

INTERNATIONAL COURT OF JUSTICE

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

MALAYSIA/SINGAPORE

COUNTER-MEMORIAL OF MALAYSIA

VOLUME 1

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Chapter 1

INTRODUCTION

A. Points of agreement and disagreement

1. The Court will have observed from a perusal of the Parties' Memorials that there are some important points of agreement between them. Thus it is agreed that:

- (a) So far as the present dispute is concerned, Malaysia and Singapore are respectively successors to the legal position of Johor, on the one hand, and of Great Britain in right of Singapore, on the other hand.¹
- (b) Johor was a substantial kingdom originally located north and south of the Singapore Strait, with which the British and other powers conducted political relations.²
- (c) Before the Crawford Treaty of 1824, Johor's sovereignty extended to Singapore island itself, and other islands in and around the coast, whether or not these were within 3 nautical miles (hereafter nm) of the mainland.³
- (d) By the Crawford Treaty, Johor ceded Singapore island and other islands within 10 nm to Great Britain, but that Treaty did not result in a cession of Pulau Batu Puteh/Pedra Branca (hereafter PBP).⁴
- (e) Horsburgh Light was constructed and operated as a lighthouse for the purposes of assisting mariners, and continued to be so operated when the present dispute broke out, in 1980.⁵

¹ See SM, paras. 1.5-1.7; MM, paras. 67-71, 190-206.

² See SM, paras. 3.2-3.5; MM, paras. 37-47, 61-67.

³ See SM, paras. 3.2-3.3; MM, paras. 77-84.

⁴ See SM, para. 3.5, 5.5, 5.30-5.31, 5.86-5.87, 6.2; MM, paras. 55, 72.

⁵ See SM, paras. 5.30-5.31, 6.2, 6.4; MM, paras. 114, 117, 180.

- (f) The Parties also agree that this is the critical date for the purposes of this case.⁶

2. In its Memorial Malaysia has shown that PBP, which has been internationally well-known since the 16th century, was not *terra nullius* but was part of the Kingdom of Johor.⁷ Malaysia has also shown that the Governor of Singapore sought Johor's permission for the construction of a lighthouse in honour of James Horsburgh,⁸ that he did so at a time when PBP was one of the preferred spots under consideration for the location of the lighthouse, and that permission was duly given.⁹ The subsequent construction and operation of the lighthouse was never accompanied by any public claim by Great Britain to sovereignty.¹⁰ The lighthouse was inaugurated with a Masonic ceremony. Neither the Governor nor the East India Company ever proclaimed the island as British.¹¹ In the more than one hundred years that followed, Great Britain never asserted or exercised sovereignty over the island or the surrounding waters; it never listed or showed the island as belonging to Singapore.¹² All Great Britain did was operate the lighthouse, and the same is true of Singapore, until for the first time it formally asserted a claim to sovereignty over PBP in response to the Malaysian map of 1979.¹³ The mere operation of a lighthouse on territory belonging to another State does not give sovereignty, and *a fortiori* it does not do so if the process is inaugurated with the consent of the latter State.

3. For its part Singapore holds that Great Britain acquired PBP by "a taking of lawful possession" in the period 1847-1851.¹⁴ The subsequent operation of the lighthouse constituted, in its view, an "effective and peaceful

⁶ See SM, paras. 4.2-4.8, 6.9; MM, para. 15.

⁷ MM, paras. 94-98.

⁸ MM, paras. 118-137.

⁹ MM, paras. 107-116.

¹⁰ MM, paras. 151-164.

¹¹ MM, paras. 152-156.

¹² MM, paras. 219-244.

¹³ MM, paras. 267, 283.

¹⁴ SM, para. 5.5.

exercise of State authority” which “confirmed and maintained the title gained in the period 1847 to 1851”.¹⁵

4. Singapore’s theory faces major obstacles. The phrase “a taking of lawful possession” is a complete equivocation. States may “possess” territory in the sense of lawfully using it for specific purposes (e.g., a communications station or a lighthouse) without taking, asserting or acquiring sovereignty, indeed without engaging in any conduct *à titre de souverain* at all. Malaysia has never suggested that the construction and operation of the lighthouse was unlawful. Indeed, the Temenggong who (with the Sultan) had consented to its being built spent time observing its construction.¹⁶ Lawfulness is not the point and is not in dispute. Rather the question is in what capacity did Great Britain construct and operate the lighthouse? Its conduct at the time indicated clearly that it did so not with a view to acquiring territorial sovereignty but with a specific view to assisting navigation in the public interest.¹⁷ That was true of many other lights operated under British auspices, in the region and elsewhere, at the time and subsequently.¹⁸ At no stage in the years prior to Singapore’s independence from Britain in 1963 did the character of British conduct change. At no stage during this lengthy period did Britain publicly assert sovereignty over PBP. Nor did Singapore act any differently in period until 1980 when the dispute broke out. In those circumstances the location of sovereignty remains unchanged; it remains with the sovereign whose consent was sought in order to establish the lighthouse.

5. Admittedly, if a remote island is *terra nullius* in the sense explained by the Court in the *Western Sahara Opinion*,¹⁹ the continued operation of a lighthouse could support a claim to sovereignty. But it could only do so if the operating State actually performed other acts consistent with such a claim –

¹⁵ Ibid.

¹⁶ See MM, para. 148.

¹⁷ See MM, paras. 107-117, and further Chapter 3 below.

¹⁸ See further below, Chapters 6 and 7.

¹⁹ *Western Sahara*, ICJ Reports 1975, p. 12 at p. 39 (para. 79).

e.g. asserting a territorial sea and continental shelf, including the island on maps in such a way as to imply a claim to sovereignty, etc. But this possibility is excluded here. PBP was not a remote, unknown island; it had been known for centuries; 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. Singapore does not argue (at least, not in so many words) that PBP was *terra nullius* in 1844,²⁰ and subsequently Great Britain performed no acts whatsoever implying a claim to sovereignty over PBP based on occupation or any other general title of sovereignty. It sought prior permission to operate a lighthouse and that is all it ever did. And the same is true of Singapore, at least until 1980 and to a substantial extent even after that.

6. If Singapore does not claim a title based on occupation in the legal sense of that term, i.e. occupation of *terra nullius*, nor does it rely on other recognised modes of acquisition. Singapore does not claim that the island was ceded in sovereignty at any time. It does not rely on acquisitive prescription (if such a doctrine exists in international law, which is doubtful²¹). In the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, the Court turned its face against the invasion of hybrid concepts such as “historical consolidation of title” in the law of territorial sovereignty,²² thereby stressing the need to maintain the basic elements of that law. Singapore’s term “lawful possession” is a similar hybrid, and similarly it begs the question of title. If title to PBP was with Johor in 1844, nothing that has happened since has displaced that title.

7. In its Memorial, Singapore glosses over the difficulties which its “taking of lawful possession” theory presents. It fails to deal (except briefly

¹⁹ *Western Sahara*, ICJ Reports 1975, p. 12 at p. 39 (para. 79).

²⁰ See SM, para. 3.3, and see further below paragraphs 16-21 for an analysis of Singapore’s position in this regard.

²¹ Cf. *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999, p. 1045, at p. 1105 (para. 97).

²² Judgment of 10 October 2002, paras. 65, 70.

and in passing²³) with the correspondence between Britain and Johor in 1844 which laid down the legal basis for the construction of a lighthouse on Johor territory.²⁴ It fails to explain how the term “taking of lawful possession” relates to established concepts of the law of acquisition of territory. It does not account for the absence of Singapore maps showing the island as Singaporean,²⁵ of Singapore laws treating it as Singaporean,²⁶ or of any action asserting maritime zones around the island or protesting relevant Malaysian conduct in that regard. In short, in its pleading so far Singapore has failed to state a coherent legal basis for its claim of sovereignty.

B. The role of *effectivités* and the critical date

8. Singapore seeks to remedy this deficiency in a number of ways. Two of these require some preliminary comment.

9. First, Singapore attaches weight to the well-known dictum of the Chamber in the *Burkina Faso/Mali* case on the role of *effectivités*. As the Chamber said:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. 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.”²⁷

²³ SM, para. 5.41, and see further below, paragraphs 136-141.

²⁴ Accordingly, apart from noting that Singapore has not produced the original letter of request to the Sultan and the Temenggong, Malaysia does not need to add to the analysis of the correspondence set out in MM, Chapter 6.

²⁵ The first such map (in fact a sketch) was in 1992, *Singapore Facts and Pictures*, 1992, 1, 178. See MM, para. 212 and MM Annex 71.

²⁶ The first such law was the Protected Places (No. 10) Order 1991. See SM, para. 6.25 and SM Annex 178.

²⁷ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports 1986, p. 554 at pp. 586-7 (para. 63), cited in SM, paras. 6.95, 7.21.

Malaysia fully accepts the Chamber's analysis. Above all in this passage the Chamber emphasized that the attribution of title to territory is always and necessarily a legal matter, a juridical process in which the idea of title is foremost. Sovereignty does not arise from mere control, irrespective of title or of the circumstances in which control was obtained. Yet Singapore seeks to disjoin its "effective administration of the lighthouse" from any consideration of title. Moreover the *effectivités* on which it relies—especially in the sense of *effectivités* going beyond the operation of the lighthouse—are limited in character and occurred exclusively after the critical date; indeed they mostly occurred after the parties had agreed in principle to refer the dispute to the Court.

10. This calls for a second preliminary comment on the role of the critical date in territorial disputes. Although the parties agree on the critical date (see paragraph 1 above), Singapore ignores the implications of that agreement. It argues that it can rely on *effectivités* occurring after the critical date.²⁸ But it can only do so if and to the extent the acts in question are of the same character, are a continuation of the same conduct having the same legal context and consequences and going back to the period before the dispute arose. Yet the only conduct carried out by Singapore (and Great Britain) before 1980 was the administration of the lighthouse, which was not conduct *à titre de souverain*. The fact is that those acts on which Singapore now relies (the exclusion of fishermen, for example) were performed with the intention to improve their case, and they were firmly rejected by Malaysia. If anything, such acts show the weaknesses of Singapore's claims based on *effectivités*; they certainly do not show its strength. For example, Singapore's sketch map of 1992 is the first map published by Singapore showing PBP as belonging to Singapore. This is evidence not of sovereignty before the critical date but of the attempt to assert it afterwards.

²⁸ SM, para. 6.9.

11. The Court took a quite different approach to that of Singapore in dealing with the *Sipadan and Ligitan* case. It was only after rejecting both parties' claims of title—Indonesia's based on the 1891 Anglo-Dutch Convention,²⁹ Malaysia's based on the Great Britain-United States Treaty of 1930³⁰—that it approached the issue of *effectivités* as such.³¹ As to this the Court observed that

“it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them... The Court will, therefore primarily, analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.”³²

This had the effect of excluding entirely from consideration substantial activities of Malaysia (e.g. the development of tourism on Sipadan) which were subsequent to 1969 and which were not “a normal continuation of prior acts”.

12. In the present case, once Malaysia has demonstrated—as it has done—that there was no act of any kind performed by Singapore before 1980 *à titre de souverain*, then it follows that all evidence of post-1980 *effectivités* must be entirely excluded from consideration. Such conduct is by its very nature distinct and different from that which preceded it.

C. The structure of this Counter-Memorial

13. It is respectfully suggested that the Court faces two essential questions in the present case:

²⁹ See the Judgment of 17 December 2002, paras. 39-52.

³⁰ Ibid., paras. 108-124.

³¹ See *ibid.*, para. 127.

³² Ibid., para. 135.

First, who had sovereignty over PBP, Middle Rocks and South Ledge in the years immediately following the inauguration of the lighthouse, and on what basis?

Second, has anything happened since that time to change that legal situation?

It should be stressed that the Parties themselves agree that the answer to the second question is: no. Where they disagree is on the answer to the first question, as already noted. In other words, this case concerns the issue of original title to the three features. Nonetheless, as in many cases in which the essential question is one of title, something needs to be said about the subsequent practice of the Parties—in particular so as to confirm the correctness of a negative answer to the second question, as well as to respond to the thoroughly misleading account by Singapore of its alleged sovereign *effectivités*.

14. This Counter-Memorial is divided into two parts, which correspond to the two questions identified above. In **Part I**, Malaysia will show that Singapore's claim based on a purported "taking of possession" did not produce a transfer of title to Great Britain, but that title to the three features remained with Johor after 1851. In **Part II**, Malaysia will show that (contrary to Singapore's contentions) the subsequent conduct of the Parties did not change this situation but rather confirmed the limited basis for Singapore's continued use of PBP as a site for a lighthouse.

PART I

THE TITLES INVOKED BY THE PARTIES

Chapter 2

MALAYSIA'S ORIGINAL TITLE

Introduction

15. Chapter III of Singapore's Memorial claims to address the "historical background" but does so in an extraordinarily selective and partial way. Apparently, in the view of Singapore, history for the entire Malay region begins with the building of a British factory in Singapore in 1819; for PBP it starts only with the construction of the Horsburgh Lighthouse in 1847-1851. Such a view disregards the following six important elements of the case:

First, PBP could at no relevant time in the historical period under discussion be regarded as *terra nullius* (Section A);

Second, this is confirmed by the events leading to the acquisition of British sovereignty over other islands in the region, including Singapore itself in 1824 and the Island of Labuan in the same period as the construction of Horsburgh Lighthouse (Section B);

Third, the history of Johor, which was founded several centuries prior to the establishment of Singapore, cannot be neglected (Section C);

Fourth, it is remarkable that, even for the period after 1819, Singapore neglects a major development with profound political importance in the region, i.e. the conclusion of the Anglo-Dutch Treaty of 1824, which had clear implications for title to PBP (Section D);

Fifth, the Crawford Treaty of 1824 did not alter the status of PBP but, on the contrary, confirmed the prior and continued sovereignty of Johor over the island (Section E);

Sixth, PBP was never a “dependency” of Singapore (Section F).

These issues are dealt with in turn in this Chapter, and the actual historical material is contrasted with Singapore’s presentation.

A. Pulau Batu Puteh was not *terra nullius*

16. One may wonder why Singapore, in its Memorial, decided not to expressly argue that PBP was *terra nullius*. It claims that in 1844 it “lawfully” took possession of PBP.³³ As the International Court of Justice observed in the *Western Sahara* Advisory Opinion:

“The expression ‘*terra nullius*’ was a legal term of art employed in connection with ‘occupation’ as one of the accepted legal methods of acquiring sovereignty over territory. ‘Occupation’ being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid ‘occupation’ that the territory should be *terra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the ‘occupation’... In the view of the Court, therefore, a ... determination that Western Sahara was a ‘*terra nullius*’ at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of ‘occupation’.”³⁴

³³ See, e.g., SM, para. 5.5.

³⁴ *Western Sahara Advisory Opinion*, ICJ Reports 1975, p. 6, at p. 39 (para. 79). Similar descriptions of the concept of *terra nullius* can be found in the decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case (*Norway v. Denmark*), PCIJ, Series A/B, No. 53 (5 April 1933) at pp. 44, 63.

17. In applying this concept of *terra nullius* the Court made a finding with respect to the Western Sahara which is equally relevant to the islands in and around the Strait of Singapore, including PBP:

“Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of territory was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers.”³⁵

18. Similar observations on the link between native rulers and their territory can be found as early as the *Island of Palmas Arbitration*, in which the sole arbitrator, Judge Huber, determined that this disputed island was “successively a part of two of the native States of the Island of Sangi (Talaute Isles)”.³⁶

19. Evidently PBP was not *terra nullius*. The island is clearly situated in the centre of the region that constituted the Sultanate of Johor, which was indisputably a sovereign State, as demonstrated in the Malaysian Memorial.³⁷ Long before the construction of Horsburgh Lighthouse, PBP was a well-known geographical feature.³⁸ It appears by name on the earliest maps, even before the designation of Singapore.³⁹ Portuguese books referred to the island (“Pedra Branca”) as being widely used by the native population as early as 1552. João de Barros (1496-1570), who was a factor for the East Indies House

³⁵ *Western Sahara Advisory Opinion*, ICJ Reports 1975, p. 6, at p. 39 (para. 80).

³⁶ *Island of Palmas Case (Netherlands v. U.S.A.)*, (1928) 2 RIAA 831, at p. 867. Judge Huber observed: “These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal State as a part of his territory.” *Ibid.*

³⁷ MM, paras. 61-67.

³⁸ See also SM, para. 2.5: “Pedra Branca has been known to mariners for centuries.”

³⁹ E.g., MM, Map Atlas, Maps 1, 2, 3; SM, para. 2.5. See also MM, para. 306. To these early maps of the area can be added a Portuguese map of 1650 by Armando Cortesão, on which PBP is marked and named “Pedra branca”: see Map 2 in the Maps Section at the end of this volume following page 273.

and was commissioned by the King of Portugal to write a history of the Portuguese in the East Indies, reported:

“D. Jorge left Malacca with Moor pilots, who had notice of this route [to the Moluccas through Borneo]. Making his way close to the coast, he entered the Strait of Singapore, which has the width of a canon shot and is so shallow than in several parts it does not have the depth of six fathom, and has many crossed shoals. Here he found that the coast curved somewhat, so that it was necessary to use intelligence in order to navigate. Arriving at one island that is called *White Rock* [‘Pedra Branca’], which is very much in demand by the pilots of those parts, he made his way to the island that people of the land call *Pulugaia*, which means Elephant’s island, because of the image showed by its aspect.”⁴⁰

20. The Dutch also referred to the island in specific sailing directions of the late 16th century,⁴¹ while references were made to PBP in diplomatic exchanges on piracy control between the Dutch and the sovereign of Johor as early as 1655.⁴² During the period of the construction of the lighthouse PBP was identified in the *Singapore Free Press* of 25 May 1843 as an island “within the territories of our well beloved ally and pensionary, the Sultan of Johore, or rather of the Tomungong of Johore, for he is the real Sovereign.”⁴³

21. With all due respect to the learned review of the principles governing acquisition of territory in the middle and late 19th century in Singapore’s Memorial,⁴⁴ this remains something of an academic exercise because PBP could not at any relevant time be considered as *terra nullius* and hence susceptible to acquisition through occupation. There is nothing to demonstrate that Johor had lost its title since there is no evidence that at any time it had the

⁴⁰ J. de Barros, *Ásia de João de Barros. Dos feitos que os portugueses fizeram no descobrimento e conquista dos mares e terras do Oriente* (Asia, by João de Barros. Facts established by the Portuguese in the discovery and conquest of the seas and lands of the Orient) (Lisbon, 1552; 6th ed., Lisbon, 1946) 56 (translation provided by Malaysia): original Portuguese text in Annexes, vol. 3, Annex 7 (emphasis added).

⁴¹ SM, para. 2.5, note 8.

⁴² See MM, para. 78.

⁴³ See MM, para. 95, and MM Annex 40.

⁴⁴ SM, vol. 1, Chapter 5, section XI.C, pp. 81-86.

intention of ceding, let alone abandoning its sovereignty over the island. Rather it is the case that from time immemorial PBP was under the sovereignty of the Sultanate of Johor. Its situation is similar to that depicted in the *Meerauge Arbitration*:

“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”.⁴⁵

B. The British taking of possession of Singapore and Labuan confirms that islands within 10 geographical miles from the coast were not *terra nullius*

22. The cession of Singapore by Johor through the Crawford Treaty of 1824 included the cession of “adjacent seas, straits and islets, to the extent of ten geographical miles” from the coast of the main Island of Singapore.⁴⁶ Evidently, this shows that such features were not considered to be *terra nullius* but that they were previously under the sovereignty of the ceding authority, the Sultanate of Johor. This was equally true for PBP, situated as it is less than 10 geographical miles off the coast of Johor, as it was for those maritime features within a 10-mile radius from Singapore.

23. The view that PBP could not have been considered *terra nullius* at the time of the construction of the lighthouse is supported by the series of events relating to the taking of possession of the island of Labuan and its dependencies by Britain in 1846. This (at the time uninhabited) island is situated less than 10 miles off the north-west coast of Borneo. Possessing coal

⁴⁵ “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” (translation by Malaysia). *Meerauge Arbitral Award (Galicia/Hungary)*, 1902, *N.R.T.*, 3rd Series, vol. III, p. 71 (for the original text in German); French text in (1906) 8 *RDILC* (2nd ser.) p. 162 at p. 207.

⁴⁶ Art. II of the Treaty of Friendship and Alliance between the Honourable the English East India Company, and the Sultan and the Temenggong of Johore, 2 August 1824: MM Annex 6. See also MM, paras. 54-56.

resources , it was considered a convenient stopping-off place for passing ships. In 1843, the rulers of Brunei expressed the desire to conclude a treaty of friendship with the British with the purpose, *inter alia*, of combating piracy and fostering trade. In return, they offered to cede the island of Labuan:

“The Sultan, and the Rajah Muda Hassim, desire to gain the friendship and aid of the Queen of England, for the suppression of piracy, and the encouragement and extension of trade; and to assist in forwarding these objects, they are willing to cede, to the Queen of England, the Island of Labuan, and its islets, on such terms as may hereafter be arranged by any person appointed by Her Majesty.”⁴⁷

24. On 31 March 1845 James Brooke, the British agent to the Sultan and the Rajah of Borneo, reported that the cession of Labuan had already been agreed. The cession was confirmed by a formal Treaty of Friendship between Britain and the Sultan of Borneo, concluded on 18 December 1846, whereby “His Highness the Sultan hereby cedes in full sovereignty and property to Her Majesty the Queen of Great Britain and Ireland, Her heirs and successors forever the Island of Labuan and its dependencies, the islets adjacent thereto.”⁴⁸ Thereupon the British took formal possession of the island, which included the hoisting of the Union Jack. A further Treaty of Friendship and Commerce was concluded on 27 May 1847 with a view to encouraging trade and putting an end to piracy. Of particular importance is Article X of this Treaty which details the territories ceded to Britain by the Sultan of Borneo. The relevant part of Article X reads:

“...His Highness the Sultan hereby confirms the cession already spontaneously made by him in 1845 of the Island of Labuan, situated on the north-west coast of Borneo, together with the adjacent islets of Kuraman, Little Rusakan, Great Rusakan, Dat, and Malankasan, and all the straits, islets, and seas situated

⁴⁷ This document was transmitted to the British Government by Captain Sir Edward Belcher R.N., C.B. See *Voyages of the HMS Samarang during the years 1843-46; Employed Surveying the Islands of the Eastern Archipelago*, Published under the Authority of the Lords Commissioners of the Admiralty, vol. I, 1848, pp. 176-177: Annexes, vol. 3, Annex 10.

⁴⁸ Text 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*, vol. II, p. 399: Annexes, vol. 3, Annex 17.

half-way between the fore-mentioned islets and the mainland of Borneo. Likewise the distance of 10 geographical miles from the Island of Labuan to the westward and northward, and from the nearest point half-way between the islet of Malankasan and the mainland of Borneo, in a line running north till it intersects a line extended from west to east from a point 10 miles to the northwards of the northern extremity of the Island of Labuan, to be possessed in perpetuity and in full sovereignty by Her Britannic Majesty and Her successors; and in order to avoid occasions of difference which might otherwise arise, His Highness the Sultan engages not to make any similar cession, either of an island or of any settlement on the mainland, in part of his dominions, to any other nation, or to the subjects or citizens thereof, without the consent of Her Britannic Majesty.”⁴⁹

25. A comparison of the formal cession and taking of possession of Labuan in 1846 and the alleged “taking of lawful possession” of PBP in 1847 leads to a number of conclusions:

- First of all, as in the case of the cession of Singapore itself, a treaty instrument was employed to effect the British acquisition of sovereignty over the island of Labuan, and the treaty was followed by a formal ceremony involving the proclamation of sovereignty and the raising of the Union Jack: there was no doubt about the intent of either party to the transaction;
- Second, both the Crawford Treaty of 2 August 1824 relating to Singapore and the Treaty of Friendship and Commerce between Borneo (Brunei) and Great Britain of 27 May 1847 relating to Labuan detail the cession in specific geographical terms;
- Third, there is a clear reference in both treaties to a ten geographical mile limit which clearly demonstrates that the territorial limits of the coastal sultanates extended beyond 3 nm;

⁴⁹ Text 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*, vol. II, p. 404: Annexes, vol. 3, Annex 21.

- Fourth, both the Crawford Treaty and the Friendship Treaty between Brunei and Great Britain spell out in considerable detail the seas, straits and adjacent islands within the specified areas to which the respective cessions apply. As regards Labuan, this is illustrated on the opposite page (Insert 1).⁵⁰

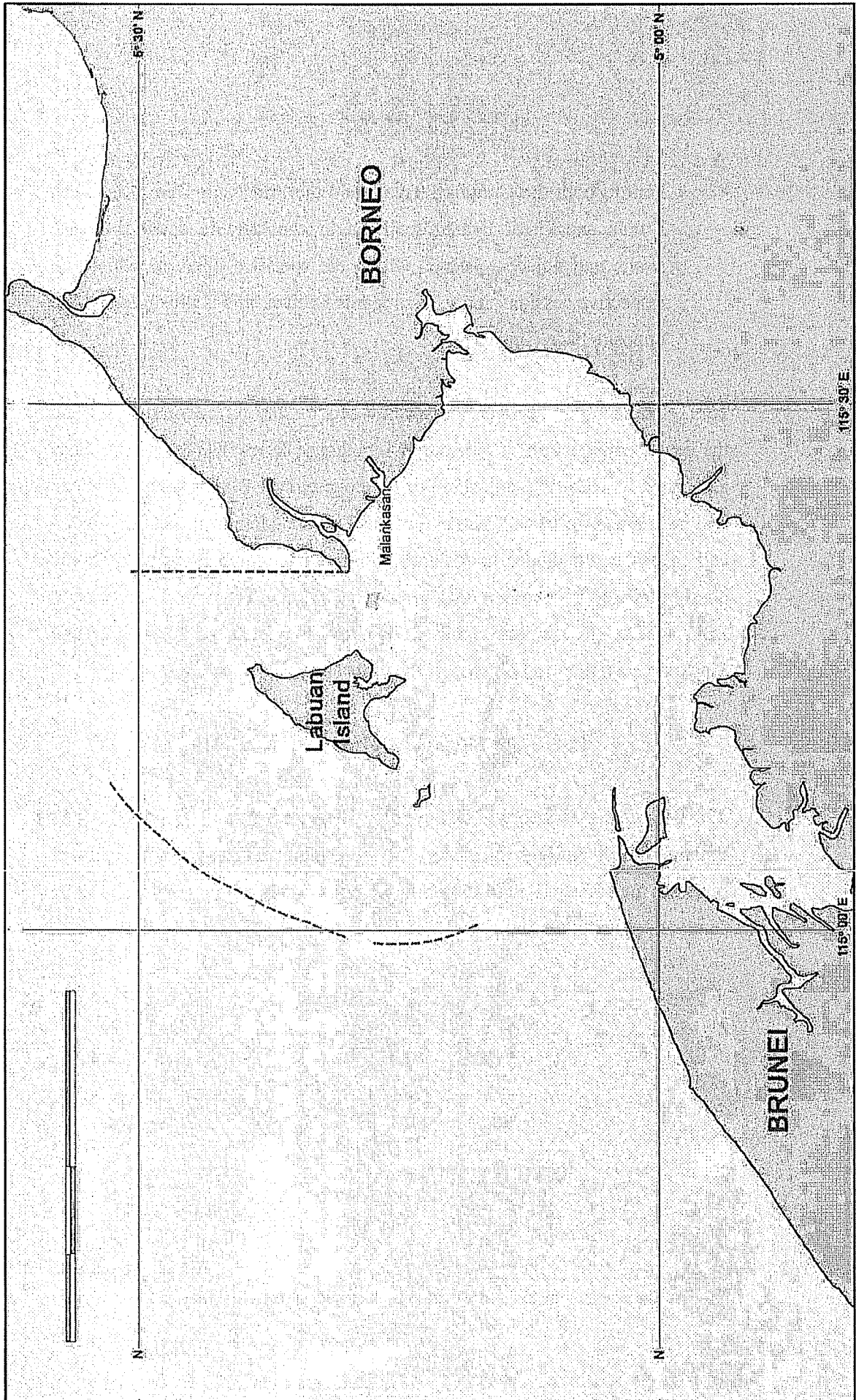
26. The contrast between the specific acts of seeking permission for and the actual construction of Horsburgh Lighthouse from 1847-1851 and those associated with British acquisition of sovereignty over islands such as Labuan will be pursued further in Chapter 3 of this Counter-Memorial. At this stage 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.

C. For Singapore, history starts in 1819

27. Singapore's theory of taking of lawful possession of PBP in 1847-1851 ignores almost entirely the history of the region. Fortunately, for present purposes the history is quite straightforward and easily ascertainable. It can be summarised as follows.

⁵⁰ The extent of the Singapore cession is illustrated on Insert 7 of MM, p. 25.

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GENERAL INFORMATION ONLY. IT IS NOT TO BE USED FOR
NAVIGATION.



28. For centuries the Strait of Singapore has been a major transit passage for trade from Europe to Japan and China. Hence, the free and safe navigation of the Strait was of major concern, and the successive foreign powers in the region, the Portuguese, the Dutch and the British, worked closely with the Sultanate of Johor to make it as secure as possible.

29. The Sultanate of Johor was established by Sultan Mahmud in 1512, following the capture of Malacca by the Portuguese in 1511.⁵¹ From the beginning of the 17th century the Sultan of Johor entered into formal and friendly relations with the Dutch East Indies Company. At the time of the Dutch capture of the Portuguese vessel *Catarina* in 1604 on the shore of Johor, Hugo Grotius identified Johor as a Sultanate which "for long had been considered a sovereign principality".⁵²

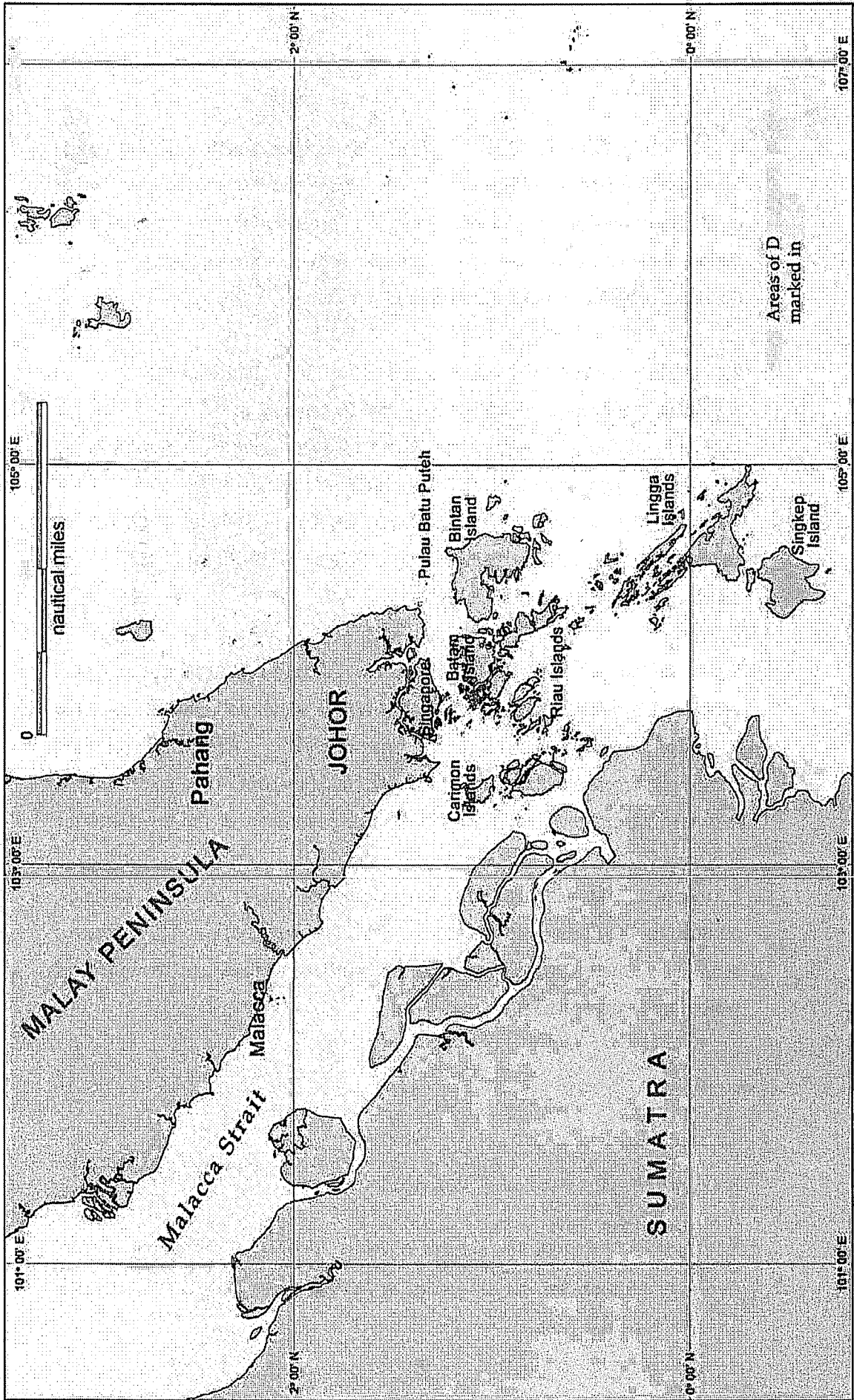
30. In the 17th and 18th centuries, the Sultan of Johor and the Dutch concluded various treaties by which they jointly sought to counterbalance the power of the Portuguese as well as the Acehnese. As a result of their combined forces, Malacca fell into Dutch hands in 1641. In a prior treaty it had been agreed that the Dutch would take possession of the town and the Sultan of Johor would take possession of the surrounding territory.⁵³ Furthermore, an alliance was formed against their common enemies, particularly the Portuguese and the Spanish. This was confirmed in a series of subsequent treaties, which provided for continuing peace and friendship as well as trade arrangements.⁵⁴

⁵¹ See R.O. Winstedt, *A History of Johore (1365-1941)* (Kuala Lumpur, Malaysian Branch of the Royal Asiatic Society, 1932, repr. 1992), p. 14.

⁵² See MM, para. 38.

⁵³ Winstedt, note 51, p. 43.

⁵⁴ See A.L. Andaya, *The Kingdom of Johore 1641-1728* (Kuala Lumpur: Oxford University Press, 1975); the texts of some of these treaties (those of 1685, 1689 and 1713) are annexed in this book. See also E. Netscher, *De Nederlanders in Djohor en Siak* (Batavia, 1870).



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31. Meanwhile, Johor itself opened a seaport at Riau, which soon flourished as a major commercial centre through which many ships passed. In the 17th and 18th centuries Johor was thus able to become a quite significant maritime force in and around the Strait of Singapore (see **Insert 2** on the preceding page).⁵⁵ The Dutch viewed the strength of Johor as a safeguard for peaceful trade in the Strait and as a counterweight to the increasing influence of the British in the Malay region from the late 18th century.⁵⁶

32. Singapore's Memorial correctly reports that by 1819 "...the Temenggong, whose fief was Johor, Singapore and neighbouring islands, enjoyed an increasing measure of independence".⁵⁷ This is confirmed by no less an authority than the founder of Singapore, Sir Stamford Raffles, in his "Notes relating to the Various Subjects of British rule in the Eastern Archipelago". He observed:

"With the exception of Java the Moluccas and the Philippines, nearly the whole of the Native States of the Archipelago may be considered independent. The European Settlements on the Coasts of Sumatra and Borneo are confined to Commercial objects, and the interior of these large islands, have never felt the effects of European interference. *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.*"⁵⁸

Obviously, Raffles is here referring to the authority of the Sultan and Temenggong of Johor. He wrote these notes in 1823, i.e. during the period 1819-1824 when the British and the Dutch were involved in lengthy negotiations to make specific territorial arrangements for the region. They agreed that the entire passage of the Strait of Singapore would fall within the British sphere of influence.

⁵⁵ See also MM, Insert 11, p. 36.

⁵⁶ R. Vos, *Gentle Janus, Merchant Prince. The VOC and the Tightrope of Diplomacy in the Malay World, 1740-1800* (Leiden: KITLV Press, 1993), Parts II & III.

⁵⁷ SM, para. 3.3, quoting C.M. Turnbull, *A History of Singapore, 1819-1975* (Oxford University Press, 1977) p. 9. The second edition of this book, *A History of Singapore, 1819-1988*, published in 1989, contains an identical observation at p. 8.

⁵⁸ Annexes, vol. 3, Annex 8 (emphasis added).

D. The 1824 Anglo-Dutch Treaty confirmed Johor's title

33. During the French occupation of the Netherlands (1795-1813) the British took temporary control of Dutch possessions, including Malacca. Earlier in 1786 the English East India Company had taken control of Penang and founded the settlement of Georgetown that same year. In 1814 the two powers concluded a general convention which restored Dutch sovereignty over its colonies in various continents, including Asia.⁵⁹ The British were anxious to maintain a presence in the Malay region in order to preserve their influence and to secure the China route and commerce in the region. During the period 1819-1824 Great Britain and the Netherlands were engaged in protracted negotiations on a demarcation of their spheres of influence in this region.

34. When negotiations had just started, Sir Stamford Raffles secured a British factory in Singapore through an agreement with Sultan Hussain Muhammed concluded on 30 January 1819.⁶⁰ Shortly afterwards, on 6 February 1819, a further Treaty of Friendship and Alliance was concluded between the English East India Company and the Sultan and Temenggong of Johor by which "The Port of Singapore is to be considered under the immediate protection and subject to the regulations of the British authorities."⁶¹

35. In subsequent years the Dutch claimed that the British should evacuate Singapore because it was part of Johor and its establishment infringed on the rights of the true sovereign of Johor, Sultan Abdu'r Rahman, who resided in Lingga under Dutch protection and who had not consented to the cession of

⁵⁹ Convention between Great Britain and the Netherlands Relative to the Dutch Colonies, London, 3 August 1814, MM Annex. 1.

⁶⁰ See MM, paras. 45-46.

⁶¹ Ibid. Text in MM Annex 3.

Singapore.⁶² However, the Dutch ultimately accepted the establishment of Singapore as part of a give-and-take process to define the respective spheres of influence in the region. For this purpose an imaginary line of demarcation was drawn from Pulau Carimon, through P. Pemping Besar, P. Belaking Padang and P. Batam to P. Bintan. 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.⁶³ PBP is clearly to the north of the line, as part of the territory of Johor and within the British sphere of influence.

36. Apart from recognising the British control of Singapore, the other immediate effects of the 1824 Anglo-Dutch Treaty were the cession of Malacca to the English East India Company and the relinquishing of any Dutch claims to possessions and territorial claims to the north of the islands along the southern shore of the Strait of Singapore. In return, the British would not claim any "Islands south of the Straights of Singapore".⁶⁴ Thus the island of Singapore, that part of the Sultanate of Johor situated on the Malayan peninsula and all islands within the Strait fell clearly within the British sphere of influence. In this way, the Treaty of 1824 between Great Britain and the Netherlands confirmed the continuing title of Johor to all islands and other maritime features in the Strait of Singapore.

37. This fact is confirmed by the following report made by a Vietnamese envoy to Batavia in 1833:

⁶² For a detailed review of the negotiations, see N. Tarling, *Anglo-Dutch Rivalry in the Malay World 1780-1824* (Cambridge, 1962) chs 4-5.

⁶³ See below, p. 277, and for an enlargement of the relevant area, p. 278. For an assessment of the effect of the Treaty of 1824 on the division of the Malay world, see B.W. Andaya & L.Y. Andaya, *A History of Malaysia* (Houndmills/Basingstoke, 2nd ed., 2001) pp. 125-128.

⁶⁴ Art. XII of the Anglo-Dutch Treaty: MM Annex 5.

“The station of Pedra Branca.

The station of Pedra Branca, or of ‘White Rock’ is surrounded by mountains. A big white rock emerges in the middle of the waves. From afar, it appears to be sparkling, hence the name given to the port. On both sides the slopes are covered by forests and the houses follow one another until the channel of Singapore. Huts made by reed and bamboo come to light over the dark cliffs, amidst the greenness of the trees. It is a calming landscape. To the south, once past Lingga archipelago, one turns to take the maritime route to Malaka and Pinang Island. To the west, after leaving the Tanjung Burung heights, one turns and is led to the Strait. When one arrives at the port of Riau, one enters Dutch territory, which continues until Kelapa. Both on the outward and the return journeys one passes through this port that constitutes the ‘avant-poste’ of that city.”⁶⁵

This report shows clearly 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.

38. A cornerstone of 19th century British policy in the Malay region was the recognition of the continuing right of the Sultanate of Johor, from 1824 under British protection, to exercise sovereignty over its dominions, including its islands in the Strait of Singapore. This is exemplified by numerous acts, including the Crawford Treaty of 1824, the permission to construct a lighthouse in 1844 and the Johor Treaty of 1885 relating to the relations of “Her Majesty’s Government of the Straits Settlement with the Government of the Independent State of Johore”.⁶⁶

⁶⁵ Translation provided by Malaysia from *Phan Huy Chú, Un émissaire vietnamien à Batavia, Récit sommaire d’un voyage en mer*, traduit et présenté par Phan Huy Le, Claudine Salmon & Ta Trong Hiep (Paris: Association Archipel, 1994) p. 46 (original text in Sino-Vietnamese, translated into modern Vietnamese and French): Annexes, vol. 3, Annex 9.

⁶⁶ See MM, para. 64, MM Annex 10.

E. Continued sovereignty of Johor over Pulau Batu Puteh was not affected by the Crawford Treaty

39. In its Memorial Singapore neglects entirely the 1824 Anglo-Dutch Convention, despite its clear relevance to this case. And it has chosen to make only cursory reference to another essential treaty, the Crawford Treaty of 1824. When the two colonial powers had resolved their differences in the Malay region as reviewed above, matters relating to Singapore proper could then be addressed. On 2 August 1824, the English East India Company and the Sultan and Temenggong of Johor concluded a new Treaty of Friendship and Alliance.⁶⁷ This treaty, commonly known as the Crawford Treaty, included an unambiguous provision relating to the cession of the island of Singapore to the Company. The key phrase relating to the geographical extent of the cession is included in Article II. It reads:

“...the Island of Singapore, situated in the Straits of Malacca, together with the *adjacent* seas, straits and islets, *to the extent of ten geographical miles*, from the coast of the said main Island of Singapore”.⁶⁸

40. Obviously, Johor could not have ceded the territory of Singapore Island and islets situated within ten geographical (i.e. nautical) miles to the English East India Company if Johor did not have title to it. And the fact that it had a title which it was capable of ceding shows that the Johor title to the area before 1824 included both PBP and sovereignty over Singapore. PBP is situated less than ten geographical miles off the coast of mainland Johor (7.7 nm) and more than ten geographical miles from the coast of Singapore (25.5 nm).

41. Singapore acknowledges that the Crawford Treaty precluded any assertion of title to islands beyond those within the 10 geographical mile limit

⁶⁷ See MM, paras. 54-56, MM Annex 6.

⁶⁸ MM Annex 6 (emphasis added).

of Singapore.⁶⁹ But it fails to appreciate the geographical extent of the cession in the Crawford Treaty. From the specific phrase used—“to the extent of ten geographical miles”—it clearly follows that this was not an area which the English East India Company or Singapore could enlarge unilaterally. This interpretation is supported by other articles of the Treaty: Articles II and IV stipulate that a certain consideration would have to be paid by the Company to the Sultan and Temenggong for the cession.⁷⁰

42. Singapore accepts that the cession of Singapore by the Sultan and Temenggong of Johor was effected by the Crawford Treaty. However, what Singapore fails to appreciate is that this important constitutive document on the establishment of Singapore also confirms formal British recognition of prior and continuing sovereignty of the Sultanate of Johor over all other islands in and around the Strait of Singapore. For the Crawford Treaty provides, in unequivocal terms, that the cession is confined to the island of Singapore itself and the area, including seas, straits and islets, within ten geographical miles of the main island of Singapore. Title to other territories and sea areas remains where it was, namely in the Sultanate of Johor.

⁶⁹ See SM, para. 5.5.

⁷⁰ MM Annex 6.

F. Pulau Batu Puteh was never a dependency of Singapore

43. In several places in its Memorial, Singapore portrays PBP as one of its “dependencies”.⁷¹ The expression “dependency” is a rather vague term and not a term of art. As the *Halsbury’s Laws of England* observe with respect to “dependency” and “dependent territory”:

“These are words of no technical meaning; they are wider and usually vaguer than ‘colony’. They refer to a country, province or territory which is subject to the control of the government of a state or country of which it is not an integral part; such control need not extend beyond responsibility for the conduct of the external relations of the dependency.”⁷²

Singapore’s Memorial uses the phrase “Singapore and its dependencies” in a very loose way, without providing any specific definition.

44. But even this loose and vague term, chosen by Singapore, refutes its case. The fact is that the territory of Singapore was described in great detail on a number of occasions, using the phrase “Singapore and its Dependencies”, and on none of these occasions was PBP treated as one of Singapore’s dependencies.

45. Article XIV of the Crawford Treaty of 1824 refers to any right or title of the East India Company to “the occupation or possession of the Island of Singapore and its *dependencies, as above-mentioned*”.⁷³ This clearly refers back to the phrase in Article II on “the adjacent seas, straits and islets, to the extent of ten geographical miles, from the coast of the said main Island of Singapore.” These dependencies are also referred to in Article 1 of the 1927 Johore-Singapore Territorial Waters Agreement and are depicted on the Map

⁷¹ See SM, paras. 3.7, 3.9, 9.14-9.15, 9.34 *et seq.*

⁷² See *Halsbury’s Laws of England* (4th edn., London, 1974), vol. 6, p. 321, para. 802. To equivalent effect, see *ibid.* (2003 reissue), vol.6, p. 414, para. 702.

⁷³ MM Annex 5 (emphasis added).

attached to it.⁷⁴ In essence, the Agreement confirmed the Crawford Treaty of 1824 and the territorial situation resulting therefrom, apart from retroceding certain areas to Johor.

46. In addition, there are a significant number of unilateral instruments of Singapore, such as acts, orders, announcements and constitutional documents adopted both shortly before and after independence, that describe in detail the extent of Singapore.⁷⁵ Throughout its history, and for all kinds of purposes, the relevant authorities have always described the territory of Singapore in a consistent, precise and detailed manner. Before 1992, PBP had not once been specifically referred to by Singapore as an “island, an area or dependency” belonging to Singapore⁷⁶ as it now puts it in its Memorial. All the geographical entities of this nature described as belonging to Singapore were necessarily limited to those within the 10-mile limit around it established by the Crawford Treaty of 1824.

47. In sum, there is no evidence whatsoever to suggest that PBP was regarded as coming within the scope of such a broad phrase “island, area of dependency”. Numerous formal and informal descriptions of the territory of Singapore exist from the 19th and 20th centuries.⁷⁷ None makes any reference to PBP.

G. Conclusions

48. It must thus be concluded that at no relevant time was PBP *terra nullius*. The Strait of Singapore and the islands, including rocks, and low tide elevations in and around it, have frequently been the subject of territorial

⁷⁴ Straits Settlement and Johore Territorial Waters Agreement, 19 October 1927: MM Annex 12. See MM, paras. 190-192 and for the Map attached to this Agreement see MM, Insert 17, p. 89.

⁷⁵ See MM, Chapter 7.

⁷⁶ Cf. MM, para. 212.

⁷⁷ See MM, Chapter 7.

regulation; throughout, PBP has remained without interruption within the dominion of the Sultanate of Johor and Malaysia.

49. For a proper understanding of the historical background of the dispute one cannot overlook the pre-1819 history in the region, especially the evolution of the Sultanate of Johor. Before 1824 this Sultanate existed North and South of the Strait of Singapore and included all islands and other maritime features in and in the vicinity of the Strait of Singapore.

50. Original title over this well-known feature in the perennially busy Strait of Singapore has always been with the Sultanate of Johor. This is confirmed by both the Anglo-Dutch Convention of 1824 and the Crawford Treaty of 1824—important legal instruments—neither of which receives more than scant attention from Singapore in its Memorial.

51. Until 1980 PBP was not once referred to by a Singaporean authority as belonging to Singapore. It does not come within the scope of the expression “Singapore and its dependencies”. The dependencies of Singapore have always been carefully described and consistently limited to the 10-mile limit of Singapore Island, both before and after the independence of Singapore. Evidently, PBP was not part of it.

Chapter 3

SINGAPORE'S PURPORTED "TAKING OF POSSESSION"

A. The original title alleged by Singapore

52. Singapore claims sovereignty over PBP on the basis of what is presented as a "taking of lawful possession" of the island by Great Britain at the time of the construction of the lighthouse. According to its Memorial,

"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."⁷⁸

53. Thus, according to Singapore, acts leading to the construction and operation of the Horsburgh Lighthouse between 1847 and 1851 can be considered as a taking of possession allowing their author to acquire sovereignty over PBP. Conduct by Singapore or its predecessor in the years that followed is presented as a *confirmation* of what is called an "original title", and as a *maintenance* of it.⁷⁹

54. Singapore thus claims to have acquired sovereignty over PBP in the period 1847-1851. Malaysia rejects that claim on the basis that the holder of sovereignty of the island at that time was Johor, which did no more than grant permission for the construction of the lighthouse. Accordingly, the main task

⁷⁸ SM, para. 5.5 (emphasis in original). See also SM, paras 5.101, 5.103.

⁷⁹ "Singapore has continuously engaged in acts of State authority which confirm her original title to Pedra Branca" (SM, para. 7.5).

of the Court is to determine whether the British Government somehow established sovereignty over PBP by constructing the lighthouse or whether, on the contrary, Johor's sovereignty remained unaffected by that construction.

55. This Chapter will examine the argument put forward by Singapore in its Memorial as the basis of its claim. It will show that:

- (1) there was no taking of possession of PBP at the time of the construction of the lighthouse;
- (2) the activity leading to the erection and operation of the lighthouse was not in any way conducted with the intention of acquiring sovereignty; and
- (3) the construction of the lighthouse went ahead on the basis of the permission granted by the sovereign of the island, Johor, for this sole purpose.

B. Britain never "took possession" of Pulau Batu Puteh

56. Singapore claims to have an "original title" over PBP; it claims that its "taking of lawful possession" was the way in which this sovereignty was established, although it did not define PBP as being *terra nullius* at the time of the construction of the lighthouse. As demonstrated in the previous Chapter, PBP was at that time under the sovereignty of Johor. Leaving aside this fundamental obstacle to Singapore's pretence of an original title on the basis of a mere taking of possession, this Chapter will show the lack of material foundation for the alleged "taking of possession of Pedra Branca by the British Crown".

57. Singapore's Memorial includes extensive doctrinal quotations regarding the acquisition of territorial sovereignty in the second half of the 19th century.⁸⁰ In spite of this, Singapore does not provide a single definition

⁸⁰ SM, para. 5.108.

of the central legal ground of its claim, the taking of possession. Below is an extract from a well known work on occupation published in the 19th century:

“La prise de possession est la preuve certaine qu’un Etat veut acquérir un *territorium nullius*... L’Etat montre par la prise de possession qu’il veut *établir* sa souveraineté... La prise de possession, avons-nous dit, sert à prouver l’intention bien certaine d’un Etat d’établir sa souveraineté sur un certain territoire. Elle a aussi un autre objet: fixer d’une manière précise le moment auquel s’est réalisée cette intention.”⁸¹

58. In the present case, neither of the aims that define a taking of possession according to this definition is present. As will be seen, the construction of the lighthouse neither entailed any intention to acquire sovereignty over a *terra nullius*, and nor did the British authorities allegedly responsible for such “taking of possession” fix the moment at which this was accomplished.

59. As to the aim of “fixer d’une manière précise le moment auquel s’est réalisée cette intention”, attention needs to be drawn to the inconsistent manner in which Singapore has presented what is called the “taking of lawful possession” of PBP by Great Britain. The Singapore Memorial gives at least four different dates to indicate when this “taking of possession” occurred.

60. In some paragraphs, the taking of possession is presented as having occurred in 1847.⁸² This year is even mentioned as the time of the *occupation*

⁸¹ “The taking of possession is conclusive evidence that a State seeks to acquire a *territorium nullius*... The State demonstrates through the taking of possession that it seeks to establish its sovereignty... As stated, the taking of possession serves the purpose of proving a State’s firm intention to establish its sovereignty over a particular territory. It also serves another purpose: that of fixing precisely the time at which this intention was expressed” (translation by Malaysia). G. Jèze, *Etude théorique et pratique sur l’occupation comme moyen d’acquérir les territoires en droit international* (Paris, V. Giard, 1896), pp. 214-215 (emphasis in original).

⁸² “Singapore took lawful possession of Pedra Branca in 1847 and acquired sovereignty over the island” (SM, para. 3.6); “the British Crown took lawful possession of Pedra Branca in 1847 for the purpose of building Horsbrough Lighthouse” (SM, para. 4.1); “Singapore... and her predecessors in title have peacefully exercised sovereign authority over Pedra Branca after taking lawful possession of the island in 1847” (SM, para. 7.1).

of the island.⁸³ In other paragraphs, 1847 appears simply as the year in which the taking of possession began.⁸⁴ In another paragraph it was the selection of PBP for the building of the lighthouse (that is to say, before 1847) that fulfils this function.⁸⁵ Finally, in other paragraphs the taking of possession was said to be a process undertaken between 1847 and 1851,⁸⁶ the “final acts” of the “process” being the inspection of the lighthouse once it was constructed.⁸⁷

61. This is the first time in the history of territorial litigation that a *taking of possession* of an island is presented as a complex act lasting at least four years and without a single manifestation during that period of the intention to acquire sovereignty. Indeed, the taking of possession is the first action by which one State “réduit à sa disposition le territoire en question”.⁸⁸ A series of acts of taking of possession could be conceived in cases of large territories or a group of islands. This was the case in the taking of possession of Singapore by John Crawfurd which took place between 4 and 8 August 1825. The British Resident took formal possession of the Island of Singapore and its dependencies, planting the Union Jack and firing a 21-gun salute in different parts of the new settlement, including islets having characteristics similar to PBP.⁸⁹ As was demonstrated in the Malaysian Memorial, British practice in taking possession of territory was formal, documented and unequivocal as an assertion of sovereignty.⁹⁰

⁸³ “In 1847, the British colonial government in Singapore occupied the island and proceed to build the lighthouse on it named ‘Horsburgh Lighthouse’” (SM, para. 2.6).

⁸⁴ “The process of taking lawful possession of Pedra Branca for the purpose of constructing and maintaining a lighthouse began in 1847” (SM, para. 5.92).

⁸⁵ “The selection of Pedra Branca as the site for building of the lighthouse with the authorization of the British Crown constituted a classic taking of possession *à titre de souverain*” (SM, para. 5.103).

⁸⁶ See particularly SM, para. 5.5, quoted above.

⁸⁷ SM, paras. 5.84, 5.101, 5.112. But SM para. 5.103 seems contradictory, since it mentions the selection of Pedra Branca as the site for the lighthouse as the taking of possession on the one hand, and the years 1847-1851 as the period in which the British Crown acquired title over PBP on the other.

⁸⁸ *Clipperton Island Case (Mexico/France)*, (1932) 6 RGDIP p. 129 at p. 132; English translation in (1932)26 AJIL 390.

⁸⁹ J.H. Moor, *Notices of the Indian Archipelago and Adjacent Countries* (Singapore, 1837), pp. 269-73.

⁹⁰ MM, paras. 157-164.

62. According to the Singapore Memorial:

“The literature requires an intention to acquire sovereignty, a permanent intention to do so, and overt action to implement the intention and to make the intention to acquire manifest to other States.”⁹¹

Malaysia agrees. Unfortunately for Singapore, none of this occurred with regard to the British Government *vis-à-vis* PBP. As will be demonstrated below, Great Britain had not the slightest intention of acquiring sovereignty—either permanently or otherwise—and consequently there was no action implementing or manifesting such intention to other States.

C. There was no intention to acquire sovereignty

63. As Singapore recognises, what is essential for the taking of possession to establish sovereignty is the physical act of taking possession coupled with the intention to do so. Its Memorial, however, separates these two elements, distinguishing the taking of possession from the intention to do so as if they are two different grounds of title.⁹² The taking of possession requires both the effective apprehension of the territory (*corpus*) together with the intention to acquire sovereignty (*animus*). They are two elements of the same act, respectively the objective and the subjective elements. The Permanent Court of International Justice put it this way:

“... a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”⁹³

64. In the present case, there is nothing to indicate an “intention and will to act as sovereign”. As to the display of authority, if this existed at all it was

⁹¹ SM, para. 5.109.

⁹² SM, para. 5.102.

⁹³ *Legal Status of Eastern Greenland*, PCIJ Series A/B N° 53 (1933), pp. 45-46. See also *Western Sahara, advisory opinion*, ICJ Reports 1975, p. 43 (para. 92); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Judgment*, ICJ Reports 2002, p. 682 (para. 134).

limited to the activities on the lighthouse or ancillary thereto and was based on the permission granted by the sovereign, Johor.

65. The subjective element, *animus*, does not always have the same purpose. It may vary, leading to different consequences. In some cases, the intention is to acquire sovereignty, in others to acquire property, in yet others to be the administrator or custodian either of territory or of immovable property without being either sovereign or owner. For this reason the element of intention is essential in order to determine the legal significance of physical acts performed with regard to territory. As Salomon pointed out in the 19th century:

“L’État peut être propriétaire, comme un simple particulier, soit dans les limites de son propre territoire, soit en dehors de ces limites. D’autre part, l’occupation est à la fois un mode d’acquisition de la souveraineté et un mode d’acquisition de la propriété. En sorte que l’État, étant à la fois une personne du droit international et une personne du droit privé, peut acquérir par occupation, suivant les cas, soit la souveraineté, soit la propriété.”⁹⁴

66. Significantly, none of the various formalities undertaken in the course of the construction of the lighthouse or after its completion—the laying of the foundation stone by a Masonic ceremony, the mounting of the plate in the visitors’ room, the inauguration of the lighthouse, the notification to the East India Company, the publication of the Notice to Mariners, the passing of Acts Nos. VI and XIII in respect of the lighthouse operations—manifested any intention to acquire sovereignty, either explicitly or implicitly. The account of the ceremony of the laying of the foundation stone appearing in the *Straits Time and Singapore Journal of Commerce* referred to “the Horsburgh

⁹⁴ “The State can be an owner, like a private individual, either within the limits of its own territory, or beyond those limits. Moreover, occupation is at the same time a mode of acquisition of sovereignty and a mode of acquisition of ownership. In this way, the State, being at the same time a subject of international law and a subject of private law, can acquire by occupation either sovereignty or ownership, depending on the circumstances” (translation by Malaysia): Ch. Salomon, *L’occupation des territoires sans maître. Etude de droit international* (Paris: A. Giard, 1889), p. 13.

Testimonial, or *Lighthouse for all Nations*".⁹⁵ This is an unlikely way of describing a lighthouse whose construction supposedly represented the taking of exclusive possession of the island on behalf of the British Crown.

67. On the contrary, the formalities listed above reveal only an intention on the part of the East India Company to own the lighthouse. Of particular importance is Act No. VI of 1852, declaring that the Horsburgh Lighthouse "shall become the property of, and absolutely vest in, the East India Company and their successors" and that "[t]he management and control of the said "Horsburgh Light-House and the keeper thereof, and of everything relating thereto, is hereby vested in the Governor of the Straits Settlements".⁹⁶ Act No. XIII of 1854 merely confirmed this.⁹⁷ Neither Act asserts or reflects a claim to sovereignty over PBP.

68. Singapore's assertion that the Notice to Mariners of 24 September 1851 "was based on a datum: that the island on which the lighthouse stands is British and forms part of Singapore"⁹⁸ is not supported by either the wording of the Notice itself or any other evidence. On the contrary, it is not specified in any contemporary documentation, either explicitly or implicitly, that PBP was or had become British territory. The fact that Governor Butterworth signed the first Notice of the beginning of the operation of the lighthouse is not in itself evidence of sovereignty over PBP. Quite simply, the authority responsible for the lighthouse proudly announced the construction and characteristics of Horsburgh Lighthouse to those intended to take advantage of it, i.e. the mariners of "All Nations".

69. All the evidence furnished by the Singapore Memorial simply goes to prove the existence of an *animus domini* in respect of the lighthouse, i.e., the intention to be its owner. There is not a single piece of evidence of any

⁹⁵ 28 May 1850 (emphasis added), quoted in SM, para. 5.56.

⁹⁶ MM, para. 169; SM, paras. 6.12, 6.13.

⁹⁷ SM, para. 6.20.

⁹⁸ SM, para. 5.88.

“intention and will” of the British Government to act with the aim of acquiring sovereignty over the island, i.e., to act *à titre de souverain* with regard to the territory. This is also true of the Singapore Government for any time before the critical date.

70. 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 in the East”, Mr Davidson, at the ceremony laying the foundation stone that “this Rock is a dependency”.⁹⁹ As noted already, the term “dependency” does not necessarily entail “sovereignty”.¹⁰⁰ 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. The Temenggong himself, in his letter granting permission for the construction of the lighthouse, states that “our dependence is wholly on the English Government”.¹⁰¹ Mr Davidson was a merchant,¹⁰² so was by no means aware of matters of territorial title, and he had no official function in the Government. Significantly, Governor Butterworth, who took the floor after Mr. Davidson, did not make any reference to matters of sovereignty. Nor did he speak either of a taking of possession or occupation of the island. This would have been an appropriate occasion on which to affirm the incorporation of another piece of territory into the Colony had the real intention underlying the construction of the lighthouse been the acquisition of sovereignty over the island. If one follows Singapore’s line of reasoning, it seems odd, to say the least, that this alleged intention was not manifested in any way on such an occasion, or at any other time.

⁹⁹ SM, para. 5.58.

¹⁰⁰ See above, paragraph 43.

¹⁰¹ MM, para. 122.

¹⁰² A partner of Messrs. A.L. Johnston and Co. until 1863: see Charles Burton Burkley, *Anecdotal History of Old Times in Singapore* (Singapore: Fraser and Neave Ltd., n.d., reprinted by the University of Malaya Press, Kuala Lumpur, 1965), vol. 1, pp. 202, 232; vol. 2, p. 457.

71. 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 Government 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".¹⁰³

72. Hence the evidence advanced by both Memorials leads to the same conclusion: the intention of the British Crown was not to acquire sovereignty over PBP but only to construct a lighthouse there and to have ownership of it.

D. Lighthouse activities and the British practice of taking of possession

73. The Singapore Memorial recognises that there was no *formal* taking of possession of PBP on behalf of the British Crown, arguing that "[i]n the circumstances, no particular formalities were called for".¹⁰⁴ The circumstances on which it relies are that PBP is a small and uninhabited island. Singapore's tactic explains why its Memorial insists on the expression "taking of *lawful* possession" to replace the traditional "formal taking of possession", used by the British Government as well as by others. But lawful presence on the island is not in dispute. What it is essential to determine is whether under the particular circumstances of the case there was a taking of possession of PBP in order to establish British sovereignty over it.

¹⁰³ SM, para. 5.59.

¹⁰⁴ SM, para. 5.90.

74. Singapore bases its claim that there is no requirement of particular formalities for taking possession on a sole doctrinal quotation which supposedly explains British constitutional practice and mentions Antarctica as an example.¹⁰⁵ Yet it is an official presentation of the United Kingdom before this Court that provides the clearest denial of that assertion. In its Applications instituting proceedings against Argentina and Chile in the *Antarctica Cases*, the British Government invoked several examples of what it considered to be takings of possession. It mentions that Captain James Cook landed on South Georgia in the Falkland Island Group and “took possession of it *formally* in the name of King George III”, that Captain W. Smith revisited the South Shetland Islands in October 1819, “planted the British flag and *formally* took possession of the group in the name of King George III”, that E. Bransfield, R.N., landed on King George Island “and took possession *formally* in the name of King George IV”, and landed later on the most easterly island of the group “taking possession *formally* in the King’s name”, that Captain George Powell landed on the largest of the South Orkney Islands on 7 December 1821 and “took possession of it *formally* in the name of King George IV”.¹⁰⁶

75. In the case of PBP, the British authorities never acted in that manner. At no time did they make any declaration formally taking possession of the island in the name of the Crown; assert that the island belonged to the Crown, or plant the Union Jack, or salute the Union Jack by gun or by holding a parade or singing the national anthem.

76. In its Memorial, Malaysia provided examples of actual cases of taking of possession of islands on behalf of the British Crown which occurred in the

¹⁰⁵ SM, para. 5.90, citing Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966) pp. 107-108. In fact the passage quoted by Singapore is concerned to distinguish acts of annexation which accompany settlement, conquest or cession from those which stand alone. Roberts-Wray was not saying that British sovereignty is acquired without any manifested intention to do so. Clearly acts of annexation without more are manifestations of such an intention.

¹⁰⁶ *ICJ Pleadings, Antarctica Cases (United Kingdom v. Argentina, United Kingdom v. Chile)* (1956), paras. 6-9, pp. 11-12 (emphasis added).

period from 1775 to 1886. They 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. This is also true even with regard to islets and rocks close to territories already under British sovereignty.

77. An example of the latter is the taking of possession of Morant Cays near Jamaica on 12 October 1862. Commander William John Ward took possession of Morant Cays in the name of Her Britannic Majesty and produced a certificate to confirm he had done so. Later, the Governor of Jamaica, Edward Eyre, issued a Proclamation announcing the taking of possession in the name of the Queen on 23 February 1863.¹⁰⁷ The Morant Cays consist of four small coral islets. Their altitude is 5m and the nearest territory to them lies at 60 km. Located at 17.43°N, 75.90°W, they are uninhabited and are seasonally visited by fishermen.¹⁰⁸

78. Another important example of the taking of possession of territory which can be compared with PBP is that of Labuan, mentioned above.¹⁰⁹ It concerns the taking of possession on behalf of the British Crown of an uninhabited island in the same region and in the same year of the purported “taking of possession” of PBP. Captain Mundy of *HMS Iris* took formal possession of the island of Labuan, following instructions from the Naval Commander in Chief of Her Majesty’s Naval Forces in India and the China Seas, Rear Admiral Sir Thomas Cochrane. The account by Thomas Church of the taking of possession reads as follows:

¹⁰⁷ 63 *BFSP* pp. 797-798; 14 *Hertslet* pp. 828-829.

¹⁰⁸ See United Nations Environmental Programme (UNEP) Island Directory: <http://islands.unep.ch/ISP.htm>.

¹⁰⁹ See above, paragraphs 23-25.

“LABUAN, its dependencies and islets, are now part and parcel of the British dominions. The English flag was formally hoisted on the 18th December [1847], with due honour and ceremony, in the presence of the Bornean Chiefs and numberless Malays.”¹¹⁰

The Sultan had offered Labuan to Great Britain in August 1843. The British Admiralty then instructed Commander Bethune to examine Labuan for the purpose of a possible taking of possession.¹¹¹ Different British Government departments—both in London and in the Straits Settlements—were involved and were consulted before an action such as the incorporation of a territory into the British Empire was taken.¹¹² On 19 September 1846, the Officiating Secretary to the Government of India addressed to the Governor of the Straits Settlements a copy of a letter conveying Her Majesty’s command that the British Admiral in the Eastern Seas be directed to take steps for obtaining formal possession of Labuan.¹¹³ It was after the conclusion of the Treaty of Friendship and Alliance with the Sultan of Borneo (Brunei) of 18 December 1846 that the island was taken in possession on behalf of the British Crown. This act was followed by other formalities, including communications between the Government of India and Governor Butterworth.¹¹⁴

¹¹⁰ *Papers Relating to Borneo and the Proceedings at Sarawak of James Brooke, Esq., Now Her Majesty's Commissioner and Consul-General to the Sultan and the Independent Chiefs of Borneo* (3rd series, London: Robson, Levey, and Franklin, 1847), p. 111.

¹¹¹ Letter of 1 November 1844, in Allen, J. de V, Stockwell, A.J. and Wright, L.R. (eds), *A Collection of Treaties and other Documents Affecting the States of Malaysia 1761-1963* (London, Oceana Publications Inc., vol. II, 1981), pp. 394-398: Annexes, vol. 3, Annex 12.

¹¹² In particular the Colonial and the Foreign Offices, the former having raised some objections against the occupation of Labuan, the Lords of the Admiralty, the Treasury, amongst others, as well as former officials knowing the region, such as Mr. Crawford. See the correspondence contained in Colonial Office file CO 144/1, June 1846: Annexes, vol.3, Annex 15.

¹¹³ Annexes, vol. 3, Annex 16.

¹¹⁴ See letter of 2 January 1847 from the Officiating Secretary to the Government of India to the Governor of the Straits Settlements and letter of 20 January 1847 from Governor Butterworth to G.A. Bushby, Secretary to the Government of India: Annexes, vol. 3, Annexes 18 and 19.

