.

Investigation of Shipwrecks and Accidents

6.41 Singapore consistently investigated and assumed jurisdiction over shipwrecks occurring within Pedra Branca's territorial waters. She also investigated incidents of accidental death off Pedra Branca. She carried out no similar actions in the waters off Pulau Pisang. Malaysia only began protesting Singapore's actions in this respect after the critical date.

Maps

6.42 Malaysia issued a series of official maps prior to the emergence of the dispute indicating that Pedra Branca belonged to Singapore. Malaysia's maps never showed Pulau Pisang as appertaining to Singapore.

Funding for Lighthouses

6.43 Malaysia expressly offered to assume responsibility for the funding of the lighthouse on Pulau Pisang. Malaysia never offered to assume responsibility for the funding of the lighthouse at Pedra Branca.

Section III. Malaysia's Silence in the Face of Singapore's Acts of Sovereignty

6.44 That Singapore has title to Pedra Branca is reinforced by Malaysia's eloquent silence in the face of Singapore's constant display of sovereignty on or with respect to the island. This silence has legal consequences.⁵¹⁸ Singapore has in her Memorial referred to the well-established jurisprudence of international tribunals, including this Court, that silence in such circumstances is good evidence of Malaysia's lack of title to Pedra Branca and its surrounding waters.

⁵¹⁸ SM pp. 140-150, paras. 7.5-7.28.

6.45 Malaysia has tried to dispute the significance of her inactions on the ground that she was not aware, or could not have been aware, of the events calling for protests from her part, or that open action or protest was not required with regard to several Singapore activities as they did not imply sovereign authority over Pedra Branca. It is once again convenient to deal with each of the Malaysian inactions to show that there is no merit whatsoever in these arguments.

6.46 However, one preliminary point deserves particular emphasis in this respect: since Malaysia's case is that the Temenggong gave permission for the construction and operation of the lighthouse only, she should have vigilantly protested non-lighthouse activities. Her failure to do so shows that Malaysia never believed that such permission was ever given and that her theory of permission is merely an *ex post facto* rationalisation.

A. MALAYSIA'S INACTION WITH REGARD TO THE INSTALLATION OF MILITARY COMMUNICATIONS EQUIPMENT

6.47 The installation of military equipment on Pedra Branca three years prior to Malaysia's first claim of sovereignty over the island, i.e., in 1976-1977, was carried out without any reaction from Malaysia. She now argues, in a footnote, that she had neither been notified of any such installation taking place, nor could have been aware of it.⁵¹⁹ She further claims that she "only [became] aware of this on receipt of Singapore's Memorial".⁵²⁰

6.48 This argument is obviously untenable. The circumstances under which the military communication equipment was installed on Pedra Branca have already been clarified by Singapore.⁵²¹ In this regard, it is important to note

⁵¹⁹ MCM p. 92, para. 185, note 247.

⁵²⁰ MCM p. 213, para. 449.

⁵²¹ SM pp. 116-117, paras. 6.72-6.74.

that even if the correspondence between the Singapore Ministry of Defence and the Hydrographic Department was not in the public domain, the installation process could not have been unknown to Malaysia's authorities.

6.49 The installation involved multiple trips between Singapore Island and Pedra Branca, using both naval vessels and military helicopters⁵²² Malaysia could not have been unaware of such military activity in the area, especially if, as she now alleges, she carried out regular patrols in the waters surrounding the island.⁵²³ If that were true, her naval officers could not have failed to note these activities, and the Malaysian Government should have been put on enquiry.

B. MALAYSIA'S INACTION WITH REGARD TO THE FLYING OF ENSIGNS ON PEDRA BRANCA

6.50 Singapore has shown in her Memorial that since the beginning of construction of Horsburgh Lighthouse, and continuously for more than a century, the British Marine Ensign flew over Pedra Branca. After 1952, the Ensign of the Colony of Singapore was flown, followed, after independence, by the Ensign of the Republic of Singapore. Malaysia does not dispute these facts but argues that the flying of ensigns on lighthouses "has no special significance for questions of sovereignty" over the territory on which the lighthouse is erected.⁵²⁴ She argues that ensigns are marks of nationality and not sovereignty and that they merely show that the lighthouse is manned.⁵²⁵

⁵²² See SM p.118, para.6.75; and Minutes of Discussion (held on 7 Nov 1976) on Communications Installation for Horsburgh Lighthouse dated 29 Nov 1976 (SM Vol. 6, Annex 130).

⁵²³ For a discussion of this untenable claim, see Chapter V *above*.

⁵²⁴ MCM p. 140, para. 294; and pp. 190-192, paras. 386-392.

⁵²⁵ MCM pp. 139-141, paras. 288-296.

6.51 As has been discussed in Chapter IV above,⁵²⁶ these arguments lack substance in the light of Malaysia's own state of mind as regards the flying of the Ensign. She protested against the flying of the Singapore Ensign on Pulau Pisang (which belongs to Malaysia) but at the same time made no protest against the flying of the same Ensign on Pedra Branca. This difference of attitude amounts to a clear recognition of Singapore's sovereignty over Pedra Branca.

6.52 As recorded by the First Secretary of the Singapore High Commission in Malaysia, the Malaysian views were as follows:

“2. He started off by asking me if I knew of an island called Pulau Pisang and I said: ‘No’. He then went on to say that this is a very tiny island worth nothing at all. There is a lighthouse on it and for the past few months a Singapore flag has been seen flying in the island. The Malaysians would like the flag taken down as soon as possible in order not to provide opportunists with something to talk about.

3. He told me that in 1900 under a treaty between the Sultan of Johore and the British, the British were allowed to use the island as a lighthouse. Subsequently in 1951, the British had stated that there was no question of the sovereignty of the island which rested in the hands of the Sultan of Johore.

4. Hamzah then told me that there have been a few statements in the *Utusan Malayu* on this subject recently. Further, he said: ‘You know what it is, these chaps will start saying that the Philippines is claiming part of Malaysia and now even a Singapore flag is flying on what is actually Malaysian territory.’ ”⁵²⁷

6.53 Singapore is therefore entirely justified, contrary to Malaysia's argument,⁵²⁸ in relying, by analogy, on the *Temple* case, in which the Court

⁵²⁶ See paras. 4.121-4.137 above. See also paras. 3.88-3.90 above.

⁵²⁷ Note by Kajapathy A. (First Secretary, Singapore High Commission in Malaysia) regarding meeting with Hamzah bin Majeed (Assistant Secretary, Ministry of Foreign Affairs, Malaysia) on 3 Sep 1968, attached to this Reply as Annex 40.

⁵²⁸ MCM pp. 185-187, paras. 379-382.

deduced Cambodia's sovereignty over the Temple of Preah Vihear from the flying of the French flag during the official visit by Siamese Prince Damrong:

“When the Prince arrived at Preah Vihear, he was officially received there by the French Resident for the adjoining Cambodian province, on behalf of the Resident Superior, with the French flag flying. The Prince could not possibly have failed to see the implications of a reception of this character.”⁵²⁹

And the Court added:

“Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in face of an obvious rival claim.”⁵³⁰

6.54 For the sake of completeness, it must be noted that:

- (a) it is bizarre for Malaysia to allege that the flying of the Ensign was not open and notorious⁵³¹ – one does *not* fly an Ensign covertly;
- (b) it is unfathomable that Malaysian naval officers who (allegedly) regularly sailed past whilst patrolling around Pedra Branca would have confused the Johor State flag with the Singapore Marine Ensign. It is even more unfathomable for them to have confused the Johor State flag with the British Ensign,⁵³² and
- (c) if indeed the future Rear-Admiral Thanabalasingam had landed on Pedra Branca in 1962 as alleged, and seen the lighthouse in close proximity, he could not possibly have confused the two flags.

⁵²⁹ See *Temple of Preah Vihear*, *supra* note 230, at p. 30.

⁵³⁰ *Ibid*, at pp. 30-31.

⁵³¹ MCM p. 189, para. 385.

⁵³² See paras. 4.126-4.127 *above*.

In short, it is simply untenable for Malaysia to argue that her authorities could have difficulties identifying what flag or ensign was being flown on Pedra Branca.

6.55 There can be no doubt that if Malaysia had considered Pedra Branca to be under her sovereignty, she would have protested against this open and notorious flying of the British, and subsequently Singapore, Marine Ensigns. She failed to do so for more than 130 years.

C. MALAYSIA'S INACTION WITH REGARD TO SINGAPORE'S PLANS TO RECLAIM AREAS AROUND PEDRA BRANCA

6.56 As explained in her Memorial, Singapore envisaged the reclamation of part of the sea around Pedra Branca. A tender notice was published in *The Straits Times* on 27 January 1978.⁵³³ This was a public advertisement made in full conformity with the usage in such circumstances. Three companies tendered for the project.⁵³⁴ There can be no doubt that if Malaysia had, at the time, been convinced that she had sovereignty over Pedra Branca she would and should have protested.

6.57 In the *Temple* case, this Court has recalled that States have a duty to react to acts encroaching upon what they consider their sovereign authority:

“... it is clear that circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it.”⁵³⁵

⁵³³ SM pp. 123-124, paras. 6.88-6.90.

⁵³⁴ See paras. 4.179-4.181 *above*.

⁵³⁵ See *Temple of Preah Vihear*, *supra* note 230, at p. 23.

6.58 Malaysia, which did not react in any manner whatsoever to Singapore’s public call for tenders to reclaim part of the area around Pedra Branca – a clear action *à titre de souverain* – now raises a number of issues relating to this project that merit comment, some of which have been discussed in Chapter IV of this Reply.⁵³⁶

6.59 Malaysia attempts to minimise the significance of the public tender by arguing that the newspaper advertisement appeared on one day only.⁵³⁷ This was the normal practice. Malaysia fails to appreciate that the tender resulted in three different proposals being submitted by three different construction companies.⁵³⁸ Evidently, unlike Malaysia, these companies had no difficulty reacting to the invitation. Moreover, if reference is made to the Report on the tenders subsequently prepared by the Engineering Services Division of the Port of Singapore Authority, it can be seen that the proposed works were extensive in nature and involved the reclamation of large areas around and attached to the island.⁵³⁹ The reference to “Horsburgh Lighthouse”, as frequently was the case, was simply a convenient term for the island as a whole.

6.60 Quite clearly, considerable preparation went into both the original tender documents and the subsequent analysis of the tenders received. The tenders quoted amounts as high as 16 million Singapore Dollars for the project, attesting to the substantial nature of the proposal. They all took place before Malaysia first raised a claim to the island in 1979. By any measure, the proposal represented another action taken at the State level evidencing Singapore’s possession of sovereignty over Pedra Branca. It was classic

⁵³⁶ See paras. 4.179-4.181 *above*.

⁵³⁷ MCM p. 224, para. 477.

⁵³⁸ See Tender Evaluation Report, at p. 5 (SM Vol. 6, Annex 135, p. 1072).

⁵³⁹ See Tender Evaluation Report (SM Vol. 6, Annex 135, p. 1080).

conduct *à titre de souverain*. Had Malaysia thought at that time that she had sovereignty over Pedra Branca, she would surely have protested. She kept silent.

D. MALAYSIA'S INACTION WITH REGARD TO SINGAPORE'S INVESTIGATION OF NAVIGATIONAL HAZARDS AND SHIPWRECKS

6.61 Singapore has recounted in Chapter IV of this Reply the numerous investigations she has conducted on shipwrecks and marine hazards around the waters of Pedra Branca from 1920 up to today.⁵⁴⁰ Such activities demonstrate the exercise of sovereign authority. These investigations were publicly and openly conducted and publicised but they did not elicit any protest from Malaysia until 2003 when she started to protest such activities by Singapore,⁵⁴¹ in sharp contrast with her persistent inactivity until then.⁵⁴²

6.62 Malaysia tries to explain her persistent silence in this regard by alleging, in substance, that these investigations did not amount to conduct *à titre de souverain* in respect of Pedra Branca.⁵⁴³ If it were so, it cannot be understood why, in January 2003, she felt obliged to take the unprecedented step of initiating her own investigations into a collision in Pedra Branca waters between a Dutch-registered container vessel, *ANL Indonesia*, and the Singapore Naval vessel *RSS Courageous*.⁵⁴⁴ This is all the more surprising since the collision involved a Singapore naval vessel, a factor which by itself, as Malaysia herself

⁵⁴⁰ See Chapter IV, Section IV, Subsection H above. See also SM pp. 118-123, paras. 6.76-6.87.

⁵⁴¹ See paras. 4.175-4.176 above.

⁵⁴² See SM pp. 118-122, paras. 6.76-6.83; and SCM Insert 13, after p. 212.

⁵⁴³ See MCM p. 215, para. 455; p. 218, para. 460; p. 219, para. 464; p. 220, para. 465; and p. 221, para. 469.

⁵⁴⁴ See Malaysia's Note EC 8/2003 dated 14 Jan 2003, attached to this Reply as Annex 57.

has acknowledged, is sufficient to give jurisdiction to Singapore.⁵⁴⁵ Similar remarks may be made about why, in November 2003, Malaysia felt obliged to protest an investigation carried out by Singapore's Maritime and Port Authority into the grounding of *M.V. APL Emerald* between Middle Rocks and South Ledge.⁵⁴⁶

6.63 These very recent protests constitute a desperate but vain attempt by the Malaysian authorities to build up a better factual background to support her case.⁵⁴⁷ Ironically, these recent protests also undermine her own arguments that Singapore's investigations of shipping accidents are not acts *à titre de souverain*.

E. CONCLUSION ON MALAYSIA'S INACTION WITH REGARD TO OTHER NON-LIGHTHOUSE ACTIVITIES BY SINGAPORE AUTHORITIES

6.64 In the cases discussed above, the situation is quite similar to that which has been commented upon by the Court in the *Fisheries case* where the United Kingdom tried to excuse her inaction with respect to the Norwegian Royal Decrees on the ground of their lack of "notoriety". The Court concluded:

"The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869."⁵⁴⁸

6.65 This reasoning is equally applicable where Pedra Branca is concerned. If Malaysia had been reasonably diligent or observant, she would not have

⁵⁴⁵ See MCM p. 221, paras. 468-469.

⁵⁴⁶ See SM pp. 121-122, para. 6.83.

