

**INTERNATIONAL COURT OF JUSTICE**

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

**MALAYSIA/SINGAPORE**

**REPLY OF MALAYSIA**

**Volume 1**

**25 November 2005**

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## Chapter 1

### INTRODUCTION

#### A. The positions of the Parties

1. Both Parties have now filed their Memorials and Counter-Memorials, and each round of pleadings brings the essential question for the Court into clearer focus. The Parties' Counter-Memorials confirm that, as suggested by Malaysia in its Counter-Memorial, the first essential question faced by the Court, and the one on which the Parties disagree, is "who had sovereignty over PBP, Middle Rocks and South Ledge in the years immediately following the inauguration of the lighthouse, and on what basis?"<sup>1</sup> The answer to the second essential question—whether anything has happened since that time to change that legal situation—was resolved in the negative in the first round of pleadings.<sup>2</sup> That is, conduct subsequent to the inauguration of the lighthouse in 1851 up to the present day is both secondary and not dispositive of the question of title. Accordingly, this Reply will focus mainly on the history of the region in the period up to the early 19<sup>th</sup> century and events in the 19<sup>th</sup> century leading to the inauguration of the lighthouse in 1851. The conduct of the Parties after 1851 has already been comprehensively addressed, but it will be dealt with in Chapter 5 to the extent necessary to respond to points raised by Singapore in its Counter-Memorial.

2. Malaysia's case, as set out in its Memorial, is that it has original title over PBP because it was part of the Sultanate of Johor which later became part of Malaysia, and that this title was never relinquished. The construction and operation of the lighthouse on PBP by Great Britain and later Singapore was on the basis of permission granted by the rulers of Johor for that purpose. Singapore's case, as set out in its Memorial, is that Great Britain acquired an original title over PBP through the "taking of lawful possession" during the years 1847-1851, such taking of sovereignty occurring variously before 1847, in 1847, and between 1847 and 1851, but in any case being completed by the end of

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<sup>1</sup> MCM, para. 13.

<sup>2</sup> Ibid.

1851.<sup>3</sup> That taking of possession in turn entailed sovereignty over the other features, Middle Rocks and South Ledge, even though there is no evidence of any exercise of sovereignty prior to the present dispute arising.

3. In its Counter-Memorial Malaysia pointed out that “the taking of lawful possession” is not a recognised mode of acquisition, and that Singapore does not seek to establish title through any other recognised modes of acquisition, such as occupation of *terra nullius* or cession, nor even the more doubtful doctrine of acquisitive prescription.<sup>4</sup> For its part Singapore’s Counter-Memorial argues that Malaysia cannot show that PBP was ever part of the Sultanate of Johor<sup>5</sup> or that there was a continuous chain of succession of title before and after 1824 to the present day.<sup>6</sup>

4. Singapore’s case of title to PBP as expanded in its Counter-Memorial is that: (a) PBP was *terra nullius* (although it does not use that term<sup>7</sup>) which was taken in “lawful possession by agents of the British Crown in the period 1847-1851” and “[i]n the circumstances the intention of the British Crown was to establish sovereignty”<sup>8</sup>; or, alternatively, (b) PBP did not belong to the Sultanate of Johor<sup>9</sup> and “[p]ossession was taken openly... without protest” from “any Malay chief or any other power in the region”.<sup>10</sup> That is, if PBP did belong to someone, that someone did not protest the open taking of possession by the construction of the lighthouse by the British between 1847-1851. The problem with the first argument is that Singapore cannot show that Great Britain ever asserted, or manifested an intention to assert, sovereignty over PBP. The problem with the second argument is that Great Britain at the time treated the consent of Johor to the building of the lighthouse as a necessary part of the arrangements, and Singapore does not identify a possible Malay entity or other power as a potential candidate for sovereignty. In short, Singapore has failed in its Memorial and again in its Counter-Memorial to state a coherent legal basis for its claim to sovereignty.

<sup>3</sup> See MCM, paras. 58-60, which discusses Singapore’s equivocation in its Memorial over the precise time at which the alleged taking of sovereignty occurred. This equivocation is continued in its Counter-Memorial: e.g., in para. 1.9 Singapore claims that lawful possession was taken “during the years 1847-1851”; in para. 3.39 it refers to “the taking of lawful possession of the island in 1847 by agents of the British Crown”.

<sup>4</sup> MCM, para. 6.

<sup>5</sup> SCM, paras. 1.5-1.8.

<sup>6</sup> SCM, para. 1.4.

<sup>7</sup> Singapore merely observes that PBP was “uninhabited” (SCM, paras. 3.11, 3.43(b)).

<sup>8</sup> SCM, para. 5.3.

<sup>9</sup> SCM, para. 3.43(b) & (e).

<sup>10</sup> SCM, paras. 1.9, 5.3.

5. On the contrary, a number of key points emerge from Singapore's Counter-Memorial in support of Malaysia's case:

- (a) Singapore does not deny that the old Kingdom (or Sultanate) of Johor extended north and south of the Straits.<sup>11</sup>
- (b) Singapore agrees that in 1824 certain events took place,<sup>12</sup> namely the conclusion of the Anglo-Dutch Treaty, which led to the dismemberment of the Sultanate of Johor into two parts, with Riau-Lingga falling within the Dutch sphere and Johor within the British sphere.<sup>13</sup>
- (c) Singapore confirms that under the terms of the 1824 Crawfurd Treaty Sultan Hussain and the Temenggong of Johor ceded the island of Singapore, together with "the adjacent seas, straits and islets" up to a distance of 10 miles to the British<sup>14</sup>—i.e. that Sultan Hussain could dispose of islands in the Singapore and Malacca Straits, including some closer to what is now Indonesia than to Johor.
- (d) Singapore's discussion of events is confirmatory of the fact that the Dutch did not acquire PBP by virtue of the Anglo-Dutch Treaty of 1824.<sup>15</sup> (The fact is that after 1824 the Dutch never claimed the islands within or nearby the Straits.<sup>16</sup>)
- (e) Singapore produces no document which contradicts the conclusion that Johor's consent to the construction of the lighthouse in 1844 extended to PBP.<sup>17</sup>

6. Despite this convergence, Singapore's Counter-Memorial attacks Malaysia's account of the history of the region as "skewed and inaccurate".<sup>18</sup> It seeks to demonstrate this by the introduction of a number of new arguments.

<sup>11</sup> SCM, para. 3.8, Appendix A, para. 12.

<sup>12</sup> SCM, para. 3.2; see also Appendix A, Section C, especially paras. 12 & 14.

<sup>13</sup> SCM, para. 2.9.

<sup>14</sup> SCM, para. 6.21, Appendix A, Section C, especially paras. 11 & 13.

<sup>15</sup> SCM, para. 3.22.

<sup>16</sup> See further Chapter 2 below.

<sup>17</sup> See Singapore's discussion of the correspondence in SCM, Chapter V.

<sup>18</sup> SCM, para. 1.4.

## B. New arguments in Singapore's Counter-Memorial

7. Singapore's new arguments attack Malaysia's account of the history of the region on three fronts: regional toponymy; geography and geomorphology; and by introducing a novel historiographical argument which can be characterised as "the case of the disappearing Sultanate". These new arguments require some preliminary comment.

### (i) Toponymy

8. Singapore places a great deal of emphasis on the variations in place names which occur in both primary and secondary materials, arguing that they are determinative of questions of historical fact relating to the place so variously named. It even challenges Malaysia's use of the name Pulau Batu Puteh. Singapore asserts, on the basis of a 2001 study in Portuguese cartography stating merely that the Portuguese *tended* to use local rather than Portuguese names in the region, that because the Portuguese called the island Pedra Branca in the 16<sup>th</sup> and 17<sup>th</sup> centuries the island cannot also have had a Malay name in the same period. On the questionable strength of this proposition Singapore then draws the conclusion that the Malays did not have sufficient interest in the island to bother naming it; because the Malays did not name the island, therefore Johor did not claim it as part of its dominions.<sup>19</sup>

9. This argument fails at every step. It certainly does not support an argument that the Malays did not call the island Pulau Batu Puteh. It also begs the question: if Singapore cannot accept that Malays living in the region, sailing past the island, and using it as a navigational aid or fishing spot might have referred to it in Malay as white rock (which is what the island looked like and what PBP means<sup>20</sup>), what does Singapore suggest they might have called it? From the very first known reference to the island, it was called "white rock". The Chinese navigator Zheng He voyaging in the area around 1405 and 1433 called the island "Pia Chiao" (white rock). His record of his voyages formed the basis of the Wubei Zhi Chart, made in about 1621: PBP is clearly marked on the Chart as

<sup>19</sup> SCM, paras. 2.6-2.7.

<sup>20</sup> MM, para. 5. "Pedra Branca" means white rock in Portuguese; the French cartographer Bellin labelled the island "Pierre Blanche" (see MM Map Atlas, Map 3).

白礁, Pia Chiao, translated into English as "white rock".<sup>21</sup> Moreover, Singapore's argument does not reflect the historical record which shows that the island was in fact referred to by its Malay name as well as by its Portuguese name. Thomson himself sometimes called the island "Batu Puteh", and observed that "The rock... is called Pedra Branca by Europeans and Batu Putih by the Malays, both terms signifying white rock".<sup>22</sup> The *Singapore Free Press* called the island Batu Puteh in 1843.<sup>23</sup> The name has been in use in print for at least 170 years.

10. In similar vein Singapore makes much of Malaysia's use of the term Sultanate of Johor. Singapore criticises Malaysia's use of the term Sultanate of Johor instead of the term "Johor-Riau-Lingga Sultanate" on the basis that these terms refer to "entirely different" entities.<sup>24</sup> In an attempt to muddy the waters further it adopts no fewer than three terms, "State of Johor", "peninsular Johor" and "mainland Johor", to refer to the entity of the Sultanate of Johor.

11. It is not correct that the terms "Sultanate of Johor" and the "Johor-Riau-Lingga Sultanate" describe, or have historically been used to describe, entirely different entities. First, the terms "Sultanate of Johor" or "Kingdom of Johor" without the additional words "Riau-Lingga" were used by both historical personalities (e.g., Hugo Grotius, the drafters of the Anglo-Dutch Treaty<sup>25</sup>) and historians of the region (e.g., Winstedt, Netscher, Andaya, Trocki<sup>26</sup>) to describe the entire pre-1824 area which Singapore terms the "Johor-Riau-Lingga Sultanate". Second, although it is true that the court of the Sultanate moved around<sup>27</sup> and that in the early 19<sup>th</sup> century the Sultanate of Johor broke up into two

<sup>21</sup> Vol. 2, Annex 1 of this Reply.

<sup>22</sup> Thomson, "Extracts of Account of The Horsburgh Lighthouse by J. T. Thomson F.R.G.S., Government Surveyor At Singapore", *The Journal of the Indian Archipelago and Eastern Asia*, p. 378, MM Annex 60 (extract) and SCM, Annex 61 (full text). Thomson spelt the name as either "Batu Putih" or "Batu Puteh": see further the references at pp. 378, 410, 411, 416, 485 and 486.

<sup>23</sup> MM, para. 95.

<sup>24</sup> SCM, para. 2.9.

<sup>25</sup> See MM, paras. 38, 51 respectively.

<sup>26</sup> R.O. Winstedt, *A History of Johore (1365-1941)*, Kuala Lumpur, Malaysian Branch of the Royal Asiatic Society, repr. 1992 (cited in MM, fn. 13; SCM, fns. 611, 641); E. Netscher, *De Nederlanders in Djohor en Siak, 1602 tot 1865. Historische beschrijving*, Batavia, Bruijning en Wijt, 1870 (cited in MM, fn. 15); A.L. Andaya, *The Kingdom of Johore 1641-1728*, Kuala Lumpur, Oxford University Press, 1975 (cited in MM, fn. 16; SCM, fn. 600); C.A. Trocki, *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885*, Singapore University Press, 1979. Trocki uses the terminology "old Johor" and "new" or "modern" Johor to describe the Sultanate before and after the split into two distinct areas from the mid-19<sup>th</sup> century (see for example pp. 1-2).

<sup>27</sup> See further Chapter 2 of this Reply, para. 58, & Appendix I, paras. B.2-B.5.



Sultanates (respectively called the Sultanate of Johor and the Riau-Lingga Sultanate in accordance with the areas they covered), there is continuity between the entity, Johor, referred to by Hugo Grotius and by the drafters of the Anglo-Dutch Treaty of 1824, and the Johor whose consent for the construction of Horsburgh Lighthouse was sought by the British in 1844, and the Johor which is a constituent state of Malaysia.

12. Moreover, Singapore's alternative terminology does not provide the clarity which it suggests.<sup>28</sup> The use of the terms "peninsular Johor" or "mainland Johor" are not accurate to describe the Sultanate of Johor after the Johor part of the Sultanate split from the Riau-Lingga part of the Sultanate because they suggest that the post-partition Sultanate of Johor consisted only of the mainland or peninsular part of the original Sultanate of Johor without any offshore islands such as PBP, Pulau Pisang, Pulau Aur, or Pulau Tinggi, and that somehow parts of the Sultanate of Johor disappeared or dropped off in the process of its split from one Sultanate into two. There is no evidence whatever to support these propositions, and much to contradict them. This includes in particular British practice affecting the Malay sultanates in 1824 and throughout the 19<sup>th</sup> century. Nowhere in the sources is there any suggestion that islands which had been part of the Sultanate of Johor (or any other native State in the region) became *terra nullius* because the Sultanate split into two under British and Dutch influence. Further, the British were careful not to acquire additional bits of territory by accident and they were meticulous in listing the territory they did acquire. At no time did any of these lists include PBP.

(ii) *Geography and geomorphology*

13. Singapore misreads Malaysia's discussion about the location of PBP in relation to Singapore and Malaysia to suggest that Malaysia is making an argument based on physical proximity.<sup>29</sup> In doing so, it describes PBP as being closer to Indonesia's Pulau Bintan than to the Malaysian mainland (by a matter of 0.1 of a nautical mile (nm)).<sup>30</sup> Quite apart from the questionable validity of an argument based on geographical proximity, this argument of Singapore ignores Malaysia's Romania Islands (which include Peak Rock) lying off its southern coast: these are the closest land to PBP, closer by nearly 1 nm to PBP than

<sup>28</sup> See SCM, para. 2.10.

<sup>29</sup> SCM, paras. 1.6, 4.6-4.7.

<sup>30</sup> SCM, para. 2.2 & Insert 1, p. 12.

Indonesia's Pulau Bintan.<sup>31</sup> Indeed the link between PBP and Point Romania at the entrance to the Strait was long recognised.<sup>32</sup>

14. Singapore also attempts to make something of the geomorphology of the region where the three features are located. It observes that there is a deep water channel between PBP and the Malaysian mainland but only relatively shallow water between PBP and Indonesia. This, it says, "demonstrate[s] that any argument on proximity is not supported by the geography".<sup>33</sup> Since Malaysia is not making an argument based on proximity as such—as distinct from the historical appurtenance of the islands in the vicinity of the peninsula to Johor—this argument is beside the point. In any event, if the provenance of PBP is to be determined by reference to the criterion of the depth of surrounding water channels (an entirely novel legal argument), it would also suggest that title to PBP more properly lies with Indonesia than with either Singapore or Malaysia. But the fact is that neither Indonesia nor its Dutch predecessors ever laid claim to PBP.

15. To repeat, Malaysia does not base its claim on the mere proximity of PBP to the rest of Malaysia. But it is an unavoidable geographical fact that PBP lies 6.8 nm from the rest of Malaysia and 25.5 nm from Singapore, that it is impossible to describe or illustrate PBP without this being apparent, and that this irreducible geographical fact is necessarily the background to the history of dealings with PBP. If Great Britain and then Singapore had sought to claim dominion over islands and other features well beyond the famous 10-mile line which determined the territory of the settlement, one might have expected them to do so clearly. One might have expected legislation that incorporated the territory, maps to show the territory, lists of islands to list it, laws to name it, officials experienced in the administration of lighthouses to treat it as part of Singapore. Yet—as Malaysia has shown—the reverse of this occurred.

<sup>31</sup> MM, para. 32. Pulau Pemanggil in the Romania Islands group is the closest land to PBP.

<sup>32</sup> See, e.g., *Le Neptune Oriental, dédié au Roi*, par M. D'Après de Manneville (Paris: Demonville, Brest: Malassis, 1775), p. 138: referring to "la *Pierre Blanche* [et] la *pointe Romanie*, qui toutes les deux forment l'entrée ou la sortie du détroit de *Malac*, du côté de l'est."

<sup>33</sup> SCM, para. 2.3.

(iii) *The "case of the disappearing Sultanate"*

16. Singapore seeks to show that Johor had no title to PBP when Thomson commenced construction of the lighthouse. In support, it mounts two alternative arguments. The first is that, because traditional concepts of Malay sovereignty were based on allegiance rather than territory, it was common to find territory—or empty land—in the Malay region that did not belong to anyone.<sup>34</sup> Because PBP was uninhabited, so goes the argument, there were no people on it from whom allegiance could be sought, so no Malay ruler would have bothered claiming PBP as part of his territory, and none did.<sup>35</sup> And so PBP was never part of the Sultanate of Johor, ancient or modern, before or after it split from Riau-Lingga, and so PBP belonged to no one in 1847 and it was not part of the coastal economy.<sup>36</sup> This argument ignores the simple fact that people who owed allegiance to a Malay ruler lived somewhere and so a notion of territoriality was part of traditional Malay forms of sovereignty; the importance of control over people in the Malay kingdom or the absence of clearly demarcated borders did not preclude notions of territoriality. Moreover, the interaction with European trading companies during the 17<sup>th</sup> and 18<sup>th</sup> centuries led Malay State-centres, such as Johor, to develop further their notion of territoriality.<sup>37</sup>

17. The second alternative argument—in which Singapore invokes the toponymy argument outlined above—is that of the “disappearing Sultanate”. This can be summarised as follows. The Sultanate of Johor was an unstable kingdom<sup>38</sup> consisting of little more than thinly populated river mouths.<sup>39</sup> It was in a state of dissolution.<sup>40</sup> It had all but disappeared by the early 19<sup>th</sup> century and it follows that the Sultanate did not retain its possessions in the region and that there is no territorial or other continuity between that entity called Johor by Grotius and the entity called Johor which became part of Malaysia. Correspondingly, PBP never became a territorial possession of the Sultanate of Johor after it split from Riau-Lingga.<sup>41</sup>

<sup>34</sup> SCM, paras. 3.8 & 4.20.

<sup>35</sup> SCM, para. 3.11.

<sup>36</sup> SCM, paras. 3.12, 4.11-4.12. See further Chapter 2 below.

<sup>37</sup> See further the expert opinions by Professors Andaya and Houben, Appendices I and II to this Reply.

<sup>38</sup> SCM, paras. 3.13-3.15.

<sup>39</sup> SCM, para. 3.15.

<sup>40</sup> SCM, para. 3.15.

<sup>41</sup> SCM, paras. 3.31-3.34.

18. On either argument, Singapore says, the 1824 Anglo-Dutch Treaty is irrelevant<sup>42</sup> and “did not touch upon or affect the status” of PBP.<sup>43</sup> Nevertheless, Singapore goes on to argue that the Anglo-Dutch Treaty did not result in any sort of “demarcation” line in the Singapore Strait<sup>44</sup> and that, even if it did, PBP was in neither the British nor Dutch sphere.<sup>45</sup> In Singapore’s eyes, Malaysia’s emphasis on the 1824 Anglo-Dutch Treaty is misplaced: the real event of importance is the subsequent donation by letter of 25 June 1825 by the “true Sultan” of the Sultanate of Johor, who was based in Riau under Dutch influence, of the Johor territory in the Malay Peninsula to his brother, Sultan Hussain, the other claimant to the Sultanate of Johor.<sup>46</sup> This donation was limited to the mainland territories and excluded “all the islands in the sea”, thus excluding PBP.<sup>47</sup>

19. Singapore also points out that the *de facto* ruler in Johor was not the Sultan but the Temenggong, suggests that the scope of his territory in Johor was less than that of the Sultan, and argues that therefore PBP could not have fallen within his domains either.<sup>48</sup> Whether or not Singapore’s argument as to the traditional extent of the Temenggong’s territories as compared with the Sultan’s is correct, it is in any event irrelevant. The British treated both the Sultan *and* the Temenggong as the sovereign authorities of Johor. Moreover, the Temenggong succeeded in 1855 to *de jure* title over the territory when the Sultan of Johor formally ceded full authority over all but a very small part of his territories.<sup>49</sup> Singapore itself records this fact.<sup>50</sup> In order to get around it, Singapore suggests that the wording of the 1855 cession agreement confirms that the Sultan only had territories “within the Malayan Peninsula” to cede; i.e. no offshore islands such as PBP, Pulau Pisang, Pulau Aur or Pulau Tinggi were included in the cession because PBP was either not one of the Sultan’s possessions (because being an island it was not a “mainland territory”) or, if it was, he did not cede it to the Temenggong (because, being an offshore island, it was not within the “Malayan Peninsula”).<sup>51</sup>

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<sup>42</sup> SCM, paras. 3.17 & 3.30.

<sup>43</sup> SCM, paras. 3.31, 3.43(d).

<sup>44</sup> SCM, paras. 3.20-3.24.

<sup>45</sup> SCM, paras. 3.29-3.30.

<sup>46</sup> SCM, paras. 3.31-3.34.

<sup>47</sup> SCM, paras. 3.33-3.34.

<sup>48</sup> SCM, para. 3.36.

<sup>49</sup> The Sultan retained title to only a small area between the Kesang and the Muar Rivers. See further Appendix I to this Reply, para. C.14.

<sup>50</sup> SCM, paras. 3.38-3.39.

<sup>51</sup> SCM, para. 3.39.

20. Singapore in essence suggests that PBP “fell off” Johor, either when the Sultan of Riau-Lingga “donated” Johor to the Sultan of Johor in 1825 or when *de jure* title was transferred from the Sultan of Johor to the Temenggong in 1855. But this is *a priori* unlikely, and there is no trace of any such suggestion in the British records of the time. The way in which successive Governors of the Straits Settlements treated the territory and islands of the Malay States in treaty relations with the Crown bears no relationship to Singapore’s new theory of vanishing sultans and disappearing dominions. The British and the Dutch agreed on the effect of their 1824 Treaty, which disposed of the whole of the ancient Sultanate of Johor; they were anxious above all not to create any vacuum of authority or territory which could allow a third power to come in. And from an indigenous point of view, the political and legal history of the Malay peninsula and immediately surrounding islands after 1824 is one of continuity, not discontinuity. The islands which became part of the Settlement of Singapore by virtue of the Johor’s cession of 1824 are still part of Singapore; the other offshore islands are still part of Johor. There is no exception, no falling off, no disappearance; no island is left unaccounted for.

21. What all these Singapore arguments fail to explain is the well-documented British behaviour in relation to PBP. If under traditional Malay concepts of sovereignty PBP and, presumably, other parts of the area which were uninhabited were not the territory of any Malay chief, and if in 1825 Sultan Abdul Rahman of Riau-Lingga ceded only mainland Johor and not any islands, the following question needs to be answered: why did the British behave as they did in relation to the region? In particular, why did the British

- seek Johor’s agreement to cede the “Island of Singapore... 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” in 1824 even though not all its surrounding islands were inhabited?<sup>52</sup>
- request permission in 1844 from the *de jure* and *de facto* rulers of Johor to construct a lighthouse on an island near Point Romania?<sup>53</sup>
- suggest in 1850 that the Temenggong be requested to establish a village on Point Romania to service and protect the lighthouse?<sup>54</sup>

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<sup>52</sup> MM, para. 56.

<sup>53</sup> MM, paras 121-2.

<sup>54</sup> MM, paras. 146-147. Singapore suggests (paras. 4.10, 4.46 ff) that the Temenggong’s administration did not extend to Point Romania in the mid-19<sup>th</sup> century—clearly the British considered otherwise at the time.

- facilitate the settlement of the dispute between the Sultan and Temenggong in 1855?<sup>55</sup>
- act as arbitrator in the territorial boundary dispute between Pahang and Johor which resulted in the 1868 Ord Award allocating islands, both inside and outside the 3 nm territorial sea, between Pahang and Johor (an allocation operative to this day)?<sup>56</sup>

22. Singapore goes to great lengths in its effort to discredit the evidence that confirms that PBP was part of Johor,<sup>57</sup> as reflected in British dealings with the rulers of Johor in respect of PBP, e.g. in seeking permission to construct a lighthouse there,<sup>58</sup> cooperating to combat piracy in the area of PBP,<sup>59</sup> receiving a visit from the Temenggong at the very beginning of construction work,<sup>60</sup> and attempting to exclude the Orang Laut, subjects of the Temenggong, from the lighthouse.<sup>61</sup> Singapore attempts to unpick the wording used in 19<sup>th</sup> century documents to show that it cannot be inferred that PBP was part of Johor. The very fact that Singapore is compelled to approach the historical evidence in this nit-picking fashion tends to undermine its case that such evidence is irrelevant: the clear sense to be gained from the evidence tendered by both Parties, taken as a whole, is that like other islands in the area PBP fell within the territory of the Sultanate of Johor, and was considered as such by the British.

23. Singapore's version of the history of the region paints an eccentric picture of a Sultanate of Johor made up of small, disconnected bits and pieces of territory interspersed with bits that belonged to no one, a Sultanate which passed in and out of existence—indeed, which did not resemble any kind of State at all, still less the State the British dealt with continuously and (for the most part) respectfully throughout the 19<sup>th</sup> century. There is no evidence that this was how the British or the Malay rulers thought of territory in the region in the mid-19<sup>th</sup> century.

<sup>55</sup> SCM, Appendix A, para. 19.

<sup>56</sup> MM, paras. 86-88.

<sup>57</sup> SCM, paras. 4.38-4.39.

<sup>58</sup> SCM, paras. 4.43-4.44.

<sup>59</sup> SCM, paras. 4.47-4.50.

<sup>60</sup> SCM, para. 4.51.

<sup>61</sup> SCM, paras. 4.53-4.54.

24. Singapore's case might carry more weight if PBP was an isolated rock in the middle of the Indian Ocean, out of sight and out of mind, but this is patently not the case. The island is visible from the Johor coast and was well known to Malay fishermen and pilots. The British and the rulers of the Sultanate of Johor were dealing with a key landmark in the entrance of a waterway which had been heavily trafficked for centuries. Whatever might be said of outlying islands or forested tracts inhabited by hunter-gatherers (and yet boundaries were drawn through such tracts and islands attributed to one State or the other), it cannot be concluded that PBP and the surrounding area, in the centre of the region between the Malay peninsula and the Riau-Lingga archipelago and at the entrance of one of the most used waterways in the region was somehow forgotten.

25. In addition, Singapore's arguments are inconsistent. For example, it claims variously that: according to traditional Malay concepts of sovereignty, based on the allegiance of populated areas and not the control of territory,<sup>62</sup> the Sultanate of Johor "at times amounted to no more than a mere collection of thinly populated centres at river mouths"<sup>63</sup>, and so PBP, and *ipso facto* Peak Rock,<sup>64</sup> did not fall under the Johor Sultan or Temenggong's or any other ruler's territory in 1850 because it was uninhabited;<sup>65</sup> and that when the Sultanate was in the process of splitting into two, the Sultan over the Riau-Lingga part of the Sultanate of Johor in 1825 "ceded" only mainland Johor and not *any* islands in the sea.<sup>66</sup> But later Singapore seeks to distinguish the provenance of PBP from that of Peak Rock, an "island in the sea", by arguing that in 1850 the Romania Island group of which Peak Rock is a part fell within the territorial seas of Johor and was therefore a location within Johor.<sup>67</sup> Point Romania and the Romania Islands cannot be part of the territory of Johor to support one part of Singapore's argument (in Chapter V) and outside of Johor to support another part of its argument (in Chapters III and VI).

26. In short, all the evidence, including that put forward by Singapore, shows that the Sultanate of Johor did survive into the modern period and that in time it became a

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<sup>62</sup> SCM, paras. 3.2, 3.4-3.12.

<sup>63</sup> SCM, para. 3.15.

<sup>64</sup> In "the mid-19<sup>th</sup> century, the Temenggong's administration effectively did not extend to the Romania Islands or even to Point Romania": SCM, para. 4.10.

<sup>65</sup> SCM, para. 3.11. Following this line of argument, Peak Rock and the Romania islands would also fall outside the Sultanate's territory as they were uninhabited in the mid-19<sup>th</sup> century.

<sup>66</sup> SCM, paras. 3.32-3.34.

<sup>67</sup> SCM, paras. 5.65, 5.71.

constituent State of modern-day Malaysia.<sup>68</sup> The division of the region into spheres of influence which resulted from the Anglo-Dutch Treaty was respected by the Dutch and the irredentist claims of the Sultan of Riau-Lingga to be the “only and true Sultan” were disregarded by British and Dutch alike.<sup>69</sup> The islands in the Singapore Strait and around the Johor coast were consistently treated as part of the Sultanate of Johor from that time onwards—and well before the relevant transactions in the present case. The very existence and extent of Singapore as a British Colony, and now as an independent State, is the result.

(iv) *Peripheral issues*

(a) Singapore’s interpretation of the lighthouse correspondence

27. All Singapore’s subsequent arguments in its Counter-Memorial, namely its interpretations of British documents bearing on the construction of the lighthouse,<sup>70</sup> are predicated on its central premise that the British at all relevant times considered PBP was *terra nullius* and/or not part of the Sultanate of Johor. But if the same documents are read and interpreted against the premise that the British considered that PBP was part of the Sultanate of Johor, a quite different picture emerges. The documents support Malaysia’s view that both the British and the rulers of Johor considered that Johor had given permission to build the lighthouse on PBP. Conversely, there is nothing that supports Singapore’s view that the British, the Dutch or the Malay rulers of Johor considered the island open to a “taking of lawful possession” and an (in the event quite fictional) incorporation into the Settlement of Singapore between 1847-1851.

28. Singapore seeks to dismiss the importance of the key fact—that permission to construct a lighthouse near Point Romania, or any other place within the territory of Johor, was given by rulers of Johor in 1844—by inferring that any documents in respect of the

<sup>68</sup> See further L.A. Andaya, *Kingdom of Johor, 1641-1728* (1975, Oxford University Press, Kuala Lumpur) and *History of Malaysia* (2nd ed., 2000, Macmillan/University of Hawaii Press, London/Honolulu).

<sup>69</sup> See further Chapter 2 of this Reply, paras. 84-92, Appendix I, para. C.12, p. 214 and Appendix II, paras. 19-24, pp. 225-227.

<sup>70</sup> Butterworth’s letter of 26 August 1846 presenting the case for the lighthouse to his superiors in India referred to his earlier letter of 28 November 1844 which in turn attached, *inter alia*, the Temenggong’s and Sultan’s letters of consent of 25 November 1844 (SCM, para. 5.81-5.84), and Church’s letter of 7 November 1850 (SCM, paras. 5.87-5.89, 5.99-5.100). Copies of Butterworth’s letters of 28 November 1844, including all its attachments (i.e., including the letters of permission of the Johor rulers) and 26 August 1846 were both attached to the letter of 3 October 1846 from the Government of India to the Court of Directors, which reported that “Pedra Branca had been approved as the position for erecting the Horsburgh Light”: annexed to Malaysia’s Memorial, MM Annex 54.



construction of a lighthouse in the area of Point Romania prepared *before* 22 August 1845 are irrelevant to the question of the construction of the lighthouse on PBP. Only documents prepared in the period 1845-1847 are considered by Singapore to be relevant<sup>71</sup> "because once the focus had shifted to Pedra Branca, the issue of third party title dropped away".<sup>72</sup> This overlooks the obvious point that if the British authorities in the years 1845-1847 had been asked who had sovereignty over the island on which the lighthouse was to be built, and to recall whether consent had been given by the native ruler to build there, the answer was in the documents before them.

29. The crucial fact is that copies of the letters of permission were attached to the key correspondence of 3 October 1846 sent by the Government of India to the Court of Directors of the EIC concerning the construction of the lighthouse on PBP.<sup>73</sup> Other correspondence explicitly dealing with PBP as the final site for construction of the lighthouse lists as relevant the dispatch from Governor Butterworth to the Government of India which includes Johor's letters of permission.<sup>74</sup> To suggest, as Singapore does, that the key British personalities involved in the planning and construction of the lighthouse would have (a) limited their view of matters concerning lighthouse on PBP to the correspondence created in the period 1845-1847, (b) ignored earlier correspondence and documents before 1845 as if they had never existed (even though such documents were attached) and (c) felt the need to restate the question of sovereignty over the location of the lighthouse in every piece of correspondence between 1845-1847, does not make sense.<sup>75</sup>

<sup>71</sup> SCM, para. 5.86-5.87.

<sup>72</sup> SCM, para. 5.90.

<sup>73</sup> MM, para. 136. See also note 69 above.

<sup>74</sup> These are the letters from the Under-Secretary to the Government of Bengal to Governor Butterworth of 10 May 1847 (SM Annex 20; MCM Annex 20), the "full report" regarding the construction of the lighthouse on PBP sent by Governor Butterworth to W. Seton Karr, Under Secretary to the Government of Bengal, dated 12 June 1848 (SM Annex 27).

<sup>75</sup> SCM, para. 5.87.

30. Singapore's argument on the omission of references to the issue of permission in the nine "relevant" documents it lists from the period 1845-1847<sup>76</sup> implies, moreover, that the question of sovereignty over PBP was relevant on each occasion. But if the question of sovereignty was relevant in each document, why did the British not restate in each that the island was *terra nullius* and open to occupation, or refer to the permission of some other Malay ruler or Power? The answer is that the documents in question were not concerned with sovereignty over the location of the lighthouse because that had already been addressed. The record of correspondence shows that Butterworth's letter of 28 November 1844 annexing the Sultan's and Temenggong's letters of consent of 25 November 1844 was always before the relevant officials during the decision making process.<sup>77</sup> The record also shows that, contrary to Singapore's suggestion,<sup>78</sup> Peak Rock was not dropped by the Singapore authorities as a possible location for the lighthouse until 1846. The final authorisation for PBP as the location was not sought from the EIC Court of Directors until 3 October 1846.

31. Thus the British authorities understood that the consent given in 25 November 1844 by the Sultan and the Temenggong to construct a lighthouse extended to PBP. This understanding is demonstrated in particular by a letter of 26 August 1846 from Governor Butterworth to the Secretary of the Government of India in which he explains that that "whole of the details for the case of Light Houses" relating to the Peak Rock location, as set forth in his previous correspondence of 28 November 1844, "will be equally applicable to the new Position", PBP.<sup>79</sup> Butterworth's letter of 28 November 1844 annexed the letters of consent of 25 November 1844 of the Sultan and Temenggong.

32. Singapore has countered this by what can be conveniently termed as its "care/case" argument.<sup>80</sup> It alleges that Malaysia mistakenly transcribed the original copy of Butterworth's letter of 26 August 1846 by substituting "case" for "care", and that Butterworth was referring only to the "care of Light House", not the "case of Light Houses" when advocating PBP as the location for the lighthouse instead of Peak Rock. Therefore, Singapore argues, the 1844 letters from the Johor authorities giving permission

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<sup>76</sup> SCM, para. 5.87.

<sup>77</sup> See further Chapter 3 below.

<sup>78</sup> SCM, paras. 5.86-5.90.

<sup>79</sup> MM, para. 134.

<sup>80</sup> SCM, paras. 5.80-5.83.

to construct a lighthouse—being aspects of the *case* for a lighthouse—did not also relate to PBP, unlike aspects of Butterworth’s letter of 28 November 1844 which related to the *care* of the lighthouse.<sup>81</sup> As will be explained in detail in Chapter 3 the word used by Butterworth in his 26 August letter was “case” rather than “care”, and Malaysia’s original transcription of the correspondence in its Memorial is accurate.<sup>82</sup> But whether the word is “case” or “care”, the correspondence does not support Singapore’s interpretation.<sup>83</sup>

33. Herein also lies the obvious explanation for the lack of Malay protest at the construction of the lighthouse on which Singapore places such weight: there was nothing to protest.<sup>84</sup> The Johor authorities had *already* given permission for a lighthouse to be built “near Point Romania” or “any spot deemed eligible”.<sup>85</sup>

34. Singapore interprets the historical record in the period after 1847—in particular the visit of the Temenggong in June 1850<sup>86</sup> and the laying of the foundation stone of the lighthouse in May 1850<sup>87</sup>—in a similar fashion to the pre-1847 correspondence, for the most part building its case solely on an attempt to discredit Malaysia’s. But in the 261 pages of its Counter-Memorial Singapore cannot show *any* record of a British intention to assume sovereignty over PBP. This is an essential element of its theory. This element is not recorded in *any* of the British correspondence from the period. Nor is there any record that Britain manifested its intention by any of the usual formalities or informalities which it employed at that time. Singapore cannot prove the title it claims.

(b) Singapore’s reliance on the *Minquiers and Ecrehos dictum*

35. Singapore invokes the Court’s statement in *Minquiers and Ecrehos Case* that “[w]hat is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the

<sup>81</sup> SCM, para. 5.83.

<sup>82</sup> SCM, para. 5.83.

<sup>83</sup> See further paras. 162-174 below.

<sup>84</sup> SCM, paras. 1.21, 5.137, 6.4 & 6.6.

<sup>85</sup> MM, para. 122.

<sup>86</sup> SCM, paras. 5.102-5.106.

<sup>87</sup> SCM, paras. 5.112, 5.117-5.120. Singapore incorrectly refers to this event as the inauguration of the lighthouse. This did not take place until 1851.

possession of the Ecrehos and Minquiers groups".<sup>88</sup> Singapore relies on it to suggest that the nature of the evidence presented by Malaysia to support its original title is in fact dispositive of that title. This ignores the context of the Court's statement in that case. The Court had already observed that the United Kingdom derived its original title to the islands as the result of the conquest of England by the Dukedom of Normandy in 1066 and that France did not dispute this;<sup>89</sup> its statement was directed to whether the evidence presented by the parties showed that anything had happened subsequently, as alleged by France, to displace that title. The Court was not persuaded that it had. Needless to say, the evidence in *Minquiers and Ecrehos* was of a markedly different character to that in this case: it concerned historical events in Anglo-French relations over several centuries and the competing original titles of European States from the 11<sup>th</sup> century. By contrast the present case involves the original title of an established indigenous State against a purported acquired title of a colonial Power in the mid-19<sup>th</sup> century. Comparisons are not easily made; but if made they support Malaysia's theory, not Singapore's.

(c) Publication of the 1979 map

36. Finally, one more peripheral argument made by Singapore should be addressed: its attempt to discredit Malaysia's claim by reference to the alleged manner in which it was informed, in December 1979, of Malaysia's map showing the "Territorial Waters and Continental Shelf Boundaries of Malaysia".

37. The publication of the 1979 map was the event which preceded the exchange of notes between the Parties which triggered the dispute now before the Court.<sup>90</sup> Singapore relies on an internal document, viz., a report of the Singapore High Commissioner dated 24 December 1979 to the Singapore Ministry of Foreign Affairs on his being informed by Malaysian officials of the gazetting of the new map. The High Commissioner concludes his report with his "overall... reading" of the events he has recorded, which is that "Malaysia is taking the line of gazetting their claim of Pulau Batu Puteh".<sup>91</sup> Based on his "reading" of events, Singapore alleges in its Memorial that "Malaysia made her claim to

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<sup>88</sup> 1953 ICJ Reports 47, 57.

<sup>89</sup> Ibid., 53.

<sup>90</sup> SM, paras. 4.5-4.6.

<sup>91</sup> SM Annex 141, para. 13.

Pedra Branca in a hesitant and unusual manner”,<sup>92</sup> that “the manner in which [Malaysia] made the claim shows that Malaysia was uncertain and embarrassed about it”<sup>93</sup> and that its publication of the 1979 map shows that “Malaysian officials clearly understood that the Malaysian claim was entirely new and was not in conformity with a long-standing situation”.<sup>94</sup> Among peripheral issues this is the most peripheral of all—an internal report based on hearsay, speculation and subjective impressions. But for the sake of completeness Singapore’s allegations invite a brief response.

38. The Malaysian Government decided that it would officially announce publication of the new map defining the boundary of Malaysia’s continental shelf on 21 December 1979 and advised all its missions accordingly by a telegram of 20 December 1979.<sup>95</sup> The telegram advised mission officials that the map took account of Malaysia’s Continental Shelf Act 1966, of agreements with Indonesia and Thailand on continental shelf boundaries, of an agreement concluded during the colonial rule of North Borneo and of the 1958 Geneva Convention on the Continental Shelf. Furthermore “the production of [the] New Map does not constitute new claim[s] by Malaysia but merely [an] indication on [a] specific map of our [Malaysia’s] right to the continental shelf”.<sup>96</sup>

39. The telegram lists neighbouring countries which the map affected for various reasons, including Singapore “due to our incorporating Pulau Batu Putih on which exist Horseburgh [*sic*] Lighthouse and Pulau Pisang on which exist another lighthouse presently administered by Singapore”. The Government further records its position that:

“It is definitely not our intention to bring about tension in this area by coming out with New Map at this time. Should any of our neighbouring countries feel unhappy with New Map matter could be brought up to us for our consideration. Malaysia on her part would be prepared to resolve whatever problem that arise through peaceful negotiations.”<sup>97</sup>

40. Instructions were given to call up the heads of missions of ASEAN Member States in Kuala Lumpur to inform them individually of the new map, and specific talking points

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<sup>92</sup> SM, para. 4.6.

<sup>93</sup> SM, paras. 6.114-6.115.

<sup>94</sup> SM, para. 7.37.

<sup>95</sup> MR, vol. 2, Annex 20.

<sup>96</sup> *Ibid*, para. 4.

<sup>97</sup> *Ibid*, para. 6.

were prepared for those States considered affected by the map, including Singapore.<sup>98</sup> It is according to these instructions that the meeting with the Singapore High Commissioner took place on 21 December 1979, which is the subject of the report by the Singapore High Commissioner annexed by Singapore to its Memorial.<sup>99</sup> As the instructions contained in the telegram make clear, the map was not produced “to gazette Malaysia’s claim” to PBP: while Malaysia appreciated that the map would affect Singapore because of its administration of lighthouses on Pulau Pisang and PBP, it clearly considered that Pulau Pisang and PBP were Malaysian territory. This was not a “new claim” on the part of Malaysia, as alleged by Singapore. There is no basis for the conclusion drawn by Singapore that “Malaysian officials clearly understood that the Malaysian claim was entirely new and was not in conformity with a long-standing situation”.<sup>100</sup>

41. Singapore seeks to draw adverse inferences from the order in which issues were addressed in the meeting between the High Commissioner and the Malaysian official, Mr. Pawanchee,<sup>101</sup> in particular from the fact that PBP was mentioned at the end of the meeting rather than at the beginning, and from the High Commissioner’s supposition that the point was not included on the prepared text which (he says) was read out. In fact, the point was listed as the last in the prepared talking points,<sup>102</sup> which explains the order in which it was dealt with. The order of the prepared text, followed during the meeting, was consistent with the purpose of the meeting from Malaysia’s viewpoint: to advise of publication of the new map, the principles on which it was prepared and, as a specific matter, of Malaysia’s belief that Singapore’s continuing administration of a lighthouse on PBP did not affect the fact that it was Malaysian territory generating territorial sea and continental shelf.

42. If Singapore was so certain in 1979 that PBP was under its sovereignty (despite the absence of claims, of official acts, of laws or of maps on Singapore’s part), why did the Singapore High Commissioner not react immediately and say so directly to Mr. Pawanchee? There is nothing in the record to suggest he did so. It was not until 8 January 1980 that Singapore raised the issue of PBP with Malaysia and even then Singapore did not claim the island was Singapore territory: it said that Singapore would be studying “All

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<sup>98</sup> Ibid, para. 7.

<sup>99</sup> SM, paras. 4.5-4.6, SM Annexes 140-141.

<sup>100</sup> SM, para. 7.37.

<sup>101</sup> SM, para. 6.115.

<sup>102</sup> MR, vol. 2, Annex 21.

aspects including particularly the legal aspect... so as to ascertain the actual legal position with regard to the ownership of Pulau Batu Putih".<sup>103</sup> This is not conduct consistent with a long-held understanding and belief that PBP had been Singapore territory since 1851.

(v) *Concluding remarks on Singapore's arguments*

43. Despite the length and emphasis of Singapore's arguments, they can be summed up in the simple proposition that whoever had sovereignty over the island in 1851 continues (through its successor) to do so. Malaysia agrees with this. In particular:

- Singapore does not anywhere in its pleadings so far point to any conduct of its own (or to any British conduct) in respect of PBP that does not relate to acts concerning the construction and operation of the lighthouse which, as Malaysia has already pointed out, are not in themselves acts *à titre de souverain*.
- In any event, Singapore reiterates that its title does not turn on *effectivités*.<sup>104</sup>
- Singapore does not provide any convincing evidence of any description from either the 19<sup>th</sup> or 20<sup>th</sup> centuries that shows an appreciation on the part of Great Britain or Singapore that PBP was indeed part of its territory from 1851.
- Singapore refers to no juncture after 1851 at which sovereignty over the island could have changed from Johor to Singapore.

44. So the four key elements to the case as summed up by Malaysia in its Memorial remain unaffected.<sup>105</sup> They are:

- First, in 1844, at the time when consideration was given to the construction of the lighthouse on PBP, the island was part of the territories subject to the Sultanate of Johor. From the early 16<sup>th</sup> century, the territories of the Sultanate of Johor had extended to the islands south of and around Singapore Strait. This title was confirmed when the Anglo-Dutch Treaty of 1824

<sup>103</sup> Minute by Ahmad Fuzi B. Hj. Abdul Razak of a meeting on 8 January 1980 with Mr. Frederick Tan Im Kian, Counsellor, Singapore High Commission, and discussions with Mr. Chao Hick Tin, Senior Federal Counsel of Singapore, at the Tripartite SOM, 15-16 January 1980, dated 21 January 1980: this Reply, vol. 2, Annex 23.

<sup>104</sup> SCM, paras. 6.105, 7.21.

<sup>105</sup> MM, paras. 8-11.

distinguished between British and Dutch spheres of influence in the Malay region. PBP did not fall within the Dutch sphere of influence. PBP and mainland Johor lay in the British sphere of influence but were not under British sovereignty. The position of Singapore was different: it came under British sovereignty by virtue of the Crawford Treaty of 1824 by which Johor expressly ceded to Britain "in full sovereignty and property" the island of Singapore and the islands lying within "ten geographical miles" of its coast.

- Second, Britain acknowledged the title of the Sultanate of Johor when, in 1844, it sought the permission of both the Sultan and Temenggong for construction of the lighthouse. The replies from the Sultan and Temenggong contain nothing to suggest that they were agreeing to part with sovereignty. All that the authorities of Johor granted was permission to build a lighthouse.
- Third, the mere construction and operation of a lighthouse does not establish the sovereignty of the lighthouse operator. *A fortiori* this is true when the lighthouse is built and operated with the permission of the territorial sovereign. The fact that the state of affairs has persisted for some 160 years does not make any difference. Neither Britain nor Singapore ever sought a change in the legal position. Neither Johor nor Malaysia had occasion to question or seek confirmation of the original legal position. Johor consented to the construction and operation of a lighthouse on one of its islands. That is all Singapore has ever done;
- Fourth, if Singapore had regarded itself as sovereign over PBP one could expect this would have been reflected in its official conduct. But it has not been. Singapore did not refer to PBP as a feature relevant to the determination of its territorial waters boundary with Johor in 1927 or with Indonesia in 1973. It did not list the island in any lists of Singapore and its islands before the critical date. Before the mid-1990s, Singapore produced no map showing PBP as part of Singapore. By contrast, maps produced by Malaysia long before crystallisation of the dispute show PBP as being part of Johor.



**C. The issues for the Court and the structure of this Reply**

45. For these reasons the central issue for this Court is the question of title over PBP and the other features in the mid-19<sup>th</sup> century. It concerns whether PBP fell within the Sultanate of Johor or whether, as argued by Singapore, PBP did not belong to any State until the British came along in 1847-1851 and constructed the lighthouse on the island with the intention of acquiring sovereignty over PBP, Middle Rocks and South Ledge.

46. In determining the answer to this question, the following points are central: Singapore's conduct is not that of *à titre de souverain* but the conduct of an administrator and operator of a lighthouse that was built as part of the regional Straits Lights system, and continues to form part of the regional navigational aids system. Singapore's case is that it took lawful possession of PBP in the period 1847-1851. Malaysia's case is that it did not, and original title over the island remained with Johor. This is the core question before the Court. The case concerns a title which—according to both States—was established before or at least at the time of the inauguration of the lighthouse and has not changed since. In accordance with basic principle, subsequent *effectivités* cannot change that situation, even if they were unequivocal, which they certainly are not.

47. Malaysia's Reply consists of five further Chapters. **Chapter 2** deals in more detail with Singapore's new "case of the disappearing Sultanate"; it shows that PBP, Middle Rocks and South Ledge were part of the Sultanate of Johor both before and after the Anglo-Dutch Treaty of 1824 and that they continued to be part of the territory of the Sultanate of Johor thereafter.

48. **Chapter 3** will respond to Singapore's arguments concerning consent to the construction of the lighthouse near Point Romania and in particular will respond to Singapore's new case of the "care of the Lighthouse".

49. **Chapter 4** shows once again that, despite Singapore's assertions, at no time did the British manifest any intention to acquire sovereignty. Singapore's theory of a "lawful taking of possession" is wrong in law and is unsupported by the facts.

50. **Chapter 5** will compare the subsequent conduct of the Parties in respect of PBP after 1851 up to the critical date (1980), including a discussion of the map evidence and certain new maps located since the Counter-Memorials were filed. It also briefly considers the conduct of the parties after the critical date to the present time, insofar as that conduct assists in an understanding of the Parties' respective cases.

51. **Chapter 6** will address the relationship between Middle Rocks and South Ledge and PBP, contesting Singapore's claim that the three features form a "group of islands".

52. Three expert reports are attached as Appendices to this Reply. These are provided by Professors Andaya and Houben and by Captain (RMN Retired) Goh Siew Chong.

53. Annexed to the Reply are 26 documentary Annexes and 5 Map Annexes.

## Chapter 2

### MALAYSIA'S ORIGINAL TITLE

#### Introduction

54. Whereas in Singapore's Memorial, history started in 1819, its Counter-Memorial addresses the history of sovereignty over PBP more extensively. Singapore raises three main points. First, it argues that Malay states did not possess territorial sovereignty and hence Malaysia's claim over PBP cannot be established.<sup>106</sup> Second, it asserts that in any event Johor was an unstable and declining polity which could not have retained or exercised sovereignty over offshore islands.<sup>107</sup> Third, it considers that the Anglo-Dutch Treaty of 1824 and the Crawford Treaty of 1824 are of no relevance to the issue of sovereignty over PBP, Middle Rocks and South Ledge.<sup>108</sup> Singapore is wrong in all three respects.