79. The contrast between a genuine act of taking of possession, such as that in the case of Labuan, with the conduct leading to the construction of Horsburgh Lighthouse on PBP is clear. It is also worth noting that the main personalities involved in the taking of possession of Labuan were the same as those involved in the construction of the lighthouse on PBP. Captain Belcher had recommended Peak Rock over PBP for the construction of the lighthouse, Admiral Cochrane recommended that the lighthouse be built on PBP instead of Peak Rock, Governor Butterworth played a key role during the whole process, Thomas Church translated the Sultan's and Temenggong's letters of permission of 1844 and was the official in direct communication with J.T. Thomson, the architect of the lighthouse. These persons knew very well how to proceed in order to take possession of an island on behalf of the British Crown. They did so in the case of Labuan but not in the case of PBP.

80. The example of the Cocos (Keeling) Islands is also important for the reasons developed below. The islands were uninhabited until 1826, when the Clunies-Ross family, British citizens, settled them with immigrant Malay labour. The Cocos (Keeling) Islands were only annexed to the Crown in 1857. The Proclamation of 31 March 1857 details the taking of possession as follows:

“WHEREAS, in pursuance of Her Majesty's pleasure, my Lords Commissioners of the Admiralty have required and directed me to take possession of these Islands, called Cocos, in Her Majesty's name, with the usual formalities:

I do, therefore, declare that from henceforth these Islands, called the Cocos Islands, including the Northern Island, otherwise called North Keeling Island, are a part of Her Britannic Majesty's possessions, and that they have been this day formally annexed to the dominions of Her Most Gracious Majesty Queen Victoria by the customary act of displaying the Union Flag of England on a staff erected on the principal island, and recognised by a royal salute from Her Britannic Majesty's Ship *Juno*, in the presence of the inhabitants of the Settlement and a guard of honour from the said ship.

Given under my hand at the Cocos Islands, this 31st day of March, 1857.”¹¹⁵

81. This proclamation is but one example of the constant practice regarding acts of taking of possession of territory. The author stresses that he accomplished “the usual formalities”, including the “customary act of displaying the Union Flag”. Even in cases of the taking of possession by private British subjects, they at least planted the British flag and followed with a formal proclamation that the territory in question belonged to the British Crown.¹¹⁶ The only plausible explanation why British official authorities did not carry out these formalities in respect of PBP, despite having multiple occasions to do so (on the first landing of J.T. Thomson, the laying of the foundation stone, the inauguration of the lighthouse, etc.) is that there was no intention to acquire sovereignty over a location put at their disposal by the actual sovereign for the sole and express purpose of constructing a lighthouse. It is also clear that, in contrast to real cases of taking of possession, there were no instructions at all from the British Government or from the East India Company to take possession of PBP on behalf of the British Crown.

82. Another example of a formal taking of possession is that which took place on 3 October 1825 when the King of Sherbro and the Queen of Ya Comba ceded their territories to Great Britain. The Proclamation of the Governor-General of Sierra Leone states:

“Now therefore be it known to all whom it may concern, that possession of the said kingdoms has been by us taken in the name and on behalf of His Majesty, and that the same, by virtue of the powers in us vested, are constituted an integral part of the colony of Sierra Leone, and are thereby become subject to the navigation and other laws of the mother country and of the said colony.”¹¹⁷

¹¹⁵ 17 *Hertslet* pp. 1196-1197.

¹¹⁶ See H.A. Smith, *Great Britain and the Law of Nations* (London, P.S. King & Son, 1935), p. 28.

¹¹⁷ 14 *Hertslet* pp. 950-951.

Further examples will be mentioned below when dealing with the incorporation of territories to a given British Colony and the display of the British flag in acts of taking of possession.¹¹⁸

83. In an attempt to conceal the weakness of the argument of the “taking of lawful possession”, Singapore pretends that the formalities involved in taking possession of territory are those of an act of annexation. Its Memorial states, on the one hand, that in the case of PBP “the formality of annexation [was] superfluous” and, on the other hand, that the process of construction of the lighthouse “provides unequivocal evidence of the will of the British Crown to annex Pedra Branca”.¹¹⁹ If Singapore’s contention is correctly understood, there was no annexation but only “the will to annex” PBP by the British Crown. In fact, as is clear from the pleadings of both Parties, there was neither the former nor the latter.

84. The term “annexation” has been used in different contexts and with different meanings. According to Lord McNair,

“[t]his word is hardly a term of art, and is perhaps used more by administrators and politicians than by lawyers. It is mainly used to denote the official act whereby a State signifies its acquisition of territory which it has conquered and has acquired by subjugation, or which has previously been under its protection or administration. It is less frequently and less justifiably employed to denote the official act whereby a State signifies its occupation of *terra nullius*.”¹²⁰

¹¹⁸ See below, paragraphs 87-89.

¹¹⁹ SM, para. 5.91 (emphasis added).

¹²⁰ Lord McNair, *International Law Opinions* (Cambridge, CUP, 1956), vol. I, p. 285, fn. 1.

85. The description of annexation that approaches the present case most closely is that given by T.J. Lawrence, who wrote that

“effective international occupation is made up of two inseparable elements,—*annexation* and *settlement*. By the formal act of *annexation* the annexing state notifies its intention of henceforth regarding the annexed territory as a part of its dominions”.¹²¹

86. Annexation can also refer to a formal legislative measure officially incorporating the territory within the sovereignty of the State. As will be shown below, in British practice the term was used to refer to the incorporation of a territory in a particular colonial unit of the Empire. Singapore seems to deny that a legislative act was necessary. The reason for this becomes apparent when one notices that the only legislative formality accomplished by the British Government in respect of PBP was the Indian Act No.VI of 1852, which merely declared that the lighthouse on Pedra Branca “shall become the property of, and absolutely vest in, the East India Company and their successors” and said nothing with regard to sovereignty over the island itself.¹²²

87. Irrespective of the terminology employed, it has been shown that there was no taking of possession of PBP on behalf of the British Crown. As to the second meaning of “annexation” mentioned in the preceding paragraph, what is clear is that, even without any further act of annexation, a legislative measure to establish the authority responsible for the island would have been necessary at some stage. This was the constant practice in the case of incorporation of territory into the British Empire, regardless of its size, remoteness or lack of inhabitants. Antarctica, the example given in the Singapore Memorial,¹²³ again offers a striking illustration. By Royal Letters

¹²¹ T.J. Lawrence, *The Principles of International Law* (London, MacMillan, 1895), p. 147 (emphasis in original).

¹²² See below, paragraphs 347-349.

¹²³ SM, para. 5.90.

Patent of 21 July 1908 the Governor of the Falkland Islands was appointed Governor of Graham's Land and the Antarctic islands, constituting them as Dependencies of the Falkland Islands. According to the British Application instituting the proceedings, "Great Britain's title to the islands and territories of the Dependencies was thus formally confirmed and defined by the issue of the Letters Patent of 1908 and 1917".¹²⁴

88. There are numerous other examples of small islands that were formally incorporated under British sovereignty. Amongst them are those of Ichaboe and Penguin Islands. After duly taking possession of them on behalf of the Queen on 21 June 1861 and 5 May 1866 respectively, the Governor of the Colony of the Cape of Good Hope issued a Proclamation declaring Ichaboe and Penguin Islands to be annexed to that Colony on 16 July 1866. British Letters Patent appointing the Governor of the Cape of Good Hope as Governor of those "islands, islets, and rocks" and authorising their annexation to the Colony of the Cape of Good Hope were issued on 27 February 1867. But even this formality was not considered sufficient: "whereas doubts having been entertained touching the legality of the said annexation [by the Governor of the Cape]", the Ichaboe and Penguin Islands Act 1874 was adopted, in order to regularise the situation. This documentation also shows that the Legislative Council of the Colony should have participated in this process of annexation, and that the British Government should have been notified and its final decision required.¹²⁵ Ichaboe is a small island of 6.5 ha, about 1.5 km offshore, 48 km north of the town of Lüderitz in Namibia.¹²⁶ The Penguin Islands are composed of Hollandsbird, Mercury, Long Island, Seal Island, Penguin Island, Halifax, Possession, Albatross Rock, Pomona, Plum-Pudding and Roast Beef or Sinclair's island and also lie offshore of Namibia.

¹²⁴ *ICJ Pleadings, Antarctica Cases (United Kingdom v. Argentina, United Kingdom v. Chile)*(1956), para. 17, p. 16. For the text of the Letters Patent, see *ibid.*, Annex I, p. 39.

¹²⁵ 67 *BFSP* pp. 554-557, 1121-1124.

¹²⁶ Avian Demography Unit, Department of Statistical Sciences, University of Cape Town: <http://web.uct.ac.za/depts/stats/adu/ichaboe.htm>

89. Other examples of the inclusion of islands or other territories within a Colony, Dominion or Protectorate already under British rule include the following:

- By Letters Patent of 30 May 1872, the Queen appointed the Governor of the Colony of Queensland to be Governor of all the islands lying and being within 60 miles of the coast of this colony. By a Proclamation of 22 August 1872, the Governor annexed those islands to the Colony.¹²⁷
- Letters Patent of 10 October 1878 appointed the Governor of the Colony of Queensland to be Governor of certain islands in the Torres Straits, authorising the Governor of Queensland to declare those islands annexed and forming part of his Colony once its Legislature had passed a law providing for this.¹²⁸
- Letters Patent of 17 December 1880 declared:

“the Island of Rotumah and its dependencies, that is to say, all islands, rocks, reefs, and fisheries lying between the 12° and the 15° of south latitude and between the 175° and 180° of east longitude from the meridian of Greenwich shall henceforth form part of our dominions.

2. And we do hereby further authorize our Governor for the time being of our said Colony of Fiji, by the same or any other Proclamation under his hand and the Public seal of our said Colony, to declare that, from and after a day to be therein named, the said Island of Rotumah and its dependencies, as above described, shall be annexed to and form part of our said Colony of Fiji; and we do thereby declare that, on and after the day so to be named, the said Island of Rotumah and its said dependencies shall form part of our said Colony of Fiji, and shall be subject to the laws from time to time in force therein”.¹²⁹

¹²⁷ 65 *BFSP* pp. 1214-1215.
¹²⁸ 70 *BFSP* pp. 262-263, 543-545.
¹²⁹ 71 *BFSP* p. 130.

- A Declaration of 3 August 1885 states that “It is hereby declared that the Island of Trobriand, as well as all islands that are near New Guinea that are south of the 8th parallel of south latitude, are included within the said Protectorate [of New Guinea]”.¹³⁰
- A Proclamation of Captain Reginald G.O. Tupper of *HMS Pylades* of 28 September 1901 states: “I, Reginald Godfrey Otway Tupper, do hoist the British flag, showing thereby that the jurisdiction of the Resident Commissioner and Deputy Commissioner of the Gilbert and Ellice Islands Protectorate is extended to Ocean Island, otherwise Paanopa”.¹³¹
- The Proclamation annexing the territory of Transkei and Griqualand East to the Colony of the Cape of Good Hope of 15 September 1879.¹³²
- The Proclamation declaring the Territory of the Transvaal to be for ever an integral portion of Her Majesty’s Dominions in South Africa of 15 September 1879.¹³³
- The Proclamation for the annexation of the Province of Griqualand West to the Colony of the Cape of Good Hope of 15 October 1880.¹³⁴
- The Proclamation annexing the Xesibe Country to that portion of the Colony of the Cape of Good Hope known as Griqualand East of 25 October 1886.¹³⁵

90. Matters related to acquisition of sovereignty were communicated by the colonial authorities to the British Government in London. The same applied with regard to internal communications between different offices of

¹³⁰ 76 *BFSP* p. 421. In 1888 the Protectorate of New Guinea was declared part of Her Majesty’s Dominions: see Proclamation of 4 September 1888, 79 *BFSP* p. 883.

¹³¹ 23 *Hertslet* p. 1200.

¹³² 70 *BFSP* pp. 1253-1255.

¹³³ 70 *BFSP* pp. 1255-1258.

¹³⁴ 71 *BFSP* p. 300.

¹³⁵ 77 *BFSP* pp. 953-954.

the Government. As seen previously, the Foreign Office was informed of any incorporation of territory to the British Empire and had its say. It was for the Government in London to take the final decision on acquisition of sovereignty. Acts of taking of possession were performed following instructions from the British Government or were subject to the approval of that Government.

91. The examples above show how formal and scrupulous the British Government was in matters of acquiring sovereignty over territory. If it had wanted to extend British sovereignty over PBP, it would certainly have taken the appropriate measures first to incorporate the island under British sovereignty and later to confirm by legislation the British authority responsible for it. Nothing of this sort occurred with regard to PBP. Indeed, there is no trace of any exchange even envisaging the possibility of acquisition of sovereignty over PBP. There was not one single act by the Governor of the Straits Settlements, the legislature of the Colony, the East India Company or Her Britannic Majesty's Government, annexing, incorporating, or otherwise indicating that PBP had come under British sovereignty and that it would be part of the Colony of the Strait Settlements or any other British administrative unit. The British practice concerning the taking of possession and the incorporation of territories to the British Crown, as well as the British practice concerning administration of lighthouses (discussed in Chapters 6 and 7) show in a clear manner that Britain had no intention to acquire sovereignty over PBP and did not acquire sovereignty over it.

92. In its Memorial, Malaysia gave two examples of takings of possession—the Cocos (Keeling) Islands and Christmas Island—because they concerned islands which the British Government determined would be administered by the Colony of the Straits Settlements, the same unit that, according to Singapore, established British sovereignty over PBP. Letters Patent of 1 February 1886 and 8 January 1900 appointed the Governor of the Straits Settlements as Governor of respectively the Cocos (Keeling) Islands and Christmas Island, and authorised the transfer of those islands to the

Colony of the Straits Settlements.¹³⁶ This practice clearly indicates that in the case of incorporation of new territories into the Colony of the Straits Settlements, formal legislative acts were required to perform it. As set out in the Malaysian Memorial, PBP was never dealt with in this way, for the simple reason that it was never considered British territory.

E. Acts invoked by Singapore are not relevant for a taking of possession

93. Singapore claims to have taken “lawful possession” of PBP on the grounds that the decision to build the lighthouse was taken by the British Crown and that the entire process of planning, choice of site and construction was subject to the control and approval of the British Government and its representatives.

94. 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.

¹³⁶ MM, para. 60, and particularly paras. 162-163. Previously Letters Patent of 10 September 1878 had annexed the Cocos (Keeling) Islands to the Island of Ceylon. Adopted in order to perfect the annexation of those islands, the Letters Patent provided that:

“WHEREAS the Cocos Islands, including the Northern Island, otherwise called the North Keeling Island, situated in the Indian Ocean, in latitude 12°5' south, and longitude 96°53' east, were, on the 31st day of March, 1857, duly taken possession of for us, and on our behalf; and whereas doubts are entertained touching the legality of the said annexation of the said Cocos or Keeling Islands by Proclamation, and it is expedient that such doubts should be removed; and whereas it is further expedient that the said Cocos or Keeling Islands (hereinafter called the Cocos Islands) should be annexed to and form part of the Colony of our Island of Ceylon and its dependencies, and that the affairs of the Cocos Islands should be administered by a Governor...”

70 *BFSP* p. 1273.

(i) *The process of selection of Pulau Batu Puteh as the site for the Horsburgh Lighthouse*

95. Singapore infers that the Court of Directors of the East India Company originated the idea of building a lighthouse on PBP. This is quite incorrect. The idea to build a lighthouse was the private initiative of certain merchants in Canton to commemorate the life and achievements of James Horsburgh, as demonstrated in the Malaysian Memorial.¹³⁷ 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.¹³⁸

96. Similarly, Singapore's assertion that the Court of Directors of the East India Company decided on the name of the lighthouse in 1849 is incorrect.¹³⁹ 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.¹⁴⁰ Singapore is simply attempting to dissociate the construction of the lighthouse on PBP from all the previous initiatives to honour James Horsburgh which mention "Pedra Branca" as one of the spots eligible for the construction of a lighthouse.

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

¹³⁷ MM, paras. 107-109; SM, paras. 5.18, 5.19, 5.60-5.61.

¹³⁸ See letter from H.T. Prinsep, Secretary to the Government of India to S.G. Bonham, Governor of Prince of Wales Island, Singapore and Malacca, 13 November 1839; letter from C. Beadon, Under Secretary to the Government of Bengal, to G.A. Bushby, 29 January 1845 (Annexes, vol. 3, Annexes 11 and 13 respectively), and letter from G.A. Bushby, Secretary to the Government of Bengal, to S.G. Bonham, 31 August 1842 (MM Annex 39).

¹³⁹ SM, para. 5.45.

¹⁴⁰ See MM Annex 30.

disposal of the Singapore Committee, under the proviso that the Lighthouse in question shall be called "The Horsburgh Lighthouse".¹⁴¹

98. It is also incorrect to state that the construction work was financed by the East India Company. As specified on the plate unveiled at the inauguration on 15 October 1851, "THE HORSBURGH LIGHTHOUSE is raised by the enterprize of British Merchants and by the liberal aid of the East India Company".¹⁴² Money was collected by merchants from different nations.¹⁴³ 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".¹⁴⁴ In a letter to the Governor General in Council, the Secretary to the Government of India, G.A. Bushby, indicated that:

"We readily admit the propriety of affording all possible facilities to navigation in the Straits of Singapore and the entrance to the China Seas... We are however opposed upon principle to the appropriation of any further sum, however small from the general revenues of India for purposes which apply with equal advantage to all shipping frequenting the Straits of Malacca & China Seas & we think that the additional funds required for the construction & maintenance of a light house near Singapore should according to the practice of other parts of the world be raised at the expense of the shipping interest for whose *special* benefit it is designed."¹⁴⁵

99. This position, taken when Peak Rock was the spot provisionally designated for the lighthouse, was reiterated once PBP was finally chosen as the location. In a letter from G.A. Bushby to F.J. Halliday, Secretary to the Government of Bengal, he says:

¹⁴¹ Letter from the remaining members of a committee of merchants formed in 1837 to the Secretary of the Singapore Chamber of Commerce of 22 January 1846: Annexes, vol. 3, Annex 14.

¹⁴² MM, para. 153; SM, para. 5.86.

¹⁴³ See Thomson, J.T., *Account of the Horsburgh Lighthouse*, 6 *Journal of the Indian Archipelago and Eastern Asia* 376 (1852), p. 496, SM Annex 61.

¹⁴⁴ SM, para. 5.27.

¹⁴⁵ Undated, enclosure in letter from Under Secretary of Bengal to Governor W. J. Butterworth, 10 May 1847: Annexes, vol. 3, Annex 20 (emphasis added).

“His Honor will perceive that the Hon’ble Court have sanctioned the proposal and have expressed their concurrence with the local authorities and with the Government of India in approving the site of the Pedra Branca over Peak Rock on the outer Romania Island... The Hon’ble Court consider it objectionable that the general resources of India should be charged with any expense for such an object, and they suggest the levy of certain rates of duty on shipping as Light House dues, in order to reimburse the Govt for monies that may be advanced by it for the construction of the Light House and to meet payment for the current expenses of the Building”.¹⁴⁶

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.

100. The fact that “[t]he process of selection was pursued by the representatives of the British Government exclusively”¹⁴⁷ has no consequence for the dispute. That the lighthouse was constructed by the East India Company through the Straits Settlements Colony is not disputed. As demonstrated, the final selection of PBP as the site for the lighthouse had nothing to do with concerns about sovereignty.¹⁴⁸ The choice of Barn Island as the location for the lighthouse was rejected because of the reluctance of the Court of Directors to impose any port duties on vessels calling at Singapore and Peak Rock was rejected for navigational reasons.

101. There was a consistent pattern of conduct by the British authorities regarding the construction of lighthouses in zones falling outside Singapore territory. It involved two elements: *first*, to obtain Johor’s authorisation and *second*, not to establish sovereignty over the territory upon which the lighthouse was constructed. This is true with regard to the four lighthouses constructed or envisaged to be constructed by the British authorities outside

¹⁴⁶ Dated 24 April 1847: SM Annex 19.

¹⁴⁷ SM, para. 5.33.

¹⁴⁸ MM, paras. 107-117.

the ten-mile limit of Singapore: PBP, Cape Rachado, Pulau Pisang and Pulau Aur.¹⁴⁹

102. As demonstrated in the Malaysian Memorial, the authorisation granted by Johor to construct the lighthouse extended to any place “near Point Romania... or any spot deemed eligible”.¹⁵⁰

(ii) *The alleged “taking of possession” of Pulau Batu Puteh in 1847 or subsequently*

103. 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.

104. Similarly, the fact that PBP was finally chosen as the site for the construction of the lighthouse is not, as such, evidence of an intention to acquire sovereignty over it. As demonstrated in the Malaysian Memorial, amongst the places envisaged for that construction were islands falling both within and outside Singapore, and within and outside Johor.¹⁵¹ The evidence submitted by both Parties shows that the the decision on the best spot for the lighthouse was based on the safety of navigation and financial considerations, and not issues of sovereignty.

105. 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,

¹⁴⁹ See MM Annexes 62, 64, 89.

¹⁵⁰ See further below, paragraph 135.

¹⁵¹ MM, paras. 110-117.

Thomson received remuneration for the construction of the lighthouse independently of his salary as Government Surveyor.¹⁵²

106. 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.¹⁵³ Leaving aside that these acts neither constituted a material act of seizure of the island nor demonstrated the slightest intention to acquire sovereignty, it should be noted that Thomson also visited Peak Rock for the same purpose of assessing its feasibility for constructing the lighthouse. Evidently, this visit could not be construed as a taking of possession (or even the beginning of it), Peak Rock belonging indisputably to Johor.¹⁵⁴

107. Further evidence that mere landing does not constitute taking of possession is afforded by the Singapore Memorial, when it mentions that in 1819 “Sir Stamford Raffles landed in Singapore to establish a trading station there on behalf of the English East India Company”.¹⁵⁵ As is well known, this landing was not considered as a taking of possession and the East India Company did not acquire sovereignty at that time. Furthermore, it required the authorisation of the sovereign of the territory, Johor, to establish the trading station.¹⁵⁶ The conduct pursued with regard to the erection of a lighthouse on PBP was the same. The striking difference is that later, when the East India Company wanted to establish sovereignty over Singapore and its dependencies, it concluded a treaty of cession with Johor. In the case of PBP, there was no such intention and consequently no treaty of cession.

¹⁵² SM Annex 27.
¹⁵³ SM, paras 5.49, 5.95.
¹⁵⁴ SM, paras. 5.36-5.38.
¹⁵⁵ SM, para. 3.3.
¹⁵⁶ MM, paras. 45-46.

(iii) *Activity of gunboats and "control of public order in the region"*

108. The activity of gunboats or the presence of guns does not in itself constitute a manifestation of sovereignty. When Peak Rock, an island indisputably under Johor sovereignty, was considered as the eligible site for the lighthouse, Captain Belcher and J.T. Thomson envisaged the construction of a tower with a gun there, in order to protect the lighthouse against pirates.¹⁵⁷ Equally, J.T. Thomson reckoned on the possibility of a gunboat for the protection of the operations "from the commencement to the finishing" of the construction of the lighthouse on Peak Rock.¹⁵⁸ Once the construction of the lighthouse began on PBP, two gunboats were assigned, one for the accommodation of Mr. Thomson and the other "for procuring water and provisions from Pt Romania and Singapore and for the carriage of work men".¹⁵⁹ Thomson even proposed "keeping the 'Charlotte' stationed at Point Romania", a place indisputably under Johor's sovereignty, "to put out to the rock as opportunity offered".¹⁶⁰ In no way did these activities manifest the exercise of sovereign functions. Notably, the gunboat used Point Romania for procuring water and provisions.¹⁶¹

109. The presence and activity of the gunboat is also explained as protection of British property and an application of the Crawford Treaty by which the parties agreed to fight piracy. It has been demonstrated that the Johor authorities also undertook to fight piracy in those regions and that in many cases the British and Johor authorities acted together. The Malaysian Memorial gives the example of a common escort of a craft "beyond Pedra Branca", consisting of one British gunboat and four of the Temenggong's boats.¹⁶² It must be recalled that Governor Butterworth presented a sword to

¹⁵⁷ SM Annexes 11, 12.

¹⁵⁸ SM Annex 12.

¹⁵⁹ SM Annex 34.

¹⁶⁰ Letter from J.T. Thomson to Resident Councillor Church, 2 November 1850, SM Annex 47.

¹⁶¹ See J.T. Thomson, *Account of the Horsburgh Lighthouse*, p. 408, SM Annex 61.

¹⁶² MM, para. 142.

the Temenggong as a testimony to his services in the suppression of piracy.¹⁶³ British personnel often went to other areas belonging to Johor, a State falling within Britain's sphere of influence under the 1824 Anglo-Dutch Treaty. This activity in no way affected Johor's territorial sovereignty, it was not intended to extend the territorial scope of Singapore, and nor did it produce any such result.

110. 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".¹⁶⁴ 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".¹⁶⁵

111. Significantly, the British authorities envisaged asking the Temenggong to establish a village in Point Romania under a local authority for the purpose of providing assistance to the light-keepers "in a case of emergency".¹⁶⁶ They discarded the idea of the establishment of a British naval station in the same place because, amongst other reasons, this would have required the permission of Johor, since Point Romania "belongs to the Sovereign of Johore, where the British possess no legal jurisdiction".¹⁶⁷ Singapore's Memorial misconstrues

¹⁶³ MM, para. 143.

¹⁶⁴ SM, para. 5.79.

¹⁶⁵ Compare SM, para. 7.79 with Thomson's *Account of the Horsburgh Lighthouse*, p. 424, SM Annex 61.

¹⁶⁶ MM, para. 146.

¹⁶⁷ MM, paras. 146-147 and Annex 59; SM, para. 5.99 and Annex 48.

this event when it indicates that “[n]o such question was raised in relation to Pedra Branca”.¹⁶⁸ First, at no time did the question of the construction of a naval station on PBP arise. Second, the only permanent construction built on the island was the lighthouse, for which Johor had already granted authorisation. Third, if 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, then the recognised authority to “control public order” was Johor and not the Straits Settlements.

112. Furthermore, the Temenggong continued to control fishing in the neighbourhood of PBP after the construction of Horsburgh Lighthouse, granting licences and exercising criminal jurisdiction in Johor’s waters. The British authorities were aware of this and continued to limit their jurisdiction to the extent of ten geographical miles of Singapore Island, as provided by the Crawford Treaty. At no time there was any attempt to extend British maritime jurisdiction around PBP after the construction of the lighthouse. The record concerning certain incidents which occurred ten years after the construction of Horsburgh Lighthouse confirms this.

113. Fishing licences granted by the Temenggong were called a “Johore Pass”. They stated that:

“This permission is granted by His Highness the Tumongong, Sree Maharajah of Johore, unto [follows the name of the holder], to catch fish in the Johore Territory with[out] molestation or hindrance from any body; he is not permitted to put down his nets closer than fifty fathoms from any Kelong, otherwise he will be seized without hesitation. This pass will stand for six months.”¹⁶⁹

114. Discussing the expression “to catch fish in the Johore Territory”, R. Macpherson, Resident Councillor at Singapore, requested the opinion of the

¹⁶⁸ SM, para. 5.99.

¹⁶⁹ Annex to the letter from R. Macpherson, Resident Councillor at Singapore, to M. Protheroe, Officiating Secretary to the Governor of the Straits’ Settlement, 2 May 1861, enclosed in the correspondence from the Government of Bengal to the Secretary of State for India, 9 January 1862, Colonial Office file CO 273/5: Annexes, vol. 3, Annex 24, p.15.

Straits' Settlements Government as to the extent of Temenggong's jurisdiction as follows:

"The question naturally arises to what extent sea-ward does the Johore Government claim jurisdiction, and upon what authority is such claim grounded. By treaty the whole of the Islands within ten miles of Singapore are ceded to the English Government, and among those Islands as well as along the coast of Singapore the inhabitants of Johore, in common with all, whether residents or non-residents under our flag, have full liberty to fish. Even granting then that this assumption of jurisdiction on the part of the Tumongong is defensible, there should at least be a reciprocity of good Offices."

The Resident Councillor of Singapore ended by raising the question "whether His Highness the Tumongong exercises such *jurisdiction over the Sea which divides Singapore from Johore* as to entitle him to prohibit our fishermen from exercising their vocation without a pass under his Seal".¹⁷⁰ The reference to "the Sea which divides Singapore from Johore" clearly refers to the extension of the ten-mile limit from Singapore Island.

115. The origin of this discussion was a number of separate incidents involving Chinese fishermen resident in Singapore on the one side, and Panghaloos (local chiefs depending on the Temenggong) or Malays subjects of Johor on the other. These were recorded in government correspondence in 1861-1862, a decade after the inauguration of Horsburgh Lighthouse. Some occurred within 10 geographic miles of Singapore Island, others outside. Some related to the payment of licences for fishing, others to violence inflicted against the fishermen. All show that the maritime jurisdiction of Singapore was not altered by the construction of the lighthouse on PBP and that the British authorities continued to claim as their waters only those within ten geographical miles from Singapore Island, in accordance with the Crawford Treaty.

¹⁷⁰ Ibid. (emphasis added).

116. A letter from Colonel Cavenagh, Governor of Prince of Wales Island, Singapore and Malacca, to the Secretary to the Government of India Foreign Department of 17 July 1861 complained that the Temenggong required fees for fishing within the ten geographic miles. Governor Cavenagh made the following analysis: "it would appear that, in addition to being illegally compelled to submit to the exactions of the Tumongong's followers, our subjects are required to take out a pass and pay a fee to His Highness for permission to fish within the limits of our own jurisdiction; it is true that the Johore Territories are alone specified in the permit, but, as the fishermen rarely proceed beyond ten miles from Changie point, the extremity of Singapore Island, there can be little doubt that it is intended to apply to their ordinary fishing places". Discussing the question of exercise of jurisdiction, Governor Cavenagh went on to state that "in the event of the cause of complaint having originated upon the Sea within ten miles of Singapore, the charge is cognizable by the British and not the Johore authorities".¹⁷¹

117. In a letter to Sir Charles Wood, Her Majesty's Secretary of State for India, of 9 January 1862, the following analysis was made:

"4. Colonel Cavenagh is of opinion that the Tumongong has been in the habit of realizing an illegal revenue by requiring British Subjects to take out permits to fish. In the Licenses, indeed, the Johore Territories only are specified, but it is known that the fishermen rarely proceed ten miles beyond the extremity of Singapore Island.

5. We have informed Colonel Cavenagh that the prevention of persons from fishing within ten miles of the British shores is a direct interference with the rights of the British Government; that the previous supineness of British Officers to which is attributed this assumption of authority on the part of the Tumongong does not afford any valid reason for waiving those rights; but that on the contrary, it is all the more necessary to insist upon the just claims of Government, now that they are distinctly questioned and invaded, and their invasion made the cover for violence and oppression. Colonel Cavenagh has accordingly been directed to make the Tumongong understand

¹⁷¹ Ibid.

that he will not be allowed to demand payment for Licences from any persons who fish within British limits only.”¹⁷²

118. This letter provides evidence of the clear understanding of the British government as to the extent of its maritime jurisdiction in the region—and this at a time when Britain had (according to Singapore) definitively acquired sovereignty over PBP. In fact the British authorities of the time proceeded on the basis that British jurisdiction was limited to ten geographic miles from the main island of Singapore, as provided by the Crawford Treaty. This is confirmed by numerous references to the ten-mile limit in the exchange of letters motivated by those incidents, and by the fact that what was finally required of the Temenggong was that he cease demanding licences for the area within the ten miles from Singapore Island and that he prosecute those suspected of violence against fishermen resident in Singapore if this violence was committed in Johor’s jurisdiction, i.e., outside the ten-mile limit.¹⁷³ The construction of Horsburgh Lighthouse on PBP was not taken into account, despite the fact that the waters around PBP were a notable fishing ground.

119. In one of the incidents, seven Chinese fishermen resident in Singapore related that they “went a fishing in one Sampan near to the Pedro Branco Light House, and on their way back a Malay, well known to be the head of a village near to that over which Nong Besar is headman, came off with three others and forcibly attempted to take all the fishes”. As a result, two of the fishermen were severely injured. In a letter to the Temenggong of 15 May 1861, Governor Cavenagh says that:

“WITH reference to our former communication No. 227 dated 4th instant, to our friend, on the matter of injuries sustained by British subjects from residents *in our friend’s territory* we now enclose, for our friend’s information, copy of a Petition from several Chinese fishermen complaining of *the serious molestation to which they have been subjected whilst pursuing*

¹⁷² Ibid.

¹⁷³ See the exchange of letters between Governor Cavenagh and the Temenggong of 4 May 1861, 17 May 1861 and 18 May 1861, enclosed in the correspondence from the Government of Bengal to the Secretary of State for India, 9 January 1862, Colonial Office file CO 273/5: Annexes, vol. 3, Annex 24, pp. 17-20

*their ordinary avocation in the neighbourhood of the Pedro Branco Light House. We trust that our friend, in addition to punishing these offenders by whom the Petitioners were attacked and two of their party wounded, will adopt suitable measures for the prevention of such illegal acts in future.*¹⁷⁴

120. Although the attack did not itself occur in the waters off PBP, but close to Sungai Rengit on the Johor coast, the incident is nevertheless relevant for the following reasons. First, the Governor of the Straits' Settlements did not make any reference to British waters while speaking about the activity of the fishermen "in the neighbourhood of Pedro Branco Light House". According to Singapore's theory, the fishermen's catch, seized by Johor subjects, should have been considered as obtained in British waters, but there is no suggestion of this idea in the correspondence. Second, the Governor did not distinguish between the location of the fishermen's "ordinary avocation" and their "molestation" by persons from Johor. Third, he included the incident under the rubric of "injuries sustained by the British subjects from residents in our friend's territory", that is, Johor, and defined it as having occurred "in the neighbourhood of Pedro Branco Light House". Fourth, the complaint addressed to the Temenggong and the exchange that followed only concerned the violence committed against the Chinese fishermen, not the question of licence fees paid by them. This is a striking fact, taking into account that the fishermen's memorial to Singapore's Resident Councillor indicated that "their fishing ground has always been a little beyond Pulo Pikong and this side of Pedro Branco; your Memorialists finding the levies exacted from them by the Malays quite unbearable".¹⁷⁵ In the Governor's letter to the Temenggong, nothing was said about licences, in clear contrast to the action taken when incidents occurred within 10 geographical miles from Singapore Island, when the British authorities denied the Temenggong had any right to levy license fees.

¹⁷⁴ Ibid. (emphasis added).

¹⁷⁵ Ibid.

121. Indeed, the only jurisdictional issue raised by the British authorities was the levying of fees for fishing within the ten geographical mile area. A discussion followed between the British Government and the Temenggong on this point because the latter considered that his jurisdiction over the maritime areas was not limited by the Crawford Treaty, by which he had only ceded the islands, not the waters.¹⁷⁶ Leaving aside this point (which does not concern PBP), the dispute shows how strict the Temenggong's interpretation was in respect of matters related to cession of sovereignty and jurisdiction.

122. The discussion provides another example of the fact that PBP has been always considered a place "near Point Romania" (and therefore, covered by the permission given by Johor to construct the lighthouse). Indeed, the incident occurred close to Sungai Rengit, which is the closest village to Point Romania, being situated a little further west on Johor's coast. In 1862, the Governor of the Straits Settlements defined this as "the neighbourhood of Pedra Branca Light House".

(iv) Visits of British officials are not evidence of sovereignty over the island

123. Nearly all the visits Singapore lists in its Memorial of Straits Settlements' officials to the island during the construction of the lighthouse were made by J.T. Thomson, the architect of the lighthouse. Other visits were conducted with the sole purpose of inspecting the construction of the lighthouse. The "official visits" after the construction of the lighthouse are presented as the "final acts in the process of taking lawful possession of the rock".¹⁷⁷ As is mentioned by Thomson himself, the purpose of these visits was to inspect the lighthouse.¹⁷⁸ It is only to be expected that the owners of the lighthouse would control the progress of the work and inspect the outcome. Nothing else can be inferred from such inspections.

¹⁷⁶ See the letter to from the Government of Bengal to the Secretary of State for India of 9 January 1862, *ibid*, p. 19.

¹⁷⁷ SM, paras. 5.81-5.84.

¹⁷⁸ *Account of the Horsburgh Lighthouse*, p. 448, SM Annex 61.

124. In particular these visits cannot be invoked as manifestations of sovereignty. The same conclusion was reached by the Court in the *Minquiers and Ecrehos Case* when it considered the visits made by the French Prime Minister and the French Air Minister to the Minquiers in 1938 to inspect buoying:

“The Court does not find that the facts, invoked by the French Government, are sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned acts from the nineteenth and twentieth centuries in particular ... such acts [which include those visits] can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.”¹⁷⁹

(v) *Other activity during the process of construction of the lighthouse*

125. The cutting of rain channels in order to obtain freshwater on an island lacking it,¹⁸⁰ far from being a sign of possession as Singapore claims, is merely a normal activity ancillary to the construction of the lighthouse, without any bearing on the question of sovereignty. Permission for the construction of the lighthouse extended to all necessary measures related to it.

126. Similarly, the Notice to Mariners issued on the completion of the lighthouse simply provided information to mariners about the new aid to navigation in the area and did not mention any issue related to sovereignty over PBP.¹⁸¹ It is a normal activity carried out by the authority responsible for a lighthouse, as will be explained in Chapter 6 below.¹⁸²

¹⁷⁹ *Minquiers and Ecrehos case*, ICJ Reports 1953, p. 47 at p. 71. The case is discussed further below, paragraphs 229-231.

¹⁸⁰ SM, para. 5.80.

¹⁸¹ See SM, para. 5.87.

¹⁸² See below paragraphs 260-263.

127. That Thomson's activities for the construction of the lighthouse in 1847-1848 were not perceived as involving acts of sovereignty is also evident from the 1849 Map drawn by Thomson himself. PBP does not appear on the map as part of Singapore, although the map itself is entitled "Map of Singapore Island *and its Dependencies*".¹⁸³

128. 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. Thomson constantly referred to "Batu Puteh" (or "Batu Putih") when he described how the Malays working on the construction of the lighthouse or engaged in activity in the vicinity of the island referred to it.¹⁸⁴ Referring to the Temenggong's presence on PBP with 30 of his followers after construction work on the lighthouse had started, he added that "He is the most powerful native chief *in these parts*, allied to British interests".¹⁸⁵ 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.

(vi) *The display of a flag*

129. As set out above, 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.

¹⁸³ MM, Map Atlas, Map No. 8 (emphasis added).

¹⁸⁴ *Account of the Horsburgh Lighthouse*, pp. 378, 410, 416, 485, 486; SM Annex 61, pp. 479, 513, 519, 588, 589.

¹⁸⁵ *Ibid.*, p. 430, SM Annex 61 (emphasis added).

130. A number of cases of raising the British flag have already been mentioned. Further examples follow:

- On 23 January 1765, Commodore Byron went on shore at Saunders Island “where the Union Jack being erected on a high staff and spread, the Commodore took possession of the Harbor and all the neighboring Islands for His Majesty King George III., his Heirs and Successors, by the name of Falkland’s Islands. When the Colors were spread, a salute was fired from the Ship”.¹⁸⁶
- On 2 March 1815, British sovereignty over the Kandy provinces in Ceylon was established: “The British Flag was then for the first time hoisted”.¹⁸⁷
- In his note to the Buenos Aires’ Commander in the Falkland Islands of 2 January 1833, Captain Onslow declared: “It is my intention to hoist, to-morrow morning, the National Flag of Great Britain on shore”.¹⁸⁸
- On 24 May 1842, Lieutenant Lapidge took possession of the island of Bulama. His proclamation of the taking of possession reads as follows:

“I, Lieutenant Charles Horace Lapidge, commanding Her Majesty’s brig *Pantaloön*, have the distinguished honour, in the name, and on the behalf of her Most Gracious Majesty Queen Victoria by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., &c., do hereby take formal possession of this Island of Bulama on this 24th day of May, in the year of our Lord 1842, and in token of having done so, I plant the Union Flag of Great Britain and Ireland. God save the Queen.”

¹⁸⁶ 20 *BFSP* pp. 344-345.

¹⁸⁷ 2 *BFSP* p. 840.

¹⁸⁸ 20 *BFSP* p. 1197.

In his report to his superiors Lieutenant Lapidge explained:

"I immediately hoisted the Union, and at the instant Her Majesty's brig *Pantaloön* displayed British ensigns at her mast head with a royal salute, the party of seamen and marines presented arms, and the officers saluted."¹⁸⁹

- In the ceremony of the taking of possession of the island of Lagos on 1 August 1861:

"the Proclamation... was read, and the British flag unfurled, and saluted with 21 guns; the national anthem sung by a band of children from the Missionary Schools... and concluded with dinner on board the *Prometheus*".¹⁹⁰

- On 12 March 1878, Britain took possession of Walvis Bay. The Proclamation reads as follows:

"I, Richard Cossantine Dyer, the officer in command of Her Majesty's ship *Industry*, at present lying at anchor off the said settlement, do, in the name of Her said Britannic Majesty, Queen Victoria, take possession of the said port or settlement of Walfisch Bay, together with the territory hereinafter described and defined, in token whereof I have this day hoisted the British flag over the said port, settlement, and territory, and I do proclaim, declare, and make known that the sovereignty and dominion of Her said Britannic Majesty shall be and the same are hereby declared over the said port, settlement, and territory of Walfisch bay; and I do further proclaim, declare, and make known that the said territory of Walfisch Bay so taken possession of by me as aforesaid shall be bounded as follows: that is to say, on the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppmansdorf; on the east by a line from Scheppmansdorf to the Rooibank, including the Plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the

¹⁸⁹ 31 *BFSP* p. 458.

¹⁹⁰ 52 *BFSP* p. 180.

last 10 miles of the course of the said Swakop River."¹⁹¹

- A telegraph sent by the Viceroy of India to the Earl of Kimberley of 11 December 1884 informed that the "British flag [was] hoisted on Mushakh and Ivat Islands. Tajourra occupied by the French, but not declared officially". The notification by the Under-Secretary of State for India to the Under-Secretary of State for Foreign Affairs of 17 December 1884, reported the same.¹⁹²
- The Act of taking of possession of St. Lucia Bay of 18 December 1884 reads as follows:

"I, WILLIAM JOHN MOORE, Lieutenant and Commander of Her Britannic Majesty's ship *Goshawk*, have this day hoisted the British flag on the shores of St. Lucia Bay in right of the Treaty made by Panda, Chief and King of the Zulu nation, on the 5th day of October, in the year of Our Lord 1843, and I have this day taken possession of the said territory in the name of Her Most Gracious Majesty Queen Victoria of the United Kingdom of Great Britain and Ireland, Empress of India, &c."¹⁹³

- A similar proclamation was made by Sir William Wiseman, captain of HMS *Caroline*, when he took formal possession of Fanning Island in the Pacific Ocean on 15 March 1888: "in token thereof I do now hoist the British flag".¹⁹⁴
- The Captain of the *Caroline* issued an identical proclamation on taking possession of Christmas Island in the Pacific Ocean on 17 March 1888 and Penrhyn Island in the Pacific Ocean on 22 March 1888.¹⁹⁵

¹⁹¹ 69 *BFSP* p. 1177.

¹⁹² 76 *BFSP* p. 681.

¹⁹³ 75 *BFSP* pp. 607-608.

¹⁹⁴ 79 *BFSP* p. 1325.

¹⁹⁵ *Ibid.*, pp. 1326-1327.

131. None of this occurred on PBP in 1847, in 1851 or at any other time. Indeed, the Union Jack has *never* flown over PBP.

132. In his letter to Resident Councillor Church of 20 July 1851, J.T. Thomson carefully detailed all the requirements for the operation of the lighthouse and ancillary activities, such as meteorological observations. When referring to the flag to be hoisted, Mr. Thomson pointed out that “The Light house flag I presume is different from the national one.”¹⁹⁶ As the Singapore Memorial acknowledges, it was the Marine Ensign that was flown and not the Union Jack. According to Singapore’s Memorial, the use of the Marine Ensign was common British practice. But Singapore does not explain to which kind of practice it is referring: whether it was the taking of possession or the maintenance of lighthouses. The national flag usually designates territorial sovereignty. The Ministry of Information, Communications and the Arts of Singapore, describing the national flag, considers that “The national flag is Singapore’s most visible symbol of statehood, symbolising our sovereignty”.¹⁹⁷ This is not the case for the Marine Ensign, which is not designed to symbolise acquisition of sovereignty. Thomson acknowledged this, by saying that the “lighthouse flag” is “different from the national one”. On the contrary, it is common practice that the Marine Ensign indicates the national designation of vessels and installations, but not territorial sovereignty.¹⁹⁸

133. In addition, the only evidence provided by Singapore of the raising of the Marine Ensign over PBP is a single drawing.¹⁹⁹ There is not a single record, not a single official communication from Butterworth to the East India Company, nor a single chronicle in the press that mentions that a flag of any kind was raised—nor, *a fortiori*, that it was saluted in any way. This is all in striking contrast to the real cases of taking of possession of which examples

¹⁹⁶ SM Annex 54.

¹⁹⁷ http://www.mita.gov.sg/pressroom/press_040103.html.

¹⁹⁸ See also below, Chapter 5.

¹⁹⁹ SM, image 15, opposite p. 74.

have been given above. Moreover, contrary to what is stated by Singapore, there was no flag of any kind flying over PBP in 1847.²⁰⁰ The only thing that J.T. Thomson planted on PBP in November 1847 were the seven brick pillars to test the strength of the waves.²⁰¹

(vii) *The "lack of opposition" from other Powers*

134. 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".²⁰² 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. As explained above, activities necessary for the construction of the lighthouse, such as supply vessel movements and patrolling by British gunboats, were covered either by that authorisation or by previous agreements between the East India Company and Johor.

F. Singapore's Memorial provides further evidence that the Johor permission included Pulau Batu Puteh

135. In its Memorial Malaysia demonstrated that the authorisation granted by Johor to construct the lighthouse included PBP and that this authorisation did not amount to a cession of territorial sovereignty. This emerges from the ordinary meaning of the terms of the letters of permission written by the Sultan and Temenggong to Governor Butterworth of 25 November 1844, from their context and from their object and purpose, and was corroborated by the subsequent conduct of the parties.²⁰³ Indeed, the Singapore Memorial supplies

²⁰⁰ SM, para. 7.12.

²⁰¹ SM, para. 5.49.

²⁰² SM, para. 5.99.

²⁰³ MM, paras. 118-150.

even more evidence that PBP is a place "near Point Romania",²⁰⁴ and consequently covered by the permission given by the Sultan and Temenggong to the British authorities to construct the lighthouse.

136. In its account of the construction of the Horsburgh Lighthouse Singapore makes every effort to avoid the crucial fact for this case—namely, the authorisation given to Governor Butterworth by the Sultan and Temenggong of Johor.

137. In Singapore's Memorial, the only references to the exchange of letters between Governor Butterworth and the Sultan and Temenggong of Johor concerning the authorisation for the construction of the lighthouse are to be found in paragraphs 5.20 and 5.41. The former is only an indirect reference. It refers to the letter of Governor Butterworth to F. Currie, Secretary to the Government of India, of 28 November 1844. Singapore asserts that Peak Rock "had belonged to the Rajah and the Temenggong of Johor" but this is a plain misquotation: in fact the letter stipulates that "This Rock *is* part of the Territories of the Rajah of Johore".²⁰⁵ The letter went on to state that both authorities of Johor "have willingly consented to cede it gratuitously to the East India Company". The cession Governor Butterworth referred to was not a cession of sovereignty, since the Sultan and Temenggong's letters only refer to the authorisation to construct the lighthouse.

138. The other reference by Singapore in its Memorial to the exchange of letters between Governor Butterworth and the Johor authorities says that "the request of permission addressed to the Temenggong [by Governor Butterworth] to build a lighthouse on a particular rock must have indicated that the chosen site was Peak Rock".²⁰⁶ This is pure speculation and it is in clear contradiction to the Temenggong's unambiguous answer to Butterworth's request: "I have duly received my friend's communication and

²⁰⁴ See the quotations of pilots in SM, para. 2.16.

²⁰⁵ Cf. SM, para. 5.20 with SM, Annex 13.

²⁰⁶ SM, para. 5.41.

understand the Contents. My friend is desirous of erecting a Light House near Point Romania".²⁰⁷ Since Malaysia has not found Butterworth's letter and Singapore has not produced it either, the Temenggong's answer furnishes the only available indication as to the extent of the permission requested. It was for the erection of a lighthouse near Point Romania. There is no basis for presuming, as Singapore does, that the request was limited to Peak Rock. There is no basis for any presumption that Butterworth requested a cession of sovereignty either.

139. Nor is Singapore's depiction of the Temenggong's letter supported by its own evidence. In its Annex 93, Singapore's Memorial reproduces Annex B of the letter from J.D. Higham, on behalf of the Singapore Colonial Secretary, to the British Adviser of Johor, dated 12 June 1953. Annex B is presented as an "Extract from a dispatch by the Governor of Singapore to the Governor-General in Bengal, 28.11.1844". It contains the abovementioned phrase ("This Rock is part of the Territories of the Rajah of Johore"), with the important addition in handwriting of "[i.e. Pedra Branca]" between the words "This Rock" and "is part of the territories of the Rajah of Johore".²⁰⁸ In fact, Butterworth's letter referred to Peak Rock, since this was the site that was preferred for the location of the lighthouse at the time the letter was written (although PBP had been envisaged before and was finally chosen later). However, the 1953 reproduction of Butterworth's letter by Singapore with that important addition shows conclusively that, in 1953, Singapore was perfectly aware that the permission granted by Johor to construct the lighthouse included PBP, and that this island "is part of the territories of Johore". The 1953 letter also shows that the basis on which Singapore inquired about the status of the island only related to the Crawford Treaty and the permission of Johor. There was not a single reference to any "taking of lawful possession of Pedra Branca".

²⁰⁷ SM Annex 13 (the transcription of p. 105 is not accurate), MM, para. 122, and MM Annex 45.

²⁰⁸ SM Annex 93.

140. 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 date the 28th November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new position [Pedra Branca]”.²⁰⁹ 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.²¹⁰

141. Hence, it is beyond doubt that the permission granted by Johor extended, and was believed by the British authorities to extend, to PBP.

G. Conclusion

142. This Chapter demonstrates that:

- (a) The acts performed in relation to the construction of the lighthouse clearly differ from the consistent British practice concerning formal taking of possession on behalf of the Crown;
- (b) These acts do not constitute a manifestation of the will of the British Crown to acquire sovereignty;
- (c) Taken either individually or as a whole, these acts are not sufficient to establish sovereignty;
- (d) At no time was there a taking of possession of PBP;

²⁰⁹ MM, para. 134, and MM Annex 51. In its Memorial, Singapore produced an inaccurate transcription of this document. Instead of “the whole of the details for the case of Light Houses...”, Singapore transcribes “the whole of the Details for the *care of Light House*” (emphasis added, SM Annex 16). This inaccuracy can be seen from the signed letter of Governor Butterworth dated 26 August 1846, as found in TAB 51 of *Complete Documents of Certain Annexes Contained in the Malaysian Memorial* filed with the Court on 25 March 2004.

²¹⁰ MM, para. 136 & MM Annex 54.

- (e) *A fortiori*, there was no annexation or incorporation of PBP into the British Colony of the Straits Settlements or anywhere else;
- (f) On the contrary, the construction of the lighthouse in PBP was performed with the authorisation of the recognised sovereign of the territory, Johor;
- (g) Singapore's Memorial affords further evidence that the authorisation extended to PBP;

Consequently, the purported original title of Singapore based on the "taking of lawful possession of Pedra Branca" has no basis and must be rejected.

Chapter 4

THE THREE FEATURES DO NOT FORM ONE ISLAND GROUP

Introduction

143. This Chapter considers the proposition asserted in Singapore's Memorial that PBP, Middle Rocks and South Ledge, which are the subject of this case, form a distinct group of maritime features and one single geographical group.²¹¹ Obviously, this is part of Singapore's effort to enlarge its State territory as much as possible.

A. Can Pulau Batu Puteh, Middle Rocks and South Ledge be identified as one island group?

144. The common meaning of the concept of a group is: "Two or more...things standing or positioned close together so as to form a collective unity" or an "ensemble de choses...formant un tout et défini par une caractéristique commune".²¹² However, it is questionable whether these definitions would allow the three features to be described as a group, particularly on the criterion of whether they form a collective unity with common characteristics.

145. Singapore's Memorial states time and again that Pedra Branca, Middle Rocks and South Ledge form a single group of maritime features.²¹³ However, Singapore provides only one piece of evidence that the three features have been identified by mariners as a group. That is SM Map 5,

²¹¹ See SM, vol. 1, chapter II, section II & Chapter IX.

²¹² *The Shorter Oxford English Dictionary* (Oxford, 2002), vol. 1, 5th ed., cd-rom; *Encyclopédie Universelle Larousse. L'Intégrale* (VUEF, 2003, cd-rom).

²¹³ SM, paras. 2.14, 2.15, 2.16, 2.17, 9.7, 9.8, 9.14, 9.34.

which was produced by Laurie and Whittle in 1799.²¹⁴ It is a small-scale chart showing a line drawn around PBP and as many as nine black dots, some of which might refer to Middle Rocks and South Ledge. Shading within the line indicates shoal water. The question arises: how probative is this evidence to support Singapore's claim that the three features form one single distinct group?

146. Curiously, the text printed on this chart deals only with the discovery of Elmore's Channel south of PBP. There is no mention in the text of dangers lying south of PBP. Indeed, Elmore found no "...rocks, breakers or shoals..." south of PBP, which appeared to offer a safer passage than that to the north of PBP.

147. Map 6 in the Singapore Memorial is also offered as proof that the three features form a group.²¹⁵ This chart is on a larger scale than the Laurie and Whittle chart. It was published by Norie and is dated 1831. South Ledge and PBP are shown and named and Middle Rocks are shown but not named. There is no line drawn around these features to indicate that they form a collective danger.

148. In Chapter IX of its Memorial, Singapore returns at some length to the issue of the three features forming a group. Attention is drawn to their location between the Middle and South Channels and the fact that the three features have the same geomorphological and geological characteristics.²¹⁶ However, Singapore fails to make clear whether such characteristics are restricted to the three features only or extend north to the Romania Islands and/or south to Pulau Bintan.

²¹⁴ Map 5, entitled "The Straits of Singapore", 1799, SM, Map 5, after p. 14.

²¹⁵ See Map 6, entitled "A Plan of the Strait of Singapore from the latest Surveys", 1831, SM, Map 5, after p. 14.

²¹⁶ SM, para. 9.16.

149. In 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 original discoverers or subsequent users that they form a group, evidenced in particular by the use of a single name for the group. There are examples of island groups to the north and south of the three features under review. To the north lies Malaysia's Romania Group and to the south lie Indonesia's *Kepulauan* [Archipelago] *Riau* and *Kepulauan Lingga*. No evidence has been found in Singapore's Memorial that a collective name was ever applied to PBP, Middle Rocks and South Ledge.

150. A review of charts published after that of Laurie and Whittle in 1799 reveals that (a) South Ledge and Middle Rocks were identified after that date; (b) they were never given a collective name such as Pedra Branca Rocks or Horsburgh Rocks, and (c) by 1851 detailed soundings between the three features had been made and charted.²¹⁷

151. A chart produced by William Heather and dated 1803 locates features southeast and southwest of PBP by a plus sign (+).²¹⁸ It is reproduced as **Map 3** in this Counter-Memorial.²¹⁹ The three features are not surrounded by a single line. Horsburgh's 1806 chart (see **Map 4**) indicates features southeast and southwest of PBP by a hash mark (#). The southeast features are described as "low ledges above water". The southwest features are described as "nearly even with the waters edge, by Capt. Galloways account of his passage to the Southward of Pedro Branco". Nor does this chart have a line surrounding the three features.

152. Norie's chart of 1815 (**Map 5**) shows "*Pedro Blanco*" and the two other features in their correct location. South Ledge is called Galloways Rock and Middle Rocks are either called or described as Low Rocks. Shoaling is

²¹⁷ See MM, Insert 16, p. 63.

²¹⁸ British Library Map Collection, maps.c.12.fl.

²¹⁹ The maps are located at the end of this volume, following page 273.

only shown around Galloways Rock and the three features are not surrounded by a line.

153. The name South Ledge has replaced Galloways Rock in Norie's 1831 chart (Map 6), together with the notation "Covered at flood". Some soundings in the vicinity of the three features have changed. The naming of the features was completed in 1851 when Thomson named Middle Rocks on his "Chart of the vicinity of the Horsburgh Lighthouse and adjacent Malayan Coast".²²⁰ No earlier use of the name Middle Rocks has been found. This chart, which provided the three names that have persisted, was also the first to record many soundings between PBP and Middle Rocks and between Middle Rocks and South Ledge.

154. It could be argued that the fact that South Ledge is south of PBP and Middle Rocks lie between PBP and South Ledge justifies the view that these features were identified as a group. However, it remains the case that the three features have never been named as a group. It is also the case that by 1870 Findlay was advising that a channel with depths to 20 fathoms and a width of 1.5 nm lay between South Ledge and Middle Rocks.²²¹ By now it was known that they were separated by navigational channels and did not stand on one single-raised section of the sea-bed. Singapore's claim²²² that the rock colour of the three features is more or less the same cannot alter the fact that they do not constitute one geological unit.

²²⁰ See MM, Insert 16, p. 63.

²²¹ A.G. Findlay, *A directory for the navigation of the Indian Archipelago and the coast of China* (1st edn, Richard Holmes Laurie, London, 1870) p. 302.

²²² SM, para. 9.16.

B. Middle Rocks and South Ledge have always been part of Johor

155. In its Memorial Singapore argues at considerable length that Middle Rocks and South Ledge are both “mere dependencies of Pedra Branca”. Singapore’s position is that “[w]hoever owns Pedra Branca owns Middle Rocks and South Ledge, which are dependencies of the island of Pedra Branca and form with the latter a single group of maritime features”.²²³ Evidently, Singapore seeks to enlarge its territorial claim as much as possible.

156. The situation in the present case is fundamentally different from the one of the islands of Meanguera and Meanguerita which were considered by the Chamber in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras. As the Chamber observed:

“Throughout the argument before the Chamber the islands of Meanguera and Meanguerita were treated by both Parties as constituting a single insular unity; neither Party, in its final submissions, claimed a separate treatment for each of the two islands.”²²⁴

This situation contrasts sharply with the present dispute in which Malaysia and Singapore take diametrically opposed views on the way these three features must be treated by the Court.²²⁵

157. Singapore argues that Middle Rocks and South Ledge have not been “independently appropriated by any State”.²²⁶ As reviewed above, for unknown reasons Singapore makes no reference to the Anglo-Dutch Treaty of 17 March 1824 and only scant reference to the Crawford Treaty of the same year. In Chapter 2 it is explained that the effect of the Anglo-Dutch Treaty was to divide the ancient Sultanate of Johor into two parts. The islands and other maritime features south of the Strait of Singapore were to be within the

²²³ SM, para. 9.7.

²²⁴ ICJ Reports 1992 p. 351 at p. 570 (para. 356).

²²⁵ Cf. MM, Chapter 8 and SM, Chapter IX.

²²⁶ SM, para. 9.7.

Dutch sphere of influence, while that part of the Sultanate of Johor situated on the Malay Peninsula and neighbouring islands, including rocks and low tide elevations, would be within the British sphere of influence. Singapore could remain in British hands and the Dutch would no longer seek to exert influence within and to the north of the Strait of Singapore.²²⁷

158. Similarly, Singapore fails to refer in this context to the Crawford Treaty of 1824. The range of islets, rocks and low-tide elevations, and even the straits and the seas, lying within ten geographical miles around the Island of Singapore were carefully described in the Crawford Treaty. There can be no doubt that the three features were not part of the cession of Singapore by Johor as they lie well beyond the limit of ten geographical miles from the Island of Singapore.²²⁸ Apparently, it is Singapore's view that when Johor expressly cedes its sovereignty over rocks and low tide elevations within ten geographical miles to Great Britain, these maritime features are lawfully disposed of by their sovereign, but when Johor does not cede similar features located at the same distance from its coast, then they are not "independently appropriated by any State", Johor included. However, as a matter of fact PBP, Middle Rocks and South Ledge formed part of the Sultanate of Johor, before and after 1824.

159. Singapore's Memorial also ignores the consistent Malaysian practice of considering both Middle Rocks and South Ledge as lying within its sovereignty when dealing with maritime jurisdiction, as exemplified in the following cases:

- the Letter of Promulgation dated 16 July 1968 by the Chief of the Royal Malaysian Navy, Commodore Thanabalasingam, showing Malaysian territorial waters;
- the Petroleum Concession of 1968;

²²⁷ See MM, paras. 49-53 & Insert 6, p. 23.

²²⁸ See MM, paras. 54-57 and see further Chapter 2 above.

- the Malaysian territorial waters map of 1979 and its reprint of 1984, and
- the 1985 Fisheries Act.²²⁹

In none of these cases did Singapore protest against the inclusion of both features, even on the occasions when it protested against the inclusion of PBP on the 1979 and 1984 maps issued by Malaysia in 1980 and 1989.

160. Furthermore, the Malaysian Memorial details evidence showing that permission was given by the Sultan and Temenggong of Johor for construction of a lighthouse "...at any spot deemed eligible".²³⁰ PBP was such a spot and was selected after lengthy consideration of various alternatives. At that time—and still today—the feature known as Middle Rocks was Johor territory as well. The selection and use of PBP did not include Middle Rocks.

161. Singapore accurately describes South Ledge as a low-tide elevation lying 2.2 nm from PBP.²³¹ Such an elevation is defined in Article 13(1) of the 1982 Law of the Sea Convention (to which both Singapore and Malaysia are parties) as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". Such elevations do not autonomously generate a territorial sea, unless they are wholly or partly situated within the territorial sea of the mainland or an island. Singapore then interprets various arbitral and judicial decisions to assert that a coastal state has sovereignty over low-tide elevations situated within its territorial waters. Obviously, South Ledge is not within the territorial waters of Singapore, situated as it is 25 nm from Singapore. For that reason Singapore argues that "there can be no doubt that South Ledge belongs to Singapore, as a consequence of her sovereignty over Pedra Branca".²³²

²²⁹ See MM, paras. 268-285, 295.

²³⁰ See MM, paras. 118-137.

²³¹ See SM, paras. 9.4, 9.29.

²³² Ibid., para. 9.42.

162. However, the weakness in this argument is that South Ledge lies 1.7 nm from Middle Rocks and 2.2 nm from PBP.²³³ This means that the low-tide elevation called South Ledge would attach to Middle Rocks rather than to PBP. If a single group of maritime features could at all be distinguished, it would constitute Middle Rocks and South Ledge.

C. Conclusions

163. Middle Rocks and South Ledge, lying close to the Johor coast, have been part of Johor since time immemorial. This was confirmed by the 1824 Anglo-Dutch Convention and the Crawford Treaty of 1824.

164. Middle Rocks and South Ledge are distinct and separate from PBP. The three features have never been named as a group and have distinct geological and geomorphological characteristics. Singapore's "discovery" in 1993 that the three features constitute a "group" and its late claim to Middle Rocks and South Ledge cannot be substantiated and is merely an effort to enlarge its territorial claim as much as possible.

²³³ See MM, Insert 21, p. 128.

PART II

THE SUBSEQUENT CONDUCT OF THE PARTIES

Chapter 5

THE SUBSEQUENT CONDUCT OF THE PARTIES: AN OVERVIEW

Introduction

165. Part I of this Counter-Memorial addresses the titles invoked by Malaysia and Singapore respectively to PBP. The legal basis of each claim is clear. Malaysia's claim rests on Johor's original title to PBP, Middle Rocks and South Ledge and Malaysia's succession thereto. At no time did Johor, either by act or by omission, alienate its sovereignty over the three features, including by the permission granted by the Sultan and Temenggong of Johor in 1844 to the British authorities for the construction of Horsburgh Lighthouse.

166. Singapore advances an opposing theory, "that the events of 1847 to 1851... constituted a taking of lawful possession of Pedra Branca by agents of the British Crown."²³⁴ Singapore's case thus hinges critically on the notion of "a taking of lawful possession"—title that somehow emerged over the course of the construction of the lighthouse—vesting sovereignty in the British Crown, and Singapore's subsequent succession thereto.

167. Having thus laid out its claim to title, Singapore goes on to contend that, since 1851, Britain and then Singapore exercised a "continuous, open and

²³⁴ SM, para. 5.5. See also para. 5.101.

peaceful display of State authority... over Pedra Branca”,²³⁵ activities that “were all undertaken *à titre de souverain*”.²³⁶ It continues, in Chapter VI of its Memorial, to enumerate a long list of practice that it contends is confirmatory of its original title. This ranges from “enacting legislation relating to Pedra Branca and Horsburgh Lighthouse” to “collecting meteorological information” and the “building and upgrading of a jetty on Pedra Branca” to “investigating incidents of accidental death in the waters of Pedra Branca”.²³⁷ In Chapter VII of its Memorial, Singapore goes on to contend that Malaysia has somehow recognised Singapore’s sovereignty over PBP. In Chapter VIII of its Memorial, Singapore alleges that Johor expressly disclaimed title to PBP.

168. This elaborate discussion of practice notwithstanding, Singapore is evidently cautious about relying on practice as a self-standing basis of claim – for good reason, as will become evident. Its discussion proceeds with measured ambiguity. For example, addressing the “legal significance of the lighthouse in these proceedings”, Singapore states that

“the basis of the title advanced by Singapore is not premised on the role of lighthouses as evidence of State activity... However, in the present case, the taking of lawful possession of Pedra Branca for the purpose of constructing a lighthouse and its appurtenances, and maintaining the installation on a permanent basis, constitutes an independent and self-sufficient basis of title.”²³⁸

169. As this passage emphasises, the essential basis of Singapore’s claim in this case is “the taking of lawful possession” during the period 1847 to 1851. The relevance of subsequent conduct is less clear. Singapore acknowledges that practice concerning lighthouses is not evidence of State activity. It nevertheless suggests that the taking of possession for purposes of the construction and maintenance of Horsburgh Lighthouse on a permanent basis is an independent and self-sufficient basis of title. The equivocation in

²³⁵ SM, para. 6.4.

²³⁶ SM, para. 6.7.

²³⁷ SM, para. 6.6.

²³⁸ SM, para. 5.101.

Singapore's approach is never clarified. As with other elements of Singapore's case – the question whether PBP was *terra nullius* in 1844, the omission of any reliance on an accepted mode of acquisition of territory, the failure to discuss the Johor permission letters of 1844 – the difficulty is simply elided.

170. Issues relating to the subsequent conduct of the Parties are addressed in the Chapters that follow. Given the equivocation in this aspect of Singapore's argument, the matter will have to be addressed in some detail. The implicit proposition relied upon throughout by Singapore is that conduct undertaken by the administrator of Horsburgh Lighthouse is to be equated with conduct *à titre de souverain* as regards PBP. There is a consistent conflation of the two in Singapore's Memorial. They are simply equated by implication, leaving the Court to address what amounts to a fundamental gap in the evidence at the heart of Singapore's case.

171. There is another element to this as well. It is that the conduct relied upon by Singapore in its capacity as administrator of Horsburgh Lighthouse is advanced in isolation from the realities both of practice relating to lighthouses in general and the arrangements of the Straits' Lights system in particular, of which Horsburgh Lighthouse was a part. The Court is thus invited simply to look at Singapore's conduct in respect of Horsburgh Lighthouse without any regard to its context and to proceed on the untested assumption that this is sufficient to sustain a claim to title to the underlying territory.

172. As will be shown in the following Chapters, these are fundamental omissions in Singapore's case. Conduct undertaken in the administration of a lighthouse cannot simply be conflated to conduct *à titre de souverain*. There is no necessary link between them. If such a link is alleged, the burden is on the proponent to prove the assertion. Singapore does not even address the point. There is, furthermore, a long-standing and widely held appreciation, evidenced in the decisions of international tribunals, including of this Court

and the Permanent Court before it, as well as in State practice, that conduct relating to lighthouses has special features which mean that it is not a reliable indicator of sovereignty. Judge van Eysinga addressed this expressly in his concurring opinion in the *Lighthouses in Crete and Samos* case before the Permanent Court in 1937 (and no judge in that case expressed a contrary opinion). His analysis was echoed by the present Court in the *Minquiers and Ecrehos Case* in 1953. It was echoed again in the maritime delimitation Award of the Arbitral Tribunal in the *Eritrea/Yemen Case* of 1998.²³⁹ It finds wider support in State practice concerning individual lighthouses (such as the Cape Race Lighthouse in Newfoundland or the Cape Spartel Lighthouse in Morocco); lighthouses in the Red Sea (where the principal lighthouses are still administered by the United Kingdom and other geographically distant States); in the Arabian/Persian Gulf (where the principal lighthouses are administered by the Middle East Navigation Aids Service (MENAS) without regard to the sovereignty of the territory on which they are located); in the practice of the Corporation of Trinity House (a charitable corporation established in 1514 in London which continues to administer lighthouses around the world), as well as in other instances.²⁴⁰

173. Beyond this, the Straits' Lights system, of which Horsburgh Lighthouse was a part, had special features all of its own which directly challenge the assertion that Singapore's administration of Horsburgh Lighthouse is in any way relevant to the question of title to PBP.²⁴¹ Three of the original 13 lighthouses managed by the Straits Settlements as part of the Straits' Lights system were situated on territory that was not at the time part of the territory of the Straits Settlements. Ten of these original 13 lighthouses were situated in territory that is now part of Malaysia. The administration of these lighthouses by the Straits Settlements had no bearing on the sovereignty

²³⁹ This jurisprudence is addressed further in Chapter 6 below.