⁵⁴⁷ See e.g., Malaysia's Notes No. EC 65/2003 dated 30 June 2003 (SM Vol. 7, Annex 202); EC 106/2003 dated 6 Nov 2003 (SM Vol. 7, Annex 203); and Malaysia's Notes No. EC 74/2005 dated 2 Aug 2005, No. EC 75/2005 dated 2 Aug 2005, and No. EC 76/2005 dated 2 Aug 2005, annexed to this Reply as Annex 63. See also SM p. 134, para. 6.116.

⁵⁴⁸ See *Fisheries (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116, at p. 139.

failed to notice the conspicuous helicopter movements in connection with the installation of military communications equipment. The further argument that she did not have the opportunity or the means to inspect Singapore's activity on the lighthouse without "risk of a potentially serious confrontation"⁵⁴⁹ is simply ludicrous and irreconcilable with her claim that she knew nothing about Singapore's activities. In any case, the point is not the need to inspect "Singapore's activity at the lighthouse",⁵⁴⁹ but the failure to make appropriate enquiries in a manner consistent with her claim to sovereignty over Pedra Branca.

6.66 Malaysia now seeks to distract the Court's attention from her inaction by alleging that she has "serious concerns about Singapore's use of Horsburgh Lighthouse for non-light (and especially military) purposes".⁵⁵⁰ This is a mere smokescreen thrown up by Malaysia to attribute sinister motives to Singapore, in order to hide the fact that she has no credible explanation for her inaction.

6.67 As the Arbitral Tribunal stated in the *Dubai-Sharjah Border Arbitration*, after having extensively cited international case law:

"... a State must react, although using peaceful means, when it considers that one of its rights is threatened by the action of another State.

Such a rule is perfectly logical as lack of action on a situation like this one can only mean two things: either the State does not believe that it really possesses the disputed right, or for its own private reasons, it decided not to maintain it."⁵⁵¹

⁵⁴⁹ See MCM p. 92, para. 185, note 247.

⁵⁵⁰ MCM p. 92, para. 185; and p. 213, para. 449.

⁵⁵¹ *Dubai-Sharjah Border Arbitration*, 91 I.L.R. 543 (1993), at p. 623. This case was discussed in SM pp. 148-150, para. 7.24.

6.68 In the *Honduras Borders Award*, the Arbitral Tribunal made a similar observation:

“... it is equally true that these assertions of authority by Guatemala... shortly after independence, with respect to the territory to the north and the west of the Motagua river, embracing the Amatique coast region, were public, formal acts and show clearly the understanding of Guatemala that this was her territory. These assertions invited opposition on the part of Honduras if they were believed to be unwarranted. It is therefore pertinent to inquire as to what action, if any, was taken by Honduras at or near the time of independence in relation to the territory now under consideration and in answer to the above-mentioned proceedings of Guatemala.”⁵⁵²

6.69 In its recent Judgment in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the Court made a similar ruling with regard to the inaction of the Netherlands (and subsequently, Indonesia) in the face of Malaysia’s activities:

“The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual.”⁵⁵³

A fortiori, in the present case, Malaysia’s total inaction and absence of protest in the face of Singapore’s overt, constant and clear exercise of sovereign authority over Pedra Branca must, to say the least, be regarded as unusual.

⁵⁵² See *Honduras Borders (Guatemala v. Honduras)* (1933) 2 RIAA 1322, at p. 1327.

⁵⁵³ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 279, at para. 148.

Section IV. Official Malaysian Maps Recognising Singapore's Sovereignty over Pedra Branca

6.70 The earlier sections of this Chapter have reviewed the relevant evidence attesting to Malaysia's recognition of Singapore's title over Pedra Branca. However, a further aspect of Malaysia's conduct confirmatory of Singapore's title remains to be treated in this final section, i.e., the issuance of official maps depicting Pedra Branca as belonging to Singapore.⁵⁵⁴

6.71 In this respect, Malaysia has resorted to a number of highly tenuous arguments in Chapter 10 of her Counter-Memorial. She has questioned whether maps could ever amount to admissions, except when they are incorporated in treaties or used in inter-State negotiations, because – in and of themselves – they cannot constitute territorial title. From this proposition, Malaysia contends, with an extraordinary leap of logic, that maps “cannot constitute definitive State admissions either”.⁵⁵⁵ Malaysia adds that this is particularly true of maps containing a disclaimer, and that it is irrelevant that such disclaimer is limited to boundaries because attribution of sovereignty and delimitation of boundaries are closely linked concepts.

6.72 Malaysia's arguments in this respect are not new and Singapore has already dealt with them in her Counter-Memorial.⁵⁵⁶ There is thus no need to dwell at length on this issue here, although a few points are worth making in light of Malaysia's Counter-Memorial.

6.73 Singapore agrees with Malaysia that maps can only constitute territorial title in specific circumstances and that the official Malaysian maps attributing

⁵⁵⁴ These maps have been reproduced by both Parties. Reference can be made to SM Maps 12 to 15; and Malaysia's Map Atlas, Maps 32, 33, 34, 38, 39 and 41.

⁵⁵⁵ MCM p. 268, para. 572.

⁵⁵⁶ SCM pp. 230-232, paras. 9.30-9.31.

Pedra Branca to Singapore do not *per se* create title. In any event, Singapore does not contend that these maps confer title. Singapore's claim is firmly grounded on the taking of lawful possession of Pedra Branca in 1847-1851 and the uninterrupted maintenance of that title by Singapore and her predecessors in title. What Singapore does contend, nonetheless, is that the cartographic material in this case has considerable significance in that it provides evidence of the official views held by the Malaysian government regarding sovereignty over Pedra Branca prior to the emergence of the dispute. A number of official Malaysian maps show that Malaysia did not consider the island as being under Malaysian sovereignty, but, rather, that it was specifically attributed to Singapore.⁵⁵⁶

6.74 As to the second leg of Malaysia's argument, i.e., that if maps do not constitute territorial title, by the same token they also cannot constitute admissions against interest, this conclusion is a *non sequitur* which runs contrary to international doctrine and the case law. It is well-established that, when a State produces and distributes maps which contradict its position and confirm the position of the opposite State party in a territorial or boundary dispute, such maps can be proof of recognition.⁵⁵⁷ For instance, in the *Minquiers and Ecrehos* case, the record contained an official French letter which stated that the Minquiers were "*possédés par l'Angleterre*", with an enclosed chart which depicted them as British territory. The Court observed that the Note and attached chart could be invoked as admissions against interest as they were "a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof"

⁵⁵⁷ See case law and doctrine cited in SCM p. 237, para. 9.42, note 597. See also *Frontier Dispute (Benin/Niger)*, ICJ Judgment of 12 July 2005, at para. 44.

and, as such, they should “be considered as evidence of the French official view at the time.”⁵⁵⁸

6.75 Similarly, in the *Beagle Channel* case, the Arbitral Tribunal noted:

“Where there is a definite preponderance on the one side – particularly if it is a very marked preponderance – and while of course every map must be assessed on its own merits – the cumulative impact of a large number of maps, relevant for a particular case, that tell the same story – especially when some of them emanate from the opposite party, or from third countries, – cannot but be considerable, either as indications of general or at least widespread repute or belief, or else as confirmatory of conclusions reached... independently of the maps.”⁵⁵⁹

6.76 Although the factual context of the present case is different, the *dictum* cited above applies to this case as well. Here, too, Malaysia’s official maps, published before 1979, tell the same story and furnish important evidence of Malaysia’s opinion at the time with respect to sovereignty over Pedra Branca. Such maps indicate Malaysia’s own belief that Pedra Branca belonged to Singapore.

6.77 There can be no doubt as to the fact that a significant number of official Malaysian maps – particularly Maps 12, 13, 14 and 15 in Singapore’s Memorial,⁵⁶⁰ and Maps 32, 33, 34, 38, 39 and 41 in the Map Atlas submitted with Malaysia’s Memorial – show Pedra Branca as belonging to Singapore:

- (a) *First*, Pedra Branca is indicated *both* with the lighthouse symbol and as an area of land. Furthermore, it is labelled with the Malay name given to the island (P. Batu Puteh), which dispels any

⁵⁵⁸ *Minquiers and Ecrehos (United Kingdom v. France)*, *supra* note 186, at p. 71.

⁵⁵⁹ *Beagle Channel Arbitration*, *supra* note 223, at pp. 203-204, para. 139.

⁵⁶⁰ These maps have also been reproduced as Maps No. 26-28 and 30 in SCM Map Atlas.

confusion as to whether the attribution to Singapore refers to the lighthouse alone.

- (b) *Secondly*, the appurtenance of the island to Singapore is not indicated by means of dotted lines or in other unclear terms, but, rather, it is unequivocally done by reference to Singapore, in capital letters appearing under the island's name.
- (c) *Thirdly*, the fact that this labelling was intended by the map makers to indicate that the island belongs to Singapore is confirmed by the appearance of the exact same attribution for another island, Pulau Tekong Besar, sovereignty of which undisputedly belongs to Singapore. It is also significant that none of Malaysia's maps carry a similar annotation with respect to Pulau Pisang, thus confirming that the legend "SINGAPORE" relates to the island's territorial status and is not a mere reference to the ownership of the lighthouse that is built on the island. (*See the relevant maps reproduced as **Insert 13** and **Insert 14**, overleaf.*)

6.78 The significance of these six maps is enhanced by the fact that they constituted a pattern of recognition, over a period of 14 years, by the highest cartographic authority of Malaysia, of Singapore's sovereignty over Pedra Branca. This is entirely consistent with the other evidence of recognition in this case.⁵⁶¹

6.79 With respect to Malaysia's arguments on disclaimers, it may be that boundary delimitation and attribution of territory are legally related concepts. But the fact remains that if a map contains an express statement excluding its

⁵⁶¹ See Sections II and III *above*; and SM Chapter VII.

authority for boundary delimitation purposes, that statement is clearly limited to *boundary delimitations* and not concerned with the attribution of territorial title.

6.80 In any event, even assuming that the disclaimer could be read to encompass attribution of territory as well, this does not detract from the significance of these maps because, as noted by the Boundary Commission in the *Eritrea/Ethiopia* arbitration:

“... a disclaimer cannot be assumed to relieve [a State] of the need that might otherwise exist for it to protest against the representation of the feature in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. *The map still stands as a statement of a geographical fact, especially when the State adversely affected itself produced and disseminated it, even against its own interest.*”⁵⁶²

Section V. Conclusion

6.81 As shown above, not only is Malaysia unable to prove original title over Pedra Branca, her conduct confirms Singapore’s title over the island. In the face of the open, peaceful and public display of sovereignty over Pedra Branca carried out by Singapore and her predecessor in title the United Kingdom, neither Malaysia, nor her predecessor, Johor, ever reacted. Indeed, Malaysia’s conduct is strong evidence of Singapore’s title on two levels. At one level, she has failed to protest Singapore’s activities on the island. At another level, her admissions (by conduct or through the maps she issued) are clear recognition of Singapore’s title.

6.82 In fact, Malaysia’s eloquent silence is particularly significant in light of her theory that the lighthouse on Pedra Branca was constructed with Johor’s

⁵⁶² *Decision of the Eritrea-Ethiopia Boundary Commission Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Decision of 13 Apr 2002, reprinted in 41 Int’l L. Materials 1057 (2002), at p. 28, para. 3.27, emphasis added.

permission. If that were the case, Malaysia should have vigilantly protested the wide range of non-lighthouse activities performed by British, and subsequently, Singapore authorities. Her failure to do so shows that she never believed that any such permission was given. The theory of permission was invented solely to prop up her paper claim to Pedra Branca.

6.83 Finally, it should be pointed out that Malaysia's conduct is also consistent with her 1953 disclaimer of ownership over Pedra Branca. This will be elaborated upon in Chapter VII below.

CHAPTER VII MALAYSIA'S FORMAL DISCLAIMER OF TITLE

7.1 In the previous Chapters of this Reply, Singapore has recalled that she has acquired title over Pedra Branca⁵⁶³ and that this title has been confirmed by the actions of both Parties,⁵⁶⁴ including an impressive pattern of actions and silence by Malaysia.⁵⁶⁵ Among those acts, one is of particular importance: Johor's formal disclaimer of title of 1953.

7.2 In a desperate attempt to minimise the legal significance of this crucial disclaimer, Malaysia has, in a short section of her Counter-Memorial,⁵⁶⁶ provided an economical response to the detailed arguments in Chapter VIII of Singapore's Memorial.⁵⁶⁷ This Chapter will comment on this minimalist defence.

7.3 Reiterating what she has already asserted in her Memorial, Malaysia contends that:

- (a) the letter from the Colonial Secretary, Singapore, to the British Adviser, Johor, dated 12 June 1953⁵⁶⁸ undermines Singapore's position concerning her acquisition of title over Pedra Branca;

⁵⁶³ See Chapter III *above*.

⁵⁶⁴ See Chapter IV *above*.

⁵⁶⁵ See Chapters V and VI *above*.

⁵⁶⁶ MCM pp. 235-239, paras. 503-514 (Chapter 9, Section B, "The 1953 correspondence").

⁵⁶⁷ SM pp. 161-178, paras. 8.1-8.41 (Chapter VIII, "Johor's Express Disclaimer of Title to Pedra Branca").

⁵⁶⁸ See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, including Annex A (Extract from Mr John Crawford's Treaty of 1824) and Annex B (Extract from a despatch by the Governor of Prince of Wales Island, Singapore and Malacca to the Secretary to the Government of India dated 28 Nov 1844) (SM Vol. 6, Annex 93).

- (b) the letter shows that Singapore was aware that Horsburgh Lighthouse was built with the permission of the local rulers;
- (c) the only consequence of the 21 September 1953 letter was that Singapore could “claim” Pedra Branca.

It will be convenient to respond to each of these surprising propositions in turn.

A. The Letter of 12 June 1953 Does Not Undermine Singapore’s Title over Pedra Branca

7.4 According to Malaysia, this letter “undermines the position that Singapore is now advancing, namely that Singapore acquired title to PBP by the ‘taking of lawful possession’ of the island by Britain in the period 1847 to 1851”.⁵⁶⁹ Interestingly enough, this contrasts with the even more categorical assertion made in the Malaysian Memorial according to which “it is evident from the letter... that Singapore did not hold the view that Pulau Batu Puteh was part of the territory of Singapore”.⁵⁷⁰

7.5 As a matter of fact, the letter of 12 June 1953 says and does nothing of the kind. It neither undermines nor contradicts Singapore’s position. As Singapore has explained in some detail in her Memorial and Counter-Memorial.⁵⁷¹

- (a) Singapore had a clear sense that she had rights over the island:
“This [*the building of the lighthouse in 1850 and its maintenance*

⁵⁶⁹ MCM p. 236, para. 506.