55. The correctness of Malaysia's analysis of the history of the Sultanate of Johor and of the impact of the Anglo-Dutch Treaty is confirmed by the expert opinions of two renowned scholars in the field of Southeast Asian history: Professor Leonard Andaya and Professor Vincent Houben. The opinion by Professor Andaya, **Appendix I** to this Reply, deals with continuity and sovereignty in the Kingdom of Johor between the 17<sup>th</sup> and the 19<sup>th</sup> centuries. Professor Houben's opinion, **Appendix II** to this Reply, addresses the evolution of sovereignty in and around Johor, with particular reference to the area of the Strait of Singapore during the 19<sup>th</sup> century, and describes the implications of the 1824 treaty as reflected in Dutch practice.

56. With reference to the Andaya and Houben opinions, this Chapter first addresses the issue of the relationship between the allegiance of Johor's subjects and title to territory (**Section A**). Second, it reviews the evolution of the Johor Sultanate before 1824 (**Section B**). Third, the pertinence of the two 1824 treaties, the Anglo-Dutch Treaty and the Crawford Treaty, to the issue of sovereignty over PBP is addressed (**Section C**). Fourth, the continuity of Johor after 1824 as a Malay State under British protection, whose territory

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<sup>106</sup> SCM, para. 3.4.

<sup>107</sup> SCM, para. 3.13.

<sup>108</sup> SCM, paras. 3.16-3.17.

included all the islands in and the entrance to the Strait of Singapore, is once more demonstrated (Section D).

#### A. Allegiance and title to territory

57. Singapore argues that sovereignty in Malay states was not based on territorial control but on the allegiance of people.<sup>109</sup> In an attempt to bolster this argument, Singapore refers to Professor Houben's expert report in the *Ligitan/Sipadan case* with respect to the Sultanate of Bulungan.<sup>110</sup> Singapore pushes the case even further by stating that it was "common to find territory which was not regarded as belonging to anyone",<sup>111</sup> thus implying that this is the case with PBP because it was uninhabited. Furthermore, Singapore denies that PBP was ever part of the coastal economy of Johor.

58. Authority in States throughout the world has characteristically been based on a combination of control over people and over territory. This applies to the Malay States as well as any other. The fact that Singapore can demonstrate shifting political fortunes and even division within the royal household of Johor does not undermine conceptions of continuity in a Malay polity. As shown by Professor Andaya in his expert opinion, the crucial factor to the conception and survival of a Malay polity was the presence of a ruler who was regarded as sacred and legitimate because of his links to the divinely appointed persons of the royal house in a distant past.<sup>112</sup> Ever since the establishment of the Sultanate of Johor in the early 16<sup>th</sup> century, there have always been rulers who were recognised as such and who commanded the allegiance of the people accordingly and thereby held sway over the territory where those people lived.

59. In earlier centuries, the rivers and the seas served as the primary highways linking the communities that offered allegiance to the Johor ruler. Scattered along the banks of these rivers and their many tributaries lived Malay families, who used these waterways and

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<sup>109</sup> SCM, para. 3.4 *et seq.*

<sup>110</sup> See the expert report by Professor Vincent Houben, submitted by Malaysia as Appendix I to the Malaysia Counter-Memorial in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, in which Professor Houben quoted from the book by A.C. Milner, *Kerajaan: Malay Political Culture on the Eve of Colonial Rule*, 1982.

<sup>111</sup> SCM, para. 3.8.

<sup>112</sup> Professor Andaya, "Continuity and Sovereignty in the Kingdom of Johor between the Seventeenth and the Nineteenth Centuries", MR, vol. 1, Appendix I, paras. B.2-B.5, p. 209. This depiction of the special

the short land passages connecting them as their principal access to the outside world. Until the recent past, they lived by fishing, some farming, collection of jungle products and trade. At or near the edges of the thick jungles were dispersed communities of the Orang Asli, who were collectors of forest products and were the major suppliers of rattan, aromatic woods and resins for international trade. Another important group in Johor was the Orang Laut, who lived in small scattered communities along the lower reaches of rivers, the coasts, the sea straits and the many islands off southeast Sumatra and the Malay peninsula. So far as these Malay peoples were concerned, in the areas of relevance to the present case—southern and eastern Johor and the offshore islands—there is no indication of any uncertainties of allegiance and considerable evidence to the contrary.

60. The personal allegiance of inhabitants to the rulers of Johor, in particular the Temenggong, does not at all preclude a sense of territory, which also included islands which were uninhabited but whose surrounding waters were used as fishing grounds. The land and sea spaces these people occupied and exploited comprised the lands and waters of their Malay rulers and determined the extent of the Sultanate.

61. In its Counter-Memorial<sup>113</sup> Singapore stipulates that people must have lived permanently in a certain spot before it can be considered as part of their sovereign's territory. This is a "Swiss cheese" theory of state formation, with the holes representing *terra nullius*. According to this theory every island or other parcel of land not permanently inhabited was up for grabs. But British practice did not support such an arduous—not to say discriminatory—requirement. Within the Straits themselves, Great Britain acquired sovereignty over many uninhabited islands within ten geographical miles from the Island of Singapore on the basis of an agreement with Johor in 1824 (the Crawford Treaty). And this express British recognition of Johor's sovereignty over offshore islands in this region and at this time had a firm basis in fact. The Orang Laut were subjects of Johor and are reported as acting at the direction of the rulers of Johor. Specific Orang Laut groups such as the Orang Suku Galang ("the upper stratum of Orang Laut Society"<sup>114</sup>) used PBP and its

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qualities of rulers is described in such well-known Malay works as the *Sejarah Melayu* (early 17<sup>th</sup> century) and the *Hikayat Hang Tuah* (late 17<sup>th</sup> century) and repeated in other Malay *hikayat*.

<sup>113</sup> SCM, para. 3.11.

<sup>114</sup> C. Sather, *The Bajau Laut. Adaptation, History, and Fate in a Maritime Fishing Society of South-Eastern Sabah*, Kuala Lumpur: Oxford University Press, 1997, p. 326. Sather describes the Orang Laut as "...literally the 'sea people', a diverse congeries of variously named groups inhabiting, or once inhabiting, the

surrounding waters because of its rich fishing grounds. They patrolled the seas to conduct trade ships to the ruler's port, provided protection for all traders involved with Johor, and sought to attack competitors or ships intending to trade at a competitor's port, including in the immediate vicinity of PBP.<sup>115</sup>

62. As proof of its thesis that there were "no-man's islands" in the region Singapore refers to a statement by Thomson that he could only ascertain that a particular territory belonged to Pahang because "all the inhabitants acknowledge the Raja as their chief and pay tribute annually".<sup>116</sup> But these are reasonable and valid tests of allegiance, which could equally be applied in other parts of the world. The whole passage from which Singapore quotes reads as follows:

"The exact boundary between the two states I could not accurately ascertain. That there should be debatable land, where the country is totally unproductive and uninhabited is a natural consequence. The last river of importance which undoubtedly acknowledges the supremacy of Johore is Sidili Besar, but I was informed that Sungei Merising, a small creek and river opposite Pulo Babi, also belonged to Johore, but this is doubtful. The last river in Pahang of importance that undoubtedly belongs to that territory is the Indau. A country covered by dense forest occupies the interval between Sidili Besar and Indau. It possesses 50 geographical miles of sea board in which there are no settled inhabitants and the few dammer collectors and rattan gatherers that frequent its jungles, claim the protection of either chief as they may find it convenient."<sup>117</sup>

It must be stressed that Thomson does not say that this area on the mainland of Johor was *terra nullius*, open to acquisition by any European naval captain carrying a flag, and in fact the British Government during this period assisted in the determination of boundaries

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Riau-Lingga Archipelago, Batam, and the coastal waters of eastern Sumatra and Southern Johore": p. 320 (see also his Map 11.1 on p. 322).

<sup>115</sup> According to Andaya, "The duties of the Orang Laut were to gather sea products for the China trade, perform special services for the ruler at weddings, funerals, or on a hunt, serve as transport for envoys and royal missives, man the ships and serve as a fighting force on the ruler's fleet, and patrol the waters of the kingdom. Except in times of actual warfare when their services were needed for the fleet, the Orang Laut were usually on patrol providing protection for Johor's traders or those wanting to trade while harrasing all other shipping": L.Y. Andaya, "The Structure of Power in Seventeenth Century Johor", in A. Reid and L. Castles (eds), *Pre-colonial Southeast Asia*, Kuala Lumpur: Malaysian Branch of the Royal Asiatic Society, Monograph No. 6, 1974, p. 7. Quoted in Sather, *ibid.*, p. 326. See also J.T. Thomson, "Account of the Horsburgh Lighthouse", in *The Journal of The Indian Archipelago and Eastern India*, vol. 6 (1852), p. 84, referring to articles in the *Singapore Free Press* in 1846-1850, extracts of which are included in Appendix II to Thomson's article: SM, Annex 61, p. 13.

<sup>116</sup> SCM, para. 3.9, *sub* (b).

<sup>117</sup> J.T. Thomson, "Description of the Eastern Coast of Johore and Pahang, and Adjacent Islands", in *The Journal of The Indian Archipelago and Eastern India*, vol. 5 (1851), p. 84. See SCM Annex 15, p. 139.

between the Malay states, for example in the Ord Award of 1868, in a manner which left none of the territory or surrounding islands unaccounted for.

63. Johor's sovereignty over areas such as PBP and surrounding waters can also be inferred from an 1822 account by John Crawfurd in his capacity as an Envoy of the Governor General of India to Siam and Cochin-China. In his report on the mission Crawfurd wrote:

"We had today a visit from some individuals of the race of Malays, called 'Orang Laut', -that is 'men of the sea'. They have a rough exterior, and their speech is awkward and uncouth, but, in other respects, I could observe little essential difference between them and other Malays. These people have adopted the Mohammedan religion. They are divided into, at least twenty tribes, distinguished usually by the straits or narrow seas they principally frequent. A few of them have habitations on shore, but by far the greater number live constantly in their boats, and nearly their sole occupation is fishing: those who are most civilised cultivating a few bananas. *They are subjects of the King of Johore*, and the same people who have called *Orang Selat* or, 'men of the Straits'; - the straits here alluded to being, not the great Straits of Malacca, but the narrow guts running among *the little islets that are so abundantly strewn over its Eastern entrance*. Under this appellation they have been notorious for their piracies, from the earliest knowledge of Europeans respecting these countries."<sup>118</sup>

64. Together with the Romania islands at the entrance of the Strait of Singapore, PBP, Middle Rocks and South Ledge are undoubtedly included in the reference to these "little islets that are so abundantly strewn over its Eastern entrance". Furthermore, Crawfurd states explicitly that the Orang Laut "are subjects of the King of Johore". As Professor Houben explains, the areas between the Straits of Malacca and the South China Sea were controlled by groups of these Orang Laut owing allegiance to the rulers of Johor.<sup>119</sup>

65. The jurisdiction of the Johor rulers over the Orang Laut was further reinforced as a result of Johor-Riau-Lingga's interaction with the Dutch and the British from the early 17<sup>th</sup> century. The Sultanate entered into a series of treaties of friendship, protection of sovereignty and territorial integrity, navigation and special trade privileges, first with the

<sup>118</sup> Emphasis added. John Crawfurd, *Journal of an Embassy from the Governor-General of India to the Courts of Siam and Cochin-China; Exhibiting a View of the Actual State of Those Kingdoms*, London: Colburn, 1828. Reproduced With an Introduction by David K. Wyatt, Historical Reprints, Kuala Lumpur: Oxford University Press, 1967, at pp. 42-43. Text in this Reply, vol. 2, Annex 7.

<sup>119</sup> See Professor Houben's opinion, "Some historical considerations on Johor and the Singapore Straits", in MR, vol. 1, Appendix II, paras. 25-28, p. 227.

Dutch (in the 17<sup>th</sup> and 18<sup>th</sup> centuries) and later with the British (in the 19<sup>th</sup> century).<sup>120</sup> These treaties were international law arrangements, acknowledging the sovereign rights of Johor in the same way as the transactions of European powers with the various rulers in the Middle East, discussed by this Court in the *Qatar/Bahrain case*.<sup>121</sup>

## B. The Johor Sultanate before 1824

66. Singapore's Counter-Memorial describes the Sultanate of Johor in terms of a fragmenting State in a constant process of degradation, which went from leading a "precarious existence" to a "state of dissolution".<sup>122</sup> Appendix A suggests that during the 16<sup>th</sup> century the Sultanate led a precarious existence, that after a short period of prosperity during the second half of the 17<sup>th</sup> century the standing of the Sultanate in the Malay world "plummeted", that in the middle of the 18<sup>th</sup> century Johor enjoyed a brief period of prosperity again but that through the Dutch conquest of Riau in 1784 Johor's independence was ended and the Sultanate fell into insignificance. In Singapore's view, it was only when Temenggong Ibrahim was handed the Sultanate in 1855 that a new political entity emerged, an entity quite distinct from the old Sultanate.<sup>123</sup>

67. This account of virtually constant decline over many centuries prompts the reflection—what sort of entity is it that can decline for so long and remain in existence? It takes some skill, one might think, to fragment, decay and dissolve for such an extended period and retain one's identity at all. After all, the present Sultan of Johor is the lineal descendant of the Temenggong with whom the British signed the Agreement of 1819 and of the Temenggong (his son) whose consent was sought in 1844 to build a lighthouse in the vicinity of Point Romania. Not many ruling houses in 21<sup>st</sup> century Europe can claim such continuity: indeed not many still exist. Singapore's account even casts doubt on its own territorial scope. How can a treaty signed with the Sultan and Temenggong of Johor

<sup>120</sup> Johor concluded various treaties with the Dutch and the British, respectively. The texts of these treaties are reproduced in J. Allen, A.J. Stockwell and L.R. Wright (eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia, 1761-1963*, New York: Oceana, 1981. The text in Dutch of the relevant Dutch treaties are published in Netscher, *De Nederlanders in Djohor en Siak 1602 tot 1865. Historische beschrijving*, Batavia, Bruijning en Wijt, 1870. See also Appendices A-D of L.Y. Andaya, *The Kingdom of Johore 1641-1728*, Kuala Lumpur: Oxford University Press, 1975, pp. 325-329.

<sup>121</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, 2001 ICJ Reports, paras. 36-69.

<sup>122</sup> See especially SCM, pp. 25-7.

<sup>123</sup> See SCM, paras. 3.35-3.39.



in August of 1824, the nadir of Johor's decline, constitute the basis to this day of the territorial extent of the Republic of Singapore? There seems to be something wrong with Singapore's account, even something self-destructive.

68. Turning to the actual and recorded history of the region, there is no doubt that after its establishment in 1511 Johor was the most important Malay state in the region. Thus according to B.W. Andaya and L.Y. Andaya, "In the late seventeenth century, Johor had become the pre-eminent power in the Straits".<sup>124</sup> This position was recognised by the Dutch, the British and by third States.

69. The Dutch East India Company (VOC) had a lengthy special relationship with Johor which began with the signing of their first treaty on 17 May 1606.<sup>125</sup> The principal concern of the VOC was to obtain the assistance of the Sultan of Johor in seizing the town of Malacca from the Portuguese. After several failed attempts (in 1606, 1608 and 1615), the alliance succeeded in seizing the town of Malacca in 1641.<sup>126</sup> The special, although not always peaceful, relationship between Johor and the VOC eventually spanned two centuries.<sup>127</sup> It is significant that it came to an end not through the disappearance of Johor (which still exists) but of the VOC and, temporarily, the Netherlands. At the end of the 18<sup>th</sup> century the VOC collapsed as a result of bankruptcy and the Netherlands were occupied by France. During this time Dutch colonial possessions and responsibilities were placed temporarily under British control (1795-1814).

70. Throughout its existence the Sultanate of Johor was sensitive to its treatment as an equal sovereign power by its allies. For example, in 1655 Johor sought the removal of Dutch ships from its waters which had been sent by the Dutch Governor of Malacca in

<sup>124</sup> B.W. Andaya and L.Y. Andaya, *A History of Malaysia*, Houndsmill, Basingstoke: Palgrave, rev. ed., 2001, p. 76 and p. 82. See also L.Y. Andaya in the recently published *Historical Encyclopedia of Southeast Asia*, 2004, p. 697, stating that Johor was the "preeminent entrepot state in the Straits of Melaka".

<sup>125</sup> The *Vereenigde Oostindische Compagnie* (VOC) was established in 1602 as a merger of various trading companies in a number of Dutch port cities. In its Charter the VOC was given wide-ranging powers, including the right to conclude and sign treaties, to enter into alliances, levy troops, wage war and appoint governors and judicial officers.

<sup>126</sup> See L.Y. Andaya, *The Kingdom of Johor 1641-1728*, Kuala Lumpur: Oxford University Press, 1975, pp. 22-33; R. Spruit, *The Land of the Sultans. An Illustrated History of Malaysia*, Amsterdam and Kuala Lumpur: Pepin Press, 1995, pp. 69-76.

<sup>127</sup> See L.Y. Andaya, *The Kingdom of Johor 1641-1728*, 1975, pp. 55-83; 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 and III.

order to prevent Chinese traders from entering the Johor River.<sup>128</sup> Johor's concern was not simply allowing traders free access to the Johor River, but the maintenance of its sovereign rights in its own maritime territories, which included the waters and islands mentioned in the Governor's letter, i.e. "the Hook of Barbukit and in the vicinity of Pedra Branca".<sup>129</sup> As the Governor of Malacca wrote to his Governor-General in Batavia:

"...in the future at least two yachts must cruise to the south of Singapore Straits under the Hook of Barkubit and in the vicinity of Pedra Branca (in order that they [the Chinese junks] do not enter [the Johor River] and therefore make certain that they are brought here [Melaka] or to Batavia. As we have seen often, unless the Johor ruler is greatly attracted to this idea, without his command we dare not put this into effect. We therefore faithfully await your order and command as to how far we should pursue this..."<sup>130</sup>

71. When the Dutch went ahead and took two Chinese junks from the Strait of Singapore to Malacca, the Sultan made it clear that he was far from pleased about the seizure of the two junks in his waters.<sup>131</sup> The message was clear: Dutch ships had no right to interfere and prevent the Orang Laut, in this case the Suku Galang, from performing their appointed task for the ruler of Johor.

72. A further example of Johor's assertion of its sovereign rights arose in 1713. The Dutch wanted Johor to allow Malacca's inhabitants to trade up the Siak River toll-free. This was refused. When the Dutch subsequently argued that Johor did not have sovereignty over Patapahan in upriver Siak because the inhabitants sent homage to the Minangkabau emperor who lived in the mountains of Sumatra, Johor was adamant that Patapahan *did* belong to Johor and that it was not up to the Dutch to question this. As Professor Andaya explains:

"Whenever the Dutch or any other nation encroached on Johor's lands without express approval or neglected to accord proper respect to the ruler, Johor was prepared to take drastic steps to correct the situation.... No longer was the issue trade or ways of outwitting a business community, but of more serious import – that of Johor's sovereignty".<sup>132</sup>

<sup>128</sup> MM, paras. 78-79.

<sup>129</sup> MM Annex 22.

<sup>130</sup> MM, para. 78 and Annex 22.

<sup>131</sup> MM, para. 79 and Annex 21.

<sup>132</sup> L.Y. Andaya, *The Kingdom of Johor 1641-1728*, Kuala Lumpur: Oxford University Press, 1975, p. 221.

73. Professor Andaya concludes:

“What mattered to the Johorese was the upholding of respect for the integrity of Johor as a sovereign kingdom where proper relations were maintained and where the inviolateness of its territories was acknowledged.”<sup>133</sup>

74. Singapore pretends that Johor was just another weak polity in which the Sultan only exercised nominal authority, of the kind that was described by Professor Houben in his discussion of the Sultanate of Bulungan in the *Ligitan/Sipadan case*.<sup>134</sup> But there were various types of Malay states and other entities and it would be absurd to put a substantial maritime empire such as Johor on a par with a tiny land-based Sultanate on the east coast of Borneo such as Bulungan. This is explained in Professor Houben’s expert opinion annexed to this Reply, in which he characterises Bulungan as “a small entity having only limited interaction with the inland peoples”.<sup>135</sup> In Professor Houben’s view “To equate the maritime empire of Johor with the small coastal Sultanate of Bulungan, as Singapore does, is historically unsustainable.”<sup>136</sup>

75. The British of course concluded agreements with the Sultanate of Johor in 1819 and 1824 which led to the establishment of Singapore.<sup>137</sup> This is just another piece of evidence which shows the existence of the Sultanate of Johor as an internationally recognised actor: the British themselves sought permission for, and legitimisation of, their settlement in Singapore by concluding agreements with the Sultan and Temenggong of Johor as the recognised local sovereigns, and they continued into the 20<sup>th</sup> century to treat Johor as a separate State under British protection.

76. As late as 10 January 1824, just two months prior to the conclusion of the Anglo-Dutch Treaty of 1824, John Crawfurd, in his report to the British Government described the Johor Sultanate as follows:

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<sup>133</sup> Andaya, *ibid.*, p. 226.

<sup>134</sup> See SCM, para. 3.6.

<sup>135</sup> See Appendix II to this Reply, para. 8.

<sup>136</sup> Houben Report, Appendix II to this Reply, para. 7.

<sup>137</sup> Agreements of 30 January 1819, 6 February 1819, 26 June 1819 and 2 August 1824. See MM, paras. 45-47 and 54-56 and MCM, para. 34.

"This principality [i.e. Johore] extends on the continent from Malacca to the extremity of the peninsula on both coasts. It had several settlements on the island of Sumatra, and embraced *all the islands in the mouth of the Straits of Malacca with all those in China seas*, as far as the Natunas in the latitude of 4°N and the longitude 109°E."<sup>138</sup>

Obviously, Crawford's description of Johor is such as to include PBP, Middle Rocks and South Ledge.

77. Notwithstanding Singapore's assertions, there is no indication that the territorial scope of the Sultanate of Johor north of the southern limit of the Straits underwent any change at all of relevance to the present case. In 1552, the Portuguese Barros reported that "White Rock [Pedra Branca] ...is very much in demand by the pilots of those parts",<sup>139</sup> which is hardly a sign of *terra derelicta*. And in 1843, just prior to Butterworth's letters of request (themselves a recognition of sovereignty over the areas they covered), the *Singapore Free Press* mentioned that PBP was one of the islands where "pirates go for shelter and concealment", islands which were acknowledged to be "all within the territories of our beloved ally and pensionary, the Sultan of Johore".<sup>140</sup>

### C. The 1824 Treaties and their implementation

78. Singapore does not deny that before 1824 the Sultanate of Johor extended north and south of the Straits.<sup>141</sup> Indeed this is an obvious fact, depicted on all contemporary maps. However, it argues that there is no line of continuity between the pre-1824 Sultanate (which may be referred to, for clarity's sake, as the Johor-Riau-Lingga Sultanate, though contemporary accounts continually refer to it as the Sultanate or Kingdom of Johor) and the post-1824 Sultanate of Johor. In Singapore's view this Treaty did not produce a division of spheres of influence in the Strait of Singapore and, in any case, PBP lies south of the Strait rather than within it.<sup>142</sup> While this would seemingly place the island within the Dutch sphere of influence,<sup>143</sup> according to Singapore it did not do so: PBP, did not fall not within any sphere of the colonial powers until the British took lawful possession of the island in

<sup>138</sup> MM Annex 58 and quoted in MM, para. 80 (emphasis added).

<sup>139</sup> Quoted in MCM, para. 19.

<sup>140</sup> MM, para. 95. The text of this article in the *Singapore Free Press* of 25 May 1843 is reproduced as MM Annex 40.

<sup>141</sup> SCM, para. 3.8 and Appendix A, para. 12.

<sup>142</sup> SCM, paras. 3.19-3.30.

1847.<sup>144</sup> Though visible from the coast and still visited from it, it somehow became *terra nullius*.

79. This is an essay in the imagination, and it bears no relation to the actual historical record. The 1824 Treaty resulted in a split of the Sultanate of Johor into two, the Sultanate of Johor in the north and the Sultanate of Riau-Lingga in the south. The new Sultan of Riau-Lingga, whose title to Johor and the surrounding islands Great Britain never recognised, was compelled by the Dutch to respect the terms of the Anglo-Dutch Treaty, and at no stage exercised or attempted to exercise any jurisdiction over the islands in the Strait of Singapore.<sup>145</sup> All the islands around the coast of Johor, except for those expressly granted to Singapore under the Crawford Treaty, remain to this day part of Johor: there are 84 of them, some a good deal further from the peninsula than PBP is. It has never been suggested that these other islands became *terrae nullius* in 1824. Yet this is what Singapore postulates, without the backing of *any* contemporary evidence, so far as concerns PBP, Middle Rocks and South Ledge.

80. That the Sultanate of Johor retained its existence and authority over its mainland territory as well as these islands following the conclusion of the 1824 Treaty accords with the standard literature on the history of the region.<sup>146</sup> It is also the conclusion reached in Professor Houben's expert opinion, where he addresses the extent of the domains of Temenggong Abdul Rahman (d. 1825) and his son and successor, Temenggong Daing Ibrahim, who ruled from 1825 to 1862. Professor Houben concludes that the Temenggong's *perintah* (part of the larger political unit of the Johor kingdom) consisted of a ring of islands in the northwestern part of the Riau Archipelago, and included Singapore and the Johor coastline.<sup>147</sup> PBP, Middle Rocks and South Ledge fell within the Temenggong's territory.

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<sup>143</sup> SCM, para. 3.27.

<sup>144</sup> SCM, para. 3.29.

<sup>145</sup> MM, paras. 49-53; MCM, para. 33.

<sup>146</sup> Standard books on the history of the region include: G. Irwin, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry*, The Hague: Martinus Nijhoff, 1955; C.A. Trocki, *Prince of Pirates. The Temenggongs and the Development of Johor and Singapore 1784-1885*, Singapore: Singapore University Press, 1979; N. Tarling, *Anglo-Dutch Rivalry in the Malay World 1780-1824*, Cambridge/Sydney: Cambridge University Press/University of Queensland Press, 1962; E. Netscher, *De Nederlanders in Djohor en Siak 1602 tot 1865. Historische beschrijving*, Batavia, Bruijning en Wijt, 1870; R. O. Windstedt, *A History of Johore 1365-1895*, 1932 (reprinted 1992); B.W. Andaya and L.Y. Andaya, *A History of Malaysia*, Houndsmill, Basingstoke: Palgrave, 2<sup>nd</sup> rev. ed., 2001.

<sup>147</sup> Professor Houben, Appendix II to this Reply, para. 28 and Conclusion no. 5, pp. 227-228.

81. Both the Dutch and the British respected the 1824 Treaty as establishing the dividing line between their respective spheres of influence. The Dutch never asserted any claim to the islands within or near the Strait of Singapore, while the British persuaded the rulers of Johor to observe the new division of spheres of influence as to locations and islands further away (e.g. Bengkulen and the Carimon Islands).

82. There was some subsequent discussion between the British and the Dutch as regards the scope of Article XII of the Treaty of March 24, 1824. This Article reads:

“His Netherlands Majesty withdraws the objections which have been made to the occupation of the Island of Singapore, by the Subjects of His Britannick Majesty.

His Britannick Majesty, however, engages, that no British Establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintang, Linggin, or on any of the Islands South of the Strait of Singapore, nor any Treaty concluded by British Authority with the Chiefs of those Islands.”

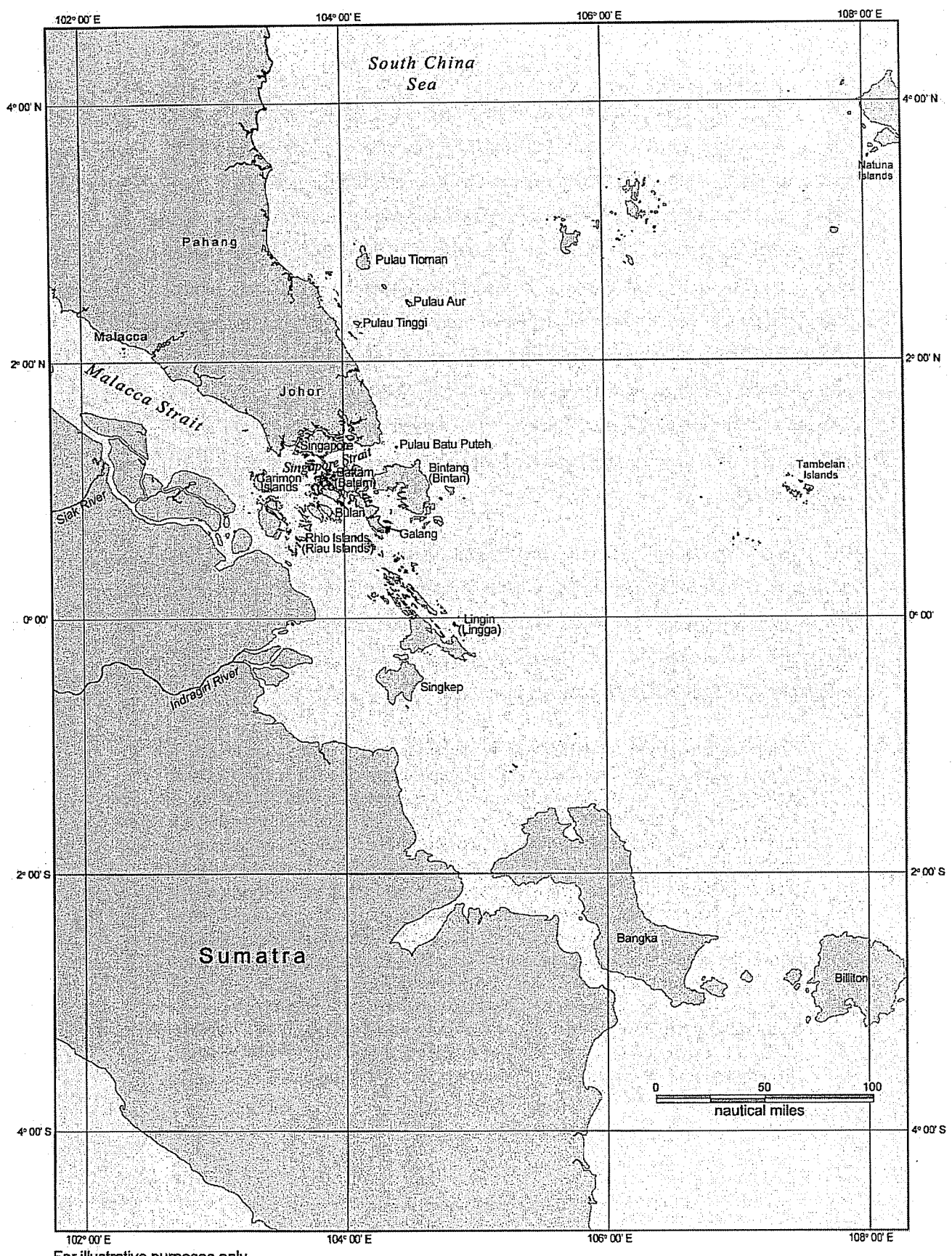
But the discussion on the scope of the second clause did not pertain to the area in which PBP, Middle Rocks and South Ledge are located, which was never disputed. Rather it concerned the phrase “or any of the other Islands South of the Strait of Singapore”: did this pertain to the immediate area of the Straits only or to *all* territories south of 1°30'N extending into the South China Sea and including, for example, the island of Borneo. Based on a study of the *travaux préparatoires*, Irwin concludes that the Dutch only wanted to set local limits to the British and Dutch spheres of influence in the immediate area of the Strait of Singapore.<sup>148</sup> Falck and Fagel, the chief negotiators on the Dutch side, explained in a note that it was necessary “to prevent the English from claiming any future right to form connections with or exert influence over the islands of Lingin, Rhio and the Carimons”.<sup>149</sup> In order to avoid confusion, Elout (at the time adviser to the Dutch Colonial Minister) had sought to substitute in the draft text of 1 February 1824 the phrase “any of the remaining islands belonging to the ancient kingdom of Johore” by the phrase “any of the Islands South of the Strait of Singapore”. This was agreed to. In the final text, Article XII referred not to Johor, but to Carimon, Battam, Bintang, Lingin and other islands South of the Straits. These islands are depicted on **Figure 1** on the opposite page.

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<sup>148</sup> G. Irwin, p. 66.

<sup>149</sup> Ibid., p. 66.

# THE ISLANDS REFERRED TO IN ARTICLE XII OF THE 1824 ANGLO-DUTCH TREATY AND 19TH CENTURY CORRESPONDENCE



For illustrative purposes only

Figure 1

83. Singapore claims that Article XII left "the entire Singapore Strait undivided and open to access by both the British and Dutch"<sup>150</sup> and that, as a consequence, PBP would have been left in neither the British nor the Dutch sphere of influence. Such a proposition cannot be maintained. Not a single piece of evidence can be found to support Singapore's thesis, either in the British or Dutch archives relating to the 1824 Treaty or in the relevant academic literature.<sup>151</sup> Moreover, it is inherently incredible: the shared purpose of the British and Dutch was to divide the region into spheres of influence, not to open the door to possible claims by other European States. The Strait of Singapore was already one of the busiest transit passages in the region, linking the South China Sea with the Strait of Malacca and the Indian Ocean. This very fact served as the main *raison d'être* for the establishment of Singapore, the extent of which was carefully specified in the Crawfurd Treaty of 1824.

84. On 31 August 1824, shortly after the conclusion of the Crawfurd Treaty, the Dutch Minister of Colonies Elout addressed a letter of instruction to the Governor-General of the Netherlands East Indies. The letter annexes the text of the Anglo-Dutch Treaty and gives very clear instructions to the Governor-General on how to implement its various paragraphs. On Article XII the Minister instructed:

"The twelfth Article by which the Netherlands renounces all its voices of protest against the possession of Singapore by British officials, will necessarily prompt the conclusion of an arrangement with the Sultan of Lingga. Your Excellency will have to make it clear to the Sultan that the mutual interests of both European Powers have made it necessary to effectuate a certain separation between their own possessions and those of their indigenous allies, and that thereto it has become necessary to include in that arrangement *that part of the Kingdom of Johor which is situated within the British sphere of influence*; conversely, the possessions and territories which belong to the Sultan and which are situated within the boundaries of the Dutch government, have been confirmed once again and in a decisive way, and with the guarantee of the traditional friendly relations with the Netherlands, with the effect that *south of the Straits of Singapore no British authority exists*, [and] that His Excellency himself will note that the dismemberment of a part of his territories will not amount to an essential loss for His Excellency, *particularly after the acts of the*

<sup>150</sup> See SCM, paras. 3.23 & 3.29.

<sup>151</sup> E.g., Tarling assesses that the division into two spheres of influence arose "partly as the result of the British policy of protecting the entrance to the China seas": N. Tarling, *Imperial Britain in South-East Asia*, Kuala Lumpur: Oxford University Press, 1975, p. 25.



*Temenggong of Johor by which his influence in these regions was already nil.*<sup>152</sup>

In other words, the areas in question were already controlled by the Temenggong of Johor; the Sultan of Lingga had no influence there and therefore had lost nothing by the Treaty.

85. Thereupon, the Governor-General sent a representative, Mr. Christiaan van Angelbeek, to the area. On 10 April 1825 he arrived at Singapore and delivered a letter from the Dutch Governor-General to Resident Crawford. Crawford informed Van Angelbeek of the treaty he had concluded with the brother of the "Sultan of Lingga and Bintang" (i.e., with Sultan Hussain of Johor) and with the Temenggong of Johor by which the Island of Singapore "with the islets, seas, straits and canals belonging to it" were ceded to the English East India Company, up to a distance of ten geographical miles.<sup>153</sup>

86. Subsequently, Van Angelbeek paid a visit to the Viceroy Raja Jafar in Riau, who was the representative of the Sultan of Lingga. He delivered a letter from the Governor-General dated 15 February 1825.<sup>154</sup> The main purpose of his visit was to notify the Sultan of Articles IX, X, XI and XII of the Anglo-Dutch Treaty. As Van Angelbeek reported, it was a difficult mission. Upon arrival at Riau on 23 April 1825 he immediately learnt that H.E. the Viceroy was "in no way inclined to cede Johor and Pahang, which at the time he still thought to be at his discretion".<sup>155</sup>

<sup>152</sup> Translation provided by Malaysia (emphasis added). The original text in Dutch reads: "Het twaalfde Artikel bij hetwelk Nederland van alle vertoogen tegen het bezitten van Singapoera door de Britsche gezagvoerders afziet, zal noodwendig aanleiding geven tot het treffen van eenige schikkingen met den Sultan van Lingen. Uwe Excellentie zal aan dien Vorst dienen te kennen gegeven, dat de wederzijdsche belangen der beide Europeesche Mogendheden het noodzakelijk gemaakt hebben zekere scheiding tusschen hunner eigen bezittingen en die van hunne Inlandsche bondgenoten te maken, en dat daarvoor noodig geworden is, dat gedeelte van het Rijk van Djohor, hetwelk binnen de grenzen der Engelsche beheering gelegen is, aan dezer beschikking over te laten; dat daartegen de eigendommen en Landen aan den Sultan behoorende, en onder de grenzen van de Nederlandsche Regering liggende, opnieuw en krachtiglijk zijn bewaard geworden, en de oude vriendschappelijke betrekkingen met Nederland gewaarborgd, zoo dat ten zuiden van de Straat Singapoera geen Britsch gezag bestaat dat Z.H. zelve gevoelen zal dat de afscheiding van een deel zijner landen, na al hetgeen voorgevallen is, bijzonderlijk na de gedragingen van den Tomraagong van Djohor voor Z.H. geen wezenlijk verlies uitmaakt, als blijkende daaruit, dat zijn invloed in die streken reeds vroeger nietig was." Source: National Archives, The Hague, 2.21.007.57, inv. no. 122, dated 31 August 1824. Extracts of the original text in Dutch, with translation, are also included in this Reply, vol. 2, Annex 2.

<sup>153</sup> Report from Mr C. van Angelbeek to Governor-General of the Netherlands East-Indies on his mission to Riau, 1825. Source: KITLV (Royal Netherlands Institute of Southeast Asia and Caribbean Studies), Leiden, Western Manuscript Collection, D H 494. Extracts of the original text in Dutch, with translation, in this Reply, vol. 2, Annex 4.

<sup>154</sup> See report in Netscher, 1870, pp. 282-283.

<sup>155</sup> Ibid., p. 283; and see Royal Netherlands Institute of Southeast Asian and Caribbean Studies, Western Manuscript Collection, D H 494: Kopie Rapport van Ch. van Angelbeek omtrent zijne zending naar Riouw 1825 (Copy of Report of Ch. van Angelbeek on his mission to Riau 1825). The relevant part of the original text, with translation, is also included in this Reply, vol. 2, Annex 6.

87. Another drawback was that the Carimon Islands were in the possession of the Temenggong of Johor, as well as the Islands of Galang and Boelang. Van Angelbeek found that the inhabitants of the islands recognized the Temenggong as their ruler, while "the Viceroy was not inclined to take action with respect to such claims by the Temenggong".<sup>156</sup>

88. From the instruction of the Dutch Minister to the Governor-General of the Netherlands East Indies and the reports of the latter's representative, it follows that the Dutch had a clear vision on the territorial consequences of the 1824 Anglo-Dutch Treaty. All the territory within and to the north of the Strait would be under the authority of the Sultan and Temenggong under British influence, while the latter were expected to stop ruling territories within the Dutch sphere of influence.

89. That islands even in the southern part of the Strait fell within the British sphere and not that of the Dutch is clear. Thus the Government of India stated in a letter dated 4 March 1825 to Crawfurd:

"...our acquisition of these islets is not at variance with the obligations of the Treaty concluded at London in March last, as they are all situated *North of the Southern limits of the Straights of Singapore*."<sup>157</sup>

90. Subsequently, on 16 August 1825, Crawfurd reported to the Government:

"... I have the honour to report that having taken up a convenient Ship for the purpose, I circumnavigated the Island of Singapore, and took possession, with the necessary formalities of all the Islands lying within 10 miles of the main Island of Singapore which includes those forming the *Northern boundary of the Straits* of that name".<sup>158</sup>

91. In its Counter-Memorial Singapore suggests that it was not the Anglo-Dutch Treaty that determined the extent of the Johor Sultanate but instead the donation by Sultan Abdul Rahman by letter of 25 June 1825 of mainland territories in peninsular Malaya to

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<sup>156</sup> Ibid.

<sup>157</sup> Emphasis added. Letter Government of India to John Crawfurd, 4 March 1825. Source: Foreign Department Proceedings: Fort William, Consultation No. 18 at folio 219, National Archives of India: this Reply, vol. 2, Annex 3.

<sup>158</sup> Emphasis added. Letter dated 16 August 1825 from John Crawfurd to Government of India. Source: Foreign Department Proceedings: Fort William, Consultation No. 1 at folio 495, National Archives of India: this Reply, vol. 2, Annex 5.

his brother Sultan Hussain in 1825.<sup>159</sup> Singapore correctly reports that this donation was made “on the advice of the Dutch, who wished to avoid any confusion over which territories remained under the control of Sultan Abdul Rahman in the post Anglo-Dutch Treaty period”.<sup>160</sup> Hence this event simply underlines that it was the 1824 Anglo-Dutch Treaty which prompted the split of the Johor-Riau-Lingga Sultanate, and not the so-called “donation” by the Sultan of Riau in 1825. This also follows from the actual text of Sultan Abdul Rahman’s 25 June letter, which expressly states that the division of the territories

“...is in complete agreement with the spirit and the content of the treaty concluded between their Majesties, the Kings of the Netherlands and Great Britain. For this reason, My Brother, heed the advice of Your Brother as much as possible and do not act contrary thereto. For who can answer for the consequences?”<sup>161</sup>

92. The “donation” of Sultan Abdul Rahman must be read in the context of what is stipulated under Article XII of the Anglo-Dutch Treaty of 1824. By no means does it serve as Johor’s title to its territory. The territories specified by Sultan Abdul Rahman to be his own (the one under the Dutch sphere of influence) in the letter of 25 June 1825 comprise “the Islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands”. Out of these five specified islands, three were mentioned in Article XII of the Anglo-Dutch Treaty of 1824 (namely, the Carimon Islands, Bintang and Lingga) while the remaining two (Galang and Bulan) are islands clearly lying south of the Strait of Singapore. The phrase “all other islands” refers to all other islands lying within the Dutch sphere of influence and not named explicitly in the letter, e.g. Batam and Singkep. To sum up, this letter was not a “donation” but was instead a formal recognition that Sultan Abdul Rahman did not claim sovereignty over Johor.<sup>162</sup>

93. Another obvious fact, undermining Singapore’s argument that it was the letter of 25 June 1825 which conferred title to territory on the Johor rulers and limited it to only mainland Johor, is the very fact of Singapore’s existence. The Johor rulers could not have

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<sup>159</sup> See SCM, para. 3.31.

<sup>160</sup> See SCM, para. 3.32.

<sup>161</sup> SCM Annexes 5 & 6. The understanding by Sultan Abdul Rahman in respect of the donation of territories is found in the fifth sentence of the third paragraph of his letter to Sultan Hussain dated 25 June 1825. Although Singapore quoted the third paragraph of Sultan Abdul Rahman’s letter in SCM, para. 3.33, it ends its quotation at the fourth sentence of the letter and has chosen to omit the reference in the fifth sentence to the 1824 Treaty.

<sup>162</sup> The various locations referred to are depicted in **Figure 1** on page 37.

ceded Singapore to the British in 1824 under the Crawford Treaty if Singapore Island and the “adjacent... islets”—indisputably “islands in the sea” and not part of mainland Johor—belonged to the Riau-Lingga Sultanate rather than to the Johor Sultanate. To the contrary, the cession of Singapore by the Johor rulers to the British confirms that the territories of the Johor Sultanate were never limited to only the mainland territories. Johor’s territories covered all the islands north of the southern limits of the Strait of Singapore and this included PBP. For Singapore to deny the legal basis of the very instruments under which it was first constituted as a separate settlement is curious, to say the least.

94. The fact that the sovereignty of Johor included PBP, Middle Rocks and South Ledge is also shown by an official Map of the Dutch East Indies produced in 1842 by G.F. Von Derfelden Van Hinderstein, shown as **Figure 2** on the opposite page.<sup>163</sup> This map is part of an extensive 8-sheet map of the Dutch East Indies, made by order of and submitted to the King of the Netherlands around the same time that the British were seeking permission to construct a lighthouse near Point Romania in Johor. As such it is authoritative. It can be clearly noted that PBP or Pedra Branca as shown on the map is to the north of the line identifying the territorial extent of the Dutch Residency of Riau. As far as the Dutch were concerned, the Dutch sphere of influence, and therefore the extent of the Riau-Lingga Sultanate, did not include PBP, nor “all the islands in the sea” off the Johor mainland.

#### **D. The continuity of Johor after 1824**

95. After the conclusion of the Anglo-Dutch Treaty of 1824, the Sultanate of Johor continued to exist within the British sphere of influence and with its main territorial base on the Malay peninsula and surrounding islands. It remained into the 20<sup>th</sup> century the most important State in the Malay world, and was regarded as the most independent of the Malay States within the British sphere of influence.<sup>164</sup>

<sup>163</sup> This Map was also produced in Malaysia’s Memorial: see Chapter 9 and MM Map Atlas, Map 7. See also MCM, Maps Section, Map 1, pp. 277, 278.

<sup>164</sup> The other Malay Sultanates within the British sphere of influence were Perak, Negeri Sembilan, Pahang, Kedah, Perlis, Kelantan, Selangor and Terengganu. On the increase in the 19<sup>th</sup> century of British interference in Johor administration in the early 20<sup>th</sup> century, see N. Nadarajah, *Johor and the Origins of British Control 1895-1914*, Kuala Lumpur: Arenabuku, 2000.

**MAP OF DUTCH EAST INDIES  
BY G. F. VON DERFELDEN VAN HINDERSTEIN,  
BY ORDER OF THE KING, 1842**



Figure 2

96. As described in Malaysia's Memorial and Counter-Memorial, the British performed successive acts of recognition of the Sultanate of Johor, including:

- concluding of the 1819 treaties with Johor rulers for the establishment of a British factory in Singapore;<sup>165</sup>
- concluding the 1824 Crawford Treaty with the Johor rulers;
- requesting permission in 1844 to construct the Horsburgh lighthouse;<sup>166</sup>
- making the "Arrangement as to the Temenggong's Property in the Island of Singapore" of 1846;<sup>167</sup>
- acting as arbitrator in the boundary dispute between the two Malay States, Johor and Pahang, which resulted in the Ord Award of 1868, delineating their territories as shown by the map annexed to the Award, shown as **Figure 3** on the opposite page;<sup>168</sup>
- recognising Abu Bakar, the powerful Temenggong of Johor, as the Sultan of Johor in 1885;<sup>169</sup>
- concluding the "Johor Treaty" of 1885 with Johor;<sup>170</sup> and
- concluding the Territorial Waters Agreement of 1927 with Johor.<sup>171</sup>

It is notable the Temenggong of Johor—from 1885 the Sultan of Johor—signed or attested to each and every act of British recognition of Johor listed above.

97. Similarly, Dutch practice recognised the Sultanate of Johor as within the British sphere of influence and never sought to encroach into its territory, although formerly the Dutch had been an influential power and had had close dealings with the Johor rulers. The Dutch, as shown by the 1842 map, strictly observed the 1824 Treaty with the British. The "*Residentie Rio*" (Residency of Riau) is positioned on the map strictly in accordance with the terms of the 1824 Anglo-Dutch Treaty.<sup>172</sup> PBP is depicted well north of the line, as part of the territory of Johor and under British influence.

<sup>165</sup> See MM, paras. 45-46.

<sup>166</sup> See MM, para. 120.

<sup>167</sup> See MM, para. 62.

<sup>168</sup> MM, paras. 87-88.

<sup>169</sup> See MM, para. 63.

<sup>170</sup> See MM, para. 64.

<sup>171</sup> See MM, paras. 99-100.

<sup>172</sup> MCM, pp. 277-278, Maps Section, Map 1; see **Figure 2** on page 43.



# MAP ANNEXED TO THE ORD AWARD, 1868

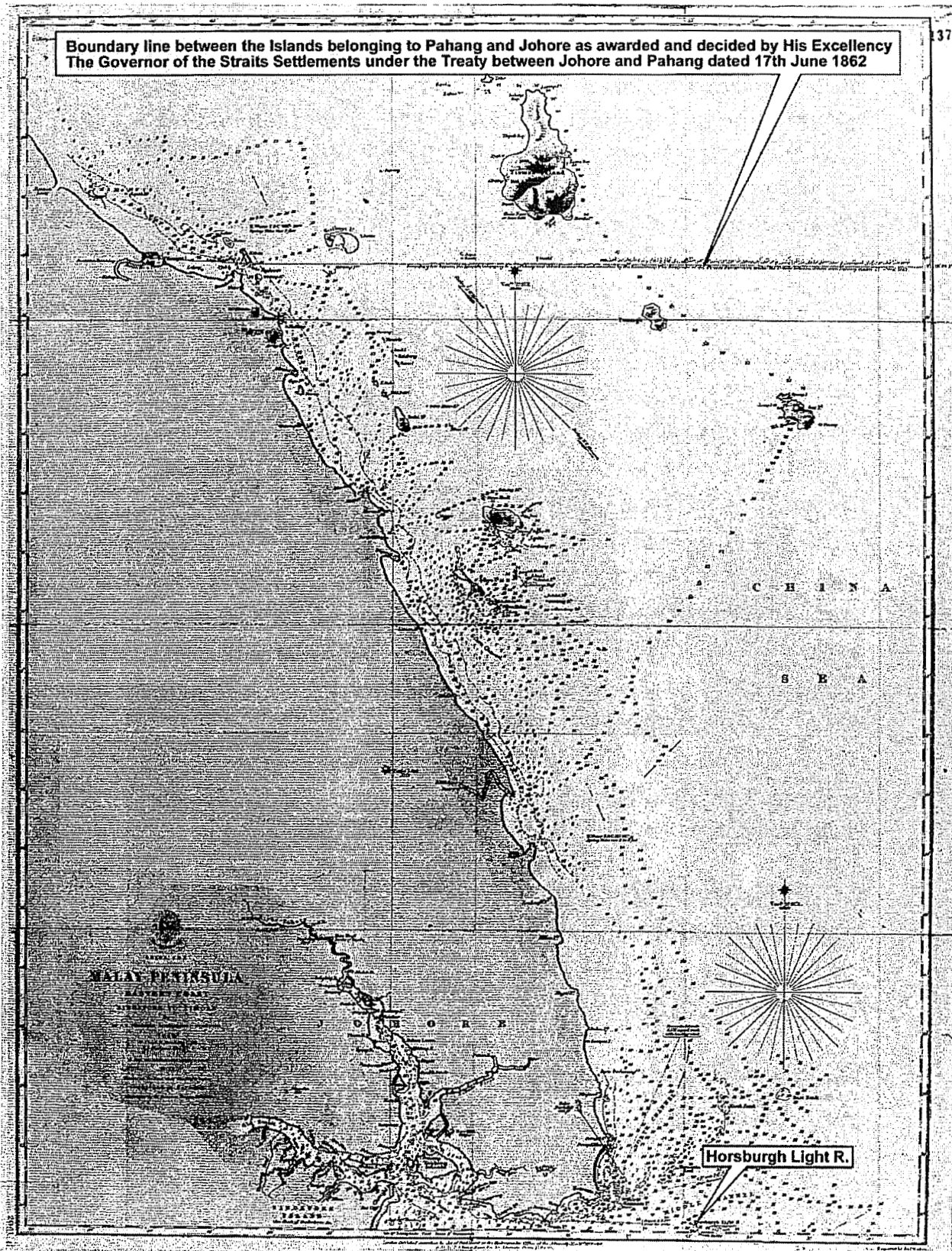


Figure 3

98. Also, in the perception of the Dutch, the maritime limit of the British Settlement of Singapore was clearly limited to 10 geographical miles from Singapore Island, as is shown in a letter by the Resident of Riau to the Director of Finance and Domains ("*lands middelen en domeinen*") dated 12 July 1833 which addresses American trading ships: "the jurisdictional limit of the Singapore port remain, as I view it, determined to be 10 English miles".<sup>173</sup>

99. Singapore seeks to downplay the importance of the article of 25 May 1843 in the *Singapore Free Press*, which reports that "Batu Puteh" is "within the territories of our well beloved ally and pensionary, the Sultan of Johor, or rather of the Tomungong of Johore, for he is the real Sovereign".<sup>174</sup> Singapore calls it an "anonymous article published in a privately-owned newspaper" and quotes the *Nicaragua case* in an attempt to show that the Court treats press articles "with great caution".<sup>175</sup> Indeed Singapore goes on at some length to argue why Pulau Tinggi, also mentioned in the same article as an island belonging to Johor, could not be within the territories of the Temenggong, the inference being that the article is also wrong about PBP.<sup>176</sup> However, it is a simple matter of fact that at the time the article was published Pulau Tinggi had always belonged to Johor and fallen within the Temenggong's domains. This was confirmed by the Ord Award and shown in the map annexed to it (reproduced on the preceding page as **Figure 3**).<sup>177</sup> Pulau Tinggi remains part of Johor to the present day. Singapore fails to provide any evidence as to why the article in the *Singapore Free Press* would not have given an accurate account of the ownership of PBP at the time it was written, as it does in respect of Pulau Tinggi.