²⁴⁰ This practice is addressed further in Chapter 6 below.

²⁴¹ This was addressed in MM, paras. 222-234. It is discussed further in Chapter 7 below.

of the territory on which the lighthouses were situated. This territory—including PBP—was never administered as part of the territory of Singapore.

174. As will be apparent from the review in Chapters 6 and 7 below, this practice relating to the siting and administration of lighthouses was a common feature of British practice from the mid-19th to the mid-20th centuries, with important vestiges of it continuing to the present day. Singapore's equivocation about relying on its practice in the administration of Horsburgh Lighthouse in support of its claim to sovereignty is thus understandable. There is no basis in contemporary British practice regarding lighthouses which can sustain Singapore's claim. All of this practice is directly at odds with Singapore's proposition that the construction and maintenance of Horsburgh Lighthouse somehow constituted "a taking of lawful possession" of PBP for purposes of sovereignty.

A. The scope of Part II and summary of conclusions

175. Against this background, Part II of this Counter-Memorial proceeds as follows. Chapter 6 addresses the law and practice concerning lighthouses in general. The conclusions that emerge from this review support the following propositions:

- There are many examples, both historic and contemporary, of lighthouses around the world which are administered by authorities, whether public or private, other than by the authorities of the State on whose territory the lighthouse is located.
- This was a particular feature of British practice regarding lighthouses in the period from the mid-19th to the mid-20th centuries.
- This practice runs directly counter to the proposition that the construction and maintenance of a lighthouse constituted "a

taking of lawful possession” of the territory on which the lighthouse was situated for purposes of sovereignty.

- While the administration of a lighthouse may coexist with sovereignty over the territory on which the lighthouse is located, this will not necessarily be the case.
- There is an extensive body of uniform practice by lighthouse authorities around the world, whether governmental or non-governmental, concerning the administration of lighthouses.
- This practice reflects the general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibility.
- This practice neither hinges on the sovereignty of the territory on which the lighthouse is situated nor is in any way determinative of it.

176. **Chapter 7** addresses in further detail the special character of the Straits’ Lights system. The conclusions that emerge from this review support the following propositions:

- The Straits’ Lights system, of which Horsburgh Lighthouse was a part, was a system of lighthouses and other aids to navigation put in place by the British in the Malacca and Singapore Straits in the period from the mid-19th to the mid-20th centuries in the interests of safeguarding shipping in these waters.
- A number of lighthouses which were part of the Straits’ Lights system were constructed on territory other than that of the Straits Settlements even though they were administered by the relevant authorities of the Straits Settlements, in some cases from Singapore.
- The administration of a lighthouse by the Straits Settlements authorities from Singapore had no bearing on the sovereignty of the territory on which the lighthouse was situated.

- The continued administration today by Singapore of a lighthouse which formed part of the Straits' Lights system cannot without more be regarded as evidence of Singapore's sovereignty over the territory on which the lighthouse is located.

177. Against this background, the Counter-Memorial goes on to address, in **Chapter 8**, the conduct claimed by Singapore to be *à titre de souverain* or otherwise said to be supportive of Singapore's case and, in **Chapter 9**, conduct by Malaysia consistent with its original title. As regards Singapore's conduct, the conclusion that stands out from this review is that, overwhelmingly, the practice cited by Singapore concerns its administration of Horsburgh Lighthouse which has nothing whatever to do with sovereignty over PBP. In the limited instances in which Singapore advances more general conduct, this is insufficient to sustain its claim, being either inconclusive or subsequent to the critical date of this dispute and evidently self-serving in character.

178. **Chapter 9** addresses the suggestions by Singapore that Malaysia somehow recognised Singapore's sovereignty over PBP or that it disclaimed title to the island. Neither contention has any substance. The Chapter also addresses two additional elements of Malaysian conduct: (a) the use of waters around PBP as traditional fishing waters for fishermen from south-east Johor, notably from the fishing village of Sungai Rengit adjacent to PBP on the Johor coast; and (b) Royal Malaysian Naval (RMN) patrols in the waters around PBP and related RMN conduct. The central proposition to emerge from this review is that, both at the level of private practice and perception (Johor fishermen) and at the level of State practice and perception, PBP was consistently regarded as part of Malaysian territory. Given the physical characteristics of PBP (ie, that there is nothing on it other than Horsburgh Lighthouse), and Singapore's administration of the lighthouse, Malaysian conduct undertaken in appreciation that PBP was part of Malaysia has special

weight: unlike that of Singapore, it cannot be explained by reference to any other considerations.

179. Finally in Part II, Chapter 10 addresses the maritime context, notably the delimitation practices of Malaysia, Singapore and other States in the Singapore Straits and the South China Sea. This practice is consistent with and supportive of Malaysia's sovereignty over PBP.

B. General and preliminary observations

180. Before turning to address these issues, a number of general and preliminary observations relevant to the succeeding Chapters must be made.

(i) Singapore's case based on the importance of Horsburgh Lighthouse

181. Singapore opens its case with a plea. In its description of the physical setting of the case, it observes that "Pedra Branca's position right in the middle of the Straits of Singapore as it opens into the South China Sea has made it a serious navigational hazard on an important international trade route."²⁴² It goes on to say that "[t]oday, more than 150 years later, the significance of Pedra Branca has not diminished."²⁴³ It concludes with the observation that the Singapore Strait is crucial to Singapore's economic well-being and that "[a]s Pedra Branca commands the entire eastern approach to the Straits, the continued ability of Singapore to exercise her sovereign territorial rights over Pedra Branca and its surrounding waters is of the utmost importance to Singapore."²⁴⁴

182. This theme runs throughout Singapore's case, the same proposition, formulated only slightly differently, forming the basis for Singapore's

²⁴² SM, para. 2.6.

²⁴³ SM, para. 2.8.

²⁴⁴ SM, para. 2.9.

discussion of its conduct in respect of Horsburgh Lighthouse in Chapter VI of its Memorial.²⁴⁵

183. To avoid any risk of confusion in the light of these statements, it should be emphasised what this case is and is not about. This case concerns sovereignty—over PBP, Middle Rocks and South Ledge—and that alone. It does not concern Singapore's ownership rights over Horsburgh Lighthouse. Permission for the construction of Horsburgh Lighthouse was given to the British authorities by the Sultan and Temenggong of Johor in 1844. That permission was predicated on the acknowledgement that it was important to ensure the safety of navigation in the Singapore Strait and that, at that time, it was the British authorities and those acting through them who, given their shipping interests and expertise, were best placed to secure this.

184. It is important that this point is clearly appreciated. An unspoken element of Singapore's case is the scare tactic of implying that the consequences of the affirmation of Malaysia's sovereignty over PBP would be, first, to endanger the safety of marine navigation in the Singapore Strait and, second, to undermine Singapore's economic position. Neither contention has any foundation. Malaysia, as one of the principal littoral States of both the South China Sea and the Singapore Strait is intimately concerned to ensure the safety of marine navigation in these waters. Indeed, Malaysia and Singapore, on occasion with the added involvement of other States (such as Indonesia and Japan) cooperate closely on all aspects of marine navigation in the Malacca and Singapore Straits, including Vessel Traffic Services (VTS) and international sea lanes and associated activity such as joint hydrographic surveys of the area. It is thus entirely misleading to imply that Malaysia's interest in the safety of marine navigation is somehow less than that of Singapore or that the affirmation of Malaysia's sovereignty over PBP would somehow undermine that safety.

²⁴⁵ SM, para. 6.2.

185. Beyond this, Singapore's observations on this matter require two further more general observations. First, the construction by Singapore in recent years (since the critical date of this dispute) of various facilities to the lighthouse (such as the helipad and VTIS tower),²⁴⁶ coupled with (a) the installation of military communications equipment in the lighthouse by Singapore,²⁴⁷ (b) the exclusion of Malaysian fishermen from their traditional fishing waters around PBP, and (c) the constant presence of a highly visible Singaporean naval presence in the waters around PBP, has raised serious concerns for Malaysia about Singapore's use of the lighthouse for non-light purposes. The enlargement of the facilities attached to the lighthouse since the critical date of the dispute, without consultation with Malaysia or explanation and apparently, as Malaysia now learns, for non-light purposes, has risked aggravating and extending the dispute.

186. Second, while Horsburgh Lighthouse continues to be important as a key navigational aid for shipping in the Singapore Strait, the tenor of Singapore's Memorial on this point risks obscuring a growing reality which suggests that the Court should be especially hesitant about simply accepting Singapore's extrapolation of its conduct as regards the lighthouse for purposes of its claim to sovereignty.

187. For many centuries lighthouses, light beacons and other aids to navigation assumed great importance. A review of *A History of Lighthouses* published in 1971 estimated the number of lighthouses in existence around the world at that point as in excess of 50,000.²⁴⁸

²⁴⁶ See, e.g., the photograph following page 102 in SM and the corresponding text at SM, para. 6.32. The VTIS tower and helipad were added by Singapore in 1989 and 1992 respectively, i.e., well after the critical date in this dispute.

²⁴⁷ See SM, paras. 6.72 *et seq.* Singapore contends (SM, para. 6.75) that the installation of the military communications equipment was carried out openly. This was not, however, notified to Malaysia and there is no way that Malaysia could have been aware of it. Malaysia has neither opportunity nor means of inspecting Singapore's activity at the lighthouse without the risk of a potentially serious confrontation with Singapore. The first that Malaysia heard of these installations—which were subsequent to the critical date of this dispute—was on receipt of Singapore's Memorial.

²⁴⁸ P. Beaver, *A History of Lighthouses* (Peter Davies Ltd, London, 1971), xi.

188. There is no doubt that, from the mid-19th century, when Horsburgh Lighthouse was built, and ever since, the light from Horsburgh has continued to perform an important service in aid of marine safety in the Singapore Strait. But, some perspective is called for. A recent review of Canadian practice regarding lighthouses, in the context of a more general study under the auspices of the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA), indicated that around a third of Canadian lighthouses were no longer central to the safety of navigation and were suitable for disposal for alternative use.²⁴⁹ The Canadian coastline is the longest in the world and has one of the most extensive systems of marine navigation lights anywhere.

189. The fact is that lighthouses are beginning to assume less importance as an aid to navigation in the face of technological developments, such as Global Positioning Systems (GPS), which are accurate, relatively cheap and readily available to marine navigators. The point was made by the Canadian Regional Director, Coast Guard Maritimes in the following terms:

“The divestiture of lighthouses signals a new era in our maritime life. The emergence of GPS (Global Positioning System) has given the mariner free access to a highly sophisticated and accurate, yet easy to use and affordable navigational aid that is making many lights and other marine navigation aids obsolete. This superior technology is the most significant development in navigation since the time of radio pioneers, radar, and the heyday of lighthouses a century ago. As novel technologies succeed traditional methods of navigation, maritime authorities need to strike a balance in program delivery by coordinating and ensuring an acceptable transition from the ‘old’ to the ‘new’.”²⁵⁰

²⁴⁹ J.L. Wilson, “Lighthouse Alternative Use - Canada’s East Coast Experience” (2001), paper presented at the XVth IALA Conference, March 2002. Copies of this and other papers mentioned in this Chapter will be filed with the Registrar.

²⁵⁰ Ibid., p. 141.

190. In similar vein, this rapid growth in alternative aids to navigation led two other experienced lighthouse administrators and marine navigation experts to speculate about whether traditional aids to navigation, such as lighthouses, would become redundant altogether in the foreseeable future.²⁵¹ While the answer to this question today is still “no”, there is nevertheless a commonly held appreciation in the professional lighthouse community that, especially for large, relatively sophisticated sea-going vessels that ply the world’s major trade routes (such as the Singapore Strait), lighthouses are steadily assuming less significance. The point was addressed in the recent, and authoritative, IALA publication *Aids to Navigation Guide* (“Navguide”, 2001), in the following terms:

“The importance of a visual aid to navigation may well change over time. There may be occasions where shipping requirements change to such an extent that the light of a prominent lighthouse structure can sensibly be down-graded to Category 2 or 3.”²⁵²

“The advent of more sophisticated radio and satellite-based, wider area positioning systems, unconventional vessels and high speed craft, has resulted in the 1983 IMO resolution [establishing accuracy standards for maritime navigation] losing some relevance.”²⁵³

191. There are two reasons for highlighting these developments in the context of the present proceedings. First, Singapore’s claims about the critical

²⁵¹ P. Christmas & J. Taylor, “The Future of Traditional Aids to Navigation”, being a paper presented at the XVth IALA Conference, March 2002. The authors were at the time respectively the Director of Operations and Navigational Requirements, and the Chief Executive of the Northern Lighthouse Board in Scotland. The abstract of their paper summarises the position as follows: “It is generally agreed that, at some indeterminate stage in the future, the place of most of the traditional [Aids to Navigation] probably will have been made redundant by evolving satellite-based radio-navigation systems and the associated on-board systems.” *Ibid.*, 42.

²⁵² IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001), para. 3.5.2. Category 1 refers to “[l]ighthouses and beacons considered to be of primary navigational significance” (emphasis in the original); category 2 refers to “[l]ighthouses and beacons considered to be of navigational significance”; category 3 refers to “[l]ighthouses and beacons considered to have less navigational significance than either Categories 1 or 2”. Relevant extracts from the *Navguide* are in Annexes, vol. 3, Annex 53.

²⁵³ *Ibid.*, para. 2.1.2.2.

role of Horsburgh Lighthouse to Singapore's own economic well-being must be kept in perspective. Singapore no doubt pushes the point as its conduct in respect of PBP since 1851 is in reality exclusively conduct in respect of Horsburgh Lighthouse rather than in respect of the island. Intimations of crisis, were the Court to decide in favour of Malaysian sovereignty, are thus simply a device to conflate Singapore's conduct in administration of the lighthouse with conduct *à titre de souverain*.

192. Second, these developments are important for another reason which goes more directly to a number of Singapore's specific claims which are addressed in Chapter 8 of this Counter-Memorial. One consequence of the development of marine navigational aids has been to emphasise the non-light uses of lighthouses, both traditional non-light uses as well as other more contemporary initiatives. The question was explored in a 1998 IALA study into third party access to navigational sites for the IALA Advisory Panel on the Preservation of Historic Lighthouses which was investigating alternative uses of lighthouses and other aids to navigation. On the basis of responses from a wide range of IALA members, IALA concluded that:

“the predominant [non-aids to navigation] applications [of lighthouses] were for the collection of meteorological data (i.e. weather, wind speed and direction), tidal/current data and for telecommunications installations.”²⁵⁴

193. As described in the IALA *Navguide*,²⁵⁵ traditional and other common non-light uses of lighthouses include:

- coastwatch or coastguard functions;
- VTS functions;
- base for audible (fog) signals;
- collection of meteorological and oceanographic data;
- radio and telecommunications facilities;

²⁵⁴ Ibid., pp. 198-199, para. 10.1.7. The relevant extract from the *Navguide* is in Annexes, vol. 3, Annex 53.

²⁵⁵ Ibid., p. 73, para. 3.5.1.3.

- tourist facilities.

194. Against the background of these traditional non-light uses of lighthouses, Singapore is massively overstating its claim to sovereignty over PBP based on its post-1851 practice in respect of the lighthouse. All of Singapore's conduct since this point has hinged on its administration of Horsburgh Lighthouse. It simply reflects its position and responsibility as administrator of the lighthouse.

(ii) *The legal framework and questions of evidence*

195. In Chapter 7 of its Memorial, Malaysia addressed the legal framework for considering the conduct of the Parties. In the light of Malaysia's original title to PBP and Singapore's claim that its conduct subsequent to 1851 is somehow confirmatory of its theory of "a taking of lawful possession", the basic principles relevant to this legal framework merit brief restatement.

196. In its Judgment in the *Frontier Land Case*, the Court emphasised that the weight to be given to conduct relied upon in support of a claim to sovereignty had to be determined in the light of the complex arrangements that operated in respect of the territory in question. The Court went on further to note that acts of a routine and administrative character would be insufficient to displace sovereignty already previously established.²⁵⁶ In the *Clipperton Island* case, the Arbitral Tribunal emphasised the absence of any *animus* by France to abandon the island as an important element in upholding the French claim to title.²⁵⁷

197. These principles are relevant to the present case. Malaysia's title to PBP, Middle Rocks and South Ledge hinges on Johor's original title to the

²⁵⁶ *Case Concerning Sovereignty Over Certain Frontier Land*, ICJ Reports 1959 p. 209 at p. 229.

²⁵⁷ *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, (1932) 26 *AJIL* 390 at p. 394.

features. Neither Johor nor Malaysia has ever had any intention to abandon that title.

198. When determining the weight to be given to the conduct relied upon by Singapore in support of its claim, the Court should properly have regard to the close and complex interaction between Johor and the Straits Settlements, and Malaysia and Singapore, especially as regards the provision of aids to navigation in the Malacca and Singapore Straits. As in the *Frontier Land Case*, in which routine and administrative acts by the Netherlands in respect of the territory in question could not displace Belgian sovereignty, so also in this case routine and administrative acts by Singapore in its capacity as operator of Horsburgh Lighthouse cannot displace Malaysian sovereignty over PBP, especially when these acts are consequent upon the permission granted by the territorial sovereign.

(iii) *Evidence adduced by Malaysia in support of the claims in this Part*

199. A number of documents are annexed to this Counter-Memorial as evidence supporting the arguments advanced in the following Chapters in this Part. They are:

1. *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 Mr David Brewer, respectively, Director of Navigational Requirements and former Director of Administration, Trinity House, London;
2. *The History and Working of the Middle East Navigation Aids Service ("MENAS") and Related Issues*, Report by Commander Peter John Christmas, Royal Navy (Retired), former General Manager of MENAS, and before that Director of Operations and Navigational Requirements of the Northern Lighthouse Board, Scotland;

3. Note on Lighthouses and Their Functions, by Rear-Admiral (retired) Jean-Charles Leclair, on behalf of IALA;
4. Affidavit of Rear Admiral (retired) Dato' Karalasingam Thanabalasingam, former Chief of the Royal Malaysian Navy;
5. Affidavit of Idris Bin Yusof, fisherman, from Sungai Rengit, Johor;
6. Affidavit of Saban Bin Ahmad, fisherman, from Sungai Rengit, Johor.

200. A number of maps are reproduced as part of this Counter-Memorial. These are addressed as appropriate in the course of argument in Part I of the Counter-Memorial and in Chapter 10 below. One map warrants particular reference at this point, and is folded in large format in the sleeve to this volume. It is British Admiralty Chart 2403, Singapore Strait, 1936, published under the authority of the Admiralty hydrographer, Rear Admiral J.A. Edgell. The chart is reproduced in reduced form as Map 25 of the Map Atlas (vol. 4) to Malaysia's Memorial. It is reproduced in its original large format as part of this Counter-Memorial as detail not otherwise readily apparent from the reduced version will be relevant to Annexes 5 and 6 concerning the traditional fishing rights of Johor fishermen in the waters of PBP. It is also directly relevant to the evidence of Rear Admiral Thanabalasingam (vol. 2, Annex 4). Given the provenance and detail of the chart, Malaysia anticipates that it will also be useful to the Court as a more general orientation map of PBP and its surrounding area.

Chapter 6

THE LAW AND PRACTICE CONCERNING LIGHTHOUSES

Introduction

201. In its Memorial, Malaysia addressed the distinction between ownership of lighthouses and sovereignty over territory.²⁵⁸ This Chapter expands upon that analysis, addressing the considerable body of State practice and jurisprudence that shed light on the special features of lighthouse administration. As will be shown, there are many examples of lighthouses constructed on the territory of one State but administered by some other authority. This being the case, conduct in the administration of a lighthouse cannot, in the absence of other factors, be taken as evidence of sovereignty.

202. Significantly, the practice described in this Chapter also shows that the construction and/or administration of lighthouses by Britain in waterways around the world in the period from the mid-19th to the mid-20th centuries never constituted, and was never regarded by Britain as constituting, "a taking of lawful possession" of the territory on which the lighthouse was situated for purposes of sovereignty. Singapore's assertions on this point as regards Horsburgh Lighthouse have no foundation whatever in the British practice of the day.

203. This Chapter also addresses the extensive body of practice by lighthouse authorities around the world, whether governmental or non-governmental, concerning the administration of lighthouses. Such practice, which neither hinges on the sovereignty of the territory on which the lighthouse is situated nor is in any way determinative of it, reflects the general

²⁵⁸ MM, paras. 165-176.

conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibilities.

204. In particular, this Chapter illustrates these points by reference to the practice of lighthouse administration in the Red Sea, in the Arabian/Persian Gulf, by Trinity House, and in a number of other cases involving individual lighthouses. As will be shown, the construction and administration of lighthouses around the world, especially during the period from the mid-19th to the mid-20th centuries, combined imperial interest and the commercial objectives of private undertakings operating under an imperial mantle. The practice of Britain, France and other European States during this period focused on the objective of securing maritime safety and was driven by commercial need and the interests of international navigation, rather than by concerns to acquire tiny islets, rocks or other portions of territory on which the lighthouses were to be constructed.

A. Imperial interest in the construction and administration of lighthouses

205. The historical importance of lighthouses in securing the safety of navigation was touched upon in Chapter 5 above. Scholarly works, such as those by Patrick Beaver, *A History of Lighthouses* (1971) and John Nash, *Sea Marks: Their History and Development* (1985) explore the historical dimension of the question in detail, including both cooperative ventures between States as well as private initiatives in the construction and administration of lighthouses. One notable example of such cooperation at the level of private enterprise which developed into State involvement is that of the Hanseatic League, the league of merchant associations of the cities of Northern Germany and the Baltic, during the period from around 1250 to 1550.²⁵⁹ Motivated by the dangers of navigating along the coastlines of

²⁵⁹ See, e.g., J. Nash, *Seamarks: Their History and Development* (Stanford Maritime, London, 1985), ch. III.

northern Europe during this period, the merchants of the cities of the League, through common endeavour, began to establish beacons and seamarks to aid navigation. This was complemented over time by public initiatives in Denmark, the German States and The Netherlands.

206. In parallel with these developments to the east, Henry VIII of England granted a Royal Charter establishing The Corporation of Trinity House ("Trinity House") in 1514 as the pilotage authority responsible for establishing seamarks on land and, in due course, for marking channels of navigation. Trinity House, as a non-governmental statutory corporation, remains responsible for the administration of lighthouses in England and Wales today as well as being responsible for the administration and maintenance of various lighthouses and other aids to navigation around the world.²⁶⁰

207. Until the 19th century, light beacons remained largely in private hands. Even subsequent to this period, the construction of lighthouses was frequently financed by private subscription—in some cases by lottery.²⁶¹ Significant innovations in lighthouse technology and construction techniques came during this period notably from France and Britain. By the 1840s, engineering advances began to allow the construction of lighthouses in previously impossible locations.²⁶²

²⁶⁰ Further background information on Trinity House is given in the Report of Captain Duncan Glass and Mr David Brewer: Annexes, vol. 2, Annex 1.

²⁶¹ See, e.g., P. Beaver, *A History of Lighthouses* (Peter Davies, London, 1971), p. 82, referring to the financing of the construction of lighthouses in New York and elsewhere in the United States.

²⁶² See, e.g., *ibid.*, ch. 9.

208. These advances in engineering, coupled with the growth in commercial shipping, resulted in the 19th century becoming “the golden age of lighthouse building all over the world”.²⁶³ As the volume of commercial shipping increased, lighthouses, originally established and maintained by philanthropists, became the subject of speculation as “[t]he ownership of a light on a busy shipping lane could secure a huge income [from light dues]”.²⁶⁴

209. One lighthouse constructed during this period of the mid-19th century, virtually at the same time as Horsburgh Lighthouse, was that at Cape Race in Newfoundland in 1856, “a cylindrical cast-iron tower perched on the edge of a cliff, 87 feet above the sea.”²⁶⁵ It is illustrative of wider British practice regarding lighthouses at around this time. Beaver notes of this lighthouse that,

“[t]he result of a joint effort between the Newfoundland and the British Governments, it was maintained by the latter who levied a due of one-sixteenth of a penny per ton on all vessels passing the light. Some fifty years later the lighthouse was handed over to the Canadian Government who abolished the light-dues.”²⁶⁶

210. At the time of the construction of Cape Race Lighthouse, Newfoundland was a self-governing Colony of Great Britain in which the construction of a lighthouse and its administration required the consent of the Legislative Authority of the Colony.²⁶⁷ The administration of the lighthouse by Britain was thus consequent upon the consent of the Legislative Authority of Newfoundland. In the light of the subsequent refusal by Newfoundland to take over the maintenance of the lighthouse from Britain, ownership and administration of the lighthouse was transferred from Britain to Canada by British and Canadian Acts passed in 1886. The transfer vested the land on

²⁶³ Ibid., p. 7.

²⁶⁴ Ibid., pp. 17-18.

²⁶⁵ Ibid., p. 63.

²⁶⁶ Beaver, *A History of Lighthouses*, p. 63.

²⁶⁷ The consent of the Legislative Assembly of the Newfoundland Colony for the construction of the Cape Race Lighthouses is recited in the first preambular para. of the (British) Cape Race Lighthouse Act, 1886, an Act “to provide for the transfer to the Dominion of Canada of the Lighthouse at Cape Race, Newfoundland, and its appurtenances” (49 Vict. c.13). The authority of the Colony to decline responsibility for the administration of the lighthouse is referred to in the fifth preambular para. of this Act: Annexes, vol. 3, Annex 26.

which the lighthouse was built, "and all dwellings, buildings, ponds, signals, and apparatus connected therewith, and all other land and all rights of water and other rights heretofore used and enjoyed therewith and all the other appurtenances thereof, for all the estate and interest therein" in Canada. In accepting the transfer of the lighthouse and the attendant responsibility for its maintenance, the Government of Canada observed that "the said lighthouse is indispensable to the safety of Canadian vessels and others navigating the North Atlantic, to and from Canada".²⁶⁸

211. Cape Race Lighthouse was built on the territory of Newfoundland. Between 1856 and 1886, the lighthouse was administered by Britain with the consent of Newfoundland. Subsequent to 1886, the lighthouse was administered by Canada. Newfoundland became a province of Canada only in 1949. Cape Race Lighthouse is an example of a lighthouse which was administered sequentially by the authorities of two States, neither of which was the territorial State.

212. As this example illustrates, 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. The point was addressed by Judge van Eysinga in his concurring opinion in the *Lighthouses in Crete and Samos* case before the Permanent Court of International Justice in 1937:

"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

²⁶⁸ Act of the Government of Canada, respecting the transfer of the Lighthouse at Cape Race, Newfoundland, and its appurtenances, to the Dominion of Canada 1886 (the Canadian Cape Race Act, 49 Vict., c.20): Annexes, vol. 3, Annex 27. See also An Act in aid of the Imperial Act providing for the Lighthouse at Cape Race and its appurtenances, 1886 (the Newfoundland Cape Race Act, 49 Vict., c. 4): Annexes, vol. 3, Annex 28.

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.

The case of the lighthouses in the Ottoman Empire offers certain analogies. It was after the Crimean War, when the navies of the Western Powers had had ample occasion to note the lack of an adequate lighting system on the Ottoman coasts, that an international commission was appointed to consider the problem. The Turkish lighthouse service dates from 1856; and it was in 1860 that MM. Collas and Michal undertook the service in virtue of the concessionary contract of August 8th/20th of that year.

The lighthouse service covers the whole of the Ottoman Empire, except in so far as certain parts of that Empire are excepted from it. Here we have a case of an 'Imperial interest' which was primarily a matter of concern to international shipping. The Powers, and especially Great Britain, gave the Sultan many proofs of their keen and persistent interest in the matter, and on more than one occasion made it the subject of diplomatic representations. This international interest was not governed by any regulation, but the Sultan recognised that it was an international interest of a very real character...²⁶⁹

²⁶⁹ *Lighthouses in Crete and Samos*, PCIJ Reports, Series A/B No.71 (1937), pp. 23-4 (separate opinion of Judge van Eysinga).

B. The construction and administration of lighthouses by authorities other than of the territorial State

(i) *State practice*

213. As Judge van Eysinga's Opinion affirms, the construction and administration of lighthouses was frequently undertaken by bodies, whether public or private, other than those of the territorial sovereign. A review of practice discloses three broad categories of such bodies: (a) authorities established by treaty, (b) private companies or undertakings, and (c) authorities of a State other than the territorial sovereign. In each case, the construction and/or the administration of the lighthouse took place independently of any question of title to the territory on which the lighthouse was located and had no bearing on questions of sovereignty.

214. A notable example in the first category—an authority established by treaty having responsibility for the establishment and administration of a lighthouse in the interests of States other than the State on whose territory the lighthouse sits—was the Cape Spartel Lighthouse International Commission referred to by Judge van Eysinga in *Lighthouses in Crete and Samos*. By the Cape Spartel Convention of 31 May 1865, the International Commission was created to administer the lighthouse under the “sovereignty and ownership of the Sultan of Morocco”.²⁷⁰ The Cape Spartel Convention was supplemented by a related agreement of 1892 which established a semaphore signal station, also at Cape Spartel, under the administration of the Corporation of Lloyd's of London (the Cape Spartel Semaphore Agreement).²⁷¹ Management of the Cape Spartel lighthouse was only transferred back to Morocco, the territorial

²⁷⁰ Convention between Great Britain, Austria, Belgium, Spain, The United States, France, Italy, the Netherlands, Portugal, and Sweden, on the one part; and Morocco, on the other part; relative to the Establishment and Maintenance of a Lighthouse on Cape Spartel, 31 May 1865, 55 *BFSP* 16.

²⁷¹ These and other similar arrangements concerning the administration of aids to navigation are addressed in C.J. Colombos, *The International Law of the Sea* (6th ed., Longmans, London, 1967), pp. 337-338.

sovereign, on 31 March 1958 pursuant to a Protocol to the 1865 Convention of that date.²⁷²

215. An example in the second category—a private company having long-term responsibility for the administration of lighthouses—was that of the French firm Collas & Michel, known as the *Administration générale des Phares de l'Empire ottoman*,²⁷³ whose concessions with the Ottoman Empire for the administration of various lighthouses were in issue in the *Lighthouses Case Between France and Greece* and the *Lighthouses in Crete and Samos* case before the Permanent Court of International Justice.²⁷⁴ The same company was granted long-term concessions to construct and administer a series of lighthouses in the Red Sea and in the Arabian/Persian Gulf.²⁷⁵

216. A further example of a company administering lighthouses on foreign territory—one which continues today—is the Middle East Navigation Aids Service (MENAS). MENAS began life in 1950 as a non-profit-making company, the Persian Gulf Lighting Service (PGLS), changing its name to MENAS in 1966. The history and workings of MENAS are addressed in more detail below and in the Report by Commander Peter John Christmas, formerly Managing Director of MENAS, which is annexed hereto. MENAS's origins in British and Indian practice in the Gulf in the early 20th century throws light on the parallel practice by Britain in the Malacca and Singapore Straits in establishing of the Straits' Lights system.²⁷⁶

217. An example in the third category—lighthouses administered by the authorities of a State other than the State of territorial sovereignty—is the

²⁷² Protocol relating to the Management of the Cape Spartel Light, 31 March 1958, 320 UNTS 105.

²⁷³ The name of the company is given slightly differently in the Maritime Delimitation Award of the Arbitration Tribunal in the *Eritrea v. Yemen* case of 9 October 1998; 40 ILM 900 (2001), para. 202.

²⁷⁴ *Lighthouse Case Between France and Greece*, PCIJ Reports, Series A/B No. 62 (1934); *Lighthouses in Crete and Samos*, PCIJ Reports, Series A/B No. 71 (1937).

²⁷⁵ *Eritrea v. Yemen*, Award of 9 October 1998, 40 ILM 900 (2001), para. 200.

²⁷⁶ Report by Commander Peter John Christmas, formerly General Manager of MENAS: Annexes, vol. 2, Annex 2.

United Kingdom's administration of various Red Sea lighthouses following the failure of the Convention concerning the Maintenance of Certain Lights of 1930 under which the administration of the lighthouses would have been undertaken by the French firm Collas & Michel.²⁷⁷ A further example of such practice is Britain's assertion of control over the existing lighthouses and aids to navigation in the Arabian/Persian Gulf in 1911. Britain operated and managed the lighthouses and aids to navigation in the area and constructed new ones until 1950 when the Persian Gulf Light Service (subsequently MENAS) was created. The administration of these lights was performed by the Government of India and the costs were shared between the British and Indian Governments.

218. A current example of aids to navigation situated in the territory of one State but administered by the authority of another State are the aids to navigation in Northern Ireland which are administered by the Commissioners of Irish Lights, the statutory lighthouse authority of the Republic of Ireland.²⁷⁸ The Commissioners of Irish Lights is the General Lighthouse Authority for the whole of Ireland, including Northern Ireland. In this function, it works in close consultation with the General Lighthouse Authorities responsible for the provision of aids to navigation in United Kingdom waters, namely, Trinity House and the Commissioners of Northern Lighthouses (otherwise known as the Northern Lighthouse Board). The arrangements in respect of Northern Ireland date back to the Lighthouses (Ireland) Act of 1810 (UK), which transferred to the Port of Dublin Corporation all powers, duties and functions relating to the control of lighthouses around the coast of Ireland. The Port of Dublin Corporation was renamed the Commissioners of Irish Lights in 1867. The responsibilities and functions of the Commissioners, as regards aids to

²⁷⁷ *Eritrea v. Yemen*, Award of 9 October 1998, 40 *ILM* 900 (2001), para. 211 *et seq.*

²⁷⁸ See further the Report by Captain Duncan Glass and Mr David Brewer (vol. 2, Annex 1), para. 18. See also the *Note on Lighthouses and Their Functions* by Rear Admiral (retired) Jean-Charles Leclair, on behalf of IALA (vol. 2, Annex 3), Answer 1, and the Report by Commander Christmas (vol. 2, Annex 2), para. 8.2, fn 4.

navigation for all of Ireland, including Northern Ireland, continued following Irish independence in 1922.²⁷⁹

219. Trinity House, a United Kingdom corporation with charitable status which is not a public authority, has also administered a number of lighthouses and other aids to navigation around the world, including on non-United Kingdom territory (as in the case of the Sombrero Lighthouse in Anguilla).²⁸⁰

220. The examples above—Cape Spartel lighthouse, the lights in the Persian Gulf between 1911 and 1950, and the Northern Irish lights—are further illustrations of British practice regarding the administration of lighthouses and other aids to navigation in the 19th and early 20th centuries. The focus was on practical arrangements for maritime safety without regard to questions of the sovereignty of the territory on which the lights were located.²⁸¹ Such arrangements continue today. They support the wider proposition that the construction and maintenance of Horsburgh Lighthouse cannot have been intended to constitute “a taking of lawful possession” of the underlying territory for purposes of sovereignty, as Singapore now contends.

(ii) *The Middle East Navigation Aids Service (MENAS)*

221. Reference has already been made to MENAS as an example of an authority incorporated in one State which owns and operates lighthouses and other aids to navigation on the territory of other States. The origins, history and workings of MENAS are addressed in detail in the Report by Commander Christmas in volume 2, Annex 2.

²⁷⁹ The history and present function of the Commissioners of Irish Lights is given on its internet site: <http://www.cil.ie/>.

²⁸⁰ This is addressed more fully in the Report by Captain Duncan Glass and Mr David Brewer: Annexes, vol. 2, Annex 1, paras. 5-7.

²⁸¹ The point is addressed in the Report by Captain Glass and Mr Brewer in the following terms: “... there are also important exceptions to the general rule [that the majority of lighthouses are operated by a government department of the relevant sovereign State or a public undertaker of the State], notably emanating from the British colonial period, e.g. the lights in the Arabian Gulf (addressed further below), in the Red Sea approaches to the Suez Canal, as well as in particular cases of individual lighthouses, such as the Sombrero Lighthouse in Anguilla and the Gibraltar lighthouse.” Glass-Brewer Report, para. 14: Annexes, vol. 2, Annex 1.

222. Following the discovery of oil at Masjid-I-Suleiman in Persia in May 1908 and the expansion of the Ottoman Empire into what is now eastern Saudi Arabia, Britain took control of such aids to navigation as there were in the Arabian/Persian Gulf in 1911. The Government of India, the closest British territory from which such an operation could be based, undertook the task of administering these lights. The British and Indian Governments shared the costs of administering the lights, using a fund known as the Persian Gulf Lighting Service Fund.

223. In 1913, following the decision by Winston Churchill, then the First Lord of the Admiralty, that the British Fleet would change from coal to oil power, the British Government took a controlling interest in the Anglo-Persian Oil Company. It also set about marking the major marine hazards in the Gulf. Important lights established in the Gulf by the British or Indian Governments during the period 1913 to 1950 included those on Tunb Island (west of the entrance to the Straits of Hormuz), Quoin or Didamar Island (at the entrance of the Straits of Hormuz on the territory of the Sultan of Muscat, now Oman), and on Sir Abu Nu'air Island (off the coast of Sharjah), as well as the Muscat Beacon (off the coast of Oman).²⁸² Other lights in the Gulf administered by the Indian Government during the period 1913 to 1950 but about which less is known include various buoys and floats off the coast of Bahrain and in the Shatt al Arab waterway.²⁸³ By the late 1940s, there were 31 such aids to navigation under the administration of the Indian Government in the Gulf. As Commander Christmas's Report indicates, some of these lights were constructed by the British or Indian Governments with the permission of local rulers. In other cases, no such permission seems to have been given.

²⁸² Report by Commander Christmas, para. 4.3: Annexes, vol. 2, Annex 2.

²⁸³ Ibid., para. 4.4.

224. After the First World War, administration of the Gulf lights remained with the Indian Government, being undertaken from a base in Bombay. From 1925, this was funded by the collection of light dues, the authority for the collection of such dues being vested in the Basrah Port Directorate in Iraq. This situation remained virtually unchanged until after the Second World War when, with the rapid expansion in the demand for oil, it became apparent that many more aids to navigation would be required in the Gulf.

225. Following Indian independence in 1947, and the Indian Government's unwillingness to continue responsibility for the maintenance and administration of the Gulf lights, control of the administration and financing of these lights was transferred from the Indian Government to the British Government, resting with the British Ministry of Transport. Subsequent initiatives by Britain to hand over responsibility for the maintenance and administration of the Gulf lights to the littoral States in whose waters they were located met with protests from users. As a result, on the suggestion of what was by this time called the Anglo-Iranian Oil Company, the British Government transferred responsibility for the lights on 12 January 1950 to a non-profit-making company incorporated under English law known as the Persian Gulf Lighting Service (PGLS). Its name was changed in 1966 to MENAS. MENAS remains a not-for-profit corporation registered as a UK charity. It continues to own and administer lighthouses and other aids to navigation situated on the territory of Kuwait, the United Arab Emirates and Qatar. It has also constructed a number of additional lights in the region, in most cases with the formal permission of the State concerned, although in one or two cases on the basis of more informal acceptance.²⁸⁴

226. Two conclusions may be drawn. First, Britain's control over the aids to navigation in the Gulf in the period 1911 to 1950 was motivated by imperial interests and concerns to secure the safety of shipping in a strategic waterway. There is no suggestion that this assumption of control over existing aids to

²⁸⁴ Ibid., para. 4.5.

navigation in the Gulf, and the construction and administration of new lights, was intended to constitute a taking of possession of the territory on which the lights were located for the purposes of sovereignty. In many cases – as was the situation with Horsburgh Lighthouse – permission was sought from local rulers for the construction of the lights. In cases in which there is no evidence of permission, subsequent practice regarding these lights discloses no hint of a suggestion that either Britain or India considered that they had sovereign rights over the territory on which the lights were situated.

227. Second, the fact that Britain and India adopted legislative or administrative measures directed at the management of the Gulf lights – including concerning the collection of light dues – did not imply that their administration of the lights constituted a taking of possession of, or an acquisition of sovereignty over, the territory on which the lights were located. For example when the Omani Government indicated that it wished to assume control over the aids to navigation situated on its territory, there was no doubt that they were entitled to do so notwithstanding that these lights had, in many cases, been constructed, and had been owned and operated, by MENAS for considerable periods. Following negotiations between Oman and MENAS, ownership and control of the lights was transferred to Oman with the Omani Government compensating MENAS for the costs of lights originally provided by MENAS.²⁸⁵

(iii) *The character of lighthouse administration: legal evaluations*

228. The consistent legal evaluation of the character of lighthouse administration and its relevance to the determination of questions of sovereignty echoes the practice of States. Judge van Eysinga's observations, quoted in paragraph 212 above, reflect this understanding. While these elements were not explicitly addressed by the Permanent Court in either the *Lighthouses Case Between France and Greece* or the *Lighthouses in Crete and Samos* case, both judgments implicitly affirm the view that the

²⁸⁵ Ibid., para. 3.5.

administration of lighthouses has no bearing on sovereignty. The Collas & Michel concessions survived the extinction of Ottoman sovereignty and the emergence in its place of Greek title to the territory on which the lighthouses were located.

229. A similar evaluation was given by this Court in the *Minquiers and Ecrehos Case*.²⁸⁶ There France contended that:

“since 1861 it has assumed the sole charge of the lighting and buoying of the Minquiers for more than 75 years, without having encountered any objection from the United Kingdom Government. The buoys were placed outside the reefs of the group and purported to aid navigation to and from French ports and protect shipping against the dangerous reefs of the Minquiers. In 1888 a French mission, appointed to make a hydrographic survey of the islets, erected provisional beacons on several of them to facilitate the survey.

The French Government has also relied on the fact that the French Prime Minister and the Air Minister in 1938 travelled to the Minquiers in order to inspect the buoying, and that a Frenchman in 1939 erected a house on one of the islets with a subsidy from the Mayor of Granville. It has finally referred to certain recent hydro-electric projects for the installation of tidal power plants in the Bay of Mont-Saint Michel and the region of the Minquiers islets.”²⁸⁷

The Court concluded:

“The Court does not find that the facts, invoked by the French Government, are sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned acts from the nineteenth and twentieth centuries in particular, including the buoying outside the reefs of the group, such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.”²⁸⁸

²⁸⁶ *Minquiers and Ecrehos Case (France/United Kingdom)*, ICJ Reports 1953, p. 47.

²⁸⁷ *Ibid.*, pp. 70-71.

²⁸⁸ *Ibid.*, p. 71.

230. The principle that underlay the Court's view in this case—that conduct in the administration of a lighthouse could not, without more, be taken as evidence of sovereignty—was echoed by the Arbitral Tribunal in the *Eritrea v. Yemen* case. The Tribunal stated:

“By the outbreak of the Second World War it may be said that the maintenance of the [Red Sea] lights is seen as a non-sovereign act and there is agreement that the underlying title to the islands concerned was left in abeyance...

...

As in 1930, the managerial role of the United Kingdom had nothing to do with the issue of title to the islands; nor did management even place the United Kingdom in a favourable position for when the title issue came to be resolved...

...

The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty. Maintenance on these islands of lighthouses by British and Italian companies and authorities gave rise to no sovereign claims or conclusions...

...

The traditional importance of both [the Jabal al-Tayr and the Zubayr groups of Islands] has been that they have been lighthouse islands (the Zubayr light was on Centre Peak, the southernmost islet of the group). It will be clear from the history of the Red Sea lighthouses (see Chapter VI above) that, although, or perhaps even because, lighthouses were so important for nineteenth and early twentieth century navigation, a government could be asked to take responsibility or even volunteer to be responsible for them, without necessarily either seeming to claim sovereignty over the site or acquiring it. The practical question was not one of ownership, but rather of which government was willing, or might be persuaded, to take on the responsibility, and sometimes the cost, if not permanently then at least for a season.”²⁸⁹

231. Singapore advances the *Qatar v. Bahrain* case to counter this trend in the jurisprudence.²⁹⁰ In that case, the Court, addressing Bahraini claims to sovereignty over the island of Qit'at Jaradah, observed that the construction of

²⁸⁹ *Eritrea v. Yemen*, Award of 9 October 1998, 40 *ILM* 900 (2001), paras. 221, 226, 328, 510.

²⁹⁰ *SM*, para. 6.96.

navigational aids can be legally relevant in the case of very small islands.²⁹¹ Rather than taking the law in a different direction (as Singapore submits), the Court's observation confirms its earlier jurisprudence. In the *Minquiers & Ecrehos* case, the Court was concerned with the sufficiency of evidence concerning the establishment and administration of navigational aids to sustain a claim to title. Notwithstanding that there was no competing evidence of this kind from the United Kingdom, the Court rejected a claim based in this evidence. The same is true for the *Eritrea v. Yemen* case, in which the Arbitral Tribunal was concerned with the weight to be attached to the administration of lighthouses in the special circumstances of the Red Sea lights. Again, it affirmed the principle that evidence of the administration of a lighthouse would not normally give rise to sovereign claims or conclusions.

232. In the *Qatar v. Bahrain* case, the question of title to Qit'at Jaradah was addressed by the Court in the context of its delimitation of the maritime boundary between the two States.²⁹² Qit'at Jaradah was not an island to which the parties had attached special importance beyond the question of maritime delimitation.

233. The principal focus of argument concerning Qit'at Jaradah was whether it was to be regarded as an island (as Bahrain contended) or whether it was simply a low tide elevation which could not be appropriated for purposes of maritime delimitation (as Qatar contended).²⁹³ Qatar offered no evidence of conduct in respect of Qit'at Jaradah, relying only on the contention that it was situated in the part of the territorial sea which belonged to Qatar. In contrast, Bahrain cited various forms of conduct relevant to Qit'at Jaradah, viz. "the erection of a beacon, the ordering of a drilling of an artesian well, the granting of an oil concession, and the licensing of fish traps."²⁹⁴

²⁹¹ *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, 16 March 2001, para. 197.

²⁹² *Ibid.*, paras. 166-174.

²⁹³ *Ibid.*, para. 191.

²⁹⁴ *Ibid.*, para. 196.

234. The Court first concluded that Qit'at Jaradah was indeed an island. Given that conclusion and the arguments that had been advanced it was bound to follow that the Court would accept Bahraini conduct as dispositive of title – there was no prior Qatari title and nor Qatari conduct of any kind relevant to the island. In assessing the Bahraini conduct, the Court thus concluded:

“Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.”²⁹⁵

Read in context, and against the background of earlier jurisprudence, this 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*. But there is no indication that the Court intended to set aside its own earlier jurisprudence or that of the various arbitral tribunals.

235. This conclusion is supported by the Court's judgment in the *Ligitan and Sipadan* case. In that case, both Parties advanced *effectivités* in respect of the islands in support of their claims. Malaysia relied *inter alia* on the fact that the colony of North Borneo had constructed lighthouses on the islands which Malaysia had subsequently maintained.²⁹⁶

236. The Court first addressed the weight to be given to the conduct relied upon by Indonesia and concluded that these activities did not constitute acts *à*

²⁹⁵ Ibid., para. 197.

²⁹⁶ *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, para. 127 *et seq.*

*titre de souverain.*²⁹⁷ It moved then to assess the conduct relied upon by Malaysia, which included the maintenance of the lighthouses as well as other elements of practice in respect of the islands, concluding that Malaysia's conduct did amount to conduct *à titre de souverain*. As regards Malaysia's reliance on its conduct in respect of the lighthouses, the Court recalled the passage in its Judgment in the *Qatar v. Bahrain* case. It nevertheless expressly prefaced this with the observation that "the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority" explicitly relying on its reasoning in the *Minquiers and Ecrehos* case.²⁹⁸

237. This jurisprudence is clear and is consistent with the broad sweep of State practice. Conduct in the administration of a lighthouse does not, without more, constitute sufficient evidence for the determination of sovereignty. In particular, such conduct will only be relevant if it discloses an *animus occupandi*, not simply in respect of the lighthouse and its associated facilities, but specifically of the territory on which the lighthouse is located. An *animus occupandi* will not itself be sufficient in circumstances in which title to the territory already vests in another State and there is no evidence of an intention on its part to abandon its title.

²⁹⁷ Ibid., paras. 137-141.

²⁹⁸ Ibid., para. 147.

C. Common usage and practice in the administration of lighthouses

238. Singapore argues that, even if the administration of a lighthouse is not in and of itself evidence of sovereignty, a range of activities carried out by it from the lighthouse do provide such evidence.²⁹⁹ In assessing this claim, it is useful to describe certain elements of common usage and practice in the administration of lighthouses. This review draws on the Reports by Captain Glass and Mr Brewer (Annex 1) and Commander Christmas (Annex 2), the Note by Rear-Admiral Leclair on behalf of IALA (Annex 3), as well as other instruments and documents, notably, Chapter V of the International Convention for the Safety of Life at Sea, 1974 (SOLAS),³⁰⁰ which addresses the safety of navigation, and the authoritative *Navguide* published by IALA.³⁰¹

(i) *The international legal framework*

239. Article 24(2) of the UN Convention on the Law of the Sea, 1982 requires a coastal State to give appropriate publicity to any danger to navigation, of which it has knowledge, in its territorial sea. Articles 43 and 44, which address transit passage in straits used for international navigation, provide:

“Article 43

Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement cooperate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

²⁹⁹ SM, para. 6.6. Singapore’s specific claims in respect of each of the items it relies on are addressed individually in Chapter 8 below.

³⁰⁰ International Convention for the Safety of Life at Sea, 1974, as amended (notably, as regards Chapter V, in 2000, the revised chapter having entered into force on 1 July 2002): 1184 UNTS 277.

³⁰¹ IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001); extracts in Annexes, vol. 3, Annex 53.

Article 44

Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.”

240. These provisions require States to cooperate in ensuring the safety of navigation by establishing and maintaining aids to navigation. They also impose an obligation on States to notify others of hazards to navigation of which they have knowledge. These responsibilities form the core of the current international legal regime concerning the provision of navigational aids.³⁰²

241. A considerably more detailed regime for the safety of navigation is set out in Chapter V, as amended, of SOLAS.³⁰³ This addresses such matters as ice patrol services, search and rescue, ships’ routing and reporting systems, the manning and maintenance of ships, carriage requirements for shipborne navigational systems, bridge visibility, steering gear and danger messages. A number of these provisions are concerned specifically with the provision of navigational aids, navigational warnings and more generally with the responsibility of lighthouse operators. In particular Regulations 4 and 13 of Chapter V provide:³⁰⁴

“Regulation 4 – Navigational warnings

Each Contracting Government shall take all steps necessary to ensure that, when intelligence of any dangers is received from whatever reliable source, it shall be promptly brought to the knowledge of those concerned and communicated to other interested Governments.*

³⁰² See the IALA Note, Answer 1: Annexes, vol. 2, Annex 3.

³⁰³ SOLAS has its origins in an international conference held in London in 1914 convened to address aspects of safety of life at sea following the sinking of the Titanic in 1912. Since then there have been four SOLAS conventions, the most recent being the convention of 1974, as amended, which entered into force in 1980.

³⁰⁴ SOLAS Chapter V. See further Glass-Brewer Report, para. 8: Annexes, vol. 2, Annex 1; Christmas Report, para. 8.1: Annexes, vol. 2, Annex 2; IALA Note, Answers 1 & 3: Annexes, vol. 2, Annex 3.

***Refer to the Guidance on the IMO/IHO World-Wide Navigational Warning Service adopted by the Organisation by resolution A.706(17), as amended.**

Regulation 13 – Establishment and operation of aids to navigation

1. Each Contracting Government undertakes to provide, as it deems practical and necessary either individually or in co-operation with other Contracting Governments, such aids to navigation as the volume of the traffic justifies and the degree of risk requires.
2. In order to obtain the greatest possible uniformity in aids to navigation, Contracting Governments undertake to take into account the international recommendations and guidelines* when establishing such aids.
3. Contracting Governments undertake to arrange for information relating to aids to navigation to be made available to all concerned. Changes in the transmissions of position-fixing systems which could adversely affect the performance of receivers fitted in ships shall be avoided as far as possible and only be effected after timely and adequate notice has been promulgated.

***Refer to the appropriate recommendations and guidelines of IALA and SN/Circ.107 – Maritime Buoyage System.”**

242. Under Chapter V of SOLAS Contracting Governments also undertake:
- to encourage the collection, examination and dissemination of meteorological data by ships (Regulation 5);
 - in cooperation, to warn ships of various meteorological hazards and to publish various meteorological information and bulletins (Regulation 5);
 - to cooperate in the collection and compilation of hydrographical data adequate to the requirements of safe navigation (Regulation 9);
 - to promulgate notices to mariners in order that nautical charts and publications are kept up to date (Regulation 9);

- to arrange for the establishment of Vessel Traffic Services (“VTS”) where the volume of traffic justifies such services (Regulation 12).

243. Malaysia and Singapore are parties to both UNCLOS and SOLAS.

244. Three points are relevant for present purposes. First, these are standard-setting instruments that constitute a yardstick for the assessment of best practice.

245. Second, none of the provisions cited limit the responsibilities of States by reference to matters arising within their territory. This is in keeping with the wider practice concerning lighthouses described above which is focused on the safeguarding of shipping irrespective of questions of territorial sovereignty. The responsibility of States to warn of navigational or meteorological hazards, or to publish hydrographical information, or to establish Vessel Traffic Services, or to publish Notices to Mariners, is a responsibility that does not derive from sovereignty over littoral territory in question but from a wider duty to warn of dangers and to ensure the safety of international navigation. As the Glass-Brewer Report puts it:

“The wording of Regulation 13 [of SOLAS] on the provision of marine aids to navigation is deliberately broad, avoiding issues concerning the ownership of property and territorial rights.”³⁰⁵

The same point is made by Rear-Admiral Leclair, on behalf of IALA, with specific reference to PBP. Referring to Regulation 13 of SOLAS Chapter V, he observes:

“[Regulation 13] means that a coastal State has the responsibility to mark dangers such as islands and that this can be done in co-operation with other States. Therefore, cases such as that of Pulau Batu Puteh are provided for in international conventions but within the framework of co-operation between States. International co-operation, as such,

³⁰⁵ Glass-Brewer Report, para. 8: Annexes, vol. 2, Annex 1.

has no effect on the status of the lighthouse and its surrounding area.”³⁰⁶

246. Third, these framework instruments reflect a wider and long-established practice concerning the provision and administration of aids to navigation. Commander Christmas notes, for example, that MENAS’s operates in the Gulf largely as a result of “custom and practice, following decades of informal cooperation with the various States in the area”.³⁰⁷ Drawing on his experience both at MENAS and the Northern Lighthouse Board, he refers to “best practice” in the provision of navigational aids.³⁰⁸ Captain Glass and Mr Brewer likewise talk in terms of “conduct that forms part of the normal administrative responsibilities of a lighthouse operator” and “the general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibility”.³⁰⁹ Both Glass-Brewer and Christmas talk in terms of uses to which lighthouses have “traditionally” been put, referring to common practices in the administration of lighthouses over many years.³¹⁰ The IALA *Navguide* refers to “several common themes” across “a wide range of IALA members” concerning the alternative uses of lighthouses and other aids to navigation.³¹¹

(ii) *Usage and practice in lighthouse administration*

247. Three broad areas of practice can be discerned in the administration of lighthouses: (a) conduct that is required of a lighthouse operator as a direct consequence of its principal responsibility to provide an aid to navigation; (b) conduct that is required of or commonly undertaken by a lighthouse operator associated with its provision of an aid to navigation; and (c) other common elements of practice. These are addressed in turn below. The telling factor that emerges from this review is that, subject to two exceptions (naval patrols

³⁰⁶ IALA Note, Answer 1: Annexes, vol. 2, Annex 3.

³⁰⁷ Christmas Report, para. 5.4: Annexes, vol. 2, Annex 2.

³⁰⁸ *Ibid.*, para. 8.2.

³⁰⁹ Glass-Brewer Report, paras. 3, 40: Annexes, vol. 2, Annex 1.

³¹⁰ Christmas Report, para. 8.8; Glass-Brewer Report, para. 27.

³¹¹ IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001), p. 198: Annexes, vol. 3, Annex 53.

and sea reclamation which, for reasons that will be explained, are not otherwise dispositive of Singapore's case), every single item of conduct on which Singapore relies is conduct that is either required of the administering authority of a lighthouse or is conduct routinely undertaken by lighthouse administrators as part of the performance of their functions. Specifically what is claimed by Singapore to be conduct *à titre de souverain* in respect of PBP is the same conduct that is a feature of Singapore's practice in relation to other lighthouses under its administration, including, for example, the Pulau Pisang lighthouse, which is indisputably situated on Malaysian territory.

(a) Conduct required in consequence of the responsibility to provide an aid to navigation

248. The principal responsibility of a lighthouse operator is to provide an aid to navigation for ships which will usually have no connection to the territory on which the lighthouse is built.

249. The IALA *Navguide* describes a lighthouse as:

"a conspicuous structure (visual mark) on land, close to the shoreline or in the water;

- that acts as a day mark, and;
- provides a platform for a marine signalling light with a range of up to 25 nautical miles.
- other aids to navigation or audible signals on or near the lighthouse".³¹²

The purpose of lighthouses and other beacons is identified as:

"one or more of the following *navigational functions*":³¹³

- mark a landfall position;
- mark an obstruction or a danger;
- indicate the lateral limits of a channel or navigable waterway;
- indicate a turning point or a junction in a waterway;
- mark the entrance of a Traffic Separation Scheme (TSS);
- form part of a leading (range) line;

³¹² Ibid., para. 3.5.1.1.

³¹³ Ibid. para. 3.5.1.3 (emphasis added).

- mark an area;
- provide a reference for mariners to take a bearing or line of position (LOP).”

250. For purposes of ensuring a sufficient and uniform standard in the provision and operation of aids to navigation, the *Navguide* addresses the “reliability” and “availability” of a light, and other criteria related to the performance of a light, in considerable detail.³¹⁴ Subjects addressed include the planning and design of aids to navigation,³¹⁵ technical elements relating to the provision of a light (light sources, the rhythmic character of lights, luminosity),³¹⁶ power supplies,³¹⁷ the operation and management of lights by lighthouse and navigation authorities³¹⁸ and performance indicators.³¹⁹

251. These elements of the operation, reliability and availability of a light address conduct that is *required*—whether explicitly by law or simply as a matter of custom and best practice—of a lighthouse authority as a direct consequence of its responsibilities concerning the provision of an aid to navigation. Quoting Regulation 13 of SOLAS Chapter V, the IALA *Navguide* comments:

“To satisfy the obligations of Regulation 13, the contracting government has to make assessments on:

- whether or not to provide particular types of aids to navigation;
- the type, number and location of aids to navigation;

³¹⁴ The “reliability” of a light is defined as “the probability that an aid to navigation, when it is available, performs a specified function without failure under conditions for a specified time” (ibid., para. 11.1.2.1). The “availability” of a light is defined as “the probability that an aid to navigation or system is performing its specified function at any randomly chosen time” (ibid., para. 11.1.2.2). The “availability” of a light “is the principal measure of performance determined by IALA” (ibid., para. 3.5.2). Issues concerning reliability, availability and other criteria related to the performance of a light are addressed in detail throughout the *Navguide*.

³¹⁵ Ibid., ch. 9.

³¹⁶ Ibid., section 3.4.

³¹⁷ Ibid., ch. 7.

³¹⁸ Ibid., ch. 10.

³¹⁹ Ibid., ch. 11. The *Navguide* also goes into detail on other matters related to the provision of navigational aids, such as Vessel Traffic Services (“VTS”) and radionavigation systems, as well as supplementing this in some cases by other specialist manuals (e.g., the *IALA Vessel Traffic Services Manual-2002*).

- what information services are necessary to adequately inform the mariner.³²⁰

252. It will be recalled, in the language of the Glass-Brewer Report, that “[t]he wording of Regulation 13 on the provision of marine aids to navigation is deliberately broad, avoiding issues concerning the ownership of property and territorial rights.”³²¹

253. Addressing the scope of MENAS’s responsibilities in managing the Gulf lights, Commander Christmas notes that its responsibilities are twofold, the operation of a light (whether it is working) and the maintenance of the light and the fabric of its structure.³²² Addressing the “normal responsibilities of a lighthouse operator”, Commander Christmas describes what he characterises as “best practice” in the following terms:

“The first responsibility of a lighthouse authority should be to ensure that the right aids to navigation are provided in the right places around the coast. This will involve knowledge of traffic patterns, cargoes carried and any particularly environmentally sensitive areas of coast-line, so that a full risk analysis can be carried out...

The second responsibility is to ensure that the aids provided by the lighthouse authority itself are operating correctly.”³²³

254. Captain Glass and Mr Brewer, drawing on their experience at Trinity House and IALA, echo this assessment:

“The duty of a lighthouse operator – whether as an arm of the State or an independent body – is to provide and maintain aids to navigation to assist the safety of navigation. While maintenance methods and standards may vary among the international community of lighthouse operators – as evidenced by work in the technical committees of IALA – the need to maintain the lighthouse structures and ancillary equipment and

³²⁰ IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001), para. 9.1.2.2: Annexes, vol. 3, Annex 53 (emphasis in the original).

³²¹ Glass-Brewer Report, para. 8: Annexes, vol. 2, Annex 1.

³²² Christmas Report, para. 6.1: Annexes, vol. 2, Annex 2.

³²³ *Ibid.*, para. 8.3, 8.5

to keep the visual, audible and electronic systems functioning correctly, remains the same.”³²⁴

255. They further observe that:

“...improvements – the extension of living accommodation, the repair and strengthening of the pier, the fitting of a radio telephone, repainting, the installation of boat davits, dihedral radar reflectors and a radio beacon – are all in keeping with those undertaken from time to time by any competent lighthouse operator. The modernisation of the station, with the installation of an electric optic, new cooling systems and solar panels, is an integral part of the evolution of lighthouse technology.”³²⁵

256. It follows from the preceding that certain conduct “forms part of the normal administrative responsibilities of a lighthouse operator”³²⁶ and is required of all lighthouse operators as a direct consequence of their responsibilities concerning the provision and maintenance of the light. This conduct will include:

- the provision of the light;
- ensuring the adequacy and sufficiency of the light in the prevailing circumstances;
- the operation and maintenance of the light and associated measures necessary to ensure its reliability and availability;
- the on-going maintenance, modernisation and improvement of the lighthouse structure, its associated facilities and ancillary equipment in keeping with evolving standards and practice;
- the operation and maintenance of other aids to navigation, and their associated visible, audible and electronic systems, provided from the lighthouse.

³²⁴ Glass-Brewer Report, para. 43: Annexes, vol. 2, Annex 1.

³²⁵ Ibid., para. 56.

³²⁶ Ibid., para. 3.

(b) Other conduct associated with the provision of an aid to navigation

257. In addition, other conduct, closely associated with the provision of a light, is commonly undertaken by lighthouse operators. Reference has already been made to the duty to co-operate in the provision of aids to navigation, and the duty to publicise dangers to navigation, found in UNCLOS and SOLAS. These duties do not hinge on sovereignty, or indeed on any specific connection to the territory in question. While these duties formally engage the responsibility of a State rather than a lighthouse operator, they are elements of the conduct that is usually undertaken by a lighthouse authority. For example IALA, formed in 1957, is “a non-government, non-profit making, technical association that provides a framework for aids to navigation authorities, manufacturers and consultants”.³²⁷

258. Three elements of conduct warrant particular comment: (i) the investigation of marine hazards and the publication of Notices to Mariners and other similar hazard warnings, (ii) the regulation of personnel and activities associated with the lighthouse, and (iii) the adding to lighthouses of additional structures and facilities.

(1) The investigation of marine hazards and the publication of Notices to Mariners and other warnings

259. The investigation of marine hazards and the publication of Notices to Mariners and other similar warnings of hazards are closely related. Referencing SOLAS Chapter V, Regulation 4, which requires dangers to navigation to be publicised, the IALA *Navguide* groups the information subject to this requirement

“into three basic categories:

³²⁷ IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001), para. 1.1: Annexes, vol. 3, Annex 53. IALA’s membership comprises (a) national authorities responsible for the provision, maintenance and operation of marine aids to navigation, (b) other organisations, agencies and services concerned with aids to navigation and related matters, (c) manufacturers and distributors of marine aids to navigation equipment and organisations providing services and support thereto, and (d) as honorary members, individuals who have made an important contribution to IALA’s work.

- information about **planned changes**, such as:
 - dredging, surveying, pipe and cable laying;
 - changes to an existing aid of the establishment of new aids to navigation;
 - changes to traffic arrangements;
 - commercial maritime activities;
 - short term events (naval exercises, yacht races, etc.).
- information about navigational **un-planned events**, such as:
 - the failure to [sic] aids to navigation;
 - marine incidents (groundings, collisions, wrecks etc.);
 - search and rescue activities.
- **new information arising from survey work or previously undiscovered hazards.**³²⁸

260. Addressing the responsibilities of lighthouse operators in respect of the investigation of marine hazards, Captain Glass and Mr Brewer observe:

“A lighthouse authority would be likely to review and survey navigational hazards, such as wrecks, shoals and sand banks, and mark any danger to navigation caused by such hazards. Who takes responsibility for the investigation of marine casualties will depend on the status of the vessel involved in the incident. In cases in which the State in whose waters the incident occurs undertakes the investigation, the Flag State of the vessel involved would be expected to cooperate in the investigation, although it may also carry out its own investigation in more serious cases. In many countries, the distinction between lighthouse authorities and the coastguard or department responsible for marine investigations is blurred, as they tend to operate as separate sections within the same government administration. In such cases, therefore, the authority responsible for the administration of lighthouses will also be responsible for the investigation of marine casualties.”³²⁹

261. On the subject of Notices to Mariners, the Glass-Brewer Report observes that “Trinity House, in common with other lighthouse authorities

³²⁸ Ibid., para. 10.3.1.

³²⁹ Glass-Brewer Report, para. 33: Annexes, vol. 2, Annex 1.

(such as MENAS and the Commissioners of Irish Lights), issues such Notices.”³³⁰ It goes on to state:

“Notices are issued in respect of changes to aids to navigation, including the establishment of new marks, the discontinuance of marking requirements, the taking possession of wrecks, and marking hazards and changes to their characteristics or position. ... There is an implicit obligation under SOLAS Chapter V to advise mariners of the provision of new marks or changes to the position or characteristics of existing marks. Failure to issue Notices to Mariners in respect of any changes to navigational marks or a navigational hazard of which an authority was aware would be negligent and could expose a lighthouse operator to major liability risks. Trinity House considers the issuing of Notices to Mariners to be necessary for the proper discharge of its statutory duty as a lighthouse authority and to protect the [General Lighthouse Fund from which it is financed] from unnecessary financial risk.”³³¹

262. This appreciation of the responsibilities of a lighthouse operator is echoed in the Report by Commander Christmas:

“Since 1976, MENAS has carried out the role of Sub-Area Co-ordinator for IMO Sea Area IX, reporting to Pakistan for the Gulf Area. In this capacity, MENAS also issues NAVTEX messages to advise vessels in the area of any dangers to navigation and also relays distress messages. MENAS also transmits local Notices to Mariners. These functions are not necessarily part of the role of a lighthouse authority and MENAS does not carry them out for the whole of the Gulf. However, in common with MENAS, many other lighthouse authorities, such as Trinity House and the Northern Lighthouse Board, issue Notices to Mariners.”³³²

263. Likewise, Rear-Admiral Leclair, on behalf of IALA, observes that “[l]ighthouse operators may have a role as regards investigation of marine hazards as witnesses or if the functioning of the aid to navigation is at stake.”³³³ As regards Notices to Mariners, he references the obligations in Regulations 4 and 13 of SOLAS Chapter V and notes:

³³⁰ Ibid., para. 25.

³³¹ Ibid., para. 26.

³³² Christmas Report, para. 9.1: Annexes, vol. 2, Annex 2.

³³³ IALA Note, Answer 6: Annexes, vol. 2, Annex 3.

“The publication of information on navigation safety is coordinated by means of the World-Wide Navigational Warning Service that was established jointly by the IMO and the IHO (International Hydrographic Organisation) in 1977. The World-Wide Navigational Service is administered through 16 NAVAREAS. Each NAVAREA has an Area Coordinator who is responsible for collecting information, analysing it, and transmitting NAVAREA Warnings by dedicated means of communication. Pulau Batu Puteh is within the NAVAREA XI coordinated by Japan.”³³⁴

264. The particular significance of this element is that it underlines that the issuing of warnings of dangers to navigation has no connection with sovereignty over the territory in question. Singapore, as the administering authority of Horsburgh Lighthouse, has certain responsibilities in respect of such matters. The coordination and issuing of NAVAREA warnings in respect of the waters around PBP comes within the broader responsibility of Japan, as the coordinator of NAVAREA XI, within which the island is located.

(2) The regulation of personnel and activities associated with the lighthouse

265. Turning to the regulation of activity and of personnel on or associated with the operation of the lighthouse, this also falls within the scope of conduct that is required of, or commonly undertaken by, lighthouse operators in consequence of their responsibilities associated with the provision of the light. The point is made in the clearest of terms by Commander Christmas:

“All lighthouse authorities are responsible for the security of, and access to, the lighthouses operated by them, as well as any activity by personnel within them. Only criminal activity would attract outside authorities and then usually in cooperation with the lighthouse authority.”³³⁵

³³⁴ Ibid., Answer 3.