⁵⁷⁰ MM p. 108, para. 237.

⁵⁷¹ See SM pp. 162-164, paras. 8.4-8.8; and SCM pp. 184-186, paras. 7.6-7.11.

since then] by international usage no doubt confers some rights and obligations on the Colony”;⁵⁷²

(b) she was somewhat uncertain as to the *exact* scope of those rights⁵⁷³ – and for good reasons:

(i) Singapore did not have in her possession, nor was she aware of, any grant or lease relating to Pedra Branca;⁵⁷⁴ and

(ii) given the close and friendly relationship between Singapore and Johor, it was only natural for Singapore to seek clarification as to the status of Pedra Branca on which the lighthouse was built;

(c) the letter of 12 June 1953 was a pure inquiry: “I am directed *to ask for information...*”;⁵⁷⁵ it simply sought clarification: “It is now desired *to clarify the status of Pedra Branca...*”.⁵⁷⁶

7.6 Contrary to Malaysia’s interpretation, what the letter clearly shows is that Singapore considered that, *absent* any document showing a lease or a grant of the island by Johor, Pedra Branca belonged to Singapore. This is evident not only from the penultimate paragraph of the letter (“*I would therefore be most grateful to know whether there is any document showing a lease or grant of the*

⁵⁷² See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 924).

⁵⁷³ As the Parties agree, the simple fact that a lighthouse is built and/or maintained may or may not, depending on the facts, confer sovereignty over the territory on which the lighthouse stands, even though it can have such an effect.

⁵⁷⁴ See SCM p. 185, para. 7.8; Letter from Pavitt J.A.L. (Director of Marine, Singapore) to the Hydrographic Department in London dated 18 Mar 1966 (SCM Vol. 3, Annex 41).

⁵⁷⁵ SM Vol. 6, Annex 93, p. 923, at para. 1.

⁵⁷⁶ *Ibid*, at para. 3.

rock...”⁵⁷⁷), but also from the contrast drawn with Pulau Pisang in the previous paragraph:

“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.”⁵⁷⁸

B. The Letter Does Not Show that Singapore Was “Aware” that Horsburgh Lighthouse was Built Pursuant to Permission Given by Johor

7.7 Malaysia contends that the Colonial Secretary was “... aware that PBP was part of the Sultanate of Johor [and] that the permission to construct the lighthouse included PBP”.⁵⁷⁹ This contention cannot be correct since these were *precisely* the issues on which the Colonial Secretary sought clarification. If indeed the Colonial Secretary had the “awareness” which Malaysia seeks to impute upon him, he would not have sought the clarification. Moreover by referring to the undisputed status of Pulau Pisang – where he noted that “it is *clear* that there was no abrogation of the sovereignty of Johore”⁵⁸⁰ – it is obvious that the Colonial Secretary did not consider that the same could be said for Pedra Branca.

7.8 In support of her arguments, Malaysia places much reliance on the two documents annexed to the Colonial Secretary’s letter.⁵⁸¹ The first is an extract of the Crawford Treaty of 1824 by which the Sultan and the Temenggong of

⁵⁷⁷ SM Vol. 6, Annex 93, p. 923, at para. 3.

⁵⁷⁸ *Ibid*, at para. 2.

⁵⁷⁹ MCM p. 237, para. 508.

⁵⁸⁰ SM Vol. 6, Annex 93, p. 923, at para. 2.

⁵⁸¹ MCM p. 237, para. 508.

Johor ceded Singapore to the East India Company.⁵⁸² As Singapore has shown, this treaty is irrelevant to the status of Pedra Branca, as the island is, quite simply, outside the territorial limits indicated in the treaty.⁵⁸³ The reason why the extract was appended to the letter of 12 June 1953 is clearly explained in the letter itself: it shows that Pedra Branca is outside the limits indicated in the treaty and explains why the inquiry was being made.⁵⁸⁴

7.9 The second document is the typewritten “Extract from a despatch by the Governor of Singapore to the Governor-General in Bengal, 28.11.1844” mentioning that:

“This Rock is part of the Territories of Johore, who with the Tamongong have willingly consented to cede it gratuitously to the East India Company.”⁵⁸⁵

In this extract, the words “i.e. Pedra Branca” had been interpolated, in manuscript, after “This Rock”.

7.10 Malaysia makes much of this interpolation and contends that the extract shows that the Colonial Secretary, Singapore, “considered that the 1844 permission to construct the lighthouse on PBP implied a transfer of property”.⁵⁸⁶ Two points must be made here:

- (a) *first*, in 1953, the British authorities in Singapore clearly did *not* consider that the 1844 despatch settled the question of

⁵⁸² See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 924).

⁵⁸³ SCM pp. 187-191, paras. 7.13-7.18.

⁵⁸⁴ Since Pedra Branca lies outside the treaty limits, its status is not governed by the treaty – questions concerning Pedra Branca’s status therefore cannot be answered by reference to the treaty, but must be sought somewhere else.

⁵⁸⁵ See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 925).

⁵⁸⁶ MCM p. 237, para. 508.

sovereignty over Pedra Branca – if they did, the inquiry would have been redundant;

- (b) *secondly*, and more importantly, the manuscript interpolation of “Pedra Branca” in the despatch was wrongly made: the 1844 despatch did not concern Pedra Branca but Peak Rock.⁵⁸⁷ When the extract was originally typed out for the letter of 12 June 1953, it *did not* bear the interpolation. There is no evidence as to *when* the interpolation was made.

7.11 Malaysia is certainly right in stressing that “[t]he answer of the Acting Secretary of State, Johor, must be read in the context of the letter to which it was replying”.⁵⁸⁸ But, as shown above, this context is not that which has been sinuously constructed by Malaysia. The relevant context is this – the Colonial Secretary, Singapore sought “to clarify the *status* of Pedra Branca”,⁵⁸⁹ in a letter which:

- (a) expressly mentions that “[t]he *status* of Pulau Pisang is quite clear”,⁵⁹⁰ and gave assurance that the authorities in the Colony of Singapore were not questioning Johor’s *sovereignty* over *Pulau Pisang*,⁵⁹¹ and

⁵⁸⁷ See paras. 3.8-3.22 above. See also SM p. 36, para. 5.20; and SCM pp. 96-97, para. 5.62-5.64.

⁵⁸⁸ MCM p. 237, para. 508.

⁵⁸⁹ See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 923, para. 3, 1st sentence), emphasis added.

⁵⁹⁰ *Ibid*, para. 2, final sentence, emphasis added.

⁵⁹¹ *Ibid*, para. 2, penultimate sentence, emphasis added.

- (b) specifically alerted Johor to the fact that the inquiry about the status of Pedra Branca was “relevant to the determination of the boundaries of the Colony’s territorial waters”.⁵⁹²

Given the foregoing context, and after three months of careful study, the answer of the Acting State Secretary, Johor, is clear and straightforward: “... the Johore Government does not claim ownership of Pedra Branca”.⁵⁹³

C. No Adverse Conclusion for Singapore’s Sovereignty Can Be Drawn from the Statement that Singapore Can “Claim” Pedra Branca

7.12 By itself the answer given by the Acting State Secretary, Johor, is a clear and unequivocal disclaimer of title. It binds Malaysia as Johor’s successor without any need for a particular reaction by Singapore.⁵⁹⁴

7.13 Malaysia attempts to dilute the unequivocal nature of her disclaimer by harping on the notation of the Singapore Attorney-General that Singapore “can

⁵⁹² See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 923, para. 1, 2nd sentence).

⁵⁹³ Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore dated 21 Sep 1953 (SM Vol. 6, Annex 96). It should be noted that the MCM no longer repeats Malaysia’s earlier argument that the letter “does not refer to sovereignty but to ownership”. The implication of this argument is clearly untenable, in light of the context highlighted above. This is also a point fully addressed in SCM p. 197, para. 7.34. As Singapore puts it in SM p. 166, para. 8.13:

“[i]t is immaterial that the letter speaks of ‘ownership’ rather than ‘sovereignty’. In this particular context, the two expressions are indistinguishable... For a State to disclaim ownership of an island is to disclaim sovereignty over it”.

If any example is needed of usage of the word “ownership” to mean sovereignty, one needs look no further than the *Eritrea/Yemen* Arbitral Award (Phase I), *supra* note 73, at paras. 19, 187, 474 and 510, where the Tribunal used the word “ownership” to mean sovereignty.

⁵⁹⁴ See SM pp. 176-177, paras. 8.37-8.39.

claim it [*Pedra Branca*] as Singapore territory”.⁵⁹⁵ This argument is overwrought. Singapore was well-aware when the letter was written in 1953 that:

“This [*the building of the lighthouse in 1850 and its maintenance since then*] by international usage no doubt confers some rights and obligations on the Colony.”⁵⁹⁶

Thus, the underlying assumption of the Colonial Secretary was that Singapore *would have had sovereignty* over Pedra Branca, in the absence of any contrary treaty or agreement.⁵⁹⁷

7.14 Given this assumption, the inquiry to ascertain that there was indeed no such contrary treaty or agreement was only prudent. Once Johor expressly disclaimed title, Singapore could authoritatively regard Pedra Branca as Singapore territory. It was therefore entirely reasonable for Singapore to have stated that she could claim Pedra Branca as Singapore territory after she received the disclaimer from Johor.

7.15 In a final attempt to cast a doubt on the scope and consequences of the said disclaimer, Malaysia alleges that “Singapore did nothing subsequent to this correspondence to assert a claim to PBP”.⁵⁹⁸ To this end, she has relied on the Straits’ Lights arrangements, the lists of islands given in some Singapore publications and the Annual Reports of the Marine Department of Singapore.⁵⁹⁹

⁵⁹⁵ MCM p. 238, para. 509.

⁵⁹⁶ See Letter from Higham J.D., on behalf of the Singapore Colonial Secretary to the British Adviser, Johor dated 12 June 1953, *supra* note 568 (SM Vol. 6, Annex 93, p. 923).

⁵⁹⁷ See SCM p. 185, para. 7.8.

⁵⁹⁸ MCM p. 239, para. 514.

⁵⁹⁹ MCM pp. 238-240, paras. 511-513.

Singapore has already answered these misconceived arguments in her Counter-Memorial⁶⁰⁰ and elsewhere in this Reply.⁶⁰¹ There is no need to repeat them.

7.16 Malaysia also makes the point that, after the 1953 correspondence, “[t]here was not the slightest change in Singapore’s conduct: it continued to act as it had done before...”.⁶⁰² This is certainly true. Singapore had no reason to change her behaviour – she had continuously acted *à titre de souverain* vis-à-vis the island after her acquisition of title in 1847-1851, and Johor’s disclaimer only reinforced the position. *A fortiori*, Singapore continued to act as such after the 1953 disclaimer, including by peacefully maintaining and administering the lighthouse and by using the island for various other purposes.

7.17 Lastly, Malaysia asserts that “there is no evidence at all to show that” Singapore “did indeed rely upon the statement by the Johor Acting State Secretary”. Malaysia then contends that “[o]n the contrary, the further activity of Singapore clearly shows that it continued to treat PBP as not being part of Singapore.” These are assertions made without regard to the facts. For ease of reference, the following is a non-exhaustive list of both internal and public Singapore acts, *after* the 21 September 1953 disclaimer of title by Johor, which demonstrate that Singapore both relied on the disclaimer and treated Pedra Branca as being part of Singapore:

1953 Advice from the Singapore Colonial Secretary to the Singapore Master Attendant that: SM Vol. 6,
Annex 97

“On the strength of this [*i.e.*, *the Johor disclaimer*], the Attorney-General agrees that we can claim it [*i.e.*, *Pedra Branca*] as Singapore territory”

⁶⁰⁰ See e.g., SCM pp. 147-150, paras. 6.42-6.49; pp. 176-180, paras. 6.100-6.106; and pp. 195-196, paras. 7.28-7.31.

⁶⁰¹ See paras. 4.113-4.114 and paras. 6.18-6.31 *above*.

⁶⁰² MCM p. 238, para. 510.

- 1958** Statement by the Singapore Master Attendant that: Annex 24 of this Reply
“Horsburgh Lighthouse, some 35 miles to the eastward, is Colony territory whereas at Pulau Pisang, some 50 miles to the north-westward, Singapore has only a lease of the land on which the lighthouse is built.”
- 1963** Convening of a Court of Investigation into the stranding of *MV Woodburn* about half a mile from Pedra Branca. SM Vol. 6, Annex 110
- 1967** Statement by D. T. Brown (the Singapore Marine Department official who succeeded J.A.L. Pavitt as Director of Marine in 1968) that: SCM Vol. 3, Annex 42
“... in addition to the waters immediately surrounding Singapore, I have been advised that the waters within 3 miles of Horsburgh lighthouse (at the eastern entrance of Singapore Strait) may be considered to be Singapore territorial waters”
- 1971**
- June Visit by Singapore’s Minister for Communications to Pedra Branca. SM Vol. 5, Annex 87, pp. 787-788
- Aug Visit by Singapore’s Minister for Home Affairs to Pedra Branca. SM Vol. 5, Annex 87, p. 789
- 1972** Idea for land reclamation in the sea areas off Pedra Branca was mooted. Annex 42 of this Reply
- 1973** Plans made for land reclamation in the sea areas off Pedra Branca. Annex 42 of this Reply
- 1974**
- Sep Visit by Singapore’s Minister of State for Communications to Pedra Branca in a Singapore naval patrol craft. Annex 43 of this Reply
- Nov Statement by Singapore Director of Marine referring to Annex 44 of this Reply
“our island territory at Horsburgh Lighthouse and the territorial sea which it will be entitled to”,
and commenting that:
“[b]ecause of our geographical situation there is no possibility of our getting an Economic Zone *except to a limited extent at Horsburgh Lighthouse.*”

- 1975**
- June Evacuation of personnel from Pedra Branca by Singapore navy vessel which was patrolling in the vicinity. Annex 45 of this Reply
- Aug Statement by Hydrographer, Port of Singapore Authority that: Annex 46 of this Reply
- “Being an Island, Horsburgh has its own territorial sea. *Territorial waters in its vicinity have not yet been agreed upon between Indonesia, Malaysia and Singapore.* Principle of median line will be applied in delineating territorial waters around Horsburgh.”
- Sep Promulgation of Operations Instructions by the Republic of Singapore Navy to formally establish a patrol sector off Pedra Branca (Sector F5 – Horsburgh Lt extending North-Easterly). SM Vol. 6, Annex 123
- 1976** Visit by Singapore’s Senior Minister of State for Communications to Pedra Branca in a Singapore Navy missile gunboat. The gunboat stayed in the vicinity of Pedra Branca throughout the 22-hour visit. Annex 49 of this Reply
- 1977**
- May Installation of military communications equipment on Pedra Branca. SM Vol. 6, Annex 132
- June Enforcement action by *RSS Sea Lion* in protection of Singapore fishermen in the vicinity of Pedra Branca. Annex 50 of this Reply
- 1978**
- Jan Public tender for reclamation works off Pedra Branca. SM Vol. 6, Annex 135
- Apr Unequivocal assertion of Singapore sovereignty over Pedra Branca by Counsellor, Singapore High Commission in Malaysia when this issue was raised *en passant* by a Malaysian Foreign Ministry official at a meeting. Annex 51 of this Reply
- 1979** Investigation into the grounding of *MV Yu Seung Ho* about 600 metres off Pedra Branca. SM Vol. 6, Annex 139

D. Conclusion

7.18 In the light of what Singapore has reiterated on the significance of Johor's 1953 disclaimer, there is no doubt whatsoever that Singapore has title over Pedra Branca and Malaysia does not.