100. It should also be observed that the *Singapore Free Press* was a respected newspaper and in addition to articles published official government information and business reports. Thomson's "Account of the Horsburgh Lighthouse", which Singapore has not called into question, relies on and includes references to articles in the *Singapore*

<sup>173</sup> Translation provided by Malaysia. The original text in Dutch reads: "de limite of jurisdictie der Sincapoersche Rheeде, die meen ik op 10. Engelsche mijlen bepaald is": this Reply, vol. 2, Annex 8.

<sup>174</sup> *Singapore Free Press*, 25 May 1843: MM, para. 95 and Annex 40. The article reads in part: "The places and Islands near which these piracies are most frequently committed and where the pirates go for shelter and concealment, such as Pulo Tinghie, Batu Puteh, Point Romania &c, are all within the territories of our well beloved ally and pensionary, the Sultan of Johore, or rather of the Tomungong of Johore, for he is the real Sovereign."

<sup>175</sup> SCM, para. 4.38.

<sup>176</sup> SCM, para. 439.

<sup>177</sup> See MM, paras. 88-89 and MM Map Atlas, Map 10.



*Free Press*.<sup>178</sup> The standing of this newspaper is acknowledged by Turnbull in her "Bibliography of writings in English on British Malaya, 1786-1867". She says that the

"newspapers of the Straits Settlement provide a very valuable source of information for the period up to 1867, particularly after the censorship laws were repealed in 1835. They are useful for gauging public opinion at a time when there was no Legislative Council in the Straits, and they contain verbatim reports of discussions held and resolutions passed at public meetings. They also record speeches made by Governors, Recorders, other officials, lawyers and merchants; verbatim accounts of charges made by the Recorders to Grand Juries and the Presentments of the Juries in reply; memoranda circulated privately to members of the British Parliament and to Chambers of Commerce in Britain; reports of interviews with British politicians; and much other material, both factual and comment, which does not appear in official records and is not to be found elsewhere."<sup>179</sup>

The *Singapore Free Press* is expressly included in this account of reliable English newspapers in the Straits Settlements.

101. Hence, there was nothing inaccurate or ill-informed about the report in the *Singapore Free Press* of 25 May 1843 that "Batu Puteh" is "within the territories of our beloved ally and pensionary, the Sultan of Johore, or rather the Tomunggong of Johore".

102. Furthermore, there is no reason to belittle the relevance of press articles which reflect contemporaneous public knowledge or information. International courts and tribunals frequently rely on such records.<sup>180</sup>

103. In 1886, during a visit to London, Sultan Abu Bakar of Johor requested the British Government by way of an official letter of 20 March 1886 to keep a Register of his islands in view of the possibility of other Powers bringing any of his islands into their protectorates.<sup>181</sup> The request was made in accordance with Article V of the 1885 Johor

<sup>178</sup> See J.T. Thomson, "Account of the Horsburgh Lighthouse", in *The Journal of The Indian Archipelago and Eastern India*, vol. 6 (1852), p. 84, referring to articles in the *Singapore Free Press* in 1846-1850, extracts of which were included in Appendix II to Thomson's article. See SM Annex 61, p. 13.

<sup>179</sup> C.M. Turnbull, "Bibliography of writings in English on British Malaya, 1786-1867", in L.A. Mills (ed.), "British Malaya 1824-67", in *Journal of the Malayan Branch, Royal Asiatic Society*, vol. 33 (1960), Part 3, No. 191, pp. 335-337, at p. 335.

<sup>180</sup> Examples include the *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, 1992 ICJ Reports 240, para. 33, p. 254 (press reports), and the *Nuclear Tests Case (New Zealand v France)* 1974 ICJ Reports 457, paras. 40-43, p. 471 (press conferences and television interview).

<sup>181</sup> MM, paras. 89-92; MM Annex 63.

Treaty which provided for British protection of the territorial integrity of the Johor Sultanate.<sup>182</sup> In his request, the Sultan explained that:

“The Islands in question range themselves around the Coast of Johore; all those on the Western side, and a large number on the Eastern side, being in the immediate vicinity of Johore; but of the latter a large proportion also extends farther out, stretching to even as far as the neighbourhood of Borneo.”<sup>183</sup>

104. The Sultan’s request was accompanied by a Memorandum and several charts as identification of the islands belonging to the Johor Sultanate. Among the charts presented for the consideration of the British Government was Admiralty Chart 2041 representing islands on the “Eastern Coast of Johor (immediate vicinity)” and which includes PBP, Middle Rocks and South Ledge.<sup>184</sup>

105. Britain never rejected the Sultan’s confirmation that the islands on the “Eastern Coast of Johor (immediate vicinity)”, including PBP and as reflected in the Admiralty Chart 2041, were part of Johor. If the British had indeed taken “lawful possession” of PBP in 1847-1851 as Singapore now claims, it was incumbent upon the British to make this clear in 1886 in response to the Sultan’s letter. The British, however, did not make any such reservation. The events of 1886 provide further evidence that, even 35 years after the construction of the Horsburgh Lighthouse on PBP and its continued operation by the British, all relevant parties, the British and Johorese, firmly believed it to be under the sovereignty of the Johor Sultanate.

106. What the 1886 events also demonstrate is that the Sultan of Johor was careful to ensure the territorial extent and integrity of his Sultanate was maintained and respected by European Powers operating in the region. The 1895 Constitution of Johor, which marked the transition from an absolute monarchy towards a constitutional monarchy by providing

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<sup>182</sup> Article V of the 1885 Johor Treaty states: “The Governor of the Straits Settlements, in the spirit of former treaties, will at all times to the utmost of his power take whatever steps may be necessary to protect the Government and territory of Johore from any external hostile attacks; and for these or for similar purposes Her Majesty’s Officers shall at all times have free access to the waters of the State of Johore; and it is agreed that those waters extend to 3 miles from the shore of the State, or in any waters less than 6 miles in width, to an imaginary line midway between the shores of the two countries.” See Agreement on Certain Points Touching the Relations of Her Majesty’s Government of the Straits Settlements with the Government of the Independent State of Johore, 11 December 1885: MM Annex 10.

<sup>183</sup> See MM, para. 90.

<sup>184</sup> See MM, para. 91.

for a Council of Ministers and a State Council, sought to protect the territorial integrity of Johor by providing in Article XV that

“...the Sovereign may not in any manner surrender or make any agreement or plan to surrender the country or any part of the country and State of Johore to any European State or Power, or to any other State or nation...”<sup>185</sup>

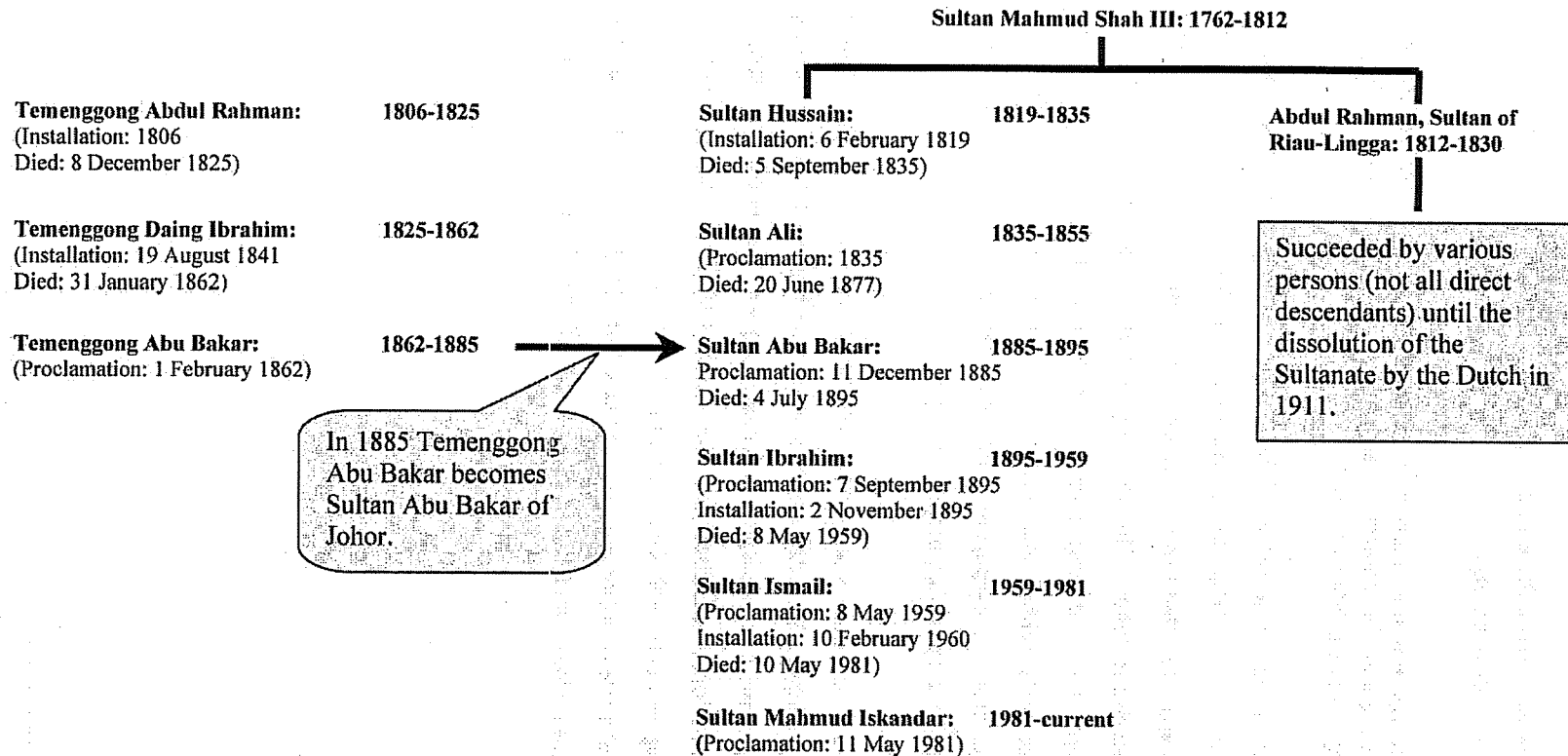
107. The issue of the territorial extent of the Sultanate was also addressed in the Straits Settlements and Johore Territorial Waters Agreement of 1927. Under this Agreement certain seas, straits and islets that had been ceded to the British under the Crawford Treaty of 1824 were retroceded to Johor. This 1927 Agreement in effect redefined the northern, eastern and western limits of Singapore in the Straits of Johor.<sup>186</sup> However, the retrocession arrangements neither addressed nor concerned PBP because PBP had never been part of the territory of Singapore under the Crawford Treaty of 1824 and never became part of Singapore thereafter, despite Singapore's recent claims.

108. The continuity of Johor is also shown by the uninterrupted succession of Sultans and Temenggongs of Johor after 1824 which are shown in **Figure 4** on the following page. This shows that each and every Sultan and Temenggong was succeeded by a son, and that the present Sultan of Johor is a direct lineal descendant of Temenggong Abdul Rahman, signatory of the agreements with Great Britain of 1819 and 1824. Thus, without any interruption, the Sultanate of Johor remained in place from 1511 until 1946 when it became part of the Malayan Union and subsequently part of the Federation of Malaya, later Malaysia.

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<sup>185</sup> See also MM, para. 65. The text of the Constitution of Johor is reproduced in MM Annex 88.  
<sup>186</sup> MM, paras. 190-192. The text of the 1927 Agreement is reproduced as MM Annex 12.

Figure 4: LIST OF TEMENGGONGS AND SULTANS OF JOHOR FROM 1762<sup>1</sup>



<sup>1</sup> **Primary sources:** Cenderamata, Hari Keputeraan Duli Yang Maha Mulia, Sultan Ismail ibni Al-Marhum Sultan Johor yang Ke-80, 28 October 1974; Pertabalan Duli Yang Maha Mulia Seri Paduka Baginda Sultan Iskandar Yang Di Pertuan Agong Malaysia, 15 November 1984, P/Raja 1, Arkib Negara Malaysia Cawangan Johor-Melaka; Percanangan Dalam, Johor Bahru, Bil. 1, J/Raja, No. 10, 12<sup>th</sup> July 1981, Arkib Negara Malaysia, Cawangan Johor-Melaka; Straits Settlement Factory Records, Series W 41, Folio 48, Reel 142, Microfilm Copy, University of Malaya Library.  
**Secondary sources:** C.B. Buckley, *An Anecdotal History of Old Times in Singapore*, Fraser and Neave: Singapore, vol. 1, reprinted, Kuala Lumpur: University of Malaya Press, 1965; C.A. Trocki, *Prince of Pirates. The Temenggongs and the Development of Johor and Singapore 1784-1885*, Singapore: Singapore University Press, 1979; R.O. Winstedt, *A History of Johore (1365-1895)*, 1932; reprinted by the Malaysian Branch of the Royal Asiatic Society, Kuala Lumpur, 1992.

## E. Conclusions

109. The recorded political history of the Johor Sultanate spans a period of nearly 450 years. Like all other States, during this long period Johor experienced upheavals. However, it always maintained its status as a recognised independent Sultanate and was one of the most powerful Malay States until well into the 20<sup>th</sup> century. A long history supported by clear evidence proves the original title of Malaysia over PBP, Middle Rocks and South Ledge: each of them was and has always been part of the Sultanate of Johor which became part of Malaysia. This history can be summarized as follows:

- (a) During the period 1511-1824 the Sultanate of Johor emerged as a maritime empire which, during the period 1784-1824, was exposed to some fragmentation and reconfiguration as a result of Dutch and English interference.
- (b) The international status of the Johor Sultanate prior to the Anglo-Dutch Treaty of 1824 was well known and generally accepted. Its domain covered parts of the mainland of the Malay Peninsula, parts of the island of Sumatra, all islands within and at the entrance of the Strait of Singapore and numerous other islands in the open China Sea, including the Natunas, Anambas and the Tambelans. PBP, Middle Rocks and South Ledge were clearly included.
- (c) At all relevant times PBP was not *terra nullius*. The island was featured by name on the earliest maps, as a seamark as well as a point of danger. The native population used the island, as referred to in Portuguese books as early as 1552. Nearly 300 years later Crawford would still report that the "men of the sea" living in that area were subjects of the Sultanate of Johor, a fact confirmed by articles in the *Singapore Free Press* around the time of the construction of the lighthouse. Dutch diplomatic exchanges with the sovereign of Johor regarding piracy control and other European Powers also made reference to PBP.<sup>187</sup>
- (d) The Johor Sultanate split into the Riau-Lingga and Johor Sultanates as a result of the Anglo-Dutch Treaty of March 1824. This treaty divided the Johor Sultanate into two separate spheres of influence: one covering the

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<sup>187</sup> See MM, para. 20.

islands south of the Strait of Singapore (i.e. the Riau-Lingga Sultanate) was left under Dutch influence and the other, the territory and all islands in the Straits of Singapore and to the north of it (i.e. the Straits Settlements and the Johor Sultanate) were placed under British influence. PBP is not an island south of the Strait of Singapore. Accordingly, it fell within the British sphere of influence and remained a territory under the sovereignty of the Johor Sultanate. The same applies to the other two features at issue in this case, Middle Rocks and South Ledge.

- (e) After the split into two Sultanates effected by the Anglo-Dutch Treaty of 1824, Johor continued to exercise sovereignty over its territory including all islands in the Strait of Singapore with the exception of those islands to the south of the Strait mentioned in Article XII of the Anglo-Dutch Treaty of 1824 and, after August 1824, the main island of Singapore and islands within its ten geographical mile circumference which Johor had ceded to the British under the Crawford Treaty.
- (f) Throughout the period from 1824 to 1957, PBP remained part of Johor territory and was recognised by the British as such in all its dealings with the Johor rulers, for example in 1886 when Sultan Abu Bakar confirmed the extent of his territory with the British and in the 1927 Territorial Waters Agreement between Britain and Johor.

## Chapter 3

### THE TRANSACTIONS LEADING TO THE CONSTRUCTION OF THE LIGHTHOUSE

#### Introduction

110. A key element for the settlement of this dispute is the determination of the scope of Johor's permission for the construction of the lighthouse. This Chapter will focus on the correspondence related to that question. The inaccuracies of Singapore's presentation of the correspondence, and the weakness of its attempt to deny that the authorisation to build the lighthouse included PBP, will be demonstrated. Attention will be drawn in particular to four key elements of that correspondence:

- Governor Butterworth's request for Johor's permission to construct the lighthouse (Section A);
- the extent of the Sultan's and the Temenggong's 25 November 1844 letters of permission, in particular, the reference to the construction of the Lighthouse "near Point Romania", "or any spot deemed eligible" (Section B);
- the letter sent by Governor Butterworth to the Government of India dated 26 August 1846 informing it of the change of location from Peak Rock to PBP, the content of which is now challenged by Singapore (Section C); and
- the dispatch of the relevant correspondence by the Government of India to the East India Company's Court of Directors in London of 3 October 1846, at a time when PBP had been definitely chosen as the site for the lighthouse, and which included the Sultan's and Temenggong's permissions (Section D).

111. Finally, this Chapter will address other ancillary arguments made in the Singapore Counter-Memorial related to the correspondence regarding the construction of the lighthouse, in particular Singapore's new theory distinguishing between "formal" and "informal" permissions given by Malay rulers to construct lighthouses on their territories (Section E).

**A. Butterworth's request for permission to construct the lighthouse**

112. Both Parties agree that Governor Butterworth wrote to the Sultan and the Temenggong in order to request permission to construct the lighthouse. They also agree that the Johor authorities gave such permission by letters dated 25 November 1844. However, they disagree as to the geographical scope of that permission. Malaysia considers that PBP was included. Singapore's argues that Butterworth's request for permission concerned Peak Rock and only Peak Rock. This argument is based upon pure speculation.<sup>188</sup>

113. Despite extensive efforts, Malaysia has been unable to locate Butterworth's letter of request. Nor has Singapore produced it. Instead, Singapore's case is based on an inconsistent analysis of the letters Butterworth sent to other British officials immediately before or soon after receiving the Sultan's and the Temenggong's answers of 25 November 1844 to his request. It will be shown that Singapore's appraisal of the correspondence is inaccurate: it does not take into account the history of the planning of the construction of the lighthouse to honour the memory of James Horsburgh, is inconsistent with Governor Butterworth's previous and later references to the region and, above all, is inconsistent with the principal documents that do exist—the Sultan's and the Temenggong's letters of 25 November 1844.

114. It is not possible to determine the exact date of Governor Butterworth's request. But even if Butterworth had Peak Rock in mind, a final decision on the location of the lighthouse had not been taken in the latter part of 1844, contrary to what Singapore contends.<sup>189</sup> Hence there is no reason to believe that Butterworth's request was confined to a single possible location. The only thing that was sure at that stage was that the lighthouse would be erected in the Strait of Singapore, preferably at the entrance to the South China Sea, since the dangers for navigation entering the Strait were located there. The correspondence corroborates this.

115. In a letter from Captain Belcher to Governor Butterworth of 1 October 1844, the former referred to the latter's request dated 20 April 1844 for "an opinion upon the most eligible position for a Light House in the Straits of Singapore". Belcher thought the lighthouse should stand "upon a position where its benefits would be generally useful to

<sup>188</sup> SM, para. 5.41; SCM, para. 5.43.

<sup>189</sup> SCM, para. 5.95.



the navigation of the China Seas as well as these straits".<sup>190</sup> Butterworth referred to Belcher's letter in a subsequent letter to Captain Faber, the Superintending Engineer, dated 3 October 1844, as being "relative to the site for a Light House at the entrance of the China Sea", and to the wish of the subscribers "to the Building of a Light House bearing the name of Horsburgh on Pedro Branco, at the entrance of China Sea".<sup>191</sup> Again, in another letter from Governor Butterworth, this time to Purvis & Co. of 30 October 1844, reference is made to his desire "of moving the Supreme Government of India *on the subject of a Light House in the vicinity of Pedra Branca*".<sup>192</sup> In his letter to F. Currie, Secretary to the Government of India, of 28 November 1844, Governor Butterworth referred to the construction of the lighthouse "as a matter of some moment to the navigation of the Straits of Malacca in the vicinity of Singapore and the opening of the China Sea", and recalled that the subscribers collected the funds "to the erection of a Light House bearing the name of 'Horsburgh' on Pedra Branca at the entrance of the China Sea, or on such other locality as might be deemed preferable by the Government of the Honorable East India Company".<sup>193</sup>

116. All these references are general in character, leaving open the question of the exact location of the lighthouse. The ensuing correspondence, and the actual course of events leading to the construction of the lighthouse, show that Butterworth's endorsement of Belcher's preference for Peak Rock was not a final decision.

117. Singapore contends that "Governor Butterworth eventually decided upon Peak Rock after receiving Captain Belcher's recommendation on 1 October 1844".<sup>194</sup> In fact, the Governor did no more than endorse Captain Belcher's views and submit "the question to the supreme government", as he himself wrote.<sup>195</sup> His letter of 22 August 1845 to C. Beadon, the Undersecretary to the Government of Bengal, shows that Butterworth considered that the decision as to the location of the lighthouse was still open.<sup>196</sup> In its Counter-Memorial, Singapore only quoted the third paragraph of this letter.<sup>197</sup> But it is

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<sup>190</sup> MM Annex 41; SM Annex 11.  
<sup>191</sup> SCM, para. 5.32 and Annex 10.  
<sup>192</sup> MR, vol. 2, Annex 9 (emphasis added).  
<sup>193</sup> MM Annex 46; SM Annex 13.  
<sup>194</sup> SCM, para. 5.33.  
<sup>195</sup> SCM, para. 5.32.  
<sup>196</sup> MM Annex 47; SM Annex 14.  
<sup>197</sup> SCM, para. 5.52.

clear from the second paragraph that Butterworth continued to refer to the area under consideration for the construction of the lighthouse as “the vicinity of Pedra Branca and Point Romania at the opening of the China Sea”; he referred to that whole region as “that neighbourhood”. Moreover in the same paragraph Butterworth defended his early choice of Peak Rock against the alternative site of PBP. Even the third paragraph (the only one quoted by Singapore) does not support its analysis. Butterworth recalled that “*it would appear that the proposition for the Erection of a Light House on the site selected by Captain Sir E. Belcher C.B. viz Peak Rock the outer Romania Island has been recommended for the favourable consideration of the Honble the Court of Directors*”.<sup>198</sup> This is not the language of decision.

118. Even as late as January 1846, Thomas Church, the Resident Councillor in Singapore who had translated the two Johor permission letters, was uncertain about the finality of the selection of the site. Referring to the letter from Captain Congalton dated 12 January 1846,<sup>199</sup> the Resident Councillor wrote:

“it appears that, *should Peak Rock be eventually selected as a suitable site for a Light House, it will occasionally be inaccessible during the N.E. Monsoon*”.<sup>200</sup>

Clearly, the decision process did not stop at Peak Rock once Butterworth received Belcher’s proposal. The British Governor was well aware that the final decision was not his to make. The alternative to Peak Rock was always the same: PBP.

119. Singapore posits that the first time PBP was considered as a candidate was in 1847, once concrete steps to construct it had been implemented, and consequently that the 1844 exchange of letters between Governor Butterworth and the authorities of Johor could not have referred to PBP. The reality was quite different. There is no doubt that at all times PBP was at the core of the discussion concerning the site for the lighthouse: before, during and after 1844. The documentation included in both Parties’ Memorials and Counter-

<sup>198</sup> Emphasis added.

<sup>199</sup> In that letter Captain Congalton explained that he and J.T. Thomson had been unable to build brick pillars on Peak Rock, due to the violence of the sea. See this Reply, Chapter 4, para. 194 and vol. 2, Annex 11.

<sup>200</sup> Letter from T. Church, Resident Councillor to the Governor of the Straits Settlements, 13 January 1846: Annex 12, vol. 2 of this Reply.

Memorials, from the first meeting in Canton on 22 November 1836 until the first steps to construct it on PBP in 1847, abundantly proves this fact:

- *The Canton Press*, 26 November 1836,<sup>201</sup>
- *The Canton Press*, 10 December 1836,<sup>202</sup>
- *The Canton Register*, 10 January 1837,<sup>203</sup>
- *The Singapore Free Press*, 9 February 1837,<sup>204</sup>
- *The Singapore Free Press*, 5 April 1838,<sup>205</sup>
- Letter from J. Matheson & Co., Treasurer to the China Fund for a testimonial to J. Horsburgh, care of Messrs. J. Purvis & Co., to S.G. Bonham, Governor of Prince of Wales Island, Singapore and Malacca, 1 March 1842,<sup>206</sup>
- Letter from Governor Bonham to J. Matheson, 4 April 1842,<sup>207</sup>
- Letter from Governor Butterworth to C.E. Faber (Superintending Engineer), 3 October 1844,<sup>208</sup>
- Letter from Governor Butterworth to J. Purvis & Co., 30 October 1844,<sup>209</sup>
- Letter from J. Purvis & Co. to Governor Butterworth, 31 October 1844,<sup>210</sup>
- Letter from Governor Butterworth to F. Currie, Secretary to the Government of India, 28 November 1844,<sup>211</sup>
- Letter from Governor W.J. Butterworth to C. Beadon, Under Secretary to the Government of Bengal, 22 August 1845,<sup>212</sup>
- *The Bombay Times and Journal of Commerce*, 10 January 1846,<sup>213</sup>
- *The Times*, 22 January 1846,<sup>214</sup>
- Letter from N.B. Hamilton, Secretary to the Admiralty to the Secretary to the East India Company, 18 April 1846,<sup>215</sup>

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201 MM Annex 30.  
202 MM Annex 31.  
203 MM Annex 32.  
204 MM Annex 33.  
205 MM Annex 34.  
206 MM Annex 35; SM Annex 8.  
207 MM Annex 36.  
208 SCM Annex 10.  
209 This Reply, vol. 2, Annex 9.  
210 MM Annex 42.  
211 MM Annex 46; SM Annex 13.  
212 MM Annex 47; SM Annex 14.  
213 MM Annex 48.  
214 MM Annex 49.  
215 MM Annex 50.

- Letter from S. Congalton, Captain of the Hooghly, and J.T. Thomson, Government Surveyor, to Governor Butterworth of 25 August 1846,<sup>216</sup>
- Letter from Governor W.J. Butterworth to G.A. Bushby, the Secretary of the Government of India, 26 August 1846,<sup>217</sup>
- Internal Minute of Governor W.J. Butterworth, 30 September 1846,<sup>218</sup>
- Letter from the Government of India to the Court of Directors of the East India Company, 3 October 1846,<sup>219</sup>
- Internal Minute of Governor W.J. Butterworth, 3 October 1846,<sup>220</sup>
- Letter from G.A. Bushby, Secretary to the Government of India, to the Governor General of India in Council, undated, enclosure in letter from C. Beadon, Under-Secretary to the Government of Bengal, to Governor W.J. Butterworth, 10 May 1847.<sup>221</sup>
- Letter from C. Beadon, Under-Secretary to the Government of Bengal, to Governor W.J. Butterworth, 10 May 1847.<sup>222</sup>

120. Of particular interest in this regard is the following assertion in Singapore's Counter-Memorial:

"from the first public meeting on 22 November 1836 in Canton concerning the proposal to construct Horsburgh Lighthouse, all the European merchants, whether in Canton, Singapore or India, had acted on the basis that all that the British had to do was to take possession of Pedra Branca. At no time did any of them consider or express a view that the consent of either the Sultan or Temenggong of Johor was relevant to the project."<sup>223</sup>

There is here an acknowledgment by Singapore that, from 1836 onwards, PBP was considered a likely place for the construction of the lighthouse. The rest is pure speculation not substantiated by any evidence. The article published by *The Canton Press* informing of the public meeting of 22 November 1836, as well as the letter of the merchants who took the initiative to pay tribute to James Horsburgh, did not refer to this

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<sup>216</sup> SCM Annex 11.  
<sup>217</sup> MM Annex 51.  
<sup>218</sup> MM Annex 53.  
<sup>219</sup> MM Annex 54.  
<sup>220</sup> MM Annex 55.  
<sup>221</sup> MCM Annex 20.  
<sup>222</sup> SM Annex 20.  
<sup>223</sup> SCM, para. 4.42.

issue in any way.<sup>224</sup> They were not concerned with matters of sovereignty at all, either the requirement of permission from the sovereign or the taking of possession of *terra nullius*. As pointed out by both Malaysia and Singapore, lighthouses in the region were constructed or envisaged by British authorities in territories either belonging to Great Britain or to local Malay rulers: in the latter case there was no reason to think consent would not be forthcoming. Singapore's theory seems to entail that merchants, hailing from different places and nationalities, collected funds in order to allow Great Britain to acquire sovereignty over PBP.

121. Singapore then analyses the exchange of letters between John Purvis & Co. and Governor Butterworth and affirms that

"Malaysia is wrong in stating that Governor Butterworth continued to refer to the project as 'the erection of a Light House in the vicinity of Pedra Branca' during the period when he decided on Peak Rock. This phrase was not used by Butterworth, but by John Purvis, a private merchant."<sup>225</sup>

In fact Purvis & Co. was in charge of the money collected by the merchants from different places for the construction of the lighthouse. Butterworth's letter to Purvis & Co., dated 30 October 1844 confirms Malaysia's views. It reads as follows:

"Being desirous again of moving the Supreme Government of India *on the subject of a Light House in the vicinity of Pedra Branca* in accordance with the views of the subscribers to the Horsburgh testimonial, I shall feel greatly obliged by you informing me, if I may intimate that the sum alluded to in a letter from Messrs. Matheson and Co. under date the 1<sup>st</sup> March 1842 sent under your care to the address of the late Governor of these Settlements is still forthcoming *for the above purpose*."<sup>226</sup>

Butterworth referred to "the subject of a Light House in the vicinity of Pedra Branca in accordance with the views of the subscribers to the Horsburgh Testimonial" less than one month before the date of the Sultan's and Temenggong's responses.

122. It is worth noting that the first of the enclosures (Enclosure A) that accompanied the letter of Governor Butterworth to F. Currie (Secretary to the Government of India) of

<sup>224</sup> See *The Canton Press* of 26 November 1836 and 10 December 1836: MM Annexes 30 & 31.

<sup>225</sup> SCM, para. 5.36.

<sup>226</sup> This Reply, vol. 2, Annex 9 (emphasis added).

28 November 1844 also contains the response from Purvis & Co. of 31 October 1844, which reads as follows:

“We have the honor to acknowledge receipt of your letter of yesterday in which you request us to inform you whether the funds subscribed in China to the Horsburgh Testimonial are still forthcoming for the purpose of aiding in the erection of a Light House in the vicinity of Pedra Branca.”<sup>227</sup>

123. Governor Butterworth continued to use the same geographic description (“erecting a Light House in the neighbourhood of Pedra Branca”) after receiving Johor’s letters of permission of 25 November 1844 and after his letter to the Government of India of 28 November 1844—for example, in the letter the Governor sent to Rear Admiral Cochrane on 8 December 1845.<sup>228</sup>

124. The only available direct evidence before the Court with regard to the geographical extent of Butterworth’s request to Johor for permission to construct the lighthouse is the Temenggong’s answer, which explicitly refers to Butterworth’s request:

“I have duly received my friend’s communication and understand the Contents. My friend is desirous of erecting a Light House near Point Romania”.<sup>229</sup>

This is the most important piece of evidence helping to determine the content of Butterworth’s letter. Neither the Temenggong’s response (nor the Sultan’s) mentions Peak Rock at all. As stated above, PBP had been the original and preferred place for the construction of the lighthouse. There is abundant evidence of this. In the letter from W.J. Butterworth to E. Belcher dated 2 October 1844 it is made clear that the original intention of those having the initiative to construct the lighthouse was to do it on “Pedro Branco”.<sup>230</sup> As seen above, the last available letter on the case of the lighthouse written by Governor Butterworth before the Sultan and Temenggong’s letters of permission of 25 November 1844 was that of 30 October 1844, and in that letter he defined the region under consideration as “*the vicinity of Pedra Branca in accordance with the views of the subscribers to the Horsburgh Testimonial*”.

<sup>227</sup> MM Annex 42; SCM Annex 13 (emphasis added).

<sup>228</sup> Letter by Governor Butterworth to Rear Admiral Sir Cochrane C.B. of 8 December 1845, vol. 2, Annex 10 of this Reply.

<sup>229</sup> Translated by T. Church, Resident Councillor: MM Annex 45.

<sup>230</sup> SCM Annex 9.

125. To sum up, there is not a single piece of evidence to support Singapore's assertion that the permission sought by Governor Butterworth concerned Peak Rock only. Singapore's effort to show that Johor gave permission to construct a lighthouse on Peak Rock both states the obvious and misses the point. Singapore put considerable effort into trying to "prove" that Johor's permission extended to Peak Rock. This is not at issue: what Singapore has to show is that the permission *exclusively* concerned Peak Rock. Singapore fails to do so.

126. But even if (*arguendo*) Butterworth's letter of request had referred to Peak Rock it does not follow that the permissions were limited to that spot. It was public knowledge at the time that several locations were under discussion. Even if Butterworth's preferred spot at the time of the Sultan's and Temenggong's answers was Peak Rock, the requests for permission and the permissions themselves were not so limited. The context and the correspondence taken together show precisely the contrary: the permissions referred to an area rather than a single location, that area covered PBP, and the two envisaged locations in that area were Peak Rock and PBP.

127. If that was (as is clear) true of the permissions, it may be inferred to have been true of the letter of request as well. If Butterworth's request had referred exclusively to Peak Rock why would the Temenggong's answer not have simply said "on Peak Rock" or "on outer Romania Island" or "on Peak Rock Romania" (the different names by which the island was referred to in the correspondence) instead of "near Point Romania"? Why did his permission extend also to "any spot deemed eligible"? Why did Butterworth continue to refer in his correspondence with those in charge of the money being collected to an area *expressly mentioning PBP* ("in the vicinity of Pedra Branca in accordance with the views of the subscribers to the Horsburgh Testimonial") and not just Peak Rock? Why did these merchants refer to the location of the lighthouse in the same manner ("in the vicinity of Pedra Branca")? Why did the very first paragraph of his 28 November 1844 letter to the Government of India contain a reference to a region ("in the vicinity of Singapore and the opening of the China Sea")? Why did the rest of this letter itself, although mentioning the preference given to Peak Rock, still refer to Pedra Branca?

128. It is much more likely, in the context of the letters discussing the matter during October and November 1844, to consider that Butterworth utilised the same wording—such as “in the vicinity of Pedra Branca” (letter to John Purvis & Co.), or “at the entrance of the China Sea” (letter to the Government of India). The letter to Purvis & Co. is the last available one from Butterworth (30 October 1844) before the Sultan’s and Temenggong’s letters. It continues to refer to the site for the lighthouse as “the vicinity of Pedra Branca in accordance with the views of the subscribers to the Horsburgh Testimonial”, and this even after receiving Captain Belcher’s advice to construct it on Peak Rock (1 October 1844).

### B. The Sultan’s and Temenggong’s answers

129. Imagined interpretations of Butterworth’s letter cannot constitute a basis for the interpretation of the authorisation given by Johor. What is essential is the scope of the Johor authorities’ letters.

130. Sultan Allie made a general statement as to his pleasure with regard to the project of the construction of the lighthouse.<sup>231</sup> Contrary to what Singapore argues, this is by no means irrelevant. The only possible interpretation of the Sultan’s letter is that he authorised Governor Butterworth to construct the envisaged lighthouse in his territories wherever the East India Company (EIC) would find it suitable. The region envisaged at that time was well known: the eastern entrance of the Singapore Strait.

131. The geographic extent of the Temenggong’s authorisation is not “imprecise”, as Singapore contends.<sup>232</sup> Both PBP and Peak Rock, the only spots ever envisaged for the construction of the lighthouse, are “near Point Romania”.

#### (i) “Near Point Romania”

132. Singapore argues that the Temenggong’s authorisation *concerned only one site, and that the site was Peak Rock*. The reasoning is that since the latter is closer to Point Romania than PBP and was temporarily preferred to PBP by Captain Belcher and later by Governor Butterworth, then the reference in the Temenggong’s permission to construct a

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<sup>231</sup> MM Annex 44.  
<sup>232</sup> SCM, para. 5.42.



lighthouse "near Point Romania" could only mean "Peak Rock". This is exactly the same speculation as that concerning the letter of request by Butterworth, refuted above. The difference is that there is an available text here and the text refers to an area ("near Point Romania"), not to the Romania Islands nor to any specific location of those islands (i.e., Peak Rock), as Singapore would have it.

133. Of course what was at issue was the construction of a lighthouse to lessen the dangers for the navigation of the eastern entrance of the Strait of Singapore. Both Parties agree that the main channels used then and now are the north and the middle channels, in particular the latter. Those channels are situated close to the Johor mainland. The Romania Islands (Pulau Lima) mark the northern limit of the middle channel and PBP is the south edge of it. Clearly, the dangers for navigation are constituted by these two features: the Romania Islands and PBP. These were the two obvious candidates for the lighthouse. The correspondence clearly shows this.

134. According to Singapore, Governor Butterworth himself did not consider that PBP was located "near Point Romania".<sup>233</sup> The passage it quotes from Governor Butterworth's letter to Under-Secretary to the Government of Bengal, C. Beadon, dated 22 August 1845 only mentions that "in response to a proposal to site the lighthouse on Pedra Branca, he indicated his preference for Peak Rock because Pedra Branca 'is so remote from Singapore, at so great a distance from the Main Land' ...".<sup>234</sup> The whole passage reads as follows:

*"The number of vessels that have been wrecked in the vicinity of Pedra Branca and Point Romania at the opening of the China Sea, imperatively rule for a Light House in that neighbourhood and there can be little doubt that the former would be the best possible position for one so far on the light is concerned, but it is so remote from Singapore, at so great a distance from the Main Land and so inaccessible at certain seasons of the year that under all circumstances I should give preference to the position selected by Captain Sir Edward Belcher C.B. as reported in my letter under date the 28<sup>th</sup> November 1844 No 110."*<sup>235</sup>

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> MM Annex 47; SM Annex 14 (emphasis added).

The first part of the sentence (“in the vicinity of Pedra Branca and Point Romania at the opening of the China Sea”) is not cited by Singapore. Butterworth employed the expression “so remote from Singapore” in contrast with the “so great a distance” used to refer to mainland Johor. Peak Rock is closer to the mainland than PBP. Butterworth employed the words “that neighbourhood” to describe “the vicinity of Pedra Branca and Point Romania at the opening of the China Sea”. Pedra Branca and Point Romania formed, in Butterworth’s eyes, part of the same “neighbourhood”.

135. Singapore contends that “proximity is a relative quality”.<sup>236</sup> But it is possible to determine the meaning of the term “near” in a given instrument or letter. Singapore supposes that only the Romania Islands are “near Point Romania” and stresses that PBP does not form part of those islands.<sup>237</sup> This is not the point. Indeed, it practically changes the wording of the Temenggong’s permission: he did not write “in the Romania Islands”, but “near Point Romania”.

136. No doubt “near” is a relative term. This Court considered that “near”, “close to its shores”, “off its coast”, “opposite”, “in front of the coast”, “in the vicinity of”, “neighbouring the coast”, “adjacent to” and “contiguous” are “all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning”.<sup>238</sup> Although the Court made this analysis in the context of continental shelf delimitation, its comment can also help to clarify the expression “near Point Romania”. Rejecting the theory of “closer proximity” invoked by Denmark and the Netherlands in the *North Sea Continental Shelf* cases, the Court considered that the idea of absolute proximity is not implied by the general terminology mentioned above.<sup>239</sup>

<sup>236</sup> SCM, para. 5.65.

<sup>237</sup> Ibid.

<sup>238</sup> *North Sea Continental Shelf*, Judgment, 1969 ICJ Reports 30, para. 41.

<sup>239</sup> The whole quotation reads as follows:

“As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments—terms such as “near”, “close to its shores”, “off its coast”, “opposite”, “in front of the coast”, “in the vicinity of”, “neighbouring the coast”, “adjacent to”, “contiguous”, etc.—all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. To take what is perhaps the most frequently employed of these terms, namely “adjacent to”, it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as “adjacent” to it, or to any coast at all, in

137. Following the Court's reasoning, "near" does not mean "nearest", and the closer proximity of the Romania Islands to Point Romania does not exclude that PBP is "near Point Romania". The historical record in this case clearly shows that PBP has been considered as "near Point Romania". This includes the fact that Point Romania was used for shelter and provisioning during the construction work on PBP, and the idea of the establishment of a station or a village in Point Romania was considered as the best way to protect the lighthouse on PBP. Referring to this possibility, Thomson wrote: "Here [i.e. Point Romania] a constant watch could be maintained on the light house and their rapid presence could be had at the rock in case of need."<sup>240</sup>

138. In order to determine whether a place is "near" another, it is essential to know the place from where the observer intends to make this judgement. Viewed from London or Calcutta, PBP is even "near" Singapore. Not surprisingly, Governor Butterworth, in his letter to F. Currie (Secretary to the Government of India) of 28 November 1844, refers to the area as being "in the vicinity of Singapore and the opening of the China Sea".<sup>241</sup> He had in mind the area being contemplated for the construction of the lighthouse. Governor Butterworth went on to explain the different locations envisaged for the construction of the lighthouse: Barn Island, Peak Rock and PBP. These locations were, for him, "in the vicinity of Singapore and the opening of the China Sea". Barn Island is close to the Island of Singapore (within the ten mile limit established by the Crawford Treaty), whereas Peak Rock and PBP lie at the opening of the China Sea. This can be seen from **Figure 5**, on the following page.

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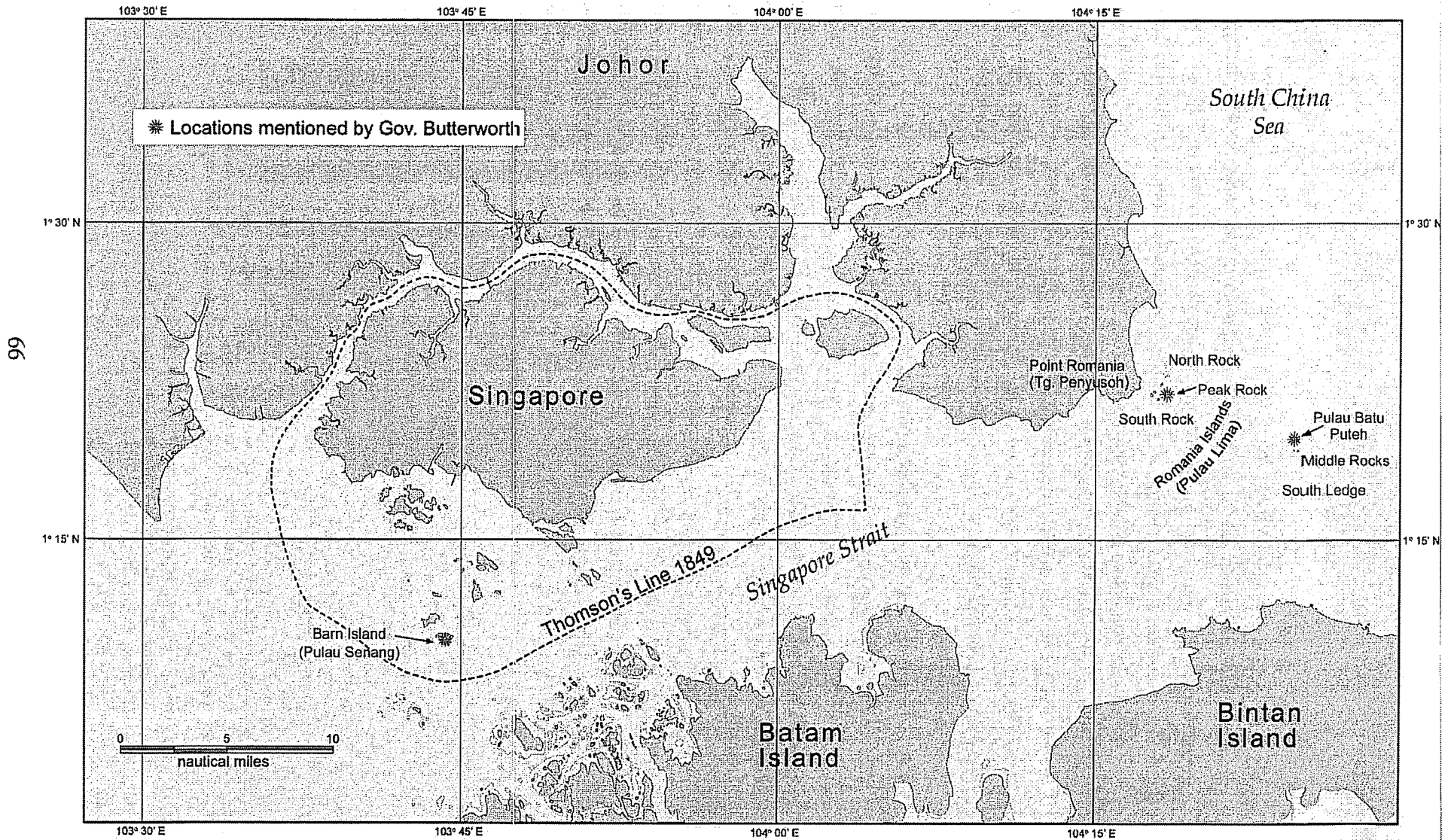
in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other. This would be even truer of localities where, physically, the continental shelf begins to merge with the ocean depths. Equally, a point inshore situated near the meeting place of the coasts of two States can often properly be said to be adjacent to both coasts, even though it may be fractionally closer to the one than the other. Indeed, local geographical configuration may sometimes cause it to have a closer physical connection with the coast to which it is not in fact closest. There seems in consequence to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; and therefore the question of which parts of the continental shelf "adjacent to" a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity."

(*North Sea Continental Shelf, Judgment*, 1969 ICJ Reports 30, paras. 41-42).

<sup>240</sup> Letter from J.T. Thomson, Government Surveyor, to T. Church, Resident Councillor, 2 November 1850: MM Annex 58; SM Annex 47.

<sup>241</sup> SCM, para. 5.36. For the whole letter, see MM Annex 46, SM Annex 13.

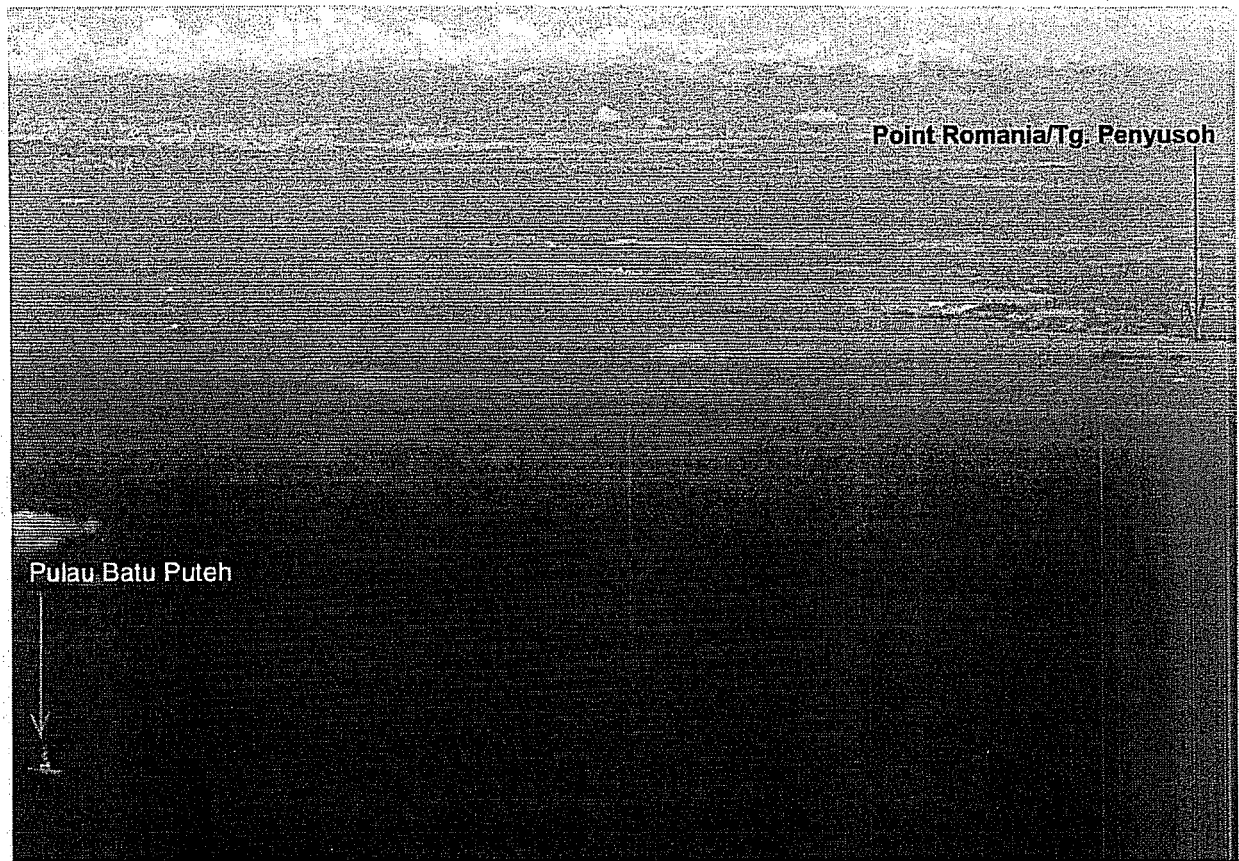
# LOCATIONS FOR THE LIGHTHOUSE MENTIONED IN BUTTERWORTH'S LETTER OF 28 NOVEMBER 1844



For illustrative purposes only

Figure 5

**Aerial photograph showing the area of PBP  
and mainland Johor (including Point Romania (Tg Penyusoh))**



**Figure 6**

139. This being so, how can the argument seriously be advanced that for Butterworth or the Temenggong, PBP was not "near Point Romania"? Viewed from Singapore, the only locations near PBP are the adjacent Johor mainland (including Point Romania), the Lima/Romania Islands and Bintan. Actually, the only locations that can be considered "near Point Romania" in correspondence between the British authorities and those of Johor for the purpose of constructing a lighthouse are the Lima/Romania islands *and* PBP, since Bintan fell within the Dutch sphere of influence.