³³⁵ Christmas Report, para. 8.7: Annexes, vol. 2, Annex 2.

266. Captain Glass and Mr Brewer echo this assessment:

“A lighthouse administrator would normally have complete responsibility for the conduct of its personnel and the performance of their duties in their lighthouses. As the Keepers were generally a uniformed service, a service disciplinary regime would be administered by the lighthouse authority – usually following that of the merchant navy.

When Trinity House lighthouses were manned, the Keepers operated under Service Regulations governing virtually everything from their accommodation (which was rent free – as a service tenancy), to their conduct and, of course, the manual operation of the aids to navigation. Regular visits were made by engineering staff and district superintendents. In addition, the Elder Brethren of Trinity House carried out periodic inspections of the stations, sometimes accompanied by dignitaries, in order to discharge their statutory duty.”³³⁶

267. The significance of these factors for present purposes is threefold. First, the authority responsible for the administration of a lighthouse will generally be responsible for regulating conduct and personnel on or associated with the lighthouse. Second, implicitly, this exercise of regulatory responsibility may take the form of measures put in place by the State whose authority is responsible for the administration of the lighthouse. Third, the exercise of this regulatory responsibility has no necessary link to the sovereignty of the territory on which the lighthouse is located. It is simply a feature of the “conduct that forms part of the normal administrative responsibilities of a lighthouse operator”.

(3) The adding to lighthouses of additional structures and facilities

268. Adding additional structures and facilities is also a common feature of lighthouse administration.³³⁷ In important elements, this practice is linked to the responsibilities of the lighthouse operator for the operation and maintenance of the lighthouse as an aid to navigation sufficient to the circumstances in which it functions.

³³⁶ Glass-Brewer Report, paras. 38-39: Annexes, vol. 2, Annex 1.

³³⁷ IALA Note, Answer 7: Annexes, vol. 2, Annex 3.

269. An important element of this aspect of lighthouse operation is the fact that today an increasing number of lighthouses are unmanned. This is true of Horsburgh Lighthouse, the operation of which was automated in 1988 using solar power. The servicing and maintenance of the facilities on unmanned lighthouses must be undertaken by periodic visits, with the possibility also of *ad hoc* visits when this is required for repairs or other urgent need. The practical significance of this is addressed by Commander Christmas:

“In order to carry out defect rectification and, indeed, general maintenance of aids to navigation, most authorities have a number of special-to-task ships, as well as contract helicopters, available on a continuous basis.”³³⁸

270. Captain Glass and Mr Brewer address the point in more detail:

“As well as automation and modernisation using advances in technology, lighthouse development commonly includes:

- the erection of helidecks on top of offshore lighthouse towers or the construction of helipads where land permits,
- conversion to solar power,
- the conditioning of buildings,
- the addition of differential GPS [Global Positioning System] equipment.

These developments can be seen in various ways in the majority of Trinity House Lighthouses, e.g., Hanois, Smalls, Eddystone, South Stack, Farne Island, Casquets and Longstone.

Licences are commonly granted by lighthouse authorities to site third party communications masts, radars and transponders. This is less so where the land or buildings are leasehold since the permission of the landlord is required and questions of rental and the commercial value of the site become an issue.”³³⁹

271. As this review shows, certain activities are either routinely required of lighthouse operators or commonly undertaken by them as part of their wider responsibilities associated with the provision of a light. These include the investigation of marine hazards, the publication of warnings of such hazards,

³³⁸ Christmas Report, para. 8.6: Annexes, vol. 2, Annex 2.

³³⁹ Glass-Brewer Report, paras. 34-36: Annexes, vol. 2, Annex 1.

the regulation of conduct and personnel associated with the lighthouse, and the addition of structures and facilities to the lighthouse associated with its operation and maintenance. This practice is a feature of lighthouse administration around the world, whether the lighthouse administrator is an authority of the territorial State or not.

(c) *Other common elements of practice in the administration of lighthouses*

272. There are other important elements of practice which are a common feature of lighthouse administration. The reason for distinguishing these elements from those discussed in the preceding sections is that they are discretionary in character and, although closely linked with the operation of a lighthouse, are not necessarily connected directly to the provision of the light. The evidence nevertheless shows that they are widespread and long-standing in the field of lighthouse administration.

273. Elements of common practice that can be identified for purposes of the present discussion include:

- the collection of light dues;
- the siting of VTS towers;
- non-light uses of lighthouses;
- the requirement of permission for the undertaking of scientific and technical surveys;
- control of access to lighthouses and their associated facilities and the keeping of log books; and
- the flying of ensigns on lighthouses.

274. Each of these elements is addressed in Chapter 8 below in response to Singapore's specific claims. It is nevertheless useful at this point to underline the generality of the practice.

(1) The collection of light dues

275. The collection of light dues has historically been a common way in which the construction and maintenance of lighthouses has been funded. As the volume of commercial shipping increased, the ownership of a light on a busy shipping lane could secure a significant income from the collection of light dues.³⁴⁰ In other cases, the collection of light dues was and remains a common way of funding the operation of a lighthouse. Commander Christmas notes, for example, that “[i]n 1923, the British Government decided that, to ease the financial burden of administering the Gulf lighthouses, light dues should be introduced”, with the collection of light dues starting in 1925.³⁴¹ He notes further that the collection of light dues continued after the creation of the Persian Gulf Lighting Service, subsequently MENAS, “from any ship entering the Gulf region and involved in cargo distribution”.³⁴² Significantly, however:

“[t]here is no clear or established legal basis for such dues being collected by MENAS but very few shipping companies refuse to pay (although there are some). Most acknowledge that, if MENAS did not provide the services that it does, probably no other body would.”³⁴³

276. Looking beyond the practice of MENAS, Commander Christmas also notes that the General Lighthouse Authorities responsible for the provision and maintenance of aids to navigation in the waters of the United Kingdom and the Republic of Ireland—namely, Trinity House, the Northern Lighthouse Board and the Commissioners of Irish Lights—are financed from the General Lighthouse Fund “which derives its income mainly from light dues collected from commercial shipping which call at United Kingdom and Republic of Ireland ports”.³⁴⁴

277. The informal arrangements which characterise MENAS’s activities in this area apart, an important element associated with the collection of light

³⁴⁰ P. Beaver, *A History of Lighthouses* (London, Peter Davies, 1971), pp. 17-18.

³⁴¹ Christmas Report, para. 2.5: Annexes, vol. 2, Annex 2.

³⁴² Ibid., para. 3.2.

³⁴³ Ibid.,

³⁴⁴ Ibid., para. 8.2, fn 4.

dues is the legislative or administrative framework under which this takes place. As will be addressed in the following Chapter, this is particularly evident in respect of the collection of light dues from shipping using the Malacca and Singapore Straits, which was undertaken pursuant to a constantly revised and updated legislative framework from as early as 1852. This again underlines the *sui generis* character of the administration of lighthouses and its detachment from questions of sovereignty.

278. Light dues collected from commercial shipping calling at Republic of Ireland ports pursuant to Irish legislation are paid into a fund under United Kingdom administration and which in part finances the General Lighthouse Authorities responsible for the provision of aids to navigation in United Kingdom waters. Light dues collected from commercial shipping calling at United Kingdom ports pursuant to United Kingdom legislation are paid into a fund which in part finances the General Lighthouse Authority which is responsible for the provision of aids to navigation in the Republic of Ireland. Light dues – or Navigation Dues, or Navdues, as they are now known – collected from commercial shipping in the Gulf fund MENAS, a charitable corporation incorporated under English law which owns and operates lighthouses on the territory of Kuwait, Qatar and the United Arab Emirates. Qatar is not even represented on the Board of Governors of MENAS.

(2) The siting of VTS towers on lighthouses

279. As regards the siting of VTS towers on lighthouses, the Glass-Brewer Report observes that VTS “is generally considered an aid to navigation and the siting of such antenna on lighthouses is commonly undertaken by lighthouse administrators.”³⁴⁵ The assessment is echoed in the IALA *Navguide*: “it is not uncommon for lighthouses, in particular, to be used for other purposes that can

³⁴⁵ Glass-Brewer Report, para. 37. A “Vessel Traffic Service” is defined in the IALA *Vessel Traffic Services Manual, 2002* as: “a service implemented by a Competent Authority, designed to improve the safety of vessel traffic and to protect the environment. The service should have the capability to interact with the traffic and respond to traffic situations developing in the VTS area” – IALA, *Vessel Traffic Services Manual, 2002*, para. 1.2: Annexes, vol.3, Annex 54.

include: ... VTS functions".³⁴⁶ There are today about 500 Vessel Traffic Services operational worldwide.

(3) Common non-light uses of lighthouses

280. In addition to VTS functions, just addressed, the *Navguide* notes other common non-light uses as: coastwatch or coastguard functions, as a base for audible (fog) signals, the collection of meteorological and oceanographic data, radio and telecommunications facilities, and tourist facilities.³⁴⁷

281. The widespread use of lighthouses for non-light purposes by lighthouse administrators is confirmed by Rear-Admiral Leclair, on behalf of IALA, by Commander Christmas, and by Captain Glass and Mr Brewer. Rear-Admiral Leclair observes:

"Lighthouses are often used for other purposes than aids to navigation. The predominant applications are for the collection of meteorological and hydrological data and for telecommunication installations. More recently, in the framework of a move to preserve the historic and cultural value of lighthouses, their use as a tourist attraction has been developed."³⁴⁸

282. Commander Christmas observes:

"There are several uses to which lighthouse structures have traditionally been put over the years, besides the primary purpose of displaying the light. These include:

- as a day-mark, for navigation during daylight (there is a descriptive column in the *Admiralty List of Lights* for the structure, colour, height etc);
- the siting of DGPS antennae;³⁴⁹
- the siting of AIS antennae;³⁵⁰

³⁴⁶ IALA, *Aids to Navigation Guide (Navguide)* (4th edn, December 2001), para. 3.5.1.3: Annexes, vol. 3, Annex 53.

³⁴⁷ Ibid.

³⁴⁸ IALA Note, Answer 4: Annexes, vol. 2, Annex 3.

³⁴⁹ Differential Global Positioning System. This uses the GPS signal to produce a more accurate position than GPS.

³⁵⁰ Automatic Identification System. This is a system whereby ships' positions (and other information) are transmitted automatically and displayed in other ships and/or shore stations.

- the siting of RACONs;³⁵¹
- the siting of radar apparatus;
- the siting of radio antennae;
- the collection of meteorological data. This can be done either automatically, by remote monitoring of fitted equipment, or by verbal reporting if a lighthouse is manned;
- if manned, for assisting in search and rescue;
- as a visitor attraction.

The only additional uses to which MENAS lighthouse structures have been put are as a day-mark and for the siting of RACONs. Additional uses to which the United Kingdom lighthouse authorities put their lighthouse structures include as a day-mark; the siting of DGPS antennae, AIS antennae, RACONs, radar apparatus and radio antennae; and the collection of meteorological data. Some are also used as a visitor attraction.”³⁵²

283. Captain Glass and Mr Brewer observe:

“Lighthouses have traditionally, over the years, been used for non-light purposes. The automation and modernisation of lighthouses, combined with an increasing awareness of the historic significance of many of the structures, has also led to an upsurge in the alternative use of the surplus accommodation that is no longer required for resident lighthouse keepers...

Apart from their core function as aids to navigation, other traditional non-light uses of lighthouse property have included:

- meteorological observation and recording stations (formerly carried out by lighthouse keepers and now automated with data transmitted by remote link);
- coastguard lookouts;
- antenna and transponder locations;
- military outposts;
- wildlife sanctuaries.

This list of traditional non-light uses has now been extended to commonly include:

- holiday cottages;
- visitor attractions;
- museums;

³⁵¹ RAdar beaCONs. These are triggered by a radar pulse to create a vector on a radar screen, emanating from the RACON's position. They are used, e.g., to differentiate a buoy, upon which a RACON may be fixed, from a vessel on radar.

³⁵² Christmas Report, paras. 8.8-8.9: Annexes, vol. 2, Annex 2.

- youth hostels;
- field study centres;
- restaurants and public houses;
- guest houses;
- shops;
- specialist libraries;
- media locations – for film productions;
- information centres.

The common theme is to secure alternative uses that will help to fund the conservation and maintenance of the stations for the access and enjoyment of future generations.³⁵³

284. The following conclusions may be drawn. First, the use of lighthouses for non-light purposes has been a feature for decades. Second, this is true regardless of the profile of the lighthouse administrator as a public or private body and regardless of questions of sovereignty over the territory on which the lighthouse is situated. Third, the siting of communications and radar equipment and the collection of meteorological information are common practices.

(4) Permission to undertake scientific and technical surveys

285. The question whether permission for the undertaking of scientific and technical surveys in the vicinity of a lighthouse is required from the lighthouse administrator is addressed by Captain Glass and Mr Brewer in the following terms:

“Scientific and technical surveys may have the effect of interfering with the effective and reliable operation of a lighthouse. To this end, it is common practice among lighthouse operators to require that permission is sought before any such activities are carried on in the vicinity of a lighthouse. For example, Trinity House does not allow any visitors to its lighthouses unless accompanied by the lighthouse attendant who is responsible for the security of the station – including the setting and un-setting of alarms and communications to the Operations Control Centre in Harwich. Permission to visit a particular station – whether in respect of Trinity House personnel or otherwise – is at the discretion of the regional

³⁵³ Glass-Brewer Report, paras. 27-29; Annexes, vol. 2, Annex 1.

maintenance manager of Trinity House who may deny access if maintenance or other essential works are in progress.”³⁵⁴

(5) Control of access to lighthouses and their associated facilities

286. As noted by Commander Christmas, “lighthouse authorities are responsible for the security of, and access to, the lighthouses operated by them”.³⁵⁵ The point is enlarged in the Glass-Brewer Report as follows:

“Secure access to the site of a lighthouse and the control of visitors is invariably the responsibility of the operator of a lighthouse. Notices similar to those on the gates of Trinity House lighthouses are quite common, declaring the premises to be private property and warning of dangers, in order to maintain security and reduce the risk of liability to trespassers.”³⁵⁶

287. The point is underlined by the *Trinity House Lighthouse Service Regulations* which address the duties and responsibilities of lighthouse keepers and conduct associated with the operation of the lighthouse. This states that “[v]isitors shall not be permitted without prior permission from the Trinity House at the following stations”, and proceeds to specify a list which includes all unwatched and semi-watched lights and a further 15 or so principal lighthouses. In the case of all other lighthouses, access is permitted “at the discretion of the Keeper-in-Charge”. The Regulations further specify that no person may inspect any part of the lighthouse unattended by a lighthouse keeper.³⁵⁷ In keeping with these arrangements, the Glass-Brewer Report notes that “it is common practice to have a log book to record visits to lighthouses”.³⁵⁸

³⁵⁴ Ibid., para. 50.

³⁵⁵ Christmas Report, para. 8.7: Annexes, vol. 2, Annex 2.

³⁵⁶ Glass-Brewer Report, para. 49: Annexes, vol. 2, Annex 1.

³⁵⁷ *Trinity House Lighthouse Service Regulations*, Pamphlet III, Regulation 62-Visitors: Annex 4 attached to Annex 1, Annexes, vol. 2.

³⁵⁸ Glass-Brewer Report, para. 58: Annexes, vol. 2, Annex 1.

(6) The flying of ensigns or flags on lighthouses

288. Finally, the flying of ensigns on lighthouses must be addressed. Singapore makes much of this in its Memorial and its specific contentions are addressed in Chapter 8 below. But the flying of ensigns, or in some cases flags, raises wider issues which are conveniently addressed at this point. A number of observations are required.

289. First, the particular status of “ensigns” as opposed to flags, must be noted. Unlike national flags which are typically flown above land territory, ensigns are not marks of sovereignty but rather of nationality. As Rear-Admiral Leclair notes:

“A Marine Ensign is typically used by ships (military and civil) to identify their nationality. Every ship must have a nationality and fly her national ensign. The dimensions and, sometimes, the design of the Marine Ensign differ from flags used for non-marine activities. But often ashore, buildings in relation with marine activities fly a Marine Ensign.”³⁵⁹

290. It is not uncommon for lighthouse authorities to fly a Marine Ensign above a lighthouse. This also explains Malaysia’s practice over many years of flying its Naval Ensign above its Woodlands Naval Base in Singapore.³⁶⁰

291. The same general point is made in the Glass-Brewer Report, viz, “Ensigns are colours which are principally worn by ships – as generally designated by the Flag State.”³⁶¹

292. Second, the Glass-Brewer Report notes that “[l]ighthouse authorities often have their own adaption of the ‘Red Ensign’ [i.e., the merchant shipping ensign] of their State”.³⁶² The Trinity House Ensign, for example, is an adaption of the United Kingdom Red Ensign.

³⁵⁹ IALA Note, Answer 5: Annexes, vol. 2, Annex 3.

³⁶⁰ See the Affidavit of Rear-Admiral Thanabalasingam, para. 35: Annexes, vol. 2, Annex 4.

³⁶¹ Glass-Brewer Report, para. 30: Annexes, vol. 2, Annex 1.

³⁶² Ibid.

293. Third, while it is not uncommon for lighthouse authorities to fly their Ensigns above their lighthouses, such practice is not uniform, especially today when very many lighthouses are unmanned. Trinity House and the Commissioners of Irish Lights continue to fly their Ensigns above the lighthouses that they operate on special occasions “as a matter of tradition and pride in the service”.³⁶³ Commander Christmas notes, in contrast, that flags of any kind are not flown above MENAS lighthouses.³⁶⁴ Enquiries undertaken by Captain Glass and Mr Brewer on the point among a cross-section of IALA members disclosed no uniformity of practice regarding the flying of either flags or Ensigns.³⁶⁵

294. Fourth, there is a common understanding that the flying of either a Marine Ensign or a flag of some other kind above a lighthouse has no special significance for questions of sovereignty. Rear-Admiral Leclair observes that “[t]he use of a Marine Ensign above a lighthouse has no special significance for mariners”.³⁶⁶ Captain Glass and Mr Brewer note of their enquiries that there is “no appreciation, however, that the flying of Ensigns or flags above a lighthouse has any bearing on sovereignty”.³⁶⁷ They go on to comment that the mariner’s response to the flying of a flag or ensign above a lighthouse would be:

“Generally, if the Ensign of a lighthouse authority was flown above a lighthouse it would be understood by a mariner or lighthouse operator as identifying the lighthouse authority, e.g. Trinity House. If a flag flown above a lighthouse was a national flag, it would be understood by a mariner or lighthouse operator as signifying the country entrusted with the operation of the lighthouse.”³⁶⁸

295. Commander Christmas endorses this assessment and adds a further consideration:

³⁶³ Ibid., para. 31.

³⁶⁴ Christmas Report, para. 7.1: Annexes, vol. 2, Annex 2.

³⁶⁵ Glass-Brewer Report, para. 31: Annexes, vol. 2, Annex 1.

³⁶⁶ IALA Note, Answer 5: Annexes, vol. 2, Annex 3.

³⁶⁷ Glass-Brewer Report, para. 31: Annexes, vol. 2, Annex 1.

³⁶⁸ Ibid., para. 32.

“The significance of any flag flown above a lighthouse would be two-fold:

- the flag would almost certainly indicate from which State the operating organisation owed its existence. The British Lighthouse Authorities’ flags, which are still flown above some lighthouses on some occasions, have a Union Flag as part of the design, while most countries fly the national flag;
- the flag would almost certainly indicate that the lighthouse was manned. The absence of a flag would not in itself, however, indicate that the lighthouse was not manned.”³⁶⁹

296. Fifth, the salient points to emerge from the preceding which are supported by the evidence are:

- there is no uniform practice regarding the flying of Ensigns or flags above lighthouses,
- there is nonetheless a common appreciation that the flying of an Ensign or a flag above a lighthouse:
 - would not be understood as having any bearing on the sovereignty of the territory on which the lighthouse was situated,
 - if a national flag, it would be understood as indicating the nationality of the lighthouse authority,
 - if a corporate or authority Ensign, it would be understood as indicating the identity of the lighthouse operator,
 - it would probably signify that the lighthouse was manned.

D. Conclusions

297. The broad conclusions that emerge from the preceding review of the law and practice relating to lighthouses are follows:

- (a) There are numerous examples, both contemporaneous with the construction of Horsburgh Lighthouse and in the period since

³⁶⁹ Christmas Report, para. 7.2: Annexes, vol. 2, Annex 2.

then, of the construction and administration of lighthouses by States and other entities other than the authority of the State on whose territory the lighthouse is located. This was a particular feature of British practice regarding lighthouses in the period from the mid-19th to the mid-20th centuries.

- (b) British practice from the mid-19th to the mid-20th centuries runs directly counter to the proposition that the construction and maintenance of a lighthouse constituted, or had the intention of constituting, “a taking of lawful possession” of the territory on which the lighthouse was situated for purposes of sovereignty, or a manifestation or display of sovereignty.
- (c) While the administration of a lighthouse *may* coexist with sovereignty over the territory on which the lighthouse is located, this will not necessarily be the case. Indeed, it is commonly accepted – including in the jurisprudence of international tribunals – that the administration of a lighthouse cannot, without more, be regarded as evidence of sovereignty.
- (d) There is an extensive body of practice by lighthouse authorities around the world, whether governmental or non-governmental, concerning the administration of lighthouses.
- (e) This body of practice reflects the general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibility.
- (f) This practice neither hinges on the sovereignty of the territory on which the lighthouse is situated nor is in any way determinative of it.
- (g) Insofar as conduct is undertaken by a lighthouse operator in fulfilment of its responsibility in respect of the administration of a lighthouse, it is *a fortiori* irrelevant to the determination of questions of sovereignty.

Chapter 7

THE STRAITS' LIGHTS SYSTEM

Introduction

298. Against the background of general practice summarised in the preceding Chapter, this Chapter addresses the Straits' Lights system.³⁷⁰ This was a system of lighthouses and other aids to navigation that were established in the Straits of Singapore and Malacca in the period 1850–1946 and administered from the Straits Settlements. In the period 1850 to 1912, 13 lighthouses were established as part of this system, including Horsburgh, Raffles, Pulau Pisang, Cape Rachado and One Fathom Bank. These developments along the coasts of what are now Malaysia and Singapore correspond closely to parallel initiatives by Britain elsewhere in the world at the same time. Just as the construction and administration of lighthouses during this period elsewhere constituted neither “a taking of possession” of the territory on which the lighthouses were situated for purposes of sovereignty nor a “continuous display of State sovereignty”, so also the establishment and administration of the Straits' Lights was not regarded as determinative of the sovereignty of the underlying territory.

A. Background issues

299. Before turning to an examination of these matters, two preliminary issues germane to the following review must be briefly recalled: (1) the constitutional position of Singapore and the Straits Settlements in the period between 1825-1946 and after 1946;³⁷¹ and (2) Pulau Pisang Lighthouse and the status of the territory on which it stands.

³⁷⁰ This review supplements the discussion in MM, paras. 222-234.

³⁷¹ See also MM, paras. 57-60, 189-218.

(i) *The constitutional position of Singapore and the Straits Settlements*

300. Following the Anglo-Dutch and Crawford Treaties of 1824, John Crawford, the British Resident, was instructed to take formal possession of the Island of Singapore and its dependencies. This he did in 1825. In 1826, the English East India Company united Penang, Province Wellesley, Malacca, and Singapore under the name of the Straits Settlements.³⁷² The East India Company governed the Settlements until the Act for the Better Government of India 1858 vested them in the British Crown.³⁷³ There is no suggestion that this Act purported to change the status of any territory.

301. Both by legislation before 1858, notably by Acts of 1852 and 1854,³⁷⁴ and thereafter by action in implementation of these Acts until 1867, measures were taken to defray the costs of the Straits' Lights system in the name of the Governor General of India in Council.

302. By Acts of 1866 and 1867,³⁷⁵ the Straits Settlements "ceased to form a part of the British possessions in India under the Government of the said Governor-General in Council", and their government was vested, with effect from 1 April 1867, in the Governor in Council of the Straits Settlements.³⁷⁶ Despite this, from 1867 until 1912 the collection of tolls or light dues to defray the costs of the Straits' Lights system was based on the Act of 1854 passed by the Governor General of India in Council. Legislative and other measures concerning the administration of the Straits' Lights system were adopted by the Governor of the Straits Settlement in Council in the period from 1912 to

³⁷² See further MM, p. 29, Insert 9.

³⁷³ An Act for the Better Government of India 1858 (21 & 22 Vict., c.106).

³⁷⁴ MM Annexes 84 and 85.

³⁷⁵ An Act to provide for the Government of the Straits Settlements 1866 (29 & 30 Vict., c.115); An Act to provide for the Execution of certain Powers by the Governor in Council and Officers lawfully acting as Lieutenant-Governors in the Straits Settlements 1867 (30 & 31 Vict.).

³⁷⁶ An Act to provide for the Execution of certain Powers by the Governor in Council and Officers lawfully acting as Lieutenant-Governors in the Straits Settlements 1867 (30 & 31 Vict.).

1946, although a significant proportion of the funding of the Straits' Lights during this period was borne by the Federated Malay States.³⁷⁷

303. With the dissolution of the Colony of the Straits Settlements, and the establishment in 1946 of the Colony of Singapore and the Malayan Union, the Straits' Lights system ceased to be administered as a single system. The establishment of Singapore and Malaya did not, however, call into question existing arrangements for the administration of the lights that formed part of the Straits' Lights system. Lighthouses and other aids to navigation that had previously been administered from Singapore continued to be so administered, whatever the status of the territory on which they were situated. Straits' Lights previously administered from elsewhere in the Straits Settlements which, after 1946, became part of the Malayan Union, continued to be administered by Malaya.

(ii) *Pulau Pisang lighthouse and the status of the territory on which it stands*

304. Pulau Pisang Lighthouse is addressed in Malaysia's Memorial and needs only brief comment here.³⁷⁸ The lighthouse is administered by Singapore today and has been since its establishment in 1886. It is, however, indisputably situated on territory that was part of Johor and is today part of Malaysia. Singapore does not challenge this. The basis of the arrangements was the grant by Johor in 1885 of a plot of land to the Government of the Straits Settlements for the construction and maintenance of a lighthouse. This grant was confirmed by an Indenture of 6 October 1900.

305. The arrangements in respect of Pulau Pisang Lighthouse, as with other lighthouses which were part of the Straits' Lights system, stand as clear evidence of the fact that there was no necessary coincidence between the

³⁷⁷ See also MM, paras. 223-224.

³⁷⁸ MM, para. 233 and MM Annex 89.

administration lighthouses that formed part of the system and the sovereignty of the territory on which the lighthouses were situated.

B. The Straits' Lights system

(i) *The existence of the Straits' Lights system and its legislative framework*

306. The existence of the Straits' Lights system is clearly evidenced from legislative and other texts, including some cited in the Singapore Memorial.³⁷⁹ The preamble of the Act of 1852 for defraying the costs of Horsburgh Lighthouse, provides *inter alia*:

“...whereas the East India Company agreed to build such Light-House, and to advance certain sums of money to complete the same, on condition that the said sums of money were repaid to them by the levy of a toll on Ships entering the harbour of Singapore; And whereas the said Light-House has been built by the East India Company, and it is desirable that the expense of building the same, and of maintaining a Light thereon, should be defrayed out of the monies arising from such toll; And whereas *it may hereafter be deemed expedient to establish other Lights or beacons in the Straits of Malacca, or elsewhere near thereto...*”³⁸⁰

307. The point emerges more clearly from the Act of 1854, which repealed the 1852 Act and made provision for defraying the costs not only of Horsburgh Lighthouse but also of “a Floating Light established in the Straits of Malacca, to the West of Singapore, and for the establishment and maintenance of such further Lights in or near the said Straits as may be deemed expedient”.³⁸¹ Section III of this Act provides:

“The light maintained at the Horsburgh Light-House, and the said Floating Light established as aforesaid, and such other light or lights as shall be established by the East India Company in lieu of such Floating Light, or in addition thereto,

³⁷⁹ See, e.g., SM, para. 6.21.

³⁸⁰ Act No.VI of 1852 (emphasis added); MM Annex 84.

³⁸¹ Act No.XIII of 1854; MM Annex 85.

in or near to the Straits of Malacca or Singapore, shall be called 'The Straits' Lights.'"

308. Between 1854 and 1946, the Straits' Lights were referred to generically in various legislative and other measures and documents of the Straits Settlements. For example, introducing the first reading of what was to become Ordinance No. XXVI of 1910, amending the 1854 Act, the Attorney General, as a member of the Legislative Council of the Straits Settlements, stated:

"Sir, I beg to move the first reading of this bill to amend, in respect of one section, Indian Act XIII of 1854, which provides for the collection of light-tolls in respect of lighthouses and lights in the neighbourhood of the Colony, referred to in the Act of 1854 as the Straits Lights."³⁸²

309. The next significant piece of legislation concerning the Straits' Lights was Ordinance No. XVII of 1912 which repealed parts of the 1854 Act and made new provision for the maintenance of the Straits' Lights.³⁸³ As the statement by the Attorney-General in the Straits Settlement Legislative Council in the course of debate about the Bill indicates, the question before the Council was whether the lights should continue to be funded by a light toll or whether the maintenance costs should be taken over by the relevant governments. The motivating concern was whether the costs of the light toll were making the "British" ports in the region less competitive than the "rival Dutch ports".³⁸⁴ The Attorney-General stated the issues as follows:

"Sir, the desirability of abolishing the Light Dues which are levied upon vessels entering and leaving the ports of this Colony and are imposed under the Indian Act of 1854 was I think first raised on the second reading of the Light Tolls Act Amendment Ordinance of 1910, and I refer to that Ordinance

³⁸² Light-Tolls Act Amendment Bill, 1910, Statement by the Attorney-General: Annexes, vol. 3, Annex 30. The Light Tolls Act Amendment Ordinance 1910 repealed and replaced section 18 of the 1854 Act concerning certain exemptions from light-tolls.

³⁸³ Ordinance No. XVII of 1912 to repeal in part Indian Act No. XIII of 1854 and to make new provision for the maintenance of the Light-houses of the Straits of Malacca, 23 December 1912: MM Annex 90.

³⁸⁴ See the statement on second reading of the Light-Tolls Act Amendment Bill, 1910 by Mr Darbishire: Annexes, vol. 3, Annex 31.

because I think the principle was there pointed out by the hon'ble Mr. FORT upon which the Council can properly be asked to approve of this bill, the purpose of which is to abolish these dues.

I shall read what Mr. FORT put forward in that regard: 'The Act which this bill proposes to amend is an Act which was brought in and passed many years ago for the maintenance and construction of lighthouses in this part of the world. Now, there is a good deal to be said on both sides of the question as to whether lighthouses should be maintained at the expense of the Government or whether they should be maintained by a levy on the ships which have the use of those lights. On the whole I am inclined to think that it is better that the Government should bear the expense of supporting the lighthouses, and for this reason, that it is inevitable that a large number of ships which have the advantage of using the lighthouse cannot be made to pay.'

Of course, the hon'ble and learned member was referring to those ships which pass in the night to some other port. They have had the advantage of the lights but they do not come to the port and they escape, so we are really taxing vessels which are making use of our ports."³⁸⁵

310. The Bill to which the Attorney-General was speaking was subsequently passed as Ordinance No. XVII of 1912. It repealed in part the 1854 Act and abolished the levying of light tolls on vessels putting into Singapore harbour.³⁸⁶

311. The Ordinance has a number of significant features. First, it affirms the existence of a system of Straits' Lights, viz.:

"4. The light maintained at the Horsburgh Light-house and all such other lights or beacons as are now or shall hereafter be maintained by the Government in or near to the Straits of Malacca or Singapore shall as heretofore be called 'The Straits' Lights.'"³⁸⁷

³⁸⁵ Statement by the Attorney-General on the reading of the Light-Houses Bill, 1912: Annexes, vol. 3, Annex 32.

³⁸⁶ See MM, paras. 223-226. The Ordinance is reproduced in MM Annex 90.

³⁸⁷ Ordinance No. XVII of 1912, s. 4: MM Annex 90.

312. Second, it records that, with the abolition of light tolls, the costs of maintaining the Straits' Lights system was to be shared by the Colony of Singapore and the Governments of the Federated Malay States, viz.:

“WHEREAS with the view of abolishing the tolls leviable under the provisions of Indian Act No.XIII of 1854 upon ships departing from or entering the ports harbours or roadsteads of the Colony an arrangement has been made between the Governments of the Federated Malay States and the Colony whereby the Government of the Federated Malay States has agreed to contribute to the cost of maintaining the Straits lights.”³⁸⁸

313. In fact the financial burden on the Federated Malay States pursuant to this arrangement was considerable. For example, the total cost of maintaining the 15 Straits' Lights in existence in 1914 was recorded as \$41,020.52.³⁸⁹ The minutes of the meetings of the Federal Council of the Federated Malay States on 8 July 1913 record a “special appropriation” of a sum of \$20,000 to meet a share of the cost of maintaining the One-Fathom Bank and Cape Rachado Lighthouses. As this amount was significantly greater than the \$5,725.92 that is recorded as the cost of maintaining these two lighthouses in 1914, this contribution by the Federated Malay States effectively amounted to a contribution to the cost of maintaining the system of Straits' Lights as a whole. The explanation given by the Chief Secretary of the Federal Council of the Federated Malay States at the July 1913 meeting is as follows:

“This is quite a new departure so far as the Federated Malay States Government is concerned. In the past, these two light-houses, which are off the coast of this country, have been entirely maintained by the Colonial Government. Up till the end of last year the Colonial Government derived revenue from collecting dues from ships passing up and down the Straits to defray the cost of maintaining them, but a new policy has been decided upon in the Colony. It has been decided to abolish the light dues altogether, thereby conferring considerable benefit on all shipping passing through the Straits. 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

³⁸⁸ Ordinance No.XVII of 1912, Preamble: MM Annex 90.

³⁸⁹ MM, para. 224. See also MM Annexes 65, 66.

be doing our duty if we did not come forward and offer to maintain these two very useful light-houses.

So long as the Colonial Government were reaping the benefit of the light dues it was only right that they should maintain them, but now, as they are giving up the dues, it is hardly fair to expect them to continue maintaining them. Therefore, subject to the approval of Council, we propose to assume responsibility for these two light-houses off the coasts of Selangor and Negri Sembilan, respectively. There were two courses open to us. One was to actually assume the responsibility for maintaining the lights, to provide crews and provide for their relief and keep up the lights themselves. It would be rather difficult for us to do this at once because light-houses required [*sic*] constant expert attendance, and in Singapore they have an official whose duty it is to look after light-houses and see that everything is in proper order.

It was accordingly decided that instead of actually transferring the maintenance of the lights we should let the Colonial Government go on maintaining the lights, as they have done in the past in a very efficient condition, and to contribute towards the cost of them. It was decided, subject to the approval of Council, to offer a sum of \$20,000 a year. I think this is a very fair amount, but at the same time we reserve to ourselves to take over the two lights."³⁹⁰

314. The basic assumption was evidently that the mere fact that the Colony of the Straits Settlements administered the lighthouses in question did not mean that it had title to the territory on which the lighthouses were situated. The Straits Settlements administered the Straits' Lights as a matter of convenience, because it had the necessary expertise to do so.

315. The position of Horsburgh Lighthouse requires comment in this context. Horsburgh Lighthouse, like Pulau Pisang Lighthouse, was situated on the territory of Johor. Johor was not one of the Federated Malay States.³⁹¹ While it is not clear whether Johor made any contribution to the maintenance of Horsburgh and Pulau Pisang Lighthouses, this does not obscure the fundamental point that emerges from the preceding extract. It was commonly

³⁹⁰ Statement by the Chief Secretary of the Federal Council of the Federated Malay States, Minutes of the Meeting of 8 July 1913, p. B8: MM Annex 65.

³⁹¹ MM, para. 198.

acknowledged, not simply by the Federated Malay States but also by the British representatives,³⁹² that the maintenance and administration of a lighthouse by the Colony of the Straits Settlement had no necessary bearing on the sovereignty of the territory on which the lighthouse was situated but, rather, was dictated by the Colony's expertise.

316. Third, the formulation of sections 3 and 5 of Ordinance No. XVII leave little room for doubt that the interest in Horsburgh Lighthouse with which the Straits Settlements was concerned was a private law interest of ownership and control and not an interest of sovereignty. Sections 3 and 5 provide as follows:

"3. The light-house known as the Horsburgh Light-house situate on the Island rock called Pedra Branca at the eastern entrance of the Straits of Singapore and all other light-houses as are now established in or near to the Straits of Malacca or Singapore together with the appurtenances thereof and all the fixtures apparatus and furniture belonging thereto shall remain the property of and be absolutely vested in the Government."

"5.—(1) The management and control of the Horsburgh Light-house and other light-houses established in or near to the Straits of Malacca or Singapore as aforesaid and of the Straits Lights shall remain vested in and be maintained by the Government.

(2) No tolls shall be paid for any of the Straits Lights in respect of any vessel entering or departing from any port harbour or roadstead of the Colony whether such vessel has passed or would pass any of the said lights or not but all necessary sums of money required to pay the cost of their maintenance shall after taking into account the amount of any contribution paid towards such cost by the Government of the Federated Malay States be provided for out of the revenues of the Colony."³⁹³

³⁹² Those present at the Federal Council meeting at which the statement by the Chief Secretary was made included the (British) Honourable Residents of Perak, Selangor, Negri Sembilan and Pahang, as well as the Honourable Legal Adviser: Minutes of the Meeting of 8 July 1913, p. 1: MM Annex 65.

³⁹³ MM, Annex 90.

317. That these sections address ownership in private law rather than sovereignty under international law is confirmed by three considerations. First, this reading accords with the plain and ordinary meaning of the words of the sections. Second, it accords with similar language used in legislation concerned with the administration of lighthouses in other parts of the world which did not involve the acquisition or transfer of sovereign rights. One example of this is the British and Canadian legislation of 1886 concerning the transfer of ownership and control of the Cape Race Lighthouse in Newfoundland from Britain to Canada, which was cast in similar terms.³⁹⁴ Third, it accords with the understanding expressed by the Chief Secretary of the Federal Council of the Federated Malay States quoted above and the contribution by those States to the maintenance of the Straits' Lights.

318. A further Ordinance of the Straits Settlements, in 1915, to authorise the collection of dues for Lighthouses established by Act of the Imperial Parliament, illustrates further that the measures taken, including legislation, for the maintenance of lighthouses in territories coming within British imperial purview were neither based on nor determinative of questions of sovereignty. Thus, the Imperial Light Dues Ordinance 1915, which finally repealed the Indian Act XIII of 1854 in its entirety, provided, in section 3, that "[a]ll dues for the lights on the Great Basses and Little Basses Rocks near the coast of Ceylon" and, in section 4, that "[a]ll dues for the light on the island on Minicoy", were to be collected in the Straits Settlements. By section 11 of the Ordinance, the dues so collected were to "be disposed of in such manner as His Majesty's Principal Secretary of State for the Colonies may, from time to time, direct."³⁹⁵ None of these territories was part of the Straits Settlements.

³⁹⁴ See paragraphs 209-211 above.

³⁹⁵ Ordinance No.XVII of 1915: Annexes, vol. 3, Annex 34.

319. By the Straits Settlements (Repeal) Act 1946, provision was made for the repeal of the Straits Settlement Act 1866 and the dissolution of the Straits Settlements as a single colony. By the Singapore Colony Order in Council 1946, Singapore was established as a separate colony.³⁹⁶ With these developments, the Straits' Lights ceased to be administered as a single system. Lights previously administered from Singapore continued to be administered from the Colony without prejudice to the sovereignty of the territory on which they were located. Lights previously administered from elsewhere in the Straits Settlements were subsequently administered by Malaya. At no point did these and subsequent developments alter the status of the territory on which the lights in question were based.

(ii) *Lights which formed part of the Straits' Lights system*

320. Act No. XIII of 1854, which first defined Straits' Lights, referred to two lights, Horsburgh Lighthouse and the Floating Light at 2½ Fathom Bank. By the time of the *Report on the Straits Settlements During the Year 1857-1858*, "three Marine Navigation Lights under the Straits' Government" were noted, viz., Horsburgh Lighthouse, Raffles Lighthouse, and the 2½ Fathom Bank Floating Light.³⁹⁷ By July 1883, a paper to be laid before the Legislative Council of the Straits Settlements identified 8 lights as part of the Straits' Lights system, viz., Horsburgh Lighthouse, Raffles Lighthouse, Malacca Light (a harbour light), Cape Rachado Lighthouse, Singapore Light (a harbour light), the Screw Pile Lighthouse (also known as the One Fathom Bank Lighthouse), Pulau Undan Lighthouse, and the Formosa Light Vessel. It further referred to enquiries respecting "the establishment of a light-house at Pulau Pisang and the removal of the light-vessel now stationed at the Formosa Bank to the Sultan Shoal".³⁹⁸

³⁹⁶ MM Annex 92.

³⁹⁷ Report on the Administration of the Straits Settlements During the Year 1857-58, p. 16: Annexes, vol. 3, Annex 22.

³⁹⁸ Paper to be laid before the Legislative Council by Command of His Excellency the Governor, 6 July 1883: Annexes, vol. 3, Annex 25.

321. By the time of a 19 September 1893 letter from the Straits Settlements to the Colonial Office in London, the number of Straits' Lights had risen to 12 (with some changes in the lights previously noted), viz., Muka Head, Fort Cornwallis, Pulau Rimau, One Fathom Bank (or Screw Pile), Cape Rachado, Harbour Light, Pulau Undan, Pulau Pisang, Raffles Light, 'Ajax' Light-ship, Singapore Harbour Light, and Horsburgh Light. The letter further requested permission "to improve the existing facilities by constructing a new lighthouse on Sultan Shoal near Singapore".³⁹⁹

322. At the point of the 1912 Ordinance abolishing light dues, the number of Straits' Lights had risen to 13, again reflecting changes in the composition since the earlier lists. These lights, together with the dates on which they were built, were given as follows:

	<u>"Station</u>	<u>When Built</u>
1.	Horsburgh Light, Singapore	1850
2.	Fort Canning Light, Do.	1903
3.	Raffles Light, Do.	1856
4.	Pulau Pisang Light, Do.	1886
5.	Sultan Shoal Light, Do.	1896
6.	Pulau Undan Light, Malacca	1880
7.	Cape Rachado Light, Do.	1863
8.	One-Fathom Bank Light, Do.	1907
9.	Harbour Light, Do.	1861
10.	Pulau Rimau Light, Penang	1884
11.	Harbour Light, Do.	1884
12.	Muka Head Light, Do.	1883
13.	Tanjong Hantu Light, Do.	1901" ⁴⁰⁰

323. These 13 lights, constructed between 1850 and 1901, may conveniently be described as the original Straits' Lights. By 1938, the number

³⁹⁹ Letter from William Maxwell, Governor of the Straits Settlements, to the Colonial Office, 19 September 1893: Annexes, vol. 3, Annex 29.

⁴⁰⁰ Straits Settlements *Blue Book for the Year 1912*, pp. V2-V3: Annexes, vol. 3, Annex 33. The notation following the name of each light is to the station which was responsible for the administration of each light. The notation "Do." is "ditto".

of “lighthouses, light beacons, light buoys and light ships” listed in the Straits Settlements *Blue Book* for the year had reached 65.⁴⁰¹

324. Significantly, at various points throughout this period and subsequently, reference is made in the Annual Reports for the Marine Department of the Straits Settlements, and subsequently of Singapore, to “the Singapore group of lighthouses”. The Annual Report of 1931 notes these as “comprising Horsburgh light, Raffles light, Sultan Shoal light and Pulo Pisang light”.⁴⁰² The Annual Report for 1948 adds Fort Canning Lighthouse to this list.⁴⁰³ The description “Singapore Group of Lighthouses” refers to the principal lighthouses administered from Singapore, not to lighthouses situated on Singapore territory. This is evident from two considerations. First, the Straits Settlements *Blue Books* record each lighthouse by reference to the “station” which was responsible for its administration. As noted in the table set out above, Singapore is recorded as the station responsible for the administration of each of the five lighthouses characterised as the “Singapore Group of Lighthouses”. Second, quite apart from the reference to Horsburgh Lighthouse, this reading of the phrase is confirmed by the inclusion amongst the Singapore Group of Lighthouses of Pulau Pisang Lighthouse.

(iii) *Permission from Malay rulers for construction and administration of lights*

325. Of the 13 original Straits’ Lights lighthouses noted above, four were located on territory that was not part of the Straits Settlements—Horsburgh, Pulau Pisang, Cape Rachado and One Fathom Bank (or Screw Pile). In the case of each of these lighthouses, permission from the local Malay Ruler for the construction and/or administration of the lighthouse is apparent.

⁴⁰¹ Straits Settlements, *Blue Book for the Year 1938*, pp. 978-985: Annexes, vol. 3, Annex 36.

⁴⁰² Annual Report for the Marine Department, Straits Settlements, for the Year 1931, p. 92: Annexes, vol. 3, Annex 35.

⁴⁰³ Annual Report of the Marine Department, Singapore, for the Year 1948, p. 10: Annexes, vol. 3, Annex 37.

326. The permission from Johor in respect of Horsburgh Lighthouse needs no further discussion. Reference has also already been made to the permission by Johor in 1885, confirmed by the Indenture of 1900, for the construction of the Pulau Pisang Lighthouse.

327. As regards Cape Rachado Lighthouse, permission for its construction took the form of a Proclamation by Raja Juma'at, the ruler of the Selangor State of Lukut, of 23 August 1860, which made over "to the Government of the Queen of England, Cape Rachado", provided that:

"the English Government do covenant and agree to build and keep a Light house for the benefit of all nations in relation of their ships or boats upon the said Cape Rachado (commonly called Tanjong Tuan) and in the event of the English Government failing to abide by the said agreement, then and in such case, the cession upon my part to be null and void."⁴⁰⁴

This Proclamation was subsequently given the imprimatur of the Sultan of Selangor in a letter to the Governor of the Straits Settlements on 26 November 1860.⁴⁰⁵

328. The scope of this "cession" of Cape Rachado to Britain in 1860 was authoritatively clarified by the statement by Sir Edward Lewis Brockman, the Chief Secretary of the Federal Council of the Federated Malay States, in July 1913. As regards both the Cape Rachado and One Fathom Bank Lighthouses, he affirmed that it was open to the Federated Malay States "to actually assume the responsibility for maintaining the lights" and that "we reserve to ourselves to take over the two lights".⁴⁰⁶ It is quite clear, therefore, that even in the minds of British officials, what had been given in 1860 was a grant of land and associated permission for the construction and operation of a lighthouse at Cape Rachado, not a cession of sovereignty.

⁴⁰⁴ Proclamation by Raja Juma'at of Lukut regarding the Cession of Cape Rachado to Britain, 23 August 1860: Annexes, vol. 3, Annex 23.

⁴⁰⁵ MM Annex 62.

⁴⁰⁶ See above, paragraph 313.

(iv) *The administration of the Straits' Lights*

329. The Straits Settlements *Blue Books* record next to each lighthouse the Straits Settlement station to which they were allocated and from which they were administered. In the case of the 13 original Straits' Lights, the relevant stations were as follows:⁴⁰⁷

1.	Horsburgh Light	Singapore
2.	Fort Canning Light	Singapore
3.	Raffles Light	Singapore
4.	Pulau Pisang Light	Singapore
5.	Sultan Shoal Light	Singapore
6.	Pulau Undan Light	Malacca
7.	Cape Rachado Light	Malacca
8.	One-Fathom Bank Light	Malacca
9.	Harbour Light	Malacca
10.	Pulau Rimau Light	Penang
11.	Harbour Light	Penang
12.	Muka Head Light	Penang
13.	Tanjong Hantu Light	Penang

330. On the dissolution of the Colony of the Straits Settlements in 1946 and the establishment of the Colony of Singapore and the Malayan Union, the administration of the various lighthouses and lights which comprised the Straits' Lights system continued to rest with the station that had previously been responsible for them. These developments did not, however, bring about any change in the pre-existing status of the territory on which the various lighthouses were located. Thus, after 1946, of the 13 original Straits' Lights, Singapore continued to be the "station" responsible for the administration of Horsburgh, Fort Canning, Raffles, Pulau Pisang and Sultan Shoal Lighthouses. Of these, both the Horsburgh and Pulau Pisang Lighthouses were located on Johor territory which, in 1946, became part of the territory of the Malayan Union. Correspondingly, the Malayan Union assumed responsibility for the continued administration of the remaining 8 lighthouses that had previously been managed from the Malacca and Penang stations.

⁴⁰⁷ Straits Settlements *Blue Book for the Year 1912*, pp. V2-V3: Annexes, vol. 3, Annex 33.

(v) *The administration of the Straits' Lights after 1946*

331. In the period after 1946, both Singapore and the Malayan Union (subsequently the Federation of Malaya, thereafter, Malaysia) took steps to maintain the sound administration of the Straits' Lights for which they were responsible. In both cases, the decision was taken to reintroduce the levying of light dues as the means of funding the maintenance of the lights. Thus, the Federation of Malaya enacted the Federation Light Dues Ordinance 1953, which established a Light Dues Board and provided for the payment of all dues collected pursuant to the Ordinance into a Light Dues Fund to be administered by the Board.

332. Singapore, similarly, enacted a Light Dues Ordinance in 1957. This also established a Light Dues Board and a Light Dues Fund. This Ordinance was amended by the Light Dues (Amendment) Ordinance 1958 and was later repealed and re-enacted with amendments by the Singapore Light Dues Act 1969. Other measures were taken subsequently.

333. The Singapore light dues legislation was discussed in detail in Malaysia's Memorial.⁴⁰⁸ Any additional comment at this point is unnecessary. But as Singapore purports to make something of this legislation,⁴⁰⁹ it may be helpful to recall the salient conclusions on this issue as set out in Malaysia's Memorial:

- The Singapore Light Dues (Amendment) Ordinance 1958 acknowledges that Horsburgh Lighthouse was not part of the territory of the Colony of Singapore. This follows both from the express terms of the Ordinance and from the common treatment in the Ordinance of the Pulau Pisang and Horsburgh Lighthouses.⁴¹⁰

⁴⁰⁸ MM, paras. 246-256.

⁴⁰⁹ See SM, paras. 6.23-6.25.

⁴¹⁰ MM, paras. 248-250.

- This appreciation is affirmed by the express terms of the Singapore Light Dues Act 1969.⁴¹¹
- This legislation is particularly significant for present purposes as it is special legislation which addresses Singapore's administration of lighthouses in the Straits of Malacca and Singapore specifically.⁴¹²
- This legislation is also particularly important as it straddles Singapore's transition from colonial status to participation in the Federation of Malaysia to independence as the Republic of Singapore.⁴¹³

334. It may also be helpful to recall that this reading of the Singapore light dues legislation corresponds with the view of J.A.L. Pavitt, for many years Singapore's Director of Marine, that Horsburgh Lighthouse did not form part of Singapore.⁴¹⁴

C. Conclusions

335. The general conclusions that emerge from the preceding review are as follows:

- (a) British practice in the establishment and administration of the Straits' Lights system from 1850 to 1946 corresponds closely to British practice elsewhere in the world during the same period.
- (b) Practice in respect of both the Straits' Lights system and other lighthouses around the world confirm that the construction and administration of lighthouses neither constituted a taking of possession of the territory on which the lighthouses were

⁴¹¹ MM, paras. 251-254.

⁴¹² MM, para. 255.

⁴¹³ MM, para. 256.

⁴¹⁴ MM, paras. 257-263.

situated for purposes of sovereignty nor, as such, a display of State sovereignty.

- (c) This conclusion draws particular support, in the case of the Straits' Lights, from the following facts:
- the arrangements in respect of the Pulau Pisang, Cape Rachado and One Fathom Bank Lighthouses (as well as those in respect of Horsburgh Lighthouse);
 - the cost sharing arrangements, and the appreciation that underpinned them, in respect of the Straits' Lights after the enactment of the 1912 Ordinance abolishing light dues;
 - the express focus, in the 1912 Ordinance, on private law concepts of ownership and control rather than on sovereignty as a matter of international law;
 - the terms of the 1915 Ordinance, which provided for the collection of lights dues by the Straits Settlements in respect of lights that were indisputably located on non-Straits Settlements territory.
- (d) On the dissolution of the Straits Settlements in 1946 and the establishment of the Colony of Singapore and the Malayan Union, the administration of particular Straits' Lights continued to be undertaken by the "stations" that had been responsible for their administration prior to 1946.
- (e) This practice after 1946 did not affect any change in the sovereign status of the territory on which the particular lighthouses were located.

336. In Chapter VI of its Memorial, Singapore advanced conduct undertaken in its capacity as administrator of Horsburgh Lighthouse in isolation from the realities both of practice relating to lighthouses in general and the *sui generis* arrangements of the Straits' Lights system in particular, of which Horsburgh Lighthouse was a part. The significance of this wider

context for the present case is cogently stated by Captain Glass and Mr Brewer in their Report:

“In the case of the Horsburgh Lighthouse, the role performed by the Maritime and Port Authority of Singapore might be compared to that of MENAS. Indeed, we understand that the Horsburgh Lighthouse was one of a number of lighthouses established by the British along the Malacca and Singapore Straits and administered from Singapore. This would make the analogy with MENAS stronger still. In the Gulf, MENAS is responsible for all matters relating to the aids to navigation which it owns or operates, including the provision of Notices to Mariners. It raises its revenue from navigation dues. It does not, however, assume any territorial rights in undertaking its role for the provision of aids to navigation (save in respect of the express donation of land for its Bahrain base of operations).”⁴¹⁵

⁴¹⁵ Glass-Brewer Report, para. 17: Annexes, vol. 2, Annex 1.

Chapter 8

CONDUCT CLAIMED BY SINGAPORE TO BE *À TITRE DE SOUVERAIN*

Introduction

337. Referring to a Notice to Mariners issued by the Governor of the Straits Settlements on 24 September 1851 to mark the completion of Horsburgh Lighthouse, Singapore contends that this “was in effect the beginning of the continuous, open and peaceful display of State authority exercised by Singapore and her predecessors over Pedra Branca following its lawful possession by the United Kingdom”.⁴¹⁶ It goes on to refer to the “exercise of State activities over Pedra Branca” and contends that “[a]part from taking possession of Pedra Branca and building and operating the lighthouse, the Singapore authorities and their predecessors have administered and controlled Pedra Branca *in a wide-ranging number of ways*”.⁴¹⁷ There follows a list of no fewer than 13 forms of conduct which Singapore prays in aid of its claim to sovereignty.

338. Pursuing the theme, Singapore contends that “the exercise of sovereignty... related not simply to the lighthouse, but also to the island as a whole as well as to its territorial waters and encompassed numerous non-lighthouse activities”.⁴¹⁸ It contends that this activity is evidence both of its sovereignty and of its continued intent to act as sovereign.⁴¹⁹ In contrast, it contends that Malaysia has never acted as sovereign, that Johor expressly

⁴¹⁶ SM, para. 6.4.
⁴¹⁷ SM, para. 6.6 (emphasis added).
⁴¹⁸ SM, para. 6.41.
⁴¹⁹ SM, paras. 6.96-6.111.

disclaimed sovereignty and that Malaysia has recognised Singapore's sovereignty over the island.⁴²⁰

339. This Chapter responds to these claims concerning the conduct of Singapore. The claims concerning Malaysia's conduct are addressed in Chapter 9 below. 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. Overwhelmingly, the conduct cited by Singapore “forms part of the general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibility”.⁴²¹ This is the view of those who are expert in the field of lighthouse management and the provision of aids to navigation. In whatever way Singapore attempts to present this conduct, it does not rise to the level of conduct *à titre de souverain*. In the isolated instances in which the conduct cited by Singapore goes beyond general conduct in the administration of a lighthouse, it takes place after the critical date and is manifestly self-serving in the context of this dispute. There is nothing, therefore, in the conduct relied on by Singapore, that supports Singapore's case.

340. Before addressing Singapore's claims directly, it is useful to recall those elements of Singapore's conduct which undermine its analysis and the apparent coherence of the position that it now puts forward. There are the instruments to which Singapore was a party, as well as its own internal measures and documents, which define Singapore's territorial reach but omit all reference to PBP. They include (a) the Straits Settlement and Johore Territorial Waters Agreement, 1927,⁴²² (b) the Singapore Police

⁴²⁰ SM, Chapters VII and VIII.

⁴²¹ Glass-Brewer Report, para. 40: Annexes, vol. 2, Annex 1.

⁴²² MM, paras. 190-192, 220-221.

Commissioner's Curfew (Johore Straits) (Singapore) Order 1948,⁴²³ and (c) successive annual volumes of the official *Singapore Facts and Figures* which go into exhaustive detail on the islands that fall within Singapore's territorial waters.⁴²⁴ This conduct includes: the practice of the Straits Settlements in respect of the administration of the Straits' Lights, which confirms that the administration of lighthouses was never regarded as a mark of sovereignty;⁴²⁵ the appreciation of Singapore's own Director of Marine about the status of Horsburgh Lighthouse;⁴²⁶ Singapore's post-1946 light dues legislation, which straddles the period of Singapore's changing constitutional status and evidences Singapore's understanding throughout this time that Horsburgh Lighthouse was not within Singapore's sovereignty,⁴²⁷ and the 1973 territorial sea delimitation agreement between Indonesia and Singapore, the terms of which support the conclusion that Singapore did not at the time consider that it had sovereignty over PBP.⁴²⁸

341. Against this background, the question is not simply whether the conduct on which Singapore now relies is capable of sustaining (in the abstract) some claim to title. It is whether this conduct (a) is capable of constituting conduct *à titre de souverain*, and (b) is sufficient to offset the inference against sovereignty which derives from Singapore's inconsistent practice just noted, and (c) is sufficient to displace Malaysian sovereignty based on Johor's original title to the island and its consent to the use of the island as a spot for the location of a lighthouse.

⁴²³ MM, paras. 194-197.

⁴²⁴ MM, paras. 207-218.

⁴²⁵ MM, paras. 222-226, and see Chapter 7 above.

⁴²⁶ MM, paras. 227-234, 257-263.

⁴²⁷ MM, paras. 246-256.

⁴²⁸ MM, paras. 264-266. On this element see further Chapter 10 below.

342. It is necessary to consider Singapore's claims concerning conduct systematically. For these purposes, the itemised list of conduct in paragraph 6.6 of Singapore's Memorial will be taken as a starting point.

A. Claims concerning enacting legislation relating to Pedra Branca and Horsburgh Lighthouse⁴²⁹

343. Singapore claims that it, and its predecessors, enacted a series of laws relating to Pedra Branca, including measures to defray the costs of establishing and maintaining Horsburgh Lighthouse. It further argues that these measures were open and notorious and did not elicit any protest from Malaysia. The specific measures cited by Singapore and on which its discussion principally focuses include Act No. VI of 1852 and Act No. XIII of 1854, passed by the Governor General of India in Council concerning the levying and collection of light dues, and Singapore's Light Dues Ordinance 1957, Light Dues (Repeal) Act 1973 and Protected Places (No. 10) Order 1991.⁴³⁰

344. This list of measures is interesting for what it omits. Although a passing footnote reference is made to the Straits Settlements' Light-Houses Ordinance 1912, which repealed the 1854 Act on which Singapore relies, there is no discussion whatever of this measure. As will be recalled,⁴³¹ the express terms of the 1912 Ordinance, the discussion leading up to it, and its consequences, notably in the form of the significant financial contribution by the Federated Malay States to the maintenance of the Straits' Lights, are highly pertinent to the present case and contradict the position that Singapore now seeks to present. The same is true of the omission of any reference by Singapore to its Light Dues (Amendment) Ordinance 1958 and its Light Dues Act 1969, both of which, by their terms, constitute compelling evidence that

⁴²⁹ SM, para. 6.6(a).

⁴³⁰ SM, paras. 6.10-6.26.

⁴³¹ See above, paragraph 309. See also, MM, paras. 223-226.

Horsburgh Lighthouse did not fall within the territory of the Colony, and later the Republic, of Singapore.⁴³²

345. Given these omissions, the picture that Singapore purports to paint by reference to “legislation relating to Pedra Branca and Horsburgh Lighthouse” is both partial and misleading.

346. Beyond this, the conduct on which Singapore does rely requires a number of comments.

347. First, it is notable that, in its discussion of the 1852 and 1854 Acts concerning light dues, Singapore makes no mention at all of the Straits’ Lights system and the practice, stretching from 1852 through to 1946 and beyond, concerning the administration of these lights. Singapore opens this discussion with the words “[t]he exercise of legislative authority over Pedra Branca began on 30 January 1852 when the Government of India enacted Act No.VI of 1852”.⁴³³ But this is wrong, as any discussion of the wider context of the administration of the Straits’ Lights would have shown. It was not the exercise of legislative authority over Pedra Branca that began in 1852 but rather the legislative provision for maintenance and administration of the Straits’ Lights, of which Horsburgh Lighthouse was an important part. Singapore’s claim that this measure was “clearly an exercise of jurisdiction *à titre de souverain*”⁴³⁴ is unsustainable. The practice of the British, Indian and Straits Settlements governments in making provision for the maintenance and administration of lighthouses in general and the Straits’ Lights in particular is diametrically opposed to the contention that this practice was intended to constitute a taking of possession of the territory on which the particular lighthouses were located for purposes of sovereignty. The point has already been fully explored in Chapter 3 and 7 above.

⁴³² See MM, paras. 246-256, and further above, paragraph 333.

⁴³³ SM, para. 6.11.

⁴³⁴ SM, para. 6.16.

348. Second, Singapore relies on the 1852 and 1854 Acts in support of the contention that “the 1852 and 1854 Acts formally vested title over Horsburgh Lighthouse and its appurtenances in the British Crown for internal constitutional purposes”.⁴³⁵ The reference here to “internal constitutional purposes” is misleading and no doubt designed to convey the impression of conduct *à titre de souverain*. This is not the case. On the contrary, quite apart from the wider Straits’ Lights context of the legislation, reference to the express terms of the legislation cannot sustain the implication. Thus, section I of the 1852 Act provides:

“The Light-House on Pedra Branca aforesaid shall be called ‘The Horsburgh Light-House,’ and the said Light-House, and the appurtenances thereunto belonging or occupied for the purposes thereof, and all the fixtures, apparatus, and furniture belonging thereto, shall become the property of, and absolutely vest in, the East India Company and their successors.”⁴³⁶

349. The language is straightforward. It clearly focuses on ownership and control of the lighthouse and its appurtenances as a matter of private law rather than on sovereignty over the island as a matter of international law. The same is true of section II of the 1854 Act, which is cast in almost identical terms.⁴³⁷

350. Third, it should be recalled that the adoption of legislation concerning the transfer of private law rights of ownership in lighthouses and their appurtenances, and providing for the maintenance and administration of lighthouses, was and remains a common feature of British practice. Thus, for example, a detailed elaboration of the appurtenances and related elements of property and other interests of the Cape Race Lighthouse in Newfoundland is found in the British and Canadian legislation of 1886 concerning the transfer of ownership rights of this lighthouse.⁴³⁸ The same is true in the case of the lights situated in Ireland (both the Republic of Ireland and Northern Ireland).

⁴³⁵ SM, para. 6.22.

⁴³⁶ MM Annex 84.

⁴³⁷ MM Annex 85.

⁴³⁸ See above, paragraphs 209-211, and Annexes, vol. 3, Annexes 26-28.

It is British legislation that provides for the collection and administration of light dues in respect of these lights notwithstanding that the lights are maintained and operated by the Commissioners of Irish Lights, the statutory authority of the Republic of Ireland.⁴³⁹

351. Fourth, mention has already been made of the omission, in Singapore's reference to its light dues legislation, of any discussion of its Light Dues (Amendment) Ordinance 1958 and its Light Dues Act 1969. These are material omissions because, by their terms, these instruments indicate that Singapore was not of the view, either as the Colony or as the Republic of Singapore, that Horsburgh Lighthouse fell within its territorial waters. The only explanation for this assessment is that Singapore did not consider that it had title to PBP.

352. Beyond this, Singapore's claim that its 1957 and 1973 legislation concerning light dues is conduct *à titre de souverain* cannot be sustained. The practice over the previous 150 years concerning the maintenance of Straits' Lights contradicts Singapore's suggestion that legislation in respect of light dues was determinative of the sovereign status of the territory on which any particular lighthouse was located. The terms of the 1912 Ordinance and the conduct relating thereto, cited above, illustrate the point.⁴⁴⁰ Wider international practice in respect of lights dues, including by the Straits Settlements in respect of light dues levied on lights that had no territorial connection with the Straits Settlements, further undermines Singapore's contention.⁴⁴¹ As noted by Captain Glass and Mr Brewer:

“...Singapore refers to tolls – light dues – imposed on ships calling at Singapore harbour. It is commonplace for the funding of lighthouses to take the form of the collection of light dues, sometimes also known as navigation dues. As both the practice of MENAS and the General Lighthouse Fund – which applies to the upkeep of both United Kingdom and Republic of

⁴³⁹ See above, paragraph 218. See also Glass-Brewer Report, para. 18: Annexes, vol. 2, Annex 1.

⁴⁴⁰ See above, paragraph 309, and MM, paras. 223-226.

⁴⁴¹ See further above, paragraph 318 on the Imperial Lights Dues Ordinance 1915.

Ireland lights and is administered by the United Kingdom on the basis of dues collection from commercial vessels calling at both United Kingdom and Republic of Ireland ports – shows, the collection, administration and application of light dues has no necessary connection with the State in whose territory the lights are located. In the case of the Horsburgh Lighthouse, the tolls in question were evidently to defray the cost of the upkeep of the lighthouse rather than for the maintenance or development of the island.⁴⁴²

353. Fifth, Singapore's reliance on its Protected Places (No. 10) Order 1991 cannot be relied on in support of its claim to sovereignty over PBP. It is not simply that this measure post-dates the critical date of this dispute, although this is the case. It is that, at this time, Malaysia and Singapore were actively engaged in detailed negotiations in an attempt to resolve the dispute. Even if the language of the Order could support the interpretation which Singapore places on it, the Order is an entirely self-serving instrument enacted by Singapore in an attempt to create some *effectivité* on which it could rely to bolster its claim. The mere fact of the measure suggests that Singapore was casting around for ways in which to advance its claim by reference to conduct in the absence of any other reliable practice.

⁴⁴² Glass-Brewer Report, para. 55: Annexes, vol. 2, Annex 1.

B. Claims concerning the maintenance and improvement of the lighthouse and building and upgrading a jetty⁴⁴³

354. Under a general heading addressing the maintenance, improvement and staffing of Horsburgh Lighthouse and other facilities on Pedra Branca, Singapore refers to a series of activities undertaken from 1883 through to 1996 in support of its claim to title. These include:⁴⁴⁴

- a 1883 Government notification inviting tenders for the strengthening of the jetty servicing Horsburgh Lighthouse and the construction of a small landing stage at the lighthouse;
- a 1902 Government notification inviting tenders for the provision of new girders at Horsburgh Lighthouse;
- the installation of new lighting equipment in the lighthouse in 1887 and the publication of Notices to Mariners to this effect;
- the upgrading of the light at Horsburgh in 1966;
- continuous maintenance of Horsburgh Lighthouse facilities including:
 - enlargement of the living quarters in 1948;
 - strengthening of the pier and the installation of a radio telephone in 1950;
 - repainting, whitewashing and other repairs in 1951;
 - authorisation to fly the Singapore Marine Ensign at all Singapore Marine Department Establishments in 1952;
 - fitting of boat davits in 1952;
 - installation of dihedral reflectors in 1959;
 - installation of a radio beacon in 1962;
 - installation of a new electric-powered optic and light source, and the addition of an alternator room, in 1966;

⁴⁴³ SM, para. 6.6(b) and (e).

⁴⁴⁴ SM, paras. 6.28-6.34.

- general repairs and repainting in 1967;
- further general repairs and repainting in 1971;
- responsibility for the staffing of the lighthouse and the maintenance of personnel on the island to do so;
- further improvements to the lighthouse in 1988 including the mounting of solar panels and the installation of a remote monitoring system;
- the installation of radar in 1989 linked to a Vessel Traffic Information System ("VTIS") (which is part of the VTS system);
- the construction of helicopter landing facilities in 1992; and
- a further upgrade to the light in 1996.

(i) *General observations*

355. At first sight, this appears to be an impressive list of conduct. It is, however, all smoke and mirrors (or, as it concerns a lighthouse, light and mirrors). When placed in perspective it advances Singapore's case not one iota. The reasons for this hinge both on the character of the conduct relied upon and, once again, on the appreciation that comes from significant omissions in Singapore's review of the material that it annexes in support of its claim.