7.19 Moreover the heart of the question is not so much whether Singapore can "claim" Pedra Branca on the basis of Johor's disclaimer, but rather that, for her part, *Malaysia cannot* now claim Pedra Branca given her predecessor's formal disclaimer.

CHAPTER VIII EVIDENCE OF GENERAL REPUTE OF SINGAPORE'S SOVEREIGNTY OVER PEDRA BRANCA

Section I. Introduction

8.1 Chapter 10 of Malaysia's Counter-Memorial deals with various issues, most of which have been answered elsewhere in this Reply.⁶⁰³ The present Chapter responds to Section C of that Chapter, which bears the section heading "The position of third States".

8.2 In that Section, Malaysia bases her arguments exclusively on a series of maps, and concludes that "[t]he perception of third States is that Singapore does not have a maritime boundary in the area around PBP".⁶⁰⁴ This conclusion is carefully crafted by Malaysia in the negative form so as not to allege that those third party maps actually recognise that she, herself, has a maritime boundary in the area around Pedra Branca. Indeed they do not (see Section IV of this Chapter). Singapore will show that the "perception of third states" is clearly that Pedra Branca belongs to Singapore, not to Malaysia. This is also clearly demonstrated by third States' attitudes confirming their belief that Pedra Branca is under Singapore's sovereignty through specific actions. This perception is also shared by private parties who, at one time or another, had been involved in activities in the area (see Section III of this Chapter).

⁶⁰³ See paras. 5.22-5.23 *above* (which answer Sections A and B of MCM Chapter 10, relating to Singapore's and Malaysia's delimitation practice); and paras. 6.70-6.80 *above* (which answer Section D of MCM Chapter 10, relating to Singapore's reliance on certain Malaysian maps).

⁶⁰⁴ MCM p. 264, para. 557; *see also* MCM pp. 267-268, para. 569.

8.3 However, by way of introduction, it is appropriate to state the legal significance of recognition by third parties where title to territory is concerned (see Section II of this Chapter).

Section II. The Legal Significance of the Attitude of Third States

8.4 There can be no doubt that third States' behaviour cannot create a territorial title: "there is no evidence from practice to suggest that recognition by third States can by itself operate to create a title to territory not in possession".⁶⁰⁵ Singapore does not base her title over Pedra Branca on recognition by third States: her sovereignty over the island is rooted in her taking of possession in 1847-1851 and her "peaceful and continuous display of State authority over the island"⁶⁰⁶ since then.

8.5 Nonetheless, the attitude and recognition of third States can provide important evidence of title, especially in the case of a State that is already in possession. As Sir Robert Jennings put it:

"... in a context of effective possession [*as is the case here*] recognition of a situation by third States can be a mode of consolidation of title. It may, so to speak, assist and accelerate a process for which the condition *sine qua non* is an existing effective possession".⁶⁰⁵

Professor Joe Verhoeven's position is that the "*tolérance*" of the international community "*consolide l'effectivité, et, par là, la validité, d'une occupation*".⁶⁰⁷ As explained by Professor Ian Brownlie, as far as title to territory is concerned, "[a] category of evidence recognized by professional international lawyers and

⁶⁰⁵ Jennings R., *The Acquisition of Territory in International Law* (1963), at p. 41.

⁶⁰⁶ See *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 839.

⁶⁰⁷ *La reconnaissance internationale dans la pratique contemporaine – Les relations publiques internationales* (1975), at p. 271. Singapore's translation of this quotation is that "[toleration]... consolidates the effectiveness and therefore, the validity, of occupation".

also by international tribunals is that of ‘general repute’.”⁶⁰⁸ To use the words of Judge Levi Carneiro:

“... such evidence is not always decisive in the settlement of legal questions relating to territorial sovereignty. It may however constitute proof of the fact that the occupation or exercise of sovereignty was well known.”⁶⁰⁹

This is precisely the situation in the present case.

8.6 International arbitral tribunals have, on several occasions, relied on recognition by third parties and general knowledge or repute in order to reconfirm a State’s legal title or position otherwise established. In the *Eritrea/Yemen* case the Arbitral Tribunal deemed it relevant to refer to a 1989 meeting at which Yemen had offered to assume responsibility for certain lights situated on islands in the Red Sea which were disputed between the parties. As the Tribunal observed, that meeting did not address matters of sovereignty at all. Nonetheless, it found that the Conference’s decision to accept the Yemeni offer “does reflect a confidence and expectation of the member governments of the conference of a continued Yemeni presence on these lighthouse islands”. The Tribunal added that “[r]epute is also an important ingredient for the consolidation of title”.⁶¹⁰ Similarly, the Tribunal noted that several maps issued by third parties which “cannot be used as indicative of legal title”, constitute “nonetheless ‘important evidence of general opinion or repute’”.⁶¹¹

8.7 The Permanent Court too attributed considerable probative value to third party recognition. In the *Eastern Greenland* case, it paid attention to bilateral

⁶⁰⁸ “International Law at the Fiftieth Anniversary of the United Nations – General Course on Public International Law”, 255 *Recueil des Cours* 9 (1995), at p. 163.

⁶⁰⁹ *Minquiers and Ecrehos (United Kingdom v. France)*, *supra* note 186, *Individual Opinion* of Levi Carneiro, p. 85, at p. 105.

⁶¹⁰ *Eritrea/Yemen Arbitration*, *supra* note 73, at paras. 515-516.

⁶¹¹ *Ibid*, at para. 381.

treaties concluded between Denmark and third parties which contained clauses excluding their application to Greenland. The Court considered that:

“[t]o the extent that these treaties *constitute evidence of recognition of her sovereignty* over Greenland in general, Denmark is entitled to rely upon them”.⁶¹² [emphasis added]

8.8 The present Court has also relied on general repute in order to reconfirm a legal title over a given territory. In *Qatar/Bahrain*, the Court found substantial evidence in the views expressed by the United Kingdom and the Ottoman Empire – both being third parties to the dispute – concerning the factual situation prevailing in the area it had to rule upon. It found that:

“[i]n the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913”.⁶¹³

8.9 General knowledge as a means of proof of the existence of a given situation is not limited to territorial disputes, as has been accepted by the Court’s Judgment in the *Fisheries* case between the United Kingdom and Norway. In that case, the Court considered:

“*The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom*”.⁶¹⁴ [emphasis added]

⁶¹² See *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, Judgment (1933) P.C.I.J. Reports, Ser. A/B, No. 53, at p. 52.

⁶¹³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 Mar 2001, at p. 68, para. 89.

⁶¹⁴ *Fisheries (United Kingdom v. Norway)*, *supra* note 548, at p. 139.

8.10 Such public knowledge or repute does not necessarily have to be expressed by *States*. The perception of a given situation by private persons can also have some probative value. As Sir Gerald Fitzmaurice noted:

“Both sides in the *Minquiers* case adduced evidence tending to show what was the view taken on sovereignty by what might be called *non-official* but professional opinion – geographers, scientists, publishers of standard atlases, well-known authors, the evidence of maps, &c. Such considerations can never be conclusive. But they furnish *important evidence of general opinion or repute* as to the existence of a certain state of fact, and *pro tanto*, therefore, may support the conclusion that the state of fact does actually exist”.⁶¹⁵ [emphasis added]

8.11 The legal principles discussed in the foregoing paragraphs have important implications for the present case:

- (a) Malaysia, which is not in possession of Pedra Branca, cannot avail herself of any kind of recognition by third States;
- (b) on the contrary, Singapore, which has been in possession of the island for more than 130 years before the first Malaysian claim, *can* avail herself of the general toleration of the international community as a confirmation of her well-established title;
- (c) moreover, specific recognition by a number of States also confirms Singapore’s well-established title.

Section III. The Perception of Third Parties Confirming Singapore’s Sovereignty over Pedra Branca

8.12 There exist several clear episodes showing that third States expressly recognise Singapore’s sovereignty over the island. One of them is of particular

⁶¹⁵ Fitzmaurice G., *The Law and Procedure of the International Court of Justice* (Vol. 1, 1986), at p. 315. See also Fitzmaurice G., “*The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II*” 32 Brit. Yr. Bk. Int’l L. 20 (1955-1956), at pp. 75-76.

importance: that of the Netherlands, made as early as 1850 (see Subsection A below). Another episode demonstrating the “perception” that Pedra Branca was actually under Singapore’s sovereignty involves the Tripartite Technical Experts Group Meeting in May 1983, with representatives from Malaysia, Indonesia and Singapore (see Subsection B below). Moreover, on several occasions, third parties asked for permission from Singapore to carry out activities on the island or in its surrounding waters (see Subsection C below). Most recently, the Philippines clearly recognised Singapore’s sovereignty over Pedra Branca (see Subsection D below).

A. THE DUTCH RECOGNITION OF BRITISH SOVEREIGNTY IN 1850

8.13 As noted earlier in the present Reply,⁶¹⁶ the Dutch General Secretary in Batavia expressly acknowledged that Pedra Branca was “British territory” (*Britsch grondgebied*). Given the far reaching importance of this recognition, the full text of the letter must be recalled:

“As commissioned, I have the honour of informing Your Excellency that the Government has found no grounds for granting gratuities to the commanders of the cruisers stationed at Riau, as proposed in your despatch of 1 November 1850, number 649, on account of their shown dedication in patrolling the waterway between Riau and Singapore, lending assistance to the construction of a lighthouse *at Pedra Branca on British territory*. And they deserve it so much the less because the cruiser crews have failed to perform their actual duties which is to cruise against pirates whose brutalities have been repeatedly complained of in the vicinity of Lingga.”⁶¹⁷ [emphasis added]

8.14 With this letter, the Netherlands unequivocally recognised British sovereignty over Pedra Branca in 1850, i.e., just months after the Horsburgh Lighthouse foundation stone ceremony (during which Pedra Branca was

⁶¹⁶ See para. 2.41 *et seq* above.

⁶¹⁷ Letter from C. Visscher (General Secretary, Netherlands East Indies) to Dutch Resident in Riau dated 27 Nov 1850, attached to this Reply as Annex 8 (English translation provided by Singapore). For the background to this letter and the actual Dutch text, *see* note 55 above.

described in a solemn, public ceremony as being a dependency of Singapore). Moreover, given the presence of the Netherlands as a colonial power in the region and her political and economic interests, particularly in the area of the Straits of Singapore, this express recognition of British sovereignty over the island reveals the perception of the state of facts and law by a particularly well-informed and interested State.

8.15 Furthermore, the 1850 letter contradicts the Malaysian interpretation of the 1824 Treaty that “all islands and other maritime features in the Strait of Singapore”, i.e., including Pedra Branca, were Johor’s possessions. As has been demonstrated at length by Singapore, the 1824 Anglo-Dutch Treaty did not purport to allocate territories between the two Sultans under the respective protection of the United Kingdom and the Kingdom of the Netherlands. It was only aimed at determining the respective spheres of influence as between the two powers. The entire Strait of Singapore was left undivided and consequently Pedra Branca was never attributed, or recognised as belonging, to Johor.⁶¹⁸ The Dutch 1850 letter confirms this interpretation by acknowledging that the island was under *British* sovereignty.

B. THE 1983 TRIPARTITE TECHNICAL EXPERTS GROUP MEETING

8.16 In her Memorial, Singapore has already referred to the Tripartite Technical Experts Group Meeting that was convened in May 1983 involving expert representatives of Singapore, Malaysia and Indonesia. During the meeting, the experts were informed that two wrecks had been identified in the

⁶¹⁸ See SCM pp. 30-31, paras. 3.22-3.24.

vicinity of Horsburgh Lighthouse and that Singapore had issued Notices to Mariners notifying the position of the wrecks.⁶¹⁹

8.17 Malaysia now argues that the salient point that emerged from this meeting was that the focus was on issues of maritime safety regardless of issues of sovereignty.⁶²⁰ It is true that the meeting did not discuss issues of sovereignty, but this is not the point that Singapore wishes to make.