140. A view of the area of PBP and mainland Johor (including Point Romania (Tg Penyusoh)) leaves no room for doubt that PBP must be considered as being "near Point Romania". This can be seen from the aerial photograph which is **Figure 6** on the preceding page. It can equally be seen from the drawings reproduced in Thomson's *Account of the Horsburgh Lighthouse*. It is significant that Thomson showed the Horsburgh Lighthouse having as "toile de fond" (or background) the Romania Islands and mainland Johor (including Point Romania, Barbukit Hill and the False Barbukit), all these Johor features being expressly mentioned in the drawing. The same can be said about the drawing showing PBP before the construction of the lighthouse (see **Figure 7** and **Figure 8**) on the following pages.

141. Insert 9 of Singapore's Counter-Memorial does not constitute evidence that PBP "is not a spot near Point Romania",<sup>242</sup> as Singapore claims. Indeed, this satellite photograph shows a rather small area, that of the Eastern entrance of the Strait closer to Malaysia. It was taken vertically at an altitude of approximately 681 kilometres with a spatial resolution of 1 metre. This small area covers Tanjung Penyusoh (Point Romania), the Lima (Romania) Islands, including Peak Rock, and PBP. Between the Lima Islands and PBP some ships can be seen. They provide a clear picture of the dimensions of the geographic features present and the close distance between them. In fact, Singapore's Insert 9 shows the contrary of what Singapore claims.

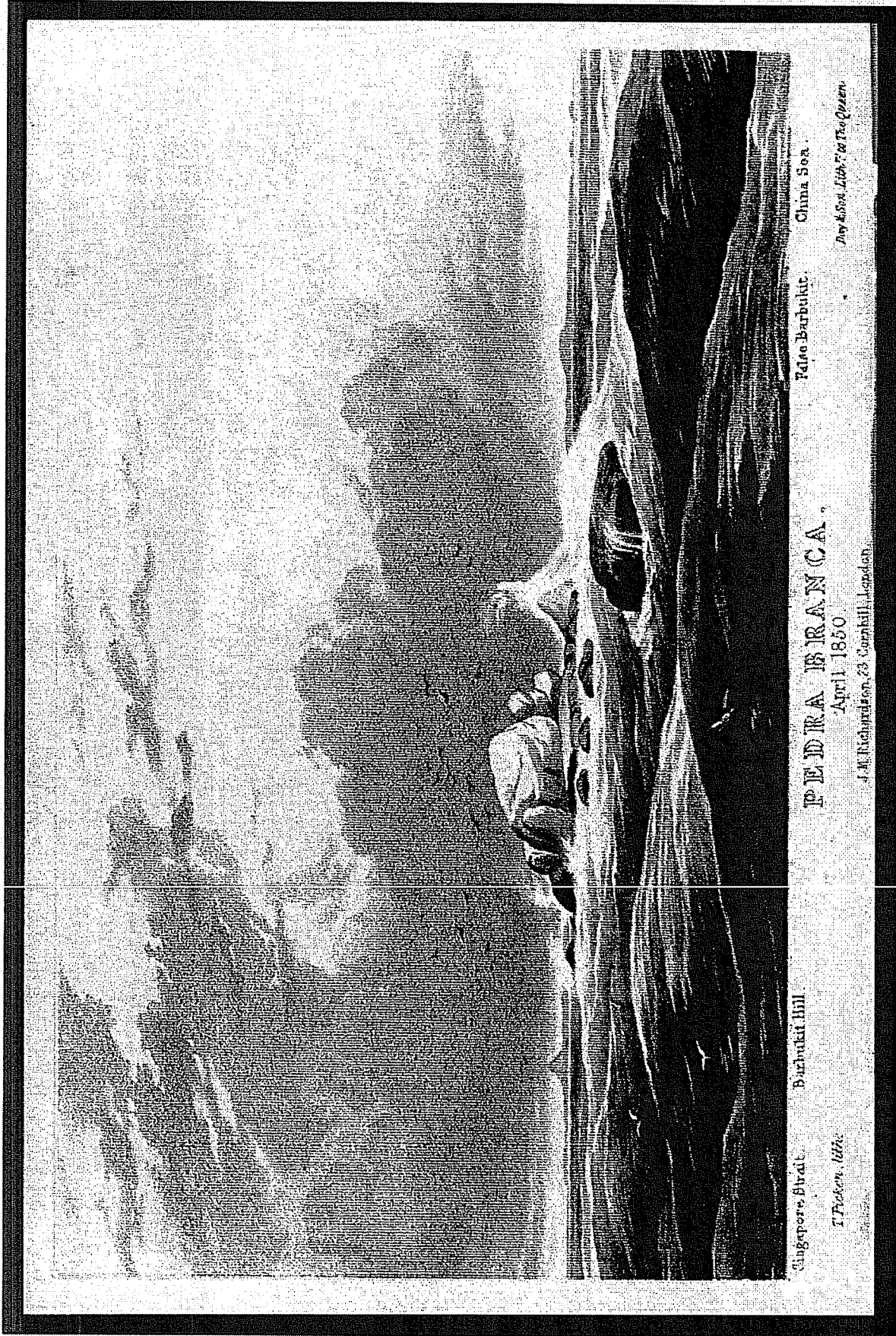
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<sup>242</sup> SCM, para. 5.70.





PEDRA BRANCA, APRIL 1850



Singapore Strait.  
I. Ficken. del.

Barbuket Hill

China Sea.

PEDRA BRANCA.

April 1850

Dep. A. S. L. 185. 5. in the Queen

J. M. Richardson, 23 Cornhill, London.

Figure 8



142. While discussing the scope of the expression “near Point Romania”, Singapore downplays the two clear and concrete geographic descriptions made by key figures in the story, Crawford and Thomson:<sup>243</sup>

“Romania is the Eastern part of Singapore Straits, the entrance is divided into two channels by a cluster of rocks, the largest is 20 feet above the level of the sea named by the Portuguese Pedro Branca.”

(J. Crawford, British Resident of the Settlement of Singapore).<sup>244</sup>

“Point Romania the nearest land to Pedra Branca.”

(J.T. Thomson, Government Surveyor, architect of the Horsburgh Lighthouse).<sup>245</sup>

The only analysis made by Singapore of these descriptions is a simple distortion of what Thomson wrote. For Singapore, “the reference [by Thomson] is to the nearest mainland and this fact is hardly conclusive of the point in question”.<sup>246</sup> Thomson referred to “land”, not to “mainland”. Unsurprisingly, the Singapore Counter-Memorial does not comment on Crawford’s statement, which actually treats “Pedro Branca” as *part* of the Romania area.

143. The *Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malay Coast* by J.T. Thomson is also strong evidence that PBP is “near Point Romania”. In its ordinary meaning, “adjacent” means “next to or adjoining something else” and its Latin origin signifies “lying near to”.<sup>247</sup>

144. Singapore argues that, since Butterworth’s letter to the Government of India of 28 November 1844 specified, referring to Peak Rock, that “This Rock is part of the territories of the Rajah of Johore, who with the Tamongong have willingly consented to cede it gratuitously to the East India Company”, only Peak Rock was the subject of the permission.<sup>248</sup> Of course the permission included Peak Rock, which off-shore island was part of Johor. But nothing supports the assertion that the spatial scope of the permission

<sup>243</sup> SCM, para. 5.65.

<sup>244</sup> MM, para. 125 & Annex 23.

<sup>245</sup> MM, para. 125 & Annex 58.

<sup>246</sup> SCM, para. 5.65.

<sup>247</sup> *Oxford Dictionary of English*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, 2003, p. 20.

<sup>248</sup> SCM, paras. 5.63 and 5.69.

was *exclusively* limited to Peak Rock. It was not for the Temenggong to decide the final location of the lighthouse. If Butterworth mentioned that the Temenggong “ceded it gratuitously to the EIC” referring to Peak Rock, it simply was because he considered Peak Rock as the most appropriate site for the construction of the lighthouse at that time and he was proposing this location to the EIC. Malaysia has already explained this paragraph of Butterworth’s letter.<sup>249</sup> The fact is that the lighthouse was not constructed on Peak Rock but on PBP. The status of Peak Rock was not affected at all. Clearly, what was essential in the exchange of letters between Butterworth and the Temenggong was the permission to construct the lighthouse somewhere in the region described or in any other place considered appropriate. Nothing happened on Peak Rock after that exchange. Instead, the lighthouse was constructed on PBP.

145. That Butterworth’s statement of 28 November 1844 was considered to apply to PBP may be inferred from the 12 June 1953 letter sent by J.D. Higham, on behalf of the Singapore Colonial Secretary, to the British Adviser of Johor. The relevant passage reads as follows:

“It appears this rock [*Pedra Branca*] is outside the limits ceded by Sultan Hussain and the Dato Tummungong to the East India Company with the Island of Singapore in the Treaty of 1824 (extract at ‘A’). *It was however mentioned in a despatch from the Governor of Singapore on 28th November 1844 (extract at ‘B’).*”<sup>250</sup>

Annex B of this letter reproduced Butterworth’s statement with the addition of the phrase “[*Pedra Branca*]” as the meaning of “this Rock”.<sup>251</sup>

146. The terms of the Temenggong’s letter are clear. There was no identity between Point Romania and the Romania Islands. These are two different geographic features. Moreover, they are the European names for Tanjung Penyusoh and Pulau Lima respectively. Singapore wrongly states that the Romania Islands are “also called Lima Islands in more recent charts and sailing directions”.<sup>252</sup> In fact Thomson’s *Chart of the Vicinity of the Horsburgh Lighthouse and Adjacent Malayan Coast* of 1851 clearly

<sup>249</sup> MM, para. 133. For a similar reference to a “cession” with regard to the construction of a lighthouse at Cape Rachado (Tg. Tuan), see MCM, paras. 327-328.

<sup>250</sup> MM Annex 67; SM Annex 93 (emphasis added).

<sup>251</sup> MCM, paras. 139, 507 & 508; SM Annex 93.

<sup>252</sup> SCM, p. 97, fn. 221.



mentions "Point Romania or Tanjong Penyusoh" and "Romania Islands or Pulo Lima" (see **Figure 9** on the preceding page). Since the Malay original of the Temenggong's letter has not been found (both Parties produced the English translation by T. Church, Resident Councillor), it is not possible to know whether he used the Malay (Tanjung Penyusoh) or the European name (Point Romania). But there is not the slightest suggestion that he referred to Pulau Lima.

147. To sum up, "Near Point Romania" is a reference to an area, not a location. In its Counter-Memorial, Singapore interpreted this phrase to refer only to one island: Peak Rock. Its effort to confine Johor's authorisation to this single location flies in the face of the clear wording of the Temenggong's letter. It also contradicts the background against which the exchange of letters between Butterworth and the Temenggong occurred. It is clear that the permission had a broad territorial scope and that the phrase "near Point Romania" necessarily included the only spot that had been in mind from the beginning: PBP.

(ii) *"Or any spot deemed eligible"*

148. The Temenggong gave the British a choice as to the location of the lighthouse: either "near Point Romania", "or any spot deemed eligible". This can only mean that the authorisation extended to any place under Johor's sovereignty that the EIC would select for the erection of the envisaged lighthouse in honour of James Horsburgh. Sultan Allie's answer cannot but be interpreted in the same way.

149. In its Memorial, Malaysia has already stressed the coincidence between the alternative formula used by the Temenggong ("or any spot deemed eligible") and similar phrases used by other relevant actors before him in the decision process of the construction of a lighthouse to pay tribute to James Horsburgh.<sup>253</sup> Singapore has not contested this analysis. One of the letters it relies on to argue that Butterworth's request to Johor's authorities referred only to Peak Rock contains a similar formula:

"At a meeting of the subscribers a wish was expressed that the contribution should be devoted to the Building of a Light House bearing the name of

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<sup>253</sup> See MM, para. 129.

Horsburgh on Pedro Branco, at the entrance of China Sea, *or on such other locality as might be deemed preferable by the Government*'.

This letter is dated 3 October 1844 (less than two months before the Sultan's and Temenggong's answers). The writer is Governor Butterworth himself.<sup>254</sup> He used the same formula in his letter addressed to F. Currie, Secretary to the Government in India, on 28 November 1844, i.e. only three days after the date of the Sultan's and the Temenggong's letters of permission.<sup>255</sup> There is a striking concurrence of terminology.

150. Singapore's analysis of this part of the Temenggong's letter of permission deprives it of any effectiveness by interpreting it as a reference to another spot "near Point Romania". In a piece of circular and self-serving reasoning, all that Singapore can say is that

"the Temenggong's reference to 'any spot deemed eligible' could not have referred to Pedra Branca because it is not a spot *near* Point Romania and there are several other islands within the Romania Group which fits that description".<sup>256</sup>

Obviously, "any spot deemed eligible" cannot be a spot "near Point Romania", otherwise there would be no sense in adding the phrase. If one follows Singapore's reasoning, "near Point Romania" means "Peak Rock", and "or any spot deemed eligible" means "or any spot near Point Romania". And as seen, for Singapore "near Point Romania" exclusively means the "Romania Islands". All of this defies the ordinary meaning of the texts. Singapore is unable to challenge the conclusion that, even if PBP was not considered to be "near Point Romania", the Temenggong's permission would still include it.

151. To sum up, the Sultan's and the Temenggong's letters, written against the background of a public debate as to the proper location of the lighthouse, cannot but be interpreted as granting permission to the EIC to construct it on any part of the territory of Johor that would be appropriate for that purpose. The area under consideration was the entrance of the South China Sea; the two possible locations were the Romania (Lima) Islands and PBP.

<sup>254</sup> SCM, para. 5.32 and Annex 10 (emphasis added).

<sup>255</sup> MM Annex 46; SM Annex 13.

<sup>256</sup> SCM, para. 5.70.

**C. Subsequent correspondence shows that the Johor permissions included PBP**

152. Once the decision to construct the lighthouse on PBP instead of Peak Rock had been made, the subsequent correspondence shows clearly that the British authorities interpreted Johor's permission to include PBP. Particularly relevant for this purpose are:

- (i) Butterworth's letter to the Government of India dated 26 August 1846;<sup>257</sup>
- (ii) The correspondence of 3 October 1846 by the Government of India to the East India Company's Court of Directors in London concerning the construction of the lighthouse on PBP;<sup>258</sup> and
- (iii) The "full report" written by Governor Butterworth to the Government of Bengal dated 12 June 1848.<sup>259</sup>

In its Counter-Memorial, Singapore made an extraordinary effort to twist the wording of the first item and acknowledged that the second supports Malaysia's position. It has failed to deal with the third at any stage of the pleadings. These items will be considered in turn.

(i) *Butterworth's letter to the Government of India of 26 August 1846*

153. Governor Butterworth's letter to the Government in India of 26 August 1846 shows that the British authorities were well aware that Johor's permission to construct the lighthouse included PBP. According to Singapore, the letter, instead of saying

"the whole of the details for the *case of Light Houses* as set forth in my letter under date the 28<sup>th</sup> November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new Position [Pedra Branca]"

should read as follows:

"The whole of the details for the *care of Light House* as set forth in my letter under date 28 Nov<sup>r</sup> 1844, with reference to its being located on Peak Rock, will be equally applicable to the new Position [Pedra Branca]".<sup>260</sup>

Singapore makes a big issue of the words "case" and "care", but its reading of the letter does not correspond with reality. Indeed this is not the only mistake made by Singapore in its reading of this letter. For example, Singapore attributes to G.A. Bushby the capacity of

<sup>257</sup> MM, paras. 134-135 & Annex 51.

<sup>258</sup> MM, para. 136 & Annex 54.

<sup>259</sup> SM Annex 27.

<sup>260</sup> SCM, para. 5.81 (emphasis added).

Secretary to the Government of *Bengal*,<sup>261</sup> whereas the clear writing in all available copies of Butterworth's letters refers to him as Secretary to the Government of *India*.

154. Before analysing Singapore's care/case exercise in more detail, it may be noted that this sentence was not the only reference made by Butterworth to his letter of 28 November 1844. The first reference is made in the first sentence of the same paragraph, which reads as follows:

"My letters under dates the 28<sup>th</sup> November 1844 No 150, and 22<sup>nd</sup> August 1845 No 139 will have pointed out the glaring necessity of a Light House in the position above indicated."

The "position above indicated" is nothing else than PBP, since the immediately previous sentence states:

"On receipt of Mr. Melvill's communication I forthwith call[ed] upon the above Officers for their Report which I have the honor to enclose, and by which the President in Council will at once perceive that Pedra Branca is the only true position for a Light House at the entrance of the China Sea".

Clearly, Butterworth considered that PBP was also included in the analysis made in his letter of 28 November 1844. This leaves no doubt as to the scope of Johor's permission and renders Singapore's "care/case" exercise futile.

155. In its Memorial, Malaysia produced the original letter (the one actually signed by Butterworth and filed in the National Archives of India), whereas Singapore in its Memorial only produced a copy of it (the file copy intended to be kept in Singapore and filed in the Straits Settlements Records, National Archives of Singapore).<sup>262</sup> Obviously, preference must be given to the original letter.

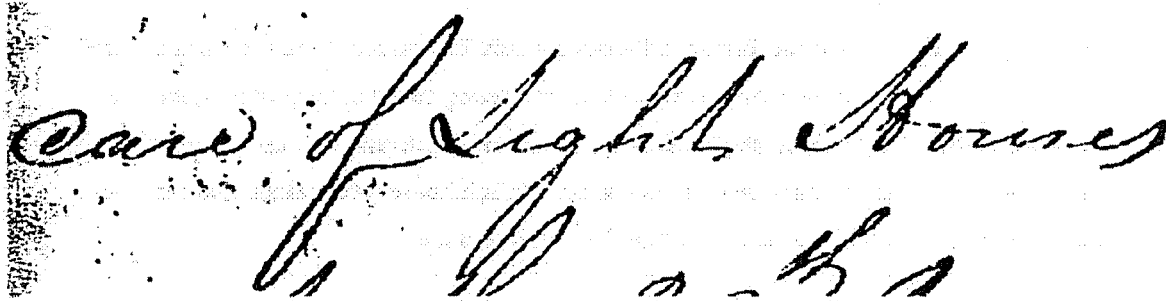
156. Even a superficial comparison of the two versions shows that the file copy contains a number of errors. Putting aside for a moment the now controversial word, it is indisputable that the original uses "Light Houses" (in the plural), whereas the file copy

<sup>261</sup> SCM, fn. 235, p. 104.

<sup>262</sup> As already mentioned in the MCM, p. 72, fn. 209.

relied upon by Singapore has the singular "Light House".<sup>263</sup> Before the relevant sentence the letter has already referred to two locations, so that "case of Light Houses" makes sense. But there was only ever going to be one lighthouse, so "care of Light Houses" makes no sense. No-one was going to have to care for lighthouses in the plural.

**Extract from the original Butterworth's letter of 26 August 1846 kept in India**

A photograph of a handwritten document in cursive script. The text reads "Care of Light Houses" followed by a signature that appears to be "W. J. Butterworth". The ink is dark on a light background.

**Extract from the copy of Butterworth's letter of 26 August 1846 kept in Singapore**

A high-contrast, noisy scan of the same handwritten text as in the previous image. The cursive script "Care of Light Houses" and the signature are visible but heavily obscured by digital noise and artifacts.

157. Moreover, Singapore has not only wrongly transcribed the word "case", but it did not mention that the file copy contains the indefinite article "a" between "of" and "Light House".<sup>264</sup> Hence, even following Singapore in the idea that the word used was "care" and not "case", the relevant part of the sentence would read "The whole of the details for the care of a Light House". Yet this is evidently not what the original says.

<sup>263</sup> The third copy provided by Singapore, from the Board of Control Records, kept at the British Library (India Office Collections) also contains the plural ("Light Houses"): SCM Annex 12, p. 109.

<sup>264</sup> See "Report in respect of the forensic examination of the letter from W.J. Butterworth (Governor of Prince of Wales Island, Singapore and Malacca) to G.A. Bushby (Secretary to the Government of India) dated 26 August 1846", prepared by Mr. Wong Kong Yong, Document Examiner, Forensic Division, Department of Chemistry, Malaysia, 21 September 2005, vol. 2 of this Reply, Annex 26, p. 3, finding number 11.



158. There is no doubt that the word employed in the 26 August 1846 letter is “case” and not “care”, for the following reasons:

- (a) the meaning of all the documents included in the dispatch of 26 August 1846, i.e. the letter and its enclosures taken as a whole;
- (b) the context in which the relevant sentence of the 26 August 1846 letter was written;
- (c) the fact that the British authorities would be unlikely to use the word “care” to refer to the acts of maintaining, protecting or the upkeep of a lighthouse.

Moreover subsequent practice shows that the “whole of the details” set up by Butterworth in his letter were applied once steps to construct the lighthouse were taken, and that these details were not limited to questions of “care” or maintenance.

159. In its Counter-Memorial, Singapore produced three different versions of the Butterworth letter of 26 August 1846, highlighting some words ending with “re” or “se” (such as “Singapore”, “enclosure”, “house”) in order to establish that the word in question is “care” and not “case”.<sup>265</sup> The first 26 August 1846 letter used by Singapore is the original that comes from the National Archives of India, the second is the file copy kept in Singapore and comes from the Straits Settlements Records, National Archives of Singapore, and the third is another copy from the India Office Collections of the British Library. The first and third of these contain the full dispatch of 26 August 1846 including the enclosures A, B, C and D to the letter; the first and second were written by the same person, whereas the third copy was written by a different person. With regard to the original letter, Singapore discarded the text of the enclosures, even though they were written by the same person who wrote the letter and contain valuable information to determine the exact word used, in particular four undisputable uses of the word “case”. The use of the same word by the same writer of both the original and the copy kept in Singapore allows a comparison with the challenged word. This comparison is made in an Appendix to this Chapter (pages 96-102) and shows that the word “case” was written similarly on all occasions in the original letter.

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<sup>265</sup>

SCM Annex 12.

160. Annex 26 also contains a forensic examination of the handwriting of both the original and the copy of Butterworth's letter of 26 August 1846 together with its enclosures. It provides a systematic calligraphic study of both the original letter signed by Governor Butterworth and its file copy kept in the National Archives of Singapore, and shows that Singapore's method is not accurate.

161. But quite apart from handwriting analysis, other factors support the reading of the phrase as "case of Lighthouses".

(a) The context in which the relevant word was written

162. In addition to the handwriting evidence, the context in which the relevant word was written demonstrates that this word is indeed "case" and cannot be "care". Given the importance of this letter, and in order to better understand its content and to determine the exact word used in the relevant sentence, its whole text is presented on the next page (Figure 10).

163. The letter of Governor Butterworth of 26 August 1846 informed the Government of India about the exchange of letters between the EIC Court of Directors and himself with regard to the selection of PBP instead Peak Rock for the construction of the lighthouse. The purpose of the letter is to explain the change of location and to request the sending of an iron lighthouse from London.

164. The first sentence of the paragraph in which the now controversial word appears has already been cited: it refers also to the 28 November 1844 letter as it "will have pointed out the glaring necessity of a Light House in the position above indicated [Pedra Branca]". Butterworth regretted that the work had not begun but trusted that the question would receive early consideration and that the accompanying letter of the Chamber of Commerce at Singapore "will induce the Hon'ble the President in Council to move the Hon'ble Court of Directors to order an Iron Light House from England for erection on Pedra Branca". Then follows the sentence in question: "the whole of the details for the [case/care] of Light Houses as set forth in my letter under date 28 Nov<sup>r</sup> 1844, with reference to its being located on Peak Rock, will be equally applicable to the new Position".

FIGURE 10 — Text of the letter from Governor Butterworth to the Government of India,  
26 August 1846

No. 123

From The Governor of Prince of Wales Island  
Singapore and Malacca

To G.A. Bushby Esquire  
Secretary to the Government of India  
Fort William

Dated Singapore 26<sup>th</sup> August 1846

Sir,

A.

I have the honor to transmit the accompanying copy of a letter\* to my address, from the Secy to the Hon'ble Court of Directors, enclosing the Copy of a letter from the Secretary to the Admiralty, relative to the Light House, proposed to be erected to the memory of the late Hydrographer, James Horsburg Esquire, at the entrance of the China Sea.

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

Vide my letter to the address of Mr. Under Secy Beadon under date the 4<sup>th</sup> May last No.63

The recent survey of the Straits made by the Government Surveyor Mr. Thomson and Captain Congalton Commanding the Hon ble E.I. Co's Steamer Hoogy has led to the discovery of so many Rocks, and Shoals previously unknown, that I only waited to learn the decision of Government touching the erection of a Light House to institute further enquiries regarding the two sites viz Pedra Branca & Peak Rock.

On receipt of Mr. Melvill's communication I forthwith called upon the above officers for their Report\*, which I have the honor to enclose, and by which the President in Council will at once perceive that Pedra Branca is the only true position for a Light House at the entrance of the China Sea.

\*B.

The former to the address of Mr. Secy [Currie] and the Letter to Mr. Under Secy Beadon

My letter under dates the 28<sup>th</sup> November 1844 No. 150, and 22<sup>nd</sup> August 1845 No. 139 will have pointed out the glaring necessity for a Light House in the position above indicated, but I need hardly observe that the work has not been commenced upon as anticipated by the Secretary to the Hon'ble East India Company. I earnestly trust however that the question will receive early consideration, and that the accompanying Copy of a letter\* with its enclosures, just received from the Chamber of Commerce at Singapore will induce the Hon'ble the President in Council to move the Hon'ble Court of Directors to order an Iron Light House from England for erection on Pedra Branca. The whole of the Details for the case of Light Houses as set forth in my letter under date the 28<sup>th</sup> November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new Position.

\*C.

It will be observed by the letter from Mr. A Gordon, that an Iron Light House can be delivered at the site selected for £ 3000, or about 30,000 Rupees and by the other letters adverted to in the Communication from the Chamber of Commerce that there is forthcoming from Madras RS. 780 and from Bombay 4300 which with that from China " 12,378 previously reported gives a total of 17, 458 Rupees available for a Light House and this I have no doubt will be added to when it becomes known that Government have decided upon carrying out the views and wishes of the Mercantile Community.

\*D.

In conclusion I beg to annex a copy of my reply\* to the Secretary to the Hon'ble E.I. Company which I trust will be approved of by the Hon'ble the President in Council.

I have the honor to be

Sir  
Your Most Obedt. Servant  
(Sgd)

Singapore  
Governor

26<sup>th</sup> Aug 1846

165. Thus the paragraph begins and ends with a reference to the letter of 28 November 1844. It is mentioned together with the letter of 22 August 1845, which also refers to the discussion of whether Peak Rock or PBP was the best spot for the construction of the lighthouse. It is the 28 November 1844 letter that contains all the specific details concerning the construction of the lighthouse: (1) the reference to the funds collected by the merchants, (2) the person in charge, (3) the permission granted by Johor, (4) the architectural plan of the lighthouse made by J.T. Thomson, (5) the budget agreed with a Chinese constructor, and (6) the method of operating the lighthouse. Once the decision was made to construct the lighthouse on PBP, Butterworth indicated that everything applicable to the lighthouse when it was envisaged on Peak Rock would be equally applicable to the new location: "the whole of the details for the case of lighthouses as set forth in my letter under date 28 Nov' 1844, with reference to its being located on Peak Rock, will be equally applicable to the new Position".

166. To avoid such an interpretation (obvious as it is on its face), Singapore wrongly asserts that "many aspects of Butterworth's letter of 1844 are simply not applicable to Pedra Branca". But it provides only one which is not: "for example, Thomson's survey of Peak Rock."<sup>266</sup> In fact many aspects of Thomson's survey were confirmed later as being equally applicable to the construction of the lighthouse on PBP. These are, in particular, (1) the period of the year during which the work must be done, (2) "the best and most economical mode of constructing a Lighthouse", envisaging either a "brick or iron edifice", (3) the protection required during the construction work, (4) the workers envisaged to construct the lighthouse, and (5) the conclusion of a contract with the Chinese contractor Choa Allum, to construct the lighthouse on PBP.<sup>267</sup>

167. A letter by J.T. Thomson himself contradicts Singapore's interpretation. He explained that he

"called upon the Chinese Contractor Choa Allum to inform the Gentleman if he would undertake *the building of my plan of the Horsburgh Light house, on Pedra Branca instead of Peak Rock Romania for the same sum*

<sup>266</sup>

SCM, para. 5.84.

<sup>267</sup>

See the survey in MM Annex 43; SM Annex 12.

*and under the same terms and conditions as set forth the estimate contained in my letter under date 20<sup>th</sup> November 1844.*<sup>268</sup>

That Thomson's plan of 20 November 1844 was applied to the construction of the lighthouse on PBP is also confirmed by a publication of the National Museum Singapore, which explains a painting of the Horsburgh Lighthouse by J.T. Thomson in 1852 in the following manner:

*"A painting of the Horsburgh Lighthouse by J T Thomson in 1852, after the lighthouse was completed in 1851. The plans for the lighthouse and the estimates for erecting it were drawn by J T Thomson in November, 1844. Construction of the lighthouse began in earnest in December, 1847. The foundation for it was laid by the Brethren of the Lodge 'Zetland in the East', on the instruction of the Governor."*<sup>269</sup>

The plans referred to are clearly those of the survey of 20 November 1844.

168. Moreover, the sentence proposed by Singapore simply does not make sense. Why refer to the "care of lighthouse" given that the paragraph is discussing its construction and the work has not yet begun? Why would Butterworth only refer to the "care" of a lighthouse without referring to the other important "details", such as the fact that the plan was ready, the contract signed, the permission obtained, etc. The paragraph that follows specifies the budgetary elements, i.e. costs of sending an iron lighthouse from England and funds collected in different places for the purpose of the construction of the lighthouse. The reason is that Butterworth enclosed a letter received from the Chamber of Commerce at Singapore with new information related thereto.

169. Even assuming that Butterworth had in mind the "details for the care of a lighthouse", the placement of this sentence would lack coherence. Both the previous and the next sentence are discussing the possibility of sending an iron lighthouse from London for its erection on the definite location of PBP. Butterworth was talking about building something, not the maintenance of something already built.

<sup>268</sup> Letter from J.T. Thomson, Government Surveyor at Singapore, to T. Church, Resident Councillor at Singapore, dated 9 July 1847: SM Annex 21 (emphasis added).

<sup>269</sup> John Hall-Jones & Christopher Hooi, *An Early Surveyor in Singapore. John Turnbull Thomson in Singapore 1841-1853*, Singapore: National Museum Singapore, 1979, p. 114 (emphasis added); vol. 2 of this Reply, Annex 22.

170. Finally, the sentence “for the care of Light Houses” is very odd. No one ever envisaged that two lighthouses would have to be cared for, yet there is no doubt Butterworth’s original letter used the plural. If the word really used was “care”, the plural “lighthouses” is inexplicable. Of the different proposed texts, only “the case of lighthouses” represents good English, and only that phrase makes sense of the context.

(b) The British Authorities would not use the expression “care of lighthouse[s]”

171. The British authorities would be unlikely to use the word “care” to refer to the act of maintenance, protection or upkeep of the lighthouse. Significantly, the word “care” does not appear in the letter of 28 November 1844.

172. According to Singapore, the paragraph of the 28 November 1844 letter that refers to “the care of lighthouse” is the following:

“A Light House, if not properly attended, would prove infinitely more perplexing and dangerous to the Mariner, than its total absence. I am therefore of opinion that less than two European and Eight Natives would barely answer the purpose of keeping watch and working the Gun in case of need, I would therefore recommend that two steady Pensioners from the Artillery might be allowed to volunteer for the service, who should receive an additional Salary and Rations, with 8 Malays or Lascars, making the annual cost to the state including the Estimated cost of materials for feeding the light, 2856 Rupees per annum should it be deemed advisable to employ 1<sup>st</sup> Class Convicts in place of the Malays or Lascars, the expense would be considerably reduced.”<sup>270</sup>

This paragraph discusses the personnel necessary for the maintenance of the lighthouse. It can hardly be summarised as “the whole of the details for the care of lighthouse[s]”. If Butterworth had wished to refer only to the maintenance, protection or upkeep of the lighthouse (as distinct from the other significant matters covered in his earlier letter), he would have used these words, or some of them. This is the style of contemporary legislation and correspondence. EIC Act No. VI of 1852 uses “maintaining”, “keeping up”.<sup>271</sup> C. Beadon (Under-Secretary to the Government of Bengal) writing to Butterworth

<sup>270</sup>

SCM, para. 5.83.

<sup>271</sup>

MM Annex 84; SM Annex 59.

on 10 May 1847 refers to the “construction and maintenance of the lighthouse”,<sup>272</sup> and this is the phrase that would normally occur to an English speaker in discussing such a subject.

(c) Subsequent practice shows that “the whole of the details for the case of lighthouses” applicable to Peak Rock were applied to PBP.

173. A striking demonstration that “the whole of the details” envisaged in 1844 were also applicable to PBP is what happened when steps to construct the lighthouse were finally taken. The money collected and the persons in charge of it, Thomson’s plans for the lighthouse, the contractor to perform the work, the authorisation to collect dues, the request to an iron lighthouse from London—all these “details” determined in Butterworth’s letter of 28 November 1844 were also applied to the final location on PBP. Even a letter from the Under-Secretary to the Government of Bengal to Governor Butterworth of 10 May 1847 categorically links Butterworth’s letter of 28 November 1844 with the construction of the lighthouse in PBP:

“I am directed to forward for your information copy of the documents noted in the margin, (No. 284 d/ 24th April 1847 Hon’ble Court’s Dispatches to Govt of India in the Marine Dpt No.6 d/15 Oct 1845, No.1 d/24<sup>th</sup> Feby 1847) and to request that you will immediately *take measures for the construction of a Light House upon Pedra Branca according to the plan and estimates with your letter No. 150 dated the 28<sup>th</sup> November 1844.*”<sup>273</sup>

Nothing excludes the other relevant matter included in Butterworth’s correspondence of 28 November 1844: the authorisation by Johor’s authorities to construct it.

174. Singapore argues that

“[e]ven if the word in Butterworth’s 1846 letter is ‘case’, this does not help Malaysia’s claim. As Singapore has shown in paragraphs 5.43 to 5.50 above, in the first place those letters of permission cannot be read as extending to Pedra Branca.”<sup>274</sup>

This is question-begging. Even if Butterworth’s letter of request had only referred to Peak Rock (which does not seem to have been the case), the fact is that Butterworth further

<sup>272</sup> SM Annex 20.

<sup>273</sup> SM Annex 20; MCM Annex 20 (emphasis added).

<sup>274</sup> SCM, para. 5.84.

informed that “the whole of the details for the case of lighthouses as set forth in my letter under date 28 Nov<sup>r</sup> 1844, with reference to its being located on Peak Rock, will be equally applicable to the new Position [Pedra Branca]”. The inescapable conclusion is that any permission granted to Peak Rock also extended to PBP. Butterworth’s letter of 28 November 1844 enclosed the Sultan’s and Temenggong’s letters. Those letters were in terms capable of applying to PBP.

(ii) *The dispatch of 3 October 1846 to the Court of Directors in London*

175. The second item of subsequent correspondence showing that the Johor permissions extended to PBP is the correspondence of 3 October 1846 from the Government of India to the East India Company’s Court of Directors in London. This contains the whole set of the relevant documentation referring to the construction of the lighthouse, including Butterworth’s letter of 28 November 1844 *with both the Sultan’s and the Temenggong’s letters of permission*. The title of this dispatch is “*Reports that Pedra Branca has been approved as the position for erecting the Horsburgh Light. Requesting consideration of the proposition for sending an Iron Light House from England*”.<sup>275</sup>

176. Singapore did not produce this correspondence. It could not have been unaware of its existence. Other correspondence included in Singapore’s Memorial and Counter-Memorial expressly refer to that letter: for example, the letter sent the same day by the same authority to Governor Butterworth informing the latter of the approval of PBP as the site for the lighthouse and that the Government of India would request the Court of Directors to send an iron lighthouse from England.<sup>276</sup> Singapore even included the response of the Court of Directors to the letter sent by the Government of India on 3 October 1846.<sup>277</sup> In its Counter-Memorial, all that Singapore had to say about this dispatch was that “it is unfortunate that the Malaysian Government cites only one document (the letter of 3 October 1846) to support the imaginative picture painted in the two paragraphs of her Memorial quoted above [those mentioning that the British authorities were aware that the permission extended to PBP]”.<sup>278</sup>

<sup>275</sup> MM, para. 136 & Annex 54.

<sup>276</sup> SM Annex 17.

<sup>277</sup> Letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 24 February 1847; SM Annex 18.

<sup>278</sup> SCM, para. 5.86.



177. In an attempt to divert attention from this important dispatch, Singapore cites a list of different letters in which "there is no reference to the issue of permission".<sup>279</sup> This is disingenuous. *First*, there was no reason at all to recall in each piece of correspondence the permission granted by Johor. Indeed, some of the letters included in Singapore's list could have never referred to the permission granted by Johor. This is the case of Governor Butterworth's letter to the Government of India dated 22 August 1845, in which he insists on the location of the lighthouse being Peak Rock. This is also the case in the letter of the Court of Directors of the EIC to the Governor-General in Council dated 15 October 1845, which referred only to Peak Rock. There is also no sense in mentioning in this list the letters from the Government of India or the EIC to Governor Butterworth, since it was Butterworth himself who obtained that permission. Singapore also included in its list two letters written by subordinate officials, Captain Congalton and J.T. Thomson, which deal with aspects of the actual construction of the lighthouse: the matter of the permission was not at issue. *Second*, because (as analysed above) in one of the letters cited by Singapore, that of Butterworth to the India Government of 26 August 1846, explicit references are made to the issue of the applicability of the 28 November 1844 letter to the location of the lighthouse on PBP.<sup>280</sup>

178. The significance of the dispatch of 3 October 1846 is apparent. It concerned the two major authorities involved in the construction of the lighthouse, that is, those having the final capacity to decide, the Government of India and the EIC Court of Directors. It contained the full set of documents on the subject required in order to make a final decision. It shows that Singapore's thesis that Peak Rock and PBP were separate, distinct and unrelated issues has no basis, for the dispatch included the Sultan's and Temenggong's 1844 letters of permission. Yet, according to Singapore, these must have been—and must have been known to be—irrelevant by this stage. If PBP was not within Johor's sovereignty, if the 1844 permissions did not extend to PBP, as Singapore asserts, why did the Government of India include the Sultan's and Temenggong's letters of permission amongst the relevant documentation concerning the construction of the lighthouse on PBP in its report to the EIC Court of Directors in London? They knew the situation. If they had intended to draw a distinction between Peak Rock as part of Johor

<sup>279</sup> SCM, para. 5.87.

<sup>280</sup> See above, paras. 153-161 (Section C).

(requiring permission) and PBP as *terra nullius* (not requiring permission) the permission letters would not have been included. The Court of Directors had before it the Sultan's and the Temenggong's letters of permission when it approved the location of the lighthouse on PBP. The dispatch of 3 October 1846 constitutes strong evidence that the British authorities understood Johor's permission to construct Horsburgh Lighthouse as being applicable to PBP.

(iii) *The "full report" sent by Governor Butterworth to the Government of Bengal dated 12 June 1848*

179. Governor Butterworth submitted to W. Seton Karr, Under Secretary to the Government of Bengal, a "full report" regarding the construction of the lighthouse on PBP dated 12 June 1848. This was the last stage in the correspondence exchanged before the beginning of the construction of the lighthouse. The report begins as follows:

"With reference to the several communications noted in the margin\* regarding the construction of a Light House on Pedra Branco at the entrance of the China Sea to the memory of the celebrated Hydrographer James Horsburgh Esquire, I have now the honor to submit the accompanying full Report on the subject for the final orders of the Right Honble the Governor of Bengal."<sup>281</sup>

180. The first of the communications noted in the margin is Butterworth's letter to the Government of India of 28 November 1844. This uncontroversial evidence does not admit of any doubt. For Butterworth, his letter of 28 November 1844, which included the Sultan's and the Temenggong's permissions, is the first of the relevant communications "regarding the construction of a Light House on Pedra Branco".

181. The communications that then passed among the relevant authorities (Government of Bengal, Government of India, Court of Directors) contained or referred to Butterworth's full report of 12 June 1848. All the authorities concerned with the construction of the lighthouse were aware that Butterworth's letter of 28 November 1844 applied to PBP.<sup>282</sup> The same can be said of his officials immediately in charge of the

<sup>281</sup> SM Annex 27.

<sup>282</sup> Letter from the Government of Bengal to Governor Butterworth dated 19 April 1849 (vol. 2, Annex 14 of this Reply); Dispatch of the Government of India to the Court of Directors dated 3 March 1849 (vol. 2, Annex 13 of this Reply), Letter from the Court of Directors to the Government of India of 5 September 1849 (SM Annex 31).

construction of the lighthouse. In his letter of 12 December 1849 communicating the decision of the Court of Directors to begin that construction, Governor Butterworth requested T. Church (the Resident Counsellor who had actually translated the Sultan's and Temenggong's letters of permission) to enclose a copy of his report of 12 June 1848 within the instructions to be addressed to J.T. Thomson.<sup>283</sup>

(iv) *Conclusion*

182. Clearly, Johor's permission to construct the lighthouse included PBP. For this reason Singapore's assertion that "the British Government and its successors considered that Peak Rock formed part of Johor, whilst Pedra Branca did not"<sup>284</sup> is not supported by *any* evidence. Not only there is no British Government statement or conduct to this effect; there is concrete evidence of the opposite, in particular Butterworth's letter of 26 August 1846, the Government of India's letter to the EIC Court of Directors in London of 3 October 1846 and Butterworth's letter to the Government of Bengal of 12 June 1848.

**D. Singapore's invented distinction between "formal" and "informal" permissions given by Malay rulers to construct lighthouses**

183. This section will briefly rebut a new theory advanced by Singapore about the existence of two different kinds of permission given by Malay rulers to the British Government for the construction of lighthouses in the region during the 19<sup>th</sup> century. According to Singapore:

"If the lighthouse was to be built on native territories, the British practice was to obtain a formal grant or cession of the land on which the lighthouse was to be built from the local chief who had authority there. For example, in the cases of Cape Rachado and Pulau Pisang, the British sought and obtained land grants from the local chief for the establishment of the lighthouse. In the cases of Peak Rock and Pulau Aur, informal permission was obtained from the local chiefs, but the British did not follow up with obtaining formal land grants because the British did not proceed with either of these projects."<sup>285</sup>

<sup>283</sup> Letter from Governor Butterworth to T. Church, Resident Councillor, of 12 December 1849, vol. 2, Annex 15 of this Reply.

<sup>284</sup> SCM, para. 5.58.

<sup>285</sup> SCM, para. 4.43 (footnotes omitted).

It goes on to argue that, “[i]n the case of Pedra Branca, the British built the lighthouse but did not request a land grant.”<sup>286</sup> The purpose is clear: to suggest that permission involved a complex procedure and that that procedure was not followed with regard to PBP. But Singapore is deliberately mixing two different questions: permission to construct the lighthouse and the establishment of a title of ownership over a piece of land.

184. The permissions obtained from local rulers all shared a similar pattern. The Governor of the Straits Settlements wrote to the authorities having sovereignty over the envisaged territory and those authorities gave such permissions. These exchanges in no way can be called “informal” permissions. In fact, these formalities were the same as regards Horsburgh Lighthouse, Cape Rachado Lighthouse, Pulau Pisang Lighthouse and that envisaged on Pulau Aur but eventually not built.<sup>287</sup> They constituted an adequate basis for the construction of lighthouses by Britain in foreign territory. They were not subordinated to any other formality.

185. The granting of a land title of ownership was something different from permissions and depended on the particular circumstances. As will be seen from **Figure 11** and **Figure 12**, Cape Rachado Lighthouse is situated on the mainland and Pulau Pisang is an island much larger than PBP. In the case of Pulau Pisang, the permission extended both to the site of the lighthouse and to the path from it to the beach. This can be seen from the map which is **Figure 13**. There used to be a small Malay village on Pulau Pisang. Its residents managed orchards. There are still the remnants of a cemetery and the foundations of a mosque on the island.<sup>288</sup> These facts explain why the explicit conferral of a title to ownership of the parcel of land on which the lighthouse stood was necessary. By contrast PBP is a small and uninhabited island on which nothing could be envisaged at the time other than the lighthouse.

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<sup>286</sup> SCM, para. 4.44.

<sup>287</sup> See MM, para 119 & Annexes 62, 64 & 89.

<sup>288</sup> See vol. 2, Annex 24 of this Reply.