356. Against the background of the review of general practice in the administration of lighthouses and the specific practice in the administration of the Straits' Lights set out in the preceding Chapters, the character of the conduct relied upon by Singapore as "general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibility" will be readily apparent.⁴⁴⁵ Before turning to the omissions in Singapore's review of the material on which it relies, it is useful to have

⁴⁴⁵ Glass-Brewer Report, para. 40: Annexes, vol. 2, Annex 1.

regard to the more detailed assessment of this conduct given in the Report by Captain Glass and Mr Brewer. They observe:

“The duty of a lighthouse operator – whether as an arm of the State or an independent body – is to provide and maintain aids to navigation to assist the safety of navigation. While maintenance methods and standards may vary among the international community of lighthouse operators – as evidenced by work in the technical committees of IALA – the need to maintain the lighthouse structures and ancillary equipment and to keep the visual, audible and electronic systems functioning correctly, remains the same.

Today, a lighthouse is a platform for a multitude of automated systems, combining equipment for the transmission of visual and audible signals with more sophisticated radionavigation systems. The power generation systems, boat and helicopter landing facilities, all form part of the necessary supporting infrastructure for the effective operation of the lighthouse. In the case of Trinity House, almost all offshore ‘rock’ lighthouses have these facilities, including Eddystone, Bishop Rock, Hanois and Smalls, as well as island stations such as Casquets, Flatholm, Skerries, Skokholm and South Stack.”⁴⁴⁶

357. Addressing the specific conduct cited by Singapore relating to the maintenance and improvement of the facilities at Horsburgh Lighthouse, Captain Glass and Mr Brewer further observe:⁴⁴⁷

“For centuries, boat landings and jetties have been constructed and maintained at lighthouses to facilitate ease of access. Today, a combination of helicopter and boat landings – including jetties – provide the necessary options for access. Examples of such practice can be seen at Trinity House lighthouses such as Casquets, Flatholm, Round Island and Godrevy.

In paragraphs 6.30 and 6.31 of its Memorial, Singapore refers to various instances of conduct concerning the maintenance and improvements of facilities at the Horsburgh Lighthouse. These improvements – the extension of living accommodation, the repair and strengthening of the pier, the fitting of a radio telephone, repainting, the installation of boat davits, dihedral radar reflectors and a radio beacon – are all in keeping with those undertaken from time to time by any competent

⁴⁴⁶ Glass-Brewer Report, paras. 43-44: Annexes, vol. 2, Annex 1.

⁴⁴⁷ Ibid., paras. 47, 56-57.

lighthouse operator. The modernisation of the station, with the installation of an electric optic, new cooling systems and solar panels, is an integral part of the evolution of lighthouse technology.

Paragraph 6.32 of Singapore's Memorial refers to its installation of radar on the island for purposes of the operation of a Vessel Traffic Information System ('VTIS'; also VTS). As we have already observed, IALA regards Vessel Traffic Services to be an aid to navigation and the siting of VTS equipment and facilities on lighthouses is common."

358. This assessment is echoed, in general terms, in the Report by Commander Christmas and in the Note by Rear-Admiral Leclair. The combined observations by professionals in the field of lighthouse management attest to the administrative character of such conduct as:

- the construction of helicopter landing facilities;⁴⁴⁸
- the installation of radar and Vessel Traffic Services;⁴⁴⁹
- the building and upgrading of a jetty to service a lighthouse;⁴⁵⁰
- the general maintenance of lighthouse facilities.⁴⁵¹

This is not conduct *à titre de souverain*.

359. Compelling evidence against the *à titre de souverain* character of this conduct also comes from the very material that Singapore annexes to its Memorial in support of its claim. Thus in paragraph 6.30, Singapore refers to the Annual Reports of the Marine Department of the Straits Settlements and the Colony of Singapore, and it attaches 25 pages of extracts from these reports covering the years 1937, 1938, 1939, 1948, 1950, 1951, 1952, 1959, 1962, 1966, 1967 and 1971. A close review of this material discloses repeated references to "the Singapore Group of Lighthouses", the list including

⁴⁴⁸ Ibid., paras. 34-35; Christmas Report, para. 8.6: Annexes, vol. 2, Annex 2; IALA Note, Answer 7: Annexes, vol. 2, Annex 3.

⁴⁴⁹ Glass-Brewer Report, paras. 36-37: Annexes, vol. 2, Annex 1.

⁴⁵⁰ Ibid., para. 47.

⁴⁵¹ Christmas Report, para. 6.3: Annexes, vol. 2, Annex 2.

reference to both the Horsburgh and Pulau Pisang Lighthouses.⁴⁵² As was addressed in detail in the preceding Chapter, the Singapore Group of Lighthouses refers to those lighthouses which were part of the Straits' Lights system and which were administered from the Singapore "station".⁴⁵³ In this context references to Horsburgh Lighthouse amongst this group cannot in any way be taken as an indication of Singapore sovereignty over PBP.

360. In the same material, repeated reference is made to the maintenance, repairs and improvements undertaken by Singapore in respect of the other lighthouses in the Singapore Group of Lighthouses, including to Pulau Pisang Lighthouse. The works referred to are of exactly the same kind as Singapore claims to be *à titre de souverain* in respect of Horsburgh Lighthouse. The inclusion of Pulau Pisang in the list is compelling evidence that the works in question neither hinged on nor constituted evidence of sovereignty over the territory on which the lighthouses were located. By way of illustration, the Annual Report for 1950 contains the following item:

"The following repairs, alterations and additions, were effected at the Lighthouses during the year: – The pier foundations at *Horsburgh* which had been damaged by heavy seas were repaired and strengthened, and a radio telephone was installed at this light; three concrete water tanks were erected at Raffles light to replace the original steel tanks which had deteriorated through age; minor improvements to the arrangements of the crews' quarters were effected at *Pulau Pisang*. It is hoped to instal radio-telephony at all the seaward lighthouses during 1951."⁴⁵⁴

⁴⁵² See SM Annex 82, pp. 712, 714, 716, 718, 720, 722, 724. Although without characterising them as the "Singapore Group of Lighthouses", and subject to one change, references to the five named lighthouses managed from Singapore are also found at pp. 727, 729.

⁴⁵³ See above, paragraph 330.

⁴⁵⁴ SM Annex 82, p. 720 (emphasis added).

The 1951 Annual Report then records as follows:

“Repainting and whitewashing was carried out at *Horsburgh* and Fort Canning, and maintenance repairs were effected at *Horsburgh*, Raffles, Sultan Shoal and *Pulau Pisang*.”

Radio-telephone was installed during the year at Raffles, Sultan Shoal and *Pulau Pisang*, thus completing installation at all seaward lighthouses.”⁴⁵⁵

The 1952 Annual Report records:

“General maintenance was carried out by the Marine section of the Public Works Department, and considerable work on the buildings, pier and road approach was done at *Pulau Pisang*. Boats’ davits were fitted at this lighthouse and also at Raffles and *Horsburgh*.”⁴⁵⁶

The 1966 Annual Report records:

“*Lighthouses*. – Pulau Pisang Lighthouse – Re-decoration and repairs were carried out and a new concrete water storage tank of 4,000 gallons capacity was built to supplement the existing water supply...

Horsburgh Lighthouse – On the evening of 30th April the new electrically operated optic and machinery was brought into use...”⁴⁵⁷

The 1967 Annual Report records:

“*Lighthouses*
Modernisation of Pulau Pisang Lighthouse
... Installation of a new optic was carried out by Marine Department and Light Dues Board staff.

...

⁴⁵⁵ SM Annex 82, p. 722 (emphasis added).

⁴⁵⁶ SM Annex 82, p. 724 (emphasis added).

⁴⁵⁷ SM Annex 82, p. 731.

General repairs to Horsburgh Lighthouse

The four yearly general repairs and repainting to Horsburgh Lighthouse were carried out and completed on 21st August, 1967.⁴⁵⁸

361. Singapore's Annex 82 also refers to the fact that Singapore continued for many years to collect light dues for lights with which it had absolutely no territorial link, including the Bahamas, Basses and Minicoy.⁴⁵⁹

362. This material also attests to the view of the Singapore Marine Department that the waters around Horsburgh Lighthouse were Malayan rather than Singaporean. Thus, the Annual Report for 1950 notes:

“At the request of the Fisheries Department, the lighthouse keepers of the four seaward lighthouses [Horsburgh, Pulau Pisang, Sultan Shoal and Raffles] have, since April 1949, collected daily samples of sea water for the purpose of investigating the salinity of *Malayan waters* and, by correlating this with weather conditions over a period of two or three years, predicting the abundance of certain species of fish.”⁴⁶⁰

The explanation for this lies in the fact that the seaward lighthouses are all recorded in the Singapore Marine Department Annual Reports as being more than 10 miles from Singapore.⁴⁶¹ The reference to “Malayan waters” in the Singapore Marine Department's Annual Report for 1950 is an acknowledgement by Singapore, more than 125 years after the Crawford Treaty, of the territorial limits of Singapore as established in that Treaty.

⁴⁵⁸ SM Annex 82, p. 733 (emphasis added).

⁴⁵⁹ SM Annex 82, pp.720, 722.

⁴⁶⁰ SM Annex 82, p. 720 (emphasis added).

⁴⁶¹ See, e.g., the 1950 Annual Report, which notes the distances of the seaward lighthouses from Singapore as: Horsburgh 33½ miles, Raffles 10¼ miles, Sultan Shoal 13¼ miles, and Pulau Pisang 43½ miles. Fort Canning was the name given to the lighthouse previously referred to as the Singapore Harbour Lighthouse: SM Annex 82, p. 720.

(ii) *Post-critical date conduct*

363. Under the general heading of maintenance and improvement of the lighthouse, Singapore also refers to a number of items of conduct which took place well after the critical date in this dispute. In particular, it refers to the automation of the lighthouse in 1988,⁴⁶² the installation of radar linked to a VTIS in 1989,⁴⁶³ the construction of helicopter landing facilities in 1992,⁴⁶⁴ and a further upgrade of the light in 1996.⁴⁶⁵

364. Four comments may be made in respect of this conduct. First, at the time of this conduct, the dispute between Malaysia and Singapore over PBP had very clearly crystallized, so this is not conduct on which Singapore can rely. Second, all the conduct cited by Singapore is general conduct that would be undertaken by any operator of a lighthouse: it is not conduct *à titre de souverain*. Third, Malaysia did in fact protest to Singapore about the aspects of this conduct which it was aware of.⁴⁶⁶ Fourth, as regards the VTIS and its related facilities, Singapore installed these without any consultation with Malaysia. This is directly contrary to the best-practice guidelines issued by IALA in respect of Vessel Traffic Services which provide that:

“In straits used for international navigation, a VTS Authority cannot restrict or impede the innocent passage of vessels. In these instances a state should endeavour to enter into agreements with neighbouring states or other maritime nations to agree on standards of conduct for vessels operating in these waters. These standards may include provisions for voluntary participation in a VTS.”⁴⁶⁷

⁴⁶² SM, para. 6.31.

⁴⁶³ SM, para. 6.32.

⁴⁶⁴ SM, para. 6.32.

⁴⁶⁵ SM, para. 6.32.

⁴⁶⁶ See, e.g., the following Diplomatic Notes from the Ministry of Foreign Affairs of Malaysia to the High Commission of the Republic of Singapore: No. EC 60/89, 14 July 1989 and EC 46/91, 11 November 1991, concerning the VTIS installation and the construction of the helipad respectively: Annexes, vol. 3, Annexes 50, 51.

⁴⁶⁷ IALA, *Vessel Traffic Services Manual*, 2002, p. 31; Annexes, vol. 3, Annex 54.

365. In recognition of the duty to cooperate in respect of maritime safety issues,⁴⁶⁸ Indonesia, Malaysia and Singapore submitted a joint proposal to the IMO's Sub-Committee on Safety of Navigation in April 1997 on the establishment of a Mandatory Ship Reporting System in the Straits of Malacca and Singapore known as STRAITREP.⁴⁶⁹ The shore-based facilities identified in the proposal to support this system included VTS facilities in Indonesia, Malaysia and Singapore as well as 14 other "remote stations", of which Horsburgh Lighthouse was one. No reference was made to issues of sovereignty in respect of any of these stations. This joint proposal confirms that maritime safety initiatives are properly made without regard to questions of territorial sovereignty. Malaysia's commitment to maritime safety in the relevant waters properly took the form of cooperative arrangements with Indonesia and Singapore, as the two other interested littoral States, notwithstanding the dispute with Singapore over title to PBP. This conduct is demonstrative of Malaysian interest in these waters, and is not illustrative of what Singapore tries to dismiss as Malaysian indifference.⁴⁷⁰

(iii) *Notices to Mariners*

366. The material in Annex 82 of Singapore's Memorial referred to above also goes to an aspect of Singapore's practice regarding the issuing of Notices to Mariners—a matter referred to by Singapore in a number of places.⁴⁷¹ It is convenient to address all these references at once.

367. Both the Glass-Brewer and Christmas Reports indicate that the issuing of Notices to Mariners is frequently undertaken by lighthouse authorities.⁴⁷² Thus, for example, Trinity House,⁴⁷³ MENAS,⁴⁷⁴ the Commissioners of Irish

⁴⁶⁸ See above, paragraphs 239-242.

⁴⁶⁹ Doc. NAV 43/3/5, 17 April 1997: Annexes, vol. 3, Annex 52.

⁴⁷⁰ SM, para. 7.6.

⁴⁷¹ See, e.g., SM, paras. 5.15, 6.3, 6.80, 6.81.

⁴⁷² Glass-Brewer Report, paras. 25-26; Christmas Report, para. 9.1.

⁴⁷³ <http://www.trinityhouse-noticetomariners.co.uk/>

⁴⁷⁴ <http://www.menas.org/notice.html>

Lights⁴⁷⁵ as well as other lighthouse authorities issue Notices to Mariners as a matter of course. For example, in the 12 months from October 2003 to October 2004 Trinity House issued approximately 45 Notices. MENAS issues individual Notices as well as a monthly summary which includes details of mobile oil rig positions. As Commander Christmas notes in his Report, MENAS also issues NAVTEX messages, i.e., messages sent out by radio as an immediate means of notifying shipping of dangers to navigation.⁴⁷⁶ An explanatory note to the MENAS monthly summary of Notices describes the provenance of the information contained therein in the following terms:

“MENAS Notices to Mariners promulgate all navigational information of a permanent or semi-permanent nature received from Governmental Nautical Authorities, Ports and Harbour Authorities, Oil Companies and others engaged in off-shore operations, Ships’ Masters and other sources.”⁴⁷⁷

368. As the Glass-Brewer Report notes, and as is immediately apparent from even the most cursory review of Notices to Mariners issued by Trinity House, MENAS and others

“Notices are issued in respect of changes to aids to navigation, including the establishment of new marks, the discontinuance of marking requirements, the taking possession of wrecks, and marking hazards and changes to their characteristics or position.”⁴⁷⁸

369. An important reason, from the perspective of a lighthouse or other associated authority, to issue Notices to Mariners is explained in the Glass-Brewer Report in the following terms:

⁴⁷⁵ <http://www.cil.ie/>

⁴⁷⁶ Christmas Report, para. 9.1.

⁴⁷⁷ E.g., MENAS *Summary of Monthly Notices to Mariners*, Edition 03/04, 1 April 2004, p. 7: Annexes, vol. 3, Annex 55.

⁴⁷⁸ Glass-Brewer Report, para. 26: Annexes, vol. 2, Annex 1.

“There is an implicit obligation under SOLAS Chapter V to advise mariners of the provision of new marks or changes to the position or characteristics of existing marks. Failure to issue Notices to Mariners in respect of any changes to navigational marks or a navigational hazard of which an authority was aware would be negligent and could expose a lighthouse operator to major liability risks. Trinity House considers the issuing of Notices to Mariners to be necessary for the proper discharge of its statutory duty as a lighthouse authority and to protect the [General Lighthouse Fund] from unnecessary financial risk.”⁴⁷⁹

370. As the practice concerning the issuing of Notices to Mariners by MENAS shows, the issuing of such Notices, and the provenance of the information contained therein, has no necessary link to sovereignty over territory.

371. The material in Annex 82 of Singapore’s Memorial illustrates this point directly in the case of Singapore. Thus, the 1937 Annual Report of the Marine Department of the Straits Settlements records that the Master Attendant of the Singapore Shipping Office published “38 Notices to Mariners concerning Malaya” during that year.⁴⁸⁰ As this affirms, Singapore had an established practice of issuing Notices to Mariners in respect of waters over which Singapore had no territorial jurisdiction.

⁴⁷⁹

Ibid.

⁴⁸⁰

SM Annex 82, p. 712.

C. Claims concerning exercise of jurisdiction over personnel on the island and the maintenance of order⁴⁸¹

372. Singapore claims that it has “legislated for the maintenance of peace and good order on Pedra Branca and [has] regulated the activities of personnel stationed there even to the extent of exercising criminal jurisdiction over them”.⁴⁸² In support of this claim, Singapore cites various revisions of a Merchant Shipping Ordinance of 1928 and successive editions of the Standing Orders and Instructions issued in respect of lighthouses which address the conduct of lighthouse keepers, access to lighthouses, the flying of flags, and other matters.

373. This point is entirely insubstantial and can be addressed very briefly. Three points may be made. First, the various sections to which Singapore refers of its Merchant Shipping legislation, from 1936 to 1985, are general provisions relating to misconduct by any person employed in any lighthouse. The provisions do not address Horsburgh Lighthouse nor even make any mention of it. Second, the *Standing Orders & Instructions – Lighthouses* to which Singapore refers (in their 1961 and 1974 reformulations) are also documents of general application relevant to Singapore’s administration of the lighthouses for which it was responsible. Thus, they refer explicitly to the Horsburgh, Pulau Pisang, Raffles, Sultan Shoal and Fullerton Lighthouses. The reference here to Pulau Pisang Lighthouse alongside Horsburgh Lighthouse again shows that these Orders are not based on considerations of territorial sovereignty but on the normal administrative responsibilities of a lighthouse authority. Indeed, an examination of the Orders discloses just how routine they are, addressing such matters as the conduct of lighthouse keepers, shore leave, visitors, rations and stores, the use of refrigerators, etc. Third, the administrative character, both of these documents and of the exercise of regulatory control by the administrator of a lighthouse over its personnel and

⁴⁸¹ SM, para. 6.6(c).

⁴⁸² SM, para. 6.35

their activities, is affirmed in the evidence of Captain Glass and Mr Brewer in the following terms:⁴⁸³

“A lighthouse administrator would normally have complete responsibility for the conduct of its personnel and the performance of their duties in their lighthouses. As the Keepers were generally a uniformed service, a service disciplinary regime would be administered by the lighthouse authority – usually following that of the merchant navy.

When Trinity House lighthouses were manned, the Keepers operated under Service Regulations governing virtually everything from their accommodation (which was rent free – as a service tenancy), to their conduct and, of course, the manual operation of the aids to navigation. Regular visits were made by engineering staff and district superintendents. In addition, the Elder Brethren of Trinity House carried out periodic inspections of the stations, sometimes accompanied by dignitaries, in order to discharge their statutory duty.

The act of regulating the activities of personnel in relation to a lighthouse is very much in keeping with the role of a lighthouse authority, whether or not it is a State body. For example, Trinity House maintains a set of Service Regulations which provide a detailed framework of rules for the conduct, standards and work expected of its lighthouse keepers. This formed the basis for any disciplinary action. A copy of Pamphlet III of the Trinity House Lighthouse Service Regulations, which addressed these matters, is attached at Annex 4.”

374. An examination of Pamphlet III of the Trinity House Lighthouse Service Regulations annexed to the Glass-Brewer Report⁴⁸⁴ shows that it covers substantially the same ground as that covered by the Singapore Standing Orders. There is no suggestion that service regulations of this type either hinge on or are in any way determinative of the sovereignty of the territory on which a lighthouse is located.

⁴⁸³ Glass-Brewer Report, paras. 38-39, 45: Annexes, vol. 2, Annex 1.

⁴⁸⁴ See Annex 4 of the Report: Annexes, vol. 2, Annex 1.

D. Claims concerning collecting meteorological information⁴⁸⁵

375. Under the general heading of activities related to the island as a whole, Singapore advances the use of Horsburgh Lighthouse as a meteorological data collection station in support of its claim.⁴⁸⁶

376. Once again, this can be addressed very briefly. The use of lighthouses for the collection of meteorological data is not conduct *à titre de souverain*. It is amongst the most commonplace of activities routinely undertaken by lighthouse operators. The reasons for this are both the location of lighthouses, often on rocks or islands at sea or remote points along the shore, and the importance of reliable meteorological information for the purposes of marine navigational safety. In this regard, it may be recalled that Chapter V, Regulation 5 of SOLAS expressly requires Contracting Governments to encourage the collection of meteorological data by ships and, in cooperation with other Contracting Governments, to warn ships of meteorological hazards and to publish meteorological information.⁴⁸⁷

377. The routine character of the collection of meteorological data as a traditional non-light function of lighthouse administration is attested to by the IALA *Navguide*,⁴⁸⁸ Rear-Admiral Leclair,⁴⁸⁹ Captain Glass and Mr Brewer,⁴⁹⁰ and Commander Christmas.⁴⁹¹ As noted in Chapter 6, the use of lighthouses for these purposes has been a common feature of lighthouse administration for decades, if not longer. Further, it is a feature of lighthouse administration regardless of the profile of the lighthouse authority as a public or private body and regardless of questions of the sovereignty of the territory on which the lighthouse is situated. Contrary to Singapore's claim, this practice is fundamentally associated with Singapore's position as administrator of

⁴⁸⁵ SM, para. 6.6(d).

⁴⁸⁶ SM, paras. 6.42-6.46.

⁴⁸⁷ See above, paragraph 242.

⁴⁸⁸ See above, paragraph 193, and the Extracts in Annexes, vol. 3, Annex 53.

⁴⁸⁹ See above, paragraph 281.

⁴⁹⁰ See above, paragraph 283.

⁴⁹¹ See above, paragraph 282.

Horsburgh Lighthouse and has nothing to do with the underlying sovereign status of PBP. It cannot sustain Singapore's claim to title over the island.

E. Claims concerning flying the Singapore Marine Ensign⁴⁹²

378. Singapore claims that the British Marine Ensign was flown above Horsburgh Lighthouse for more than a century and that this was replaced, first by the Marine Ensign of the Colony of Singapore in 1953 and then by the Marine Ensign of the Republic of Singapore in 1965.⁴⁹³ It refers to the Judgment of the Court in the *Temple Case* in support of the proposition that “national emblems such as the one flown at Pedra Branca are indications of sovereignty”.⁴⁹⁴ Singapore further refers to its 1974 Standing Orders and Instructions to Lighthouse Personnel which addresses the flying of ensigns. A number of black and white and colour photographs are presented showing the Marine Ensign flying over the lighthouse. Singapore contends that “[t]he flying of the Singapore Ensign on Pedra Branca was open and notorious yet elicited no protest from Malaysia”.⁴⁹⁵ It contrasts this with Malaysia's protest over the flying of the Singapore Marine Ensign over Pulau Pisang Lighthouse. In that context it argues that the alleged failure to protest the flying of the Ensign above Horsburgh Lighthouse is “especially significant”.⁴⁹⁶

(i) Singapore's reliance on the Temple case

379. A preliminary observation on this aspect of Singapore's claim is required. 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. This is amply illustrated by the fact that the flying of flags and the use of national emblems by one State on the territory of another State—or

⁴⁹² SM, para. 6.6(f).

⁴⁹³ SM, paras. 6.47-6.53.

⁴⁹⁴ SM, para. 6.48. Also, SM, paras. 7.10-7.12.

⁴⁹⁵ SM, para. 6.52

⁴⁹⁶ SM, paras. 7.10-7.14, esp. 7.13.

on territory having an international status—is commonplace and, indeed, in certain cases is specifically provided for by international conventions and in others occurs as a matter of practice.

380. For example, the Vienna Convention on Diplomatic Relations, 1961, provides that the flag and emblem of the sending State may be used on the premises of the mission, including the residence of the head of mission and on his or her means of transport.⁴⁹⁷ Similarly, the Vienna Convention on Consular Relations, 1963, provides that the sending State has the right to use its national flag and coat-of-arms in the receiving State, to fly the flag at consular posts, at the residence of the head of the consular post and on his or her means of transport.⁴⁹⁸ Parallel practice, at the level of custom, is particularly evident in the field of naval and other military bases. Thus, for example, it is common practice for the national flag or naval ensign of the “sending” State to be flown above a naval base situated in foreign territory. For example, Rear-Admiral Thanabalasingam, the former Chief of the Royal Malaysian Navy, attests to the Malaysian Naval Ensign being flown consistently for decades above the Royal Malaysian Naval Base at Woodlands in Singapore.⁴⁹⁹ Rear-Admiral Leclair similarly observes that it is common for marine ensigns to be flown above buildings on shore which are associated with marine activities.⁵⁰⁰

381. In the abstract, therefore, the flying of the flag of one State on the territory of another has no bearing on sovereignty. The relevant questions are (a) whether the flying of a flag or other display of national emblems is intended as an act *à titre de souverain*, (b) whether, in the circumstances, it is capable of constituting an act *à titre de souverain*, and (c) whether the conduct is open and notorious and demanding of a reaction.

⁴⁹⁷ Vienna Convention on Diplomatic Relations, 10 April 1961, 500 *UNTS* 95, Art. 20(3).

⁴⁹⁸ Vienna Convention on Consular Relations, 24 April 1963, 596 *UNTS* 261, Art. 29(1)-(3).

⁴⁹⁹ Affidavit of Rear-Admiral Thanabalasingam, para. 35: Annexes, vol. 2, Annex 4.

⁵⁰⁰ IALA Note, Answer 5: Annexes, vol. 2, Annex 3.

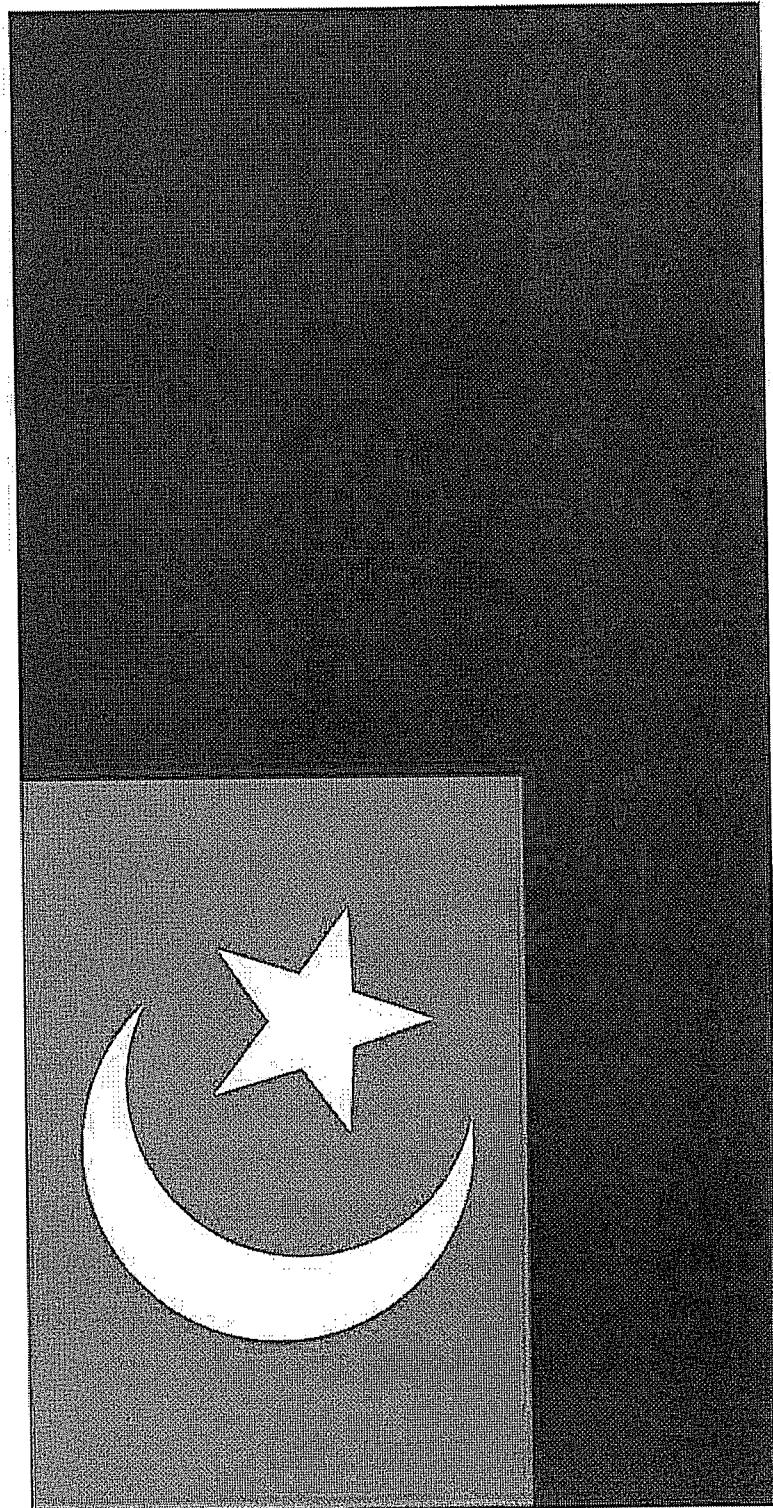
382. The *Temple Case*, relied upon by Singapore, illustrates the point well. In that case, the issue arose in the context of a visit paid to the Preah Vihear temple in 1930 by Prince Damrong, formerly Minister of the Interior and at that time President of the Royal Institute of Siam. The issue was addressed by the Court in the following terms:

“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.”⁵⁰¹

Thus the reception of the Prince on a quasi-official occasion was intended to be an affirmation of title. It took place in such a manner that he must have seen its implications, and it demanded a reaction.

383. In the present case, for the reasons given below, flying the Singapore Marine Ensign above Horsburgh Lighthouse was not an act *à titre de souverain*; indeed it was not even capable of being so. However, even assuming *arguendo* that such an act was capable of evidencing sovereignty, Singapore’s claim is flawed on its facts for two reasons.

⁵⁰¹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports 1962 p. 6 at p. 30.



384. First, Singapore presents no evidence at all to suggest that flying the ensign in this case was intended as an act *à titre de souverain*. The documentary evidence Singapore adduces points to the flying of the ensign as a routine matter of lighthouse administration, not as a manifest display of sovereignty demanding a reaction from Malaysia.

385. Second, it is important that the Court should have an accurate view of the “open and notorious” character of the conduct that Singapore relies upon. Horsburgh Lighthouse is almost 100 feet high. The Singapore Marine Ensign—shown in Images 19 and 20 following page 108 of Singapore’s Memorial—is remarkably similar to the Johor State flag (see **Insert 3** on the opposite page). The background against which the largely dark blue ensign is to be seen is black. As the photographs in Singapore’s Memorial illustrate, it is not easy to see a flag flying above Horsburgh Lighthouse at all, let alone to identify that flag as the Singapore Marine Ensign. The point is clear from Images 3, 4 and 16 in Singapore’s Memorial.⁵⁰² In Images 3 and 4, which are recent high quality colour photographs of the lighthouse taken aerially and from a short distance, it is not possible to see the ensign at all. In Image 16, which is an enlarged high quality photograph of the whole facility taken from relatively close up and at a height corresponding almost with the top of the VTIS tower, it is virtually impossible to make out the ensign (but for Singapore’s annotation on the photograph pointing it out). Even if it were possible to discern a flag, it is quite impossible to identify what flag or ensign it is. It is fanciful to suggest that the flying of the ensign, even if it took place on a regular basis, was an “open and notorious” mark of sovereignty. The contrast with the quasi-official visit of the Thai Prince to a disputed temple, the French *tricolor* flying, is obvious.

⁵⁰² These follow pp. 10 and 102, respectively, of Singapore’s Memorial.

(ii) *Flying the Singapore Marine Ensign on Horsburgh Lighthouse is not an act à titre de souverain*

386. But quite apart from these factual issues, the essential point is that the flying of the Singapore Marine Ensign above Horsburgh Lighthouse is not an act *à titre de souverain*.⁵⁰³ Unlike national flags flown on land territory, ensigns are not marks of sovereignty but of nationality. They are worn principally by ships.⁵⁰⁴ "Every ship must have a nationality and fly her national ensign".⁵⁰⁵ Typically, the dimensions and the design of ensigns differ from flags used for non-marine activities,⁵⁰⁶ although ensigns may incorporate elements of, or even the entire, national flag as a part of its design.

387. Ensigns take various forms. As Captain Glass and Mr Brewer observe, the ensigns authorised to be worn by British ships are the Red Ensign (worn by merchant shipping), the White Ensign (worn by the Royal Navy), and the Blue Ensign (worn by ships belonging to certain public authorities and by some members of the Commonwealth).⁵⁰⁷ They note also that lighthouse authorities often have their own ensign: in the case of Trinity House, this is an adaption of the British Red Ensign.⁵⁰⁸ Colour prints of the Trinity House ensigns are attached as Annex 3 of the Glass-Brewer Report.

388. As the Glass-Brewer Report also indicates, there is no uniform practice concerning the flying of ensigns or flags above lighthouses. This is a matter determined by each lighthouse authority separately in their Service Regulations. Trinity House addresses the matter in some detail in Pamphlet I of its Service Regulations, *Flags and Their Uses* (Annex 5 of the Glass-Brewer Report). The provisions on flying ensigns in the Singapore Standing Orders & Instructions mirror, in a much abbreviated form, the Trinity House provisions.

⁵⁰³ See also above, paragraphs 288-296.

⁵⁰⁴ See Glass-Brewer Report, para. 30: Annexes, vol. 2, Annex 1.

⁵⁰⁵ IALA Note, Answer 5. Also, UNCLOS 1982, Art. 91.

⁵⁰⁶ IALA Note, Answer 5: Annexes, vol. 2, Annex 3.

⁵⁰⁷ Glass-Brewer Report, para. 30: Annexes, vol. 2, Annex 1.

⁵⁰⁸ Ibid.

389. Trinity House and the other General Lighthouse Authorities of the United Kingdom and the Republic of Ireland used, as a matter of common practice, to fly their ensigns above the lighthouses they operated. Today Trinity House flies its ensign on lighthouses on special occasions when they are manned.⁵⁰⁹ This does not signify the sovereign status of the territory on which the lighthouse is situated.

390. The enquiries made of a cross-section of IALA members by Captain Glass and Mr Brewer indicates that little, if any, significance attaches to the flying of ensigns above a lighthouse. In particular, there is no appreciation amongst the professional lighthouse community, which is mostly made up of national authorities, that the flying of an ensign above a lighthouse has any bearing on sovereignty. The evidence of Captain Glass and Mr Brewer, Commander Christmas and Rear-Admiral Leclair is at one on this point, as the following extracts show:

“Generally, if the Ensign of a lighthouse authority was flown above a lighthouse it would be understood by a mariner or lighthouse operator as identifying the lighthouse authority, e.g. Trinity House. If a flag flown above a lighthouse was a national flag, it would be understood by a mariner or lighthouse operator as signifying the country entrusted with the operation of the lighthouse.”⁵¹⁰

“Pamphlet I of the Trinity House Lighthouse Service Regulations contains the detailed instructions issued by Trinity House to Lighthouse Keepers on the flying of flags... Much of this is self-explanatory and gives the background to the use of the Trinity House Ensign, which is still flown at our main depots, although less so at lighthouses – due to de-manning. Trinity House Lighthouses bear the Corporation’s crest. Whilst this may be regarded as a sign of ownership or possession of the property, it cannot, quite clearly, be regarded as a symbol of sovereignty as the ownership and operation of lighthouses by Trinity House does not necessarily correspond to the sovereignty of the State on which the lighthouse is situated.”⁵¹¹

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid., para. 32.

⁵¹¹ Ibid., para. 48.

“The significance of any flag flown above a lighthouse would be two-fold:

- the flag would almost certainly indicate from which State the operating organisation owed its existence. The British Lighthouse Authorities’ flags, which are still flown above some lighthouses on some occasions, have a Union Flag as part of the design, while most countries fly the national flag;
- the flag would almost certainly indicate that the lighthouse was manned. The absence of a flag would not in itself, however, indicate that the lighthouse was not manned.”⁵¹²

“The use of a Marine Ensign above a lighthouse has no special significance for mariners. Generally, it cannot be identified by ships crossing offshore due to its size and the distance.”⁵¹³

391. Rear-Admiral Thanabalasingam echoes this view from the perspective of a naval officer:

“I am not an expert on lighthouses, but, to a naval officer, the flying of the Singapore Marine Ensign, or even the Singapore Naval Ensign, above the [Horsburgh] lighthouse would be understood as indicating only that Singapore managed the lighthouse, not that it had sovereignty over the island on which the lighthouse stood.”⁵¹⁴

392. It follows from this that no significance can attach to flying the Singapore Marine Ensign above Horsburgh Lighthouse. The flying of ensigns by lighthouse authorities above the lighthouses for which they are responsible is a routine matter. There is no appreciation, amongst the professional lighthouse community, that flying flags or ensigns above lighthouses has any bearing on sovereignty.

⁵¹² Christmas Report, para. 7.2: Annexes, vol. 2, Annex 2.

⁵¹³ IALA Note, Answer 5: Annexes, vol. 2, Annex 3.

⁵¹⁴ Affidavit of Rear-Admiral Thanabalasingam, para. 35: Annexes, vol. 2, Annex 4.

(iii) *The alleged contrast with the Pulau Pisang Lighthouse*

393. Singapore makes much of what it alleges to be divergent Malaysian practice in respect of Horsburgh Lighthouse by comparison to that regarding Pulau Pisang Lighthouse. It is mistaken on this point.

394. Pulau Pisang is a Malaysian island. Singapore operates the lighthouse which was built there in 1886. The island is much larger than PBP and has a resident Malaysian population.

395. The fact that Singapore was flying its Marine Ensign above Pulau Pisang Lighthouse was the subject of specific complaint by the Youth Wing of the United Malays National Organisation dated 28 May 1968 in a letter addressed to the Permanent Secretary of the Malaysian Ministry of Foreign Affairs.⁵¹⁵ As the matter threatened to become a domestic political issue, Malaysia raised the issue with Singapore and, following a meeting on 6 September 1968, Singapore agreed that the ensign would no longer be flown above the lighthouse.

396. It must be emphasised that Malaysia did not regard the flying of the Singapore Marine Ensign above Pulau Pisang Lighthouse as a mark of sovereignty: sovereignty was not and is not in dispute with respect to the island, including that part of it on which the lighthouse is located. The flying of the ensign above the lighthouse was raised with Singapore in view of the domestic political sensitivities to which it risked giving rise.

397. The flying of the Singapore Marine Ensign above Horsburgh Lighthouse became an issue *en passant* in 1978 in the context of discussions between Malaysia and Singapore about a joint hydrographic survey for purposes of "demarcating the international boundary between Singapore and

⁵¹⁵ Annexes, vol. 3, Annex 40.

Malaysia” along the Straits of Johor.⁵¹⁶ In the course of the discussions, Malaysia raised the question of Singapore’s refusal to allow a Malaysian survey team to land on PBP, indicating that the island belonged to Malaysia. This took place at a bilateral meeting in Wisma Putra (Ministry of Foreign Affairs, Malaysia) on 13 April 1978. In the course of this meeting, the Malaysian representative also raised the question of the Singapore flag being flown on Horsburgh Lighthouse. The Singapore representative responded that Singapore regarded the island as theirs. An internal Malaysian filenote of the meeting recorded the exchange as follows:

“I also raised with Kishore the question of Singapore flag being flown on the Hofsburgh [sic] Lighthouse and the refusal of Singapore authorities to allow a Malaysian Survey team to land on Pulau Batu Puteh on which the Lighthouse is situated. I expressed concern at the Singapore action as the island belongs to Malaysia. Kishore responded by saying that Singapore regards the island as theirs and they have incontrovertible proof supported by legal documents to back their claim to the island. He said that having come to know about the proposal by the Malaysian navy to undertake a survey around Horsburgh Lighthouse, Singapore immediately undertook a thorough study and research on the ownership of the island of Batu Puteh which is of vital importance to Singapore. The study was completed about 3 or 4 months ago and from the study it was established beyond any doubt that the island belonged to Singapore by treaty agreement. Singapore has in its possession the original copy of this agreement.”⁵¹⁷

398. In the light of this claim by Singapore to have “incontrovertible proof supported by legal documents”, including the “original copy of this agreement”—which, it may be observed, has never been produced—the Malaysian Ministry of Foreign Affairs set in train a review of the matter. Malaysia’s considered position, in the light of this closer review, took the form of its affirmation of title to PBP with the publication of the 1979 map. Singapore’s protest at this map in February 1980 crystallised the dispute.

⁵¹⁶ Note from the Ministry of Foreign Affairs of Malaysia to the Singapore High Commission, EC 1/78, 13 January 1978: Annexes, vol. 3, Annex 44.

⁵¹⁷ Notes on Discussion Between Mr. M. Kishore, Counsellor, Singapore High Commission and PAS (Principal Assistant Secretary) Southeast Asia on 13th April, 1978 at

399. To summarise: Malaysia first raised the matter of the flying of the Singapore Marine Ensign above Horsburgh Lighthouse with Singapore in the context of wider discussions between the two States in 1978 concerning a joint hydrographic survey. When it did so it believed that this point could be easily addressed, as in the case of Pulau Pisang. Malaysia's enquiry was met by an assertion of sovereignty over the island by Singapore on the basis of what was said to be incontrovertible proof in the form of a "treaty agreement". In the light of Singapore's claim, Malaysia adopted the reasonable response that it should investigate the matter more closely before taking further action. The dispute crystallised shortly thereafter with the publication of Malaysia's map in 1979 and Singapore's protest thereto.

F. Claims concerning control of access to the island, official visits and granting permission for surveys⁵¹⁸

400. Singapore advances a number of related claims hinging on its control over access to Horsburgh Lighthouse. In particular, it asserts that it has:

- controlled and, where appropriate, authorised access to the island by personnel from Singapore as well as from other States, including Malaysia;⁵¹⁹
- issued permits to Malaysian officials wishing to visit the island to conduct scientific surveys;⁵²⁰
- denied access by Malaysian personnel to PBP;⁵²¹

Wisma Putra (Ministry of Foreign Affairs, Malaysia), 14 April 1978 (emphasis added): Annexes, vol. 3, Annex 45.

⁵¹⁸ SM, para. 6.6(g), (h) & (i).

⁵¹⁹ SM, paras. 6.54-6.59.

⁵²⁰ SM, paras. 6.60-6.62, 7.31-7.32.

⁵²¹ SM, para. 6.63.

- given permission to Malaysia, in response to Malaysian requests, to undertake activities in Singaporean territorial waters around PBP,⁵²²
- given permission to foreign parties to operate in the waters around the island.⁵²³

(i) *Preliminary observations*

401. Before addressing the particular items of conduct to which Singapore refers, two preliminary observations are required. First, the character of PBP cannot be ignored in this discussion. 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. On this basis, Singapore implicitly seeks to characterise control over access as conduct which is relative to the island rather than simply as conduct that is relative to the lighthouse. As it does throughout its discussion of conduct, Singapore simply conflates routine conduct in the administration of the lighthouse and conduct that can properly be characterised as *à titre de souverain*.

402. Second, control over access to a lighthouse facility and its surrounding waters, including for purposes of technical and scientific surveys, is routine practice in lighthouse administration and part of the normal responsibilities of any lighthouse operator. Captain Glass and Mr Brewer describe the general practice in respect of such matters as follows:

“Secure access to the site of a lighthouse and the control of visitors is invariably the responsibility of the operator of a lighthouse. Notices similar to those on the gates of Trinity House lighthouses are quite common, declaring the premises to be private property and warning of dangers, in order to maintain security and reduce the risk of liability to trespassers.

...

Scientific and technical surveys may have the effect of interfering with the effective and reliable operation of a

⁵²²

SM, para. 7.34.

⁵²³

SM, paras. 6.65-6.67, 7.33-7.34.

lighthouse. To this end, it is common practice among lighthouse operators to require that permission is sought before any such activities are carried on in the vicinity of a lighthouse. For example, Trinity House does not allow any visitors to its lighthouses unless accompanied by the lighthouse attendant who is responsible for the security of the station – including the setting and un-setting of alarms and communications to the Operations Control Centre in Harwich. Permission to visit a particular station – whether in respect of Trinity House personnel or otherwise – is at the discretion of the regional maintenance manager of Trinity House who may deny access if maintenance or other essential works are in progress.”⁵²⁴

403. This view is echoed by Commander Christmas: “All lighthouse authorities are responsible for the security of, and access to, the lighthouses operated by them, as well as any activity by personnel within them.”⁵²⁵

(ii) *Measures regulating the conduct of lighthouse personnel*

404. Turning to the particular claims advanced by Singapore, it first refers to its 1961 and 1974 Standing Orders & Instructions regulating the conduct of lighthouse keepers.⁵²⁶ As this element has already been addressed in response to other claims made by Singapore, it suffices at this point simply to observe therefore that the drawing up of regulations of this kind is normal practice in lighthouse administration. Moreover, the Instructions to which Singapore refers are generic instructions which apply to the conduct of lighthouse personnel in all the lighthouses for which Singapore is responsible. They are not measures specific to Horsburgh Lighthouse. In particular, they regulate the conduct of personnel at the lighthouses on Pulau Pisang and elsewhere.

⁵²⁴ Glass-Brewer Report, paras. 49-50; Annexes, vol. 2, Annex 1.

⁵²⁵ Christmas Report, para. 8.7; Annexes, vol. 2, Annex 2.

⁵²⁶ SM, para. 6.54.

(iii) *Visits to the lighthouse, the logbook and visits recorded therein*

405. Singapore next refers to requests submitted to “the Master Attendant of Singapore to visit Pedra Branca” and attaches a representative sample of such requests in illustration of its control over access.⁵²⁷ It further states that:

“due to the number of applications that were received to visit the lighthouse, the Master Attendant was obliged to establish a set of rules relating to such visits, thus further demonstrating Singapore’s control over the island.”⁵²⁸

406. Singapore notes that a logbook was kept at Horsburgh Lighthouse from 1946 and contends that its entries reveal literally hundreds of visits by Singapore officials to the island without interference or objection from Malaysia.⁵²⁹ It characterises the logbook and the entries therein as evidence of Singapore’s “control over Pedra Branca”.⁵³⁰

407. The material annexed to Singapore’s Memorial in support of these contentions is remarkably insubstantial, in no case amounting to anything that even approaches conduct *à titre de souverain*. Singapore’s contentions also overstate the material on which it relies. An examination of the representative sample of requests “to visit Pedra Branca” in Annex 105 of Singapore’s Memorial shows that what was actually requested in each of the four cases cited was a visit to the “Horsburgh Lighthouse”. Of course these requests were properly made to the Master Attendant of the Port of Singapore Authority as the operator of the lighthouse. The point has already been made that control of access to a lighthouse and its associated facilities and surrounding area is a common feature of lighthouse administration.

⁵²⁷ SM, para. 6.55 & Annex 105.

⁵²⁸ SM, para. 6.55 & Annex 104.

⁵²⁹ SM, paras. 6.56-6.59.

⁵³⁰ SM, para. 6.59.

408. Next, there are the rules said to have been established by the Master Attendant “due to the number of applications that were received to visit the lighthouse”. The pleading is clear in its implication, namely, that the rules in question were established by the Master Attendant in respect of visits to Horsburgh Lighthouse because of the large number of applications to visit this lighthouse.

409. The document annexed to Singapore’s pleading shows no such thing. The document in question—Annex 104 of Singapore’s Memorial, dated 6 May 1961—records a “Visit to Lighthouses by Staff and family or friends onboard the m.v. ‘Berkas’”. As this indicates, the focus of the document is on visits to lighthouses in general, not to Horsburgh Lighthouse in particular. Indeed, there is no mention of Horsburgh Lighthouse in the document. The document addresses “permission to visit the various lighthouses by the staff of this department”. It does not even rise to the level of rules of general application. It is a staff directive which is more likely to have addressed visits by the staff of the Port of Singapore Authority to the Raffles or Sultan Shoal Lighthouses than visits to Horsburgh Lighthouse, given that Raffles and Sultan Shoal were a good deal closer to Singapore than Horsburgh and were something of a tourist attraction.

410. Then there is the logbook of visits. As the Glass-Brewer Report observes, “[i]t is common practice to have a log book to record visits to lighthouses”.⁵³¹ In fact a close examination of the almost 500 entries in the logbook in the 40 year period it covers (16 November 1946-18 August 1986) shows that the vast number of entries refer to routine inspection and maintenance visits associated with the normal operation and upkeep of the lighthouse and its associated facilities. There are unexplained gaps in the logbook. For example, there are no entries at all for the four year period from July 1979 to August 1983, notwithstanding that the lighthouse was still manned at this point and would have been supplied and serviced regularly.

⁵³¹ Glass-Brewer Report, para. 58, Annexes, vol. 2, Annex 1.

411. Of various visits recorded in the logbook by naval personnel, only two appear not to have been related in some way to hydrographic surveys. The first of these was a visit by an unidentifiable Admiralty official on 18 November 1952 “for the purpose of examining the structure as to its possible [undecipherable] for Naval requirements”.⁵³² Singapore refers to this entry specifically in support of its case, seeking no doubt to imply that it is an example of a visit to the island which had *jure imperii* purposes.⁵³³ However Singapore had no navy of its own at this point. The Singapore navy was only “officially formed on 1 April 1975”.⁵³⁴ As the Affidavit of Rear-Admiral Thanabalasingam attests, the maritime defence of both the Colony of Singapore and the Federation of Malaya was undertaken at this time (in 1952) by the British Royal Navy, with the overwhelming majority of the recruits of the Malay Section of the Royal Navy coming from Johor.⁵³⁵ In fact, the date of the visit in question, 18 November 1952, is three months after Britain established the Malayan Naval Force. Given that the identity of the Admiralty official who visited the island unclear, it is possible that Singapore is quoting as an example of its control of the island conduct which is in reality that of an official of the Malayan Naval Force. At the very least, the conduct in question would have been of a British official acting in the course of Britain’s naval responsibilities for both Singapore and Malaya.

412. The second non-hydrographic naval entry in the logbook is that of 4 March 1965 in respect of the visit by *HMS Maryton* which “landed to take prisoner – Indon?”.⁵³⁶ As is evident, this was a visit by a British, not a Singaporean, naval vessel. Not only did Singapore still not have a navy of its own but this visit occurred during the period in which Singapore was part of the Federation of Malaysia. Once again, therefore, this entry cannot be relied upon as evidence in support of Singapore’s claim.

⁵³² Logbook, p. 19.

⁵³³ SM, para. 6.57.

⁵³⁴ SM, para. 6.70.

⁵³⁵ Affidavit of Rear-Admiral Thanabalasingam, para. 11: Annexes, vol. 2, Annex 4.

⁵³⁶ Logbook, p. 72.

413. Nearly all the other "official" visits recorded in the logbook relate to the lighthouse and associated facilities and/or to the collection of meteorological data. All of these visits are consistent with common practice in the administration of lighthouses. Moreover as regards visits for meteorological and telecommunications purposes, until 1965 at the earliest, these matters were addressed on a cooperative pan-Malayan-Singapore basis. Visits to the lighthouse for these purposes cannot be characterised as visits by Singaporean personnel.

414. Of other visits recorded in the logbook, none appear to disclose anything that supports Singapore's claim to sovereignty. Horsburgh Lighthouse is an important aid to navigation operated under the responsibility of Singapore. It is not surprising that, from time to time, Singapore officials visited the facility and were granted access by the resident lighthouse keeper in accordance with his instructions. As the Glass-Brewer Report notes, in the case of Trinity House lighthouses, it was not uncommon for Trinity House personnel to conduct inspections of the lighthouses for which they were responsible "accompanied by dignitaries".⁵³⁷

415. Finally, Singapore presents an application to visit PBP "by a member of the American Piscatorial Society to study the migratory habits of fish".⁵³⁸ It is notable that this is a request for permission by a private individual, while visiting his parents in Singapore, to visit the island to tag some fish. The letter of request makes it abundantly clear that the applicant is writing to the Chairman of the Singapore Light Dues Board as it is the Light Dues Board that is responsible for the lighthouse. For example, the applicant emphasises that he "will stay completely clear of the lighthouse, and not hinder the personnel there in any way". Given Singapore's responsibility for the lighthouse, and the writer's location in Singapore, the question may be asked where else the applicant might reasonably have directed his correspondence.

⁵³⁷ Glass-Brewer Report, para. 39: Annexes, vol. 2, Annex 1.

⁵³⁸ SM, para. 6.59 & Annex 117.

In any event, the unsolicited (and isolated) letter of a private individual is hardly a solid basis on which to found a claim of conduct *à titre de souverain*.

(iv) *Permission in respect of technical and scientific surveys*

416. Singapore next contends that “when Malaysian officials wished to visit the island to conduct scientific surveys, they were also obliged to obtain permits from the relevant Singapore authorities”.⁵³⁹ It cites three examples in support of its contention: (i) a visit by Malaysian personnel as part of a joint hydrographic survey in 1974, (ii) an inspection of tide gauges by the Malaysian vessel *MV Pedoman* in May-June 1978, and (iii) a visit in April 1978 by members of the Survey Department of West Malaysia.⁵⁴⁰ Singapore also contends that, even after 1979, “Malaysia continued to seek permission from Singapore to enter the waters around Pedra Branca” and cites in support correspondence concerning a feasibility study for electrical power transfer by underwater cable from Sarawak to Peninsular Malaysia.⁵⁴¹ Not only do the examples cited not support Singapore’s case but Singapore’s discussion of the material which it annexes is actively misleading.

417. The 1974 visit concerned a joint hydrographic survey in the Rumenia Channel. The survey team was composed of members from Malaysia, Japan, Indonesia and Singapore. The survey took place over a seven to eight week period.

418. The correspondence annexed to Singapore’s Memorial shows that a few officers from the joint survey team wished “to stay at *Horsburgh Lighthouse* for tidal observations”.⁵⁴² The relevant official from the Singapore Hydrographic Department therefore wrote to the Commanding Officer of the survey vessel, *KD Perantau*, and requested, in generic terms, the names,

⁵³⁹ SM, para. 6.60.

⁵⁴⁰ SM, paras. 6.61-6.63. See also, *ibid.*, paras. 7.31-7.32.

⁵⁴¹ SM, para. 7.33-7.34.

⁵⁴² SM Annex 121, p. 1029 (emphasis added).

passport numbers, nationalities and duration of stay at Horsburgh.⁵⁴³ The response followed giving the names and the other requested information.⁵⁴⁴

419. It so happens that, in the end, the members of the joint survey team that wished to stay in the lighthouse were Malaysian nationals. This cannot obscure the fact, however, that permission was sought and granted to members of a joint survey team to stay *at the lighthouse*. This had nothing whatever to do with access to the island but simply with the use of the facilities of the lighthouse itself. As the evidence of Captain Glass and Mr Brewer, and of Commander Christmas, attest, this is standard practice for access to lighthouse facilities around the world. It has nothing to do with sovereignty over PBP.

420. An examination of the material relevant to the tide gauges inspection of May-June 1978 shows that Singapore's reliance on this element is equally misplaced and its discussion of it misleading.

421. By a note dated 9 May 1978, the Malaysian High Commission in Singapore wrote to the Ministry of Foreign Affairs of Singapore to request clearance "for the Malaysian Government vessel MV 'Pedoman' to enter Singapore territorial waters and conduct an inspection of Tide Gauges".⁵⁴⁵ The note continued: "The High Commission has the honour to inform the Ministry that the MV 'Pedoman's' movements will be as follows: ..." This was followed by 13 itemised coordinates for the period 9 May 1978 to 2 June 1978. The second of these entries refers to the "Horsburgh Lt. House Station". The last of these entries refers to "Pulau Pisang Station".⁵⁴⁶ Documents relating to further inspections undertaken at four monthly intervals thereafter—in October-November 1978 and March 1979—disclose similar information.⁵⁴⁷

⁵⁴³ SM Annex 120, p. 1027.

⁵⁴⁴ SM Annex 122, p. 1031.

⁵⁴⁵ SM Annex 137, p. 1083.

⁵⁴⁶ SM Annex 137, pp. 1083-1084.

⁵⁴⁷ Annexes, vol. 3, Annex 46.

422. In each case, the "stations" listed in the correspondence concerning the movements of the *MV Pedoman* included areas which fell within the territorial waters of Malaysia, Indonesia and Singapore. In no case was there any specific designation of PBP as falling within Singapore's territorial waters. This conduct does not in any way support the contention for which it is advanced.

423. These 1974 and 1978 requests by Malaysia for permission for joint survey team members to visit Horsburgh Lighthouse are not in any way unusual. As Singapore's evidence confirms, it is standard procedure for anyone going to Horsburgh Lighthouse, whether Singaporean or nationals from third States, to seek permission from the Port of Singapore Authority to visit the lighthouse. For example, the letter of 8 July 1976 from the Hydrographic Department of the Port of Singapore Authority to the Singapore Navy in response to its request to install VHF and HF systems in Horsburgh Lighthouse states: "[t]his department will have to be informed of any personnel proceeding to Horsburgh Lighthouse".⁵⁴⁸ Similarly, Article 9 of Singapore's 1974 Standing Order & Instructions to Lighthouse Personnel states that "Lightkeepers are instructed to see that no visitors are allowed to land or stay at lighthouses without a valid permit".⁵⁴⁹

424. As regards the April 1978 landing on PBP by two members of the Survey Department of West Malaysia, the correspondence annexed by Singapore in respect of this item reads as follows:

"Our Lightkeeper, Mr Lee Lai Nam, repeated that two gentlemen who claimed to be from the Survey Department, West Malaysia, landed at Horsburgh Lighthouse in mid April 1978. Their purpose was to carry out triangulation observations.

Mr Lee Lai Nam politely informed them that he could not allow them to remain at the lighthouse unless prior permission had been obtained from this office. The two gentlemen then left by the tug boat 'Tunda'.

⁵⁴⁸ SM Annex 125.

⁵⁴⁹ SM Annex 119.

The action of Mr Lee was strictly in accordance with the standing orders issued to lighthouse personnel.”⁵⁵⁰

425. This correspondence illustrates three points. First, it shows that Malaysian officials were in the habit of using PBP as a triangulation point for purposes of trigonometrical surveys. Second, it indicates that the point of difficulty surrounding this visit, such that it was, was access to the lighthouse, not the landing on the island. Third, the actions of the lightkeeper is explained by reference to the Standing Orders that governed his conduct—i.e., by reference to administrative measures—not by reference to any claim or understanding by the relevant Singapore officials that the island fell within Singapore’s sovereignty.

426. Finally, Singapore contends that, even after 1979, Malaysia continued to seek permission from Singapore to enter the waters around PBP and refers in support to two letters from the Malaysian High Commission in Singapore to the Singapore Ministry of Foreign Affairs, dated 28 January 1980 and 26 March 1980, concerning a feasibility study to be conducted concerning electrical power transfer by underwater cable from Sarawak to Peninsular Malaysia and requesting permission to undertake part of that study in Singapore waters. Singapore contends that the waters in question were the waters around PBP.⁵⁵¹

427. Once again, the evidence presented by Singapore does not support its case. The letter dated 28 January 1980 from the Malaysian High Commission encloses the “Draft Terms of Reference for the Hydrographic Survey of the Submarine HVDC Cable Route Between Peninsular Malaysia and the State of Sarawak”.⁵⁵² These Draft Terms of Reference make no mention of PBP or of Horsburgh Lighthouse but refer to a survey to “select the alternative survey routes for the interconnection between the western tip of Sarawak and the

⁵⁵⁰ SM Annex 136, p. 1081.

⁵⁵¹ SM, para. 7.34.

⁵⁵² SM Annex 143, p. 1096.

southern tip of Peninsular Malaysia and the submarine landing sites".⁵⁵³ The covering letter from the Malaysian High Commission states "I would appreciate if early approval could be granted by your Government, since the above project will covers [sic] also your territorial waters".⁵⁵⁴

428. It is not clear whether the approval that was being sought was for the terms of reference, which were attached in draft form, or for the feasibility study. Either way, the letter and the attached draft terms of reference make no mention of PBP, nor do they allude to it in any way.

429. The letter of 28 January 1980 was followed up by the letter of 26 March 1980. This attached a map showing the likely point where the said survey would take place. This shows a line from Sarawak to southern Johor which is annotated "D.C. Submarine Cable". Singapore attaches that map as Map 11 in its Memorial (after p. 154) and contends that, as "there are no territorial waters between Sarawak and Peninsular Malaysia, except for the waters around Pedra Branca", the reference to "Singapore territorial waters was obviously to the waters around Pedra Branca".⁵⁵⁵

430. There are a number of difficulties with Singapore's hypothesis. First, the letter of 26 March 1980 to which the map is attached does not refer to Singapore territorial waters. The letter describes the map simply as "showing the likely point where the said survey would take place". The letter goes on to request clearance from Singapore "for our consultant to conduct power market survey in Singapore with your government agencies as soon as possible."⁵⁵⁶ As is apparent from this, the point was not that the cable between Sarawak and Peninsular Malaysia would run through territorial waters around PBP (it did not), still less that these waters were stated to be Singaporean (they were not). Rather the point was that the project survey would also examine the

⁵⁵³ SM Annex 143, p. 1096, para. 2.1.

⁵⁵⁴ SM Annex 143, p. 1095.

⁵⁵⁵ SM, para. 7.34.

⁵⁵⁶ SM Annex 145, p. 1101.

possibilities of onward transfer of electrical power to Singapore. This is confirmed by internal Malaysian correspondence of 4 March 1980 which records that:

“the appointed Consultant has been requested to determine the ‘demand for power’ and ‘power market survey of Singapore, Brunei and Kalimantan’. In order to fulfill this request, the Consultant needs to discuss and interview the relevant foreign government agencies and electricity bodies.”⁵⁵⁷

This reading of the correspondence is supported by the map attached to the letter of 26 March 1980. As an examination of the map shows, the line depicting the “D.C. Submarine Cable” runs well to the north of PBP. Even on this rough sketch, the cable would not have approached anywhere near PBP.

431. Second, internal Malaysian correspondence concerned with this study confirms that the only foreign waters that would be affected by the study would be Indonesian waters. Thus, a telex message from the Sarawak Electricity Supply Corporation extracted in an internal Malaysian Ministry of Foreign Affairs note dated 26 February 1980 states:

“THE OBJECTIVE OF THE SURVEY IS TO DETERMINE THE SHORTEST AND MOST SUITABLE ROUTE FOR LAYING THE HVDC CABLES BETWEEN WESTERN TIP OF SARAWAK AND SOUTH-EAST POINT OF JOHORE. THE PROPOSED ROUTE IS A DIRECT LINK BETWEEN THE TWO POINTS AND A SKETCH OF THE ROUTE WOULD BE FOLLOWED BY MAIL. THE ROUTE WOULD BE SURVEYED BY A SUITABLY EQUIPED SURVEY VESSEL AND SEABED SURFACE WITHIN A WIDTH OF 250 METRES ON BOTH SIDES OF THE ROUTE WOULD BE INVOLVED. IT IS ENVISAGED THAT ONLY INDONESIAN WATER WOULD BE INVOLVED.”⁵⁵⁸

432. Third, it is evident from Singapore’s letter of permission authorising the survey to go ahead that Singapore had no appreciation at the time that the survey would go through the waters around PBP. On the contrary, Singapore

⁵⁵⁷ Letter from the Director General of the Economic Planning Unit, Malaysia, to the Secretary General of the Ministry of Foreign Affairs, Malaysia, 4 March 1980: Annexes, vol. 3, Annex 48. See also the telex from the Sarawak Electricity Supply Corporation referred to in paragraph 5 of this letter.

⁵⁵⁸ Letter from the Directory General of the Economic Planning Unit, Malaysia, to the Secretary General of the Ministry of Foreign Affairs, Malaysia, 26 February 1980: Annexes, vol. 3, Annex 47. An examination of the Report produced following the survey confirms that the only non-Malaysian waters involved in the survey were Indonesian. See “Seabed Study along the HVDC Submarine Cable Route Interconnecting Sarawak and Peninsular Malaysia as Part of the Feasibility Study for the Power System Development in Sarawak” (Bremen, December 1982). Copies of the Feasibility Study have been lodged with the Registrar.

was unclear which of its territorial waters would be the subject of the survey. This, its letter of permission of 7 June 1980 states: "Since the proposed areas for the survey would affect Singapore territorial waters, the Singapore authorities concerned would like to have the coordinates of the areas in Singapore territorial waters to be surveyed."⁵⁵⁹ The proposition that Singapore now advances was evidently not one that informed its thinking at the time.

433. Fourth, the feasibility study was eventually conducted in July-August 1982 and a Report produced. This Report makes it clear that the survey had nothing whatever to do with PBP or with waters around it. Describing the "Area of Investigation", the Report states: "the area of investigation extends from 1°55' N to 2°05' N, from Peninsular Malaysia in the west to Sarawak in the east."⁵⁶⁰ PBP is located at 1°19'48"N and 104°24'27"E.⁵⁶¹ The closest the survey came to PBP was around 40 nm to the north at coordinates 2°00.3'N and 104°24.2'E. This corresponds to the depiction on the map that was attached to the Malaysian High Commission's letter of 26 March 1980. It is nowhere near the territorial waters of PBP, and indeed the Report neither depicts PBP by name on any of its graphics nor mentions it in the text.

434. Fifth, the Survey Report indicates that various legs of the survey ended in Singapore, the port at which the survey vessel was based.

435. As all this attests, the correspondence in respect of this survey supports neither the contention that Malaysia requested permission from Singapore for the conducting of a survey in the waters around PBP nor that the survey took place in these waters. Singapore's reliance on this material in support of its case is thus wholly misplaced.

⁵⁵⁹ SM Annex 147, p. 1105.

⁵⁶⁰ "Seabed Study Along the HVDC Submarine Cable Route Interconnecting Sarawak and Peninsular Malaysia as Part of the Feasibility Study for the Power System Development in Sarawak" (Bremen, December 1982), p. 7, para. 1.1.

⁵⁶¹ MM, para. 32.

(v) *Permission given to foreigners to operate in Pulau Batu
Puteh's territorial waters*

436. Finally, Singapore contends that it "also controlled access by foreign parties to her territorial waters around Pedra Branca, and foreign parties recognized Singapore's sovereignty over Pedra Branca when seeking to engage in activities in these waters".⁵⁶²

437. In fact, Singapore makes no reference here to foreign parties, but only to a number of exchanges with one foreign party. An examination of the material annexed to Singapore's Memorial in support of this contention is instructive. It includes three letters to the Port of Singapore Authority from the English salvage company Regis Ltd., and one letter of reply to the company by the Port of Singapore Authority, all between May and July 1981. This correspondence concerns a salvage survey in an area "about 6 to 10 miles north-east of Horsburgh Light".⁵⁶³ The correspondence from Regis Ltd. goes on to state:

"the area to be looked at lies entirely within the territorial waters (as defined by accepted international practice) of the islet on which Horsburgh Light House stands."⁵⁶⁴

Subsequent correspondence from the company clarifies this further, viz.:

"The area concerned is shown on the attached diagram. It is clear of the Traffic Separation Zone north of the lighthouse, and lies within the territorial waters of Horsburgh islets (assuming 12 mile limits and the customary methods of determining base-lines)."⁵⁶⁵

The letter from the Port of Singapore Authority in response to these enquiries, dated 2 July 1981, grants permission for the carrying out of the sidescan survey subject to various conditions.

⁵⁶² SM, para. 6.65.

⁵⁶³ SM Annex 151, p. 1115.

⁵⁶⁴ SM Annex 152, p. 1117.

⁵⁶⁵ SM Annex 153, p. 1119.

438. A number of points on this material are required. First, Regis Ltd. is a private company, not an agency of a foreign State. The actions of a private company in mistaken appreciation of questions of sovereignty or the extent of territorial waters cannot amount to conduct confirmatory of Singapore's claim to title. Still less is it opposable to Malaysia.

439. Second, Captain Glass and Mr Brewer observe that:

“[s]cientific and technical surveys may have the effect of interfering with the effective and reliable operation of a lighthouse. To this end, it is common practice among lighthouse operators to require that permission is sought before any such activities are carried on in the vicinity of a lighthouse.”⁵⁶⁶

While it is not clear whether the sidescan survey proposed by Regis Ltd. was of a kind that might have interfered with the effective operation of Horsburgh Lighthouse, a salvage company may be expected to know that scientific and technical surveys could interfere with lighthouse systems. Their request for permission to conduct the survey from the lighthouse operator would thus have been prudent conduct simply reflecting the realities of lighthouse administration.

440. Third, the language of the correspondence by Regis Ltd. is interesting. Instead of simply referring to the survey area as “Singapore territorial waters”, which would have been the simplest formulation to use, the company used more qualified language, viz., the area lies within the territorial waters of “the islet on which Horsburgh Light House stands”. This language is qualified, suggesting that Regis Ltd. were not themselves sure that the waters in question were Singapore waters. Had they been, the simpler formulation “Singapore territorial waters” would have sufficed.