8.18 What emerges from this episode is that, as a matter of general repute, the Parties assumed that Singapore had jurisdiction to deal with matters of maritime safety falling within Pedra Branca's territorial waters. In this regard, the 1983 Tripartite Meeting resembled the 1989 London Conference on Lighthouses referred to by the Arbitral Tribunal in the *Eritrea/Yemen* case, during which Yemen had offered to assume responsibility for certain lights situated on islands in the Red Sea. The absence of any discussion of sovereignty at the 1989 London Conference did not prevent the Tribunal from finding, in the decision of that Conference, an expression of "confidence and expectation" of the participants about the "continued Yemeni presence on these lighthouse islands".⁶²¹

8.19 The Tripartite Meeting similarly reflected the confidence and expectation of the participants that Singapore was best placed to deal with wrecks found in the vicinity of Pedra Branca and to issue Notices to Mariners. As to the latter, while such notices may primarily be concerned with safety of navigation, the Tribunal in the *Eritrea/Yemen* case noted that, "[t]he issuances

⁶¹⁹ See Report made by Singapore to Twelfth Tripartite Technical Experts Group Meeting on Safety of Navigation in the Straits of Malacca and Singapore dated 5-6 May 1983 (SM Vol. 7, Annex 156).

⁶²⁰ MCM p. 215, para. 453.

⁶²¹ *Eritrea/Yemen Arbitration*, *supra* note 73, at paras. 513-516. The 1989 London Conference is also discussed at para. 8.6 *above*.

of such notices, while not dispositive of the title, nevertheless supposes a presence and knowledge of location”.⁶²² Because of Singapore’s long-standing presence on Pedra Branca, it is not surprising that Singapore was, and is, in the best position to know of incidents that occur in Pedra Branca’s territorial waters. This was clearly recognised by the participants at the meeting.

C. PERMISSIONS GRANTED BY SINGAPORE TO THIRD PARTIES

8.20 In her Counter-Memorial, Malaysia also tries to minimise the significance of two instances where Singapore granted permission, to nationals of third States, to carry out research on Pedra Branca and to conduct salvage operations within its territorial waters.

8.21 The first example involved an application received by Singapore from a member of the American Piscatorial Society to land on Pedra Branca in order to study the migratory habits of fish. Given the nature of Malaysia’s criticism that most of Singapore’s conduct is only related to the lighthouse, the request is significant because it indicated that the intention was to stay “completely clear of the lighthouse” by using other parts of the island. The Singapore Light Dues Board granted the application.⁶²³

8.22 Malaysia wonders to whom the application might have been sent if not to the Singapore authority responsible for the lighthouse.⁶²⁴ The answer is that it should have been sent to Malaysia if the applicant had any notion that Malaysia was the real sovereign, *quod non*. The mere fact that the application was directed to Singapore’s authorities demonstrates that the applicant was

⁶²² *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 283.

⁶²³ See Letter from the American Piscatorial Society to the Light Dues Board, Singapore dated 17 June 1972 (SM Vol. 6, Annex 117). This was discussed in SM p. 111, para. 6.59. See also para. 4.148 *above*.

⁶²⁴ MCM p. 201, para. 415.

convinced as a matter of general repute that Pedra Branca was under Singapore's sovereignty. Malaysia also comments on the private nature of the applicant. That may be true, but the fact that the application was directed to Singapore, and that it was a government agency of Singapore that granted the request, shows the public nature of the matter. Singapore acted on the basis that she possessed sovereignty over the island and the applicant acted likewise in order to respect fully this sovereignty.⁶²⁵

8.23 Malaysia goes to greater lengths in attempting to dismiss the relevance of an application that a British firm, Regis Ltd, submitted to the Hydrographic Department of the Port of Singapore to undertake a sonar scan of undersea areas lying 6 to 10 miles northeast of Pedra Branca in connection with salvage operations. After obtaining details of the proposal, the Singapore Port Authority granted its permission subject to a number of provisos, including that a Singapore official accompany the survey.⁶²⁶

8.24 Malaysia's Counter-Memorial again points to the private nature of Regis Ltd.⁶²⁷ But, once more, the significance of the event lies not in the private capacity of the applicant, but in Singapore's involvement, at the governmental level, of granting permission to survey areas in the vicinity of Pedra Branca.⁶²⁸

⁶²⁵ See para. 8.10 *above*.

⁶²⁶ See SM pp. 113-114, paras. 6.66-6.67. See also Letter from Regis Ltd. to Hydrographic Department, Port of Singapore Authority, dated 25 May 1981 (SM Vol. 7, Annex 151); Letter from Regis Ltd to Hydrographic Department, Port of Singapore Authority, dated 18 June 1981 (SM Vol. 7, Annex 152); and Letter from Regis Ltd. to Port Master, Port of Singapore Authority dated 1 July 1981 (SM Vol. 7, Annex 153).

⁶²⁷ MCM p. 210, para. 438.

⁶²⁸ Malaysia also speculates that Regis Ltd may have involved the Singapore authorities merely out of concern that the survey may impede the operation of the lighthouse (MCM p. 210, para. 439). This theory is ill-founded. There was nothing that an underwater sonar survey taking place 6 to 10 miles from Pedra Branca would have done to even remotely affect the operation of the lighthouse.

8.25 Malaysia also alleges that, at the time Singapore, while having previously signalled her intention to extend her territorial sea to 12 miles, continued to apply a three-mile territorial sea limit. According to Malaysia, this illustrates the unreliability of a private party's appreciation of the extent of territorial waters or matters of sovereignty.⁶²⁹ The fact of the matter, which Malaysia seeks to disregard, is that Singapore considered herself competent to issue the approval for the project to proceed. Neither Regis nor Singapore raised the slightest concern that the survey might be taking place within Malaysian territorial waters. Regis clearly considered that, as a matter of general repute, Pedra Branca belonged to Singapore. Although Malaysia casts Singapore's permission as a self-serving action undertaken after the dispute had emerged, this contention also misses the mark. The proposal in question was not initiated by Singapore in order to enhance her legal position. The request came from Regis. Moreover, the actions Singapore took had nothing to do with the lighthouse. They were concerned with activities proposed to take place within Pedra Branca's territorial waters. Singapore did no more than act in the same sovereign manner she previously had with respect to other activities involving Pedra Branca.

8.26 These requests for permission to land and stay at Pedra Branca or to undertake any kind of hydrographic research in its territorial waters are highly relevant as evidence of general repute that Pedra Branca falls under Singapore's sovereignty. Malaysia tries to play down the significance of this evidence by alleging that it relates to only "one foreign party" (i.e., Regis Ltd) and not "foreign parties".⁶³⁰ However this is incorrect. As has been shown, requests for permission were addressed to Singapore's authorities by British and American nationals, and similar requests were submitted and complied

⁶²⁹ MCM p. 211, para. 441. Malaysia is incorrect in her assertions. By this time, Singapore had already accepted the 12-mile territorial sea – see SM p. 188, para. 9.29(c).

⁶³⁰ MCM p. 209, para. 437.

with in the name of Malaysian, Indonesian and Japanese nationals participating in the 1974 joint survey team.⁶³¹

D. RECOGNITION OF SINGAPORE'S SOVEREIGNTY OVER PEDRA BRANCA BY THE PHILIPPINES

8.27 It is also significant that following the collision between *Everise Glory* and *Uni Concord* on 4 June 2005 in Pedra Branca waters,⁶³² which resulted in the death of a Filipino crew member, the Department of Foreign Affairs of the Philippines issued three press releases which expressly describe the collision as having occurred “at sea off Pedra Branca, Singapore”, “off the Singapore coast” and “off Pedra Branca, Singapore”.⁶³³ As with the recognition of Singapore sovereignty by the Netherlands 155 years ago,⁶³⁴ this recognition deserves special notice since it emanates from a State neighbouring the area and which is particularly well-informed of the situation.

Section IV. Third States' Maps as Evidence of General Repute

8.28 In Chapter 10, Section C, of her Counter-Memorial, Malaysia deploys a certain number of third-State maps as evidence of third-State perception that “Singapore does not have a maritime boundary in the area around PBP”.⁶³⁵ This, according to Malaysia, has the effect of placing the island within

⁶³¹ See paras. 4.144-4.146 above. See also, para. 6.5, *et seq.*

⁶³² On this incident, see para. 4.177 above.

⁶³³ Philippines Department of Foreign Affairs Press Releases SFA-AGR-389-05 dated 17 June 2005, SFA-AGR-405-05 dated 21 June 2005 and SFA-AGR-423-05 dated 24 June 2005, attached to this Reply as Annex 61. The relevant diplomatic correspondence in respect of this matter is attached as Annexes 59 to 66 to this Reply.

⁶³⁴ See paras. 8.13-8.15 above.

⁶³⁵ MCM p. 264, para. 557.

Malaysia's waters, and would thus represent an attribution of sovereignty over Pedra Branca to Malaysia.

8.29 Such an ambitious conclusion is pure speculation and finds no support either in the maps themselves or in the factual record. *First of all*, as Malaysia herself recognises, none of these maps “show any other boundary lines in the area of PBP”.⁶³⁶ *Secondly*, the lines shown on these maps do not recognise Pedra Branca as part of Malaysia or her predecessors and thus cannot be relied upon as informed opinion in Malaysia's favour. Moreover, as noted by the Arbitral Tribunal in *Eritrea/Yemen*, the mere existence of dotted lines on maps – without any specific indication as to their provenance or meaning – cannot form the basis for any conclusion as to their *raison d'être*. The Tribunal in that case rejected Eritrea's characterisation of certain maps for the following reason:

“... the Tribunal is unwilling, without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labelling”.⁶³⁷

8.30 Thus, even when dotted lines *do appear* on maps, international tribunals are extremely cautious in assessing the relevance of cartographic evidence as determinative of legal title. Judge Huber put this very clearly in the *Island of Palmas Award*:

“[O]nly with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas), clearly marked as such, must be rejected forthwith...”.⁶³⁸

⁶³⁶ MCM pp. 264-265, para. 559.

⁶³⁷ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 382.

⁶³⁸ *See Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 852.

Hence, *a fortiori*, attribution of sovereignty cannot be established from *the absence* of a line on a map.

8.31 In any event, the maps deployed by Malaysia in Section C of Chapter 10 of her Counter-Memorial cannot be properly characterised as third-State perceptions that legal title over Pedra Branca rested with Malaysia or her predecessors, as explained below.

8.32 Malaysia begins by giving a list of nine maps in her Counter-Memorial,⁶³⁹ claiming that these maps “clearly place PBP within the territorial waters of Malaysia or its predecessors”.⁶³⁹ A proper study of these maps will show that they do nothing of the kind. An illustrative example is the very first map on that list, which is misleadingly labelled as a “1936 British Admiralty Chart of the Singapore Strait”, with a footnote referring to Map 25 of Malaysia’s Map Atlas. In reality, the original 1936 British Admiralty Chart shows no lines at all. Map 25 is a copy of the 1936 Admiralty Chart *on which lines were subsequently added* – apparently by hand – by the Malaysian Navy in 1968 to illustrate the contents of a confidential letter to which the chart was attached.⁶⁴⁰

8.33 More importantly, there is further evidence in the record contradicting and outweighing the conclusions which Malaysia wishes to draw from this map. In 1952, the Singapore Chief Surveyor expressed the opinion that Singapore was entitled to a three-mile territorial sea around Pedra Branca.⁶⁴¹ In

⁶³⁹ MCM p. 264, para. 558.

⁶⁴⁰ For a copy of the 1936 British Admiralty Chart *without* the manuscript lines subsequently added by the Malaysian Navy, *see* SCM Map Atlas, Map No. 13. The same chart is enclosed in the back pocket of the Malaysian Counter-Memorial without the hand-drawn annotations of the Malaysian Navy.

⁶⁴¹ *See* Letter from Master Attendant, Singapore to Colonial Secretary, Singapore dated 6 Feb 1953 (SM Vol. 6, Annex 91).

1958, the Singapore Master Attendant defined Pedra Branca as “Colony territory”.⁶⁴² In 1967, one of the officials of Singapore’s Marine Department, on behalf of the Director of Marine J.A.L. Pavitt, stated as follows:

“... in addition to the waters immediately surrounding Singapore, I have been advised that the waters within 3 miles of Horsburgh lighthouse (at the eastern entrance of Singapore Strait) may be considered to be Singapore territorial waters”⁶⁴³.

In 1974, the Singapore Director of Marine referred to “our island territory at Horsburgh Lighthouse and the territorial sea which it will be entitled to.”⁶⁴⁴

8.34 Other maps on the same list are equally inconsequential and do not provide reliable evidence of third States’ views on the matter. These maps have been dealt with comprehensively in Singapore’s Counter-Memorial.⁶⁴⁵ The same observations also apply to Maps 7 and 8 in the Maps Section of Malaysia’s Counter Memorial.⁶⁴⁶

8.35 Malaysia next relies on Maps 9 to 17 of her Counter-Memorial in support of her argument that “there was no perception on the part of the United States Government during that period [1945-2000] that PBP was part of Singapore”.⁶⁴⁷ This argument is misguided. As pointed out in Singapore’s

⁶⁴² Letter from Rickard R.L. (Master Attendant, Singapore) to Permanent Secretary of the Ministry of Commerce & Industry dated 15 Feb 1958, attached to this Reply as Annex 24. This letter is quoted more fully in para. 6.33 *above*.

⁶⁴³ *See* Letter from Brown D.T. on behalf of Director of Marine, Singapore to Permanent Secretary, Ministry of Foreign Affairs dated 14 Sep 1967 (SCM Vol. 3, Annex 42).

⁶⁴⁴ *See* Letter from Lai V. (Acting Deputy Director, Port of Singapore Authority) and Goh C.K. (Director of Marine) to Permanent Secretary, Ministry of Communications dated 20 Nov 1974, attached to this Reply as Annex 44.

⁶⁴⁵ SCM pp. 227-228, paras. 9.26-9.28; pp. 232-233, para. 9.32; and pp. 234-235, paras. 9.35-9.36.

⁶⁴⁶ These are referred to in MCM pp. 265-266, paras. 561-562.

⁶⁴⁷ *See* MCM p. 267, para. 568.