### Aerial photograph of Cape Rachado Lighthouse

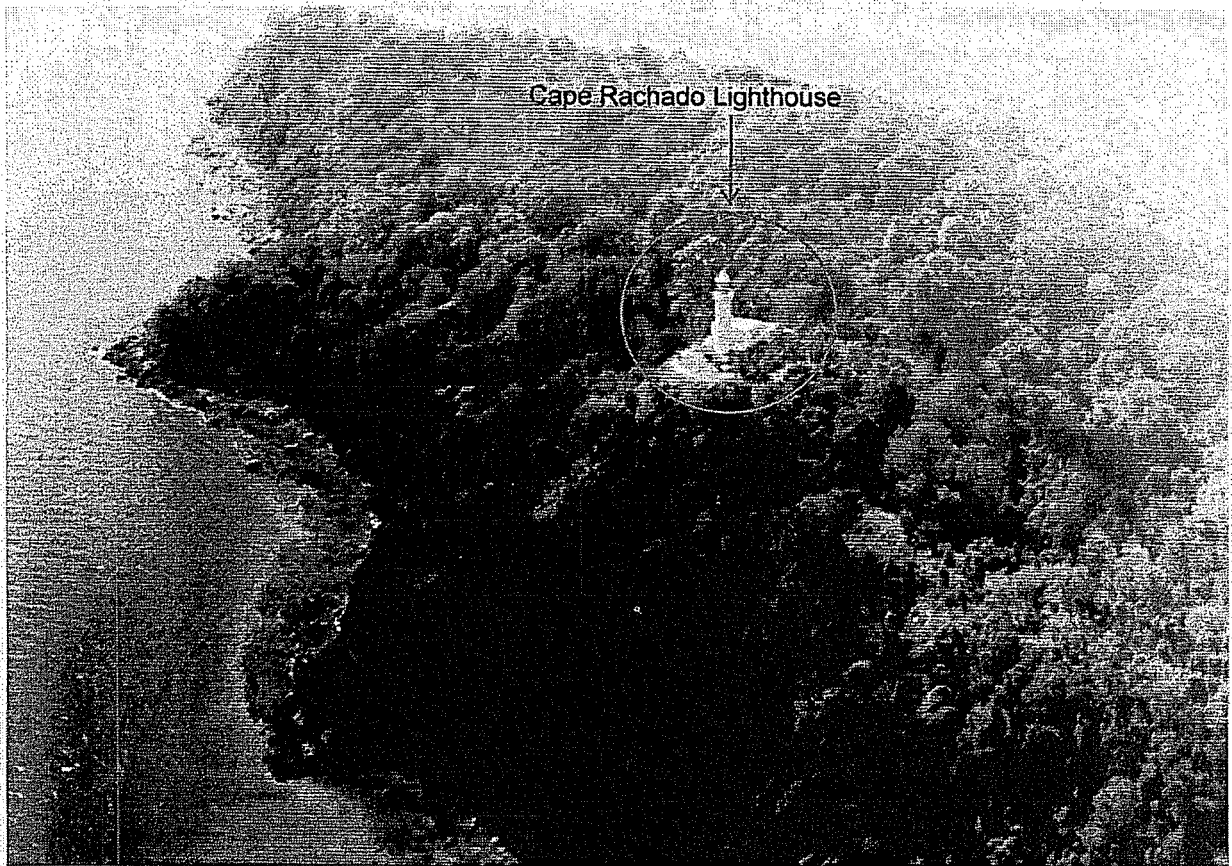
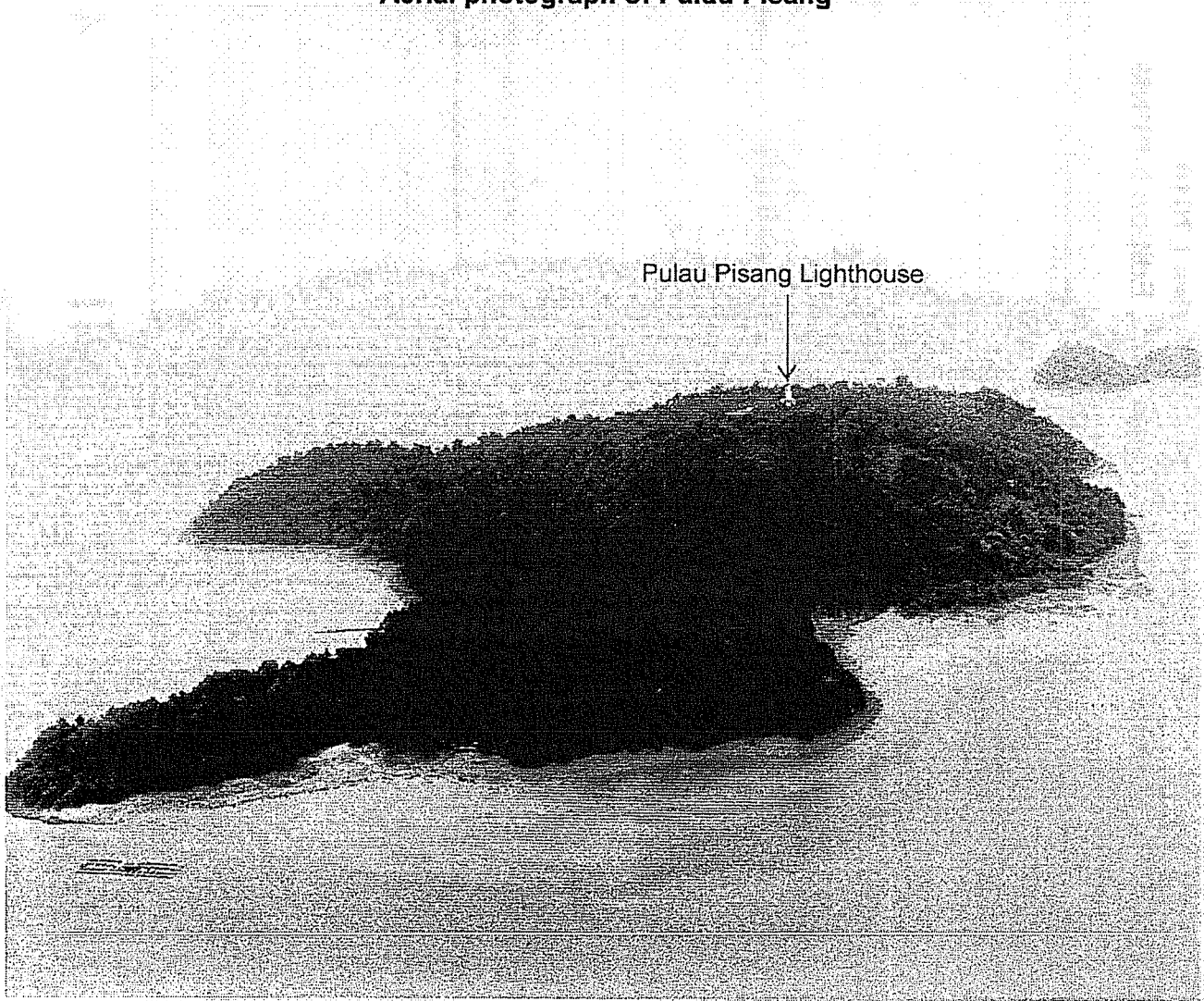


Figure 11

**Aerial photograph of Pulau Pisang**



**Figure 12**

Extract and Enlargement, Pontian Kecil, Sheet 129, Series L7010  
Published by the Director of National Mapping, Malaysia 1974, Edition 5-PPNM

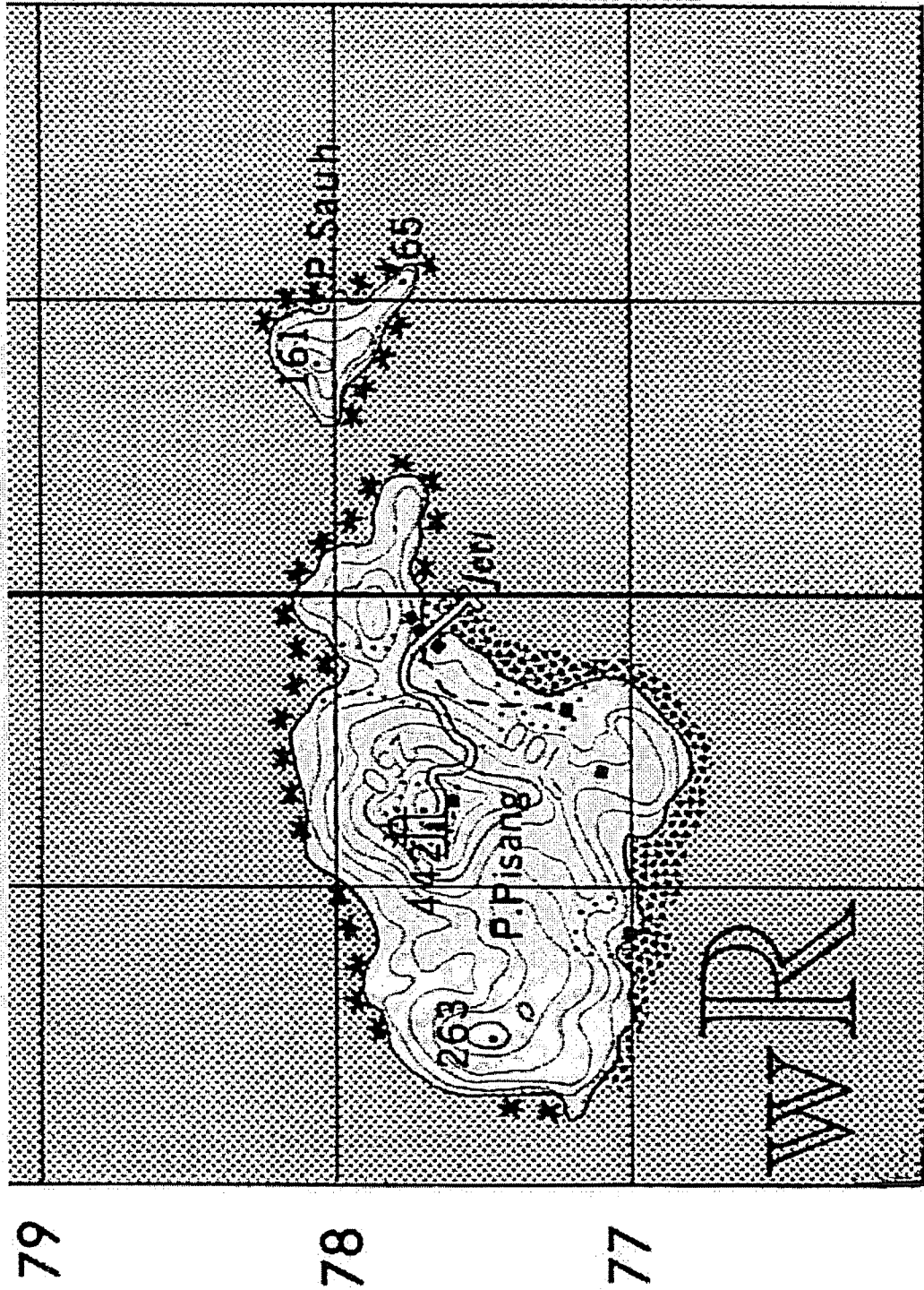


Figure 13



186. The case of Pulau Pisang lighthouse is telling. It was constructed by the British Government with the authorisation of Sultan Abu Bakar of Johor in 1885.<sup>289</sup> The indenture granting a plot of land was made only on 6 October 1900.<sup>290</sup> Clearly, the permission granted in 1885 did not require any other formality for the lighthouse being constructed, operated and owned by the authorities of the Colony of the Straits Settlements. The 6 October 1900 indenture concerned only a title deed to ownership of land on an island where other people were also present.

187. Hence, contrary to what Singapore suggests, there were not different kinds of “formal” and “informal” permissions by local rulers in the process of construction of lighthouses by Britain on Malay territories. The construction of Horsburgh Lighthouse by the British Government on PBP is not distinguishable at all from the other cases of the construction of lighthouses by the same government in other Malay territories with the permission of the Malay rulers.

#### E. Conclusions

188. The correspondence related to the construction of the lighthouse to pay tribute to James Horsburgh, shows that:

- (a) The construction of Horsburgh Lighthouse was a process in which its possible location on PBP was envisaged at all times;
- (b) Peak Rock and PBP were two different locations envisaged for the construction of the same lighthouse with the same purpose and in the same region;
- (c) The British authorities sought and obtained permission from the authorities of Johor to construct the lighthouse “near Point Romania... or any spot deemed eligible”;
- (d) PBP, an island under Johor’s sovereignty, was covered by that permission;
- (e) The British authorities were aware that the permission granted by Johor included PBP, as both the letter of Governor Butterworth to the Government

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<sup>289</sup> Abu Bakar was the grandson of Temenggong Abdul Rahman who ceded Singapore in 1824 and the son of Temenggong Ibrahim who gave permission for Horsburgh lighthouse.

<sup>290</sup> MM Annex 89.



in India of 26 August 1846 and the correspondence of the Government in India to the EIC Court of Directors in London of 3 October 1846 show;

- (f) Instead of demonstrating any acquisition of sovereignty by Great Britain over PBP, the transactions regarding the construction of the Horsburgh Lighthouse on PBP prove Johor's sovereignty: to give permission to construct that lighthouse thereon constitutes evidence of an act *à titre de souverain* by Johor with regard to this territory.

### Appendix to Chapter 3

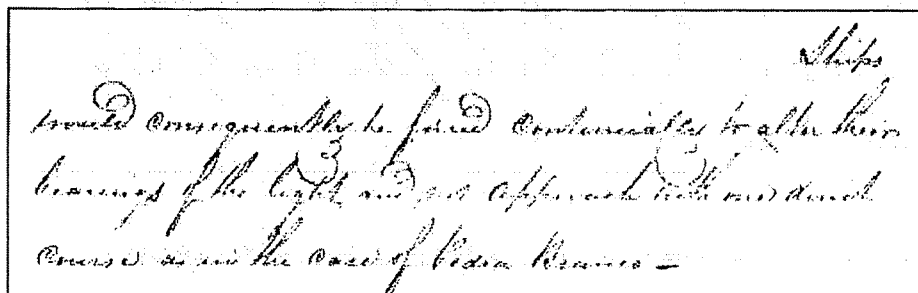
#### Handwriting comparison of the word "case" used in Butterworth's letter of 26 August 1846

(1) This Annex analyses the handwriting of the word "case" both in the original and the copy of Butterworth's letter of 26 August 1846 and demonstrates that the word used in the letter is "case".

(2) The word "case" was used in different documents contained in the 26 August 1846 dispatch. A comparison follows that indicates that the word used in the relevant sentence of the letter is "case". The word used in the relevant sentence of the 26 August 1846 letter will systematically be compared with the word "case" used in the enclosures, in all instances in which there is no doubt that the word used in the enclosures is "case". The first perusal corresponds to the original letter from the National Archives of India (A), and the second to the file copy kept in the Straits Settlements Records, National Archives of Singapore (B). Both were written by the same person and "A" contains the enclosures, also copied by the same person.

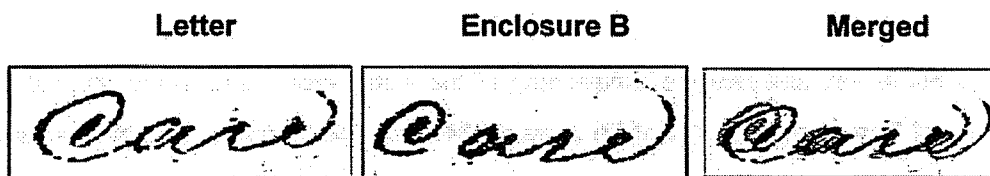
#### (A) Comparison with regard to the original letter (National Archives of India)

Comparison with enclosure B to the 26 August 1846 letter (Letter from S. Congalton and J.T. Thomson to Butterworth of 25 August 1846), National Archives of India



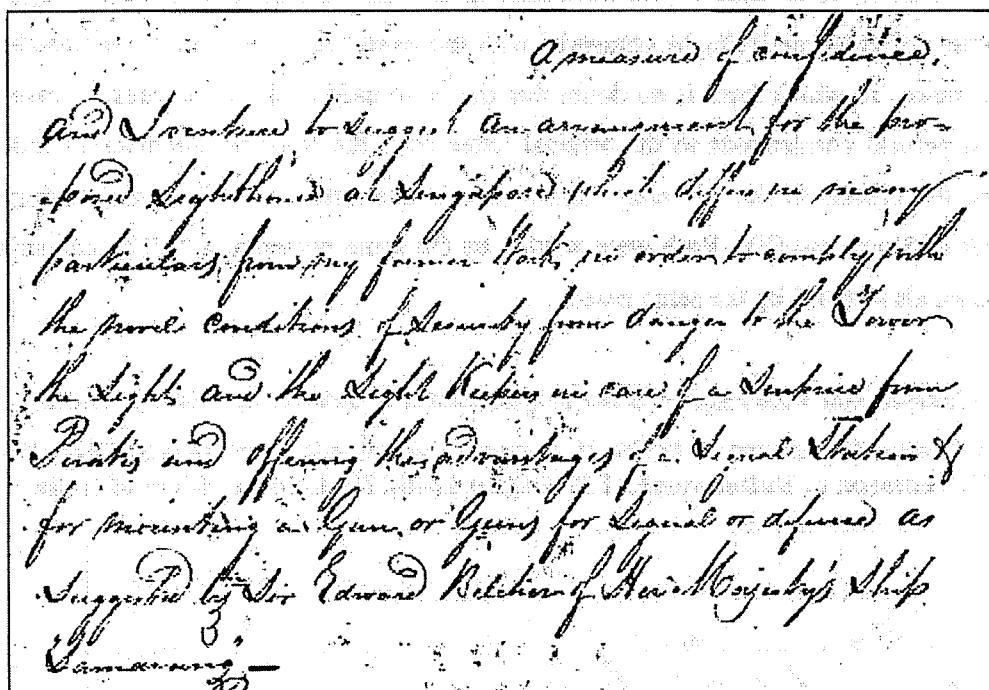
ships  
consequently be joined containing to alter their  
bearings of the light and get approach to the vessel  
course as in the case of India Revenue =

The relevant sentence extracted from enclosure B above reads as follows: "Ships would consequently be forced continually to alter their bearings of the light and not approach with one direct course as in the case of Pedra Branca". There can be no doubt here that the word is "case" and cannot be "care". In the two versions the word appears as follows:



Comparison with enclosure C to the 26 August 1846 letter (Letter from A. Gordon to Governor Butterworth of 31 January 1846), National Archives of India

This enclosure has three instances where the word "case" was undoubtedly used.



The relevant first sentence extracted from enclosure C above reads as follows:

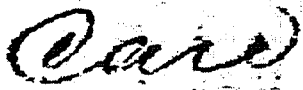
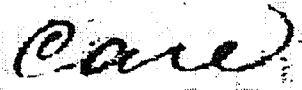
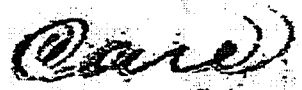
"A measure of confidence and I venture to suggest an arrangement for the proposed Lighthouse at Singapore which differs in many particulars from my former Works in order to comply with the novel conditions of security from danger to the Tower of the

Lights and Light Keepers in case of a surprise from Pirates and offering the advantages of a Signal Station...”

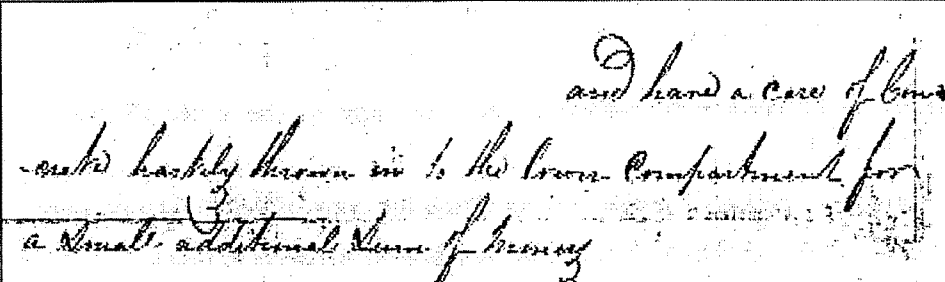
Letter

Enclosure C first case

Merged

		
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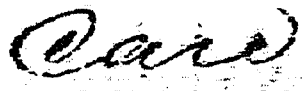
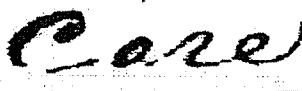

The relevant second sentence extracted from enclosure C above reads as follows: “...and have a case of concrete hastily thrown in to the lower compartment for a small additional sum of money”.



Letter

Enclosure C second case

Merged

		
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The relevant third sentence extracted from enclosure C above reads as follows: “...It will at once be seen that such a Lighthouse is Cheap, easily erected strong to resist vibration in hurricanes, cannot be injured by lightning and is safe in case of Earthquakes or fire”.

*It will*

*should be done that such a lightning is cheap, easily pro-  
 vided. Many persons, particularly in the case of, cannot be  
 engaged by lightning and is safe in case of earthquakes  
 or fire*

Letter

Enclosure C third case

Merged

**(B) Comparison exercise with regard to the file copy of the letter (National Archives of Singapore)**

A similar comparison exercise follows in respect of the file copy of the 26 August 1846 letter, extracted from the Proceedings Volume in the National Archives of India.

**Comparison with enclosure B to the 26 August 1846 letter (Letter from S. Congalton and J.T. Thomson to Butterworth of 25 August 1846).**

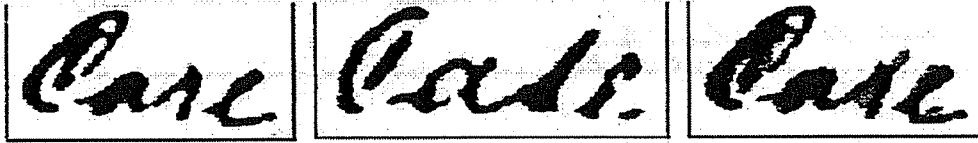
*Ships would consequently be forced continually  
 to alter their bearings of the light and not approach with one direct course as  
 in the case of Pedra Branca.*

The relevant sentence extracted from enclosure B above reads as follows: "Ships would consequently be forced continually to alter their bearings of the light and not approach with one direct course as in the case of Pedra Branca"

Letter

Enclosure B

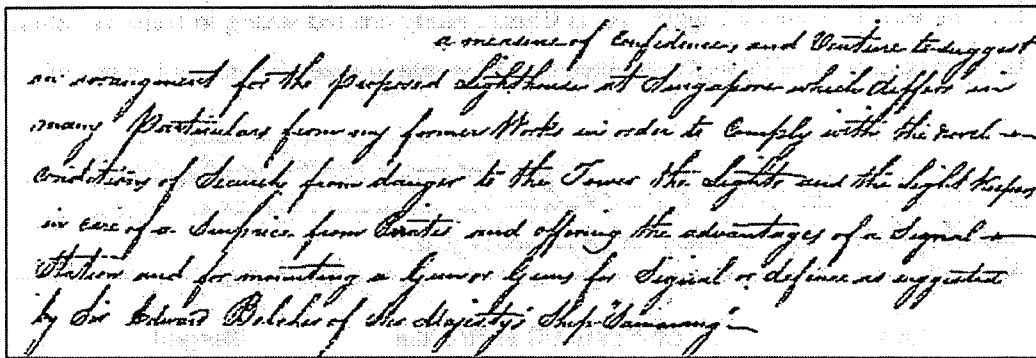
Merged



This is the only occasion in which a distinction between the two words seems to appear.

Comparison with enclosure C to the 26 August 1846 letter (Letter from A. Gordon to Governor Butterworth of 31 January 1846).

First use of the word "case"



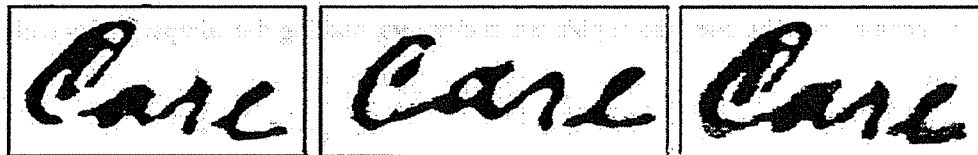
The relevant first sentence extracted from enclosure C above reads as follows:

"A measure of confidence and I venture to suggest an arrangement for the proposed Lighthouse at Singapore which differs in many particulars from my former Works in order to comply with the novel conditions of security from danger to the Tower of the Lights and Light Keepers in case of a surprise from Pirates and offering the advantages of a Signal Station..."

Letter

Enclosure C first case

Merged



The relevant second sentence extracted from enclosure C above reads as follows: "...and have a case of concrete hastily thrown in to the lower compartment for a small additional sum of money".

*and have a case of Larnoch. Larnoch is to the lower part of  
for a small additional sum of money.*

Letter

Enclosure C second case

Merged

		
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The relevant third sentence extracted from enclosure C above reads as follows: "...It will at once be seen that such a Lighthouse is Cheap, easily erected strong to resist vibration in hurricanes, cannot be injured by lightning and is safe in case of Earthquakes or fire".

*It will at once be seen that such a Lighthouse is  
Cheap, easily erected strong to resist vibrations in hurricanes, cannot be injured by  
lightning and is safe in case of earthquakes or fire.*

Letter

Enclosure C third case

Merged

		
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As mentioned above, a similar comparison cannot be made with regard to the third copy of the 26 August 1846 letter (from the British Library) submitted by Singapore. The letter and its enclosures were not placed in the same file. The copyist of the letter was a different person from the one who copied the enclosures, making the comparison exercise irrelevant.

## **Conclusions**

An examination of the exercise made with regard to the two 26 August 1846 letters and the enclosures, on the basis of the comparison of the word used in the relevant paragraph of the letter and the word "case" undoubtedly used by the same writer in the enclosures show a striking identity. The four comparisons of the challenged word in the original letter (National Archives of India) with the clear writing of the word "case" in other parts of the same file show a striking identity. With regard to the similar comparison exercise made with the copy of the letter kept in the National Archives of Singapore, three show an identity with the word written in the challenged sentence, whereas the remaining (the comparison with Enclosure C) is open to doubt. This comparison leads to the conclusion that what Butterworth wrote was:

**"the whole of the details for the case of Light Houses as set forth in my letter under date the 28<sup>th</sup> November 1844, with reference to its being erected on Peak Rock will be equally applicable to the new Position".**

**(emphasis added)**



## Chapter 4

### SINGAPORE'S THEORY OF "TAKING OF LAWFUL POSSESSION" TESTED AGAINST THE FACTS

#### Introduction

189. This Chapter will show that, despite the sharpness of language used in Chapter V of its Counter-Memorial, Singapore has been unable to advance any concrete argument to justify its claim based on an alleged "taking of lawful possession of Pedra Branca by agents of the British Crown" at the time of the planning and construction of the lighthouse, nor to dispute Malaysia's factual and legal analysis as set out in earlier pleadings.<sup>291</sup>

190. The Chapter will be divided into four sections: **Section A** will address the plea of "taking of lawful possession" and will show how that plea cannot possibly be applied to PBP. It is true that Singapore has not yet decided exactly when Great Britain "took possession" of PBP (its Counter-Memorial considers that British sovereignty existed even before the laying of the foundation stone of the lighthouse in 1850, whereas its Memorial put emphasis on the "taking of lawful possession" in the period from 1847 to 1851). This section will show that the exclusive reliance by Singapore on a single doctrinal quotation to sustain its claim is devoid of any justification. **Section B** will deal with three events or discussions occurring in 1850 which shed light on the perception of the parties concerned as to the situation with regard to PBP at that time, and whose content was misrepresented in the Singapore Counter-Memorial:

- (i) The Masonic ceremony for the laying of the foundation stone;
- (ii) The visit of the Temenggong to PBP one week after the laying of the foundation stone of the lighthouse; and
- (iii) The internal debate by the British authorities in Singapore about whether to establish a station on Point Romania, or to request the Temenggong to establish a village there, in order to protect the lighthouse.

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<sup>291</sup> MM, paras. 151-176.

**Section C** will underline Singapore's failure to demonstrate any British intention to acquire sovereignty over PBP. As will be seen, Singapore attributes to the British Government an intention it clearly did not have at any relevant time. **Section D** will briefly refer to the situation existing immediately after the inauguration of the lighthouse. It will show that the British government did not modify its position as regards sovereignty over PBP by the fact of operating the lighthouse. For example, there was no legislation incorporating PBP into the Straits Settlement, a matter on which Singapore's Counter-Memorial is silent but the significance of which will be further explained. Finally, Singapore's Counter-Memorial misrepresents some fishing incidents which occurred in the region a decade after the inauguration of the lighthouse: it will be seen that these demonstrate the absence of any British claim to or exercise of sovereignty over PBP.

**A. Singapore's claim of "taking of lawful possession" of PBP**

191. Singapore's presentation of its claim based on the "taking of lawful possession" of PBP is irreconcilable with the facts and the law. Its position that it acquired sovereignty over PBP between 1847 and 1851 through the taking of lawful possession faces the following insurmountable obstacles:

First, it requires that the territory was *terra nullius* but at that time PBP had a sovereign, Johor.

Second, the material acts performed on the island, i.e. the construction of the lighthouse, were authorised by the sovereign: this very fact excludes the argument that the subsequent possession was *à titre de souverain*.

Third, British practice shows that in order to take possession of territory on behalf of the British Crown some formalities were required: none of these were carried out in relation to PBP, at that time or at any time (in contrast to unmistakable formalities associated with small islands, for example around Singapore itself in 1825).

Fourth, the material element of possession must be accompanied by the subjective element, that is, the intention to acquire sovereignty: even if the material element was present (which it was not), the subjective element was totally absent.

Fifth, the taking of possession of territory is followed in British practice by the incorporation of the territory into the British Crown or the official designation of

the territorial unit to which it henceforth belongs or the authority responsible for it: none of these procedures was instituted with regard to PBP.

(i) *When did Britain "take possession" of PBP?*

192. After two rounds of pleadings, Singapore is still unable to decide when Britain purportedly took possession of PBP and consequently "acquired" sovereignty over it. In its Memorial, Singapore presented three different moments or periods: (1) at the time of the final selection of PBP as the site for the lighthouse (which occurred at local level in 1846 and was approved by the Court of Directors in London in early 1847); (2), when J.T. Thomson planted seven brick pillars to measure the strength of the waves (1 November 1847); and (3) the period of construction of the lighthouse (1847-1851).<sup>292</sup> The third of these seems to be the predominant line of reasoning in Singapore's Memorial. There is a shift in Singapore's Counter-Memorial, where Singapore emphasises the fact that British sovereignty existed before 1850,<sup>293</sup> although it has not entirely abandoned 1847-1851 as the period of the taking of possession.<sup>294</sup>

193. Singapore no longer invokes the argument that it acquired sovereignty when the decision to construct the lighthouse on PBP was adopted. This is understandable. To consider that the mere choosing of PBP as the location of construction of the lighthouse is tantamount to a taking of possession defies common sense. Even if the choice had been made with the declared idea of acquiring sovereignty (of which there is no evidence), this could not have been considered as an act of taking of possession, which requires both *corpus* and *animus*. Not a single piece of evidence supports the theory that the simple choosing of PBP as the location of the lighthouse implied any intention to acquire sovereignty over it. However, Singapore still invokes the other two contradictory positions.

<sup>292</sup> See MCM, para. 60.

<sup>293</sup> For example, "the British Government -when they took possession of Pedra Branca in 1847..." (SCM, para. 4.43); "it would have been unnecessary to use the inauguration ceremony as the juncture at which sovereignty would be claimed. Sovereignty already existed. The first unequivocal acts of possession occurred in 1847 when Thomson placed the brick pillars on Pedra Branca" (SCM, para. 5.112); "the ceremony on Pedra Branca took place in May 1850, by which time the British Crown had already taken possession of Pedra Branca" (SCM, para. 5.120).

<sup>294</sup> "Lawful possession of Pedra Branca was taken by agents of the British Crown during the years 1847-1851 for the purpose of constructing a lighthouse" (SCM, para. 1.9); "The basis of claim is the taking of lawful possession of Pedra Branca by the agents of the British Crown in the period 1847 to 1851" (SCM, para. 5.3).

194. Singapore's indecision as to the moment in which Britain would have acquired sovereignty over PBP reveals the weakness of its claim. Faced with overwhelming evidence of the type of acts performed by Britain in undisputed situations of acquisition of territory in the name of the British Crown, Singapore is obliged to find explanations as to why the 1850 ceremony was not carried out in the same manner. For example, it contends that those acts were not necessary at the time of the "inauguration of the lighthouse in 1850" because Britain already had sovereignty over PBP. But this line of reasoning simply shifts the problem to a different timeframe; it does not solve it. If one accepts this assertion, typical acts constituting a taking of possession of territory should have occurred at some earlier time. The idea that Britain acquired sovereignty over PBP in 1847 cannot be accepted: J.T. Thomson visited the island and planted seven brick pillars to test the strength of the waves in order to consider the feasibility of the site for the construction of the lighthouse.<sup>295</sup> A similar test was envisaged for Peak Rock when this island was considered as a site for the lighthouse.<sup>296</sup> Moreover, Singapore is wrong when it asserts that the *inauguration* of the lighthouse occurred in 1850.<sup>297</sup> This took place on 15 October 1851.<sup>298</sup> What happened in 1850 was the laying of the foundation stone of the lighthouse.

(ii) *Singapore's approximate presentation of doctrine*

195. Singapore's theory of the "taking of lawful possession" as the ground for the acquisition of sovereignty over PBP is based on a confused and partial reading of doctrinal sources.<sup>299</sup> According to Singapore's Counter-Memorial, Malaysia's thesis is "built on sand" because "standard works on British practice are ignored".<sup>300</sup> Leaving aside for a moment Singapore's complete disregard for primary sources (i.e. British official documentation), the standard works it refers to are of no help to its case, since they do not concern the situation of PBP as presented by Singapore. Nor do they contradict Malaysia's analysis either.<sup>301</sup>

<sup>295</sup> MCM, paras. 106-107.

<sup>296</sup> Letter from S. Congalton, Commander of H.C. Steamer *Hoogly*, to T. Church, Resident Councillor in Singapore, 12 January 1846: vol. 2 of this Reply, Annex 11.

<sup>297</sup> SCM, para. 5.111.

<sup>298</sup> MM, para. 153; SM Annex 56.

<sup>299</sup> SM, paras. 5.90-5.91 and 5.108-5.111, rebutted in MCM, paras. 21, 57-59, 74; SCM, paras. 5.6-5.11.

<sup>300</sup> SCM, para. 5.9.

<sup>301</sup> The way Singapore dealt with the quotation by Keller, Lissitzyn & Mann cited by Malaysia in its Memorial is telling. As mentioned, this is the standard reference work on the practice regarding symbolic acts employed by European powers to acquire sovereignty (MM, paras. 158-159). According to Singapore, "[t]he proposition by Keller, Lissitzyn and Mann is not relevant and has no application to the British occupation of Pedra Branca. Instead, as explained above, in some cases, symbolic acts effected by the individuals in the

196. Singapore attaches great importance to Kenneth Roberts-Wray's book *Commonwealth and Colonial Law*. According to this text, "A Colony may be acquired by any one of the following means or by a combination of two of them: Settlement, Cession, Conquest, Annexation."<sup>302</sup> This list does not reflect general international law, and nor does it use the appropriate terminology. Quoting A.D. McNair and T.J. Lawrence, Malaysia has already referred in its Counter-Memorial to the improper use of the term "annexation".<sup>303</sup> What will be stressed here is the way Singapore misuses its selected author. Singapore twice quotes the same paragraph from Roberts-Wray<sup>304</sup> which refers to "Annexation alone" as "a fourth method of acquisition of Colonies".<sup>305</sup> The question is whether Singapore now considers that "annexation alone" was the means by which Britain acquired sovereignty over PBP. Until now this has not been the basis of Singapore's claim.

197. The whole paragraph quoted by Singapore is as follows:

"Annexation, in a broad sense, is a fourth method of acquisition of Colonies. An instrument of annexation may accompany the acquisition of territory by settlement, conquest or cession, but the unilateral manifestation of the will of the Crown may also be the only means by a territory has been brought within Her Majesty's dominions; for example, in the case of remote unoccupied areas, such as those in the Antarctic, where there is no question of settlement, cession or conquest. Even if the root of title is discovery, that, though important from the international point of view, is not *per se* a method of acquisition. In international law it must be followed by effective occupation; in municipal law ownership should somehow be asserted. Preferably by formal document, such as an instrument of annexation. The first formal instrument made with respect to the Falkland Islands Dependencies and the British Antarctic Territory appears to have been Letters Patent dated July 21, 1908, providing for their government."

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absence of a commission from the Crown were not sufficient in themselves to generate title, except when the ratification of the Crown had been effected. This... is of no relevance to Pedra Branca" (SCM, para. 5.12). But the quotation from those authors did not refer to acts of "individuals in the absence of a commission from the Crown". Instead it stressed the formal character of the British practice of taking of possession of territory.

<sup>302</sup> Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, London: Stevens & Sons, 1966, p. 99.

<sup>303</sup> MCM, paras. 84-87.

<sup>304</sup> At pp. 107-108 of *Commonwealth and Colonial Law*.

<sup>305</sup> SM, para. 5.90; SCM, para. 5.6.

198. Contrary to what Singapore asserts, this paragraph indicates that settlement, conquest and cession can be accompanied by annexation, but that annexation can alone be a means of acquisition of a colony. The first part of the paragraph suggests that the author uses "instrument of annexation" and "unilateral manifestation of the will of the Crown" as synonyms. But what follows is rather obscure. The example of Antarctica is followed by the correct assertion that discovery is not enough in international law to acquire territory. The author then argues that in international law discovery must be followed by effective occupation and "in municipal law 'ownership' [*sic*] should somehow be asserted. Preferably by formal document, such as an instrument of annexation." Apparently an instrument of annexation is not the only way to assert "ownership". Then follows the reference to the Letters Patent of 1908 concerning Antarctica. Roberts-Wray does not give any example of an informal annexation.

199. The inference is that the Great Britain took possession of PBP and annexed it; in other words, that the "taking of lawful possession" is the equivalent to the "annexation alone". What is lacking, however, is any indication of when or how Britain manifested its intention to acquire sovereignty over PBP and consequently annexed it. Such an intention being manifestly absent, this was not a case of "annexation alone". Moreover, the paragraph of Roberts-Wray upon which Singapore relies shows that "annexation alone" was envisaged as the way to acquire sovereignty in the case of remote and unoccupied areas: PBP is not remote and is not located in an unoccupied area.

200. The other two cases Roberts-Wray quotes under the heading of "Annexation Alone" are those concerning the sea bed and Cyprus.<sup>306</sup> From both it follows that what the author had in mind by using the term "annexation" was a legislative or executive act of the British Crown (e.g., an Order in Council). The present case has nothing in common with those examples as no such acts were undertaken in respect of PBP.

201. Singapore quotes at length from W.E. Hall, without any explanation as how the quotation assists Singapore's case.<sup>307</sup> Hall clearly requires both the taking of possession and the intention to acquire as two cumulative conditions for acquisition of territory by

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<sup>306</sup> Kenneth Roberts-Wray, *op. cit.*, pp. 108-110.

<sup>307</sup> SCM, para. 5.11.

occupation.<sup>308</sup> Further, in the extract quoted in Singapore's Counter-Memorial, Hall is essentially distinguishing between the taking of possession by unauthorised individuals and by those having an official character. The former requires State endorsement in order to reunite both possession and intention. The case of the latter is described by Hall as follows: "A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention."<sup>309</sup> The author clearly refers to a "declaration" made by a commissioned officer. No declaration of any kind of the intention to acquire sovereignty over PBP was made by any British official. No British officer was ever commissioned to take possession of PBP in order to acquire sovereignty on behalf of the British Crown: there was not even a momentary conjunction of fact and intention.

202. Singapore does not refer to other classic British works such as Oppenheim-Lauterpacht. The relevant passages on the kind of territory open to occupation and on the requirements for such occupation read as follows:

"Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered as a State. Natives may live on a territory under a tribal organisation which need not be regarded as a State; and even civilised individuals may live and have private property on a territory without forming themselves into a State proper which exercises sovereignty over such territory. But the territory of any State, even though it is entirely outside the Family of Nations, is not a possible object of occupation; and it can only be acquired through cession or subjugation."<sup>310</sup>

"Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State. Occupation thus effected is real occupation, and, in contradistinction to fictitious occupation, is named effective occupation. Possession and administration are the two essential facts that constitute an effective occupation.

Possession.—The territory must really be taken possession by the occupying State. For this purpose it is necessary that it should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*). This can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that

<sup>308</sup> Hall, William E., *A Treatise of International Law*, 8<sup>th</sup> ed. By P. Higgins, Oxford: Clarendon Press, 1934, p. 125.

<sup>309</sup> *Ibid.*, p. 128.

<sup>310</sup> L. Oppenheim, *International Law. A Treatise*, 5th ed. By H. Lauterpacht, London: Longman, 1937, vol. I, p. 438, para. 221 (footnotes omitted).

the possessor intends to keep it under his sovereignty. It usually consists either of a proclamation or of the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is immaterial whether or not some agreement is made with the natives by which they submit themselves to the way of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand its meaning it has a moral value only.

Administration.—After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within a reasonable time after the act of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any State over the territory.”<sup>311</sup>

203. This quotation shows conclusively that acquisition involved both *corpus* and *animus*, the latter requiring “some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty”. Indeed even after possession is taken, the establishment of an administration is also a requirement for the acquisition of sovereignty. The British Government did not accomplish anything of the kind with regard to PBP. There was no formal act announcing the taking of possession and the acquisition of sovereignty. There was no legislation determining the authority in charge to the island and no exercise of authority in virtue of sovereignty over the island. There is no evidence whatsoever that the British Government had it in mind to acquire sovereignty over PBP.

(iii) *Singapore's disregard for British practice*

204. Malaysia has furnished comprehensive evidence based predominantly on primary sources, completed by doctrinal references.<sup>312</sup> Malaysia's interpretation of British practice concerning the taking of possession of territory with the intention to acquire sovereignty is supported by more than 30 concrete cases, concerning territories all over the world and particularly islands, rocks and reefs, most of them of reduced dimensions and uninhabited, like PBP.<sup>313</sup> Of particular importance are the examples of taking of possession which

<sup>311</sup> Ibid., pp. 439-440, para. 222 (footnotes omitted).

<sup>312</sup> MM, paras. 157-164; MCM paras. 56-92.

<sup>313</sup> MCM, paras. 74-89, 130.



occurred in the same region and in the same period as the construction of the lighthouse, notably the islands and islets around Singapore in 1825 and the island of Labuan in 1847.<sup>314</sup> The comparison with Singapore's presentation is pronounced. With the exception of the indirect and incorrect reference to Antarctica, there is not a single example in Singapore's pleadings of a taking of possession by Britain that can support its claim in the present case.

205. The allegation that Malaysia relied in its Memorial upon practice relating to "acts of annexation by British subjects" is a distortion.<sup>315</sup> In its Memorial, Malaysia mentioned five territories taken in possession by Britain close in time with the purported "taking of possession" of PBP. These were: (1) some islands and parts of Antarctica, (2) Singapore and its dependencies, (3) the Falkland/Malvinas Islands, (4) Bulama Island and (5) El Tigre Island. Only in one of the Antarctic cases were the relevant acts performed by British subjects. In all the others the acts were performed by British officials. The taking of possession of Singapore and its dependencies was performed by John Crawford, the British Resident, the Falkland/Malvinas Islands by Captain Onslow, Bulama Island by Lieutenant Lapidge and the island of El Tigre by the British Consul General in Central America.<sup>316</sup>

206. Despite this, Singapore still seeks to maintain that formalities were required only when the taking of possession was performed by individuals not having an official character.<sup>317</sup> The Malaysian Counter-Memorial demonstrates, with concrete examples of British practice from the end of the 18<sup>th</sup> century to the beginning of the 20<sup>th</sup> century, a consistent pattern of British conduct undertaken in order to take possession of territory. What was involved in all cases was the reading of a declaration of taking of possession on behalf of the British Crown, accompanied by acts such as the hoisting of the Union Jack, a 21-gun salute, a military parade or other formalities, and its communication to the relevant superior authorities. Most of the cases also show that the taking of possession occurred only after instructions from the British government, through the Admiralty or other relevant authority, were received. If there were no such instructions, the British government would formally confirm its intention to acquire sovereignty after the act of

<sup>314</sup> MCM, paras. 22-26, 78-79 and this Reply, para. 213 below.

<sup>315</sup> SCM, para. 5.10.

<sup>316</sup> MM, para. 160.

<sup>317</sup> SCM, para. 5.10.

taking of possession was performed, and this was the case whether the act of taking possession had been performed by a British official or a private British subject.

207. Singapore's Counter-Memorial criticises the example given by Malaysia in its Memorial, despite the fact that it was supplied by the British government itself in its Applications against Argentina and Chile concerning Antarctica. The relevant reference to the British Applications reads as follows:

"In 1829, Captain H. Foster, R.N., in H.M.S. *Chanticleer*, effected a landing on one of the coastal islands, Hoseason Island off West Graham Land, and deposited there a copper cylinder in which was a document taking possession in the name of King George IV".<sup>318</sup>

In Singapore's analysis, this

"is proposed as an act more substantial in character (perhaps because it is supposedly 'formal') than the pattern of British Government activities concerning Pedra Branca which are detailed in Chapter V of the Singapore Memorial. In this context the Court is asked to consider that a process lasting more than four years, and involving the appropriation of an island and the construction of a major lighthouse for State purposes, as evidence of *animus occupandi*, should carry less weight legally than the 'formal' deposit of a cylinder containing a document".<sup>319</sup>

This is the only place in Singapore's Counter-Memorial where it attempts to explain the purported intention to acquire sovereignty by Britain over PBP. The following remarks may be made in response to this curious reasoning.

208. What the example of Antarctica (one of many) shows, is that Britain, like other States, explicitly displayed its intention to acquire sovereignty, even in a region such as Antarctica, at about the same time as the construction of the lighthouse. It is Singapore that relies heavily on a single doctrinal quotation (indeed this constitutes its main source of evidence) that refers to Antarctica as an example in which annexation was unnecessary and "the unilateral manifestation of the will of the Crown may also be the only means by which a territory has been brought within Her Majesty's Dominions".<sup>320</sup> But that is not

<sup>318</sup> ICJ Pleadings, Antarctica Cases (*United Kingdom v Argentina; United Kingdom v Chile*), 4 May 1955, p. 12, para. 10, p. 52, para. 10.

<sup>319</sup> SCM, p. 80, para. 5.22.

<sup>320</sup> Roberts-Wray, K., *Commonwealth and Colonial Law* (1966), pp. 107-108, in SM, para. 5.90 and SCM, para. 5.6.

the British position as declared before this Court. In its Application in the *Antarctica* cases, there was an explicit declaration by the United Kingdom that the territory had been taken in possession in the name of the King. This was indeed a “unilateral manifestation of the will of the Crown”. Nothing of the sort occurred in respect of PBP. There was no “unilateral manifestation of the will of the Crown” to acquire sovereignty at all.

209. Singapore argues without any supporting evidence that the process of construction of the lighthouse amounted to the “appropriation” of the island. On the contrary, as demonstrated by Malaysia, the East India Company only declared that Horsburgh Lighthouse was its property.<sup>321</sup> As has been shown, until comparatively recent times Johor’s subjects continued to use the island for their traditional purposes; the 1851 instructions to the light-keepers were only not to allow them to enter the lighthouse.<sup>322</sup>

210. Singapore contends that the construction of the lighthouse was made “for State purposes”. It is not clear what “State purposes” Singapore is here referring to. In reality, the purpose of the construction of the lighthouse was widely known and affirmed by the British authorities on many occasions, that is, the safety of navigation at the entrance of Singapore Strait.<sup>323</sup> It had nothing to do with sovereignty or any alleged “State purpose”.

211. Singapore tries to approximate a formal annexation by analogy to the copper cylinder containing a document taking possession in the name of King which was deposited in the *Antarctica* case. Singapore observes in its Counter-Memorial that some items like “British coins, copies of the official trade and revenue figures of the Straits Settlements and a plan of the Town of Singapore were deposited on Pedra Branca during the inauguration ceremony”.<sup>324</sup> Other items reported by Thomson’s *Account*, such as copies of Horsburgh’s Directory and of the *Free Press* (the same newspaper that had reported in 1843 that PBP belonged to Johor), the *Straits Times* and the *Journal of the Indian Archipelago and Eastern Asia*, are not mentioned by Singapore. Apparently it selects among the items deposited in an attempt to stress the supposedly “official” character of the deposited objects.<sup>325</sup> It is true that these items were deposited under the

<sup>321</sup> East India Company, Act N° 6, 1852 (MM Annex 84; SM Annex 59).

<sup>322</sup> MM, paras. 94, 143-145; MCM, paras. 516-529.

<sup>323</sup> See MM, paras. 152-154.

<sup>324</sup> SCM, para. 5.27.

<sup>325</sup> See J.T. Thomson, *Account of the Horsburgh Lighthouse*, p. 428; SM Annex 61, p 531.

foundation stone, together with a copper plate whose inscription plainly summarises the content and purpose of the ceremony. See Figure 14 on the following page. Clearly, the act in question had nothing to do with sovereignty.

212. According to Singapore, “[i]f, as Malaysia has argued, the deposit of a cylinder in the Antarctica case fulfils the requirements of formality, it is illogical to claim that the deposit of these items on Pedra Branca does not similarly fulfil this requirement”.<sup>326</sup> But what is important in the case of Captain Foster’s action in Antarctica in 1829 is not the deposit of the cylinder itself, but that it contained “a document taking possession in the name of King George IV”.<sup>327</sup> Unfortunately for Singapore’s argument, there is one crucial document that is lacking amidst the coins and papers deposited under the foundation stone: a declaration of the taking of possession of PBP on behalf of the British Crown.

213. Against this background it is worth recalling how John Crawfurd described the taking of possession of the islands and islets situated within the ten mile radius to the Island of Singapore in his letter to the Secretary to the Government of India of 16 August 1825:

“In obedience to the instructions contained in your letter of the 13<sup>th</sup> of January directing that the Islets or Islands in the Straits of Singapore should be taken possession of on the part of the British Govt. as well as in conformity to the Treaty concluded on the 2<sup>nd</sup> of August last with the native Princes, I have the honour to report that having taken up a convenient Ship for the purpose, I circumnavigated the Island of Singapore, and took possession, with the necessary formalities, of all the Islands lying within 10 miles of the main Island of Singapore which includes those forming the Northern boundary of the Straits of that name.”<sup>328</sup>

214. From this letter as from all the other cases cited, it is clear what the pattern of British practice was:

- (a) The acts of taking of possession of those islands and islets occurred after instructions from the superior authorities to do so.

<sup>326</sup> SCM, para. 5.27.

<sup>327</sup> See above, para. 207.

<sup>328</sup> This Reply, vol. 2, Annex 5.

Figure 14

Photographical reproduction of the inscription on the copper plate which appears in  
J. T. Thomson, "Account of the Horsburgh Lighthouse", (1852) 6 *Journal of the  
Indian Archipelago and Eastern Asia*, Series 1, 428

In the Year of our Lord 1850,  
and  
In the 13th Year of the Reign of  
VICTORIA,  
QUEEN of Great Britain and Ireland,  
The Most Noble  
JAMES ANDREW MARQUIS of DALHOUSIE, K. T.  
being Governor-General of British India,  
The Foundation Stone  
of the Light-house to be erected on Pedra Branca,  
and dedicated to the Memory of the Celebrated  
Hydrographer JAMES HORSBURGH, F. R. S.  
was laid on the 24th day of May, the anniversary  
of the Birth-day of Her Most Gracious Majesty,  
by the  
Worshipful Master M. F. DAVIDSON, Esq.  
and the  
Brethren of the Lodge Zetland in the East  
No. 748.

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

J. T. Thomson,  
*Architect.*

- (b) In Crawford's words, this act is accomplished "with the necessary formalities": these included the planting of the Union Jack and the firing of a 21 gun salute.<sup>329</sup>
- (c) The taking of possession of those islands on behalf of the Crown was later communicated to the superior authorities.

The contrast with what happened (or, more accurately, what did not happen) on PBP is striking.

215. Perhaps aware of the clear contradiction between what Singapore argues with regard to PBP and the British practice concerning the taking of possession of territory with the intention to acquire sovereignty, Singapore contends that "the applicable law is general international law and not British practice".<sup>330</sup> But general international law (then and now) required a clear manifestation of an intention to acquire sovereignty. At issue is whether Great Britain manifested such an intention in this case. Its practice in analogous cases at the same time is both highly material and revealing.

216. Singapore has been unable to produce a single piece of evidence that the British government considered that through a "taking of lawful possession" it had acquired sovereignty over PBP. British official attitudes in Singapore a century later reveal that for more than one hundred years Britain had not considered itself as having sovereignty over PBP due to a "taking of lawful possession" or otherwise.<sup>331</sup> The theory was invented for the purposes of Singapore's Memorial.

#### **B. Events which occurred on or related to PBP in 1850**

217. In an attempt to mask the fact that there was no act of taking of possession of PBP by Britain, Singapore attempts to present acts that were not concerned with sovereignty at all as "official" acts, and in turn to assimilate such "official" acts with those manifesting an intention to establish British sovereignty over PBP. This is another *non sequitur*. For it is obvious that not all official acts performed by State authorities have as their consequence the establishment of, or the manifestation of, sovereignty. There is no need

<sup>329</sup> MM, paras. 57 & 160.

<sup>330</sup> SCM, para. 5.9.

<sup>331</sup> See MM, paras. 237-239; MCM, paras. 139 & 506.

to dwell on this. Examples of official acts performed by States on foreign territory are numerous all around the world.

218. Singapore's difficulties with its case do not, however, stop here. In some cases, Singapore presents acts not having a public character as public. This is the case in respect of the major event which would have been the best occasion for the purported taking of possession of PBP on behalf of the British Crown to take place—the laying of the foundation stone of the lighthouse through a Masonic ceremony on 24 May 1850. In another case, Singapore relies on an imaginary British permission allowing the Temenggong to visit PBP. Yet again Singapore is at pains to accommodate the idea of the British requesting the Temenggong to establish an authority on Point Romania to provide security to the lighthouse and its keepers to its theory of “exclusive control of public order” in and around PBP. These three items will be dealt with in turn.

(i) *The ceremony of 24 May 1850 was a Masonic one*

219. Singapore recognises that in principle a Masonic ceremony does not constitute an official act. Nonetheless, it argues that the ceremony of the laying of the foundation stone on 24 May 1850 was an official one.<sup>332</sup> There is much evidence to the contrary.<sup>333</sup> Singapore asserts that the ceremony took place “under the control and the auspices of the British Crown, in the person of Colonel W.J. Butterworth, the Governor of the Straits Settlements”.<sup>334</sup> The use of the word “control” is an exaggeration. The Masonic ceremony was performed in accordance with the rites of Freemasonry, excluding any governmental control. All the published accounts are consistent on this.<sup>335</sup> That it took place under the auspices of Governor Butterworth does not necessarily afford it an official character. A Government can organise or assist in events not having an official character. English Freemasonry was closely linked to the Crown and governing circles on a personal basis,<sup>336</sup>

<sup>332</sup> SCM, paras. 5.117 & 5.113.