441. Fourth, the qualified appreciation of Regis Ltd. that the survey area that was the subject of this request might have fallen within the territorial

⁵⁶⁶ Glass-Brewer Report, para. 50.

waters of Singapore was incorrect. As the correspondence makes clear, the survey area was between 6 and 10 miles northeast of PBP. At the time, in 1981, Singapore only claimed a territorial sea of 3 nm. Although Singapore had, on 15 September 1980, signalled its intention to extend its territorial sea beyond three nm "in certain areas",⁵⁶⁷ it had not done so by the time of this correspondence. On any reading of the status of PBP, therefore, the survey area would not have fallen within Singapore's territorial waters. The point simply illustrates that appreciations of sovereignty and the extent of territorial waters by private companies are inherently unreliable.

442. Significantly, the survey area did fall within the territorial waters of Malaysia at this time as Malaysia had, in 1969, claimed a territorial sea of 12 nm. Insofar as Regis Ltd. were proceeding on the basis of some uncertain notion that a territorial sea of 12 nm had been claimed, the relevant State was Malaysia, not Singapore.

443. Fifth, Singapore's "permission" for the conducting of the survey in July 1981 occurred after the dispute with Malaysia had crystallised. As the survey area could not, even by reference to Singapore's conduct at the time, have fallen within Singapore's claimed territorial waters, this permission can only be seen in self-serving terms as post-critical date conduct.

444. Sixth, Malaysia knew nothing of the correspondence with Regis Ltd. at the time, and so it is not conduct which Malaysia could have objected to.

⁵⁶⁷ SM Annex 148.

**G. Naval patrols and the installation of military communications
equipment on Pedra Branca⁵⁶⁸**

445. Singapore contends that it was engaged in "frequent naval patrols in the territorial waters around Pedra Branca and installed military communications equipment on the island".⁵⁶⁹ It annexes in support a single Singapore Navy Operations Instruction dated 18 September 1975 which provides for the deployment of Singapore Navy "in anti-piracy and routine security patrols" across five patrol areas extending from the Sultan Shoal Lighthouse in the west to the "Horsburgh Lighthouse extending North-Easterly". At its closest to the Johor coast, the coordinates of patrol area F5, from the "Horsburgh Lighthouse extending North-Easterly", are given as 01°17.5'N, 104° 20.5'E.⁵⁷⁰ Related to these patrols, Singapore also contends that it "installed military communications equipment on Pedra Branca" in May 1977.

446. A number of observations may be made regarding these contentions. First, as will be addressed in Chapter 9 below, the Royal Malaysian Navy had been engaged in naval patrols in the waters around PBP from the period immediately following the independence of Malaya on 31 August 1957 and the transfer by Britain to Malaya of the Royal Malayan Navy on 1 July 1958 all the way through the 1960s and 1970s and beyond.⁵⁷¹ Isolated instances of naval patrols by the Singapore Navy after its formation in April 1975 are hardly sufficient to undermine the long-established pattern of Royal Malaysian Navy patrols in this area.

447. Second, from the coordinates provided by Singapore concerning its sector F5 patrols, it is evident that these naval patrols by Singapore are likely to have traversed Malaysian territorial waters along the Johor coast. The

⁵⁶⁸ SM, para. 6.6(j).

⁵⁶⁹ SM, para. 6.68.

⁵⁷⁰ SM, para. 6.70; Annex 123, p. 1033.

⁵⁷¹ See below, paragraphs 533-546. See also the Affidavit of Rear-Admiral Thanabalasingam, paras. 13, 21-25, 51-75; Annexes, vol. 2, Annex 4.

coordinates given above (01°17.5'N, 104°20.5'E) would have taken the patrols within 1-1½ nautical miles of the Johor coast and the islands proximate thereto, such as Pulau Lima and Pulau Pemanggil.

448. Third, given Singapore's responsibilities for Horsburgh Lighthouse, it is not surprising that it would have taken steps to safeguard the security of the facility. As PBP lies in the middle of a strait used for international navigation, in respect of which transit passage "shall not be impeded or suspended",⁵⁷² it is equally unsurprising that Malaysia would not have taken any steps to impede passage by Singapore naval vessels in the area. Moreover, it is likely, given the Singapore Navy patrol sectors, that these patrols would have been on a transit basis, i.e., that the vessels concerned would have been *en route* rather than anchoring at any particular spot.⁵⁷³ They would not have appeared to an outside observer as patrols, and certainly not as patrols relevant to PBP which, in the language of the Court in the *Temple Case*, demanded a reaction.⁵⁷⁴

449. Fourth, as regards the installation of military communications equipment by Singapore in Horsburgh Lighthouse in May 1977, Malaysia can only observe that this was undertaken secretly, as the "restricted" or "confidential" markings on the internal Singapore communications on this matter show.⁵⁷⁵ Malaysia only became aware of this on receipt of Singapore's Memorial. This conduct by Singapore, together with other conduct of which Malaysia has only recently become aware, has raised serious concerns about Singapore's use of Horsburgh Lighthouse for non-light (and especially military) purposes.

⁵⁷² UNCLOS, Articles 38(1), 44.

⁵⁷³ See further the Affidavit of Rear-Admiral Thanabalasingam, para. 59: Annexes, vol. 2, Annex 4.

⁵⁷⁴ See above, paragraph 382.

⁵⁷⁵ SM Annexes 124-132.

**H. Claims concerning investigation of navigational hazards
and shipwrecks⁵⁷⁶**

450. Singapore claims that it has “exercised sovereign authority over Pedra Branca by investigating and reporting on maritime hazards and shipwrecks within the island’s territorial waters”.⁵⁷⁷ In support of this claim, it cites three investigations into marine casualties over a 60 year period, namely, in respect of incidents that occurred on 9 July 1920, 7 November 1963 and 29 November 1979,⁵⁷⁸ the issuing of Notices to Mariners in 1981 and 1983,⁵⁷⁹ and various investigations into marine casualties between 1985 and 1998.⁵⁸⁰

451. The issue of Notices to Mariners has already been addressed above and, but for a brief comment, requires no further discussion.⁵⁸¹ The comment concerns Singapore’s argument that when it reported to the Twelfth Tripartite Technical Experts Group Meeting on Safety of Navigation in the Straits of Malacca and Singapore (“TTEG”) in May 1983 (after the critical date) that “two wrecks in the vicinity of the Horsburgh Lighthouse had been verified”, “[n]o questions were raised as to Singapore’s jurisdiction over these hazards”.⁵⁸²

452. A review of the Report of this meeting—the full version of which is attached as an annex to this Counter-Memorial⁵⁸³—shows that this was a meeting of technical experts. The TTEG is a forum for discussion of technical issues relating to the safety of navigation in the whole area of the Malacca and Singapore Straits by experts from Indonesia, Malaysia and Singapore. It was as a result of recommendations of this group that the Traffic Separation Scheme for the Straits was implemented in 1981.

⁵⁷⁶ SM, para. 6.6(k).
⁵⁷⁷ SM, para. 6.76.
⁵⁷⁸ SM, paras. 6.77-6.79.
⁵⁷⁹ SM, paras. 6.80-6.81.
⁵⁸⁰ SM, para. 6.82.
⁵⁸¹ See above, paragraphs 366-371.
⁵⁸² SM, para. 6.81 & Annex 156.
⁵⁸³ Annexes, vol. 3, Annex 49.

453. The salient point that emerges from a review of the Report of this meeting is that the focus of the TTEG is on maritime safety issues regardless of questions of sovereignty. It is a response to the injunction in UNCLOS and SOLAS that States have a duty to cooperate in respect of such matters. It affirms precisely the opposite point to the one Singapore seeks to make. Maritime safety issues, including the administration of lighthouses, are addressed within a functional rather than a territorial framework. In the Straits of Malacca and Singapore, this goes back to the earliest days of the Straits' Lights system.

454. Moreover nothing is said in either the Report or in Singapore's pleadings about the wrecks that were verified—the nationality of the vessels, the circumstances of the incidents, etc. As the earlier discussion in this Chapter on Notices to Mariners indicates, lighthouse operators have a responsibility to warn of marine hazards to navigation.⁵⁸⁴

455. As regards the investigation of marine casualties cited by Singapore, a number of observations may be made. First, as a general proposition, both UNCLOS and SOLAS impose duties in respect of the investigation of hazards to the safety of navigation and the publication of information on such hazards. Inasmuch as Singapore had the capacity and acted to investigate such matters and publish information thereon, it was acting in accordance with best practice in the field of maritime safety. It was not acting (and did not purport to be acting) *à titre de souverain* in respect of PBP.

⁵⁸⁴ See above, paragraph 261, 369.

456. Second, while the investigation of marine casualties may or may not be taken by an authority responsible for the operation of a lighthouse, Captain Glass and Mr Brewer note that a lighthouse authority will have certain responsibilities in this regard:

“A lighthouse authority would be likely to review and survey navigational hazards, such as wrecks, shoals and sand banks, and mark any danger to navigation caused by such hazards. Who takes responsibility for the investigation of marine casualties will depend on the status of the vessel involved in the incident. In cases in which the State in whose waters the incident occurs undertakes the investigation, the Flag State of the vessel involved would be expected to cooperate in the investigation, although it may also carry out its own investigation in more serious cases. In many countries, the distinction between lighthouse authorities and the coastguard or department responsible for marine investigations is blurred, as they tend to operate as separate sections within the same government administration. In such cases, therefore, the authority responsible for the administration of lighthouses will also be responsible for the investigation of marine casualties.”⁵⁸⁵

457. Third, as regards the marine casualty on 9 July 1920 to which Singapore refers, this resulted from a collision between the British *S.S. Chak Sang* and the Dutch *S.S. Ban Fo Soon* about 1½ to 1¾ miles north of Horsburgh Lighthouse.⁵⁸⁶ At this time, Singapore was part of the Straits Settlements, a British Colony. The Court of Investigation was sitting under the terms of the Merchant Shipping Ordinance 1910, pursuant to which jurisdiction could be exercised in a wide variety of circumstances. As the Court of Investigation’s record of this incident indicates, this was an investigation into the circumstances of the collision involving a British ship at sea in which there was a question about the propriety of the conduct of the

⁵⁸⁵ Ibid., para. 33.

⁵⁸⁶ SM Annex 78, p. 681.

Master.⁵⁸⁷ The jurisdictional basis of the inquiry—whether as a matter of British⁵⁸⁸ or international law⁵⁸⁹—had nothing whatever to do with sovereignty over PBP.

458. Fourth, the marine casualty on 7 November 1963 cited by Singapore concerned the British registered cargo vessel *MV Woodburn* which ran aground on PBP on 7 November 1963. The incident was investigated by the Master Attendant of Singapore. Following his report, Singapore's Deputy Prime Minister convened a Court of Investigation under section 315 of the Merchant Shipping Ordinance. Singapore asserts that, under this section, the Minister could only appoint a Court of Investigation for a ship not registered in Singapore unless the incident "occurs on or near the coast of [Singapore]".⁵⁹⁰

459. Of course Singapore was part of the Federation of Malaysia at all material times – at the time of the incident, the time of the report of the Master Attendant, and the time of the appointment of the Court of Investigation. Moreover, the terms of section 315 of the Merchant Shipping Ordinance are not qualified by reference to distance and jurisdiction can be exercised in a wide range of cases. For example, under the Ordinance a "shipping casualty" is deemed to occur "(b) where in any place any British ship has been stranded or damaged and any of her crew who are competent witnesses to the facts are found" in Singapore.⁵⁹¹

⁵⁸⁷ The Court of Investigation reprimanded the Master of the British ship for failing to take bearings of the *S.S. Ban Fo Soon* after sighting her. SM Annex 78, p. 681.

⁵⁸⁸ Merchant Shipping Ordinance No. XXXII of 1910 (Straits Settlements), ss. 285, 288. Under these provisions (passed pursuant to powers granted by the Merchant Shipping Act 1894 (UK) s. 478), jurisdiction could be exercised, for example, "[w]here the officer of a British ship who is charged with incompetency or misconduct on board that British ship is found in the Colony", irrespective of where in the world the accident occurred. The (disputed) location of the collision near PBP was not the jurisdictional basis of the inquiry, which could equally have been held with respect to a collision within a mile or two of the Pulau Pisang light—or anywhere else for that matter.

⁵⁸⁹ Cf. *The Case of the S.S. Lotus*, PCIJ, Series A, No.10 (1927) p. 25.

⁵⁹⁰ SM, para. 6.78 (parentheses and emphasis in original).

⁵⁹¹ Merchant Shipping Ordinance, s.312: *Laws of the Colony of Singapore* (1955 edn.) vol. VI ch. 207. The power to appoint a Court of Investigation under s. 315 may be exercised, *inter alia*, "where a shipping casualty has occurred". The term "shipping casualty" is defined in s. 312.

460. There is a further dimension to this matter. Singapore places store in the fact that this incident was investigated by the Master Attendant of Singapore. The Master Attendant at the time was J.A.L Pavitt.⁵⁹² Pavitt, who at the time also carried the title Singapore Director of Marine, was a noted authority on Horsburgh Lighthouse. His own writings about the lighthouse in 1966, i.e., almost contemporaneous with the grounding of the *MV Woodburn*, express his view that Horsburgh Lighthouse was not part of Singapore.⁵⁹³ Pavitt's position on this point was clear; but he had ample ground in the Merchant Shipping Ordinance to propose a Court of Investigation into the incident, which was on any view a "shipping casualty" as defined in the Ordinance. Pavitt's investigation and the subsequent appointment of a Court of Investigation cannot be taken as conduct *à titre de souverain* by Singapore relative to PBP.

461. Fifth, as regards the marine casualty on 29 November 1979 to which Singapore refers, there is a curious paucity of information concerning this incident in the documents provided by Singapore. Thus, we are told in Singapore's Memorial that a Panamanian cargo vessel, the *MV Yu Seung Ho*, "ran aground approximately 600 metres east of Pedra Branca".⁵⁹⁴ No additional information is provided, whether on the vessel, the location or the incident. An examination of the large scale Admiralty Chart 2403 folded into the sleeve of this Counter-Memorial shows that the shallowest point in proximity to PBP to the east is about 6 fathoms in depth. It is not clear from the information that Singapore provides whether the *MV Yu Seung Ho* ran aground at this point or whether it was involved in a collision with another vessel or whether there was some other factor which might have been material to Singapore's subsequent investigation of the incident.

⁵⁹² SM Annex 109, p. 990.

⁵⁹³ MM, paras. 257-263. See also MM, paras. 227-234.

⁵⁹⁴ SM, para. 6.79.

462. The only information provided on this incident are three brief documents which are entirely barren of any information about the incident. The first is the single sentence letter, dated 4 December 1979, from the Director of Marine of the Port of Singapore Authority to Captains Thomas and Chua of the Port of Singapore Authority appointing them "to investigate into the above grounding".⁵⁹⁵ The other two are letters in almost identical terms from Captain Thomas to Mr Bang No Hyeon and Mr Bak Jong Hak, both of Korea. The letters read as follows:

"This is to inform you that after investigating the above casualty, the Minister for Communications has found you unfit for employment on Singapore registered ship[s]."⁵⁹⁶

These letters leave some doubt as to whether the *MV Yu Seung Ho* was actually a Singapore registered vessel or whether the incident had some other connection to Singapore. In any event, the information provided by Singapore is so sketchy and so lacking in precision that it should be disregarded.

463. Sixth, this leaves only the post-critical date incidents and investigations cited by Singapore. In the light of the paucity and insubstantial nature of the pre-critical date practice on which Singapore has relied, this post-critical date conduct cannot provide a foundation for Singapore's claim. Indeed, it would be quite inappropriate for this conduct to be taken into account as there is no continuity of pre- and post-critical date conduct. Malaysia does not therefore consider it necessary to address this conduct in any detail. Two brief observations may however be made.

464. First, in the light of the requirements of UNCLOS and SOLAS in respect of the investigation of marine hazards, Singapore's investigation of these incidents accords with best practice in the field and reflects its capacity in maritime field. These investigations do not amount to conduct *à titre de souverain* in respect of PBP.

⁵⁹⁵ SM Annex 139, p. 1087.

⁵⁹⁶ SM Annex 142, pp. 1093 and 1094. The first letter refers to "ship", the second refers to "ships".

465. Second, in each of the five incidents cited by Singapore between 1985 to 1998, there is a connection to Singapore.⁵⁹⁷ In two cases, the ships were registered in Singapore. In four cases, the ships were dry-docked in Singapore for repairs. In every case, the ships had just departed Singapore after taking on cargo. In every case, the ship contacted the Singapore Port Authority after the incident, either to request assistance or, in one case, to indicate that it would be returning to Singapore under its own steam. Given these factors, it is no surprise that Singapore undertook investigations. Once again, however, the investigations do not amount to conduct *à titre de souverain* in respect of PBP.

I. Claims concerning the investigation of accidental death in the waters of Pedra Branca⁵⁹⁸

466. Singapore refers to an August 1981 inquiry by the Singapore State Coroner into the deaths of three members of the Singapore armed forces when their Singapore Navy vessel capsized off PBP in June 1980. Singapore relies on the fact that the inquiry was conducted under a section of the Singapore Criminal Procedure Code which provides that, where a body cannot be found, a coroner may assume jurisdiction if he believes that the death occurred within his jurisdiction. It is apparent from the inquiry findings that the vessel in question, referred to as RSN Harbour Launch No.3, was engaged in some sort of military exercise off PBP when it capsized in rough seas with the death of three serving members of the Singapore Armed Forces.⁵⁹⁹

467. Leaving to one side the question of the character of the operation and the legality of the use of these waters for military purposes (on which Malaysia reserves its position), the fact of the Singapore State Coroner's inquiry cannot avail Singapore's case. The incident occurred on 24 June 1980,

⁵⁹⁷ SM Annexes 157, 159, 184, 198, 200.

⁵⁹⁸ SM, para. 6.6(l).

⁵⁹⁹ SM Annex 155, p. 1123 *et seq.*

after the dispute over PBP had crystallised. The inquiry took place 14 months later, in August 1981. In the circumstances, soon after the crystallisation of the dispute, the naval exercise itself appears to have been a self-serving attempt by Singapore to manufacture some *effectivité* in support of its claim to PBP.

468. As for the coroner's inquiry, it is a long-established principle of international law that warships have absolute immunity from the jurisdiction of the foreign State in whose waters they are found. From the terms of the coroner's report, there is little doubt that RSN Harbour Launch No. 3 would have come within the definition of a "warship".⁶⁰⁰ The immunity of warships was expressly affirmed in Article 22(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the operative statement of law at the time of the incident. It is expressly affirmed in Article 32 of UNCLOS, subject to limited exceptions, none of which would permit the investigation of conduct occurring on such a vessel by the authorities of a foreign State even were that conduct to have occurred in the territorial waters of that State. The most that a coastal State could lawfully do in the circumstances would be to require the warship "to leave the territorial sea immediately".⁶⁰¹

469. Seen in its legal context, therefore, jurisdiction to inquire into the service deaths that occurred in the incident which Singapore describes did indeed properly rest with the Singapore State Coroner. It did so because the incident concerned a Singapore naval vessel and serving members of the Singapore armed forces. The vessel, its crew and troops fell exclusively within Singapore's jurisdiction because of their status, not for any reason of territoriality. The incident, and the State Coroner's inquiry, does not constitute conduct *à titre de souverain* on which Singapore can properly rely in support of its claim to PBP.

⁶⁰⁰ The definition in UNCLOS Art. 29 broadly corresponds to that given in Art. 8(2) of the 1958 Convention on the High Seas.

⁶⁰¹ UNCLOS, Art. 30.

J. Claims concerning sea reclamation plans⁶⁰²

470. Singapore relies on the fact that it looked into the feasibility of undertaking a sea reclamation project around PBP as evidence that it considered the island to be Singapore territory.⁶⁰³ It says that “an invitation for tenders was published in the national newspapers”.⁶⁰⁴ In its pleading, it indicates that these events occurred in 1970.⁶⁰⁵

471. There is an initial factual error in Singapore’s pleading on this point. The circumstances to which it refers took place in 1978, not in 1970. This is evident from the material reproduced in Annex 135 of Singapore’s Memorial.

472. While the error may be typographical, it is nonetheless of some significance as it is evident that, sometime in 1977, Singapore initiated an internal process to begin to prepare its claim to PBP. The salient events are as follows.

473. On 13 January 1978, Wisma Putra (Ministry of Foreign Affairs of Malaysia) wrote to the Singapore High Commission in Kuala Lumpur concerning a “joint hydrographic survey along the Straits of Johore for the purposes of demarcating the international boundary” between them.⁶⁰⁶ A meeting between the representatives of the two sides was eventually held in Wisma Putra (Ministry of Foreign Affairs, Malaysia) on 13 April 1978 to discuss the issue. In the course of this meeting, the Malaysian representative *en passant* raised the question of the Singapore flag being flown on Horsburgh Lighthouse. The Singapore representative responded that Singapore regarded PBP as theirs. The internal Malaysian note of this meeting records the following statement by the Singapore representative:

⁶⁰² SM, para. 6.6(m).

⁶⁰³ SM, para. 6.90.

⁶⁰⁴ SM, para. 6.89.

⁶⁰⁵ SM, para. 6.88.

⁶⁰⁶ Note from the Ministry of Foreign Affairs of Malaysia to the Singapore High Commission, EC 1/78, 13 January 1978: Annexes, vol. 3, Annex 44.

“[The Singapore representative] said that having come to know about the proposal by the Malaysian navy to undertake a survey around the Horsburgh Lighthouse, Singapore immediately undertook a thorough study and research on the ownership of the island of Batu Puteh which is of vital importance to Singapore. The study was completed about 3 or 4 months ago and from the study it was established beyond any doubt that the island belongs to Singapore by treaty agreement. Singapore has in its possession the original copy of the agreement.”⁶⁰⁷

474. As this makes plain, by mid-April 1978, Singapore already had in its possession an internal study, completed 3 or 4 months earlier (i.e., around December 1977 or January 1978), setting out its claim to PBP. The study was presumably initiated some months before this as it was characterised by the Singapore representative as a “thorough study”.

475. So by the time Singapore came to invite the tenders for the reclamation works on which it now relies—on 27 January 1978—it evidently had its claim to PBP in mind.

476. Singapore refers to “an invitation for tenders [which] was published in the national newspapers”.⁶⁰⁸ Following receipt of Singapore’s Memorial, Malaysia’s researches into this issue were able to identify only one advertisement published on one day in the *Straits Times*, i.e., on 27 January 1978. The implication in Singapore’s pleadings of substantial invitations to tenders, widely published over an extended period is thus misleading. Moreover, an examination of the actual Tender Notice on the day in question is revealing. The Notice is reproduced at Annex 135 of Singapore’s Memorial. It invites tenders for five proposed works, of which one concerned the works in question. The reclamation works were described in the following terms:

⁶⁰⁷ Notes on Discussion Between Mr. M. Kishore, Counsellor, Singapore High Commission and PAS [Principal Assistant Secretary] Southeast Asia on 13th April, 1978 at Wisma Putra (Ministry of Foreign Affairs, Malaysia), 14 April 1978 (emphasis added): Annexes, vol. 3, Annex 45.

⁶⁰⁸ SM, para. 6.89.

“RECLAMATION AND SHORE PROTECTION
WORKS AT HORSBURGH LIGHTHOUSE
Tender Deposit: \$1,500.00
Closing Date: 21 Feb 78”.

477. This Notice is what Singapore now relies upon as *effectivité* supporting its claim to title over PBP—an invitation to tender published on one day in one Singapore newspaper, which simply refers to unparticularised works at Horsburgh Lighthouse, at a time when Singapore had already decided to make a new claim to sovereignty over PBP based on a “treaty agreement” which it has never yet managed to produce.

478. Two further observations are warranted. First, the tender explicitly linked the proposed reclamation works to Horsburgh Lighthouse, describing them as “shore protection works at Horsburgh Lighthouse”. The observations by Captain Glass and Mr Brewer on this point are instructive:

“If such work were necessary in connection with providing additional facilities for the operation of the lighthouse and ancillary equipment, including, for example, the construction of a helipad, boat landing area or antenna base, this would fall within the scope of responsibility of a lighthouse authority and could be undertaken by them. If such work was not necessary for purposes of the operation and maintenance of the lighthouse, it would not come within the scope of responsibility of a lighthouse authority and would not be undertaken by them.”⁶⁰⁹

479. The Tender Notice does not describe specifically what the proposed works were for. It only indicates in general terms that they were for the lighthouse. On its face, this was conduct in the administration of the lighthouse.

480. Second, the Tender Evaluation Report for these proposed works that Singapore annexes to its Memorial is marked “Secret”. It is not a report which

⁶⁰⁹ Glass-Brewer Report, para. 54: Annexes, vol. 2, Annex 1.

Malaysia had previously seen and not one to which Malaysia might have been expected to respond.

K. Conclusions

481. Singapore's claims of conduct are spread over two Chapters and almost 70 pages of its Memorial. Some items are addressed in more than one place and are cited in support of more than one proposition. Other items are addressed *en passant*. The preceding review seeks to address each and every item of conduct advanced by Singapore in support of its claim.

482. It emerges clearly from this review that there is not a single item of conduct—not a single item from the array of conduct that Singapore has produced—in support of Singapore's claims. In a significant number of cases, the claims are not supported by the material that Singapore annexes to its Memorial. Singapore's pleadings on these elements are characterised by omissions, misstatements and inaccuracies, some highly material.

483. In many cases the conduct relied on has no specific reference to PBP at all, or references to Horsburgh Lighthouse appear among a series of references to lighthouses administered from the Singapore station, including lighthouses admittedly on Malaysian territory. As this Court said in the *Sipadan and Ligitan* case, 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."⁶¹⁰

484. Even where the material does contain a specific reference to Horsburgh Lighthouse, in every case prior to the critical date (and in most of the cases since) the conduct cited by Singapore is simply part of the general conduct that would be undertaken by any operator of a lighthouse. It is not conduct à

⁶¹⁰ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment 17 December 2002 at para. 136, cited in SM, para. 6.106.

titre de souverain. As has been shown, in the isolated cases in which the conduct cited goes beyond conduct in the administration of a lighthouse, it takes place after the critical date and is self-serving in the context of this dispute. There is nothing—nothing—in the conduct relied upon by Singapore that supports Singapore's case.

Chapter 9

MALAYSIAN CONDUCT SUPPORTIVE OF ITS CLAIM TO SOVEREIGNTY

Introduction

485. In its Memorial Singapore makes various claims about Malaysian conduct concerning PBP. It contends that Malaysia (a) never carried out sovereign acts in respect of the island,⁶¹¹ (b) never protested “against any of the constant clear and public manifestations of State authority by Singapore”,⁶¹² (c) recognised Singapore’s sovereignty through its silence in the face of Singaporean conduct⁶¹³ and by requesting authorisation from Singapore for access to PBP waters,⁶¹⁴ and (d) formally acknowledged Singapore’s sovereignty,⁶¹⁵ this element being later recast as a disclaimer of Malaysian title.⁶¹⁶ In large measure, these claims are simply the corollary of the claims that Singapore advanced in respect of its own conduct, the material being relied upon twice, first as conduct *à titre de souverain* by Singapore, second as an acknowledgement of title by Malaysia.⁶¹⁷ Malaysia does not consider it necessary to respond to these arguments twice. The response to Singapore’s claims which are hinged on its own conduct is straightforward. As has been shown in Chapter 8, Singapore’s pre-critical date conduct either had no specific relation to PBP or was conduct that would have been undertaken by any operator of a lighthouse as part of its administrative responsibilities. It was not conduct *à titre de souverain*. It did not, in the language of the Court in the *Temple Case*, demand a reaction from

⁶¹¹ SM, para. 6.112.

⁶¹² SM, para. 6.113.

⁶¹³ SM, paras. 7.6-7.19.

⁶¹⁴ SM, paras. 7.31-7.37.

⁶¹⁵ SM, para. 7.29.

⁶¹⁶ SM, Chapter VIII.

⁶¹⁷ The point is expressly made in SM, para. 7.28.

Malaysia.⁶¹⁸ These issues have been explored fully in the preceding Chapter. This relates in particular to Singapore's claims of silence and acquiescence (items (b) and (c) above). Nothing more needs to be said on these elements.

486. There remain two claims concerning Malaysian conduct that require some further response, supplementing the points made in Malaysia's Memorial. These are the claims (a) that Malaysia never carried out sovereign acts in respect of PBP and (d) that Malaysia formally acknowledged Singapore's title and/or disclaimed its own title to the island.⁶¹⁹ Before addressing these two issues, a number of general observations are necessary.

A. General observations

(i) *Historical interaction between Malaysia and Singapore and the character of Pulau Batu Puteh*

487. The history of the interaction between Malaysia and Singapore and the character of PBP are germane to an evaluation of the conduct relied upon by the Parties in this case. As the review of the Straits' Lights system in Chapter 7 showed, the independence of Malaya (in 1957) and Singapore (in 1965) was preceded by over a century of interaction at various levels between the Malay States and the Straits Settlements under the British colonial framework. This was not only evident in the field of aids to navigation—including lighthouse management—but also, for example, in defence, railways, water supplies, telecommunications and meteorology. The close interaction continued between Malaya and Singapore, culminating in the incorporation of Singapore into the Federation of Malaysia between 16 September 1963 and 9 August 1965. Even after Singapore separated from Malaysia, close links have continued to exist. For example the Separation Agreement provided for

⁶¹⁸ See above, paragraph 382.

⁶¹⁹ Malaysia's conduct, both bilateral (with Singapore) and unilateral, is addressed in MM, paras. 219-244, 268-282. The question of alleged acknowledgement or disclaimer is addressed at MM, paras. 235-243.

Malaysia's continued involvement in Singapore's defence.⁶²⁰ The Republic of Singapore Navy was only "officially formed on 1 April 1975".⁶²¹ From 12 July 1958 until the early 1980s, the Royal Malaysian Navy was principally based at its Woodlands Naval Base in Singapore. This Base was only finally vacated by Malaysia and handed over to Singapore towards the end of 1997.⁶²²

488. The administration of Horsburgh Lighthouse by the Straits Settlements was one element in this interaction. A number of the key lighthouses which were part of the Straits' Lights system were administered from Singapore. Others were administered from elsewhere in the Straits Settlements.⁶²³ This system was developed without prejudice to issues of territorial sovereignty. This was particularly evident in the cases of two of the five "Singapore Group of Lighthouses" which although administered from the Singapore station were situated on Johor territory.⁶²⁴

489. The character of PBP is also relevant to a review of conduct, and is likewise lacking in Singapore's Memorial. As Malaysia noted in its Memorial, given the tiny surface of the island and the permission given for its use as the location of Horsburgh Lighthouse, the conduct that could be expected from Malaysia is conduct in respect of the maritime spaces around the island, including the use of these waters, naval patrols and maritime delimitation.⁶²⁵ Key elements of Malaysian conduct were addressed in Malaysia's Memorial.⁶²⁶ This aspect is supplemented by further discussion in Section C of this Chapter below.

⁶²⁰ See the Affidavit by Rear-Admiral Thanabalasingam, para. 21: Annexes, vol. 2, Annex 4.

⁶²¹ SM, para. 6.70.

⁶²² Affidavit of Rear-Admiral Thanabalasingam, paras. 11-15, 21-25.

⁶²³ Viz., Malacca and Penang. See above, paragraph 322.

⁶²⁴ See above, paragraph 324.

⁶²⁵ MM, para. 269.

⁶²⁶ MM, paras. 270-282.

(ii) *Cooperation in the Singapore Straits in the field of maritime safety and related matters*

490. Unsurprisingly, conduct in respect of maritime safety issues and related matters in the Singapore and Malacca Straits has long been characterised by the cooperation between the littoral States, Indonesia, Malaysia and Singapore. This cooperation is particularly evident at the technical level. Experts in maritime safety, hydrographic and related areas from the three States work closely on issues ranging from the implementation of the traffic separation scheme in the Straits, conducting joint hydrographic surveys in the area and environmental protection.

491. A number of examples of Malaysian participation in these cooperative initiatives can be given. First, Malaysia, Singapore and Indonesia cooperate closely within the framework of the Tripartite Technical Experts Group on Safety of Navigation in the Straits of Malacca and Singapore ("TTEG"). This element was addressed in the preceding Chapter in the context of claims by Singapore that Malaysia did not assert sovereignty over PBP in one meeting of this group in which Singapore noted that two wrecks in the vicinity of Horsburgh Lighthouse "had been verified".⁶²⁷

492. The TTEG is a tripartite forum for discussion by experts of technical issues relating to the safety of navigation in the Malacca and Singapore Straits. The Traffic Separation Scheme for the Straits came about as a result of cooperative initiatives between the three coastal States.⁶²⁸ Malaysia played an active role in these developments. Malaysia's participation in these endeavours attests to its interests in this area which includes PBP and its surrounding waters. But the TTEG is not a forum for dealing with bilateral issues.

⁶²⁷ See above, paragraphs 451-454.

⁶²⁸ See Annex B of the TTEG Report: Annexes, vol. 3, Annex 49.

493. Second, as has also already been noted, Malaysia, Singapore and Indonesia put forward a joint proposal within the framework of the IMO Sub-Committee on Safety of Navigation for a "Mandatory Ship Reporting System in the Straits of Malacca and Singapore".⁶²⁹ Malaysia's involvement in this exercise similarly attests to its interests in the area including PBP and its surrounding waters.

494. Third, Malaysia, together with Singapore and Indonesia, has participated actively over many years in joint hydrographic surveys of the waters of the Malacca and Singapore Straits, including the waters around PBP. In 1964, in the period in which Singapore was part of the Federation of Malaysia, the Royal Malaysian Navy assumed responsibility for coastal and offshore surveying of Malaysian waters. A hydrographic survey unit was established within the Royal Malaysian Navy in 1965 in order to meet Malaysia's defence hydrographic survey requirements.

495. Correspondence of 24 February 1967 from the Director of Marine, Malaysia to the Secretary to the Ministry of Transport of Malaysia, addressed the responsibility of the Royal Malaysian Navy to undertake hydrographic surveys in the following terms:

"3. As you are aware the Royal Malaysian Navy have established a hydrographic survey unit in charge of a surveyor seconded from the Royal Navy. The vessel to be first used for this purpose is to be refitted soon and will be in use within a few months. At the same time, the additional staff required to carry out surveys is now either being trained or have already been trained.

4. According to previous agreements on the division of responsibility of surveying, the Royal Malaysian Navy was to be responsible for all Malaysian waters other than within the limits of ports."⁶³⁰

⁶²⁹ See above, paragraph 365.

⁶³⁰ Letter dated 24 February 1967 from J. Groves, Director of Marine, Malaysia, to the Secretary to the Ministry of Transport, Kuala Lumpur, paras. 3-4; Annexes, vol. 3, Annex 39.

496. To give an example of one such survey, in March-April 1974, the Royal Malaysian Navy Survey Ship *KD Perantau* undertook a hydrographic survey of the area around PBP. As noted in the *Report of the 3rd Joint Hydrographic Survey in Malacca-Singapore Straits*, participants from Indonesia, Japan and Singapore joined this survey.⁶³¹ The area surveyed included that around PBP, with the survey proceeding initially by the setting up of a tide pole at the pier leading to Horsburgh Lighthouse.⁶³² A subsequent survey of this area by the Royal Malaysian Navy in the period July-October 1974 included the establishment of a tide pole at Horsburgh Lighthouse.⁶³³

497. These joint hydrographic surveys do not represent exclusively Malaysian conduct. The surveys took place in the waters of all three participating States. What these surveys do show, however, is that Malaysia and Malaysian personnel have always been involved in charting the waters around PBP, that they have used the lighthouse on PBP as an inspection point for these surveys, and that they have landed on the island to take measurements. As with the preceding examples of cooperative initiatives, Malaysian involvement in these hydrographic surveys attests to its continuing interests in PBP and its surrounding waters.

498. Fourth, in the context of this discussion of cooperative initiatives, it is convenient to address Singapore's specific claim of silence on Malaysia's part. In its Memorial, Singapore contends that "one would not have expected Malaysia to have remained silent on the several solemn occasions when international decisions were made relating to the legal regime of waters in the region".⁶³⁴ In particular Singapore refers to two "crucial occasions" on which it contends that a statement of reservations might have been expected by Malaysia. The first occasion was what Singapore describes as "the adoption

⁶³¹ Report of the 3rd Joint Hydrographic Survey in Malacca-Singapore Straits, August 1974, p.13: Annexes, vol. 3, Annex 41.

⁶³² Ibid.

⁶³³ Report of the 4th Joint Hydrographic Survey in Malacca-Singapore Straits, April 1975, p. 18: Annexes, vol. 3, Annex 42.

⁶³⁴ SM, para. 7.19.

of the Joint Statement on the Malacca and Singapore Straits signed by Indonesia, Malaysia and Singapore on 16 November 1971".⁶³⁵ The second was "the discussions that led to the adoption by the Inter-Governmental Maritime Consultative Organisation ('IMCO') Assembly, on 14 November 1977, of its Resolution 375 (X) establishing a new navigation scheme in the Horsburgh Light Area".⁶³⁶ Neither example helps Singapore's case.

499. As the press statement attached at Annex 116 of Singapore's Memorial shows, the November 1971 "occasion" was a joint statement issued by Indonesia, Malaysia and Singapore following consultations between them "with a view to adopting a common position on matters relating to the Straits of Malacca and Singapore". The statement did not mention PBP. It did not address issues relevant to the sovereignty of any territory, land or maritime. In its principal paragraphs it simply affirmed that:

"(i) the three governments agreed that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal States concerned;

(ii) the three governments agreed on the need for a tripartite cooperation on the safety of navigation in the two straits;

(iii) the three governments agreed that a body for co-operation to co-ordinate efforts for the safety of navigation in the Straits of Malacca and Singapore be established as soon as possible and that such body should be composed of only the three coastal states concerned."⁶³⁷

No reservation of territorial rights by Malaysia in respect of PBP was required by this consultation, just as it was not required in respect of any other portion of Malaysian land or maritime territory. There was nothing in the consultation that warranted it, whether on the part of Malaysia or (for that matter) of Singapore.

⁶³⁵ SM, para. 7.19 & Annex 116.

⁶³⁶ SM, para. 7.19 & Annex 134.

⁶³⁷ SM Annex 116, pp. 1007-1008.

500. The same is true for the other "occasion" advanced by Singapore, the passing of the IMCO Resolution A.375(X) of 14 November 1977. The purpose of the Resolution was to adopt "the new routing system in the Straits of Malacca and Singapore including traffic separation schemes, deep water routes and rules described in Annexes I to V to this Resolution".⁶³⁸ The Resolution endorsed "the necessity that all oil tankers navigating through the Straits shall be adequately covered by relevant insurance and compensation schemes for oil pollution damage, including clean-up costs".⁶³⁹ Rather than focusing on the Horsburgh Light Area, as Singapore implies in its pleading, the Resolution was concerned with navigation through the Straits of Malacca and Singapore as a whole. It had nothing whatever to do with unresolved issues of sovereignty, land or maritime.⁶⁴⁰ Thus the occasion of IMCO Resolution A.375(X) did not call for any reservation or declaration of territorial rights by Malaysia in respect of PBP. There was nothing in either the Resolution or the consultations leading up to it that warranted such a reservation or declaration, as shown equally by the absence of any declaration by Singapore regarding PBP.

(iii) *The scope of Malaysian conduct*

501. Singapore contends that Malaysia never carried out sovereign acts in respect of PBP and that it formally acknowledged Singapore's sovereignty. This is inaccurate. In its Memorial, Malaysia drew attention to various items of conduct which affirmed Malaysian sovereignty over PBP. The conduct was not only unilateral Malaysian conduct but also bilateral conduct by Malaysia and Singapore together which was supportive of Malaysia's title. This bilateral conduct included:

⁶³⁸ IMCO Resolution A.375(X), 14 November 1977, sixth preambular paragraph: SM Annex 134, p. 1057.

⁶³⁹ Ibid., seventh preambular paragraph: SM Annex 134, p. 1057.

⁶⁴⁰ Ibid., Annex III: SM Annex 134, p. 1060.

- the Straits Settlements and Johore Territorial Waters Agreement, 1927, which contains a detailed description of the territorial limits of Singapore;⁶⁴¹
- the Straits' Lights system;⁶⁴²
- the 1953 Correspondence.⁶⁴³

502. In addition, the following items of unilateral Malaysian conduct (or conduct involving third States), also confirmatory of Malaysia's title, were addressed in Malaysia's Memorial:

- 1968 Malaysian naval charts showing PBP and its surrounding waters to be Malaysian territorial waters;⁶⁴⁴
- a 1968 Petroleum Agreement Between the Government of Malaysia and Continental Oil Company of Malaysia;⁶⁴⁵
- the 1969 delimitation of Malaysia's territorial sea in the area around PBP;⁶⁴⁶
- the 1969 Indonesia-Malaysia Continental Shelf Agreement.⁶⁴⁷

Further elements of Malaysian conduct in respect of PBP are addressed in Section C below.

B. The 1953 correspondence

503. Singapore claims that Malaysia "made an express disclaimer of title to Pedra Branca, which was also a formal confirmation of her recognition of Singapore's sovereignty".⁶⁴⁸ Chapter VIII of Singapore's Memorial addresses this matter at length by reference to a 1953 exchange of correspondence between the Colonial Secretary, Singapore and the Acting State Secretary, Johor. Singapore contends that the correspondence of the Acting State

⁶⁴¹ MM, paras. 190-192, 220-221.
⁶⁴² MM, paras. 222-234, and see above, Chapter 7.
⁶⁴³ MM, paras. 235-243.
⁶⁴⁴ MM, paras. 270-273.
⁶⁴⁵ MM, paras. 274-278.
⁶⁴⁶ MM, para. 279.
⁶⁴⁷ MM, paras. 280-281.
⁶⁴⁸ SM, para. 7.29.

Secretary, Johor “put to rest the status of Pedra Branca vis-à-vis Johor”,⁶⁴⁹ that this letter containing “a solemn undertaking which Singapore was entitled to rely, and did rely, upon”,⁶⁵⁰ and that the letter of the Acting State Secretary, Johor was “a binding unilateral declaration made in response to a specific enquiry”.⁶⁵¹

504. The 1953 correspondence was addressed fully in Malaysia’s Memorial,⁶⁵² to which the Court is respectfully referred. The following remarks are merely supplemental.

505. Singapore relies on the statement in the letter by the Acting State Secretary, Johor to the effect that “the Johor Government does not claim ownership of Pedra Branca”. It contends that this amounts to a disclaimer of title by Malaysia or a binding unilateral declaration on which Singapore was entitled to rely.

506. What Singapore skirts over, however, is that the letter from the Singapore Colonial Secretary to the British Adviser, Johor, to which the Johor Acting State Secretary ultimately responded, 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. Singapore, still in 1953 a British colony, evidently did not hold the view that PBP had been acquired by Singapore in this manner at the time the Singapore Colonial Secretary wrote to British Adviser, Johor.

⁶⁴⁹ SM, para. 8.11.

⁶⁵⁰ SM, para. 8.17; also *ibid.*, para. 8.35.

⁶⁵¹ SM, para. 8.18.

⁶⁵² MM, paras. 235-243 & Annexes 67-70.

507. Singapore also evades an analysis of the basis of the request made by J.D. Higham, on behalf of the Singapore Colonial Secretary, to the British Adviser, Johor. His letter dated 12 June 1953, as shown in Singapore's Memorial, contains two annexes.⁶⁵³ Annex A is an extract of the Crawford Treaty and Annex B is an "Extract from a dispatch by the Governor of Singapore to the Governor-General in Bengal, 28.11.1844". The extract is the paragraph from Governor's despatch which refers to the permission granted by Johor for the construction of the lighthouse: "This Rock is part of the Territories of the Rajah of Johore, who with the Tamongong have willingly consented to cede it gratuitously to the East India Company." Between "This Rock" and "is part of the territories of the Rajah of Johor" was added "[i.e. Pedra Branca]".

508. This letter clearly shows that Singapore was aware that PBP was part of the Sultanate of Johor, that the permission to construct the lighthouse included PBP and that the Governor's reference in his dispatch to an alleged "consent to cede it gratuitously" did not evidence a cession of sovereignty. This point is confirmed by the text of the letter itself. The British authorities in Singapore sought "to clarify the status of Pedra Branca". After referring to Annex B, the letter went onto say "I would therefore be most grateful to know whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of." The letter shows that in 1953 these authorities considered that the 1844 permission to construct the lighthouse on PBP implied a transfer of property. What they wanted to know from the British Adviser, Johor, was whether there was evidence of a lease, grant or cession or other act of disposal of PBP. The answer of the Acting Secretary of State, Johor, must be read in the context of the letter to which it was replying.

509. Furthermore, while Singapore refers to the letter from the Singapore Colonial Secretary to the Singapore Master Attendant dated 13 October

⁶⁵³ SM Annex 93, vol. 6, p. 923.

1953,⁶⁵⁴ it does not address the central element of this correspondence. In this letter, the Singapore Colonial Secretary observes that, on the strength of the statement by the Johor Acting State Secretary, “the Attorney General agrees that *we can claim* [the island] as Singapore territory”.⁶⁵⁵ The internal correspondence between the Singapore Colonial Secretary and the Singapore Attorney-General of 2 October 1953 is reproduced as Annex 70 of Malaysia’s Memorial. This confirms the Attorney-General’s observation, viz.: “I think, on the strength of [the Acting State Secretary’s statement], *we can claim* Pedra Branca as Singapore territory”.⁶⁵⁶

510. Significantly, neither the Attorney-General nor the Colonial Secretary of Singapore responded to the comment by the Johor Acting State Secretary with an observation such as the following: “this confirms that Pedra Branca is Singapore territory”. They did not think it was *already* Singapore territory. Moreover they did nothing to give effect to the correspondence: at no point subsequently (until just before the critical date) did Singapore assert a claim to PBP. There was not the slightest change in Singapore’s conduct: it continued to act as it had done before, that is, to administer the lighthouse and nothing else. There was no extension of Singapore territorial waters nor any other act implying a claim of sovereignty. Nothing more was said of the matter. While Singapore now contends that it did indeed rely upon the statement by the Johor Acting State Secretary, there is no evidence at all to show that this was the case. On the contrary, further activity of Singapore clearly shows that it continued to treat PBP as not being part of Singapore.

511. It is not surprising that the Singapore Master Attendant took no steps to assert a claim to PBP, or to encourage anyone else to do so, in response to the note from the Singapore Colonial Secretary. The Master Attendant was intimately familiar with the Straits’ Lights arrangements.

⁶⁵⁴ SM, para. 8.35 & fn. 376.

⁶⁵⁵ SM Annex 97 (emphasis added).

⁶⁵⁶ MM Annex 70 (emphasis added).

512. As Malaysia pointed out in its Memorial,⁶⁵⁷ at the same time as the 1953 correspondence was taking place, the Rural Board of Singapore published a detailed list of the islands which came within the control of the Board. PBP was not on this list. And it was not just the Rural Board. Over an extended period, various official Singapore agencies produced detailed lists of the islands said to form part of Singapore: PBP was never on any of these lists.⁶⁵⁸ There was a consistent appreciation on Singapore's part that PBP was not Singapore territory.

513. At the same time, successive Annual Reports of the Marine Department of Singapore catalogued Singapore's routine administration of Horsburgh Lighthouse alongside similar works in respect of Pulau Pisang Lighthouse and the other lighthouses in the "Singapore Group of Lighthouses".⁶⁵⁹ The Annual Reports of the Marine Department attest to the fact that the waters around Horsburgh Lighthouse were Malayan rather than Singaporean waters.⁶⁶⁰

514. In any event, nothing turns on the 1953 correspondence. It is not a model of clarity from a Malaysian perspective, but nor does it advance Singapore's case. It indicates that Singapore did not in 1953 regard PBP as part of Singapore, as confirmed by other contemporaneous conduct. Singapore did nothing subsequent to this correspondence to assert a claim to PBP. Nor did Singapore rely on the correspondence in any other way. In the period that followed, the Federation of Malaya's conduct left no doubt that it considered the status of PBP and its surrounding waters to be unchanged.

⁶⁵⁷ MM, paras. 213-216.

⁶⁵⁸ MM, paras. 207-218.

⁶⁵⁹ See above, paragraph 329.

⁶⁶⁰ See above, paragraphs 324, 359-362.

C. Conduct confirmatory of Malaysia's title

515. Singapore claims that Malaysia never carried out sovereign acts in respect of PBP.⁶⁶¹ This is not the case, as has been shown in Malaysia's Memorial and in further detail above.⁶⁶² Without retracing this ground it is useful to supplement the earlier discussion with a further review of two elements of Malaysian conduct confirmatory of its title. These are, first, the use of the waters around PBP as traditional fishing waters by fishermen from south-east Johor and, second, Royal Malaysian Navy patrols in these waters. As this review will illustrate, both at the level of private practice and perception (Johor fishermen) and at the level of State practice and perception (naval patrols), PBP was consistently regarded as part of Malaysian territory.

(i) *Use of Pulau Batu Puteh waters by Johor fishermen*

516. PBP is 7.7 nm from the Johor mainland. It is 6.8 nm from the next Malaysian island, Pulau Pemanggil. Pulau Pemanggil is one of a cluster of small islands immediately off the Johor coast at Tanjung Penyusoh (Point Romania) known as the Romania or Lima islands. Other islands in this group include Pulau Lima and Pulau Besar.

517. The main fishing village along this part of the Johor coast is Sungai Rengit. Sungai Rengit is about 10 nm from PBP and about 5 nm from Pulau Besar and Pulau Lima.⁶⁶³ As the evidence of Idris Bin Yusof and Saban Bin Ahmad attest, the waters around PBP have been traditional fishing waters for Johor fishermen for generations.⁶⁶⁴

⁶⁶¹ SM, para. 6.112.

⁶⁶² See MM, Chapter 7.

⁶⁶³ Affidavit of Idris Bin Yusof, para. 2: Annexes, vol. 2, Annex 5.

⁶⁶⁴ Ibid., paras. 5, 10. See also Affidavit of Saban Bin Ahmad, para. 4: Annexes, vol. 2, Annex 6.

518. Depending on the size of boat and engine, it takes fishermen from Sungai Rengit between 30 to 90 minutes to reach PBP.⁶⁶⁵ In earlier generations, it would take a small fishing boat with a sail about 5 hours to do the trip.⁶⁶⁶ In earlier generations, fishermen would stay out for a day or more. The usual practice of local fishermen today is to go out either from dawn to dusk or from late afternoon until first light the next morning.⁶⁶⁷

519. PBP is 25.5 nm from the nearest point on Singapore's coast.⁶⁶⁸ It is about 35 nm from Singapore Harbour.⁶⁶⁹ Depending on the size of the boat and engine, it would take a fisherman from Singapore Harbour between 3 to 5 hours to reach PBP.⁶⁷⁰ Before the use of engines, it would have taken a small sailing boat from Singapore Harbour between 15 to 25 hours.

520. Attached to this Counter-Memorial are affidavits of two local fishermen, Idris Bin Yusof and Saban Bin Ahmad. This evidence is illustrative of a wider pool of similar evidence from fishermen from Sungai Rengit.

521. Idris Bin Yusof was born in 1945 in Sungai Rengit. He began as a fisherman in his mid-teens in about 1958 or 1959 and has worked as a fisherman ever since. In 1979, he was appointed as the Head of Fishermen for the group of fishermen from Sungai Rengit who had permits from the local Johor Fisheries Department to fish beyond 3 nm from the Johor coast. He occupied this position until 2000. His role was to assist the fishermen of the group and to represent their interests. From 2003, he has been Deputy Chairman of the Fishermen's Association of Pengerang, as well as a member of the Board of Directors of the Fishermen's Association of Pengerang.⁶⁷¹ His

⁶⁶⁵ Affidavit of Idris Bin Yusof, para. 12: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 6: Annexes, vol. 2, Annex 6.

⁶⁶⁶ Ibid., para. 4.

⁶⁶⁷ Affidavit of Idris Bin Yusof, para. 13: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 7 Annexes, vol. 2, Annex 6.

⁶⁶⁸ MM, para. 32.

⁶⁶⁹ Affidavit of Rear-Admiral Thanabalasingam, para. 47: Annexes, vol. 2, Annex 4.

⁶⁷⁰ Ibid., para 48.

⁶⁷¹ Affidavit of Idris Bin Yusof, paras. 1-4: Annexes, vol. 2, Annex 5.

evidence concerning the fishing practices of Johor fishermen from Sungai Rengit in the waters around PBP reflects both his own direct experience and matters that come within his own knowledge as a result of his representative roles.

522. Saban Bin Ahmad was born in Sungai Rengit in 1948. He comes from a fishing family in which both his father and grandfather were fishermen before him. He began fishing with his father at the age of nine in about 1957. Following measures taken (from about 1986) by the Singapore navy and marine police to preclude Johor fishermen from fishing in the waters around PBP, Saban Bin Ahmad seldom goes fishing today, working rather in his business making shrimp paste for traditional Malay cooking.⁶⁷² His evidence concerning the fishing practices of Johor fishermen from Sungai Rengit in the waters around PBP reflects his own direct experience as well as matters that come within his own knowledge as a prominent member of the Sungai Rengit fishing community.

523. This evidence attests that the waters around PBP were traditional fishing waters for fishermen from Sungai Rengit for generations until Singapore, through the peremptory use of its naval and marine police forces, began forcibly to exclude them fishermen from the area in the mid-1980s. The reasons for the importance of the PBP waters to the Sungai Rengit fishermen are apparent. The waters are comparatively sheltered and attract a wide variety of fish in great numbers. They are easily accessible from Sungai Rengit. The island provided a refuge for fishermen in case of bad weather.

⁶⁷² Affidavit of Saban Bin Ahmad, paras. 1-3, 14; Annexes, vol. 2, Annex 6.

524. The waters around PBP are relatively sheltered by comparison to the deeper and faster moving waters closer to the Johor coast through which the major international shipping lane runs.⁶⁷³ As Admiralty Chart 2403 (folded into the back cover of this volume) shows, the waters in the immediate proximity of PBP range from 23 fathoms (138 feet or 42.1 meters), at its deepest point, to 10 fathoms (60 feet or 18.3 meters) or less, with average depths being around 12 to 14 fathoms (72 to 84 feet or 21.9 to 25.8 meters). The usual practice is to use lines for fishing during the day when the fish tend to stay deeper in the water and can see and avoid the nets. Nets, of around 8 to 10 meters in size, are used at night when the fish are closer to the surface.⁶⁷⁴ Neither the lines nor these nets would be effective in the deeper and faster moving waters closer to the Johor mainland, which in any event are not abundant with fish.⁶⁷⁵

525. The evidence of Saban Bin Ahmad attests to the wide variety of fish in the waters around PBP.⁶⁷⁶ These are fish of medium commercial value.⁶⁷⁷ Fishermen from Sungai Rengit would usually sell their catch to local Malaysian Chinese intermediaries.⁶⁷⁸

526. The easy accessibility of the PBP waters from Sungai Rengit commented on in both affidavits.⁶⁷⁹ The particular abundance of fish in the waters around PBP is also attested to anecdotally, in inter-generational terms, in both affidavits. Thus, Idris Bin Yusof notes that “[i]n 1 day of fishing in the waters around PBP, a fishermen could usually catch the equivalent of about 3

⁶⁷³ Affidavit of Idris Bin Yusof, para. 10: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 9: Annexes, vol. 2, Annex 6.

⁶⁷⁴ Affidavit of Idris Bin Yusof, para. 7: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 8: Annexes, vol. 2, Annex 6.

⁶⁷⁵ See also, in this regard, the Affidavit of Rear-Admiral Thanabalasingam, para. 80: Annexes, vol. 2, Annex 4.

⁶⁷⁶ Affidavit of Saban Bin Ahmad, para. 8: Annexes, vol. 2, Annex 6. See also the Affidavit of Idris Bin Yusof, para. 13: Annexes, vol. 2, Annex 5.

⁶⁷⁷ Affidavit of Saban Bin Ahmad, para. 8: Annexes, vol. 2, Annex 6. See also the Affidavit of Idris Bin Yusof, para. 13: Annexes, vol. 2, Annex 5.

⁶⁷⁸ Affidavit of Saban Bin Ahmad, para. 8: Annexes, vol. 2, Annex 6. See also the Affidavit of Idris Bin Yusof, para. 5: Annexes, vol. 2, Annex 5.

⁶⁷⁹ Affidavit of Idris Bin Yusof, paragraph 10: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 6: Annexes, vol. 2, Annex 6.

or 4 days of fish compared to fishing in other areas".⁶⁸⁰ Saban Bin Ahmad recalls a story told by his grandfather to the effect that "the fishing was so good around PBP that, when there was a wedding, it was only necessary to go fishing the day before the wedding. They were so sure of getting a good catch."⁶⁸¹

527. The possibility of shelter for the fishermen on the island during bad weather is also attested. Idris Bin Yusof states that:

"Pulau Batu Puteh was a good place to fish even for fishermen from Sungai Rengit with very small boats because the island provided shelter. In stormy waters, the fishermen were able to pull their boats onto the rocks and seek shelter in the lighthouse. The lighthouse keepers were always helpful and would provide the fishermen with food and shelter."⁶⁸²

Saban Bin Ahmad attests to the same point from his both grandfather and father's experience and his own:

"Pulau Batu Puteh has been a traditional fishing area for Johor fishermen from Sungai Rengit for generations. I remember stories from my father and grandfather about the fishing in these waters. In my father and grandfather's time, they would use boats with sails and oars. Depending on the wind, it would take them about five hours to get to Pulau Batu Puteh. They would shelter in the waters around the island. If the weather was bad, they would move the boat on to the rocks and would be invited by the lighthouse keepers to shelter in the lighthouse...

I usually did not land on Pulau Batu Puteh, preferring to anchor in the waters of the island to do my fishing. Since the 1960s, however, I landed on Pulau Batu Puteh on maybe 10 occasions. On 1 occasion, my catch was so great that I left some of it in a sack on the rocks to be collected the next day. On other occasions, the lighthouse keepers gave me shelter and assistance. I remember three lighthouse keepers in particular: Samy, who was Indian, Salim, who was English but had converted to Islam, and Thomas, who was Chinese. I especially remember Samy and Salim as they were kind to me. Usually, there were others in the lighthouse with the lighthouse keeper, including a cook and someone to help with

⁶⁸⁰ Affidavit of Idris Bin Yusof, para. 10: Annexes, vol. 2, Annex 5.

⁶⁸¹ Affidavit of Saban Bin Ahmad, para. 5: Annexes, vol. 2, Annex 6.

⁶⁸² Affidavit of Idris Bin Yusof, para. 11: Annexes, vol. 2, Annex 5.

the light. The keepers and the others were rotated once a month during the 1960s and 1970s.⁶⁸³

It was the practice of fishermen from Sungai Rengit to spend between 10 and 20 days a month fishing in the waters around PBP in the period April to October each year.⁶⁸⁴ They would anchor in the waters just off PBP—perhaps 100 meters from the island—to do their fishing.⁶⁸⁵

528. Over the years, a relationship developed between the fishermen from Sungai Rengit and the Keepers in Horsburgh Lighthouse. According to Idris Bin Yusof:

“[t]here was an arrangement that the fishermen would provide the lighthouse keepers with supplies which they would buy for them in Sungai Rengit in exchange for shelter and petrol. The supplies that the fishermen brought to the lighthouse keepers included cooking oil, bread, biscuits and other foodstuffs, and sometimes cigarettes. If the lighthouse keepers ran out of these things, they could wait for a week before they got fresh supplies. Instead of waiting, they would give the fishermen money and the next day the fishermen would deliver what they had asked for.”⁶⁸⁶

Similarly, Saban Bin Ahmad attests:

“If the weather was bad, [my father and grandfather] would move the boat on to the rocks and would be invited by the lighthouse keepers to shelter in the lighthouse. The lighthouse keepers would also offer them food. In exchange, my father and grandfather would give the lighthouse keepers a small portion of their catch or other provisions, such as vegetables, fruit, chillies, coconuts, or whatever the lighthouse keepers needed. It was the same for other fishermen from Sungai Rengit.”⁶⁸⁷

⁶⁸³ Affidavit of Saban Bin Ahmad, paras. 4, 11: Annexes, vol. 2, Annex 6.

⁶⁸⁴ Affidavit of Idris Bin Yusof, para. 8: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 6: Annexes, vol. 2, Annex 6.

⁶⁸⁵ Affidavit of Idris Bin Yusof, para. 13: Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 11: Annexes, vol. 2, Annex 6.

⁶⁸⁶ Affidavit of Idris Bin Yusof, para. 11: Annexes, vol. 2, Annex 5.

⁶⁸⁷ Affidavit of Saban Bin Ahmad, para. 4: Annexes, vol. 2, Annex 6.

Both Idris Bin Yusof and Saban Bin Ahmad attest to the unimpeded access by Johor fishermen to the waters around PBP until the mid-1980s. They both also affirm a visible Malaysian Marine Police presence in the area.⁶⁸⁸

529. After generations of unimpeded fishing in PBP waters, access by Johor fishermen to these waters began to be peremptorily restricted by Singapore naval and marine police vessels in around 1985 or 1986. Idris Bin Yusof describes these developments in the following terms:

“There were no restrictions on fishing around Pulau Batu Puteh until about 1985 or a little later. After that, the Singapore Marine Police or Singapore Navy began to stop us, prohibiting us from anchoring in the area around Pulau Batu Puteh. The reason they gave was that there were cables in the water and there was a danger that our anchors would pull on the cables and we would be electrocuted. I do not know if this was true or whether they were just trying to frighten us. From this time, Johor fishermen have not been permitted to anchor within 1 nautical mile of Pulau Batu Puteh. Before that, we would anchor about 100 meters from the island.”⁶⁸⁹

Similarly, Saban Bin Ahmad attests:

“Before about 1986, I was never stopped when going to Pulau Batu Puteh. Once or twice a month, I saw Malaysian Marine Police in the area but was never stopped by them. Before about 1986, I never saw the Singapore Marine Police or the Singapore Navy in the area. At about this time, however, they began to stop me saying that entering the area around the island would jeopardise relations between Malaysia and Singapore. They never gave any other reason. They ordered me to go at least 1 nautical mile from the island to fish.”⁶⁹⁰

530. The significance of this evidence is not that the actions of Johor fishermen from Sungai Rengit is conduct *à titre de souverain* by Malaysia as regards PBP. These are private acts.⁶⁹¹ The evidence does, however, show that the waters around the island have been used by fishermen from Johor for

⁶⁸⁸ Affidavit of Idris Bin Yusof, paras. 14-15; Annexes, vol. 2, Annex 5; Affidavit of Saban Bin Ahmad, para. 12; Annexes, vol. 2, Annex 6.

⁶⁸⁹ Affidavit of Idris Bin Yusof, para. 15; Annexes, vol. 2, Annex 5.

⁶⁹⁰ Affidavit of Saban Bin Ahmad, para. 12; Annexes, vol. 2, Annex 6.

⁶⁹¹ Cf. *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 p. 1045, at pp. 1105-6 (para. 98).

generations without question or hindrance. The evidence of Saban Bin Ahmad on the subject of his detention by Indonesian Marine Police in the waters to the south-east of PBP indicates that the Johor fishermen had an appreciation, born of experience, of the limits of Malaysian waters and their entitlement to fish.⁶⁹²

531. The evidence also attests to the absence of any Singaporean presence or interest in the waters around PBP prior to the mid-1980s, and to an evident lack of concern by the Singaporean Keepers of Horsburgh Lighthouse at the presence of Johor fishermen in the waters around the island and even on the island itself.

532. While the possibility cannot be excluded that fishermen from Singapore might occasionally have been found in PBP waters in the period prior to the mid-1980s, this was not usual. Rear-Admiral Thanabalasingam has this to say on the subject of local fishing practices in the waters around PBP:

“As a result of my naval duties, I had some familiarity with the practices of the fishermen from south eastern Johor in the waters around Pulau Batu Puteh. This requires further explanation.

During Confrontation with Indonesia from 1963 to 1966, the Royal Malaysian Navy patrolled actively in the waters of the Singapore Straits, including around Pulau Batu Puteh. For reasons of security, all Malaysian naval vessels patrolled completely darkened, without even navigation lights. The safety of the ship, as well as of other vessels in the vicinity, thus lay completely in the hands of the Commanding Officer. We navigated using radar.

In the circumstances of Confrontation, and navigating in this darkened state, we had to be particularly alert. Whenever we identified a small vessel of whatever kind, we stopped it and boarded it for purposes of identifying who was on board, where it came from and whether it was a fishing vessel, a vessel engaged in barter trade or a vessel engaged in the insurgency. There were many occasions like this when we boarded our own fishing vessels in the area around Pulau Batu Puteh. They were

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Affidavit of Saban Bin Ahmad, paragraph 10: Annexes, vol. 2, Annex 6.

the vast majority of such vessels in the area. Once we had identified that they were Malaysian fishing vessels, we allowed them to proceed.

The barter trade vessels were mostly in the vicinity of Singapore, coming from the Riau islands. I do not recall coming across fishing boats from Singapore in the vicinity of Pulau Batu Puteh. As I have noted, it would take a small fishing boat between 3 to 5 hours to reach Pulau Batu Puteh from Singapore. This is quite a time and distance for local fishermen to travel in small boats simply to reach a fishing area. It is not surprising therefore that the waters around Pulau Batu Puteh were used almost exclusively by Johor fishermen.⁶⁹³

(ii) *Royal Malaysian Navy patrols in the waters around
Pulau Batu Puteh*

533. In its Memorial, Malaysia drew attention to the issuance in July 1968 of a Letter of Promulgation and accompanying chartlets by Commodore (as he then was) Thanabalasingam, then recently appointed Chief of the Royal Malaysian Navy. The Letter of Promulgation described the outer limits of Malaysian territorial waters and foreign claimed waters in West Malaysia for purposes of Royal Malaysian Navy patrols. One of the accompanying chartlets—No.2403—marked PBP, Middle Rocks and South Ledge clearly within Malaysian territorial waters (“MTW”). The Letter of Promulgation and Chartlet No.2403 are attached to Malaysia’s Memorial as Annex 76 and Map 25. As noted in Malaysia’s Memorial, while the Letter of Promulgation was internal Malaysian practice, it stands as clear and incontrovertible evidence that Malaysia regarded PBP, as well as the Middle Rocks and South Ledge and their surrounding waters, as Malaysian territory.⁶⁹⁴

534. The background to the issuing of the Letter of Promulgation and chartlets, and the significance of these documents, is addressed in the Affidavit of Rear-Admiral Thanabalasingam (as he became in 1973) which is attached as Annex 4 to this Counter-Memorial. The affidavit addresses a

⁶⁹³ Affidavit of Rear-Admiral Thanabalasingam, paras. 76-79: Annexes, vol. 2, Annex 4.
⁶⁹⁴ MM, paras. 270-273.

number of related matters, including (a) the establishment of the Royal Malayan Navy (subsequently the Royal Malaysian Navy) by the British and its handover to the Malayan Government on 1 July 1958, (b) the Royal Malaysian Navy's Woodlands Naval Base in Singapore, (c) the funding, staffing and responsibilities of the Royal Malayan/Malaysian Navy, including in respect of the defence of Singapore, and (d) Royal Malaysian Navy conduct concerning PBP from 1958 through to 1976, i.e., the period to which Rear-Admiral Thanabalasingam can attest from personal knowledge. The arrangements in respect of naval patrols in the waters around PBP to which the Rear-Admiral attests continued after his retirement from the navy in 1976 beyond the period of the crystallisation of this dispute.

535. The Royal Malayan Navy, later to become the Royal Malaysian Navy ("RMN"), had its roots in the Malay Section of the (British) Royal Navy, established before the Second World War. Virtually all of the recruits of the Malay Section came from the Malay States, mostly from Johor. After the Second World War, the Malay Section was disbanded and then reconstituted in December 1948 as the Malayan Naval Force. The Malayan Naval Force became the Royal Malayan Navy in August 1952. The Malayan Naval Force, and thereafter the Royal Malayan Navy, was based as the Woodlands Naval Base in Singapore.⁶⁹⁵

536. On 31 August 1957, the Federation of Malaya became independent. In consequence Britain took steps to transfer the Royal Malayan Navy to the control of the Malayan Government. The transfer took place on 1 July 1958. On 12 July 1958, Britain also handed over the Woodlands Naval Base in Singapore to the Malayan Government, this being the principal naval base of the Royal Malayan Navy. The Royal Malaysian Navy only finally vacated the Woodlands Naval Base towards the end of 1997, handing it back to Singapore.⁶⁹⁶

⁶⁹⁵ Ibid., para. 11.

⁶⁹⁶ Ibid. paras. 13, 15.