Counter-Memorial, the United States' view on the matter is better provided by the database on toponyms issued by the U.S. Board on Geographic Names which has – since 1970 – shown Pedra Branca as belonging to Singapore.⁶⁴⁸ In any event, *none* of the maps attributes Pedra Branca to Malaysia.⁶⁴⁹

8.36 Ultimately, the maps produced by Malaysia in Chapter 10 of her Counter-Memorial as opinions of third States regarding the territorial status of Pedra Branca have no relevance. In the present case, title over Pedra Branca rests with Singapore by virtue of the title acquired in 1847-1851 and her open, continued and unchallenged exercise of State authority thereafter. Furthermore, the record contains significant evidence that third parties have recognised that Pedra Branca belonged to Singapore. The following deserve special mention:

- (a) the Dutch recognition of Pedra Branca as “British territory” which took place in 1850;⁶⁵⁰
- (b) the U.S. Board on Geographic Names Gazetteer No. 10 (1970), which shows Pedra Branca as appertaining to Singapore;⁶⁵¹
- (c) the toponym database made available by the U.S. Board on Geographic Names which identifies Pedra Branca as a geographic feature belonging to Singapore.⁶⁵²

⁶⁴⁸ See SCM pp. 232-233, para. 9.32; Extracts from Gazetteer No. 10, Malaysia, Singapore and Brunei – Official Standard Names approved by the United States Board on Geographic Names (2nd ed., 1970) (SCM Vol. 3, Annex 46); Singapore and Malaysian Geographic Names downloaded from the GEOnet Names Server maintained by the United States Board on Geographic Names (extracts) (15 July 2004) (SCM Vol. 3, Annex 57).

⁶⁴⁹ The Court's attention is also drawn to SCM p. 227, para. 9.26, note 577, where Map 9 of Malaysia's Counter-Memorial has already been dealt with.

⁶⁵⁰ See paras. 8.13-8.15 *above*. See also Annex 8 to this Reply.

⁶⁵¹ See Extracts from Gazetteer No. 10, Malaysia, Singapore and Brunei – Official Standard Names approved by the United States Board on Geographic Names (2nd ed., 1970) (SCM Vol. 3, Annex 46).

8.37 Before ending the discussion on third-State maps, it is relevant to note that when the map evidence is viewed as a whole, what is particularly significant in the present case is Malaysia's own perception as reflected in her *official* maps issued before the dispute emerged. These are the only maps that truly matter. None of them attribute to Malaysia the island which she now claims in these proceedings. On the contrary, she has published no fewer than six official maps, over a period of 14 years, which attributed Pedra Branca to Singapore.

Section V. Conclusions

8.38 It will be readily appreciated that third States have shown, through a variety of acts, a clear perception that Pedra Branca was under Singapore's sovereignty, a perception shared by the public as shown by the behaviour of private persons who had to deal with various matters in the area, including matters that are not connected with the lighthouse. In this respect it is significant that the Netherlands and the Philippines – States with special interests in the area – recognised Pedra Branca as belonging to Great Britain and Singapore, as early as 1850 and as recently as 2005, respectively. In contrast, there is a total absence of any corresponding third party view that Pedra Branca falls under Malaysia's sovereignty.

⁶⁵² See Singapore and Malaysian Geographic Names downloaded from the GEOnet Names Server maintained by the United States Board on Geographic Names (extracts) (15 July 2004) (SCM Vol. 3, Annex 57).

CHAPTER IX THE MAP EVIDENCE SUPPORTS SINGAPORE'S TITLE

Section I. Introduction

9.1 It is necessary at this stage to review the cartographic material introduced by the Parties to assess its overall contribution in the present case. In Singapore's view, maps have a subsidiary value and can be used as primary evidence only in exceptional circumstances. As noted by Sir Travers Twiss in the *Venezuela-British Guyana Boundary* arbitration (1897), maps "are but pictorial representation of supposed territorial limits, the evidence of which must be sought for elsewhere."⁶⁵³ Sir Travers Twiss' statement refers to boundary delimitation cases, but it applies equally to the determination of title to territory. This is also consistent with Judge Max Huber's observation in the *Island of Palmas* case, cited and quoted in paragraph 8.30 above.

9.2 In the present dispute, the evidence of title resides in the historical facts, not the maps. Title over Pedra Branca rests with Singapore by virtue of the taking of possession by the British Crown in 1847-1851. That title was subsequently confirmed by Singapore's open, continued and unchallenged exercise of State authority on the island and within its territorial waters. To the extent that maps should be taken into account in this case, it is when – to paraphrase the Permanent Court's Advisory Opinion in the *Polish-Czechoslovakian Frontier (Question of Jaworzina)* case – they confirm the conclusions drawn from the documentary evidence and from a legal analysis of them, and are not contradicted by the documents.⁶⁵⁴

⁶⁵³ Cited in Sandifer D. V., *Evidence before International Tribunals* (1975), at p. 229, and in Kamto M., "Le matériau cartographique dans les contentieux frontaliers et territoriaux internationaux", *Liber Amicorum Judge Mohammed Bedjaoui* (1999), at p. 386.

⁶⁵⁴ See *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Advisory Opinion (1923) P.C.I.J. Reports, Ser. B, No. 8, at p. 33.

9.3 It is in this context that the official maps issued by Malaysian authorities depicting Pedra Branca as appertaining to Singapore have primary importance. These maps have particular probative value not only because they contradict Malaysia's present claim, but also because they confirm Singapore's sovereignty over Pedra Branca in a manner that is consistent with a legal analysis of the documentary record. As noted by Judge Huber in the *Island of Palmas* case, "official or semi-official maps... would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued."⁶⁵⁵

9.4 It should be observed that Malaysia's position with respect to maps has evolved from her Memorial to her Counter-Memorial. Indeed, when it comes to dealing with the cartographic evidence, it appears that Malaysia cannot make her mind up.

9.5 At first, Malaysia devoted a whole Chapter of her Memorial to a review of the map evidence and filed an Atlas containing 48 maps of the region.⁶⁵⁶ Evidently, Malaysia believed then that the map evidence had an important role to play in the case. The arguments advanced in Malaysia's Memorial included the following:

- (a) early maps of the area are said to have depicted a "close connection" between Pedra Branca, the Romania group and the coast of Johor;⁶⁵⁷

⁶⁵⁵ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 852.

⁶⁵⁶ See MM pp. 135-152, paras. 301-327; and Malaysia's Map Atlas.

⁶⁵⁷ MM pp. 137-138, paras. 307-308.

- (b) later maps allegedly show Pedra Branca as part of the “Malay dominions” or, in any event, not as appertaining to Singapore;⁶⁵⁸ and
- (c) Singapore never published any map which depicted Pedra Branca as belonging to Singapore, at least not until after the dispute arose.⁶⁵⁹

9.6 With Malaysia’s Counter-Memorial, the map evidence appears to have taken a back seat. Rather than including a specific chapter devoted to maps, Chapter 10 of her Malaysian Counter-Memorial contains two sections which have a bearing on this subject: Section C, entitled “The position of third States” discusses a certain number of third-State maps;⁶⁶⁰ and Section D, entitled “Singapore’s reliance on certain Malaysian maps”, attempts to rebut Singapore’s reliance on the official Malaysian maps as admissions against interest.⁶⁶¹ There is no Atlas, but a “Maps Section” at the end of the volume containing 17 maps reproduced in A4 format.

9.7 In the sections below, Singapore will discuss the cartographic evidence as a whole against the backdrop of the positions advanced by the Parties. For present purposes, the map evidence can be conveniently grouped under five general headings:

- (a) the early cartography (from the 17th to the 19th Century) (see Section II below);
- (b) maps showing ill-defined lines at sea (see Section III below);

⁶⁵⁸ MM pp. 140-143, paras. 311-314.

⁶⁵⁹ MM p. 150, paras. 323-324.

⁶⁶⁰ See Chapter VIII *above*, where this section of MCM is rebutted.

⁶⁶¹ See MCM pp. 264-270, paras. 557-575.

- (c) official maps issued by Malaysian Governmental authorities which constitute admissions against interest (see Section IV below);
- (d) other maps issued by Johor/Malaysian authorities (see Section V below); and
- (e) official maps issued by Singapore authorities (see Section VI below).

Section II. The Early Cartography

9.8 None of the six maps dating from 1620 to 1826 reproduced by Malaysia with her Memorial Atlas attributes Pedra Branca, Middle Rocks or South Ledge to any particular sovereign.⁶⁶² Furthermore, the accuracy of such early cartography is suspect, and the colour-coding appearing on some of them is either unclear or unfavourable to Malaysia in as much as Pedra Branca is depicted in a different colour from Johor.

9.9 As to the alleged “close connection” between Pedra Branca and Johor which, according to Malaysia, these maps portray, Malaysia provides no explanation why the location of Pedra Branca shown thereon should be regarded as any kind of proof of attribution of Pedra Branca to Johor. As Singapore has explained, to the extent Pedra Branca is depicted at all on such maps, it is as a separate feature unconnected to any mainland coast. Even assuming, *quod non*, that these maps have any significance for present purposes, they are contradicted by a number of other maps published between 1595 and 1851 (reproduced by Singapore with her Counter-Memorial) which

⁶⁶² See Maps 1-6 of Malaysia’s Map Atlas.

depict Pedra Branca as an isolated feature at a considerable distance from the mainland.⁶⁶³

9.10 With respect to maps produced during the early 19th Century, these are mainly not pictorial representations of political attributions, but rather consist of survey maps or illustrations, with varying degrees of accuracy, of geographical features to aid navigation. Two of these maps warrant specific mention. They are:

- (a) the 1842 Map of the Dutch East Indies by van Hinderstein. As discussed at Chapter II above,⁶⁶⁴ this map shows clearly that the Dutch authorities never considered Pedra Branca as belonging to the old Johor-Riau-Lingga Sultanate;
- (b) the 1887 Map of the Territories and Dependencies of Johore presented by the Sultan of Johor to the Government of South Australia.⁶⁶⁵ This map is particularly significant because it provides the first pictorial representation of what Johor's officials considered to be the extent of the territories of the State of Johor. Pedra Branca is not depicted at all, thus showing that it was not perceived at the time as forming part of Johor. Significantly, this map was published *after* the Ord Award of 1868 and one year

⁶⁶³ SCM Map Atlas, Maps No. 1-10.

⁶⁶⁴ See paras. 2.34-2.40 *above*. This map was reproduced by Malaysia as Map 7 of Malaysia's Map Atlas and Map 1 in the Maps Section of Malaysia's Counter-Memorial. An enlargement of the relevant portion of the map is found at **Insert 5** *opposite* p. 22 *above*.

⁶⁶⁵ SCM Map Atlas, Map No. 8.

after Sultan Abu Bakar wrote to the British Colonial Office to claim certain offshore islands.⁶⁶⁶

9.11 In conclusion, the early cartography does not recognise any particular connection between Pedra Branca and Johor. In fact, the most important conclusion that can be drawn from these ancient maps is that not a single one of them attributes Pedra Branca to the old Johor-Riau-Lingga Sultanate, to the State of Johor or to any political entity.

Section III. Maps Showing Ill-Defined Lines at Sea

9.12 Malaysia also relies on a number of maps showing lines in the sea dividing British Malaya/Malaysia-Singapore from Netherlands East Indies/Indonesia.⁶⁶⁷ None of these maps attribute Pedra Branca to the Federation of Malaya or Malaysia. As noted in Singapore's Counter-Memorial,⁶⁶⁸ these maps contain no indication that the lines drawn on them purported to allocate territories between the different political units that were collectively referred to as British Malaya. Certainly, nothing in these maps indicate that the lines were drawn for the purpose of allocating territories as between Singapore and Johor. If anything, the express disclaimers appearing on most of these maps suggest precisely the opposite. Examples of such disclaimers include the following:

“The delineation of international boundaries on this map must not be considered authoritative.” (Map 28 of Malaysia's Atlas); or

“This map is not an authority for international boundaries.” (Map 35 of Malaysia's Atlas).

⁶⁶⁶ See SCM pp. 220-221, para. 9.15, discussing the map reproduced in SCM Map Atlas, Map No. 9 (*Map of the Territories and Dependencies of Johore*, by Dato Bintara Luar, presented by the Sultan of Johor to the Government of South Australia, 1887).

⁶⁶⁷ See Maps 27-29 and 35-36 in Malaysia's Map Atlas and Maps 7-15 in MCM pp. 286-297. See also Chapter VIII, Section IV *above*.

⁶⁶⁸ SCM pp. 227-228, para. 9.27.

9.13 In any event, even assuming that these maps have any relevance in the present case, their significance would be vastly overshadowed by the “admissions against interest” maps issued by Malaysia which expressly and unequivocally attribute Pedra Branca to Singapore.⁶⁶⁹

Section IV. The Official Maps Issued by Malaysian Governmental Authorities which Constitute Admissions Against Interest

9.14 In Chapter VI above, Singapore has already addressed the significance of the series of six official Malaysian maps, published over a period of 14 years from 1962 through 1975, i.e., before the critical date, which unequivocally attribute Pedra Branca to Singapore.⁶⁷⁰ When the totality of the almost 90 maps introduced in this case is reduced to their essentials, these six maps are the only maps possessing a genuine legal significance for purposes of assessing the sovereignty dispute over Pedra Branca.

9.15 Malaysia’s maps, published by her Director of National Mapping, clearly label Pedra Branca as belonging to Singapore. The country name “SINGAPORE” appears next to the island in exactly the same manner as other territory, which is undisputedly part of Singapore, is also labelled “SINGAPORE”.⁶⁷¹

9.16 In her Counter-Memorial, Malaysia asks, rhetorically, whether “it can really be supposed that the map-maker intended thereby to decide legal issues of the fate of territory and maritime zones by the (accurate) depiction of Horsburgh Lighthouse as owned by Singapore?”⁶⁷² This question misses the

⁶⁶⁹ See SCM p. 216, para. 9.4; and SM p. 158, paras. 7.47-7.50.

⁶⁷⁰ See paras. 6.70-6.80 *above*.

⁶⁷¹ See the annotation against the island “Pulau Tekong Besar”. See also, para. 6.77 *above*.

⁶⁷² MCM p. 269, para. 574.

point in two ways. *First*, Malaysia is wrong to claim that the map-maker was depicting ownership of the lighthouse. This point is canvassed exhaustively in paragraph 9.31 of the Singapore Counter-Memorial and in Chapter VI above. It can easily be verified by noting that, when it comes to Pulau Pisang, on which there is also a lighthouse owned by Singapore, that island *does not* carry the label “SINGAPORE” in any official Malaysian maps. Without a shadow of a doubt, the label “SINGAPORE” against Pedra Branca in these maps relates to the attribution of territory, not ownership of the lighthouse. *Secondly*, it is disingenuous of Malaysia to ask whether the map-maker intended to “decide legal issues of the fate of the territory”. Certainly, map-makers do not set out to decide legal issues. Nevertheless, maps can be probative as evidence of general repute or of opinions of informed persons. What the cartographer has done in this series of maps was to depict a well-recognised fact and an established state of affairs – namely, that Pedra Branca was Singapore’s territory. More importantly, these were maps published by the Director of National Mapping, Malaysia, and clearly represented the position of the Malaysian government.