<sup>333</sup> MM, paras. 152 & 155-156 & Annex 57; SM Annex 45; J.A.L. Pavitt, *First Pharos of the Eastern Seas. Horsburgh Lighthouse*, Singapore: Singapore Light Dues Board by Donald Moore Press, 1966, pp. 23-30.

<sup>334</sup> SCM, para. 5.113.

<sup>335</sup> J.A.L. Pavitt, *First Pharos of the Eastern Seas. Horsburgh Lighthouse* (Singapore: Singapore Light Dues Board by Donald Moore Press, 1966), pp. 23-30; MM Annex 57; SM Annex 45.

<sup>336</sup> The United Grand Lodge of England had the Duke of Sussex (son of King George III) as first Grand Master in 1813. Albert Edward, Prince of Wales (later King Edward VII) was elected Grand Master in 1874 (<http://www.grandlodge-england.org/ugle/the-history-of-grand-lodge-1.htm>, visited on 30 September 2005).

but this well-known fact does not transform Freemasonry into an institution having an official character. J.T. Thomson was a Freemason, as were many of the merchants who were members of the Singapore Chamber of Commerce and subscribers to the Horsburgh Fund, including T.O Crane and W. Napier.<sup>337</sup>

220. Contrary to Singapore's presentation, this was not a ceremony conducted by Governor Butterworth in the presence of the Worshipful Master of the Lodge Zetland in the East, Mr. Davidson: it was a ceremony conducted by the Worshipful Master in the presence of the Governor. The copper plate celebrating the event could not be clearer. It explains that the foundation stone of the lighthouse dedicated to the memory of James Horsburgh was laid by the Worshipful Master of the Lodge Zetland in the East, M.F. Davidson, *in the presence of the Governor of the Straits Settlements and many of the British and foreign residents of Singapore.*<sup>338</sup> See Figure 14 on page 115 above.

221. Singapore cites as evidence of the "official" character of the ceremony the fact that the party went to PBP on Government-provided vessels.<sup>339</sup> But the use of official means of transport to attend an event does not transform the event into an official one. What is essential is the event itself. As can be seen, the evidence furnished by both sides describes the ceremony of 24 May 1850 as Masonic, not official.

222. To defend its curious vision of the "official act" involving the laying of the foundation stone, Singapore invokes the presence of a chaplain amongst the persons invited to attend. According to Singapore, "The analogy is useful because, whilst it is clear that a religious element is not as such 'an official act', prayers are a normal concomitant of official ceremonies in many parts of the world."<sup>340</sup> But the presence of a chaplain amongst a party made up from the British and foreign residents of Singapore has no legal significance at all. The fact that prayers are "a normal concomitant of official ceremonies in many parts of the world" does not explain what happened on 24 May 1850:

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Arthur Wellesley, Duke of Wellington, was initiated in 1790 and, having visiting Prince of Wales Island colony in 1797, ranks as the second known Freemason in what is now Malaysia. Stamford Raffles, the creator of the British settlement in Singapore, was also a Freemason (Christopher Haffner, "Eastern Masonic Frontiers before the Union", *Ars Quatuor Coronatorum, Transactions of Quatuor Coronati Lodge No. 2076*, London: Butler & Tanner, 1991, vol. 104, pp. 21-22 and 24-27).

<sup>337</sup> Charles Burton Buckley, *An Anecdotal History of Old Times in Singapore*, Singapore: Fraser & Neave (1902), reprinted in Kuala Lumpur: University of Malaya Press (1965), p. 437; this Reply, vol. 2, Annex 18.

<sup>338</sup> J.T. Thomson, *Account of the Horsburgh Lighthouse*, p. 428; SM Annex 61, p 531.

<sup>339</sup> SCM, para. 5.113.

<sup>340</sup> SCM, para. 5.117.



the question is whether the prayer by the chaplain was a "concomitant" of an official ceremony. This was not the case. According to all descriptions, the prayer was simply a concomitant to the only ceremony that took place, the Masonic one. In fact the ceremony is still considered by Singapore's Freemasonry as one of the "Major Masonic events in South East Asia in the past 150 Years".<sup>341</sup>

223. Singapore attaches much significance to the fact that the Worshipful Master of the Lodge Zetland in the East, Mr. Davidson, in his discourse for the laying of the foundation stone, affirmed: "May the All Bounteous Author of Nature bless our Island, of which this Rock is a dependency, with Corn, Wine and Oil, and with all the necessary comforts and conveniences of life." Malaysia has already referred to his discourse.<sup>342</sup> In its Counter-Memorial, Singapore qualifies this statement as a "political attribution".<sup>343</sup> But Mr. Davidson, a private merchant of Singapore, had no authority to make any "political attribution" at all. His language was vague and did not involve any reference to sovereignty. What is more relevant is that Governor Butterworth did not make any such statement or endorse that made by Mr. Davidson. The 1849 "Map of Singapore Island and its Dependencies" drawn by J.T. Thomson does not contain any inset showing PBP as a "dependency".<sup>344</sup>

224. The Singapore Counter-Memorial argues that the absence of reaction from the Sultan and the Temenggong to the publication by the *Singapore Free Press* and the *Straits Times* of what Mr. Davidson said is relevant. In fact, neither Davidson's reference to a "dependency" nor the lack of reaction is relevant. As explained, Davidson was an individual not acting in any official function; neither at that time nor today does a government need to react to a statement made by a private individual and published in the press. Moreover, for the Sultan and the Temenggong the situation was clear: they had granted permission to the British authorities to construct the lighthouse. Since the British authorities' actions were directed to that purpose, there was nothing to protest or object to.

<sup>341</sup> <http://web.singnet.com.sg/~masonry/eventsea.htm>, visited on 30 September 2005. See vol.2 of this Reply, Annex 25.

<sup>342</sup> MCM, paras. 70-71.

<sup>343</sup> SCM, para. 5.116.

<sup>344</sup> MM Map Atlas, Map 8.

225. Governor Butterworth's speech followed that of the Worshipful Master of the Lodge. It is clear evidence not only that there was no intention to acquire sovereignty over PBP, but also that the construction of the Horsburgh Lighthouse did not even have the character of an exclusive enterprise of the East India Company, as Singapore asserts. Governor Butterworth explained the participation of the EIC and his presence in the ceremony in the following terms:

"I should be wanting in justice to the mercantile community and mariners in China if I omitted to notice what you mentioned of their liberality for their donations towards the Horsburgh testimonial, which magnified by the munificence of Messrs. Jardine, Matheson and Co., in allowing compound interest on the sum raised in 1842, most certainly enabled me to call upon the Government of India for aid in this matter. The call was readily responded to and favourably received by the Hon'ble Court of Directors as our presence here this day bears evidence."<sup>345</sup>

226. As reported in the Malaysian Memorial, a similar Masonic ceremony occurred with regard to the laying of the foundation stone of Raffles Lighthouse on Coney Island (Pulau Satumu) in 1854.<sup>346</sup> By virtue of the 1824 Crawford Treaty this is a Singaporean island, taken in possession by a formal act in 1825. For Singapore, this reference "is a mere distraction precisely because in that case sovereignty was not involved".<sup>347</sup> Again, this misses the point. The fact that identical Masonic ceremonies were accomplished with regard to the two lighthouses shows that "sovereignty was not involved", not only in the case of Raffles Lighthouse but of Horsburgh as well.

227. Governor Butterworth's request to the Worshipful Master of the Lodge Zetland in the East on 9 March 1854 to perform the ceremony on Pulau Satumu provides a full explanation of the nature of the act:

"I had occasion in 1850, to solicit the exercises of your Craft in laying the foundation Stone of *the most Philanthropic work, the Horsburgh Light House* which has been in full operation at Pedra Branca for the past two years *to the benefit of the Mariner* in these Seas.

2. I am now desirous of again enlisting the services of the Lodge Zetland in the East *in a similar undertaking* I allude to the Light House about to be

<sup>345</sup> Pavitt, J.A.L., op. cit., p. 29.

<sup>346</sup> MM, para. 155.

<sup>347</sup> SCM, para. 5.119.

constructed on the 'Coney', in the immediate vicinity of this Island, by the Hon'ble East India Company."<sup>348</sup>

228. In another letter after the laying of the foundation stone of Raffles Lighthouse, Governor Butterworth said:

"I cannot close this communication without expressing the gratification I experience at having my name associated with that of the Lodge Zetland in the East in connexion with *two such Philanthropic works as the Horsburgh and Raffles Light Houses*."<sup>349</sup>

229. Indeed, Singapore itself ends up acknowledging the limited scope of those events: "The ceremonies *merely underscored* the solemnity of the occasion".<sup>350</sup> In order to diminish the impact of the fact that the 1850 ceremony in no way implied an assertion of sovereignty, Singapore seems to have retreated from its earlier position on the Masonic ceremony. In its Counter-Memorial, it asserts that British sovereignty existed even before the beginning of the construction of the lighthouse, and that "it would have been unnecessary to use the inauguration ceremony as the juncture at which sovereignty would be claimed. Sovereignty already existed. The first unequivocal acts of possession occurred in 1847 when Thomson placed the brick pillars on Pedra Branca."<sup>351</sup> Similarly it asserts that "the ceremony on Pedra Branca took place in May 1850, by which time the British Crown had already taken possession of Pedra Branca".<sup>352</sup> The lack of any basis for this argument was underlined earlier.<sup>353</sup>

230. Summing up, the Singapore Counter-Memorial confirms that the ceremony of laying the foundation stone of Horsburgh Lighthouse was not an act of taking of possession. Despite its efforts to suggest that the ceremony had an official character, it was a Masonic one and did not concern sovereignty at all.

<sup>348</sup> Annex 16, vol. 2 of this Reply (emphasis added). For the similar letter sent by Governor Butterworth to the Worshipful Master with regard to Horsburgh Lighthouse, see MM Annex 56.

<sup>349</sup> Letter from Governor W.J. Butterworth to the Worshipful Master of the Lodge Zetland in the East dated 12 August 1854: this Reply, vol. 2, Annex 17.

<sup>350</sup> SCM, para. 5.120 (emphasis added).

<sup>351</sup> SCM, para 5.112.

<sup>352</sup> SCM, para. 5.120.

<sup>353</sup> Above, para. 194.

(ii) *The Temenggong's presence on PBP in June 1850*

231. In its Memorial, Malaysia referred to the significance of the presence of the Temenggong with 30 of his subjects on PBP just eight days after the laying of the foundation stone of the lighthouse and the beginning of the construction work.<sup>354</sup>

232. In order to diminish the importance of that presence, Singapore invents the theory that the Temenggong was on PBP by reason of being "invited" by the British Government.<sup>355</sup> To support this theory, it attaches considerable significance to the fact that the Temenggong went to PBP in a sampan belonging to Governor Butterworth, a fact which (it complains) Malaysia did not mention in its Memorial. Indeed, Pavitt's *Horsburgh Lighthouse* book, published by the Singapore Light Dues Board, which also reproduces Thomson's account, does not mention this fact.<sup>356</sup> Equally, Thomson's biographical book on his life and action in Singapore, published by the National Museum Singapore, does not mention it either, while mentioning the Temenggong's presence on PBP during the construction work.<sup>357</sup>

233. Singapore asserts in its Counter-Memorial that the Temenggong visited PBP "with British permission" and "at the British Governor's invitation". There is no trace whatsoever of any such "permission" or "invitation" in the record. Thomson's account does not refer to any invitation or permission granted to the Temenggong to visit PBP. The quoted text neither explicitly nor implicitly suggests that the Temenggong came to PBP because he was invited, or that permission was granted to him.

234. In its Counter-Memorial, Singapore transforms what Thomson described as "a beautiful fast sailing sampan belonging to the Governor of the Straits Settlements" into "the British Governor's boat".<sup>358</sup> The Governor's boat was the *Hooghly* and was not a sampan. It is only on the basis of this unsupported supposition on Singapore's part that Singapore infers that the British Government "invited" the Temenggong and gave "permission" for him to visit PBP. But the fact that the Temenggong used a sampan that

<sup>354</sup> MM, paras. 148-150.

<sup>355</sup> SCM, para. 5.103.

<sup>356</sup> J.A.L. Pavitt, *op. cit.*, p. 32.

<sup>357</sup> John Hall-Jones & Christopher Hooi, *An Early Surveyor in Singapore. John Turnbull Thomson in Singapore 1841-1853*, Singapore: National Museum Singapore, 1979, pp. 15-16: vol. 2 of this Reply, Annex 22.

<sup>358</sup> SCM, para. 5.104.

belonged to the Governor does not mean that its destination was British territory. For example, for the Masonic ceremony concerning Raffles Lighthouse, a vessel belonging to the Sultan of Lingga was used to carry the members of the Lodge Zetland in the East. On another occasion a vessel of the Temenggong of Johor was used by Singapore merchants to go to Rhio.<sup>359</sup> None of this carried any connotation of a concession of sovereignty.

235. In his *Account*, Thomson mentions that “[a]bout ten other small sampans composed his fleet”.<sup>360</sup> For Thomson, this was the Temenggong’s fleet, not the Governor’s. Thomson went on to explain that “[t]he Singapore sampan is famed over the world for its fleetness in either pulling or sailing; manned with the orang laut (men of the sea) they have successfully competed with the fastest gigs or wherries from England, brought out on purpose for the contest.”<sup>361</sup>

236. As is recorded, the Temenggong arrived at PBP the same day as J.T. Thomson, i.e. 2 June 1850. To judge from Thomson’s *Account*, they did not come together.

237. Singapore goes on to imagine that the British marine ensign “was flying on Pedra Branca” at the time of the Temenggong’s recorded presence. The only evidence is Thomson’s painting reproduced in the Singapore Memorial.<sup>362</sup> Leaving aside the question of the evidentiary value of these paintings,<sup>363</sup> nothing supports the contention that they were painted at the time when the Temenggong was present. Moreover, as explained in Malaysia’s Counter-Memorial,<sup>364</sup> the marine ensign is not a symbol of territorial sovereignty, and Thomson’s presence on PBP in order to construct the lighthouse had its ground in Johor’s permission. As Thomson himself explained in his letter to Resident Councillor Church of 20 July 1851, detailing all the requirements for the operation of the lighthouse and ancillary activities, “The Light house flag I presume is different from the national one.”<sup>365</sup>

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<sup>359</sup> Charles Burton Buckley, *An Anecdotal History of Old Times in Singapore*, Singapore: Fraser & Neave (1902), reprinted in Kuala Lumpur: University of Malaya Press (1965), pp. 520 and 546: vol. 2 of this Reply, Annex 18.

<sup>360</sup> Emphasis added, J.T. Thomson, *Account of the Horsburgh Lighthouse*, p. 430: SM Annex 61, p. 533.

<sup>361</sup> Ibid.

<sup>362</sup> SCM, para. 5.106.

<sup>363</sup> See MCM, para. 133.

<sup>364</sup> MCM, paras. 129, 132-133 & 386-392.

<sup>365</sup> Letter from J.T. Thomson to T. Church dated 20 July 1851: SM Annex 54.

238. While referring to the fact that the Temenggong was "allied to British interests", Singapore omits the previous political reference made by J.T. Thomson in the first part of the same sentence.<sup>366</sup> The whole sentence reads as follows: "He is the most powerful native chief in these parts, allied to British interests". The previous sentence reads: "On the same day his highness the Tomungong of Johore visited the rock, accompanied of 30 of his followers". The sentence that follows the reference to the Temenggong being the most powerful native chief in these parts, comments: "He remained at my house for two days, employing his leisure in fishing, to which sport he is greatly devoted". The ordinary meaning of the words employed by Thomson in their context leads to the unavoidable conclusion: "these parts" cannot but include PBP.

(iii) *Plans for the establishment of a station on Point Romania to protect Horsburgh Lighthouse*

239. Close to the time of the inauguration of the lighthouse, the question arose as to the best way to protect it as well as the keepers. Those involved in the construction of the lighthouse discussed two possibilities: establishing a station with a military presence in or near Point Romania or requesting the Temenggong to establish a village under the authority of a reliable village chief (Panghooloo) in the same place. Fighting piracy in the region was also envisaged as a task for the force that would be established there. This emerges from J.T. Thomson and T. Church's letters of 2 November 1850 and 7 November 1850 respectively.

240. Thomson proposed "the erection of a station on that point [Point Romania] in which an armed party of not less than 14 men and two boats could be placed one a fast pulling boat for inshore duty and the other a safe built boat for sea duty. Here a constant watch could be maintained on the light house and their rapid presence could be had at the rock in case of need."<sup>367</sup>

241. The Resident Councillor of Singapore, Thomas Church, responded as follows:

<sup>366</sup> SCM, para. 5.104.

<sup>367</sup> Letter from J.T. Thomson, Government Surveyor, to T. Church, Resident Councillor, 2 November 1850: MM Annex 58; SM Annex 47.

"I observe Mr. Thomson advocates the Establishment of a station near Point Romania, for the purpose of offering assistance to the inmates of the Light House in case of need, and also to suppress Piracy, an armed party of the strength suggested would, doubtless, be of some service, but I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an Establishment must necessarily occasion, Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction, it will, of course be necessary for the Steamer or Gun boats to visit Pedro Branca weekly, some benefit would also accrue by requesting His Highness the Tamoongong to form a village at Romania under the control of a respectable Panghooloo to render assistance to the inmates of the Light House in case of emergency".<sup>368</sup>

242. Singapore relies heavily on Church's letter, pretending that it provides evidence that Britain had sovereignty over PBP. Singapore "achieves" this result through *a contrario* reasoning: "The text of Church's response of 7 November 1850 confirms the contrast between Point Romania, which 'belongs to the Sovereign of Johore, where the British possess no legal jurisdiction', and the status *a contrario* of Pedra Branca where the British do possess legal jurisdiction."<sup>369</sup>

243. Malaysia has already responded to this untenable supposition.<sup>370</sup> Church's letter neither explicitly nor implicitly affirms that the British had jurisdiction over PBP and the Temenggong not. On the contrary, it was Church himself who envisaged the Temenggong's exercise of authority to protect the lighthouse and light-keepers on PBP. In reality, what was at stake was the establishment of a permanent station with armed presence "near Point Romania". At no time was the establishment of such a force envisaged on PBP itself. The alternative was not between establishing a British military presence either on Point Romania or on PBP. The alternative was to request Johor's authorisation to establish that presence near Point Romania or to ask the Temenggong to create a village under a respected authority in the same area. Singapore's *a contrario* argument is groundless.

<sup>368</sup> Letter from T. Church, Resident Councillor, to W.J. Butterworth, Governor of Prince of Wales Island, Singapore and Malacca, 7 November 1850: MM Annex 59; SM Annex 48.

<sup>369</sup> SCM, para. 5.89. See also a similar reasoning in para. 4.56: "The real significance of Church's letter is that he, the most senior British official in Singapore after the Governor, drew a clear distinction between mainland Johor (Point Romania) where the British possessed no legal jurisdiction, and Pedra Branca where the British had jurisdiction (and the Temenggong had none)."

<sup>370</sup> MCM, para. 111.

244. Moreover, it must be recalled that during the construction work, Point Romania was frequently used by the British, including with gunboats, without any specific permission.<sup>371</sup> The reason is very simple. The Sultan and the Temenggong had already given authorisation to construct the lighthouse; consequently, activities performed with such aim were covered by that authorisation. What was discussed by Thomson and Church here was different: the establishment of a permanent station in Johor's territory.

245. Singapore stresses that what Church discussed in his letter was "the necessity of establishment of a station *on the mainland* at Point Romania".<sup>372</sup> This is a distortion of what Church actually wrote. He described the place as "near Point Romania" or simply "Romania". It is also in contradiction with previous Singaporean interpretation of the expression "near Point Romania" as used by the Temenggong. In its previous interpretation, Singapore attributed to this expression the meaning of the Romania Islands.<sup>373</sup> Indeed, given the nature of the envisaged activity, involving gunboats aiming at securing the light-keepers and suppressing piracy in the region, "near Point Romania" means both Johor's land and waters.

246. To sum up, the discussion of the establishment of an armed station or a village on or near Point Romania in order to protect the lighthouse constructed on PBP shows that:

- (a) PBP is a place "near Point Romania";
- (b) the establishment of a permanent British station with an armed party near Point Romania to protect the lighthouse and fight against piracy would have required Johor's permission;
- (c) the British officials directly in charge of the construction of Horsburgh Lighthouse envisaged ensuring its security and that of the light-keepers through the authority of the Temenggong of Johor.

<sup>371</sup> MCM, para. 108.

<sup>372</sup> SCM, para. 4.55 (Singapore's emphasis). Equally, para. 4.56 insists that Thomson's and Church's letters "addressed the proposal to establish an aid station on *mainland Johor*" (Singapore's emphasis).

<sup>373</sup> SCM, para. 5.70. Singapore also misconstrues Malaysia's statements with regard to Thomson's and Church's letters and essentially ends up rebutting arguments which have never been made by Malaysia (SCM, paras. 4.55-4.56). In reality, what Malaysia maintains is what clearly emerges from the Church and Thomson letters: that the establishment of a permanent armed station near Point Romania would have required Johor's authorisation and that in order to provide protection to the lighthouse and its inmates, Resident Councillor Church envisaged requesting the Temenggong to do so by establishing a subordinated authority "at Romania".



### C. There is no evidence of British intention to acquire sovereignty

247. Singapore acknowledges in its Counter-Memorial that the intention of acquiring sovereignty is essential and qualifies this requirement as “the key legal principle” or “the governing principle”.<sup>374</sup> Equally, while examining the relevance of the construction of lighthouses for the acquisition of sovereignty, Singapore affirms that “[t]he criterion is not based upon an abstract proposition to the effect that navigational aids are, or are not, manifestations of sovereignty, but consists of the intention to acquire sovereignty as revealed in the relevant circumstances”.<sup>375</sup>

248. The previous section of this Chapter has demonstrated the key role that the subjective element (*animus*, intention) plays when a State takes possession of territory aiming at the acquisition of sovereignty. British practice in this regard has consistently been presented. Malaysia has also demonstrated the very limited function that the construction of lighthouses or other aids to navigation plays in the acquisition of sovereignty; there is no need to further elaborate on this point either.<sup>376</sup> The purpose of these devices is to help navigation. Their construction cannot be enough to show an intention to establish sovereignty. Following the case law quoted in previous Malaysian pleadings, it can be said that there is a presumption against an intention to acquire sovereignty over territory on which aids to navigation are constructed.<sup>377</sup>

249. Singapore did not include any evidence in its Counter-Memorial showing that the intention of the British Crown was to acquire sovereignty over PBP. The present section of this Chapter need, therefore, only briefly analyse (i) some aspects of the actual British intention while constructing the Horsburgh Lighthouse, and (ii) the distinction between ownership of the lighthouse and sovereignty over the territory where it is located.

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<sup>374</sup> SCM, paras. 5.4 & 5.7.

<sup>375</sup> SCM, para. 5.122.

<sup>376</sup> MM, paras. 171-175; MCM, paras. 201-237.

<sup>377</sup> Singapore’s attempt to give the idea of a contradiction in Malaysia’s present position with the one it adopted in the *Pulau Ligitan and Pulau Sipadan* case is clumsy (SCM, paras. 5.123 & 5.128). There is no contradiction at all. Malaysia was very clear during the proceedings in its case with Indonesia. It clearly and explicitly stressed that the construction of lighthouses *with the knowledge and the consent of the other State* are not considered to be an act *à titre de souverain* in respect of the location of the light (*Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Reply of Malaysia, paras. 5.25 & 5.26). In its Memorial, Malaysia has already clearly indicated the main differences between the *Ligitan and Sipadan* case and the present one (MM, p. 80, para. 175).

(i) *The actual British intention in constructing the lighthouse*

250. According to Singapore, “the existence of intention depended on the provision of evidence but no particular formalities were called for. This was the position in the British practice of the time”.<sup>378</sup> Singapore assumes that “[i]n the circumstances, the intention of the British Crown was to establish sovereignty”.<sup>379</sup> There is just a laconic *renvoi* to the Singapore Memorial, which is said to contain “a variety of proofs of intention”.<sup>380</sup> But the fact is that so far Singapore has been unable to produce *any* evidence showing that the intention of the British government was to acquire sovereignty over PBP by the construction of the lighthouse. On the contrary, the records submitted by both Parties clearly show that the intention behind the construction of the lighthouse had nothing to do with the acquisition of sovereignty, but was to aid navigation in the Strait while honouring James Horsburgh. All the so-called “evidence” invoked by Singapore has been rebutted in Malaysia’s Counter-Memorial.<sup>381</sup>

251. Singapore argues that “the unilateral manifestation of the will of the Crown is a sufficient basis of title”.<sup>382</sup> But even assuming that this could be correct in principle as a general statement, *quod non*, in the case of PBP there was no “unilateral manifestation of the will of the Crown” to acquire sovereignty at all. This is enough in itself to reject Singapore’s claim. The records do not show any fact, proclamation, declaration, legislative act or other possible way by which the Crown manifested an intention to acquire sovereignty. The operation of the lighthouse is not a sufficient basis from which to deduce such an intention. As acknowledged by both Parties, the Straits Settlements operated—and Singapore still continues to operate—lighthouses in foreign territory.

252. Indeed, Singapore’s Counter-Memorial even provides new evidence that the intention of the British authorities in constructing the lighthouse had not at all been the

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<sup>378</sup> SCM, para. 5.5.

<sup>379</sup> SCM, para. 5.3.

<sup>380</sup> SCM, para. 5.27.

<sup>381</sup> MCM, paras. 93-134. As demonstrated, it consists only of the laying of the foundation stone, the construction of the lighthouse by the East India Company, the visits of official agents, the display of the marine ensign and the panel placed in the visitors’ room. Not one of these acts proves that intention at all. Other facts invoked by Singapore are not substantiated by any evidence, such as the “maintenance of public order” on the island.

<sup>382</sup> SCM, para. 5.7.

acquisition of sovereignty. An example is the letter from Governor Butterworth to Captain Edward Belcher of *H.M.S. Samarang*, dated 2 October 1844. Butterworth wrote:

"I have the honor to acknowledge the receipt of your letter under date the 1<sup>st</sup> Instant, in reply to my communication of the 20<sup>th</sup> April last, soliciting the favor of your opinion as to *the most advantageous site for the erection of a Light House with a view of carrying out the Philanthropic intention of the committee for a testimonial to the memory of the late celebrated Hydrographer James Horsburgh Esquire.*"<sup>383</sup>

253. Visits by British officials to PBP in no way constitute an expression of the intention to acquire sovereignty.<sup>384</sup> For example, Governor Butterworth himself went to Point Romania with the purpose of deciding the best location for the construction of the Horsburgh Lighthouse. Point Romania was (and is) part of Johor and Britain had no intention to acquire sovereignty over it. The letter from Butterworth to Captain Belcher of 2 October 1844, quoted above, concluded with the following request:

"In the course of a few days I intend to visit Point Romania in the steamer when I shall request the favor of your attendance in furtherance of the Philanthropic resolution of the committee for the Horsburgh testimonial."<sup>385</sup>

254. The correspondence clearly shows that no distinction in the nature of the intention of the British authorities was made when they dealt with the different options envisaged for the location of the Horsburgh Lighthouse. In deciding in favour of the latter, the Admiralty gave the following reasons:

"I am commanded by their Lordships to request that you will state to the Court of Directors that the proper position of this Light is a question of great importance not only to the safety of her majesty's Fleet but also to the welfare of all Mariners that frequent the China Seas – and my Lords are inclined to think that Pedra Branca is the best point for the Light House and for the following reasons :-

- 1<sup>st</sup> Because that Islet stands nearly in the middle of the Entrance of the Straits;
- 2<sup>nd</sup> Because it may be freely approached by running down its latitude;
- 3<sup>rd</sup> Because its conspicuous appearance at the distance of 9 or 10 miles renders it the usual Beacon by which all vessels endeavour to make the Straits and by the addition of a Light it would be rendered equally serviceable by night; and
- 4<sup>th</sup> Because when a vessel has passed it, the stern bearing of the Light would enable him to shape a safe course to Singapore."<sup>386</sup>

<sup>383</sup> SCM Annex 9 (emphasis added).

<sup>384</sup> MCM, para. 123.

<sup>385</sup> SCM Annex 9.

<sup>386</sup> MM Annex 50.

255. Nothing in this can be assimilated to the slightest intention to acquire sovereignty. The contrast with Admiralty instructions to take possession of territory with the purpose of acquiring sovereignty given in actual cases of takings of possession is clear.

256. Summing up, Singapore is still unable to advance any evidence that the intention of the British authorities by constructing the Horsburgh Lighthouse was the acquisition of sovereignty over PBP. Moreover, Singapore provides no examples of a British assertion of sovereignty over territory where the *intention to do so was not explicitly recorded* in some way. On the contrary, the records submitted by both parties clearly show that the intention of that construction had nothing to do with the acquisition of sovereignty. The real intention, quite simply, was to provide safety to vessels navigating the entrance to the Strait while paying tribute to James Horsburgh. The word that came up repeatedly in the reasons given for the construction of the lighthouse was not sovereignty, but philanthropy.

(ii) *The distinction between ownership of the lighthouse and sovereignty over PBP*

257. Singapore did not contradict the general distinction made by Malaysia in its Memorial between sovereignty and ownership.<sup>387</sup> The records show that if there was any British intention to acquire something through the construction of the lighthouse, it was ownership of the lighthouse, not sovereignty over PBP. The correspondence with Johor's authorities did not concern matters of sovereignty but permission to construct a lighthouse on Johor's territory. The internal British correspondence relating to the construction of the lighthouse does not refer even once to the acquisition of sovereignty.

258. It is significant that the British Government felt the need to declare that the lighthouse was its property, but did not feel the same need to declare that the territory belonged to it. This is in sharp contradiction to the way the British government expressed its will to acquire sovereignty in other places at the same time. It is even more so if the same government considered that the territory in question did not belong to anyone at the time of its purported acquisition. To proclaim sovereignty over a territory without a master is even more necessary than in a case where a treaty of cession exists.

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<sup>387</sup> MM, paras. 165-168. See also MCM, para. 65.

259. A comparison with the most recent decision rendered by the Chamber of this Court in the case concerning the *Frontier Dispute (Benin/Niger)* is illustrative. The parties in that case had constructed two bridges over the River Niger. They disagreed as to the location of the boundary on the bridges. The Chamber dissociated ownership of the bridge and territorial sovereignty, i.e. the course of the boundary with regard to the bridges. Observing the existence of agreements and arrangements concerning the use or maintenance of the bridges between the parties, the Chamber “observes that these agreements and arrangements do not contain any provisions on territorial issues”.<sup>388</sup> The judgment went on by saying that “[t]he Chamber observes in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly.”<sup>389</sup> The same can be said in the present case: the question of sovereignty over PBP is totally independent of the ownership of the Horsburgh Lighthouse, which belongs to Singapore. This ownership in no way modified Johor’s, now Malaysia’s, sovereignty over PBP.

**D. Great Britain did not claim sovereignty over PBP after the inauguration of the lighthouse**

260. This section addresses the lack of any action taken by the British Government to assert its sovereignty in the years that followed the inauguration of the lighthouse. Indeed, as Chapter 5 will show, that pattern of conduct also continued into and during the 20<sup>th</sup> century. Once the operation of the lighthouse began in 1851: (i) there was no British authority installed on PBP; (ii) the British government did not take any legislative measure either incorporating PBP into one of the colonial divisions of the British Empire or designating any authority as responsible for its government; (iii) incidents concerning fishermen coming from Singapore to fish in the area motivated an exchange of correspondence between the Governor of the Straits Settlements and the Temenggong of Johor in 1861 which shows that Britain did not consider that the waters around PBP were incorporated into the Colony. To the contrary, the British authorities strongly relied on the 1824 Crawford Treaty as the sole basis for their jurisdiction.

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<sup>388</sup> *Case concerning the Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, para. 123.  
<sup>389</sup> *Ibid*, para. 124.

- (i) *No single authority was installed on PBP, which the Orang Laut continued to frequent*

261. Singapore does not point to the presence of a British authority on PBP once the lighthouse began its operation. As Singapore acknowledges, Britain did not envisage the permanent presence of any military force or station, even a limited one, on or around PBP.

262. The presence of the lighthouse-keepers in Horsburgh Lighthouse did not amount to a presence of State organs having administrative functions over the island. There is nothing to suggest these persons did anything other than what was expected of ordinary lighthouse-keepers, i.e. facilitated the functioning and maintenance of the lighthouse, together with other ancillary activities.<sup>390</sup> In its Memorial, Malaysia quoted Thomson's warnings relating to the frequent visits of Orang Laut to PBP and the need to prevent them from entering the building.<sup>391</sup> It also quoted the Light-keepers Rules, which instructed the lighthouse-keepers in the same manner.<sup>392</sup> The clear distinction between the Orang Laut's presence on the island (not prohibited) and their non-admittance to the lighthouse (prohibited) was stressed. Singapore has interpreted the Light-keepers Rules to mean that the reason for not excluding the Orang Laut from PBP but from the lighthouse only was that "if attacked by pirates and outnumbered, it would have been imprudent for the light-keepers to leave the lighthouse to try to expel them from the island".<sup>393</sup> If this were true, then there would have been no need to include such an instruction in the Rules: it is obvious that if attacked the lighthouse-keepers would not grant permission to enter the lighthouse to the attackers! Moreover, Singapore presumes that the Orang Laut only ever came to PBP for the purposes of piracy. But PBP was used as a traditional fishing place until very recently.

263. In short, there was no British authority in the island, either on a permanent basis or otherwise.

<sup>390</sup> MCM, Chapters 6 & 8, extensively analyse the activities of lighthouse operators and their legal scope.

<sup>391</sup> MM, para. 143.

<sup>392</sup> MM, para. 144.

<sup>393</sup> SCM, para. 4.54.

(ii) *No British legislation incorporated PBP into the Colony of the Straits Settlements*

264. The British Government did not enact any legislation in order to incorporate PBP into the Colony of the Straits Settlements or into any other colonial division. The Indian Act No. VI of 1852 only declared that the lighthouse was the EIC's property. The Singapore Counter-Memorial presented extracts from the *travaux préparatoires* of that Act.<sup>394</sup> They confirm that sovereignty over PBP was not at all at issue and that the main purpose of Act No. VI was "defraying the cost of a Light House on Pedra Branca".<sup>395</sup>

265. To explain the lack of any legislation including PBP under British sovereignty, the Singapore Counter-Memorial misleadingly mixes the issuing of Letters Patent with the intention of acquiring sovereignty at the time of a taking of possession.<sup>396</sup> Normally, Letters Patent, Orders in Council or Proclamations come after the occupation of territory, and are designed to proclaim either its incorporation into the British Crown or the designation of the entity within the Empire that is henceforth responsible for its administration. As stated by Sir Henry Jenkyns:

"As a general rule, the British dominions cannot be added to or diminished without the consent of the Crown. Whether the Crown can, except for the purpose of concluding a war, surrender British territory without the consent of Parliament, is a moot constitutional question. The answer would depend largely upon the circumstances of the surrender, but in this, as in most other constitutional questions, the modern tendency is to consider that the Crown could not do so important an act without the consent of Parliament.

In India, territory is not infrequently annexed or surrendered by the Governor-General. But the case of India, with its dependent states, is exceptional, and can hardly be cited as a precedent for the surrender of territory in other cases.

In the case of other British possessions, the boundaries are determined or altered by Order in Council or Letters Patent under the Great Seal of the United Kingdom, and are sometimes fixed by or under the direct authority of an imperial Act."<sup>397</sup>

<sup>394</sup> SCM Annex 16.

<sup>395</sup> See the letters of A.R. Young, Under Secretary to the Government of India, to the Under Secretary with the Governor General of 24 October 1851, the letter of F.J. Halliday, Secretary to the Government of India, to W.J. Butterworth, Governor of P.W. Island, Singapore and Malacca of 24 October 1851, the letter of Sir H.M. Elliot, Secretary to the Government of India with the Governor General, to F.J. Halliday of 12 November 1851 and the Letter of W.J. Butterworth to F.J. Halliday of 17 November 1851, *ibid*.

<sup>396</sup> SCM, para. 5.16.

<sup>397</sup> Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas*, Oxford, Clarendon Press, 1902, pp. 2-3 (footnotes omitted).

266. In the present case there was no taking of possession on behalf of the British Crown and consequently no Letters Patent incorporating PBP, Middle Rocks and South Ledge within the Straits Settlements, in notable contrast with what happened with the Christmas and Cocos (Keeling) Islands.<sup>398</sup> Singapore does not explain why, when territory outside the 1824 Crawford Treaty was incorporated to Singapore (as was the case with the Christmas and Cocos Islands) corresponding legislation was passed, whereas nothing of this sort occurred with regard to PBP.<sup>399</sup> Had Great Britain intended to acquire sovereignty over PBP through the construction of the lighthouse, the further step would have been its incorporation into one of its administrative units in the region, notably the Straits Settlements and, in particular, the Settlement of Singapore. This did not happen. Singapore fails to explain why PBP should have received a different treatment to the actual cases in which the territory of the Settlement of Singapore was extended after the 1824 Crawford Treaty, i.e. through the incorporation of Christmas Island and the Cocos (Keeling) Islands by the issue of Letters Patent stating that these territories formed part of the Settlement of Singapore.

267. Singapore's Counter-Memorial continues to blur the acts necessary to the taking of possession of territory with the legislative acts determining which entity or authority is responsible for its administration. It compares the whole of the British conduct with regard to the Cocos (Keeling) Islands—which is clear—with “the activities relating to Pedra Branca in the period leading up to the inauguration of the lighthouse”, in order to raise the following question: “can it be credibly argued that the modalities of possession relating to the Cocos Islands are in any sense of superior quality, legally and politically, than those relating to Pedra Branca?”<sup>400</sup> The answer to this question is simple: yes.<sup>401</sup> In the case of the Cocos Islands there was a formal taking of possession on behalf of the British Crown in 1857, following instructions of the Admiralty, despite the fact that British nationals had been established there as early as 1826. The British government took administrative decisions as to the appointment of the colonial authority charged to exercise administrative control over the islands, the first being that of Ceylon and then transferring them to the Colony of the Straits Settlements and finally incorporating them into the Settlement of

<sup>398</sup> MM, paras. 162-164; MCM, para. 80.

<sup>399</sup> See SCM, para. 5.19.

<sup>400</sup> SCM, para. 5.21.

<sup>401</sup> MM, para. 62; MCM, para. 92.



Singapore, determining that "the boundaries of the Colony of the Straits Settlements should be extended so as to include the Cocos Islands".<sup>402</sup>

268. In order to conceal the problem of a lack of any British intention to acquire sovereignty over PBP, in clear contrast with its evident intention to acquire sovereignty and to take the necessary administrative measures to exercise it in the case of, *inter alia*, the Cocos Islands, Singapore refers to "the modalities of possession". In the case of the Cocos Islands, these "modalities" were manifestly those of a sovereign; in the case of PBP they were not. The construction and maintenance of the lighthouse cannot amount to possession of the island as such. Moreover, while granting authorisation to construct the lighthouse, Johor did not intend to abandon its sovereignty. If the intention had been otherwise, i.e. to cede sovereignty, then there was an established way to do it which was clear and well-known at the time: it would have been a treaty of cession as had been done in 1824, with a clear and specific geographic determination of the ceded territory.

(iii) *The 1861 incidents show that there were no jurisdictional changes after the construction of the lighthouse*

269. Both Parties referred in their Counter-Memorials to the exchange of correspondence between Johor and the British authorities in Singapore in 1861 as a result of a series of incidents involving Singapore fishermen and Johor authorities or subjects. The origin of these incidents was the levying of a fishing tax by the Temenggong and some alleged violence inflicted on Singapore fishermen by Johor authorities or subjects, including the seizure of their catch.<sup>403</sup>

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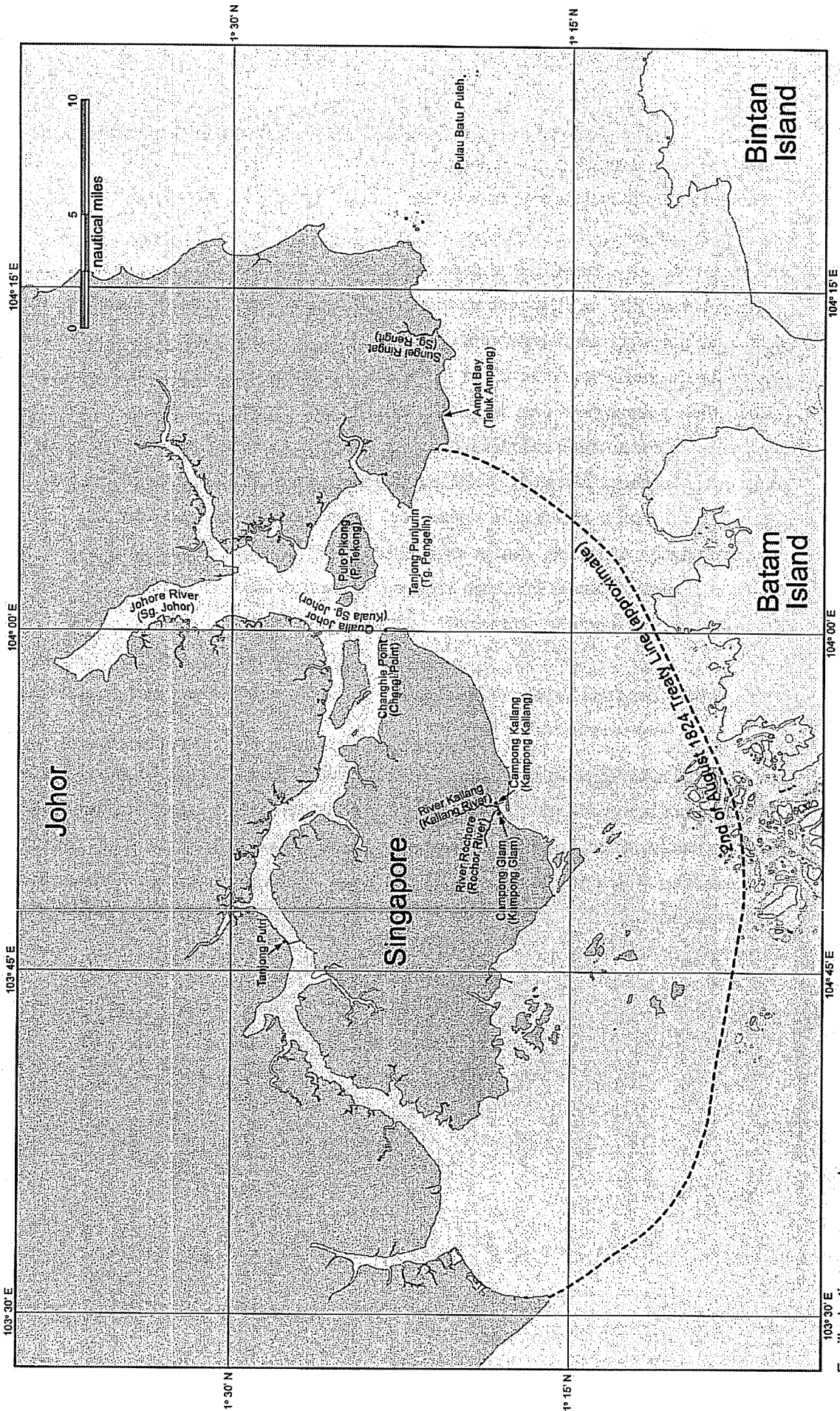
<sup>402</sup>

*Ibid.*

<sup>403</sup>

MCM, paras. 112-122; SCM, paras. 4.61-4.62.

**Location of Places Mentioned in the Exchange of Letters Between  
Governor Cavenagh and the Temenggong of May 1861**



For illustrative purposes only

Figure 15

270. As explained in the Malaysia Counter-Memorial, some of the incidents occurred within the 10 geographical mile limit of Singapore Island, others outside, including in the neighbourhood of PBP. The Governor of the Straits Settlements, in correspondence with the Temenggong, clearly distinguished the two situations. In the first, he strongly denied any right of the Temenggong to collect taxes and affirmed British jurisdiction to judge the authors of the violence and robbery. In the second, he lodged a protest with the Temenggong, requiring him to punish the persons responsible for the criminal conduct. In order to facilitate the understanding of this correspondence, Figure 15 on the opposite page shows the different locations mentioned.

271. According to Singapore's Counter-Memorial, the fishermen involved had simply chosen to "lie" about the location of their fishing near to PBP to attract British support, since they were aware that those waters were under British jurisdiction. As a result, Singapore says, the British authorities "took up their complaints without hesitation".<sup>404</sup> Nothing in the detailed records of these incidents submitted by both Parties supports such speculation.<sup>405</sup>

272. There is no basis for the assumption that the Singapore fishermen lied. They affirmed that they went fishing "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".<sup>406</sup> Both the British and Johor records show that the Singapore fishermen performed their activity "in the neighbourhood of Pedro Branco Light House" or "at the mouth of 'Sungei Ringat'". There is no contradiction here. The incident occurred at the mouth of Sungai Rengit. This does not mean that the Singapore fishermen had not come from fishing "near to the Pedro Branco Light House". Both locations are part of the same area. Sungai Rengit (located near the river of the same name) is the closest locality to PBP. And PBP was a well-known fishing spot: even until recently, Johor fishermen from Sungai Rengit continued to fish around PBP.<sup>407</sup> In the past, it would take a small fishing boat with a sail

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<sup>404</sup> SCM, paras. 4.61-4.62.

<sup>405</sup> See MCM Annex 24; SCM Annex 19.

<sup>406</sup> Ibid.

<sup>407</sup> MCM, para. 517.

about five hours to do the trip between Sungai Rengit and PBP, and between 15 to 25 hours from Singapore Harbour.<sup>408</sup>

273. The fishermen's memorial, instead of showing that they were aware that PBP was under British jurisdiction, clearly demonstrates that they acknowledged Johor's authority. They stated that they paid the Johor tax while "their fishing ground has always been a little beyond Pulo Pikong and this side of Pedro Branco". They were complaining about their treatment at the hands of Johor's subjects and the *amount* of the levies collected by Johor, not about the fact of paying tax to the Temenggong.

274. Moreover, what is essential (and completely neglected in Singapore's Counter-Memorial) is analysis of the content of the British protest to Johor about the acts performed by Johor subjects "in the neighbourhood of Pedra Branca Light House". The relevant letter is that from Governor Cavenagh to the Temenggong of 15 May 1861, which reads as follows:

"After compliments, With reference to our former communication No. 227 dated 4<sup>th</sup> instant to our friend on the matter of injuries sustained by the British subjects from residents in our friend's country we now enclose for our friend's information a copy of a petition from several Chinese fishermen complaining of the serious molestation to which they have been subjected whilst pursuing their ordinary avocation in the neighbourhood of the Pedra Branca 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 the future".<sup>409</sup>

275. The contrast with the previous letter of 4 May 1861 sent by the Governor of the Straits Settlements to the Temenggong, referring to an incident which occurred "in the neighbourhood of Punjurin, about six miles from Changhie" is noticeable. Governor Cavenagh stressed in this letter:

"I deem it right to point out to my friend that the Sea in which the above offences were committed being within the limit prescribed by Article 11 of the treaty of the 2<sup>nd</sup> August 1824, the fishermen were within British waters,

<sup>408</sup> MCM, paras. 518-519.

<sup>409</sup> MCM Annex 24; SCM Annex 19.

and consequently none of my friends's subjects could in any way have been justified in interfering with them."<sup>410</sup>

276. The letter sent by Governor Cavenagh to the Temenggong on 15 May 1861 was based on the allegation that the facts occurred "in the neighbourhood of the Pedro Branco Light House". If the Governor had considered that PBP was British territory, he should have undoubtedly referred to the Temenggong in the same manner as he reacted to the previous incident: i.e. he would have reminded him that Johor's subjects could not interfere with fishing in British waters.

277. The correspondence related to the 1861 incidents shows that:

- (a) The Temenggong continued to control fishing in the neighbourhood of PBP and to exercise criminal jurisdiction for acts carried out in Johor waters;
- (b) The maritime jurisdiction of Singapore was not altered by the construction of the lighthouse in PBP, the British authorities continued to claim as their waters no more than those extended to ten geographical miles from Singapore Island, in accordance with the Crawford Treaty;
- (c) The British authorities recognised that the Temenggong had jurisdiction over the waters "in the neighbourhood of the Pedra Branca Light House".

#### E. Conclusion

278. The crucial period in the 1840s to the beginning of the 1850s involving the planning, construction and inauguration of the lighthouse, as well as the years that followed its inauguration, show that:

- (a) The parties agree that the construction of the lighthouse was accomplished by the British authorities on a territory that did not previously belong to Great Britain.
- (b) Singapore still has to decide whether its claim of the acquisition of sovereignty through the "taking of lawful possession" of PBP occurred in 1847 or in the period from 1847 to 1851. Its contradictions on the fundamental time element reveal the weakness and uncertainty of its claim.

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<sup>410</sup> Ibid.

- (c) All that Singapore has proved to date is that it was the East India Company that constructed Horsburgh Lighthouse on PBP and asserted ownership of it—facts that are not in dispute.
- (d) Activity leading to the construction of the lighthouse did not amount to the taking of possession of PBP in the name of the British Crown. Singapore's Counter-Memorial does not advance any new element to sustain its claim in this regard. All the acts invoked by Singapore in its Memorial purportedly constituting a taking of possession have been refuted as such by Malaysia.
- (e) Britain did not have the slightest intention of acquiring sovereignty over PBP (still less Middle Rocks and South Ledge) through the construction of the lighthouse. The whole of the evidence advanced by both Parties clearly demonstrates that the purpose of the East India Company in constructing the lighthouse was to help navigation in the Strait of Singapore.
- (f) The conduct of the Parties and their predecessors in the years that followed the inauguration of Horsburgh Lighthouse shows that they did not consider that the presence of it amounted to a change with regard to the sovereignty over PBP. To the contrary, they confirm that, on the one hand, Johor continued to consider itself as sovereign of PBP and its neighbouring waters and, on the other hand, Britain considered the extension of its jurisdiction in the region was limited to ten geographic miles from the main island of Singapore, as provided by the Crawford Treaty.
- (g) Consequently, the situation as regards sovereignty over PBP remained unchanged after the construction of the Horsburgh Lighthouse, i.e. Johor kept its sovereignty over the island. All that the EIC claimed and acquired was ownership over the lighthouse that it had constructed at the initiative of, and mostly with the funds collected by, private merchants from different parts of Asia.

## Chapter 5

### THE SUBSEQUENT CONDUCT OF THE PARTIES INCLUDING THE MAP EVIDENCE

#### Introduction

279. As noted already, the Parties are essentially in agreement about the critical question in issue in this case, namely, who had sovereignty over PBP, Middle Rocks and South Ledge in the years immediately following the inauguration of the Horsburgh Lighthouse, and on what basis. Malaysia's claim rests on Johor's original title to the three features and Malaysia's succession thereto. Singapore's case, emphasised throughout its pleadings (including in its discussion of the subsequent conduct of the Parties) is that its title "stems from the British Crown's taking of possession of the island in 1847" following which "title was acquired in 1847-1851".<sup>411</sup> It is no part of either Parties' case that title was acquired through the conduct of the Parties in the period since the lighthouse was constructed. The subsequent conduct of the Parties is accordingly peripheral. The Parties agree that nothing has happened since 1851 that changes the legal position concerning title as it subsisted at that point. The Parties' respective claims to title stand or fall by reference to the position in 1851.