537. Singapore itself had no naval force until 1975.⁶⁹⁷ A small naval reserve force had been established by Britain in 1934, but this did not have a sea-going capability.⁶⁹⁸ Singapore was not in a position to patrol the waters around PBP until 1975. The maritime defence of Singapore remained with Britain until Singapore became part of the Federation of Malaysia on 16 September 1963. In the years immediately following Singapore's separation from Malaysia on 9 August 1965, Malaysia continued to have some responsibility for the defence of Singapore under the Separation Agreement of 1965.⁶⁹⁹ During the period of Confrontation—the Indonesian-backed insurgency against Malaysia between 1963 and 1966—the Royal Malaysian Navy was given considerable assistance in responding to this threat by the British, Australian and New Zealand navies.⁷⁰⁰ Thus not only did the Royal Malayan/Malaysian Navy conduct patrols in the waters around PBP—as will be seen—but it did so for a period of years in close coordination with the British, Australian and New Zealand navies on the basis of a common appreciation that PBP was a Malaysian island.⁷⁰¹

538. Rear-Admiral Thanabalasingam attests to his firm belief, throughout his naval service, that PBP and its surrounding waters was Malaysian territory. He notes, for example, his landing on the island in April or May 1962, in full RMN uniform, when he was in command of the Royal Malaysian Navy vessel *KD Sri Pahang*: “I would never have done so if I thought, even for a moment, that Pulau Batu Puteh was not Malayan territory.”⁷⁰² He also refers to the common understanding amongst naval officers that the arrangements in respect of Horsburgh Lighthouse were similar to those in respect of Pulau Pisang Lighthouse, i.e., that “Singapore was running the lighthouses but both were on Malaysian territory.”⁷⁰³

⁶⁹⁷ SM, para. 6.70.

⁶⁹⁸ Affidavit of Rear-Admiral Thanabalasingam, para. 12: Annexes, vol. 2, Annex 4.

⁶⁹⁹ Ibid., para. 21.

⁷⁰⁰ Ibid., para. 22.

⁷⁰¹ Ibid., paras. 22-25, 57-63.

⁷⁰² Ibid., para. 52.

⁷⁰³ Ibid., para. 58.

539. Rear-Admiral Thanabalasingam also notes various additional factors which affirmed that "Pulau Batu Puteh was a Malaysian island, even though Singapore operated the lighthouse". In his view:

"I also had no doubt that it was regarded as a Malaysian island by the senior naval officers from the Royal Navy, and the Australian and New Zealand navies, with whom I served, as well as by Singapore."⁷⁰⁴

These additional factors include routine RMN patrols of the waters around PBP, the evident appreciation of senior officers of the Royal Navy (as well as of Australian and New Zealand navies) that PBP was Malaysian, and the clear and specific understanding of the limits of Malaysian territorial waters that informed the drawing up and issuing of the 1968 Letter of Promulgation and accompanying chartlets.

540. On the question of the appreciation of senior officers of the Royal Navy, and the Australian and New Zealand navies, the Rear-Admiral attests:

"Pulau Batu Puteh's status as a Malaysian island was also affirmed during the period of my service on board *HMS Cavalier* in 1962, the British Royal Navy destroyer, to which I have already referred. During this time, we used to go off to the South China Sea, from the Naval Base in Singapore, to conduct submarine exercises. As I have noted, on our return, it was the practice to undertake blind navigation exercises. For this purpose, we were required to plot a course back to the Naval Base by taking navigational bearings from various points 'on Malayan territory'. On this basis, as we approached the south eastern tip of Malaya, I would plot a course taking bearings, on the one side, from Tanjung Penyusoh, and the small islands, such as Pulau Lima, just off this point, and from Pulau Batu Puteh, on the other. Of course, we were then engaged in blind navigation and our principal concern was to avoid hazards to navigation. We were not directly concerned with the status of the island. I note the point, however, to illustrate that Pulau Batu Puteh featured regularly in operational discussions with the Royal Navy at this time and was always regarded, without any doubt, as a Malayan island.

There were also other occasions, when I was on exercises with the British, Australian and New Zealand navies, that Pulau

⁷⁰⁴ Ibid., para. 57.

Batu Puteh featured in the planning and was again uniformly regarded as a Malaysian island. The SCAP area designations, to which I have already referred, and which were common to the Malaysian, British, Australian and New Zealand navies, all featured Pulau Batu Puteh. I do not recall any discussion or comment in the context of these coordinated patrols that alluded to Pulau Batu Puteh in terms that suggested that it was anything other than a Malaysian island. All of the ships taking part in these patrols had charts on which the territorial waters of the various States were clearly marked, including the extent of Malaysian territorial waters and those of Indonesia. When Singapore separated from Malaysia in August 1965, Singapore's territorial waters would have been similarly marked on the charts.

Another element that I recall, which affirmed Pulau Batu Puteh's Malaysian character, were the requests by the Royal Navy for permission for the survey ship *HMS Dampier* to survey off Pulau Batu Puteh. One particular request of which I subsequently became aware, was that on 20 February 1967 at around the time that I was informed that I was to take up the position of Chief of the Navy. The request came from the Royal Navy Office of Commander Far East Fleet, Singapore to the Ministry of Defence (Navy), Kuala Lumpur requesting clearance 'for *HMS Dampier* and detached parties to carry out surveys in West Malaysia'. The coordinates of the survey given in the letter of request, which I have been shown and exhibit hereto as Attachment 6, are the coastal reference points of the survey to be conducted. The survey included the waters around Pulau Batu Puteh, as is clearly evident from the Fair Sheet Report of *HMS Dampier* in respect of this survey. The Fair Sheet Report, which I have been shown and exhibit hereto as Attachment 7, was signed by the Captain of *HMS Dampier*."⁷⁰⁵

541. On the subject of naval patrols of the waters around PBP, Rear-Admiral Thanabalasingam observes:

"we patrolled this area routinely from the very first days following independence in 1957 and our control of the Royal Malayan Navy in July 1958. To my knowledge, and, certainly, as I took on progressively senior roles in the navy during 1967, I would have been aware of such developments, Singapore never once protested against these patrols."⁷⁰⁶

⁷⁰⁵ Ibid., paras. 61-63.

⁷⁰⁶ Ibid., para. 60.

542. On the general character of these patrols, the Rear-Admiral states:

“Singapore never asked for permission to supply the Horsburgh Lighthouse and Malaysia never expected it to do so. Singapore had been running the lighthouse for many years. It was not a source of difficulty. The Royal Malayan/Malaysian Navy regularly patrolled the waters around Pulau Batu Puteh. We did so on a transit basis. In other words, we did not give the island special attention, in the same way that we did not give special attention to the many other islands along the Malaysian coast. Malaysia, both peninsula Malaysia and the eastern states of Sabah and Sarawak, has a very long coastline of around 4,300 km. At times, there may be a particular need for a naval presence at various points along the coast. The Royal Malaysian Navy does not have unlimited resources. This was even more the case during the period of the Royal Malayan Navy all the way through to the late 1970s and early 1980s during which virtually all of our fleet was based at the Woodlands Naval Base in Singapore. Royal Malayan/Malaysian Navy patrols in the area around south eastern Johor and Pulau Batu Puteh were thus routine. We did not generally lay anchor off the island. There was no need to do so.”⁷⁰⁷

543. Several examples of Royal Malaysian Navy patrols in the waters around PBP are given by Rear-Admiral Thanabalasingam. He attaches various Passage Narratives and Reports of Proceedings from a number of RMN ships which conducted patrols and other activities in PBP waters in the period January 1965 to November 1971. One of these vessels was *KD Hang Tuah*, the flagship of the Royal Malaysian Navy, on which Rear-Admiral Thanabalasingam served, first, with the rank of Lieutenant Commander, as Executive Officer in the period from February 1965 to October 1966 and, subsequently, with the rank of Commander, as its Commanding Officer in the period 1 March to 31 August 1967.⁷⁰⁸ The Passage Narratives for *KD Hang Tuah* record the following:⁷⁰⁹

- (a) January 1965 – “Slipped 14 berth 1400 (-7½) Monday 11th Jan. 1965 for exercise off the east coast and night patrols between Horsburgh Lt.

⁷⁰⁷ Ibid., para. 59.

⁷⁰⁸ Ibid., paras. 9-10.

⁷⁰⁹ Ibid., Attachment 1, *Passage Narratives: Annexes*, vol. 2, Annex 4.

- and Jasons Bay. The patrols were fruitless as the sea was fairly rough, force 4 to 5 and landings by sea although not possible was unlikely”;⁷¹⁰
- (b) June 1965 – “At 2200 we were ordered to patrol off Horsborough Lt, in place of Agincourt, who had developed engine trouble. At 2350 a fast sampan was sighted illuminated and a Bofor warning shot was fired. The sampan stopped and on investigation they turn to be 2 Indons Chinese going back to Indonesia from Singapore in a twine engined boat loaded with biscuits. They were held onboard and tuned over to the police the following morning. The ship then proceeded to M1 Buoy. Arrived at 0900 (-7½)”;⁷¹¹
- (c) September 1965 – “Slipped ‘C’ Buoy 0900 (-7½) Tuesday 7th Sept. and proceeded to Singapore straits for trails on main bearings. Trials were successfully completed, carried out night patrol off Horsborough Lt. Patrol was uneventful except for the sighting of a B.T. boat... Returned to Singapore straits on Friday 17th for a night patrol off Horsborough light”;⁷¹²
- (d) November 1965 – “Friday 26th November, NOIC W/M and staff arrived at 0730 by helicopter for sea inspection. On completion of inspection a patrol off Horsburgh was carried out”;⁷¹³
- (e) April 1966 – “The next day a Helo was dispatched and Hang Tuah Patrolled JSB/HORS. Lt.”;⁷¹⁴
- (f) May 1966 – “From Horsburgh Lt. to Tg API it was noticed that the current settings northely at slightly more than a knot”.⁷¹⁵

544. The Reports of Proceedings for *KD Hang Tuah* and other RMN ships record as follows:

⁷¹⁰ Ibid., Attachment 1, para. 10.

⁷¹¹ Ibid., Attachment 1, *Passage Narratives*, para. 20.

⁷¹² Ibid., Attachment 1, *Passage Narratives*, para. 27.

⁷¹³ Ibid., Attachment 1, *Passage Narratives*, para. 31.

⁷¹⁴ Ibid., Attachment 1, *Passage Narratives*, p. 7, “The West Coast Patrol 23rd-26th April”.

⁷¹⁵ Ibid., Attachment 1, *Passage Narratives*, p. 7, “Singapore to East Malaysia”.

- (a) April 1966 – “JERAI cast off at 0600 on Tuesday 12th and proceeded to rendezvous with K.D. HANG TUAH in its position 063 Horsburgh Light 15.5”;⁷¹⁶
- (b) April 1966 – “On 27th April the helicopter disembarked and after two patrols off HORSBOROUGH Light and fuelling at BUKOM, HANG TUAH returned to SINGAPORE, securing to M Buoy at 0900 on Friday 29 April”;⁷¹⁷
- (c) June 1971 – “While off Horsburgh Lighthouse K.D. HANDALAN transferred 1,200 gallons of fuel to K.D. PENDEKAR by bump transfer on General Motors after all K.D. PENDEKAR’s passengers have previously been transferred by bump transfer on proteus to K.D. GEMPITA”;⁷¹⁸
- (d) November 1971 – “On the 3rd the ship was brought to immediate notice for sea at 1330 and was told that pending on further signals from KEMENTAH KL, the ship would be required to proceed to the East Coast for a search and possible arrest of a North Vietnamese Trawler. Later in the evening, at 1700 the order was received and the ship sailed MBJ under the Tactical Command of KD SRI NEGRI SEMBILAN (LT. CDR. PANG MENG KUNG, RMN, Senior Officer Second Patrol Craft Squadron) at 1725. On arrival at Horsbrough Light at 2050, the ship was detached to proceed for patrol north of Pulau Aur. No incidence occurred during the night”.⁷¹⁹

545. As these extracts illustrate, RMN patrols in the waters around PBP were routine. They continued in this manner the period after Rear-Admiral Thanabalasingam’s retirement from the Navy on 31 December 1976. Reports of Proceedings of *KD Sri Perak* (for September 1977) and *KD Lembing* (for

⁷¹⁶ Ibid., Attachment 2, *Report of Proceedings-Month of April 1966-K.D. JERAI*, para. 7: Annexes, vol. 2, Annex 4.

⁷¹⁷ Ibid., Attachment 3, *KD Hang Tuah, 2hb Mei, 1966*, para. 8: Annexes, vol. 2, Annex 4.

⁷¹⁸ Ibid., Attachment 4, *K.D. PENDEKAR-Report of Proceedings-June 1971*, para. 3: Annexes, vol. 2, Annex 4.

⁷¹⁹ Ibid., Attachment 5, *K.D. SRI TRENGGANU-Report of Proceedings For Month of November 1971*, para. 4: Annexes, vol. 2, Annex 4.

January and February 1979) are attached as annexes, in illustration of the continuity of this practice.⁷²⁰

546. The July 1968 Letter of Promulgation and its accompanying chartlets was addressed in Malaysia's Memorial.⁷²¹ These documents are addressed more fully in Rear-Admiral Thanabalasingam's Affidavit.⁷²² The essential elements of the Rear-Admiral's evidence is as follows:

“64. The clearest naval practice affirming Pulau Batu Puteh's Malaysian character comes from my Letter of Promulgation of 16 July 1968 and the chartlets and notes attached to it.

65. Because of the heavy maritime traffic through the deep channel to the north and west of Pulau Batu Puteh, Royal Malaysian Navy patrols would usually stay to the south, east, or north east of the island, ie, away from the main shipping channel. To the south and the east, however, there was a risk of running into what we referred to as Indonesian Claimed Waters ('ICW'). Some time before I took over as Chief of the Navy in 1967, Indonesia had unilaterally claimed a territorial sea of 12 nautical miles. Pulau Batu Puteh is less than 8 nautical miles from the Indonesian Island of Pulau Bintan. Pulau Bintan is about 5.6 nautical miles from South Ledge, which we also considered to be Malaysian.

66. Malaysia first claimed a territorial sea of 12 nautical miles in 1969. When I took over as Chief of the Navy in December 1967, the question of Malaysia's territorial sea limits was actively under consideration. As I understand it, the Geneva Convention on the Territorial Sea and the Contiguous Zone, to which Malaysia was a party, provided that, in the case of opposite States, the outer limit of the territorial sea was to be the median line between the two States. Given the width of the Singapore Straits (less than 12 nautical miles at its widest), Malaysia and Indonesia would have had overlapping territorial claims in the area. We therefore began discussing maritime delimitation issues with Indonesia at this point, concluding an agreement delimiting the continental shelf between the Malaysia and Indonesia in 1969.

⁷²⁰ Annexes, vol. 3, Annex 43.

⁷²¹ MM, paras. 270-273.

⁷²² Background issues relevant to the Letter of Promulgation are addressed in the Rear-Admiral's Affidavit, paras. 37-46. The Letter of Promulgation itself is addressed in paras. 64-75 of the Affidavit.

67. The depth of the water in the area around Pulau Batu Puteh is variable and includes a number of navigational hazards. I have been shown a large scale version of (British) Admiralty Chart 2403, which I had annotated and attached to my Letter of Promulgation of 16 July 1968. I understand that Malaysia will be attaching this large scale version of the chart to its Counter-Memorial. Reference to this chart shows that the water depth immediately to the south and the east of Pulau Batu Puteh ranged from around 7 fathoms (or 42 feet or 12.8 metres) to around 19 fathoms (or 114 feet or 34.7 metres), the average depth being 12 to 14 fathoms. The chart also shows a 10 fathom line as well as Middle Rocks, South Ledge and other navigational hazards in the area.

68. The importance of these factors is that, when it came to drawing up the Letter of Promulgation that I eventually issued in July 1968, two factors weighed heavily on the process. The first was the need to identify the limits of Malaysian territorial waters, pending the extension of these waters to 12 nautical miles, which I expected would occur. The second was to identify the limits of foreign claimed waters, notably those claimed by Indonesia and the limits of Singapore's territorial waters. The reason was to ensure that naval operations were sensitive to the limits of these waters. In particular, especially as Malaysia had just emerged from the period of Confrontation with Indonesia, I wanted our ships to be aware of and respect Indonesian Claimed Waters. This was the reason for drawing up the Letter of Promulgation in 1968. The narrow width of the Straits and the shallow depth of the waters meant that the annotation of these limits on the charts had to be done with precision.

69. As the Letter of Promulgation indicates, its purpose was to show 'the outer limits of Malaysian Territorial Waters and foreign claimed waters in West Malaysia' for the information of Senior and Commanding Officers. While only Commanders and other Senior Officers will have seen the Letter itself, the chartlets attached to the Letter were provided to all Royal Malaysian Navy ships and the details would have been incorporated on to their large scale charts.

70. The notes and chartlets attached to the Letter of Promulgation indicate clearly both the outer limits of Malaysia's territorial waters and various points of uncertainty, which we were concerned to represent faithfully. Thus, referring to "Chart 2403 - Singapore Strait"... a number of boundary lines (actual or claimed) are depicted in manuscript annotation on the original Admiralty Chart. The thick solid line that runs the length of the Singapore Straits marks the limit

of Indonesian Claimed Waters, as we understood them to be at the time. This is evident from the by now rather faint, but nonetheless still clearly visible, manuscript annotation along the line "Limit of ICW".

71. The thick solid line that runs between Malaysia and Singapore, to the north, west and east, is the boundary line described in detail in the Straits Settlements and Johore Territorial Waters Agreement of 19 October 1927. There is a typographical error in the reference to this line in the notes attached to the Letter of Promulgation, which refers to this as the '1923 Treaty'.

72. To the east of Singapore, at the point of the Johore Straits between Singapore and Johore, the thick solid line comes to an end, being picked up further south by a lighter pecked line which diverges to the east and the west. At this point on the chart, there is another faint manuscript annotation which reads 'See Note 1'. Note 1, in the notes attached to the Letter of Promulgation in respect of this chart (which is attached as Annex 76 to Malaysia's Memorial), provides:

'The boundary between Singapore and Malaysia would seem to be still based on a 1923 Treaty [sic] between the British and Johore Governments which specifies the centre of the deep water channel of the Johore Strait as the dividing line. As far as can be ascertained, the exact line has never been officially drawn and published. As the treaty can be interpreted more than one way south of Calder Harbour, the dividing line in that area has been omitted on this chartlet. The pecked line south of the Johore Shoal Buoy represents the outer limit of Singapore/Malaysian Territorial Waters.'

73. Where there was uncertainty about territorial waters' limits, we were thus careful to reflect that uncertainty. The pecked line at this point, which became a solid, but still somewhat faint line, reflected Malaysia's understanding of the limits of both its own and of Singapore's territorial waters at the time.

74. The continuation of the faint solid line which follows the arc of the south eastern Malaysian coast continues to depict the outer limits of Malaysian territorial waters. Where this comes to a point adjacent to Pulau Batu Puteh, Middle Rocks and South Ledge, this line takes the form of a circle around the three features, indicating that the three features fall within Malaysian territorial waters. At the point at which the

territorial waters line intersects the line showing Indonesian Claimed Waters, it takes the form of a pecked line in the area adjacent to the Indonesian island of Pulau Bintan. At this point, there is another manuscript annotation on the chart reading 'See Note 2'. Note 2, on the notes accompanying the Letter of Promulgation for this chart, provides:

'The pecked line south of the Horsburgh Light represents the outer limit of Malaysian Territorial Waters as authorised by the 1958 Geneva Convention, i.e. a three mile circle around South Ledge flattened at the southern end by a true median line between South Ledge and the isolated rock close north of Tanjong Sading. R.M.N. vessels are to comply with S.O.A.I. 107 in regard to this area.'

75. As I examine this chart today, and read the accompanying notes, 36 years after I issued the Letter of Promulgation, I am quite clear that, in 1968, we had no doubt that Pulau Batu Puteh (as well as Middle Rocks and South Ledge) were Malaysian territory. Equally important is the fact that these chartlets formed the basis of the ongoing Royal Malaysian Navy patrols in these waters to which I have already referred. The only restriction that they marked in respect of patrols in the waters around Pulau Batu Puteh was south of the line marking Indonesian Claimed Waters."⁷²³

D. Conclusions

547. The preceding review attests that: Singapore's claim of acquiescence and disclaimer of title by Malaysia has no foundation in substance; Malaysia, contrary to Singapore's contention, did indeed act *à titre de souverain* as regards PBP and its surrounding waters; there was a wider appreciation of Malaysian sovereignty over PBP by senior naval officers of the British, Australian and New Zealand navies.

548. It also shows that a consideration of the practice of the Parties in this case cannot proceed in isolation from its historical and physical context. Singapore would like to persuade the Court that the only conduct that is

⁷²³ Ibid., paras. 64-75.

relevant are a number of isolated individual acts undertaken by each Party. In proceeding in this manner, Singapore leaves out of its account an assessment of whether the instances of conduct to which it refers were simply part of a pattern of routine acts in the administration of Horsburgh Lighthouse or manifestations of sovereign activity. It leaves out the historical evidence of the Straits' Lights system and the interaction between Malaysia and Singapore over centuries. It leaves out the character of PBP itself. It leaves out the joint and cooperative arrangements concerning the Singapore Straits in which Malaysia was actively engaged. Singapore's case on conduct—both its own and Malaysia's—is thus constructed in large measure on omission rather than on any reflection of the *actual* purpose of the conduct on which it relies.

549. The significance of the evidence in the last section of this Chapter on the traditional use of PBP waters by Johor fishermen and the patrolling by the Royal Malaysian Navy is twofold. First, it attests that practice and perception, both at the private and State level, consistently regarded PBP as Malaysian. Second, given the character of PBP and that it has nothing on it other than Horsburgh Lighthouse, this Malaysian conduct has special weight. It can only be explained as a manifestation or appreciation of sovereignty. In contrast, Singapore's conduct *in all respects* is explicable as routine conduct in the administration of the lighthouse.

Chapter 10

THE MARITIME CONTEXT

A. Singapore's new claim to jurisdiction in the South China Seas compared with its delimitation practice

550. If Singapore has had sovereignty over PBP since 1851 as it claims, this would imply a maritime boundary line which at the least delimits the area around PBP at the entrance of the Singapore Strait in the China Sea, between Singapore, Malaysia and Indonesia. However, despite the opportunity to do so, Singapore has not sought to delimit a maritime boundary in the vicinity of PBP, nor has it formally reserved its rights in circumstances where it could have been expected to do so if it was indeed convinced of its sovereignty over the three features. Singapore's failure to register any interest in the area around PBP, arising from a sovereignty it now says it has had since 1851, is striking.

551. Of particular interest here is its failure to do so in negotiating the delimitation of its territorial sea boundaries with Indonesia.

552. Indonesia's Pulau Bintan is less than 10 nm from PBP, so that the 12 nm territorial sea claimed by Indonesia in 1960⁷²⁴ would overlap with a territorial sea claim by Singapore around PBP. Yet, as observed in Malaysia's Memorial,⁷²⁵ the Agreement Stipulating the Territorial Sea Boundary Lines Between Indonesia and the Republic of Singapore in the Strait of Singapore of 25 May 1973⁷²⁶ does not contain any reference to the waters in the area of PBP, either to delimit the waters between the parties or to record that the waters were yet to be delimited. There is no conceivable reason why in 1973,

⁷²⁴ Article 1(2) of Government Regulation Replacing Law No. 4 of the Year 1960 on Indonesian Waters, 18 February 1960: Annexes, vol. 3, Annex 38.

⁷²⁵ MM, para. 101.

⁷²⁶ MM Annex 18.

before this dispute arose, if Singapore considered that it did have sovereignty over PBP it did not seek to delimit the territorial sea boundary between itself and Indonesia in the area around PBP, or at least to register the fact of such a claim.

553. Nor is there any suggestion that there was any part of the territorial sea boundary line between the two parties left open for future negotiation: the Preamble to the Agreement states that the parties note

“that the coasts of the two countries are opposite to each other in the Strait of Singapore.... And desiring to establish *the boundaries* of the territorial seas of the two countries in the Strait of Singapore.” (emphasis added.)

If PBP was considered by Singapore to lie in the Strait of Singapore then the agreement would have delimited the territorial sea between it and Pulau Bintan. If PBP was not considered to lie in the Strait of Singapore, why did the parties not record that the coasts of the two countries were “opposite” in that area also?

554. Singapore thus failed to act in a manner consistent with the claim now put forward by Singapore to a long-settled sovereignty over PBP in territorial sea boundary negotiations with neighbouring States. This is not the behaviour of a State which considers itself to have sovereignty over a strategically located and highly visible island. It is, on the other hand, consistent with the actions of a lighthouse operator.

B. Malaysia's practice

555. By contrast Malaysia's practice in the same period is consistent with its view that PBP is a Malaysian island. This practice was detailed in Malaysia's Memorial,⁷²⁷ but it is worthwhile recalling it here:

⁷²⁷ MM, paras. 268-281.

- Under the April 1968 Petroleum Agreement between Malaysia and the Continental Oil Company of Malaysia, Malaysia granted a concession area covering a maritime area which includes PBP and sets a boundary line which broadly follows an anticipated Malaysia-Indonesia continental shelf boundary, the agreement for which was concluded in the following year. This is clearly shown on the Map of Concession Area reproduced at page 120 of Malaysia's Memorial. As noted in Malaysia's Memorial, the concession does not "carve out" an area around PBP, as would be expected if Malaysia had any conception that PBP was a part of Singapore.⁷²⁸
- When Malaysia extended its territorial waters to 12 nm under the Emergency (Essential Powers) Ordinance 1969, the legislation included waters around PBP. Clearly in defining its territorial sea Malaysia conceived that PBP fell within it, that it was not Singapore's territory.⁷²⁹
- The Indonesia-Malaysia Continental Shelf Agreement of 27 October 1969 was avowedly a partial agreement, which did not resolve all issues. Point 11 of the Indonesia-Malaysia Continental Shelf Agreement of 27 October 1969 was set 6.4 nm from PBP. The continental shelf negotiations were publicised by Joint Press Statement of Malaysia and Indonesia on 22 September, more than a month before the conclusion of the Agreement on 27 October.⁷³⁰

556. As noted by Malaysia in its Memorial, on none of the three occasions outlined above did Singapore protest the sea boundary lines. Nor has it suggested in its Memorial that it did otherwise.

⁷²⁸ MM, para. 278.

⁷²⁹ MM, para. 279.

⁷³⁰ MM, para. 280.

C. The position of third States

557. The perception of third States is that Singapore does not have a maritime boundary in the area around PBP.

558. Malaysia gave a number of examples in its Memorial of maps which depict boundary lines which clearly place PBP within the territorial waters of Malaysia or its predecessors. Evidently these maps do not show a Singapore boundary line in the area around PBP:

- a 1936 British Admiralty Chart of Singapore Strait;⁷³¹
- a 1941 British War Office map;⁷³²
- a 1944 Survey of India map;⁷³³
- a 1950 UK War Office map;⁷³⁴
- a 1959 War Office and Air Ministry map;⁷³⁵
- a 1967 UK Ministry of Defence map;⁷³⁶
- a 1968 UK Ministry of Defence map;⁷³⁷
- a United States Department of State map published in 1974;⁷³⁸
- a 1994 UK Joint Operations Graphic published by the United Kingdom Director General of Military Survey.⁷³⁹

559. Other than the depiction of a boundary line between Malaysia and Indonesia or their predecessors in the area of PBP, none of the maps listed above show any other boundary lines in the area of PBP. The absence of any such boundary line in United Kingdom and the United States maps shows that

⁷³¹ MM, para. 316, Map Atlas, Map 25.
⁷³² MM, para. 317 & Insert 29 p. 147; Map Atlas, Map 26.
⁷³³ MM, para. 318; Map Atlas, Map 27.
⁷³⁴ MM, para. 318; Map Atlas, Map 29.
⁷³⁵ MM, para. 317; Map Atlas, Map 31
⁷³⁶ MM, para. 318; Map Atlas, Map 35
⁷³⁷ MM, para. 318; Map Atlas, Map 36.
⁷³⁸ MM, para. 322 & Insert 30 p. 149; Map Atlas, Map 40.
⁷³⁹ MM, para. 325 & Insert 32 p. 153; Map Atlas, Map 47.

they did not consider Singapore to have a maritime boundary area around PBP or that it fell within Singapore waters.

560. For example the Joint Operations Graphic, published by the United Kingdom Directory General of Military Survey in 1994,⁷⁴⁰ depicts the maritime boundaries between Singapore-Malaysia, Singapore-Indonesia and Malaysia-Indonesia. While the boundary line between the three States shown in the Graphic is depicted by an incomplete dotted line, in the area of PBP the line nevertheless clearly shows PBP falling on the Malaysian side of the Malaysia-Indonesia boundary line and it does not show any other delimitation in the area around PBP, or register any territorial claim of Singapore in this locality.

561. The 1950 Chart of the South China Sea published by the United Kingdom War Office (Sheet A-48 O, "Sedili Besar", first edition), depicts the maritime boundaries between the Federation of Malaya, the Netherlands East Indies-Singapore in an unbroken line which encloses Singapore. It shows the maritime boundary between Singapore-Federation of the Malaya meeting the Federation of Malaya-Netherlands East Indies maritime boundary at a point just to the right and below of Singapore Island. PBP falls clearly within the maritime boundary of the Federation of Malaya and well outside the Singapore boundary line. See Map 7 in the Maps Section at the end of this Memorial.⁷⁴¹

562. Further examples of official United Kingdom and United States maps which place PBP outside Singapore waters can be added to the list above. A 1965 United Kingdom military map prepared for "Operation Mason", part of the British and Commonwealth response to the Indonesian insurgency, uses the same unbroken line as the 1950 Chart referred to in paragraph 558 above to depict the maritime boundaries between Malaya, the Republic of Indonesia

⁷⁴⁰ MM, para. 325 & Insert 32 p. 153; Map Atlas, Map 47.

⁷⁴¹ Map 7 is a colour reproduction and enlargement of Map 29 in the MM Map Atlas. See also MM, para 318.

and Singapore, placing PBP well outside the Singapore boundary line. This map is reproduced as **Map 8** in the Maps Section at the end of this Memorial, with an enlargement showing the relevant area.

563. The same unbroken boundary lines are depicted on a United States War Office map (Second Edition – AMS 2, “Lagoi”, sheet 26) which, although it labels the main line as being between “The Unfederated Malay States-Straits Settlements” and “Sumatra, Netherlands East Indies”, also labels the boundary line between Singapore and Johor which intersects the Unfederated Malay States-Straits Settlements and Netherlands East Indies line as that between “Singapore” and “Johor”. Again, Singapore waters clearly exclude PBP. See **Map 9** in the Maps Section at the end of this Memorial.

564. United States Government agencies depict boundary lines in maps they produce of the area which are not consistent with a perception that Singapore has a maritime boundary line in the area of PBP. A 1965 map of “Malaysia and Singapore” in the Collections of the US Library of Congress, Geography and Map Division has a broken dashed line loosely depicting maritime boundary lines of the two States. The map contains an inset showing a close-up of Singapore and the maritime boundary lines around it. The inset does not include the area around PBP, which is not consistent with a view that there is a Singapore maritime boundary line in the area of PBP. See **Map 10** in the Maps Section at the end of this Memorial.

565. A 1967 map of Singapore from the same collection (Base 52646 3-67) depicts the same Singapore boundary line in even more detail. While the boundary line is depicted as a broken dash, intersection points for the convergence of Singapore-Malaysia-Indonesia boundary lines in the Singapore Strait are shown which indicate a boundary line completely enclosing Singapore waters and clearly excluding a Singapore maritime boundary line anywhere near PBP. PBP is not shown (**Map 11** in the Maps

Section). This is repeated in a 1968 map of Singapore (57209 7-68) (**Map 12** in the Maps Section), again in a 1969 map of Malaysia and Singapore (77236 10-69) (**Map 13** in the Maps Section) and again in a 1973 map of Singapore (Base 501016 3-73) published by the US Central Intelligence Agency (**Map 14** in the Maps Section).

566. A 1974 Operational Navigation Chart (ONC L-10) of Indonesia-Malaysia-Singapore depicts maritime boundary lines which place PBP in Malaysian waters (see **Map 15** in the Maps Section, and the enlargement following it).

567. A further map of Singapore in the same series by the United States CIA published in 1994 after the critical date (802150 (R01039) 10-94) does not depict convergence points of Singapore-Malaysia-Indonesia boundary lines in the Singapore Strait which clearly indicate a boundary line completely enclosing Singapore waters. Nor is PBP shown (**Map 16** in the Maps Section). The 2000 edition of the same map of Singapore does however depict "Pedra Branca" in an inset, although no maritime boundary lines between it and Johor are depicted (**Map 17** in the Maps Section). The change in the representation of Singapore in 2000 to include an inset showing Pedra Branca suggests an awareness on the part of the United States Government of Singapore's assertion of sovereignty over PBP and the current dispute.

568. However, earlier depictions of Malaysia and Singapore suggest there was no perception on the part of the United States Government during that period that PBP was part of Singapore or that Singapore had a maritime boundary line in the area of PBP.

569. With only one recent exception, the practice of third States when publishing maps of Singapore and Malaysia and the surrounding areas has been to depict maritime boundaries in the vicinity of PBP which place it firmly in Malaysian waters and outside Singapore waters. This practice is

consistent with a perception that Singapore does not have a maritime boundary in the area of PBP.

D. Singapore's reliance on certain Malaysian maps

570. In its Memorial Singapore places great emphasis on certain Malaysian maps which depict a lighthouse and attribute it to Singapore.⁷⁴² According to Singapore these maps "are entitled to the highest degree of probative value as admissions against interest by the Government of Malaysia".⁷⁴³

571. There is of course a question whether maps can ever, as such, amount to admissions (independently of their use in inter-State negotiations or encounters, as in the *Temple* case⁷⁴⁴). And there are good reasons both of a general and a specific kind why this cannot be so here.

572. As to the general reasons, the Court has taken a consistent position that "by virtue solely of their existence, [maps] cannot constitute a territorial title",⁷⁴⁵ and it follows equally that—unless they are incorporated or used in treaties or inter-State encounters in such a way as to give them particular significance—they cannot constitute definitive State admissions either.

573. This is particularly so where, as here, the maps contain a disclaimer. Singapore argues that because the disclaimers refer to "boundaries" or to "the delimitation of international or other boundaries", the maps do constitute representations or admissions as to sovereignty over islands.⁷⁴⁶ But any distinction between the attribution of sovereignty and the delimitation of boundaries is a relative one; the two concepts are closely linked. In some cases sovereignty over territory (land or insular) results from a boundary delimitation; in others, establishing sovereignty over distinct plots or areas

⁷⁴² SM, paras. 7.38-7.50.

⁷⁴³ SM, para. 7.50.

⁷⁴⁴ See above, paragraph 382.

⁷⁴⁵ *Frontier Dispute Case*, ICJ Reports 1986 p. 554 at p. 582 (para. 54), cited in MM, para. 302.

⁷⁴⁶ SM, para. 7.49.

carries with it the implication of a boundary between them and the process of delimitation starts from that premise. Thus it is artificial in the extreme to suppose that the map-maker intended by the varying language of disclaimers to make any such categorical distinction between sovereignty and delimitation, or that the map could be used to determine issues of disputed sovereignty.

574. Turning to the specifics of the present case, even if maps could in some cases have the preclusive effect attributed by Singapore, this is not the case here. The maps in question are several among many which have been published of the region, and they have never been relied on by any State for the purposes of attributing sovereignty. In particular, as pointed out in Malaysia's Memorial, all these maps do is to show the lighthouse, as is emphasized by the lighthouse symbol. In such a context they do not constitute a statement as to sovereignty over the scrap of rock on which the lighthouse stands.⁷⁴⁷ Can it 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? Nor have these maps been taken as fixing the position so far as other States are concerned, as has been demonstrated.⁷⁴⁸

E. Conclusion

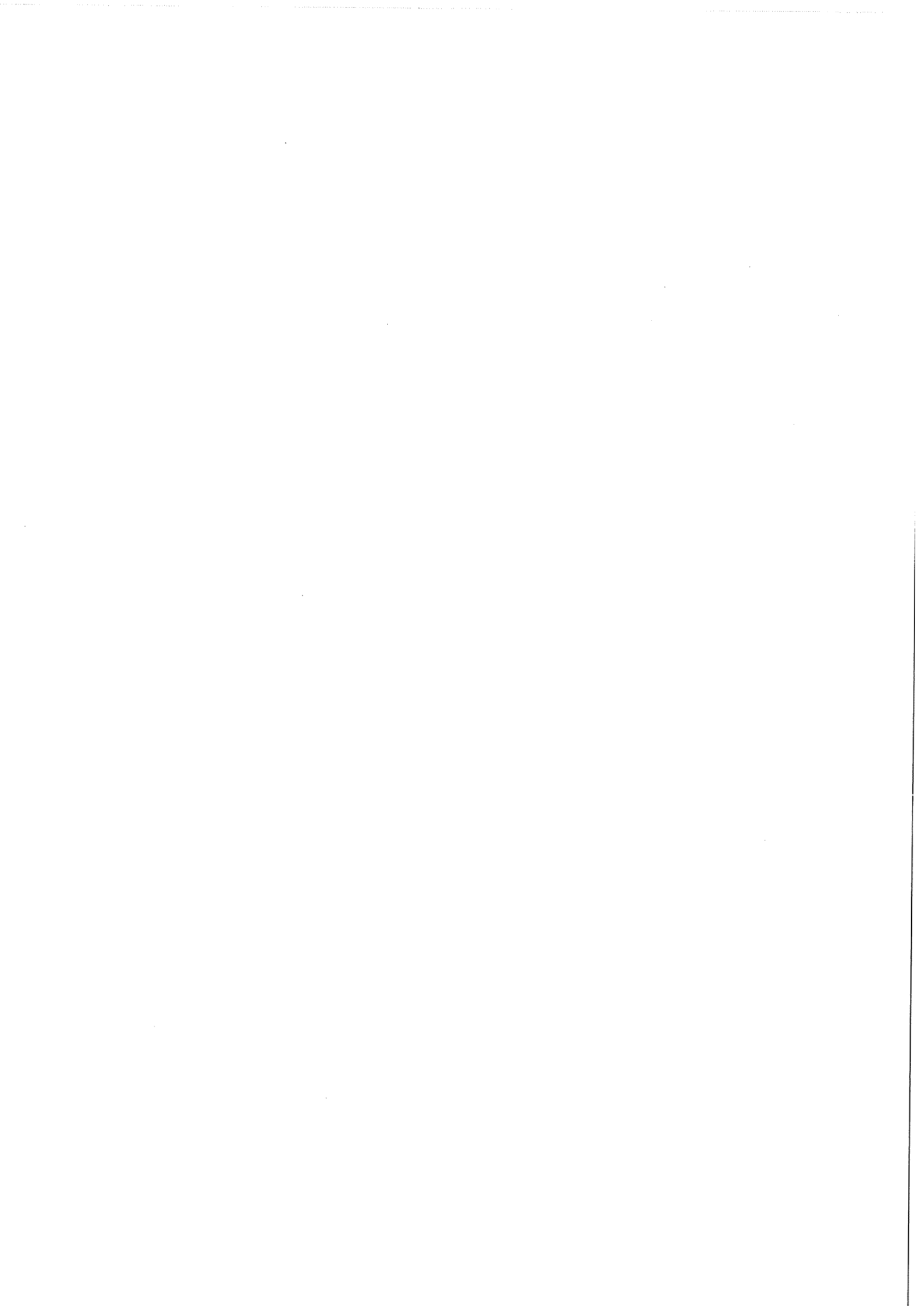
575. The discussion above demonstrates that neither the practice of Singapore itself nor that of other States, including Malaysia, in the context of maritime boundaries is consistent with a perception that Singapore has had sovereignty over PBP for over 150 years, as it claims:

- (a) Singapore did not delimit the area around PBP in its 1973 territorial waters delimitation agreement with Indonesia, despite there being only 10 nm between PBP and the Indonesian coastline;

⁷⁴⁷ MM, para. 321.

⁷⁴⁸ See MM, para. 322, and see further above, paragraphs 557-569.

- (b) Malaysia on the other hand did take actions consistent with its view that it shared a maritime boundary with Indonesia only in the area of PBP—the April 1968 Petroleum Agreement between Malaysia and the Continental Oil Company of Malaysia and the Indonesia-Malaysia Continental Shelf Agreement of 27 October 1969;
- (c) Singapore never protested Malaysia's actions or otherwise indicated in any way that it considered that it had a maritime boundary in the area of PBP consistent with sovereignty over the island;
- (d) The consistent practice of the United Kingdom and United States Governments in the placing of maritime boundary lines on official maps of the area was to place PBP in Malaysian waters.



Summary

576. Throughout its Memorial, Singapore argues that its title to the three features derives from “a taking of lawful possession” of PBP in the period 1847-1851. But States may possess territory in the sense of lawfully using it for specific purposes without asserting or acquiring sovereignty. The key question is: in what capacity did Great Britain construct and operate the lighthouse? Its conduct at the time indicated clearly that it did so not with a view to acquiring territorial sovereignty but with a specific view to assisting navigation in the public interest. That was true of many other lights operated under British auspices, in the region and elsewhere, at the time and subsequently. At no stage prior to Singapore’s independence did the character of British conduct change. At no stage did Britain publicly assert sovereignty over PBP. Nor did Singapore act any differently in the period until 1980 when the dispute broke out. In those circumstances the location of sovereignty remains unchanged; it remains with the sovereign whose consent was sought in order to establish the lighthouse.

577. Before 1824 the Sultanate of Johor existed North and South of the Strait of Singapore and included all islands and other maritime features in and in the vicinity of the Strait of Singapore. Both the Anglo-Dutch Convention of 1824 and the Crawford Treaty of 1824 confirm this.

578. The acts performed in relation to the construction and inauguration of the lighthouse clearly differ from the consistent British practice concerning formal taking of possession on behalf of the Crown. They did not constitute a manifestation of the will of the British Crown to acquire sovereignty. Nor was there ever any annexation or incorporation of PBP into the British Colony of the Straits Settlements. On the contrary, the construction of the lighthouse was performed with the authorisation of the recognised sovereign of the territory, Johor.

579. The absence of any original title on the part of Great Britain to PBP was reflected in British practice throughout. This was also true of Singapore: until 1980 no Singaporean authority ever referred to PBP as belonging to Singapore. The dependencies of Singapore have always been carefully described and were consistently limited to the 10-mile limit of Singapore Island. They have never included PBP.

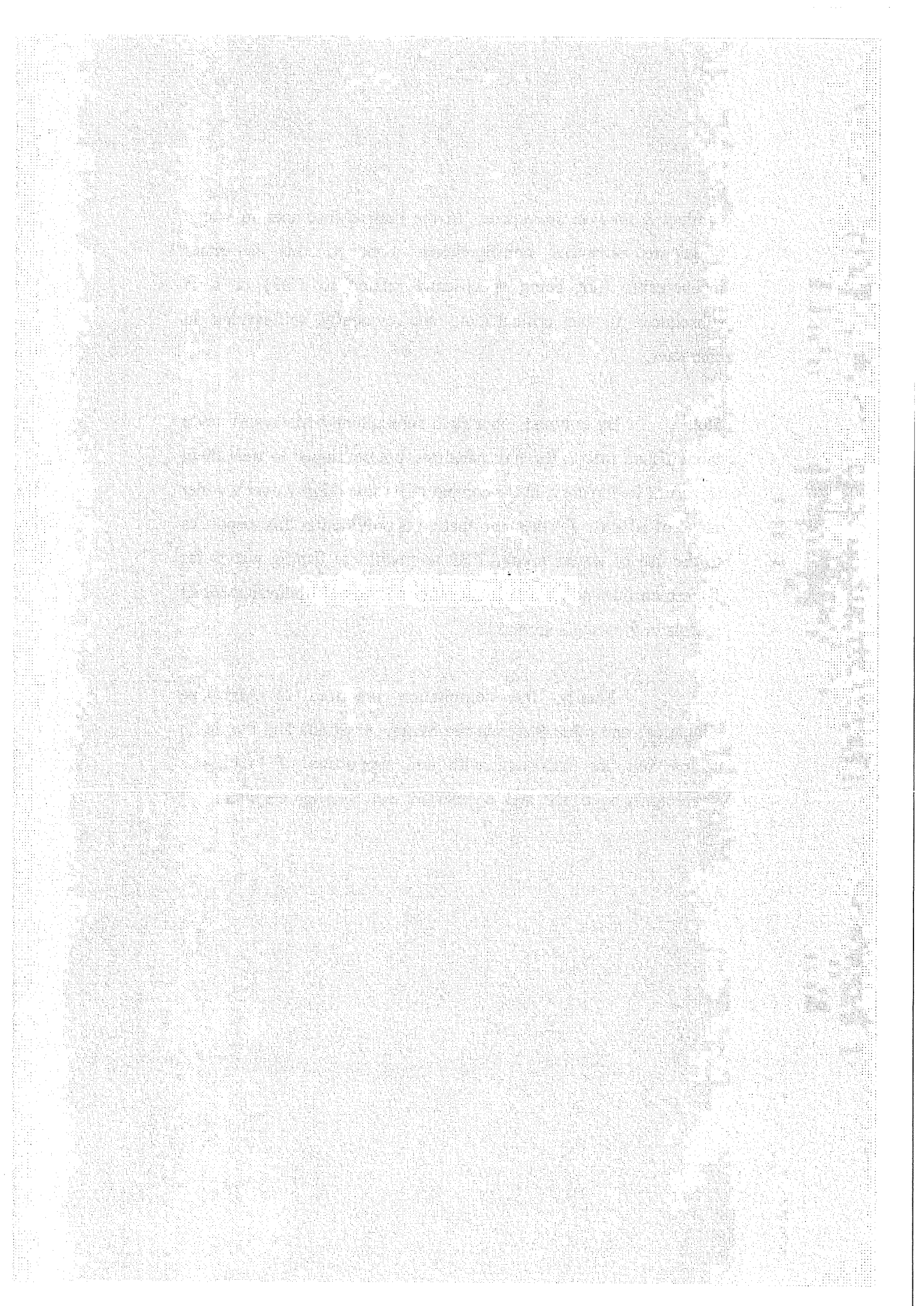
580. Middle Rocks and South Ledge are distinct and separate from PBP. The three features have never been named as a group and have distinct geological and geomorphological characteristics. Singapore's late claim to Middle Rocks and South Ledge is merely an effort to enlarge its territorial claim.

581. Singapore's account of *effectivités* comes down to nothing more than the construction, operation and administration of the lighthouse. In the context, including British practice in the region (the Straits' Lights system) and elsewhere, this is not

conduct *à titre de souverain*. In the limited instances in which Singapore advances non-lighthouse conduct, this is either inconclusive (not being specifically related to PBP) or it is subsequent to the critical date and evidently self-serving in character.

582. By contrast Johor (and subsequently Malaysia) never relinquished title to the three features, but continued to treat them as part of its territory, in the context of its sovereignty over a wider range of islands. Further information is provided in this respect as to the use of waters around PBP as traditional fishing waters for fishermen from south-east Johor, and as to Royal Malaysian Naval patrols in the waters around PBP.

583. Finally, the delimitation practices of Malaysia, Singapore and other States in the Singapore Straits and the South China Sea are consistent with and supportive of Malaysia's sovereignty over PBP, and inconsistent with Singapore's claim.



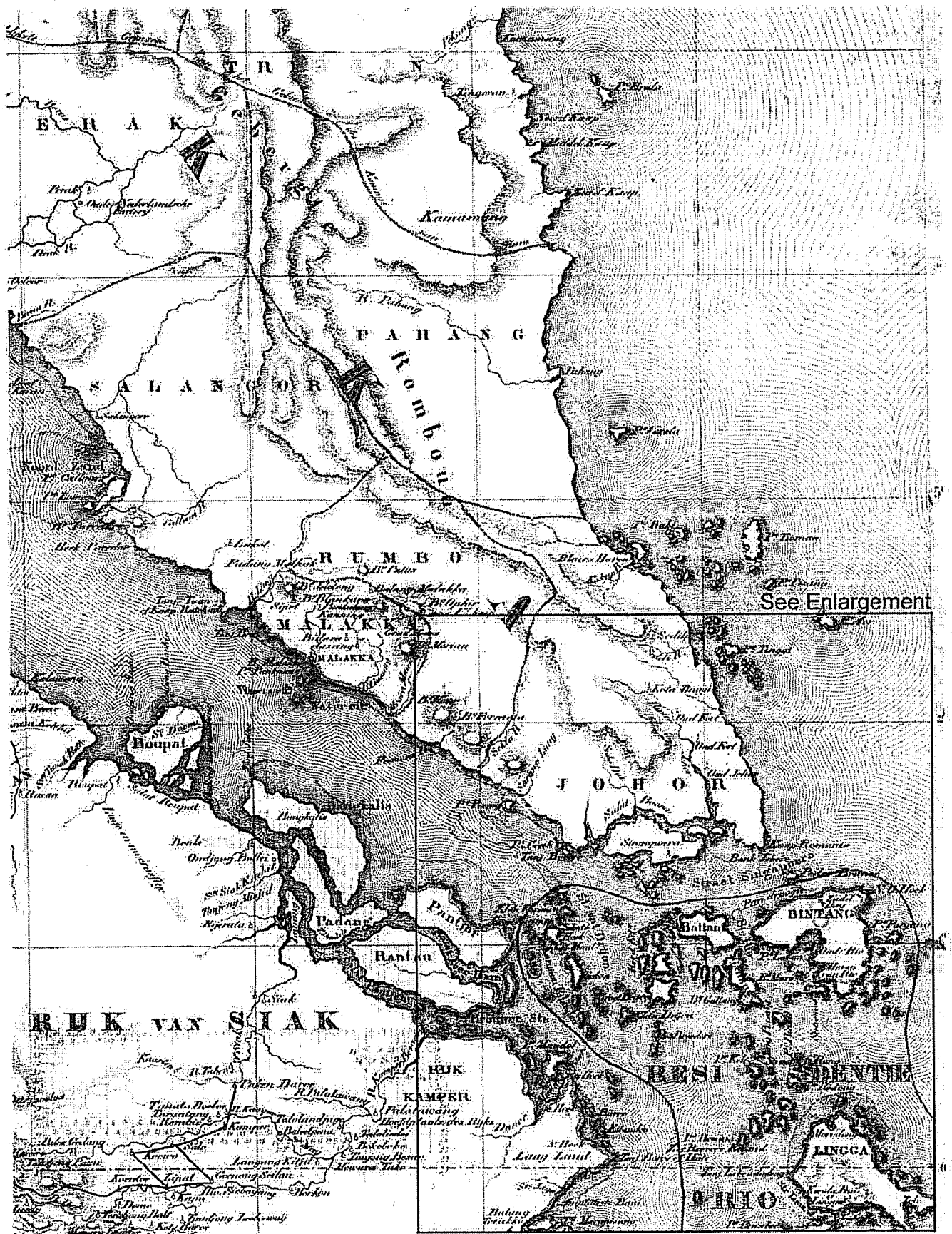
1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent data collection procedures and the use of advanced analytical techniques to derive meaningful insights from the data.

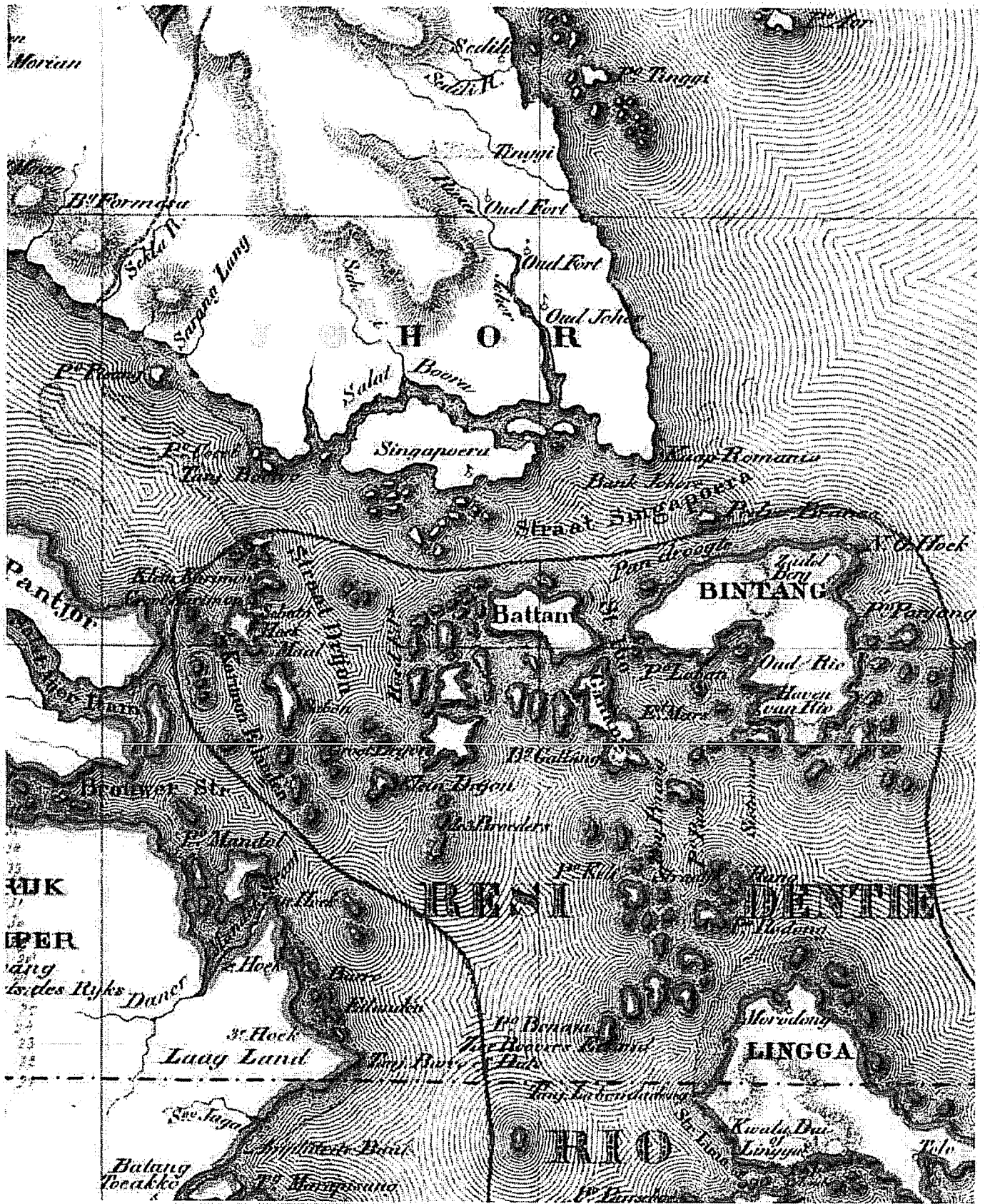
3. The third part of the document focuses on the role of technology in data management and analysis. It discusses how modern software solutions can streamline data collection, storage, and processing, thereby improving efficiency and reducing the risk of errors.

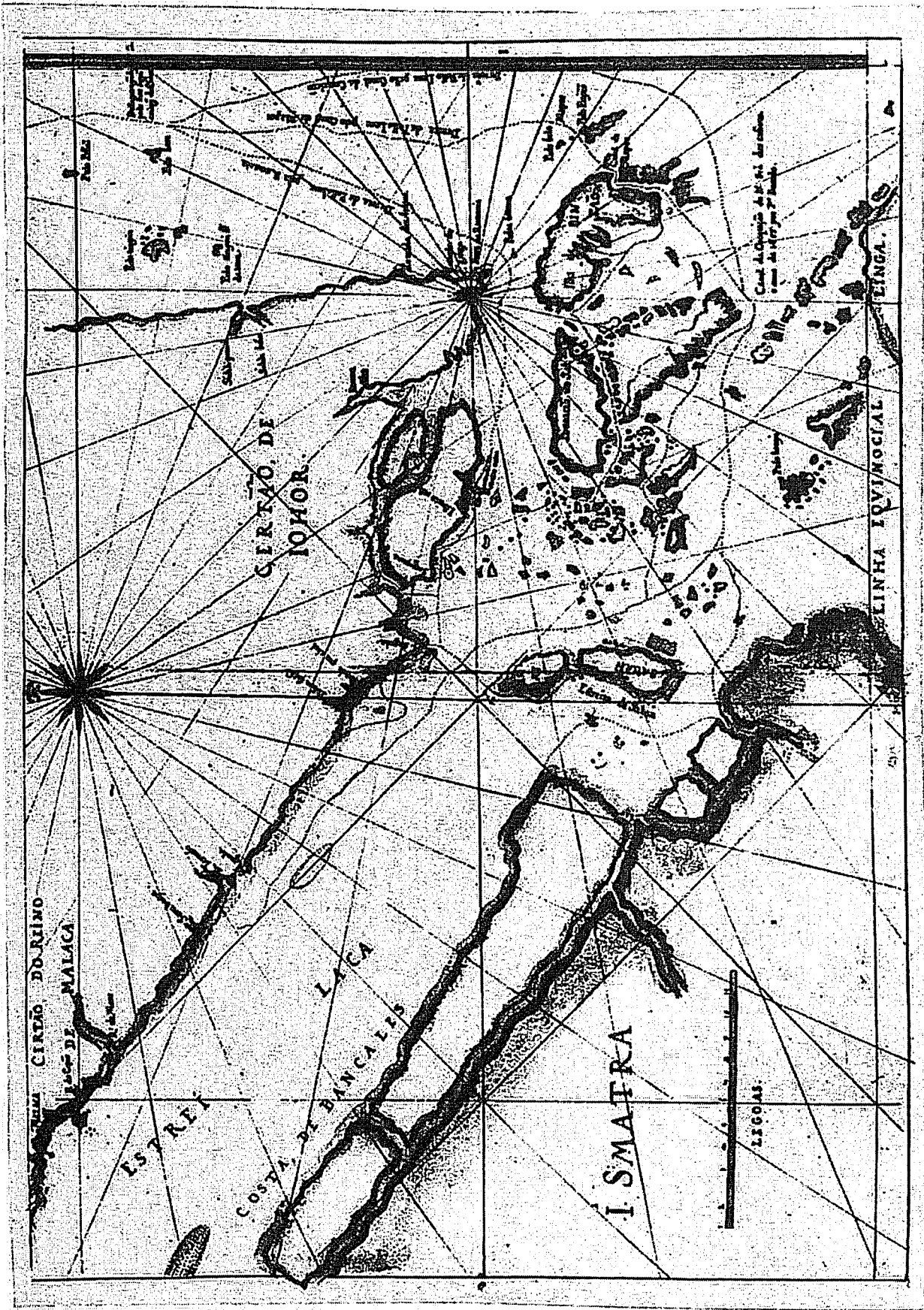
4. The fourth part of the document addresses the challenges associated with data security and privacy. It stresses the importance of implementing robust security measures to protect sensitive information and ensure compliance with relevant regulations.

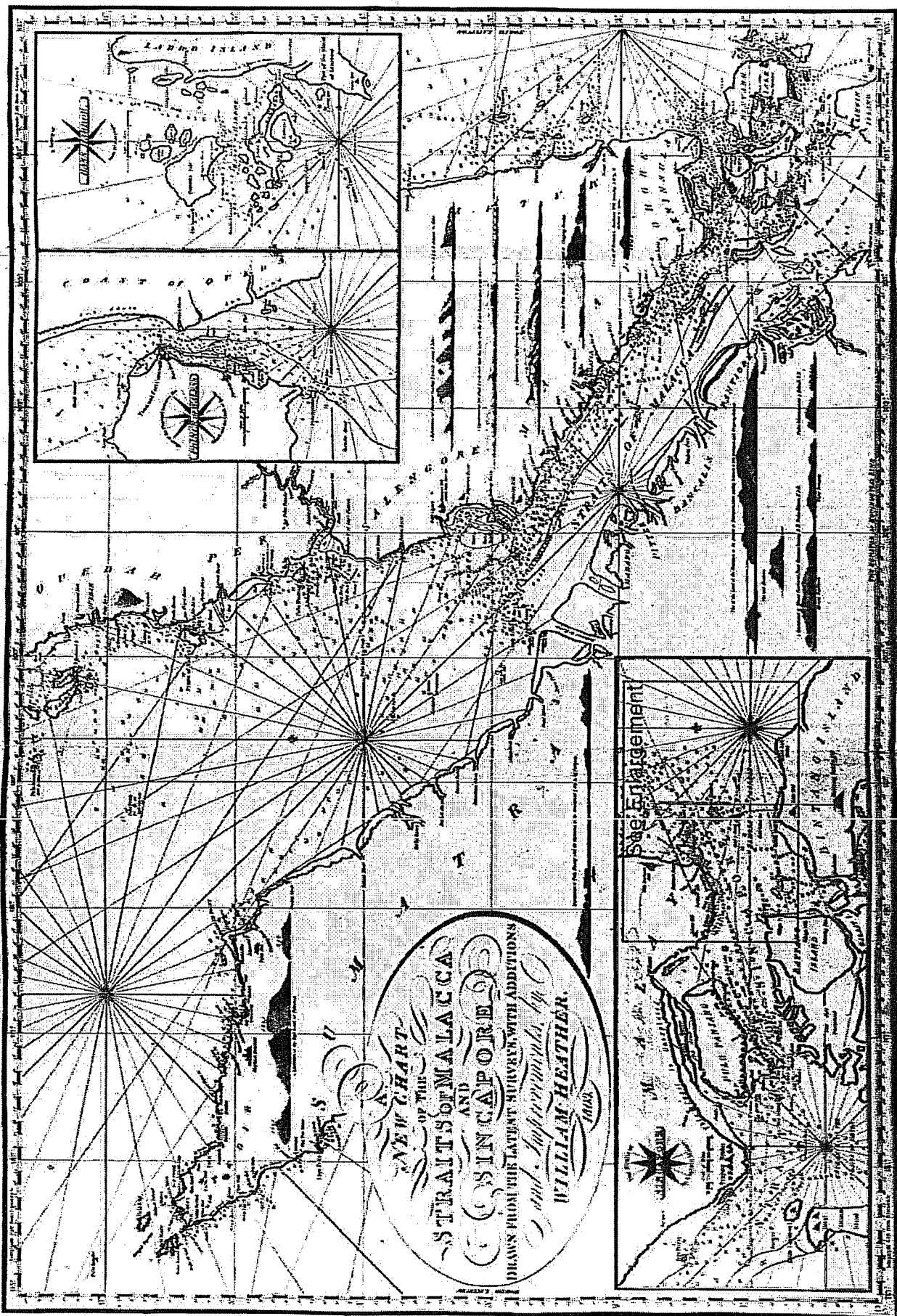
5. The fifth part of the document concludes by summarizing the key findings and recommendations. It reiterates the importance of a data-driven approach and encourages the organization to continue investing in data management capabilities to stay competitive in the market.



See Enlargement







NEW CHART
 OF THE
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 AND
 SINGAPORE
 DRAWN FROM THE LATEST SURVEYS WITH ADDITIONS
 and Improvements by
 WILLIAM HEATHER.
 1843

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Sumatra

Java

Borneo

Malacca

Singapore

Sumatra

Java

Borneo

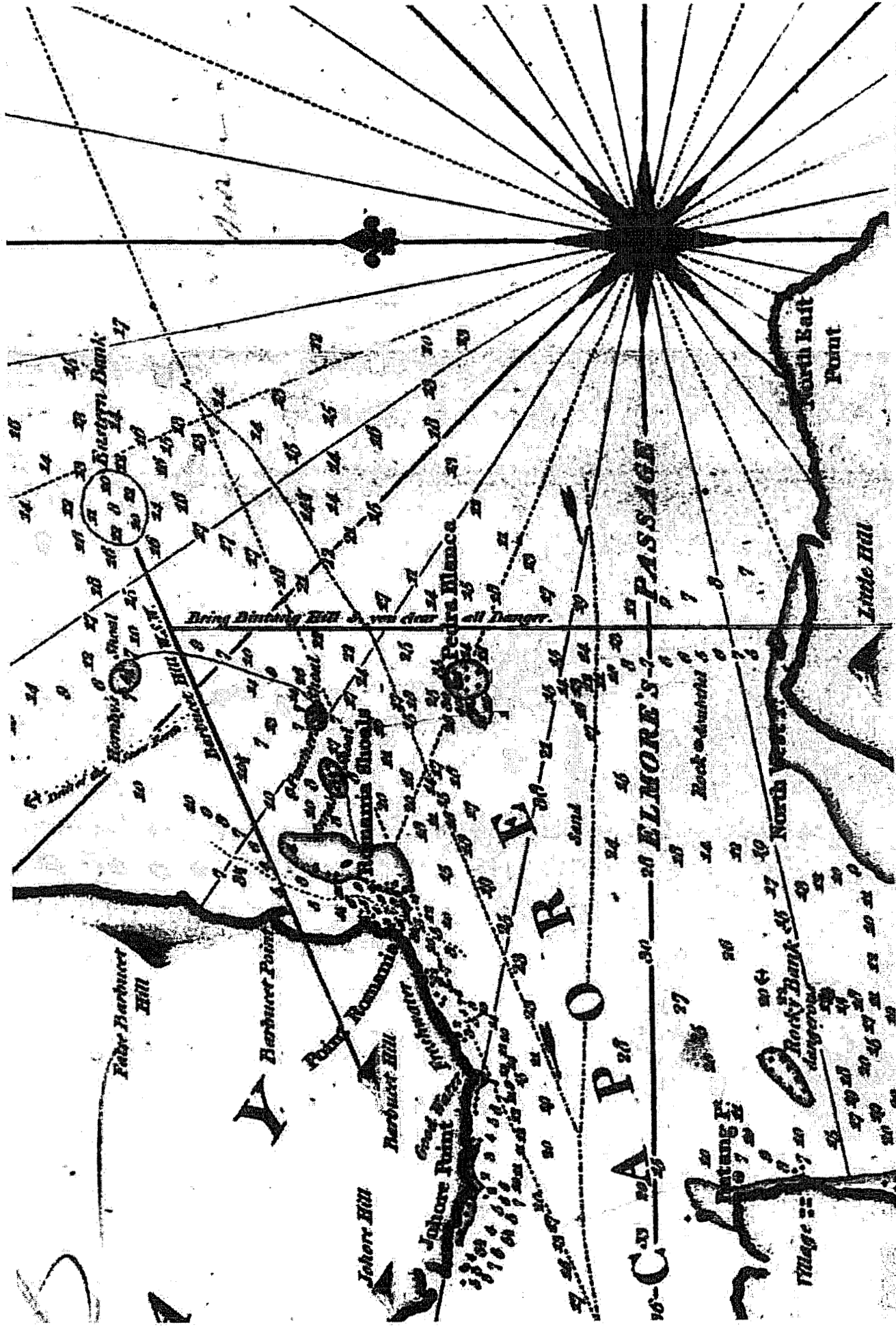
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16-CAP 26 ELMORE'S PASSAGE

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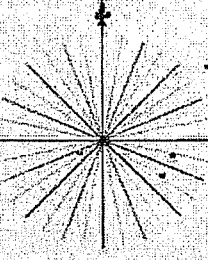
PLAN OF SOUNDINGS
 1835
 MADE BY THE SURVEYING OFFICERS OF THE ROYAL NAVY
 UNDER THE DIRECTION OF THE ADMIRALTY

A PLAN of SOUNDINGS
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 the entrance of SINGAPORE STRAIT,
 with
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 and the visible positions of the Hills etc.

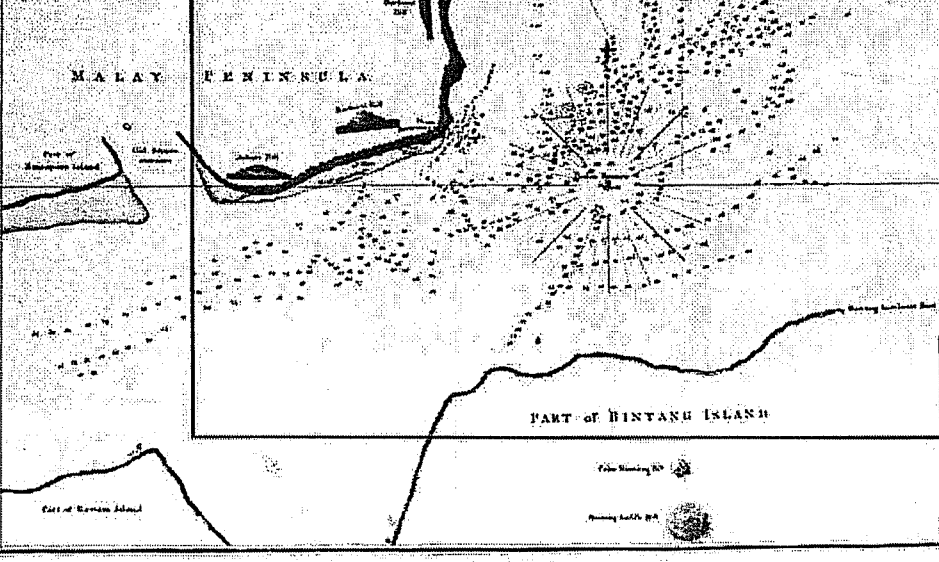
It is necessary that the Limits of the Soundings be clearly defined and that the true Limits of the Soundings be the outer boundaries when the Tides are at the Height of High Water and when the Wind is at the Force of Five or Six Beaufort's Scale. It is also necessary that the Limits be marked by a Line of Soundings which shall be at least 1/2 mile in length and shall be marked by a Line of Soundings which shall be at least 1/2 mile in length and shall be marked by a Line of Soundings which shall be at least 1/2 mile in length.