Section V. Other Maps Issued by Johor/Malaysian Authorities

9.17 Malaysia then relies on a selection of maps published by Johor or by Malaysian authorities in support of the proposition that Pedra Branca was considered as part of Johor’s possessions. However, as Singapore has already shown, the dominions of the Temenggong of Johor did not extend to Pedra Branca.⁶⁷³ The mere fact that Pedra Branca is depicted on certain maps of Johor is not in itself proof of its appurtenance to Johor.

9.18 Moreover, a number of maps – which have been omitted from Malaysia’s selective assortment of Johor/Malaysian maps – do not depict Pedra

⁶⁷³ See SCM pp. 36-38, paras. 3.36-3.39; SCM Chapter IV; and in this Reply, Chapter III *above*.

Branca at all. The most notable examples are the 1887 Map of the Territories and Dependencies of Johore presented by the Sultan of Johor to the Government of South Australia discussed above,⁶⁷⁴ and the 1893 map of the Johor territory by Harry Lake, a cartographer in the Johor Government's service.⁶⁷⁵ It may be recalled that the latter map was published in 1894 in the Royal Geographic Society's Geographical Journal and met with the approval of the Secretary of the Sultan of Johor, who remarked that it "may be considered the map of the day."⁶⁷⁶ It should also be recalled that, from 1931 onwards, the maps attached to the Johor Annual Reports do not depict Pedra Branca at all, demonstrating Johor's official view that Pedra Branca was not part of the territory of Johor.⁶⁷⁷

9.19 Seen in the light of the express disclaimer of ownership by Johor in 1953, and the maps published by Malaysia in the 1960s and 1970s attributing Pedra Branca to Singapore, the maps referred to in the preceding paragraph make perfect sense and are clear evidence of the fact that none of the maps

⁶⁷⁴ SCM Map Atlas, Map No. 9 (*Map of the Territories and Dependencies of Johore*, by Dato Bintara Luar, presented by the Sultan of Johor to the Government of South Australia, 1887).

⁶⁷⁵ SCM Map Atlas, Map No. 10 (*Map of the Johore Territory*, by Harry Lake, 1893).

⁶⁷⁶ The Sultan's Secretary was Abdul Rahman bin Andak. He was the Sultan's nephew and one of his most trusted advisors. He accompanied the Sultan to London to negotiate the 1885 Treaty. In 1886, he was in London representing Sultan Abu Bakar in pursuing the Sultan's claim to certain islands (*see* SCM Vol. 2, Annex 21). According to historian Carl Trocki:

"The archetype of the new Malay elite was Enche Abdul Rahman bin Andak, the Sultan's personal secretary in his last years. He was also given the title of Dato Sri Amar di Raja, made Secretary to the Johore Government, and sat on the State Council. 'Abdul Rahman, a nephew of the Sultan, was a 'very clever' English-educated Malay who became the Sultan's private secretary... Cecil Smith [*i.e.*, *the Governor of the Straits Settlements from 1887 to 1893*] suspected that it was Abdul Rahman who drafted the Sultan of Johore's replies to communications from the Singapore authorities.' " – *see* Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), at p. 201, attached to this Reply as Annex 53, footnotes omitted.

⁶⁷⁷ *See* SCM Map Atlas, Maps No. 15-23.

submitted by Malaysia can be interpreted to support her claim that Pedra Branca was Johor territory.

Section VI. Official Maps Issued by Singapore Authorities

9.20 Malaysia argues that Singapore never published maps which showed Pedra Branca as belonging to Singapore, and reproduces certain maps in her Atlas in support of this contention.⁶⁷⁸ However, the maps in question are topographical or geological maps depicting the main island of Singapore and the islands in its immediate vicinity. They are not political maps, and, given their geographical coverage, the fact that they do not portray Pedra Branca is without any significance. For that matter, numerous maps published by Malaysia also did not depict Pedra Branca, *even though* their geographical coverage included the area in which Pedra Branca is located.

9.21 What is significant, on the other hand, is that none of Singapore's maps shows Pedra Branca as belonging to Malaysia, unlike the official Malaysian "admissions against interest" maps. Furthermore, the geographical facts shown on these maps do not contradict Singapore's claim in any way and, similarly, do not advance Malaysia's case in the slightest.

9.22 Singapore's position with respect to Pedra Branca is apparent from the consistent pattern of evidence, spanning one and a half centuries, showing the conviction by Britain first, and by Singapore subsequently, that title to Pedra Branca was vested in Britain/Singapore.

⁶⁷⁸ See MM p. 150, paras. 323-324; and Malaysia's Map Atlas, Maps 42, 43, and 45-48.

Section VII. Conclusion

9.23 In conclusion, maps are not, in and of themselves, capable of creating sovereign rights over territory other than in exceptional circumstances which are not present in this case. Nonetheless, certain maps do play an important role in this case because they show how the Parties themselves, and particularly Malaysia, viewed the sovereignty issue. In this category, the official maps issued by Malaysia over a 14-year time span showing Pedra Branca as Singapore territory are of obvious probative value – they demonstrate in a singularly convincing manner that Malaysia herself, prior to the critical date, regarded the island as belonging to Singapore. These maps are entirely consistent with the historic facts, and they confirm, in the same manner as Johor’s 1953 correspondence, that title to Pedra Branca lies with Singapore.

CHAPTER X MIDDLE ROCKS AND SOUTH LEDGE

10.1 In her Memorial, Singapore has made the very simple and obvious point that “sovereignty in respect of Middle Rocks and South Ledge goes together with sovereignty over Pedra Branca”.⁶⁷⁹ Her reasoning in support of this position is straightforward: the two features fall within Pedra Branca’s territorial waters, are not capable of independent appropriation and have been treated by the Parties in the same manner as Pedra Branca.⁶⁸⁰ In addition, Singapore has acted *à titre de souverain* on all of them and in the waters around them; Malaysia has not. In this regard, Singapore has noted that:

- (a) Middle Rocks comprises two clusters of rocks lying about 250 metres apart. These two clusters are islands in the legal sense of the word, but they are insignificant when compared to Pedra Branca – the western cluster lies only 0.9 metres above sea level while the eastern cluster lies merely 1.7 metres above sea level;
- (b) Middle Rocks, lying merely 0.6 nautical miles from Pedra Branca, constitutes part of a single rock formation with Pedra Branca, both standing on a single raised section of the seabed. Middle Rocks is clearly a dependency of Pedra Branca;
- (c) South Ledge is a low tide elevation, lying within the territorial sea generated by Pedra Branca and Middle Rocks. Sovereignty over South Ledge therefore goes hand in hand with sovereignty over Pedra Branca and Middle Rocks.

⁶⁷⁹ SM p. 180, para. 9.7.

⁶⁸⁰ SM pp. 179-198, paras. 9.1-9.52.

10.2 Malaysia’s Counter-Memorial makes no serious attempt at addressing the central arguments in Singapore’s Memorial. Instead, Chapter 4 of Malaysia’s Counter-Memorial is but a collection of self-serving affirmations without a semblance of factual or legal basis.

10.3 What is important is that Malaysia’s Counter-Memorial made a number of significant admissions which narrow the issues before the Court. Relevantly, Malaysia accepts that:

- (a) South Ledge is not an island. It is a low tide elevation lying 1.7 nautical miles from Middle Rocks and 2.2 nautical miles⁶⁸¹ from Pedra Branca,⁶⁸²
- (b) as a low tide elevation, “South Ledge would attach to Middle Rocks”,⁶⁸³ and
- (c) therefore, Middle Rocks and South Ledge may be considered part of a single group of maritime features.⁶⁸³

10.4 Since the Parties are in agreement about the position of South Ledge (i.e., that it forms part of a group with Middle Rocks), the only issue to be decided by the Court is whether the two clusters of Middle Rocks, together with Pedra Branca, form a group in the sense that “the fate of the principal part may involve the rest”⁶⁸⁴ or that they “share the same legal destiny”.⁶⁸⁵

⁶⁸¹ Actually, South Ledge lies 2.1 nautical miles from Pedra Branca. Malaysia’s pleadings give the distance erroneously as 2.2 nautical miles. However, nothing turns on this discrepancy. What is important for the purposes of this case is that South Ledge lies less than 3 nautical miles from Pedra Branca and Middle Rocks but more than 3 nautical miles from the Johor coast.

⁶⁸² MCM p. 81, para. 161.

⁶⁸³ MCM p. 82, para. 162.

⁶⁸⁴ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 855.

10.5 This Chapter will demonstrate that:

- (a) Pedra Branca and Middle Rocks form a group of islands; and
- (b) consequently, Pedra Branca, Middle Rocks and South Ledge form a single group of maritime features.

Section I. Pedra Branca and Middle Rocks Form a Single Group of Islands

10.6 In discussing the status of Middle Rocks vis-à-vis Pedra Branca, Malaysia offers a very formalistic and artificial conceptualisation of a “group”: after ruling out the usual meaning of the word given by English or French dictionaries.⁶⁸⁶ She contends that:

“[i]n deciding whether a collection of islands, rocks and low-tide elevations form an insular group, the chief criteria are their spatial relationships and the conviction of their initial discoverers or subsequent users that they form a group, evidenced in particular by the use of a single name for the group”.⁶⁸⁷

10.7 Malaysia’s characterisation of a group is not supported by the case law of this Court or that of other international tribunals. On the contrary:

- (a) in the *Island of Palmas* arbitration, Judge Max Huber considered that “[a]s 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”,⁶⁸⁸

⁶⁸⁵ *Eritrea/Yemen Arbitration*, *supra* note 73, at para. 475.

⁶⁸⁶ MCM p. 75, para. 144.

⁶⁸⁷ MCM p. 77, para. 149.

⁶⁸⁸ *Island of Palmas Arbitration (Netherlands v. U.S.)*, *supra* note 249, at p. 855.

- (b) in the case concerning the *Land, Island and Maritime Dispute* between El Salvador and Honduras, this Court considered that two islands, Meanguera and Meanguerita, ought to be recognised as having the same legal position by virtue of their contiguity and because the latter appeared as a mere dependency of the former;⁶⁸⁹
- (c) in the *Eritrea/Yemen* award on *Territorial Sovereignty and the Scope of the Dispute*, the Arbitral Tribunal also considered several sub-groups of the islands involved to be units.⁶⁹⁰ For example, the Tribunal held that “the Mohabbakahs have always been considered as one group, sharing the same legal destiny”.⁶⁹¹ The Tribunal also gave little weight to whether a collection of islands is given a collective name as a “group”. Thus, in relation to the Zuqar-Hanish group, the Tribunal found that “the examination of the activities material itself shows very clearly that there was no common legal history for the whole of this Zuqar-Hanish archipelago”⁶⁹² and “[i]t would be wrong to assume that they must together go to one Party or the other”⁶⁹³; and
- (d) a “group” of islands or islets can be seen as dependencies of another, as shown by the *Minquiers and Ecrehos* case, where

⁶⁸⁹ *Land, Island and Maritime Frontier Dispute*, *supra* note 466, at p. 570, para. 356; and p. 579, para. 368. Malaysia alleges that the situation in that case “contrasts sharply with the present dispute” since the parties had treated the two islands as constituting a singular insular unit (MCM p. 79, para. 156); but it is revealing that the Court endorsed their view by basing itself on the objective grounds indicated above.

⁶⁹⁰ *Eritrea/Yemen Arbitration*, *supra* note 73, at paras. 465-466.

⁶⁹¹ *Ibid*, at para. 475.

⁶⁹² *Ibid*, at para. 458.

⁶⁹³ *Ibid*, at para. 491.

the Minquiers group was claimed to be a “dependency of the Channel Islands”.⁶⁹⁴

10.8 The international case law is based on purely empirical criteria, such as the proximity of the maritime features concerned and their relations of “dependency” (in particular in the case of a clearly smaller island related to a bigger one). On these empirical criteria, Pedra Branca and Middle Rocks clearly qualify as a group which must be dealt with as a single whole in international law.

10.9 Notwithstanding Singapore’s rejection of Malaysia’s flawed and unsubstantiated characterisation of a group of islands in international law, Singapore will show, in the next few paragraphs, that even applying Malaysia’s own criteria, Pedra Branca and Middle Rocks undoubtedly form a single group.

A. SPATIAL RELATIONSHIP

10.10 According to Malaysia, in assessing whether several features should be treated as a group, one of the “chief criteria” is “their spatial relationships”.⁶⁹⁵ Singapore notes that Middle Rocks lies a mere 0.6 nautical miles (or 1 kilometre) from Pedra Branca, and is linked to Pedra Branca by a submerged bank. The spatial relationship between Middle Rocks and Pedra Branca is

⁶⁹⁴ *Minquiers and Ecrehos (United Kingdom v. France)*, *supra* note 186, at p. 71. See also the *Continental Shelf* case between Tunisia and Libya, where the Court treated “the Kerkennah Islands surrounded by islets and low-tide elevations” as a single whole. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, at p. 88, para. 128. In the *Gulf of Maine* case, the Court made no distinction between Seal Island and “its smaller neighbour, Mud Island” in spite of the fact that they had distinct names and were not formally qualified as a “group” nor appeared as such on the maps. See *Delimitation of the Maritime Boundary in The Gulf of Maine Area (Canada v. United States of America)* [1984] ICJ Rep 246, at p. 336, para. 222.

⁶⁹⁵ MCM p. 77, para. 149.

obvious as both are part of one single rock formation. As the *Malacca Strait Pilot* puts it:

“Middle Rocks, from 2 to 4 feet (0^m6 to 1^m2) high, and of a whitish colour, lie about half a mile southward of the lighthouse and on the south-western edge of the bank on which Pedra Branca lies.”⁶⁹⁶

This situation is represented diagrammatically in Image 23 of Singapore’s Memorial and Inserts 11 and 12 of Singapore’s Counter-Memorial.