280. Nonetheless the conduct of the Parties may have legal relevance in confirming a legal title already established, and both parties rely on the conduct of the other in that respect. In this context this Chapter addresses two issues: first, the subsequent conduct of the Parties; and second, the question of maps. These issues properly go together as they address the way in which the Parties have dealt with and depicted the three features since the mid-19<sup>th</sup> century. As the very full review of the conduct claimed by Singapore to be *à titre de souverain* in Malaysia's Counter-Memorial showed, there is nothing in Singapore's subsequent conduct, including mapping, which could properly provide a foundation for a claim to title. In contrast, Malaysia's conduct is consistent with and supportive of its original title to PBP and the permission granted for the construction of the Horsburgh Lighthouse.

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<sup>411</sup> SCM, paras. 6.8, 6.7 respectively.

### A. The Conduct of the Parties

281. While subsequent conduct is largely peripheral to the assessment of the respective claims to title, Singapore nevertheless puts subsequent conduct in issue by contending that its “consistent conduct *à titre de souverain* since the British authorities took possession of the island in 1847” is confirmatory of its claim.<sup>412</sup> The core of this contention is that the conduct in question is indeed conduct *à titre de souverain*. On this the Parties fundamentally disagree. As Malaysia demonstrated in comprehensive detail in its Counter-Memorial, “there is nothing – not a single item – in the conduct on which Singapore relies that is capable of sustaining Singapore’s claim to sovereignty”.<sup>413</sup> It is not conduct *à titre de souverain*. It is conduct in the administration of the lighthouse that would have been undertaken by any operator of a lighthouse as part of its administrative responsibilities.<sup>414</sup> It does not constitute evidence of title and is in no way confirmatory of title.

282. There are three questions that arise in respect of the conduct on which Singapore relies.<sup>415</sup> First, is the conduct in question conduct *à titre de souverain*? Second, is the conduct in question sufficient to offset the inference against Singaporean sovereignty which derives from Singapore’s own inconsistent practice? Third, is the conduct in question sufficient to displace Malaysia’s sovereignty based on Johor’s original title to the island? In this regard, it is notable that Singapore has not at any point advanced a claim based on adverse possession.

283. These are cumulative questions. Before any weight can attach to the conduct advanced by Singapore, the Court must be satisfied that the answer to each of them is in the affirmative. Singapore’s conduct must be *à titre de souverain*. Its conduct as a whole (not simply that on which it relies) must be consistent with its claim to sovereignty. And this conduct must be of sufficient weight to displace Malaysia’s original title. In Malaysia’s contention, the answer to each of these questions cannot but be in the negative, for reasons which were developed in detail in Malaysia’s Counter-Memorial.

<sup>412</sup> SCM, paras. 6.4, 6.8.

<sup>413</sup> MCM, para. 339.

<sup>414</sup> MCM, para. 339.

<sup>415</sup> See further, MCM, para. 341.



284. A good deal of Singapore's response in its Counter-Memorial on the question of subsequent conduct proceeds simply by way of a restatement of arguments that it had already advanced in its Memorial and to which Malaysia has already responded. Thus, the twin contentions that "title was already vested in Singapore by virtue of the taking of lawful possession of the island by the British Crown during the period 1847-1851" and that "[t]his title was subsequently maintained by the United Kingdom's and Singapore's uninterrupted administration of Pedra Branca to the present"<sup>416</sup> are simply repeated, like a mantra, throughout the discussion of subsequent practice in Chapter VI of Singapore's Counter-Memorial. They are at the core of Singapore's responses on the subject of Malaysia's and Singapore's constitutional developments.<sup>417</sup> They are repeated in marginally different language in response to Malaysia's submissions regarding the character of Singapore's administration of PBP.<sup>418</sup> They are repeated again in response to Malaysia's contentions on the subject of J.A.L. Pavitt's comments regarding PBP.<sup>419</sup> They are repeated once again in summation of Singapore's case on conduct.<sup>420</sup> For good measure, they appear yet again in the context of Singapore's discussion of the 1953 correspondence and the relationship between the management of a lighthouse and the issue of sovereignty.<sup>421</sup>

285. The first of these contentions, which goes to the heart of this case, was addressed in detail in Malaysia's Memorial, Counter-Memorial and earlier in this Reply. The second of these contentions was addressed in considerable detail across four chapters in Malaysia's Counter-Memorial. Only the barest of additional comment on this issue is now required.

286. Central aspects of the substantive arguments advanced by Singapore in Chapters VI and VII of its Counter-Memorial have also already been fully addressed in Malaysia's Counter-Memorial. This is the case as regards the 13 or so specific heads of conduct advanced by Singapore in its Memorial and repeated in paragraphs 6.39 and 6.71 of its Counter-Memorial. These were addressed in a line-by-line analysis in Chapter 8 of Malaysia's Counter-Memorial and require no further comment here. Observations have

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<sup>416</sup> SCM, para. 6.14.

<sup>417</sup> SCM, paras. 6.14 & 6.19.

<sup>418</sup> SCM, paras. 6.38 & 6.39.

<sup>419</sup> SCM, para. 6.62.

<sup>420</sup> SCM, para. 6.71.

<sup>421</sup> SCM, para. 7.21.

also been made in Malaysia's Counter-Memorial on various subjects revisited in Singapore's Counter-Memorial. These include Singapore's Light Dues Legislation,<sup>422</sup> the Indonesia-Singapore Territorial Sea Agreement 1973,<sup>423</sup> Malaysian naval charts showing Malaysian territorial waters,<sup>424</sup> the Straits Lights system,<sup>425</sup> and the 1953 correspondence.<sup>426</sup> In the light of the further observations on these elements in Malaysia's Counter-Memorial, only marginal additional comment on these issues is now required.

(i) *Applicable principles*

287. Singapore opens its discussion on subsequent practice with some comment on the *applicable principles*. In particular, it notes its agreement with the proposition advanced by Malaysia in its Memorial that there is a presumption against the easy abandonment or displacement of title to territory. It also notes its agreement with the proposition that title to territory can only be established by conduct *à titre de souverain*.<sup>427</sup> This principle applies equally to the creatively amorphous process of acquisition of title which Singapore advances in support of its claim, that it somehow acquired title through a process of taking of lawful possession in 1847 (or perhaps during the period 1847 to 1851).

288. Malaysia's title rests on the original title of Johor. If the practice on which Singapore relies is to have any relevance at all in this case, Singapore must show that it is conduct *à titre de souverain*, that it is of sufficient weight and character to displace Malaysia's original title, and that Malaysia has relinquished its claim and has recognised Singapore's title. As the Chamber of the Court observed recently in its Judgment in the *Benin/Niger Frontier Dispute* case, citing the Judgment of the Chamber in *Burkina Faso/Mali Frontier Dispute* case, "pre-eminence is to be accorded to legal title over effective possession as a basis of sovereignty".<sup>428</sup> Insofar as Singapore relies upon conduct (a point which remains unclear given that Singapore has not at any stage advanced a claim based on adverse possession), it is clear that the burden rests on Singapore to show that the conduct on which it relies is both conduct *à titre de souverain* and is of sufficient weight and character to displace Malaysia's original title. It is for

<sup>422</sup> MCM, paras. 332-333, 343-344 & 351.

<sup>423</sup> MCM, paras. 552-554.

<sup>424</sup> MCM, paras. 533-546 and the Affidavit of Rear-Admiral Thanabalasingam; MCM vol. 2, Annex 4.

<sup>425</sup> MCM, Chapter 7.

<sup>426</sup> MCM, paras. 503-514.

<sup>427</sup> SCM, para. 6.3; addressing points advanced in MM, paras. 186-187.

<sup>428</sup> *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, para. 47.

Malaysia to show that its conduct since 1851 has been consistent with its original title, the permission it gave for the construction of the lighthouse, and the character of the island more generally.

289. In paragraph 6.5 of its Counter-Memorial, Singapore challenges Malaysia's reference to the *Belgium/Netherlands Frontier Land* case. Singapore asserts that "Malaysia omits important aspects of the decisions she quotes" and goes on to quote an extract of the *Frontier Land* Judgment which refers to the "complex system of intermingling enclaves which existed" between Belgium and The Netherlands.

290. The extract quoted by Singapore is in fact set out fully in Malaysia's Memorial.<sup>429</sup> There has been no omission by Malaysia. The point made by Singapore by reference to the "complex system of intermingling enclaves which existed" is that "[t]here are no such difficulties in the present case".<sup>430</sup> It follows, presumably, in Singapore's analysis, that the Court's rejection of the Netherlands' claim in that case, on the grounds that the conduct on which it relied was insufficient to displace Belgium's sovereignty, is not apposite here. Nothing could be further from the truth.

291. As Malaysia showed in Chapter 7 of its Counter-Memorial, the arrangements regarding the Straits' Lights System in the period 1850 to 1946 were both complex and intermingling, and proceeded without regard to questions of the sovereignty over the territory on which the various lighthouses that formed part of the Straits' Lights System were constructed or by whom they were administered. The extract of the Court's Judgment in the *Frontier Land* case is entirely apposite. Indeed, one could simply slot the names and facts of the present case into the language of the Court in the *Frontier Land* case to arrive at a fair and proper assessment of the position as it applied between Malaysia/Johor and Singapore/Straits Settlements concerning lighthouses in the period 1850-1946:

"The weight to be attached to the acts relied upon by *Singapore* must be determined against the background of the complex system of *the Straits' Lights System* which existed. The difficulties confronting *Malaysia* in detecting encroachments upon, and in exercising, its sovereignty over

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<sup>429</sup> MM, para. 186.

<sup>430</sup> SCM, para. 6.6.

*Pulau Batu Puteh, given Singapore's administration of the Horsburgh Lighthouse, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and in consequence of the administration of the Horsburgh Lighthouse by Singapore. They are insufficient to displace Malaysia's sovereignty based on Johor's original title to the island.*<sup>431</sup>

292. In paragraph 6.7 of its Counter-Memorial, Singapore contends that "in the present case, Malaysia's claim rests on her ability to show that she effectively exercised territorial sovereignty over Pedra Branca". This fundamentally misconceives the nature of Malaysia's case and ignores the burden upon Singapore to prove its claim. Malaysia's title is not based on the acquisition of sovereignty by occupation or adverse possession. It is based on Johor's original title to PBP, Middle Rocks and South Ledge and Malaysia's succession thereto. Malaysia's conduct in respect of the three features since 1851 reflects the character of the features, the permission granted to Britain to construct a lighthouse on PBP, and Singapore's administration of the lighthouse since then in exercise of that permission. As Malaysia showed in Chapter 9 of its Counter-Memorial, its conduct since 1851 has in every way been consistent with its title to these features.

(ii) *Singapore's responses on constitutional developments and official descriptions*

293. In paragraphs 6.10 to 6.50 of its Counter-Memorial, Singapore addresses various arguments advanced in Malaysia's Memorial concerning constitutional developments in Malaysia and Singapore and official descriptions of Singapore relevant to an assessment of title.<sup>432</sup> Malaysia contends that (a) there was nothing in Singapore's constitutional evolution which provides a basis for or supports its claim to PBP, and (b) various official descriptions of Singapore—ranging from that in the *Straits Settlements and Johore Territorial Waters Agreement, 1927* to the *Singapore Curfew Order, 1948* to detailed and purportedly comprehensive enumerations by Singapore of the islands that belonged to Singapore in the official series *Singapore Facts and Pictures* and the *Annual Report of the Rural Board of Singapore*—either had the effect of excluding PBP or failed to include PBP in circumstances in which reference to PBP would have been expected. The basic proposition is summed up in Malaysia's Memorial in the following terms:

<sup>431</sup> The unaltered paragraph of the Court's Judgment in the *Frontier Land* case, p. 229, words in italics substituted by Malaysia for those in original report is quoted in MM, para. 186.

<sup>432</sup> For these arguments see MM, paras. 189-218.

"As this account shows, Singapore has had a consistent and highly detailed appreciation of its territory. The four documents noted in the preceding paragraph span a 53 year period straddling the crucial developments in the transition of Singapore from (a) the Settlement of Singapore, part of the Straits Settlements, prior to 1946, to (b) the Colony of Singapore from 1946 to 1958, to (c) the State of Singapore, from 1958 to 1963, through (d) the period of Singapore's participation as part of the Federation of Malaysia between 1963-1965, to (e) the Republic of Singapore, from the point of Singapore's exit from the Federation of Malaysia in 1965 to the period immediately prior to Singapore's objection to Malaysia's map on 14 February 1980. Throughout this 53 year period, in which the authorities in Singapore have evidently paid very close attention to the extent of their territory, there was never any indication that Pulau Batu Puteh was part of Singapore."<sup>433</sup>

294. Singapore's response to this argument is to contend that (a) Malaysia's constitutional developments must be seen in the light of its "explicit disclaimer" of title in the 1953 correspondence,<sup>434</sup> (b) Singapore, and its predecessor in title, the United Kingdom, carried out a steady stream of official activities on PBP and within its territorial waters, and its legislative measures and constitutional developments confirmed that title,<sup>435</sup> (c) PBP never formed part of Johor and Malaysia cannot refer to a single act of administration that either Johor or Malaysia carried out with respect to PBP,<sup>436</sup> (d) the *Straits Settlements and Johore Territorial Waters Agreement, 1927* had nothing to do with PBP,<sup>437</sup> (e) the *Curfew Order, 1948* had nothing to do with PBP,<sup>438</sup> (f) the official series *Singapore Facts and Pictures* was not a legally comprehensive description of Singapore's territory,<sup>439</sup> (g) the successive *Annual Reports of the Rural Board of Singapore* was equally not comprehensive in detailing the extent of Singapore's territory.<sup>440</sup>

295. The subject of the 1953 correspondence has already been addressed at length by Malaysia in both its Memorial and its Counter-Memorial.<sup>441</sup> In the light of the further

<sup>433</sup> MM, para. 218 (emphasis added).  
<sup>434</sup> SCM, para. 6.11.  
<sup>435</sup> SCM, para. 6.12; see also paras. 6.37-6.40.  
<sup>436</sup> SCM, paras. 6.13-6.18.  
<sup>437</sup> SCM, paras. 6.20-6.25.  
<sup>438</sup> SCM, paras. 6.31-6.34.  
<sup>439</sup> SCM, para. 6.43.  
<sup>440</sup> SCM, para. 6.49.  
<sup>441</sup> MM, paras. 235-243; MCM, paras. 503-5.14.

arguments advanced by Singapore under this heading in Chapter VII of its Counter-Memorial, some further brief comment is made on this issue below.

296. Singapore's reference to a "steady stream of official activities" in respect of PBP, activities which it says are *à titre de souverain*, is simply a repetition of the conduct advanced in its Memorial. Paragraph 6.39 of Singapore's Counter-Memorial is an exact repetition of the conduct on which it relied in Chapter VI of its Memorial. There is nothing new. Malaysia gave a comprehensive response to these claims in Chapter 8 of its Counter-Memorial. The essence of Malaysia's response is that not even a single item of the conduct relied upon by Singapore amounts to conduct *à titre de souverain* that is capable of sustaining a claim to title, let alone capable of sustaining a claim to title of a strength and weight that is capable of displacing Malaysia's original title.

297. Malaysia's conduct as regards PBP and its surrounding waters has also been fully addressed.<sup>442</sup> As Malaysia observed in its Counter-Memorial, consideration of the practice of the Parties cannot proceed in isolation from its historical and geographical context. In contrast, Singapore relies on isolated acts of conduct leaving out of account any assessment of whether the conduct referred to was part of a pattern of routine acts in the administration of the Horsburgh Lighthouse or whether it amounted to manifestations of sovereign activity. Singapore would thus have the Court ignore the historical record concerning the Straits' Lights system and the interaction between Malaysia and Singapore over centuries. Singapore also ignores the joint and cooperative arrangements concerning the Singapore Strait in which Malaysia has been actively engaged. As Malaysia observed in its Counter-Memorial, Singapore's case on conduct—both its own and Malaysia's—is constructed in very large measure on omission rather than on any reflection of the *actual* purpose of the conduct on which it relies.<sup>443</sup>

298. There is nothing in Singapore's general response to Malaysia's submissions on Malaysian conduct that requires further comment here. Singapore's assertion that PBP never formed part of Johor is addressed in detail in Chapters 4 and 5 of Malaysia's Memorial, in Chapter 2 of its Counter-Memorial, and in Chapter 2 of this Reply. This goes to the heart of the case. It is not, however, a matter of subsequent conduct.

<sup>442</sup> MM, paras. 268-282; MCM, Chapter 9.

<sup>443</sup> MCM, paras. 547-548.

299. This leaves Singapore's contentions on the *Straits Settlements and Johore Territorial Waters Agreement, 1927*, the *Curfew Order, 1948*, the *Singapore Facts and Pictures* enumeration of islands said to be part of Singapore, and the similar enumeration of islands in the successive *Annual Reports of the Rural Board of Singapore*. Singapore's response on these documents is that they either had nothing to do with PBP or they were not dispositive of the extent of Singapore's territory.

300. The basic proposition as regards all of these documents is that stated in Malaysia's Memorial and recalled above. Over the years, Singapore has had a highly developed sense of its own territory. This is not so surprising given that Singapore is comprised of a number of mostly small islands with a readily identifiable territorial reach, a situation going back to the creation of the Settlement of Singapore in 1824 and which has never changed. The geographic extent of Singapore as a State thus hinges on a clear appreciation of which of the outlying islands in the Singapore, Malacca and Johor Straits form part of Singapore's territory.

301. Following the 1824 Crawford Treaty, the *Straits Settlements and Johore Territorial Waters Agreement, 1927* had as its object the retrocession of "certain of the said seas, straits and islets" to Johor. It did so, however, not by setting out an agreed and comprehensive definition of *Johor* but by adopting an agreed and comprehensive delimitation of the geographic extent of the Settlement of *Singapore*. The existence and importance of PBP, and Singapore's administration of the Horsburgh Lighthouse, would have been well known to those who signed the 1927 Agreement. If there had been any understanding at the time that PBP was part of Singapore, it would have been a simple matter to reflect this in the text. But no mention is made of PBP as being part of Singapore. At a point at which those mostly intimately concerned with and knowledgeable about the territorial reach of Singapore were addressing, in a detailed and comprehensive manner, the outer territorial limits of the Settlement of Singapore in a document that was intended to be enduring, no mention at all is made of an island whose strategic importance Singapore emphasises and which it claims was uncontroversially part of its territory from 1851. This is simply not credible. The 1927 Agreement authoritatively described and delimited Singapore's territorial reach. No mention was

made of PBP in this exercise. It is true that the 1927 Agreement did not concern PBP as such. The omission of PBP is, however, telling.

302. As regards the *Curfew Order, 1948*, Malaysia does not contend that it constitutes an authoritative statement of the extent of Singapore's territory. The Order is relevant for two reasons. First, it repeats the territorial description of Singapore given in the 1927 Agreement. In doing so, it reflects an appreciation that the language of the 1927 Agreement constituted an accurate and definitive statement of Singapore's geographic reach. Second, the description of Singapore given in the Order correlates, insofar as its omission of PBP is concerned, with the detailed lists of islands that formed part of Singapore set out in the *Singapore Facts and Pictures* and in the *Annual Reports of the Rural Board of Singapore*. It is thus part of a consistent pattern of conduct ranging from 1927, though 1948, through 1953, through to 1972 and beyond, illustrating that Singapore paid close attention to the extent of its territory and had a consistent appreciation of it. The *Rural Board* report of 1953 states that the list of islands falling within the territorial waters of the Colony of Singapore includes all the small neighbouring islands, whether inhabited or not.<sup>444</sup> The *Singapore Facts and Pictures* publication includes amongst the 54 islands identified a number which are uninhabited, are smaller than PBP and which have lighthouses.

303. Singapore seeks to persuade the Court that it acquired title to PBP in 1851 and that it has acted as sovereign in respect of the island ever since. The documents to which Malaysia points, however, fundamentally challenge that proposition—especially if they are read together. PBP features nowhere on successive, detailed lists of Singapore's outlying islands until the crystallisation of this dispute. The documents to which Malaysia refers thus attest to an absence of any appreciation by Singapore over an extended period that PBP formed part of Singapore's territory.

(iii) *Singapore's further arguments concerning its own conduct*

304. In paragraphs 6.51 to 6.73 of its Counter-Memorial, Singapore revisits certain of its own conduct which had been the subject of comment in Malaysia's Memorial. Leaving to one side the epithets ("cavalier", "unimpressive"), the elements on which Singapore

<sup>444</sup> See the extracts at MM, paras. 213-214.



focuses are (a) its light dues legislation,<sup>445</sup> (b) J.A.L. Pavitt's comments regarding PBP,<sup>446</sup> (c) the differences between Pulau Pisang and PBP,<sup>447</sup> and (d) the *Indonesia-Singapore Territorial Sea Agreement 1973*.<sup>448</sup> Something should be said about each.

(a) Singapore's light dues legislation

305. As regards Singapore's light dues legislation, Malaysia's contention is that the special additional references in the Light Dues (Amendment) Ordinance 1958 to the lighthouses at "Pedra Branca (Horsburgh) and at Pulau Pisang" indicated that these lighthouses, although administered by Singapore, did not fall within the "waters of the Colony" of Singapore that was otherwise addressed by the legislation. The need for special reference suggests that, absent such a reference, light dues in respect of these lighthouses would not have been covered by the legislation. Furthermore, given the undisputed status of Pulau Pisang as a Malaysian island, notwithstanding that the lighthouse thereon is administered by Singapore, the references to the lighthouses at "Pedra Branca (Horsburgh) and at Pulau Pisang" constituted evidence of an appreciation by Singapore that these two lighthouses, and the islands on which they stood, are subject to a special regime of lighthouse administration. This reading of the 1958 Ordinance is supported by a plain reading of the terms of the Singapore Light Dues Act 1969.

306. Singapore disputes this reading of its legislation. It does not do so, however, by reference to the language of the measures themselves. Rather, it falls back on the mantra that "Singapore has already shown that she was administering Pedra Branca at the relevant date and that the island and its territorial waters consequently fell squarely within the definition of 'Singapore' in the [1969] Act."<sup>449</sup> This merely asserts what has to be proved and takes matters no further at all.

307. As regards the 1958 Ordinance, Singapore again side-steps the plain language of its own measure, preferring instead to rely on a speech in the Singapore Legislative Assembly in which special reference was made only to the Pulau Pisang lighthouse.

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<sup>445</sup> This is discussed at MM, paras. 246-256; MCM, paras. 343-352.

<sup>446</sup> This is discussed at MM, paras. 257-263.

<sup>447</sup> This is discussed at MM, paras. 232-234, 250 & 246; and MCM, Chapter 7 generally and paras. 304-305 specifically.

<sup>448</sup> This is discussed at MM, paras. 264-266 & MCM, paras. 550-554.

<sup>449</sup> SCM, para. 6.57.

308. It is telling when a State has to fall back on inconclusive language in a parliamentary debate to oust the plain language and evident meaning of legislation. This approach would not be accepted in a Singapore or Malaysian court and it should not be accepted by this Court either. This is not simply a question of statutory interpretation; it goes also to the substantive poverty of the point which Singapore makes. The plain language of Singapore's light dues legislation in 1957-58 and 1969 is clear. It places the Horsburgh and Pulau Pisang lighthouses in a special category. It makes special reference to them in terms which imply that, but for that reference, light dues in respect of these lighthouses, both administered by Singapore, would not be covered by the legislation.

309. There is a further element to all this which Singapore also fails to address. This is that the administration of the Straits' Lights in the period after 1946 can only be properly understood in the light of the development of the Straits' Lights system and its administration prior to this date. This element is addressed in detail in Chapter 7 of Malaysia's Counter-Memorial.<sup>450</sup>

310. The significant point for present purposes is that after 1946 both Malaysia and Singapore legislated to make provision to secure funding for the maintenance of the Straits' Lights. The Federation of Malaya did so first in 1953 by the enactment of the Federation Light Dues Ordinance 1953. Singapore followed suit in 1957, in legislation that was subsequently revised by the 1958 Ordinance and then repealed and replaced in 1969. Given that the Singapore "station" under the Straits' Lights system<sup>451</sup> had been responsible for the maintenance of five of the Straits' Lights—Horsburgh, Fort Canning, Raffles, Pulau Pisang, and Sultan Shoal—the intent of the new legislation was to provide for the continued maintenance of these lights and others that had been constructed since. Both the Horsburgh and Pulau Pisang lighthouses, although administered by the Singapore "station", were situated on Johor territory. Singapore's light dues legislation reflects this by making special reference to these lighthouses in the legislation.

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<sup>450</sup> See in particular paras. 331-334.

<sup>451</sup> See the MCM, paras. 329-330.

(b) Pavitt's comments regarding PBP

311. On the subject of J.A.L. Pavitt's comments regarding PBP, Malaysia's contention is that in his writings on the Horsburgh Lighthouse, Pavitt, Singapore's Director of Marine, distinguished between navigational aids "in Singapore waters" and those "for outlying stations at Pedra Branca (Horsburgh) in the South China Sea and Pulau Pisang in the Malacca Strait".<sup>452</sup> In doing so, Pavitt explicitly distinguished between the Horsburgh and Pulau Pisang lighthouses, on the one hand, and the Raffles, Sultan Shoal and Fullerton lighthouses, on the other. In Malaysia's contention, this distinction by perhaps the most authoritative source of the day between the various lighthouses of the Straits' Lights system administered by the Singapore "station" is cogent acknowledgement of the special status of the Horsburgh and Pulau Pisang lighthouses. There is no other plausible explanation.

312. Singapore responds by saying that Pavitt's reference to "Singapore waters" "simply refers to the waters around the Island of Singapore".<sup>453</sup> It goes on to suggest that the Horsburgh and Pulau Pisang lighthouses "were distinguished as 'outlying stations' in contrast to the Raffles, Sultan Shoal and Fullerton lighthouses".<sup>454</sup> Finally, it contends that the "misguided nature of Malaysia's conclusions" regarding Pavitt's comments is underlined by a letter written on his behalf in 1967 by D.T. Brown in which Brown says "I have been advised that the waters within 3 miles of Horsburgh Lighthouse (at the eastern entrance to the Singapore Strait) may be considered to be Singapore territorial waters".

313. A number of observations are required in response. First, there is no basis in substance for Singapore's assertion that Pavitt's reference to "Singapore waters" must be read as a reference to "the waters around the Island of Singapore". No proof is offered in support of this proposition, which contradicts the plain meaning of the words. The Singapore Light Dues Board was responsible for the maintenance of all the lighthouses, lights and other beacons that fell within the administrative remit of the Singapore "station". These were not confined to "the waters around the Island of Singapore", whatever geographical connotation this phrase may carry—a point left unaddressed by Singapore.

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<sup>452</sup> The relevant extract is reproduced in MM, para. 259.

<sup>453</sup> SCM, para. 6.61.

<sup>454</sup> SCM, para. 6.61.

314. Second, in asserting that, in Pavitt's writings, the Horsburgh and Pulau Pisang lighthouses "were distinguished as 'outlying stations' in contrast to the Raffles, Sultan Shoal and Fullerton lighthouses", Singapore overlooks documents to which it has referred elsewhere in its own pleadings. Thus, at Annex 82 to Singapore's Memorial, in the Annual Report of the Marine Department of Singapore for 1950, the following statement is found:

"At the request of the Fisheries Department the lighthouse keepers of the four *seaward lighthouses* have, since 1949, collected daily samples of sea water for the purpose of investigating the salinity of Malayan waters

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The reference to "Malayan waters" here was the subject of comment in Malaysia's Counter-Memorial.<sup>456</sup> For present purposes, the question is what was meant by the references to the four "seaward lighthouses".

315. References in the preceding paragraphs of the same report indicate that the four seaward lighthouses, also referred to as the "Singapore group of lighthouses", included

"Horsburgh (Pedra Branca) distant 33½ miles; Fort Canning in Singapore; Raffles distant 10¾ miles; Sultan Shoal distant 13¼ miles, and Pulau Pisang distant 43½ miles."<sup>457</sup>

316. Of the five lighthouses comprising the Singapore Station, to which Pavitt referred, four were located more than 10 miles from the Singapore mainland. There is thus no basis for Singapore's assertion that the Horsburgh and Pulau Pisang lighthouses were distinguished from the Raffles, Sultan Shoal and Fullerton lighthouses because the former were "outlying" whereas the latter were in some way "inlying" or coastal.

317. Third, as regards Singapore's reliance on the 1967 letter by D.T. Brown, it provides no context or other explanation to the letter. Singapore is not able to offer any other contemporaneous document to show that Singapore, in 1967, claimed for itself a territorial sea around PBP. There is no indication of who Brown was advised by in

<sup>455</sup> SM Annex 82, p. 720 (emphasis added).

<sup>456</sup> MCM, paras. 361-362.

<sup>457</sup> SM Annex 82, p.720.

making this observation. Nor is it evident that Brown was purporting to offer a definitive view about the status of the waters around PBP or whether he was simply saying that these waters "may" be considered to be Singapore territorial waters, i.e., whether he was commenting on a hypothetical; whether he was writing with any knowledge of the actual status of PBP and its surrounding waters; or whether he was addressing correspondence which raised these issues in some wider political context. Brown's letter is so unclear that it cannot be given any weight.

318. In any event, especially given the absence of any context to Brown's letter, the authoritative voice in all of this must be Pavitt's. Pavitt's monograph was published in 1966. It is fanciful to suggest that there was a complete and unexplained change of view in the mind of Singapore's Director of Marine on the basis of an unexplained, uncontextualised, unpublished letter by his subordinate the following year which proceeds on the basis of "I have been advised" that the waters around PBP "may" be considered to be Singapore waters.

(c) The differences between Pulau Pisang and PBP

319. There is no dispute that Singapore is responsible for administering the lighthouse on Pulau Pisang. Equally, there is no controversy that the island is Malaysian territory. The wider framework in which Singapore came to administer the Pulau Pisang lighthouse was addressed in Malaysia's discussion of the Straits' Lights system, of which both the Horsburgh and Pulau Pisang lighthouses were an integral part.<sup>458</sup>

320. Singapore's only refuge is to say that "each island had a very different legal and factual history" and that they "were subject to entirely different legal regimes".<sup>459</sup> It is true that the two are not identical and that this helps to explain the different way in which they were treated at certain times. But for present purposes, however, the similarities between Pulau Pisang and PBP are more important than their differences. They were both part of the Straits' Lights system. Both lighthouses were constructed by the British on land that was part of Johor sovereign territory pursuant to permission granted by Johor for the construction of the lighthouse. Both lighthouses were administered by the Singapore

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<sup>458</sup> MCM, Chapter 7.

<sup>459</sup> SCM, paras. 6.63 & 6.66.

“station” as part of the Straits’ Lights system, although they were not situated in Singapore territory.

321. The Pulau Pisang lighthouse is relevant to the present discussion because it neatly lifts the veil on the complexities and realities of the Straits’ Lights system. Simply to say that there are differences between Pulau Pisang and PBP is to say nothing at all of any substance.

322. For completeness, on the question of differences between Pulau Pisang and PBP, Malaysia observes simply that the character of Pulau Pisang and PBP as islands is entirely different. Pulau Pisang is considerably larger than PBP, with the lighthouse and its associated property taking up a fraction of the territory of the island. As the Indenture in respect of the Pulau Pisang lighthouse makes clear, the initial February 1885 agreement was for the grant of “a plot of ground in the Island of Pulau Pisang in the Straits of Malacca as a site for a Lighthouse and a roadway from there to the beach”. Following the construction of the lighthouse, the Indenture of 6 October 1900 went on to grant the plot of land on which the lighthouse was constructed, the roadway connecting the plot of land to the beach, a landing place contiguous to the beach, and a landing causeway and pier adjacent thereto.<sup>460</sup>

323. In the case of Pulau Pisang, the need for the Indenture was to delineate between the territory of the island granted for purposes of the construction and maintenance of the lighthouse and the remaining territory of the island which was not available or required for such purposes. In the case of PBP, its small size obviated any need to delineate between the territory made available for purposes of the construction and maintenance of the lighthouse and other habitable territory on the island.

(d) The Indonesia-Singapore Territorial Sea Agreement 1973

324. As regards the *Indonesia-Singapore Territorial Sea Agreement 1973*, Malaysia’s contentions are straight-forward. The Agreement delimits the boundary of the territorial sea between Singapore and Indonesia. It is not drawn by reference to PBP. It makes no accommodation for PBP. Its conclusion was not accompanied by any reservation of

<sup>460</sup> Indenture of 6 October 1900, MM Annex 89. See also above, paras. 184-185.

position by Singapore regarding the claim status of PBP as a Singapore island. The Agreement is silent on the subject.

325. Had Singapore considered that it had sovereignty over PBP, some reference to or reservation of position in respect of PBP would have been expected. The absence of any such element is telling and attests to the absence of any appreciation on Singapore's part at the time that it had title to PBP. Furthermore, there is no suggestion that any major part of the territorial sea boundary between Indonesia and Singapore was held over for future negotiation.

326. Singapore's response is simply to say that the Agreement does not "effectuate a complete delimitation of the two States' maritime zones".<sup>461</sup> In support of this position, it quotes an extract from the collection on maritime boundaries edited by Charney and Alexander which says that "the delimitation in this agreement has been left 'unfinished' except in the heavily navigated portion of the Strait of Singapore."

327. This contention cannot withstand scrutiny. First, by reference to the 1973 Agreement itself, there is no suggestion that a discrete portion of the boundary remains unaddressed and held over for further negotiation. On the contrary, as pointed out in Malaysia's Counter-Memorial, the language of the Agreement is definite and unequivocal, talking of "the boundaries of the territorial seas of the two countries in the Strait of Singapore".

328. Second, as to the Charney-Alexander quote, this dates from 1993 and reflects the fact that at that time the dispute between Malaysia and Singapore over PBP had crystallised and become a matter of public knowledge. Moreover, as the Charney-Alexander quotation indicates, the 1973 Agreement does not delimit the tri-junctions at both ends of the Singapore Strait. To this extent it is true that the 1973 Agreement is not a complete delimitation. But it is one thing (and a common practice) for a bilateral delimitation agreement to stop short of the putative tripoint with another State: it is something else again for an agreement which is expressed to delimit "the boundaries of the territorial seas of the two countries in the Strait of Singapore" to omit a substantial

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<sup>461</sup> SCM, para. 6.68.

section of boundary within and at the entrance to the Strait of Singapore without so much as a reference to the omission. Had Singapore had any sense at all that it was sovereign over PBP, good sense would have included this within the delimitation as it would significantly have improved Singapore's position in any later delimitation of the tri-points. At the very least, Singapore would have taken steps to reserve its position.

(e) Conclusions on the subject of Singapore's conduct

329. In its conclusion of its discussion of its own conduct Singapore recapitulates all of the conduct on which it relied in its Memorial.<sup>462</sup> Malaysia addressed this comprehensively in its Counter-Memorial. As Singapore's tactic of repetition suggests, and as is borne out by the preceding review of Singapore's substantive comments, Singapore's attitude to PBP (outside of the framework of its administrative responsibilities toward the lighthouse) has been equivocal at best. It cannot point to any conduct *à titre de souverain* as regards the island. Its explanations for its own conduct contradicting any appreciation of sovereignty over the island are unconvincing. Its reliance on practice is puffed out by repetition of administrative conduct. It fails to take any account, in its discussion of its own conduct, of the singular features of the Straits' Lights system.

(iv) *Singapore's responses on bilateral conduct of the Parties*

330. In its Memorial, Malaysia highlighted three examples of the bilateral conduct of the Parties which showed, in dealings with Malaysia, the absence of any perception on Singapore's part that it had title to PBP. The conduct cited was the 1927 Agreement, the management of Straits' Lights system, and the 1953 exchange of correspondence. Singapore's response in its Counter-Memorial on the 1927 Agreement and Straits' Lights system was brief, remarkably so in the case of the Straits' Lights system given the centrality of these arrangements. In contrast to its response on the 1927 Agreement and the Straits' Lights system, Singapore devoted Chapter VII of its Counter-Memorial to a response to Malaysia's submissions on the 1953 correspondence. This element is accordingly addressed separately below.

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<sup>462</sup> SCM, para. 6.71.



(a) The 1927 Agreement

331. Singapore's response on the question of the 1927 Agreement is simply to say that the purpose of the Agreement was not the comprehensive definition of the limits of the land territory and territorial waters of Singapore. It goes on to reiterate that the Agreement merely affected a retrocession of certain maritime territory and islets back to Johor.<sup>463</sup>

332. Malaysia does not take issue with the stated objective of the 1927 Agreement, which is clear from its opening article. However, as has already been observed, the singular feature of the 1927 Agreement is that the retrocession proceeded by way of a detailed delimitation of the geographic extent of the Settlement of Singapore, rather than by a definition or description of the territory of Johor.

333. But Malaysia does not rely on the 1927 Agreement only as an authoritative delimitation of Singapore's territorial reach. Rather, the 1927 Agreement is important for two other reasons. First, it is one instance in a chain of consistent practice that stretches from 1927 through to the critical date of this dispute in which the territorial extent of Singapore is described in considerable detail, including in official publications of Singapore itself, but in which no reference to PBP is to be found. Second, this consistent practice is at odds with the assertion now made by Singapore that it acquired sovereignty over PBP in 1847, or otherwise in the period 1847 to 1851, and that it has consistently and knowingly exercised its sovereignty over the island ever since.

334. If Singapore had acquired sovereignty over PBP in the mid-19<sup>th</sup> century as it now claims, it is inconceivable, given the strategic importance of the island, that no reference would have been made to the island in the string of documents starting with the 1927 Agreement in which the geographic extent of Singapore is described in detail. The existence and importance of PBP and the Horsburgh Lighthouse would have been familiar to those who signed the 1927 Agreement. Had there been any sense at the time that PBP was part of Singapore, it is unlikely that reference, even if only passing and for completeness, would not have been made to PBP. It is difficult to accept that, at a point at which the outer territorial limits of the Settlement of Singapore was being addressed in a document that was intended to be enduring, no mention is made at all of an island which Singapore now claims was uncontroversially part of its territory from 1851. Moreover this

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<sup>463</sup> SCM, paras. 6.97-6.99.

difficulty is multiplied as we multiply the occasions on which Singapore could have made such a reservation or reference and failed to do so.

(b) The Straits' Lights system

335. On the subject of the Straits' Lights system, Singapore is remarkably brief.<sup>464</sup> It appears to accept that the construction and maintenance of lighthouses which were part of the Straits' Lights system bore no necessary relationship to the sovereignty of the territory on which the lighthouses were located.<sup>465</sup> Nonetheless, it takes issue with Malaysia's analysis, contending that "[i]t is untenable for Malaysia to argue that, just because Horsburgh Lighthouse is part of the Straits Light system, it is not situated in British/Singapore territory".<sup>466</sup> It goes on to take issue with Malaysia's analysis of Ordinance No.XVII of 1912 and contends that Johor was not one of the Federated Malay States and was thus not a contributor to the Straits Lights Fund.<sup>467</sup>

336. The existence and operation of the Straits' Lights system was addressed in detail in Chapter 7 of Malaysia's Counter-Memorial in terms which comprehensively address the arguments advanced in Singapore's Counter-Memorial. Nevertheless, given the central importance of the Straits' Lights system to the present case, some further brief comment is appropriate.

337. The essential propositions that follow from the existence and operation of the Straits' Lights system may be simply stated. First, it was common practice by Britain, France and other maritime States, in the period from around the mid-19<sup>th</sup> to mid-20<sup>th</sup> centuries, to construct and maintain lighthouses on foreign territory, whether on the basis of express permission or otherwise, without such conduct amounting to a taking of possession of the territory on which the lighthouse was situated for purposes of sovereignty. Second, the subsequent management and operation of these lighthouses equally did not constitute conduct *à titre de souverain* for purposes of sovereignty. Third, this wider practice was reflected in British conduct in the construction and administration of lighthouses in the Malacca and Singapore Straits in the period from the mid-19<sup>th</sup> to the

<sup>464</sup> SCM, paras. 6.100-6.103.

<sup>465</sup> SCM, para. 6.101, viz., "the inclusion of a lighthouse within the Straits Lights system has no impact on territorial sovereignty."

<sup>466</sup> SCM, para. 6.101.

<sup>467</sup> SCM, paras. 6.102-6.103.

mid-20<sup>th</sup> centuries. Fourth, the fact that a lighthouse was managed by the Governor of the Straits Settlements as part of the Straits' Lights system had no bearing on the sovereignty over the territory on which the lighthouse was situated. Fifth, lighthouses administered by the Governor of the Straits Settlements as part of the Straits' Lights system were not administered as part of the territory of Singapore. Sixth, it was entirely consistent with this practice that the Horsburgh Lighthouse, an integral part of the Straits' Lights system, was constructed by Britain and administered from Singapore on the basis of permission to do so granted by Johor and without prejudice to the continuing sovereignty of Johor over the island on which the lighthouse was located.

338. The legislative framework of the Straits' Lights system is described in Malaysia's Counter-Memorial, including the elements of the 1912 Ordinance with which Singapore takes issue.<sup>468</sup> Although Johor was not one of the Federated Malay States (a point noted by Malaysia), this does not obscure the fundamental point, commonly acknowledged by British representatives and others, that the maintenance and administration of a lighthouse by 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.<sup>469</sup>

(v) *Singapore's responses to Malaysia's conduct*

(a) Preliminary observations

339. In its Memorial, Malaysia pointed to a number of examples of Malaysian conduct which are confirmatory of its title to PBP. This included Malaysian naval charts showing Malaysian territorial waters, including around PBP, the 1968 Petroleum Agreement between Malaysia and the Continental Oil Company of Malaysia, the delimitation of Malaysia's territorial sea in the area around PBP, and the Indonesia-Malaysia Continental Shelf Agreement 1969.<sup>470</sup>

340. In its Counter-Memorial, Malaysia supplemented these examples with further detailed evidence on Malaysian naval patrols in the waters around PBP, and the appreciation of senior Malaysian and third State naval officers of Malaysian sovereignty

<sup>468</sup> MCM, paras. 306-319.

<sup>469</sup> MCM, para. 315.

<sup>470</sup> MM, paras. 268-282.

over PBP.<sup>471</sup> Of particular note was the Affidavit, accompanied by documentary annexes, by Rear-Admiral (retired) Thanabalasingam, the former Chief of the Royal Malaysian Navy.<sup>472</sup> As regards these patrols, the Rear-Admiral attests that “[t]he Royal Malaysian Navy patrolled the waters around Pulau Batu Puteh right from the point that Britain first handed over the navy to the Malayan Government in July 1958”,<sup>473</sup> the patrols taking place “routinely” throughout the Rear-Admiral’s service through to the point of his retirement as Chief of the Royal Malaysian Navy on 31 December 1976.<sup>474</sup> This timeline affirms a period of consistent conduct by Malaysia running from the earliest days of the Royal Malaysian (later Malaysian) Navy through to the crystallisation of this dispute. It also rebuts Singapore’s allegation that relevant Malaysian conduct “only date[s] back to 1968 at best”.<sup>475</sup>

341. Additional evidence provided by Malaysia in its Counter-Memorial attested to the historic use of the waters around PBP by Johor fishermen.<sup>476</sup> Of particular importance for purposes of providing necessary context to both Malaysian and Singaporean conduct in respect of the waters around PBP, Malaysia also addressed the historical interaction between Malaysia and Singapore, including in respect of lighthouses, and the historical and on-going cooperation between Malaysia and Singapore in the field of maritime safety and related matters that have a bearing on the waters around PBP.<sup>477</sup>

342. This analysis points to three conclusions. First, the wider context of Malaysian–Singaporean interaction and cooperation in respect of maritime safety in the Singapore and Malacca Straits provides important context, both to the construction and administration of the Horsburgh Lighthouse and to the on-going conduct of the Parties in respect of these matters today. Second, Malaysia’s on-going sovereign interests in respect of PBP, Middle Rocks and South Ledge continue to be expressed and exercised in the context of Malaysia’s participation in cooperative ventures with Singapore, Indonesia and other States in respect of the waters around PBP, Middle Rocks and South Ledge. Third, Singapore is unable to point to any conduct of its own in these cooperative fora in which it

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<sup>471</sup> MCM, paras. 533-546.

<sup>472</sup> MCM Annex 4.

<sup>473</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 51.

<sup>474</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 60.

<sup>475</sup> SCM, para. 6.75(a).

<sup>476</sup> MCM, paras. 516-532 and Annexes 5 & 6.

<sup>477</sup> MCM, paras. 487-500.

either asserted sovereignty over PBP, Middle Rocks or South Ledge, or reserved its position on this issue.

343. Singapore responded to the examples of Malaysia's conduct in paragraphs 6.74 to 6.94 of its Counter-Memorial. In the light of Malaysia's further treatment of these issues in its Counter-Memorial, only brief further comment is required in response to Singapore's arguments.

(b) Malaysia's naval charts

344. On the subject of Malaysia's naval charts,<sup>478</sup> Singapore's principal contention of substance is that the charts in question cannot have any probative value as they are internal Malaysian practice and are not opposable to Singapore.<sup>479</sup> Singapore further contends that these charts were nothing but a "projection" of the rules of the 1958 Convention on the Territorial Seas by the Malaysian navy without regard to the legal boundaries between the concerned States in the area.<sup>480</sup> Singapore further suggests that this "projection" did not necessarily reflect the views of the Malaysian Government as a whole, as demonstrated by the fact that, while Malaysia asked Singapore to stop flying the Singapore marine ensign over the lighthouse on Pulau Pisang that same year, it did not make a similar request in respect of the flying of the marine ensign over the Horsburgh Lighthouse.<sup>481</sup>

345. Singapore's contentions regarding the flying of the marine ensign over the Horsburgh Lighthouse were addressed fully in Malaysia's Counter-Memorial, including in respect of the alleged contrast with the Pulau Pisang lighthouse.<sup>482</sup> This element does not therefore require any further comment.

<sup>478</sup> In SCM, para. 6.78, Singapore observed that Malaysia did not expressly refer to any annexed maps. The absence of a cross-reference in Malaysia's Memorial was an oversight, remedied in the MCM, para. 533. In any event, the appropriate chart was included and clearly marked in the Map Atlas annexed to Malaysia's Memorial, the title to Map 25 being given as follows: "Admiralty Chart 2403, Singapore Strait, 1936[;] Chart Showing Outer limits of Malaysian Territorial Waters and Foreign claimed waters in West Malaysia[;] Drawn by Naval Staff Division, Ministry of Defence Malaysia, 1968". Singapore correctly identifies this chart, and that at Map 20 in Malaysia's Map Atlas, as the relevant charts in SCM, para. 6.78.

<sup>479</sup> SCM, para. 6.79. Also, para. 6.81.

<sup>480</sup> SCM, para. 6.80.

<sup>481</sup> SCM, para. 6.80.

<sup>482</sup> MCM, paras. 378-399.

346. As regards Singapore's other contentions on the question of Malaysia's naval charts, first, there can be no doubt whatever that the Letter of Promulgation, and its attached chartlets, issued by the Chief of the Royal Malaysian Navy to the Naval Staff Division of the Malaysian Ministry of Defence reflected in every small detail the formal views of the Malaysian Government on these matters. It is disingenuous of Singapore to suggest otherwise.

347. The character and status of Letters of Promulgation are addressed in detail in the Affidavit of Rear-Admiral Thanabalasingam, attached as Annex 4 to Malaysia's Counter-Memorial.<sup>483</sup> These matters will be familiar to Singapore, and to its senior naval officers and civilian naval administration, as both the Malaysian and Singaporean navies have emerged from the same naval tradition. The following observations by Rear-Admiral Thanabalasingam on this point warrant emphasis for present purposes:

"45. I should emphasise that normal naval orders are not issued by way of Letters of Promulgation. Letters of Promulgation are reserved for specific orders of particular importance. The object of a Letter of Promulgation is to inform Senior and Commanding Officers of matters that it is essential for them to know, such as the limits of a State's territorial waters, or particular problems associated with international waterways or foreign waters about which they should be especially aware.

...  
68. ... 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.

...  
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 on-going 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."

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<sup>483</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, paras. 36-46, 64-75.

As is clear from these extracts, reinforced by the wider evidence of Rear-Admiral Thanabalasingam, the Letter of Promulgation and its accompanying chartlets reflected the clear and official appreciation of the Malaysian State about the limits of its territorial waters and those of both Indonesia and Singapore.

348. Second, it will also be clear from these extracts, and from the evidence of Rear-Admiral Thanabalasingam as a whole, that the Letter of Promulgation and its attached chartlets were not some unofficial and abstract "projection" of the limits of territorial waters without regard to the legal boundaries of all the States concerned. As the Rear-Admiral attests, the Letter of Promulgation was prepared with painstaking attention to detail.<sup>484</sup> Where there was uncertainty about territorial waters' limits, the Rear-Admiral, his staff and those advising him were careful to reflect that uncertainty,<sup>485</sup> both in the Letter of Promulgation and in its attached chartlets.<sup>486</sup>

349. Furthermore, the Letter of Promulgation and chartlets were prepared and issued pending the extension of Malaysian territorial waters to 12 nautical miles, not to effect such an extension.<sup>487</sup> As the Rear-Admiral further attests, contemporaneously with the preparation and issuing of the Letter of Promulgation and chartlets, Malaysia and Indonesia began discussing maritime delimitation issues in the Singapore Strait.<sup>488</sup> One of the objectives of the Letter of Promulgation and chartlets, reflected expressly on the face of these documents, was to identify the limits of waters *claimed* by Indonesia and Singapore precisely so as to avoid any confrontation between Malaysia and these States that might have resulted from Malaysian naval patrols inadvertently operating in waters claimed by these States. The annotated version of (British) Admiralty Chart 2403 which was attached to the Letter of Promulgation shows the boundary line between Malaysia and Singapore described in detail in the 1927 Straits Settlements and Johore Territorial Waters Agreement.<sup>489</sup> Similarly, the chart depicts the limits of "Indonesian Claimed Waters".<sup>490</sup>

<sup>484</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, para. 46.

<sup>485</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 73.

<sup>486</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at paras. 70-74.

<sup>487</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 68.

<sup>488</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 66.

<sup>489</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 71; and the chart attached as Map 25 in the Map Atlas to Malaysia's Memorial.

<sup>490</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 74; and the chart attached as Map 25 in the Map Atlas to Malaysia's Memorial.