Explanatory Description.
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See Enlargement



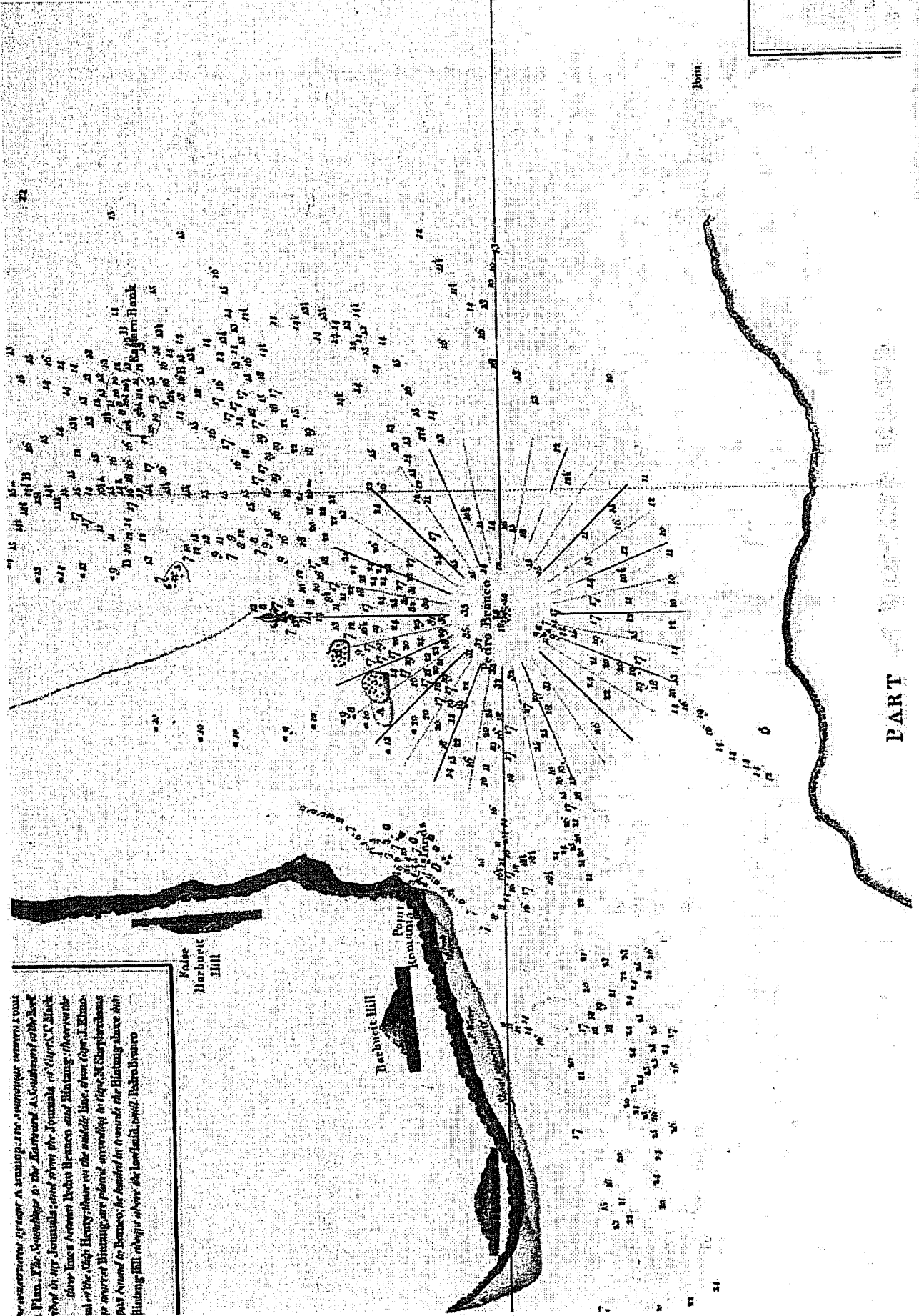
Note.
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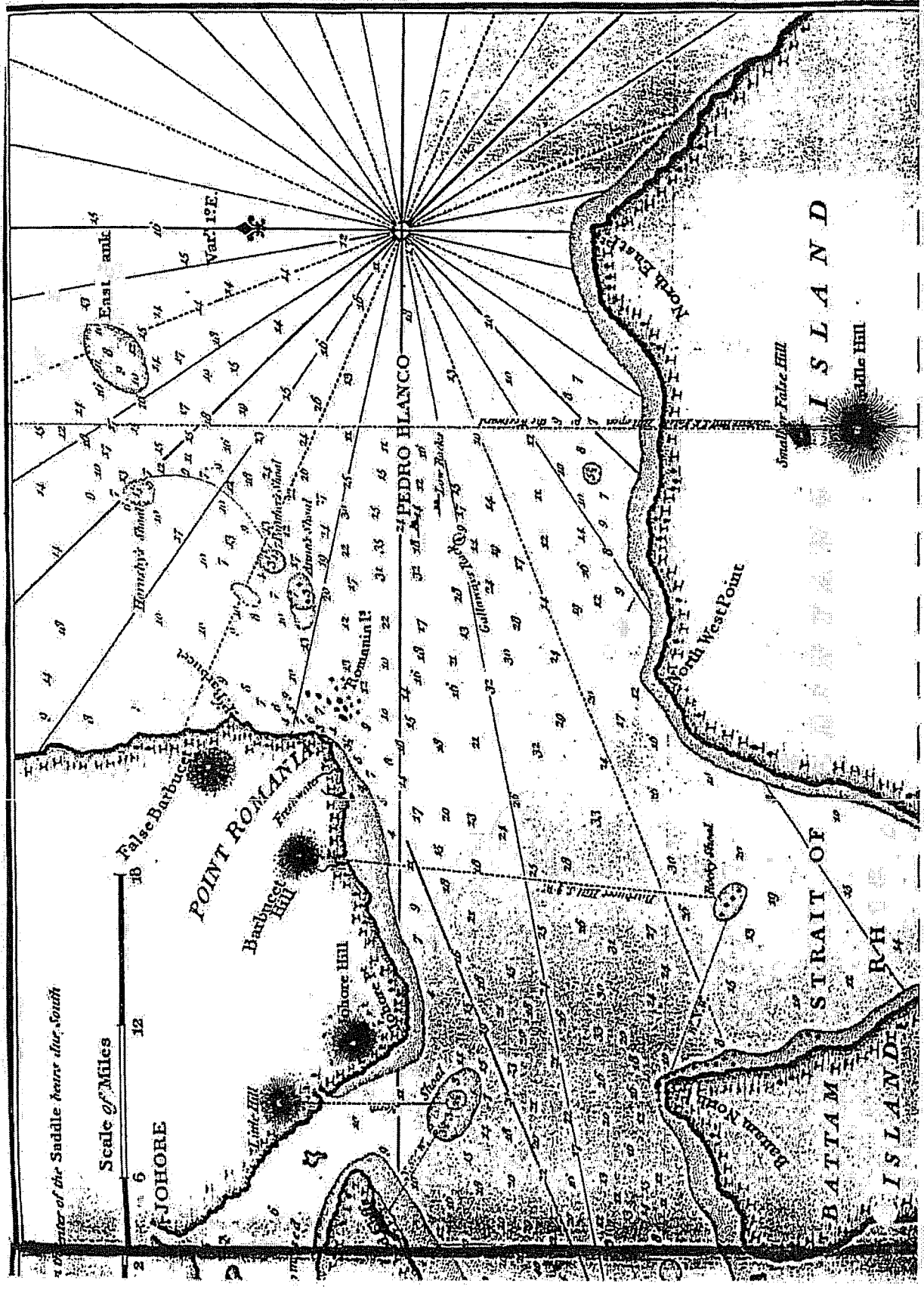
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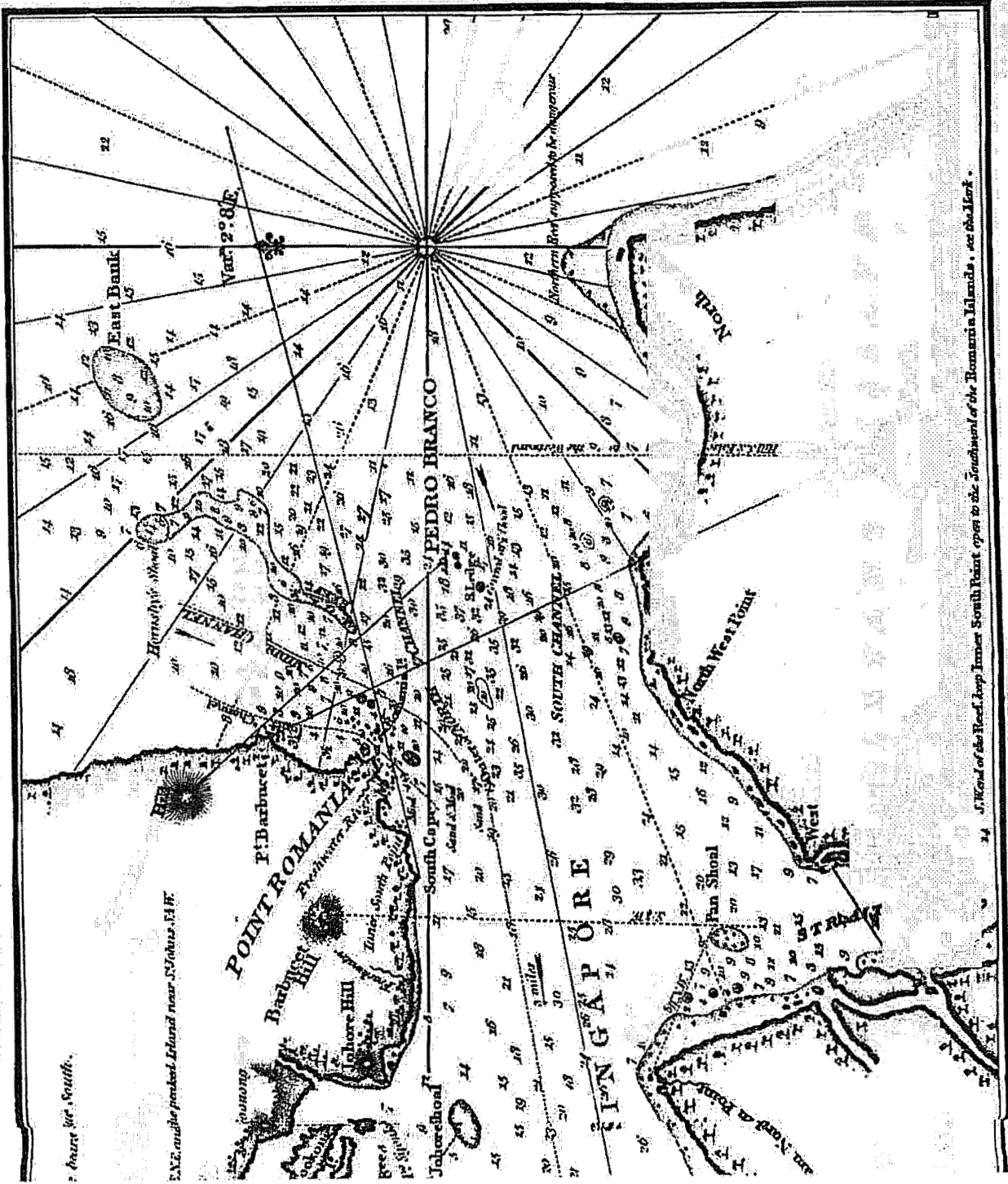
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OFFICE OF THE CHIEF OF DEFENSE
 HEADQUARTERS, UNITED STATES OF AMERICA
 DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

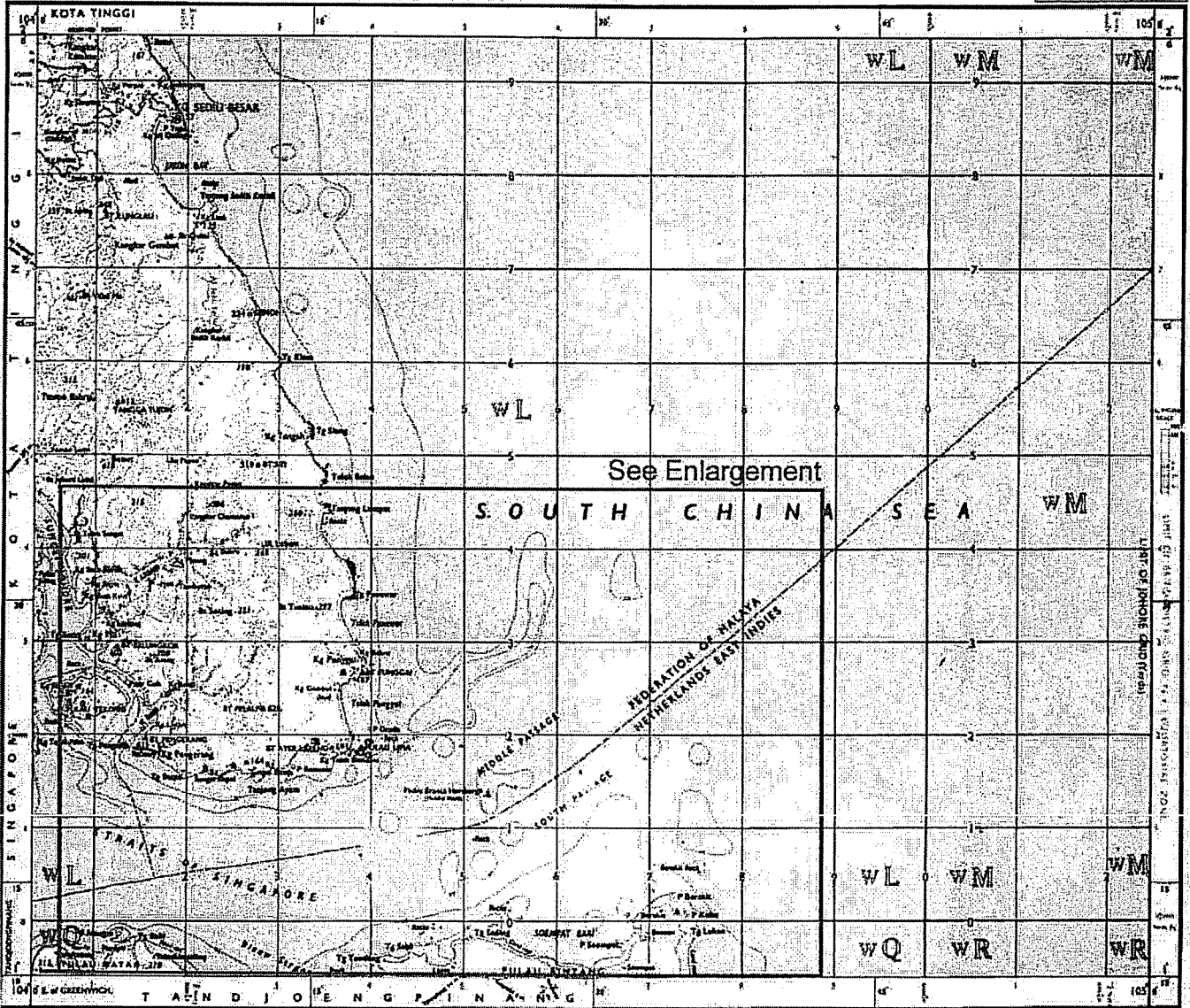
MALAYA 1:253,440

SEDILI BESAR

FIRST EDITION

SHEET A-48 O

Refer to this map as G.C.G.C. 418
 Sheet A-48 O
 First Edition



See Enlargement

SOUTH CHINA SEA

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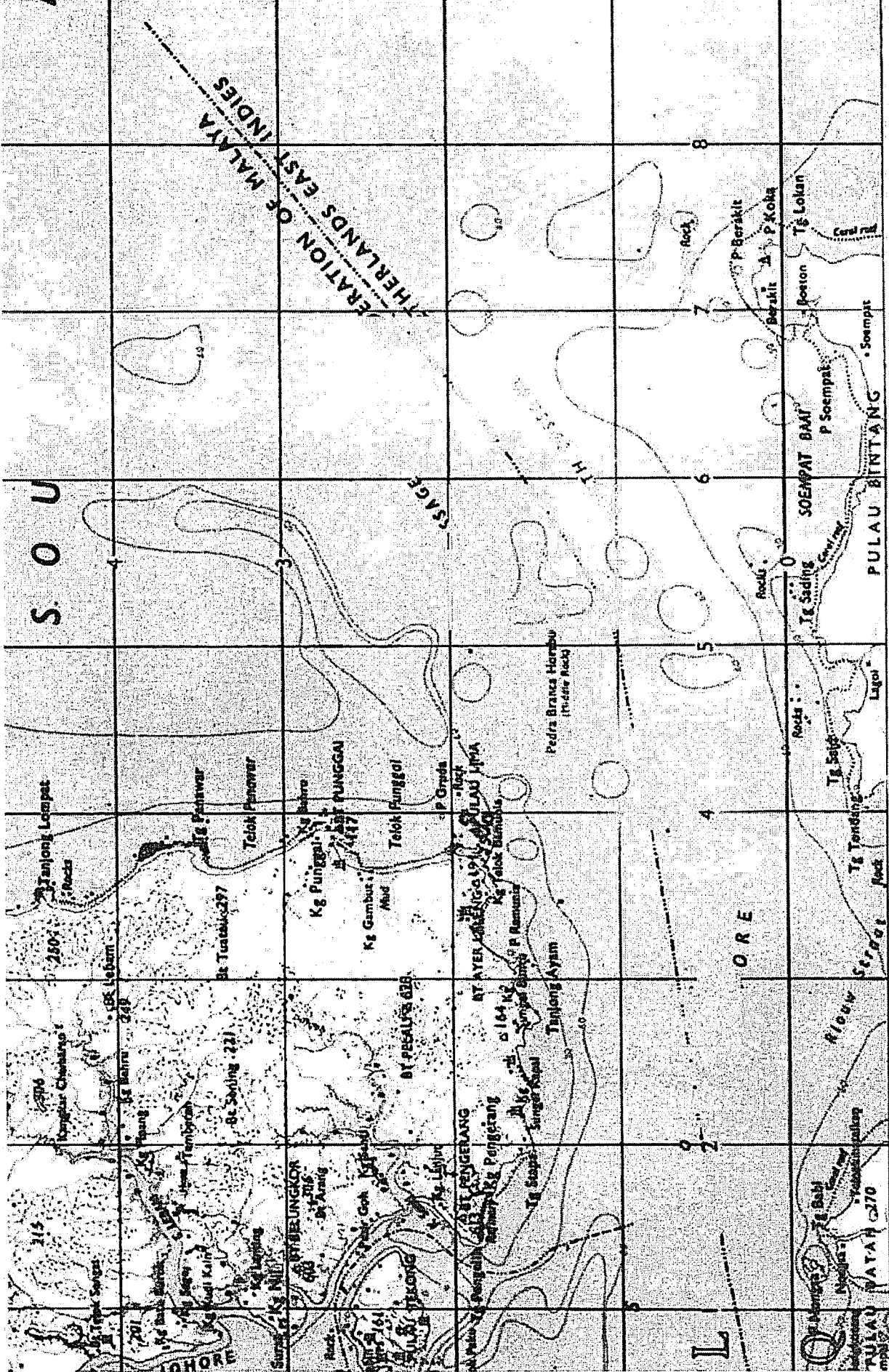
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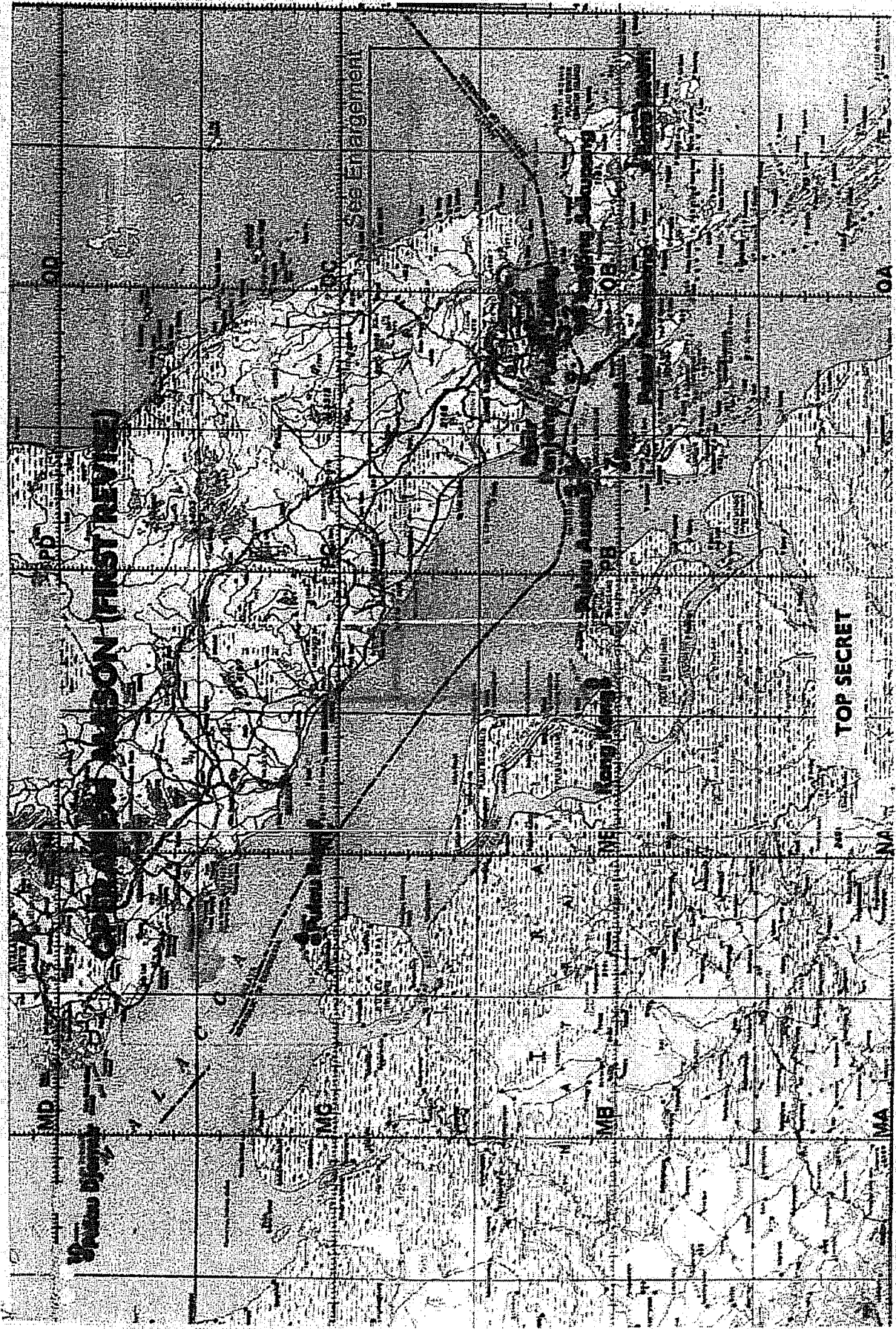
Refer to this map as G.C.G.C. 418
 Sheet A-48 O
 First Edition

<p> Symbols used on this map: General Code, 1964, 4212. Symbols used on this map: General Code, 1964, 4212. Symbols used on this map: General Code, 1964, 4212. </p>	<p> Symbols used on this map: General Code, 1964, 4212. Symbols used on this map: General Code, 1964, 4212. Symbols used on this map: General Code, 1964, 4212. </p>
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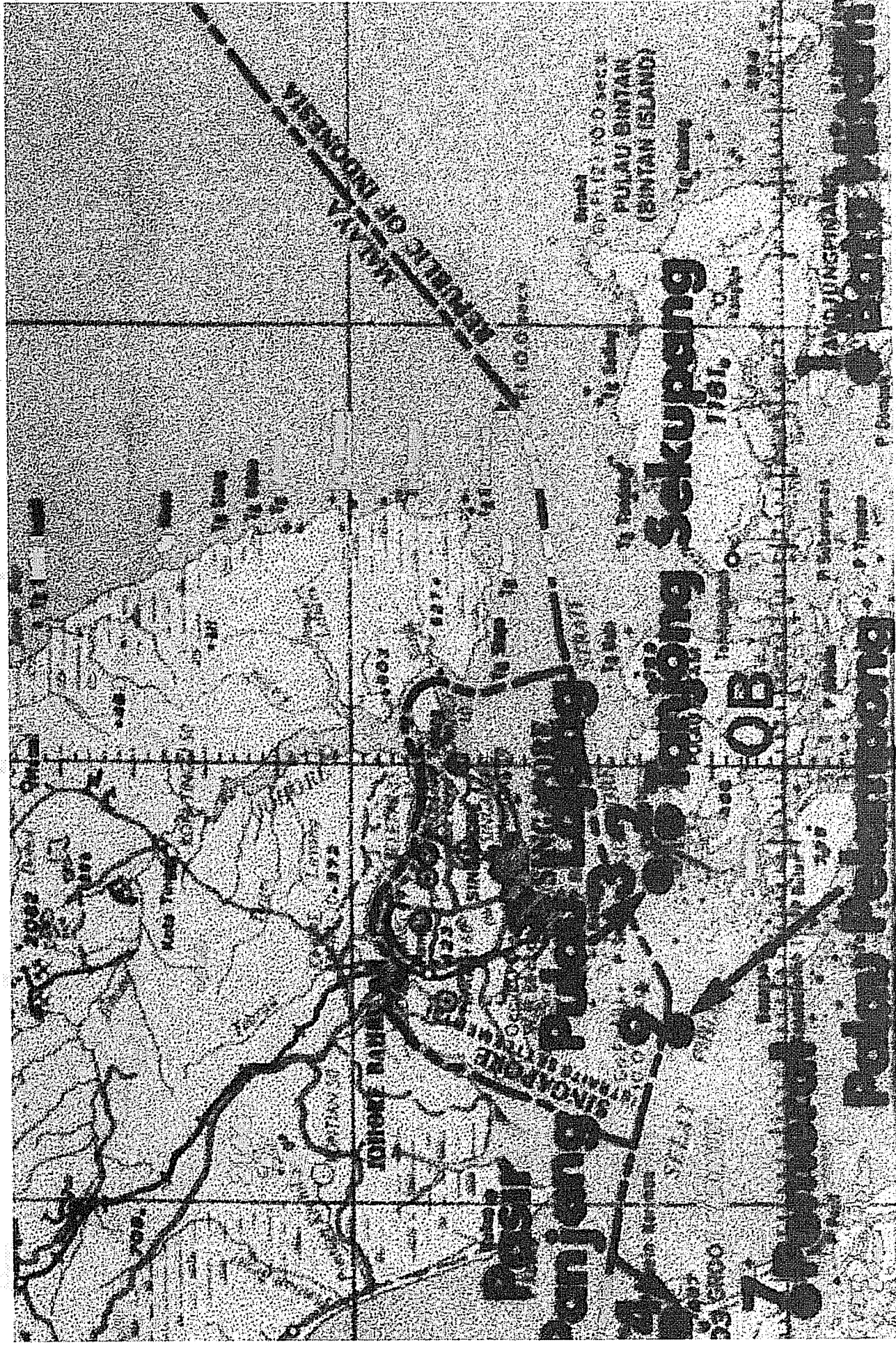


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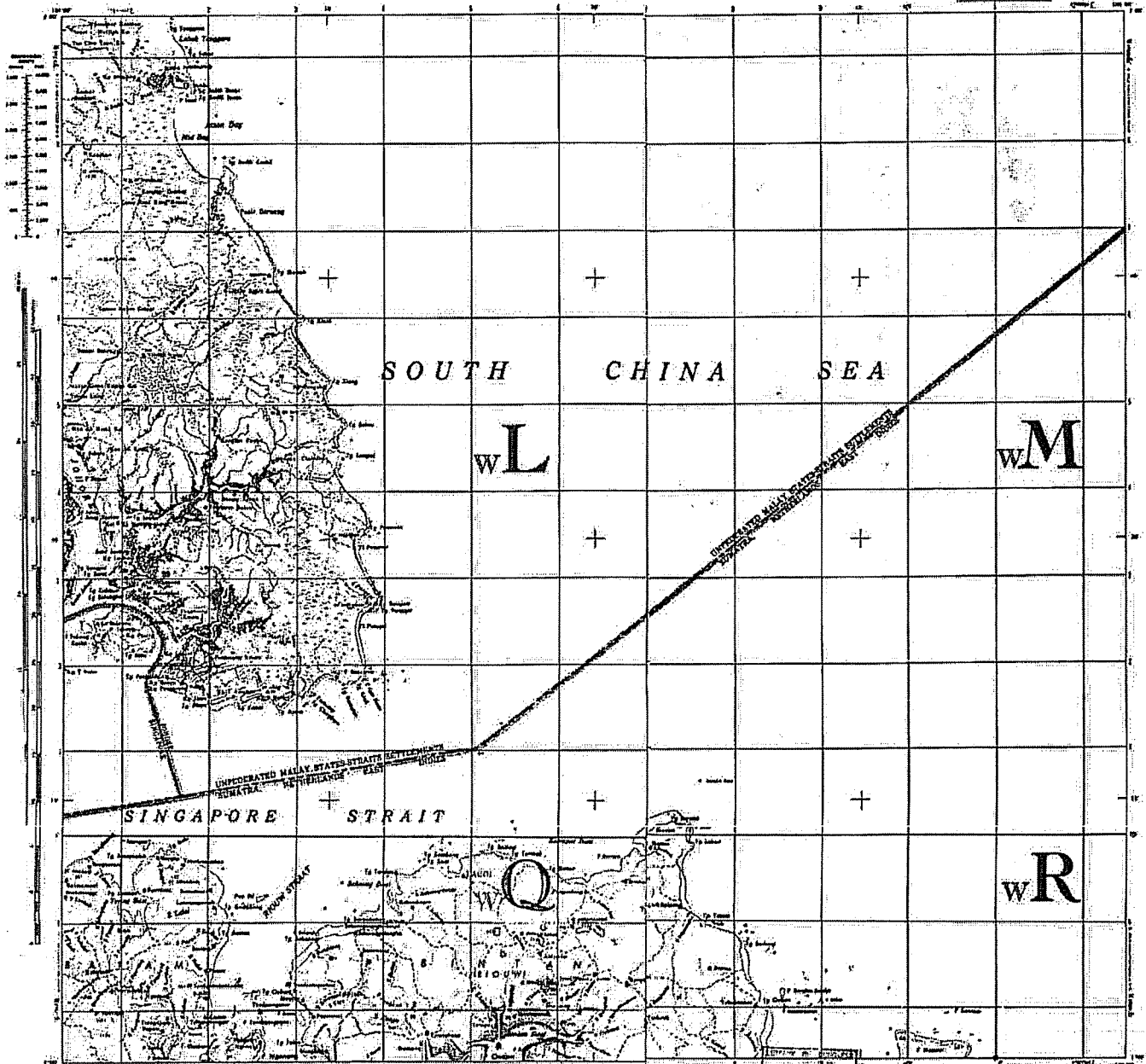
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SECOND EDITION-AMS 3

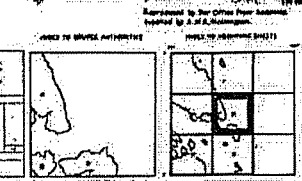
SHEET 26



Geographical Position, Coastal Survey, etc. (AMS 3) (and map)
 Published by the Hydrographic Office, Washington, D.C., U.S.A.
 First Edition 1914
 Revised under the authority of the Board of Admiralty, & by the Hydrographic Office, U.S.A., in accordance with the provisions of the Act of Congress of the 22d March 1899, and the Act of the 10th March 1908, and the Act of the 10th March 1910, and the Act of the 10th March 1912, and the Act of the 10th March 1914, and the Act of the 10th March 1916, and the Act of the 10th March 1918, and the Act of the 10th March 1920, and the Act of the 10th March 1922, and the Act of the 10th March 1924, and the Act of the 10th March 1926, and the Act of the 10th March 1928, and the Act of the 10th March 1930, and the Act of the 10th March 1932, and the Act of the 10th March 1934, and the Act of the 10th March 1936, and the Act of the 10th March 1938, and the Act of the 10th March 1940, and the Act of the 10th March 1942, and the Act of the 10th March 1944, and the Act of the 10th March 1946, and the Act of the 10th March 1948, and the Act of the 10th March 1950, and the Act of the 10th March 1952, and the Act of the 10th March 1954, and the Act of the 10th March 1956, and the Act of the 10th March 1958, and the Act of the 10th March 1960, and the Act of the 10th March 1962, and the Act of the 10th March 1964, and the Act of the 10th March 1966, and the Act of the 10th March 1968, and the Act of the 10th March 1970, and the Act of the 10th March 1972, and the Act of the 10th March 1974, and the Act of the 10th March 1976, and the Act of the 10th March 1978, and the Act of the 10th March 1980, and the Act of the 10th March 1982, and the Act of the 10th March 1984, and the Act of the 10th March 1986, and the Act of the 10th March 1988, and the Act of the 10th March 1990, and the Act of the 10th March 1992, and the Act of the 10th March 1994, and the Act of the 10th March 1996, and the Act of the 10th March 1998, and the Act of the 10th March 2000, and the Act of the 10th March 2002, and the Act of the 10th March 2004, and the Act of the 10th March 2006, and the Act of the 10th March 2008, and the Act of the 10th March 2010, and the Act of the 10th March 2012, and the Act of the 10th March 2014, and the Act of the 10th March 2016, and the Act of the 10th March 2018, and the Act of the 10th March 2020, and the Act of the 10th March 2022, and the Act of the 10th March 2024.



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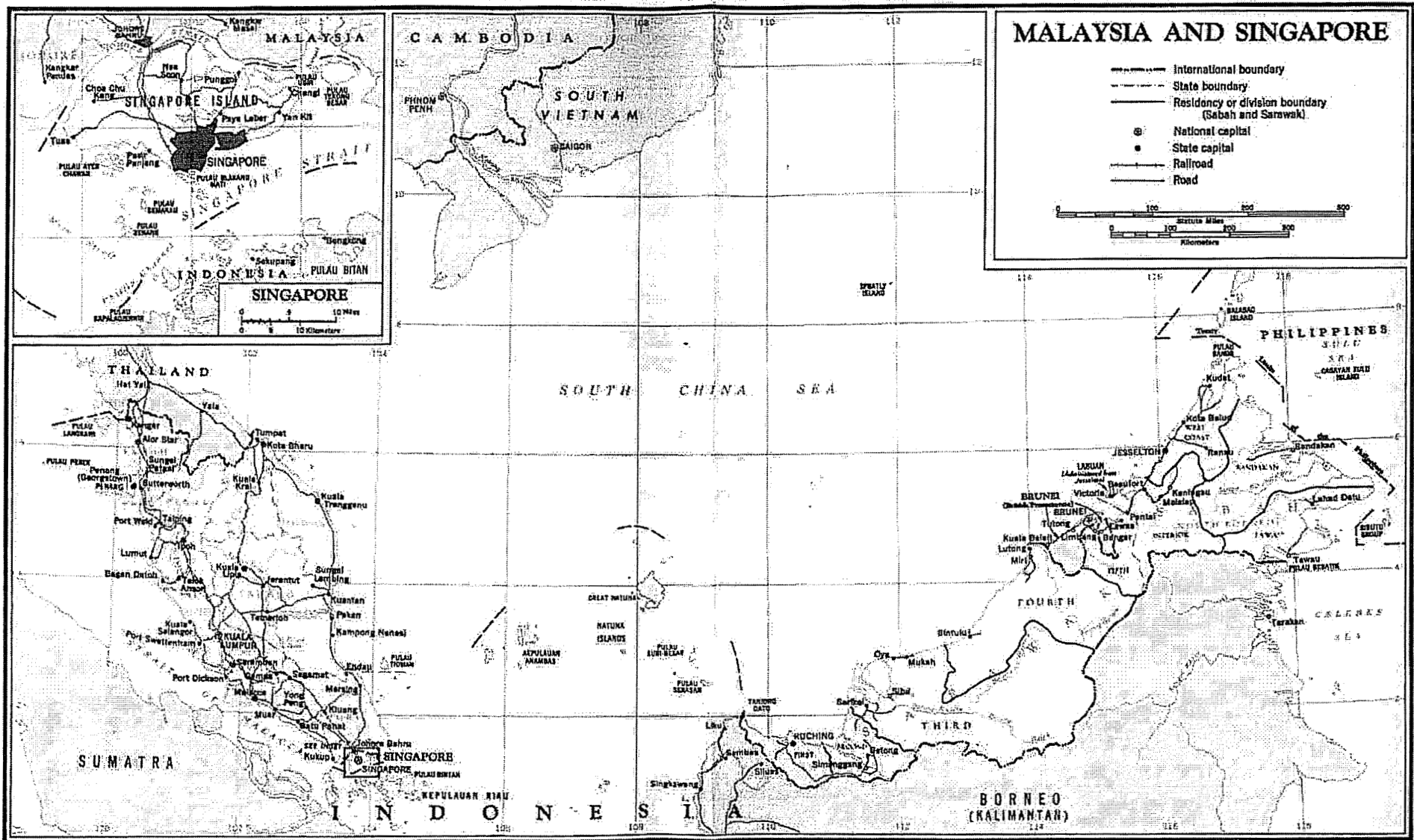


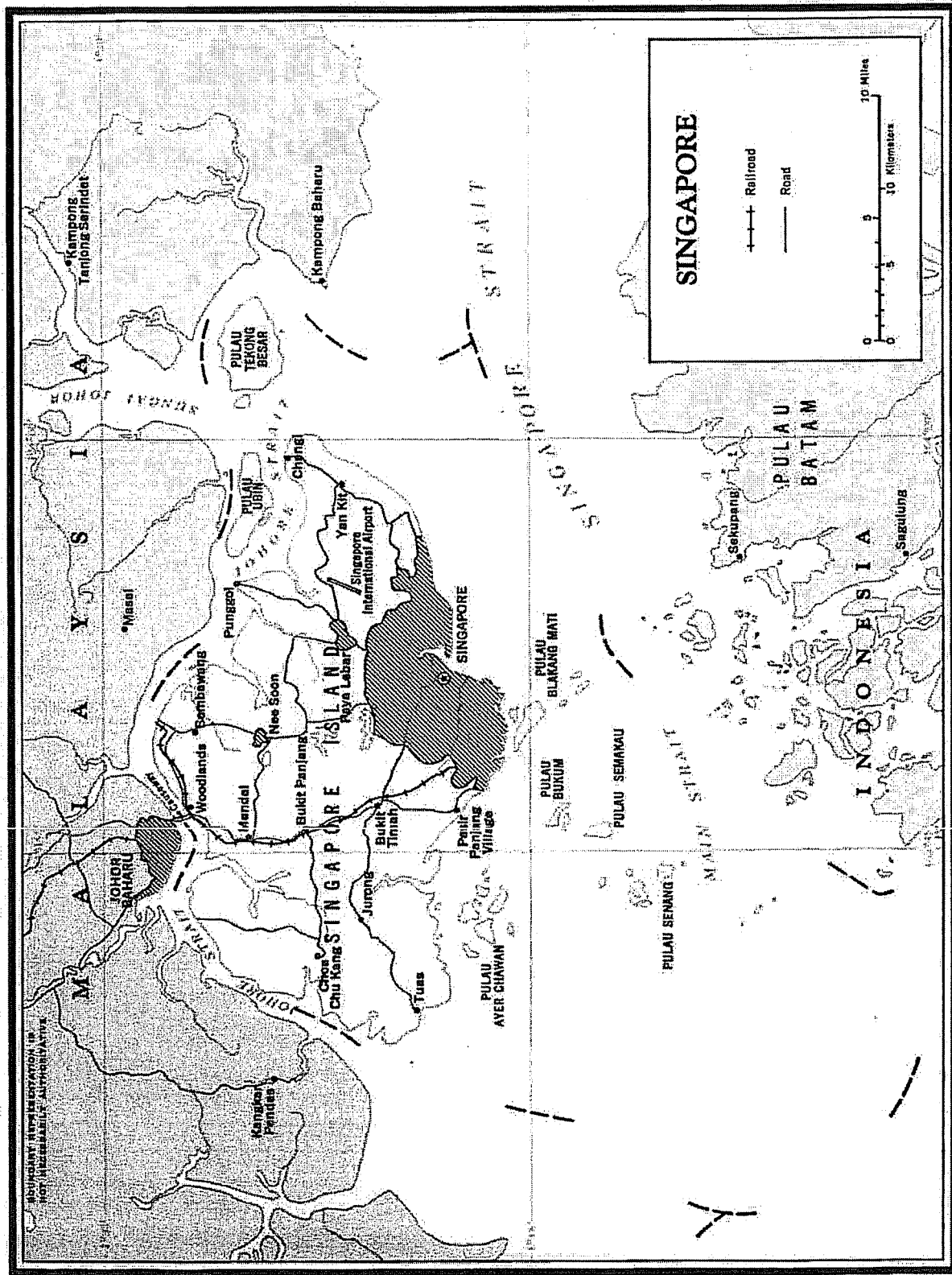
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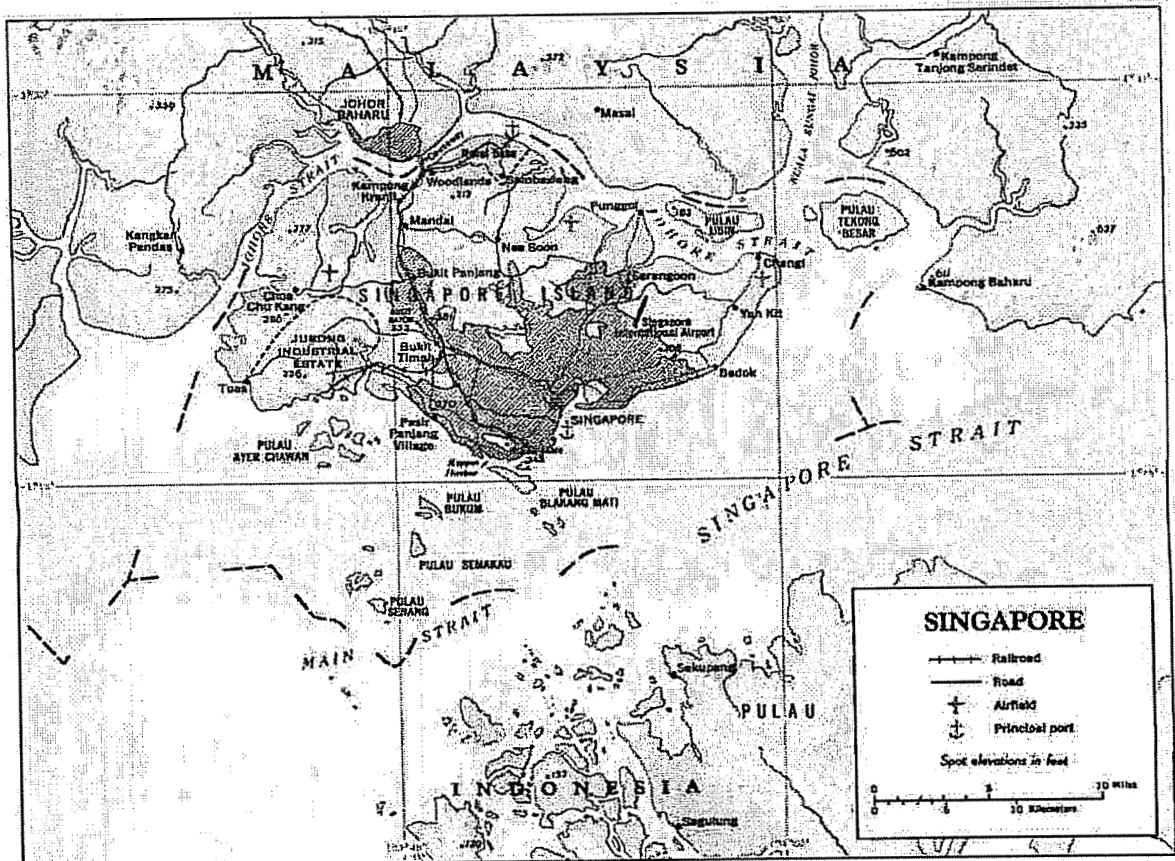
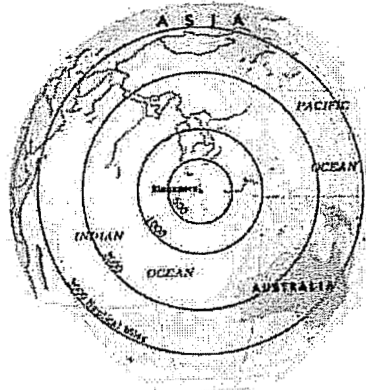
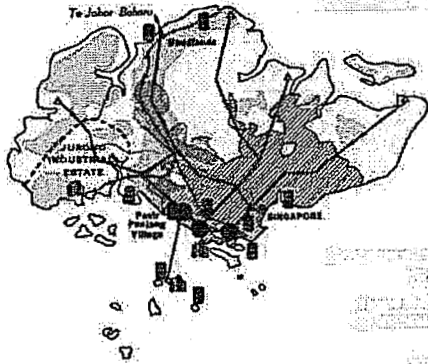
MALAYSIA AND SINGAPORE, 11-65
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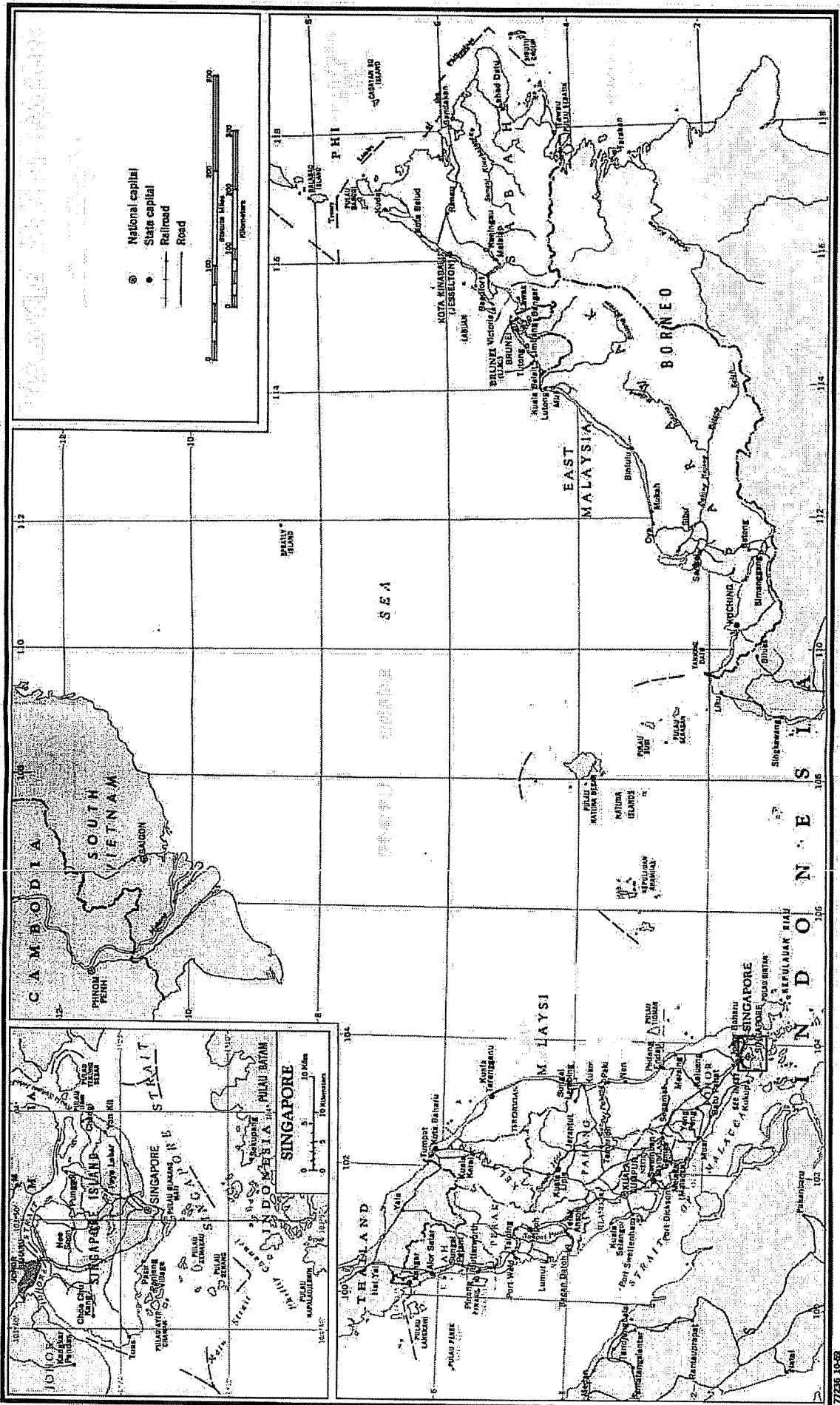
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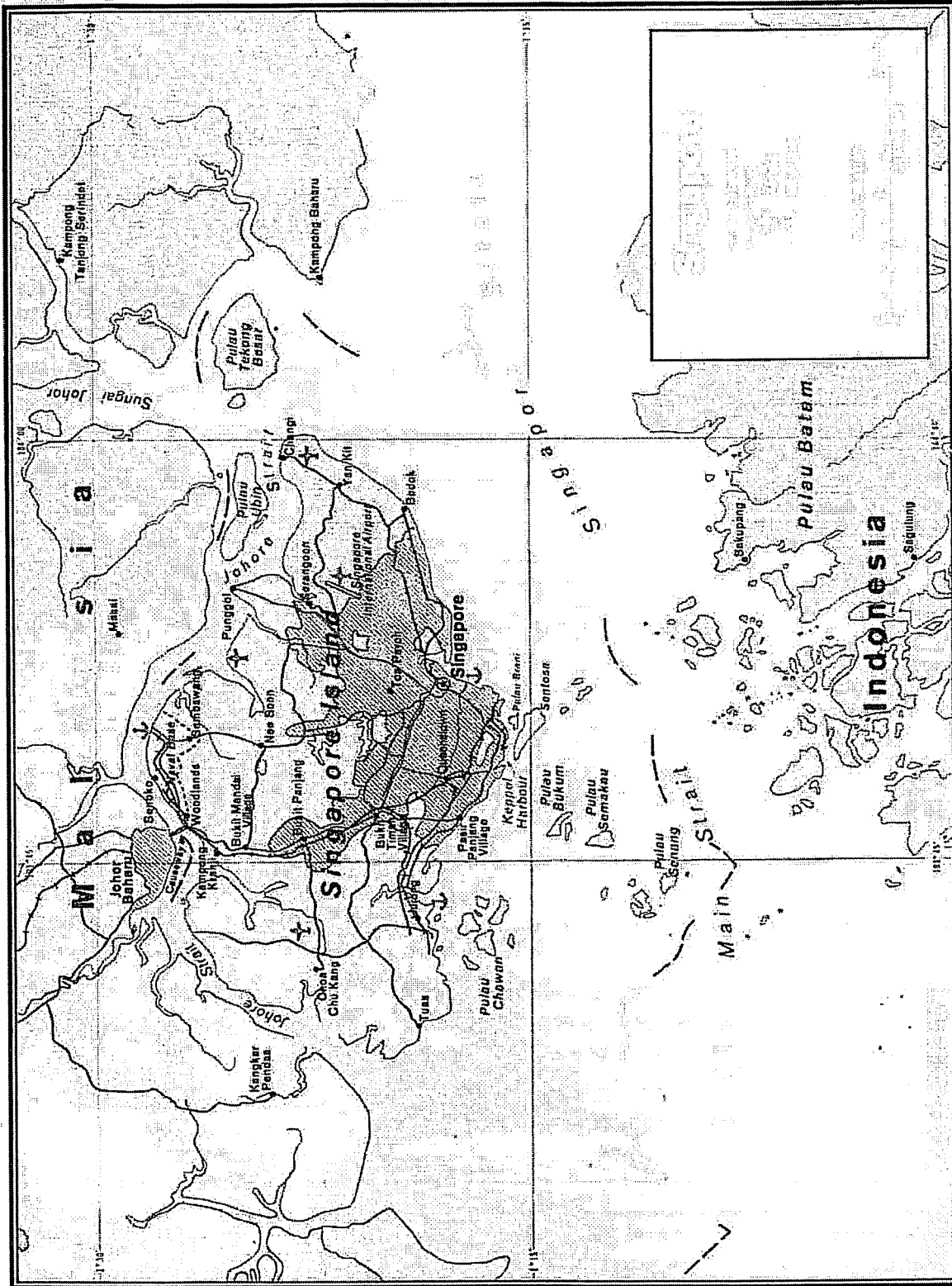




SINGAPORE, AREA 6-01
LIMITS OF THE STRAITS SETTLEMENTS AND SINGAPORE, 1870



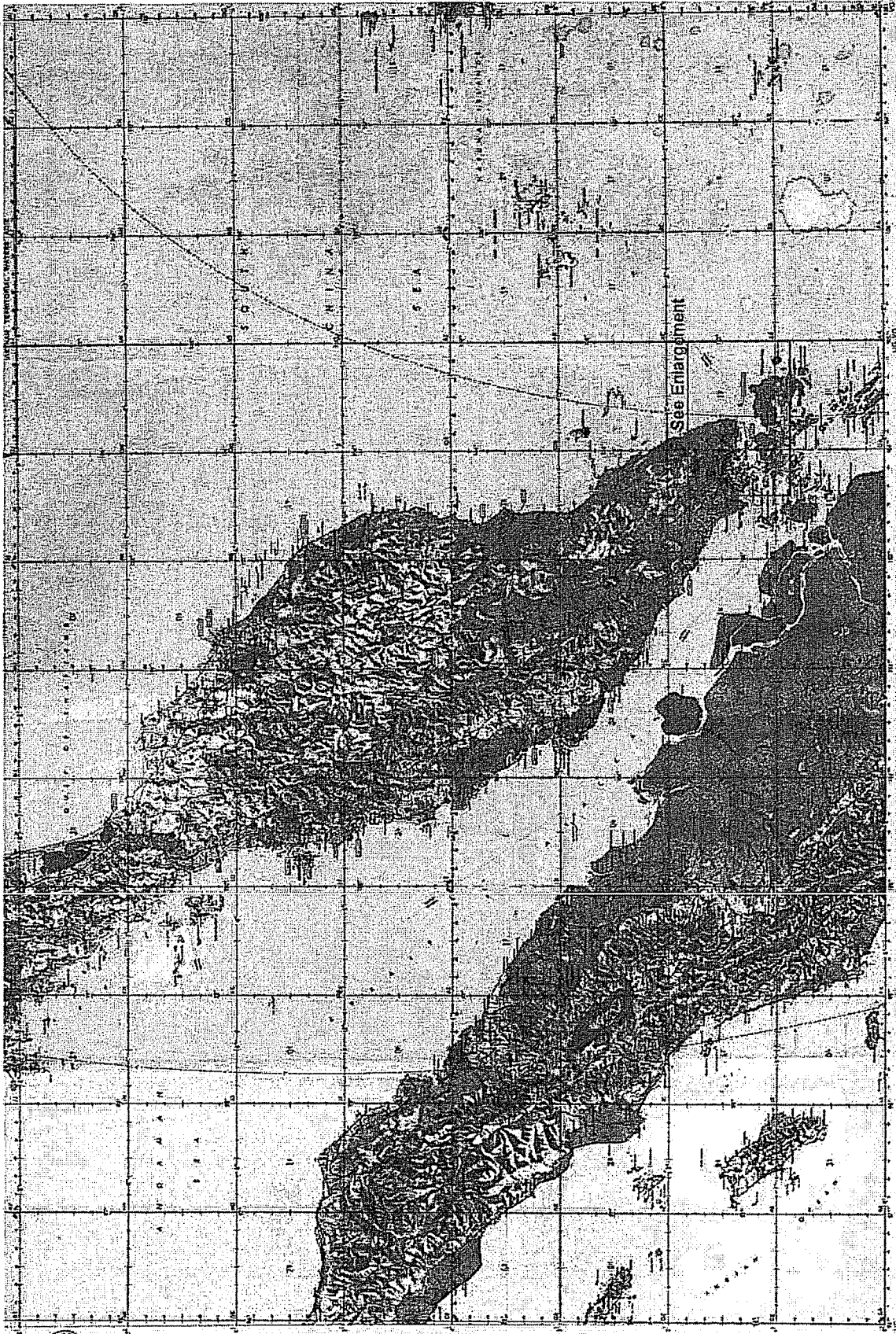




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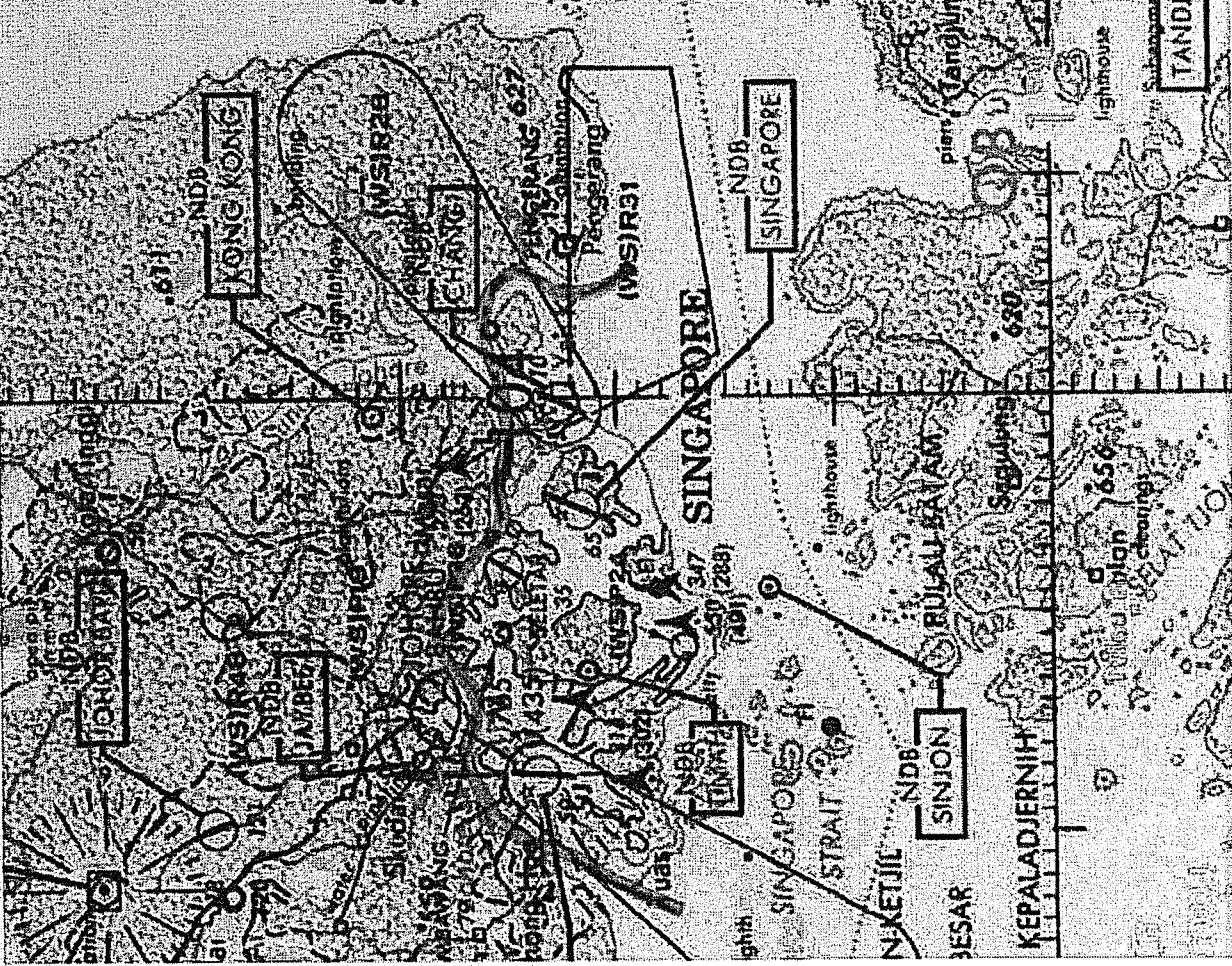
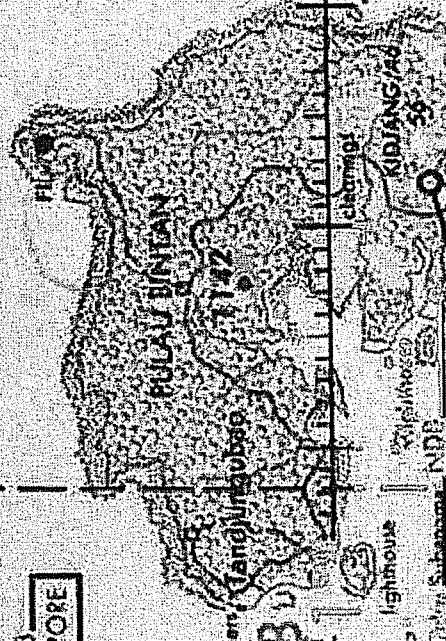
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PULAU MAPU

PULAU POTO

TANDUINGPINANG
TANDUINGPINANG
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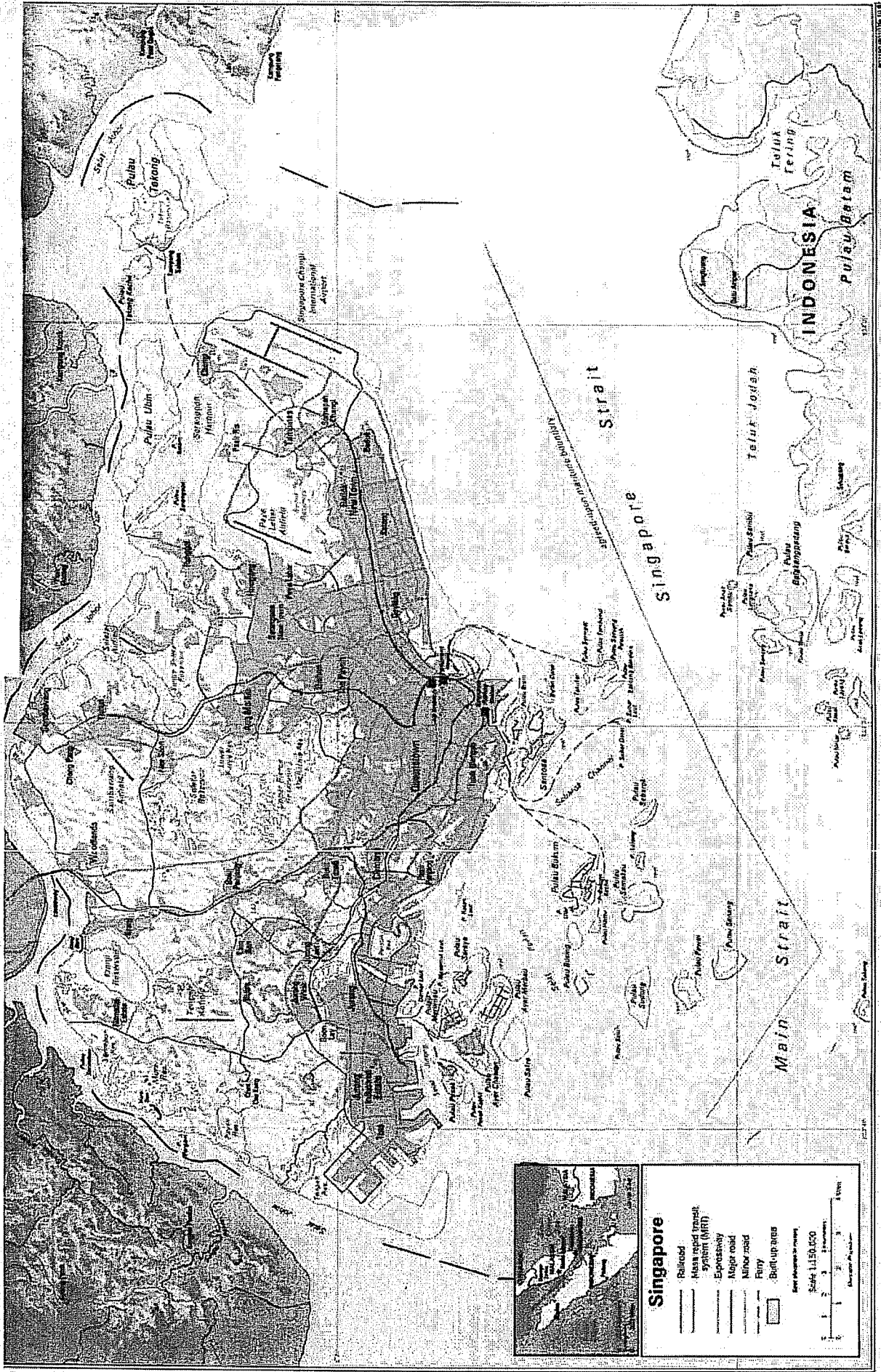
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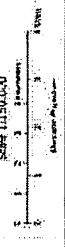
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Singapore

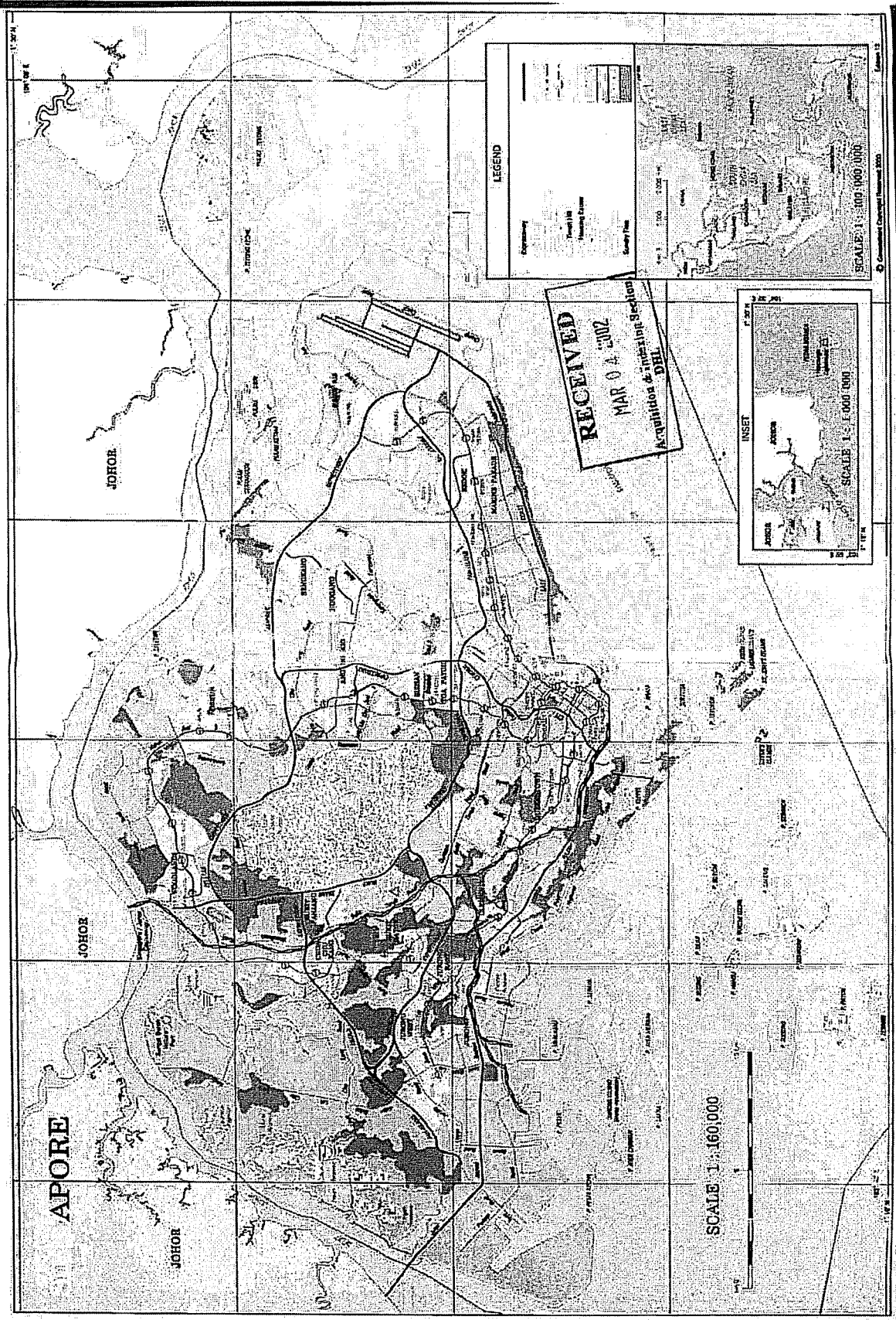
- Railroad
- Mass rapid transit system (MRT)
- Expressway
- Major road
- Minor road
- Ferry
- Built-up area

Scale 1:150,000



Source: Singapore Department of Statistics

1:60,000
1:160,000
1:250,000
1:500,000
1:1,000,000



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This map was prepared by the Defense Intelligence Agency
for the use of the United States
and its allies in the Pacific Region

SUBMISSIONS

In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over

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

belongs to Malaysia.

Agent of Malaysia

Kuala Lumpur

25 January 2005