B. COLLECTIVE NAME

10.11 Another of Malaysia’s key criteria is whether the features were “given a collective name, such as Pedra Branca Rocks or Horsburgh Rocks”.⁶⁹⁷ Singapore has shown in paragraphs 10.7 and 10.8 *above* that whether or not several maritime features are collectively *named* a “group” *as such* is of little significance. This point has been fully addressed in Singapore’s Counter-Memorial.⁶⁹⁸ In any event, Pedra Branca and Middle Rocks have, in fact, been referred to as a single group. Malaysia cannot deny this, as the following examples demonstrate:

- (a) several maps employ the collective label, “Pedra Branca Horsburgh (Middle Rock)” to describe the two features;⁶⁹⁹ and
- (b) Commander R.H. Kennedy’s Preparatory Document for UNCLOS I⁷⁰⁰ refers to Pedra Branca and Middle Rocks

⁶⁹⁶ Extracts from First to Fifth editions of the *Malacca Strait Pilot* (SM Vol. 5, Annex 79).

⁶⁹⁷ MCM p. 77, para. 150.

⁶⁹⁸ SCM pp. 206-207, para. 8.9.

⁶⁹⁹ See e.g., Maps 27, 28 and 29 in Malaysia’s Map Atlas.

⁷⁰⁰ Commander R.H. Kennedy was the former British Naval Hydrographer and prepared this document at the request of the Secretariat of the Conference.

collectively as “Horsburgh group”, “the group of rocks on which stands Horsburgh Light” and “Horsburgh group of rocks”.⁷⁰¹

C. LINES ON MAPS

10.12 Another criteria employed by Malaysia is whether the features are “surrounded by a single line”⁷⁰² on maps. Singapore does not accept that there is any legal principle that a collection of features must be shown surrounded by a single line on maps before they can be considered a group. In any event, Pedra Branca and Middle Rocks are, in fact, shown surrounded by a single line on a number of maps. For example:

- (a) Map 5 (1799) shown after page 14 of Singapore’s Memorial;⁷⁰³
- (b) Map 3 (1803) shown on pages 280-281 of Malaysia’s Counter-Memorial;
- (c) Map 7 (1950) shown on pages 286-287 of Malaysia’s Counter-Memorial;
- (d) the British Admiralty Chart No. 2403 folded into the back pocket of Malaysia’s Counter-Memorial also shows Pedra Branca and Middle Rocks surrounded by a 10-fathom line;⁷⁰⁴

⁷⁰¹ UNCLOS I, Official Records, vol. I, Preparatory Documents, Geneva, 24 Feb-27 Apr 1958, A/CONF.13/6/Add.1 (SCM Vol. 3, Annex 37). The distances given in this document make it clear that the author was referring to Pedra Branca *and* Middle Rocks. *See also* SCM p. 207, para. 8.9(b).

⁷⁰² MCM p. 77, para. 151.

⁷⁰³ This map is also reproduced as Map No. 6 in the SCM Map Atlas.

⁷⁰⁴ This is the same map that Singapore has reproduced as SCM Map Atlas, Map No. 13 (Admiralty Chart 2403, Singapore Strait, 1936).

- (e) Map 40 of Malaysia's Map Atlas shows Pedra Branca and Middle Rocks surrounded by a 5-fathom line;
- (f) a 1910 Dutch official navigational chart, an extract of which is reproduced as **Insert 15** *opposite*, shows a 10-metre line surrounding Pedra Branca and Middle Rocks.

D. EXISTENCE OF NAVIGATIONAL CHANNELS AND GEOMORPHOLOGY

10.13 The last argument deployed by Malaysia is that the features are “separated by navigational channels and [do] not stand on one single-raised section of the sea-bed”.⁷⁰⁵ *First*, as demonstrated by the bathymetric contour lines in the navigational charts discussed in paragraphs 10.12(d)-(f) *above* and by Inserts 11 and 12 of Singapore's Counter-Memorial,⁷⁰⁶ Pedra Branca and Middle Rocks are indeed standing on a single raised section of the sea-bed. *Secondly*, the bathymetric contour lines mentioned in the preceding sentence also demonstrate that there is no practicable navigational channel between Pedra Branca and Middle Rocks. The only recognised navigational channels in the vicinity are Middle Channel (north of Pedra Branca) and South Channel (south of South Ledge).⁷⁰⁷ In fact, there are no sailing directions that instruct ships to sail between Pedra Branca and Middle Rocks for the purpose of entry into, or exit from the Singapore Strait.

⁷⁰⁵ MCM p. 78, para. 154.

⁷⁰⁶ SCM p. 204, para. 8.7; Insert 11 *after* SCM p. 204; and Insert 12 *after* SCM p. 206.

⁷⁰⁷ See Extracts from First to Fifth editions of the Malacca Strait Pilot (SM Vol. 5, Annex 79); Thomson's *Account*, *supra* note 55, at pp. 379-380 (SM Vol. 4, Annex 61, pp. 480-481); Horsburgh J., *India Directory*, Vol. 1 (2nd ed., 1817), pp. 192-193 (SM Vol. 2, Annex 3); Dunn S. *et. al.*, *A New Directory for the East Indies* (5th ed., 1780), p. 509 (SM Vol. 2, Annex 2).

E. CONCLUSIONS WITH REGARD TO PEDRA BRANCA AND MIDDLE ROCKS AS A GROUP

10.14 As the foregoing discussion demonstrates, even by Malaysia's own formalistic criteria, Pedra Branca and Middle Rocks are undoubtedly a single group of islands. Furthermore, as discussed in the next section, the Parties themselves have consistently regarded Pedra Branca and Middle Rocks as forming part of an indivisible group.

Section II. Middle Rocks and South Ledge Have Always Been Recognised to Share the Same Legal Fate as Pedra Branca

10.15 With respect to her own claim to Middle Rocks and South Ledge, Malaysia simply repeats her *idée fixe*, based on the Anglo-Dutch Treaty and the Crawford Treaty of 1824.⁷⁰⁸ Singapore has shown that both treaties have no relevance whatsoever in the present case.⁷⁰⁹ This applies *a fortiori* where Middle Rocks and South Ledge are concerned: they are not mentioned any more than Pedra Branca itself and it is certainly not Singapore's case that any of the three features were ceded to the British by the Crawford Treaty. Malaysia's self-serving assertion according to which "as a matter of fact PBP, Middle Rocks and South Ledge formed part of the Sultanate of Johor, before and after 1824"⁷¹⁰ simply begs the question.

10.16 In her Counter-Memorial, Malaysia also takes up again her refrain that she had a "consistent... practice of considering both Middle Rocks and South Ledge as lying within her sovereignty when dealing with maritime

⁷⁰⁸ MCM pp. 79-80, paras. 157-158.

⁷⁰⁹ See paras. 2.22-2.44 above. See also SCM pp. 28-33, paras. 3.19-3.30.

⁷¹⁰ MCM p. 80, para. 158.

jurisdiction”.⁷¹¹ In seeking to prove this, she lists a series of four “examples” which are exactly the same as those listed in her Memorial⁷¹² and which happen to be also exactly the same as those she gives in support of her claim to Pedra Branca.⁷¹³ Singapore has repeatedly rebutted these unfounded arguments.⁷¹⁴ The only conclusion which can be drawn from them is that, clearly, Malaysia herself treats all three features in the same way and with the same arguments – she cannot find any independent or separate arguments in respect of Middle Rocks or South Ledge.

10.17 For her part, Singapore has consistently considered all three features as being under her sovereignty and has treated them as a group.⁷¹⁵

Section III. Conclusions

10.18 In conclusion:

- (a) it is unacceptable to treat Pedra Branca, Middle Rocks and South Ledge separately for the purposes of this case;
- (b) all three features clearly form a group, and this conclusion is based both on objective factors and on the way they have constantly been treated;

⁷¹¹ MCM p. 80, para. 159.

⁷¹² MM pp. 132-133, para. 295.

⁷¹³ See MM pp. 117-124, paras. 268-282; and MCM p. 235, para. 502.

⁷¹⁴ See e.g., SCM pp. 165-171, paras. 6.77-6.89, and pp. 209-211, paras. 8.12-8.16; and in this Reply, at paras. 5.10, 5.23 *above*.

⁷¹⁵ See SCM pp. 212-213, paras. 8.18-8.20.

- (c) they have also been consistently treated as a group by Singapore which, unlike Malaysia, has been active around and *on* each of them;
- (d) in any event:
 - (i) Malaysia accepts that South Ledge, being a low tide elevation, attaches to Middle Rocks and forms a group with Middle Rocks;
 - (ii) Singapore has demonstrated that even on the basis of Malaysia's own criteria as pleaded in her Counter-Memorial, Pedra Branca and Middle Rocks form part of an indivisible group; and
 - (iii) since South Ledge attaches to Middle Rocks and Middle Rocks attaches to Pedra Branca, they necessarily form a single group of maritime features;
- (e) as sovereignty over Pedra Branca belongs to Singapore, the same necessarily holds true with regards to Middle Rocks and South Ledge.

SUMMARY OF REASONING AND CONCLUSIONS

1. In accordance with the Court's Practice Direction II, Singapore presents a short summary of the reasoning as developed in Singapore's written pleadings, including this Reply.

A. The Basis of Singapore's Title to Pedra Branca

2. With respect to the question of sovereignty over Pedra Branca, Singapore possesses sovereignty over the island on the basis of the lawful possession of Pedra Branca by Singapore's predecessor in title, the United Kingdom, during the period 1847-1851. Prior to 1847, Pedra Branca was *terra nullius* – the island was uninhabited, and had never been the subject of a prior claim, or any manifestation of sovereignty on the ground, by any sovereign entity.

3. The lawful possession of Pedra Branca by the United Kingdom during the period 1847-1851 was effected by a series of official actions evidencing the intention of the British Crown to establish an exclusive title under the principles and rules of international law applicable at the time. These actions began with the first landing by an agent of the British Crown in 1847 and culminated with the official commissioning of the lighthouse in 1851.

4. The decision to build the lighthouse on Pedra Branca was taken by the Court of Directors of the East India Company as an official organ of the British Crown. The entire process of choosing Pedra Branca as the site of the lighthouse, and the planning, financing and construction of the lighthouse, was subject to the exclusive control of the British Crown and its representatives.

5. The whole pattern of activities and official visits undertaken by agents of the British Crown during the period from 1847-1851 constituted a clear and unequivocal manifestation of the intention to claim sovereignty over Pedra Branca. The concrete manifestations of the British Crown's intention to take lawful possession of Pedra Branca included numerous activities of an official character described and documented in Singapore's written submissions. These actions were peaceful and public, and elicited no opposition from any other power.

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

B. Singapore's Conduct in Maintenance of Title

7. After 1851, the United Kingdom and, subsequently, Singapore, confirmed and maintained the title that had been acquired over Pedra Branca by the continuous, open and effective display of State authority on Pedra Branca and within its territorial waters. These activities were wide-ranging in nature, comprised both lighthouse and non-lighthouse activities suitable to the nature

of the territory concerned, and were undertaken *à titre de souverain*. All of them have been fully documented in Singapore's pleadings.

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

9. Singapore has thus demonstrated, with contemporary evidence, that she had the intention to claim sovereignty over Pedra Branca (*animus occupandi*) and that she engaged in the concrete exercise of that sovereignty on the ground on a continuous basis (*corpus occupandi*).

C. Malaysia's Case Rests Entirely on a Single Unproven Assertion

10. In contrast, Malaysia's entire case rests on the oft-repeated but totally unproven assertion that the Sultanate of Johor possessed an "original title" to Pedra Branca which has never been displaced. This extraordinary contention is not supported by any evidence whatsoever. Malaysia has been unable to produce a single piece of evidence that Johor ever had the intention to claim sovereignty over Pedra Branca or ever carried out a single sovereign act on the island at any time. For this reason, Malaysia's claim that the British sought permission to build the lighthouse cannot stand. In any event, Malaysia has not provided any evidence whatsoever that the British authorities had sought any such permission.

D. Malaysia's Conduct Supporting Singapore's Case

11. Not only did Malaysia (and Johor) never protest the taking of lawful possession of Pedra Branca by the British Crown in 1847-1851, she never objected to any of the official State actions that the United Kingdom and

Singapore undertook on Pedra Branca until well after 1980. Malaysia recognised Singapore's sovereignty over the island by virtue of Malaysia's own conduct. For example:

- (a) Malaysian officials sought permission from Singapore to visit Pedra Branca;
- (b) Malaysia offered to fund lighthouses that were situated on her own territory, but never offered to contribute to the upkeep of the lighthouse on Pedra Branca;
- (c) Malaysia protested the flying of the Singapore Marine Ensign on Pulau Pisang, which was Malaysian territory, but not the Singapore Ensign that flew at Pedra Branca;
- (d) the Malaysian Meteorological Service listed Horsburgh Lighthouse as a Rainfall Station "in Singapore" but when it ceased publishing data from Singapore in 1967, it also ceased publishing data from Horsburgh Lighthouse;
- (e) from 1962 to 1975 Malaysia issued a series of official maps which specifically attributed Pedra Branca to Singapore;
- (f) in 1953, Johor officially declared that it did not claim ownership over Pedra Branca: this disclaimer is binding on Malaysia, and must be given effect to.

Each and every one of these facts is documented on the record.

E. Conclusion on the Conduct of the Parties

12. There is thus a remarkable consistency in the conduct of the two Parties with respect to Pedra Branca. On the one hand, Singapore has always acted in a manner that is entirely consistent with her sovereignty over Pedra Branca.

Singapore has acted as sovereign over the island for more than 150 years. On the other hand, prior to Malaysia's belated claim in 1979, Malaysia never once intimated that she possessed title to Pedra Branca, never once carried out any sovereign act on or in relation to the island, officially disclaimed ownership over the island, issued official maps which depicted Pedra Branca as belonging to Singapore, and remained silent in the face of Singapore's continuous administration and control of the island.

F. Middle Rocks and South Ledge

13. With respect to Middle Rocks and South Ledge, Singapore has shown that both features lie within Pedra Branca's territorial waters. Middle Rocks, lying only 0.6 nautical miles from Pedra Branca, is part of the same island group as Pedra Branca while South Ledge is a low-tide elevation incapable of independent appropriation. Sovereignty over both Middle Rocks and South Ledge belongs to Singapore by virtue of Singapore's sovereignty over Pedra Branca.

SUBMISSIONS

For the reasons set out in Singapore's Memorial, Counter-Memorial and this 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.

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