In any case where there was uncertainty, or where Malaysian claims overlapped with claims, actual or potential, of Indonesia or Singapore, the otherwise solid line depicting Malaysian territorial waters would take the form of a pecked line.<sup>491</sup>

350. Third, on the question of the probative value of the Letter of Promulgation and chartlets, it is true that these constitute internal Malaysian practice. Singapore is, however, incorrect in jumping to the conclusion that “[t]hese documents are in no way dispositive and are not opposable to Singapore”.<sup>492</sup>

351. The Letter of Promulgation and chartlets are relevant for three distinct purposes. First, they demonstrate a clear, developed and well-grounded appreciation by Malaysia that PBP, Middle Rocks and South Ledge, and their surrounding waters, were Malaysian. This is important not only as it is confirmatory of the consistency of Malaysia’s appreciation of sovereignty but also because it is evidence that cogently rebuts Singapore’s assertions, based, for example, on the 1953 correspondence, that Malaysia did not have such an appreciation of sovereignty. Second, they show a clear, developed and well-grounded appreciation by Malaysia that there were no competing claims by Singapore (or any other State) in respect of PBP, Middle Rocks and South Ledge and their surrounding waters. The Letter of Promulgation and chartlets faithfully and accurately reflect Malaysia’s understanding of the limits of Singapore and Indonesian claimed waters. The fact that these documents were sensitive naval documents, internal to Malaysia, adds to their weight and veracity on this point as there can be no suggestion that they were produced for any wider self-serving purpose.

352. Third, these documents, while not opposable to Singapore as such, were the basis of on-going naval patrols by the Royal Malaysian Navy in the waters around PBP, Middle Rocks and South Ledge on the understanding that these waters were Malaysian waters. The evidence relating to these patrols was addressed in Malaysia’s Counter-Memorial and in the Affidavit attached thereto by Rear-Admiral Thanabalasingam.<sup>493</sup> As the Rear-Admiral attests, these patrols and other related naval activity “took place routinely in

<sup>491</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at paras. 72-74; and the chart attached as Map 25 in the Map Atlas to Malaysia’s Memorial.

<sup>492</sup> SCM, para. 6.79.

<sup>493</sup> MCM, paras. 533-546; Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at paras. 51-63 (notably, para. 60 and Attachments 1-5).



Pulau Batu Puteh waters throughout the period of my tenure as Chief of the Royal Malaysian Navy from 1 December 1967 to 31 December 1976.<sup>494</sup> These patrols were manifest and open displays of Malaysian sovereignty, yet "Singapore never once protested against these patrols".<sup>495</sup> The facts of these patrols *are* opposable to Singapore. The Letter of Promulgation and attached chartlets go to the basis for these patrols and are thus probative of Malaysia's sovereignty over PBP, Middle Rocks and South Ledge and their surrounding waters.

(c) The 1968 Petroleum Agreement between the Government of Malaysia and the Continental Oil Company of Malaysia

353. Responding to Malaysia's reliance on the 1968 Petroleum Agreement between the Government of Malaysia and the Continental Oil Company of Malaysia, Singapore asserts that the concession agreement did not encompass PBP and was speculative in that it left open the fact that relevant international boundaries may be established in the future.<sup>496</sup> Singapore further notes that islands, including three-mile belts of territorial sea around them, were expressly excluded from the concession.<sup>497</sup> Singapore also seeks to rely on the Court's dictum in the *Ligitan and Sipadan* case to the effect that it could not in that case draw any conclusion from the practice of the parties in awarding oil concessions.<sup>498</sup> Finally, Singapore argues that Malaysia did not provide any evidence that the actual coordinates of the concession were made public at the time.<sup>499</sup>

354. As will have been evident from the geographic coordinates of the concession area reproduced at Annex 110 of Malaysia's Memorial as well as from the map of the concession area reproduced on page 120 of Malaysia's Memorial, the concession area encompassed an extensive maritime area off the east coast of Peninsula Malaysia, including the waters around PBP. As with the waters immediately around all of the islands covered by the concession, the waters immediately around PBP were not included within the concession area. This was an indiscriminate provision which related to all

<sup>494</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 60.

<sup>495</sup> Affidavit of Rear-Admiral Thanabalasingam, MCM Annex 4, at para. 60.

<sup>496</sup> SCM, para. 6.83.

<sup>497</sup> SCM, para. 6.85.

<sup>498</sup> SCM, paras. 6.86-6.87.

<sup>499</sup> SCM, para. 6.88.

islands within the concession area, not simply to PBP. It has no bearing on any question of status regarding any island within the area.

355. Malaysia relies on the 1968 Petroleum Concession Agreement for three reasons. First, it is evidence of Malaysia's appreciation that the entire concession area fell within Malaysia's continental shelf. This point is expressly made in the First Schedule of the concession, which addresses the "Continental Shelf off the East Coast of West Malaysia" by reference to detailed geographic coordinates which encompass an area extending to and beyond the waters around PBP.

356. Singapore contends that the precise extent of the concession area was speculative in that the First Schedule refers to an area "extending to the International Boundaries wherever they may be established". What Singapore fails to address, and what is made abundantly clear from the Letter of Promulgation and accompanying chartlets, as well as from the further elucidation of this matter in the Affidavit of Rear-Admiral Thanabalasingam, is that, while there may have been some indeterminacy over the precise reach of the concession area in the south, the area of uncertainty was precisely identified. It related to the area covered by notation "Indonesian Claimed Waters", insofar as this overlapped with Malaysian maritime claims, as depicted by the solid and pecked lines on the chartlet attached to the Letter of Promulgation. This area of uncertainty was some way to the south of PBP, Middle Rocks and South Ledge, Malaysian sovereignty over these features and their surrounding waters not being in doubt at this time. Furthermore, as Rear-Admiral Thanabalasingam attests, at the point at which the petroleum concession was awarded, Malaysia and Indonesia were actively engaged in discussions about the delimitation of the maritime zones between them in this area. Insofar as there was any speculative element at all, therefore, this did not relate to PBP, Middle Rocks or South Ledge or their surrounding waters.

357. The second reason for Malaysia's reliance of the concession agreement is that it is evidence of actual State conduct by Malaysia—conduct *à titre de souverain*—in respect of an area which Malaysia considered to fall within its sovereign territory. In other words, Malaysia's appreciation of sovereignty in respect of this area was not simply an abstract appreciation but one which was manifest in public form opposable to all. As with Malaysian naval patrols in this area, the award of the concession agreement was an open

display of Malaysian sovereignty which, had it been disputed by Singapore, would have called for a protest.

358. Particularly when taken together with other contemporaneous conduct by Malaysia—notably the Letter of Promulgation and chartlets and Royal Malaysian Navy patrols of the waters around PBP, Middle Rocks and South Ledge—the award of the concession agreement is illustrative of a wider and consistent appreciation by Malaysia of its sovereignty over this area. This distinguishes this practice from that in issue in the *Ligitan/Sipadan* case where, as the quotation cited by Singapore makes clear, the islands in dispute did not fall within the concession perimeters.

359. The third reason for Malaysia's reliance on the concession agreement flows from the second. The concession agreement was concluded openly. It was widely publicised, including in trade journals and the *Straits Times*.<sup>500</sup> While the precise coordinates of the concession area were not published, the fact that it covered the full length of the east coast of West Malaysia was known. It was also the case that the concessionaire, Continental Oil Company, worked its concession initially from the Jurong Marine Base, which belonged to the Singapore Port Authority. The general region of the concession area is therefore likely to have been familiar to the Singapore authorities. Particularly in the case of uncertainty over the extent of the concession area, had there been any basis for concern that the concession area might have encroached into sovereign Singapore territory, protest or, at the least, enquiry by Singapore might have been expected. The explanation for Singapore's silence is that it was unconcerned with the concession as it had no territorial interests that could possibly be affected by an oil concession off the east coast of West Malaysia.

(d) Malaysia's delimitation of its territorial sea

360. In its Memorial, Malaysia drew attention to the extension, by its Emergency (Essential Powers) Ordinance 1969, of its territorial waters from 3 to 12 nm and the fact that this legislation extended Malaysian territorial waters to and beyond PBP.<sup>501</sup> This legislation attest to two things; first, Malaysia's conviction that PBP and its surrounding

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<sup>500</sup> See MM, para. 278.

<sup>501</sup> MM, para. 279.

waters fell within its territorial waters; second, an absence of any appreciation by Singapore that Malaysia's conduct in any way touched upon Singapore's territorial interests.

361. Singapore contests this analysis, suggesting that the Ordinance "expressly left open the question of delimitation between Malaysia and her neighbours".<sup>502</sup> Singapore cites section 3 of the Ordinance in support of this contention and goes on further to quote "Section 12, paragraph 1, of the said Ordinance", contending that "this provision clearly cannot prejudice sovereignty over any land territory or island".<sup>503</sup>

362. As an examination of the Ordinance at Annex 111 to Malaysia's Memorial will show, Singapore is in error both in its reading of section 3 of the Ordinance and in its reference to "section 12, paragraph 1" of the Ordinance. As regards section 3, this provides, in paragraph 1, that "[i]t is hereby declared that the breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958), which Articles are set out in the Schedule hereto". Contrary to Singapore's contention, this section does not leave open the question of delimitation between Malaysia and her neighbours.

363. It seems more likely that Singapore intended to refer not to section 3 of the Ordinance but rather to Article 12, paragraph 1 of the 1958 Geneva Convention scheduled to the Ordinance pursuant to section 3. This provides that States with opposite or adjacent coastlines are not entitled, failing agreement between them to the contrary, to extend their territorial seas beyond the median line. Section 6 of the Ordinance, which is controlling on this matter, varies this provision by providing that Malaysia may, by order, modify the areas of the Malaysia's territorial waters pursuant to any agreement entered into by Malaysia and another coastal State. Contrary to Singapore's contention, therefore, the effect of the Ordinance was to extend Malaysia's territorial waters to 12 nm, subject to a latitude to revise this in places subsequently in the light of an agreement concluded with another States.

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<sup>502</sup> SCM, para. 6.90.

<sup>503</sup> SCM, para. 6.91.

364. While it is appropriate to correct Singapore on this small detail, as with so much of Singapore's pleadings, Singapore's lack of attention to detail obscures a wider and more important point. As has already been observed, this is simply that the 1969 legislation attests to the fact that, in 1969, Malaysia had no doubt that PBP fell within Malaysia's territorial waters. In this regard, Malaysia's appreciation, evidenced by its affirmative conduct, that it had title to PBP, finds support in Singapore's appreciation, evidenced by its silence and an absence of protest, that the island was not part of Singapore's territory.

(e) The Indonesia-Malaysia Continental Shelf Agreement 1969

365. On 27 October 1969, Indonesia and Malaysia concluded an agreement delimiting the continental shelf between them. The fact of the negotiations, and the Agreement itself, were a matter of public record. Although Point 11 of this boundary was only 6.4 nm from PBP, Singapore at no point asserted any interest, raised any objection or reserved its position.<sup>504</sup>

366. In its Counter-Memorial Singapore contends that it was not obliged to react to the Agreement, first, because it was *res inter alios acta* and, second, because the Agreement "carefully avoided any intrusion into the area in the vicinity" of PBP.<sup>505</sup> The reality is, however, somewhat different. Singapore's silence in the face of this Agreement, which certainly approached the vicinity of PBP closely, mirrors its silence in the face of every other instance of conduct in respect of PBP that would have been inconsistent with Singapore's claim to sovereignty over the island, if indeed Singapore entertained such a claim at that time. Thus, PBP does not feature in key documents, ranging from 1927 through to 1979, issued by Singapore or to which it was a party and which addressed Singapore's territorial reach. Singapore's silence in these documents is mirrored by its silence in the face of Malaysian naval patrols in the waters around PBP, Middle Rocks and South Ledge from the earliest days of the Royal Malayan Navy in 1958, extending through the late 1960s and into the 1970s. Singapore was silent in the face of the 1968 Petroleum Agreement. It was silent in the face of the extension of Malaysia's territorial waters in 1969. It was silent in the face of the *Indonesia-Malaysia Continental Shelf Agreement 1969*. It failed to say anything to reserve its position in the context of its own 1973

<sup>504</sup> MM, para. 280; MCM, paras. 555-556.

<sup>505</sup> SCM, paras. 6.92-6.93.

*Territorial Sea Agreement* with Indonesia. The reality, when the pieces of the puzzle are presented together, is that Singapore has come by its claim to sovereignty very late in the day. Nothing else can explain this consistent silence.

(f) Conclusions on Singapore's responses to Malaysia's conduct

367. Given the character of PBP, Singapore's administration of the Horsburgh Lighthouse, the historical interaction between Malaysia and Singapore stretching over centuries, including in respect of the Straits' Lights system, and the more recent bilateral and multilateral cooperative arrangements in the field of maritime safety in the Singapore Strait, it is not surprising that Malaysia can point to only a few examples of unilateral conduct which illustrate its sovereignty over PBP. But these examples are in every respect consistent and affirmative of Malaysia's title over PBP. The evidence, adduced in Malaysia's Counter-Memorial, regarding naval patrols and related naval conduct, is of particularly significance. In contrast, Singapore's response to Malaysia's conduct is characterised by silence. It has said nothing and done nothing to contradict Malaysia's conduct.

(vi) *The 1953 correspondence*

368. Singapore devotes a separate chapter to the 1953 correspondence.<sup>506</sup> It contends that (a) the 12 June 1953 letter sent on behalf of the Singapore Colonial Secretary "in no way shows that Singapore recognised Johor's title to Pedra Branca", (b) the Anglo-Dutch and Crawford Treaties of 1824 are irrelevant to the present dispute, (c) there is no correlation between the status of Pulau Pisang and PBP, (d) Singapore's internal correspondence confirms Singapore's ownership of the island, (e) Singapore consistently and constantly reconfirmed its ownership of PBP, and (f) the letter from the Acting State Secretary, Johor is a clear disclaimer of sovereignty by Malaysia.

369. These issues have already been the subject of extensive comment in both Malaysia's Memorial and Counter-Memorial.<sup>507</sup> In summary, Malaysia's contentions on this point are as follows:

<sup>506</sup>

SCM, Chapter VII.

<sup>507</sup>

MM, paras. 235-243; MCM, paras. 503-514.

First, the letter sent on behalf of the Singapore Colonial Secretary of 12 June 1953 indicates quite clearly, in contrast to the argument that Singapore now advances, that in June 1953 Singapore did not have any sense that PBP was part of the territory of Singapore.

Second, this correspondence also indicates that the Singapore Colonial Secretary had a clear understanding of the extent of Singapore's sovereignty.

Third, the reference, in the letter sent on behalf of the Colonial Secretary, to the position of Pulau Pisang indicates an understanding that the administration and management of a lighthouse was distinct from and was not determinative of the sovereign status of the territory on which the lighthouse was located.

Fourth, the internal Singapore correspondence in response to the reply from the Acting State Secretary, Johor is equivocal and confirms that it was not, even at that point, Singapore's view that PBP was at that time already a part of Singapore's territory.

Fifth, at no time subsequent to this correspondence and before the critical date did Singapore ever take any steps to assert a claim to PBP. On the contrary, as the documents (referred to above) which enumerate the islands that form part of Singapore attest, Singapore at no time manifested any appreciation that PBP was a Singaporean island.

Sixth, the letter from the Acting State Secretary, Johor of 21 September 1953 does not refer to sovereignty over PBP but to ownership of the lighthouse.

Seventh, the letter of 12 June 1953 sent on behalf of the Colonial Secretary clearly shows that Singapore was aware that PBP was part of the Sultanate of Johor.

370. Nowhere is the equivocation and uncertainty underlying Singapore's claim of sovereignty over PBP more apparent than in its discussion of the 1953 correspondence. On the one hand, Singapore's case rests categorically on the proposition that it acquired title, through Britain, in 1847 or in the period 1847 to 1851. The point is encapsulated in the following paragraph found in the midst of its discussion of the 1953 correspondence:

"It must however be recalled that, in the present case, Singapore's title is not based on the role of the lighthouse as an *effectivité per se*. As explained in Singapore's memorial, Singapore's title is based on the lawful taking of possession of the island. This title is confirmed by the administration and control of the island and the maintenance of the

facilities on it for more than 150 years without any dispute or contention by Johor or Malaysia or any third State."<sup>508</sup>

And then we have reference by Singapore to the 1953 correspondence. Leaving aside the substance of the issues raised by the 1953 correspondence, there is a glaring *non sequitur* in Singapore's claim. The very essence of its claim is that it acquired title, demonstrably, by the taking of lawful possession in 1847 or the period 1847-51. It eschews conduct as a basis of claim. But it nonetheless seeks to rely on ambiguous correspondence in 1953 which opens with a letter sent on behalf of the Singapore Colonial Secretary, explicitly expressing uncertainty about the very position that Singapore now asserts is clear and was always clear, and concludes, following an ambiguous letter by the Acting State Secretary, Johor, with total inaction by Singapore to assert any claim to PBP. What this shows is that the essential basis of Singapore's claim to PBP in these proceedings rests on a legal theory, a fiction, which it has developed as an after-thought. There was no clear and unambiguous taking of lawful possession by Britain in 1847-1851. This was no part of Singapore's conception of the position in 1953. The theory of sovereignty that Singapore now advances is simply a peg on which to hang its case.

(vii) *Conclusions on the conduct of the Parties*

371. The issue of subsequent conduct is peripheral to the claims of both Parties in this dispute. Malaysia's claim to title rests on Johor's original title and Malaysia's succession thereto. Subsequent conduct is relevant to this claim only insofar as Malaysia must show that it has not abandoned its original title. This it has amply done. While Malaysian conduct in respect of PBP is necessarily limited in nature, given the character of the island and other considerations identified above, it is conduct *à titre de souverain* and undoubtedly sufficient to maintain sovereignty derived from Johor's original title. As both Parties accept, there is a presumption against the easy abandonment of title. Moreover pre-eminence is to be accorded to legal title over effective possession, a position which again both Parties accept and which is repeatedly affirmed in the jurisprudence of the Court. By reference to these principles, there is no basis on which to displace Malaysia's original title.

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<sup>508</sup> SCM, para. 7.21.



372. Singapore advances a theory of a taking of lawful possession in 1847 or perhaps over the period 1847 to 1851. It does not advance a claim based on adverse possession. Subsequent conduct is not therefore relied upon by Singapore as a basis of title. It is said only to be confirmatory of title. But an examination of the conduct on which Singapore relies in support of its claim shows that there is nothing in its own conduct that can properly be described as conduct *à titre de souverain*. Every item of Singapore's own conduct in respect of PBP is properly characterised as conduct in the administration of the Horsburgh Lighthouse. It cannot point to any conduct *à titre de souverain* as regards the island. It also fails, in its analysis, to reflect the complexities of the Straits' Lights system. It fails to address the realities of the historical interaction between the Parties and the relevance of the character of PBP. And in respect of conduct that is inimical to its claim to sovereignty, there is only silence. Singapore's conduct is insufficient to sustain its own claim to title. It is certainly insufficient to displace Malaysia's original title.

#### B. The Map Evidence

373. Turning to the question of maps, two preliminary observations should be made at the outset about the totality of the map evidence advanced by the Parties. First, despite Singapore's claim to have exercised sovereignty over PBP and the two features for over 150 years, in all the 89 maps and charts produced by both Parties in two sets of pleadings—a representative selection of the total maps and charts of the area of which there are many—there is only *one* map, of 1995, which shows PBP as part of Singapore. This map was in fact produced before the Court by Malaysia, not Singapore.<sup>509</sup> Singapore has not been able to produce any maps of Singapore which show PBP as part of Singapore.

374. Second, there are *no* maps of maritime boundaries in the area of PBP which show or even suggest that Singapore has any maritime boundaries in the area of PBP, as would be expected if Singapore had actually had sovereignty over the island for over 150 years as it now claims.

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<sup>509</sup> MM Map Atlas, Map 48.

375. Before responding in detail to Singapore's arguments on the map evidence in its Counter-Memorial, it is useful to briefly recall both Parties' argument on the map evidence in their Memorials and Counter-Memorials.

(i) *Malaysia's arguments on the map evidence*

376. In its Memorial, Malaysia showed that the cartographic history of the region provides general support for Malaysia's case of sovereignty over the three features, PBP, Middle Rocks and South Ledge.<sup>510</sup> As observed by Malaysia, in the present case there is no map having legal force in the manner described by the Court in the *Frontier Dispute Case (Burkina Faso/Mali)*.<sup>511</sup> What the map evidence does show is that:

- early pre-1824 maps of the region show a close connection in contemporary eyes between PBP and Point Romania;<sup>512</sup>
- post-1824 maps, insofar as they showed the division between the British and Dutch spheres of influence, treat PBP as falling on the British side of the line;<sup>513</sup>
- maps of Singapore never included PBP, Middle Rocks and South Ledge, by inset or otherwise, until the 1990s, well after the critical date in this case, 14 February 1980. Maps of Singapore consistently show it as consisting of the main island of Singapore and the islands within the 10 mile limit established by the 1824 Crawford Treaty;<sup>514</sup>
- apart from a few equivocal maps (discussed below), there is no suggestion in any other maps of Singapore, Johor, Malaya or Malaysia, that PBP and the other two features are not part of Malaysia;<sup>515</sup>
- Malaysia considered PBP is within Malaysian territorial waters as shown in its 1979 publication of a 2-sheet map depicting the limits of its continental shelf boundaries;<sup>516</sup>
- there is no suggestion in the charts and maps drawn by very well-informed geographers of third States that PBP is other than Malaysian. The United

<sup>510</sup> MM, para. 301.

<sup>511</sup> MM, para. 302, citing *Frontier Dispute Case (Burkina Faso/Mali)*, 1986 ICJ Reports 554, 582 (para. 54).

<sup>512</sup> MM, paras. 306-308.

<sup>513</sup> MM, para. 310.

<sup>514</sup> MM, paras. 312-314, 323-324.

<sup>515</sup> MM, paras. 315-319.

<sup>516</sup> MM, para. 320.

States Geographer's 1974 depiction of international boundary lines in the region and a 1994 map produced by the United Kingdom Director General of Military Survey shows that these States did not consider that Singapore had any maritime territory in the area of PBP. Certainly there is no indication or suggestion in either of these maps that there is a Malaysia-Singapore international boundary in the area of PBP;<sup>517</sup>

- there are British maps showing PBP as belonging to Malaysia and there are no British maps showing PBP as belonging to Singapore.

377. In its Counter-Memorial, Malaysia observed that if Singapore has had sovereignty over the three features (as it claims it has had since at least 1851), this would imply a maritime boundary line which at least delimits the area around PBP and Middle Rocks at the entrance of the Singapore Strait in the China Sea between Singapore, Malaysia and Indonesia. However, Singapore has never sought to delimit such a boundary with Malaysia or Indonesia, nor even reserved its rights in circumstances where it could have been expected to do so. Nor have any depictions of international maritime boundaries in the area, whether by the Parties themselves or agencies of third States, suggested any such delimitation.<sup>518</sup> Not only is there no suggestion of a Singapore maritime boundary in the area of the three features, but a significant number of maps indicate complete maritime limits around Singapore which place PBP in Malaysian waters and outside Singapore waters.

(ii) *Singapore's arguments on the map evidence*

378. Singapore introduced only 12 maps and charts in its Memorial, for the most part directed to its arguments concerning Middle Rocks and South Ledge, except for four maps, three editions from the same series (two published in 1962 and one in 1965) and another map of 1974, all of which, it argued, represent admissions against interest by Malaysia.<sup>519</sup> Three of these maps were also produced by Malaysia in its Memorial.<sup>520</sup> Singapore discussed these four maps at length,<sup>521</sup> claiming that they are a "significant number of

<sup>517</sup> MM, para. 322, 325.

<sup>518</sup> MCM, Chapter 10.

<sup>519</sup> SM, para. 7.50; SCM, para. 9.4.

<sup>520</sup> MM, para. 321, Map Atlas, Maps 34, 39 & 41.

<sup>521</sup> SM, paras. 7.38-7.50.

maps published over a significant period” and, as such, represent admissions against interest by Malaysia.

379. Singapore’s response in its Counter-Memorial to Malaysia’s map evidence makes two main points:<sup>522</sup> (a) maps from the late 16<sup>th</sup> century to the early 19<sup>th</sup> century show that PBP was not considered to have any connection with the Johor mainland or to be part of Johor’s dominions; and (b) official maps of the State of Johor from 1887 show that PBP was not considered to be part of the State of Johor.<sup>523</sup> Singapore also makes a number of small, more specific points on individual maps produced by Malaysia.<sup>524</sup> Although Malaysia’s response will focus on Singapore’s two main points in order to retain an overall view of the map evidence, for the sake of completeness each of these small points will also be addressed.

(iii) *Malaysia’s response*

380. Before turning to Singapore’s first main point, it should be observed that nowhere in Singapore’s extensive discussion of maps<sup>525</sup> is there any reference to the absence of any Singapore maps showing PBP as part of Singapore prior to the critical date. Singapore is silent on this key point. It does not even attempt to explain why there are no maps showing PBP as part of Singapore even though, it asserts, the Singapore authorities had considered PBP to be a part of Singapore for well over 100 years since 1850. Why are there no maps? The only likely explanation for the complete absence of maps showing PBP as part of Singapore is because the Singapore authorities did *not*, contrary to Singapore’s case, consider that PBP was part of Singapore.

381. Singapore’s first main point on the map evidence is that there are “numerous historical maps ranging from the late 16<sup>th</sup> century to the early 19<sup>th</sup> century [which show] that Pedra Branca was not considered to have any connection with the Johor mainland or be part of Johor’s dominions”.<sup>526</sup> Singapore furnishes two historical maps which, it says,

<sup>522</sup> SCM, Chapter 9.

<sup>523</sup> SCM, para. 9.5.

<sup>524</sup> Singapore questions the attribution of Maps 15 & 16 of MM Map Atlas (SCM, para. 9.16).

<sup>525</sup> SM, paras. 7.47-7.50; SCM, Chapter IX, entitled “The Map Evidence”.

<sup>526</sup> That “numerous historical maps ranging from the late 16<sup>th</sup> century to the early 19<sup>th</sup> century [show] that Pedra Branca was not considered to have any connection with the Johor mainland or be part of Johor’s dominions”: SCM, paras. 9.5(a) & 9.9.

clearly depict PBP in a different colour from the Johor mainland.<sup>527</sup> The first of the two maps, Maps 3(a) and (b), a republication of a 1617 map by Petrus Plancius, Hydrographer to the Dutch East India Company, of the East Indies does not show PBP in any colour, but none of the islands of the size of PBP are coloured because they are so small that their depiction by black line completely fills in the space, leaving no room for colour. Colour coding is not conclusive in any event.<sup>528</sup> But Maps 3(a) and 3(b) of Singapore's Counter-Memorial do not support Singapore's conclusion that PBP is depicted in a "different colour" from the Johor mainland—it is not coloured at all. The second map furnished by Singapore, a reproduction of *Les isles de la sonde entre lesquelles sont Sumatra, Java, Borneo, &c* of 1654 does not, contrary to Singapore's assertion, clearly show PBP in yellow. This map is not a very accurate depiction of the area and it is not clear to which island the title "Pedra Bruca" is intended to refer. Neither of the most likely candidates appear to be coloured yellow.

382. Singapore also argues that there are many historical maps of the region between 1595 to 1851 that show PBP "considerably removed from the mainland" and so "maps of the period do not show a close connection between Pedra Branca and the Johor mainland."<sup>529</sup> The first point to note is that the scale in these early maps is inaccurate. Second, the phrases employed by Singapore to describe the maps it annexes—"considerably removed from the mainland", "significant distance",<sup>530</sup> "far out into the China Sea"<sup>531</sup> or "isolated feature"<sup>532</sup>—are rather opaque descriptions of the maps to which they refer. For example, PBP is not actually illustrated as "far out into the China Sea" in Map 2 of the Singapore Counter-Memorial Map Atlas as suggested by Singapore's comment thereon. In any case, Malaysia's point in its Memorial is that the three maps it refers to show "the close connection in contemporary eyes between the Johor coast, the islands in the Romania group and Pulau Batu Puteh".<sup>533</sup> None of the maps that Singapore furnishes show any differently: PBP is prominently shown and labelled off in the area between Point Romania, Johor, and Pulau Bintan in the entrance to the Singapore Strait. The reason for this is obvious. PBP was perhaps the best known rock in the eastern mouth

<sup>527</sup> SCM, para. 9.11 and SCM Map Atlas, Maps 3 and 4.

<sup>528</sup> See SCM, para. 9.10.

<sup>529</sup> SCM, para. 9.9.

<sup>530</sup> Comment to Map 1, SCM.

<sup>531</sup> Comment to Map 2, SCM Map Atlas.

<sup>532</sup> Comments to Maps 2 and 3, SCM Map Atlas.

<sup>533</sup> MM, paras. 307-308.

of the Strait. It was a key nautical mark in the area for safe navigation, and sailors took their bearings from Point Romania and PBP, as shown in the “Vues des Terres dans les Détroits” in Bellin’s map of 1755<sup>534</sup> and in the Wubei Zhi Chart and accompanying sailing instructions completed by Mao Yuanjiin in about 1621.<sup>535</sup> Suarez’s *Early Mapping of Southeast Asia*, cited by Singapore, details the role of PBP as a guide to sailors.<sup>536</sup>

383. Turning to Singapore’s arguments on the 19<sup>th</sup> century maps,<sup>537</sup> Singapore claims that “the maps published in the 19<sup>th</sup> century discussed in Malaysia’s Memorial are neither indicative, nor dispositive of the issue of title”.<sup>538</sup> It says further that

“... these maps do not, in any way, contradict the fact that, until the British authorities in Singapore took lawful possession of Pedra Branca in the period 1847-1851, sovereignty over the island was undetermined. This reasoning is not inconsistent with Thomson’s map of 1849 showing a boundary drawn around Singapore... For Malaysia, the fact that Pedra Branca was not included amongst Singapore’s dependencies on the map means that this island was not considered as belonging to Singapore. In reality... this map deals only with islands lying within 10 miles of Singapore and thus did not encompass Pedra Branca for obvious reasons.”<sup>539</sup>

384. The obvious reason PBP was not included on the 1849 map was that it was not considered part of Singapore and that was because it was not part of Singapore: Singapore at the time of its establishment in 1824, in 1847-1851 and until the 1927 Johore Agreement and retrocession of certain islands in the Johor Strait to Johor, consisted of the main Island of Singapore, “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”.<sup>540</sup> It did not include PBP, lying some 25 nm from Singapore. In fact, another Map of Singapore Island and its Dependencies copied from Government Surveys in 1852, a year after

<sup>534</sup> MM, para. 308 and MM Map Atlas, Map 3.

<sup>535</sup> This Reply, vol. 2, Annex 1 (original and English translation, compiled by the Malaysian Institute of Translation, 28 July 2005). The sailing directions advise pilots “After the white rock, use Gui Chou and Dan Gui direction for 5 Gen distance straight to Mount East Bamboo Mountain...”.

<sup>536</sup> Suarez, p. 49.

<sup>537</sup> SCM, paras. 9.12-9.15.

<sup>538</sup> SCM, para. 9.12.

<sup>539</sup> SCM, paras. 9.13-9.14.

<sup>540</sup> Article II, Crawford Treaty; MM, para. 54 and references therein.

Singapore says that its "taking of lawful possession" was definitively completed, does not include PBP.<sup>541</sup>

385. Singapore's argument that the 1849 map was not considered by the British authorities to be authoritative as to Singapore's territorial extent (because the British in 1861 rejected an argument by the Johor authorities based on that map which showed a line running through the Johor Strait) does not further its case.<sup>542</sup> Putting to one side the fact that the statements relied on by Singapore were made by the two parties in 1861 in the course of making a case against each other in a dispute, and so are not an indication of what they thought of the relative strength of those arguments, the reason for the British position that the line was not definitive was because Johor by the Crawford Treaty had ceded the "adjacent seas, straits and islets, to the extent of ten geographical miles, from the coast of the said main Island of Singapore". That meant that Singapore's territory went right up the Johor coastline because that was less than 10 miles from Singapore, as illustrated in the *Sketch of the British Settlement of Singapore, According to the Treaty of the 2<sup>nd</sup> of August 1824*.<sup>543</sup> Britain's view in the 1861 dispute with Johor is in fact fully consistent with the view that Singapore went no further than the famous 10-mile line from Singapore Island.

386. Singapore next observes that the maps Malaysia has produced of Singapore from 1885, 1898 and 1911, which do not show PBP either, do not contain any attribution of sovereignty.<sup>544</sup> But Singapore cannot show a single map produced by Singapore authorities in the 19<sup>th</sup> century which shows PBP as one of its dependencies, nor has it given a convincing explanation of this striking fact. Singapore says that "by the time these maps [of Singapore] were issued, sovereignty over Pedra Branca lay with Great Britain and these maps do not contradict that legal conclusion and nor are they inconsistent with

<sup>541</sup> "Map of Singapore Island and its Dependencies: Copied by permission from the Government Surveys, Singapore, 1852", annexed to this Reply, vol. 2, Map Annex 1.

<sup>542</sup> See MCM, para. 9.14.

<sup>543</sup> *Sketch of the British Settlement of Singapore According to the treaty of the 2<sup>nd</sup> of August 1824*, by Lieut. P. Jackson, Assistant Engineer. The Map depicts a complete red dotted line from a western point on the Johor Peninsula joining to the a point on the eastern side of the Peninsula. A note on the map records "N.B. ... The red dotted line denotes the limits of the Treaty" (from the National Archives of India): annexed to this Reply, vol. 2, Map Annex 2.

<sup>544</sup> SCM, para. 9.15.

it.”<sup>545</sup> But the maps are *not* consistent with that legal conclusion. If “during the period 1847-1851, title to Pedra Branca was acquired by Britain by the taking of lawful possession, through a series of official acts”<sup>546</sup> why did none of the maps of Singapore show it as part of Singapore, even when insets were employed in maps of Singapore to show Singapore islands which fell outside the margins of the map?<sup>547</sup>

387. Singapore also notes that “during the same period [1885, 1898 and 1911], official maps published by Johor also fail to depict Pedra Branca amongst Johor’s dependencies”<sup>548</sup> and that although PBP was included in maps of Johor enclosed in the *Johor Annual Reports* for the years 1928-1930, it was omitted from the maps for the years 1931-1939.<sup>549</sup> The explanation for this is that the format of the maps changed between 1930 and 1931 so that PBP fell outside the edge of the map, as did other islands belonging to Johor such as Pulau Aur and Pulau Tinggi. In fact, Johor islands lying further out into the South China Sea such as Pulau Aur and Pulau Tinggi were never included in maps in the *Annual Report* series. Singapore argues that “Johor’s selective inclusion of Pedra Branca in this series of maps is wholly inconsistent, and does nothing to advance the Malaysian case”.<sup>550</sup> But if Johor’s depiction of PBP may have been inconsistent, Singapore has been consistent in *not* depicting PBP. This is highly significant.

388. Turning to Singapore’s critique of the Admiralty Chart appended to Commodore (subsequently Rear-Admiral) Thanabalasingam’s 1968 Letter of Promulgation (Map 25 in Malaysia’s Map Atlas),<sup>551</sup> Singapore suggests that Malaysia did not make the connection between the Commodore’s actions and the lines on the map clear and says that this is “troubling”,<sup>552</sup> as if to suggest that Malaysia has been misleading in some way. The innuendo is baseless, since it is clear from Malaysia’s Memorial that the lines drawn on

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<sup>545</sup> SCM, para. 9.15.

<sup>546</sup> SCM, para. 9.15.

<sup>547</sup> See the map in the MM, Map Atlas, Maps 15 & 16. Referred to in the SCM at para. 9.16. Singapore complains that the legend of this 16-sheet compilation map has *not* been reproduced. 13 of the 16 sheets making up the map contain the map legend; one of these sheets is reproduced in vol. 2 to this Reply, Map Annex 3-1. The entire map is reproduced again in the Reply as Map Annex 3-2. Singapore suggests the absence of this information means “it is impossible to establish the purpose of these maps”. This statement simply seeks to distract from the fact that Singapore cannot provide a convincing reason as to why PBP and the other two features were never included in maps of Singapore. Whether or not these maps “show nothing relating to the legal status of the islands”, they certainly do show they were not considered part of Singapore.

<sup>548</sup> SCM, para. 9.15.

<sup>549</sup> SCM, para. 9.20.

<sup>550</sup> SCM, para. 9.20.

<sup>551</sup> MM, paras. 270-273 and 316.

<sup>552</sup> SCM, para. 9.22.



the chart were drawn by Rear-Admiral Thanabalasingam, that it was an internal Malaysian document; and that Malaysia appended the chart to show the Rear-Admiral's depiction of Malaysia's territorial waters in 1968. The issues of substance going to the significance of this chart have already been discussed.

389. Map 26 in Malaysia's Memorial Map Atlas depicts boundary lines which place PBP within the territorial waters of Malaysia or its predecessors.<sup>553</sup> Singapore observes that the map contains a number of curious features: it notes that the map seems to be compilation of different maps, that it is not clear whether any pertinent information has been omitted as a result or whether some of the markings are part of the original or were later added by hand.<sup>554</sup> In fact Map 26 is a compilation of two sheets from the World 1:1,000,000 Series GSGS 4646 produced by the UK War Office, Sheet NA-48 of the series, entitled "Singapore", Edition 5, 1954, and Sheet SA-48, entitled "Palembang", from the Third Edition, 1946. Several editions of the series were produced, and not every sheet of each edition was published in the same year. For the avoidance of further confusion, Malaysia appends an original copy of Sheet NA-48, "Singapore", edition 5 of the series, which forms the top half of the compilation in Map 26 of its Memorial Map Atlas. This is the relevant part of Map 26 for the purposes of Malaysia's pleadings as it shows the international boundary lines in the area of Singapore, Indonesia and Malaysia referred to by Malaysia in its Memorial and Counter-Memorial.<sup>555</sup> The international boundary line indicated on Sheet NA-48, "Singapore", edition 5, clearly shows a complete maritime boundary around Singapore which excludes the three features and does not indicate any Singapore waters in the area of the three features.<sup>556</sup>

390. Map 27 of Malaysia's Memorial Map Atlas, entitled "Sedili Besar", printed by the Survey of India Offices, 1944,<sup>557</sup> also depicts international maritime boundary lines which place the three features in Johor waters and outside Singapore waters. Singapore argues in respect of this map that because British Malaya at the time the map was produced included the Straits Settlements and the Malay States such as Johor, the "map therefore

<sup>553</sup> MCM, para. 558 & MM, para. 317 & Insert 29, p. 147.

<sup>554</sup> SCM, para. 9.23.

<sup>555</sup> MM, para. 317 & Insert 29, & MCM, para. 558.

<sup>556</sup> This Reply, vol. 2, Map Annex 4.

<sup>557</sup> On a scale of 1:253440, HIND 1076, Sheet 41, First edition, printed at the Survey of India Office (P.Z.O.), 1944.

provides no information about whether Pedra Branca belonged to Singapore or Johor".<sup>558</sup> Singapore also attempts the same argument in respect of Maps 28 and 29 of the Malaysian Map Atlas.

391. Singapore's argument here amounts to little more than a smoke screen, attempting to blur in its written description of the maps what is patently clear on looking at the maps themselves. The waters shown in Map 27 are divided into three distinct areas by a dashed line which, the legend at the bottom of the map says, depicts "Boundaries, international: state and province: district". A complete international boundary line from the left hand side of the map to the right is marked and labelled "British Malaya" and "Netherlands East Indies". A complete boundary line between Johor and Singapore is also drawn which runs down from the boundary in Johor Strait to intersect the British Malaya/Netherlands East Indies line. The lines so drawn clearly place the three features in Johor waters. While the only labelling on the map is that which labels the British Malaya/Netherlands East Indies boundary, the legend information at the bottom of the map contains a diagram illustrating the "Index to Provinces". Each of the three areas is numbered, 1-3, "1 Johore (Malaya)", "2 Singapore (Malaya)" and "3 Riouw (Sumatra N.E.I.)". If there was an appreciation that PBP belonged to Singapore as Singapore claims, it would have been logical for a line to have been drawn between the Netherlands East Indies, Johor and Singapore in the area of PBP. But no such line is drawn. Contrary to Singapore's claim that no information is provided, the map informs us that the authors did not consider that PBP fell in the Singapore (Malaya) province. The same is true of Maps 28 and 29.

392. Singapore suggests that the labelling of the international boundary line in an earlier map, on which it says Map 27 is based, "Unfederated Malay States - Straits Settlements/Sumatra, Netherlands East Indies", seems to imply that the mapmaker considered that there were territories belonging to the Straits Settlements in the vicinity of the South China Sea.<sup>559</sup> Again, this is not convincing: the map again shows lines dividing the waters into three distinct areas,<sup>560</sup> the Malay State of Johore, the Settlement of Singapore and Sumatra Netherlands East Indies. Again the three features are shown as falling in the Malay State of Johor. The lines themselves are slightly different in this case:

<sup>558</sup> SCM, paras. 9.26 & 9.27.

<sup>559</sup> SCM, fn. 577, p. 227, referring to Map 24 of the SCM Map Atlas.

<sup>560</sup> The legend at the bottom of Map 24, SCM Map Atlas.

the Johore/Singapore boundary is shown by a different dashed line from the dashed line between the "Unfederated Malay States-Straits Settlements/Sumatra, Netherlands East Indies". The legend at the bottom of the map says the latter form type of dashed line indicates "Boundary: International" whereas the former form of the dashed line indicates "Resident in Malay State". The reason, therefore, why the international boundary line is labelled "Unfederated Malay States-Straits Settlements/Sumatra, Netherlands East Indies" is because it labels the line illustrating the international boundary line running through both the Straits Settlements waters of Singapore and the Unfederated Malay State waters of Johore. Again there is nothing in Singapore's point as to Map 27.

393. Singapore also argues that "the line drawn in the sea continues to be for the purpose of differentiating between the British and Dutch possessions", and that there "are no indications on these maps [that they were done] with the intention of authoritatively attributing territories between ... elements of British Malaya", Johor and Singapore.<sup>561</sup> This is not convincing. If the line in the sea was solely to differentiate between British and Dutch possessions, as Singapore suggests, why was the line between Singapore and Johor drawn at all? The fact the lines were drawn at all strongly suggests that that was where the British authorities considered the boundaries between Singapore and Johor lay, and it is not consistent with an understanding that the waters around PBP were attributable to Singapore. It is not consistent with a view that PBP had belonged to Singapore predecessors since roundabout 1851 as claimed by Singapore. It is consistent with the view that PBP fell in Johor waters and did not belong to Singapore.

394. Singapore says in respect of Maps 35 and 36 that it is not clear what the "sporadic, dotted line going between Pedra Branca and Indonesia, labelled 'Malaysia' on one side and 'Indonesia' on the other side", "were intended to represent".<sup>562</sup> As Singapore says, the detailed map legend for some reason does not specify what the type of line is meant to indicate. However, it is difficult to see what the line might be intended to indicate if not the international boundary, especially as it is labelled "Malaysia" on one side and "Republic of Indonesia" on the other. Again in this map, as in the other maps referred to above, there is no indication in the area of PBP of any Singapore boundary line.

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<sup>561</sup> SCM, para. 9.27.

<sup>562</sup> SCM, para. 9.28.

395. The next map discussed by Singapore in its Counter-Memorial is the Johore survey compilation sheet which includes PBP dated 1957 (Map 30 of Malaysia's Memorial Map Atlas). Singapore says there is "no way of knowing what Malaysia's grounds are for advancing the assertion" that the sheet was "evidently carefully drawn and checked".<sup>563</sup> It argues that nothing in the sheet attributes PBP to Johor or Malaya, that the sheet was drawn for the purpose of an air photo survey, that a surveyor need not actually travel to a feature for it to serve as a triangulation point, and that the same compilation sheet formed the basis on which the 1962 so-called "admission against interest" map was drawn.<sup>564</sup>

396. These points may be addressed in turn. First, that the sheet was carefully drawn is shown by the level of detail in which the land is depicted, showing the varying elevation of the land and coastal shoaling in great detail, and the preciseness of the figure given for the coordinates of the Plan Control Points in the table on the right hand side of the sheet. That the sheet was carefully checked is shown by the list of signatures at the bottom right hand corner of the page. The list shows that the compilation and contouring were completed by two different drafters, both were checked by another official and then the survey compilation was approved again by a fourth official.

397. Second, while nothing in the sheet attributes PBP to Johor or Malaya, it is clear from the survey compilation sheet that PBP is included in, and is key to, the survey of Johor. It is the only feature of that size in the waters off the Johor coast which is named in the survey compilation sheet and is used as a Plan Control Point. Contrary to the implication by Singapore that PBP might have been used as a Johor triangulation point without Federation of Malaya surveyors travelling to the feature,<sup>565</sup> the records show that the surveyors did indeed travel to PBP to take observations from the island. The "Survey Department Federation of Malaya, Topographical Branch, Angle Book TRIG 1524 for Survey of Sheet 135", part of the Series L7010,<sup>566</sup> Season 1959 includes records headed the "Obsn for fixing rocks round Batu Puteh" which were completed by a Federation of Malaya surveyor, Mr. A. Velu Pillai. Mr. Pillai took the observations over a period of

<sup>563</sup> MM, para. 318, cited in SCM, para. 9.29.

<sup>564</sup> SCM, para. 9.29.

<sup>565</sup> SCM, para. 9.29(b).

<sup>566</sup> Copies of various versions of Sheet 135 from the L7010 Series are annexed to the MM, Map Atlas, Maps 32, 33, 34 and 39 and in the SCM Map Atlas, Maps 26, 27, 28 and 30, and SCM Insert 14, p. 230.

several days, on 2, 10, 11, 14 and 15 October 1959.<sup>567</sup> Besides being used as a triangulation point, PBP was occupied while the detailed surveys were being carried out. Amongst his detailed recordings, Mr. Pillai's records include a detailed diagram and description of PBP and the location of the trig point on it, and a diagram and description of the relationship of Middle Rocks and South Ledge to PBP.

398. Singapore's last point in respect of the 1957 compilation survey sheet is that its technical experts are of the view that it formed the basis on which the so-called "admission against interest" map was drawn. It is not known whether this was in fact the case. In any event, Malaysia does not accept that the maps can be characterised as an admission against interest on its part. As pointed out already,<sup>568</sup> these maps are equivocal. First of all, they contain disclaimers.<sup>569</sup> Second, it is not at all clear whether the term "(Singapore)" as used here is meant to indicate that the island or the lighthouse or the island and the lighthouse belong to Singapore. The use of the brackets suggests not: "Batu Puteh" is not in brackets, whereas the name of the lighthouse is listed directly below in brackets, "(Horsburgh)", and then under that in brackets is the term "(Singapore)", shown as follows:

Lighthouse [symbol] 28  
P. Batu Puteh  
(Horsburgh)  
(SINGAPORE)".<sup>570</sup>

399. This is equivocal; the maps cannot stand as the "statement of geographical fact"<sup>571</sup> which Singapore claims they represent. Nor is Singapore's argument aided by its comparison of the treatment of Pulau Pisang by Malaysia on the 1961 Pontian Kechil map sheet in Edition 3 of the map series with that of Horsburgh Lighthouse in the same Edition of the series.<sup>572</sup> The Pontian Kechil map shows the lighthouse on Pulau Pisang and the road connecting it to the beach, both being land granted to Singapore under the 1900 Indenture.<sup>573</sup> The lighthouse does not occupy the whole island and the road is illustrated differently from those on the mainland. Adding the notation "(Singapore)" under the

<sup>567</sup> This Reply, vol. 2, Annex 19.

<sup>568</sup> See MM, para. 321; MCM, para. 574.

<sup>569</sup> MM, para. 321.

<sup>570</sup> SM, paras. 7.47-7.50. Singapore reiterated this point at SCM, para. 9.4.

<sup>571</sup> SCM, para. 9.31, citing *Eritrea/Ethiopia* Boundary Commission, Decision 13 (2002) 41 ILM 1057, para. 3.27.

<sup>572</sup> SCM, para. 9.31(c) & SCM Map 25.

<sup>573</sup> MM para. 233 & Annex 89.

lighthouse symbol on this map sheet would have obscured the drawing of the contours on Pulau Pisang and the road to the lighthouse, a drawback in a land survey map. The omission of a reference to the ownership of the Pulau Pisang lighthouse and connecting road cannot be construed as a statement of geographical fact about PBP.

400. Singapore points out that the Gazetteer maintained by the U.S. Board on Geographic Names, second edition 1970, lists PBP as belonging to Singapore.<sup>574</sup> A recently declassified United States Department of State map of the area, Sheet NA 48-10, however, has the following notation for the island:

“Pulau Batu Puteh  
(Horsburgh)  
[MALAYSIA]”<sup>575</sup>

401. This recent example from the US State Department’s digital intelligence database, together with the consistent representations by the US Government of Singapore maritime boundary lines as excluding PBP,<sup>576</sup> can be compared against with the US Gazetteer reference and the 2000 edition of the CIA map which (well after the critical date) shows Pedra Branca as an inset on the Singapore map.<sup>577</sup> The weight of US practice falls on the

<sup>574</sup> SCM, para. 9.32.

<sup>575</sup> This Reply, vol. 2, Map Annex 5 (italics in original). Below the map there is a notation in handwriting as follows: “NO LIMDIS RESTRICTION, VERIFIED (Liz) MAP ANNEX, 21 May 2004. VER/INK/GGI, SOURCE: JOG 1:250,000 no date (1990’s) Sheet NA 48-10”. Liz is the US State Department official who verified the map and wrote this notation; INK is the Bureau of Intelligence and Research; GGI is the Office of the Geographer and Global Issues; JOG is Joint Operations Graphic. The map is reproduced from their digital intelligence’s map database and is an unannotated copy of an original paper map, Joint Operations Graphic (AIR) map, “Singapore, Malaysia and Indonesia”, produced by the Director General of the Military Survey, Ministry of Defence, United Kingdom (1993), Series 1501 AIR, Sheet NA 48-10, Edition 4-GSGS. This is an earlier edition of Map 47 of the MM.

<sup>576</sup> See the discussion in MCM, paras. 564-567. Singapore explains at para. 9.36 of its Counter-Memorial that after the United Kingdom published the original Joint Operations Graphic in 1993, from which the United States map is copied (Map Annex 5, vol. 2 of this Reply), that it protested the annotation on the map attributing PBP to Malaysia, explained that Singapore and Malaysia were currently in a dispute over sovereignty over the island, and that as a result of its representations the United Kingdom reissued the map without the annotation “[Malaysia]” and the earlier version was never published. The diplomatic records regarding this incident which Singapore annexes to its Counter-Memorial (SCM Annexes 52-54) indicate that the UK offered no opinion on the question of sovereignty and its High Commissioner to Singapore told Singapore that it had no intention of interfering in the dispute (SCM Annex 53). Singapore says that the UK Ministry of Defence sent a draft of the map to Singapore for comments, whereas the diplomatic records annexed by Singapore do not indicate that Singapore came into possession of the map in this manner, nor that it was never formally published. In fact, Singapore’s representative pointed out to the UK High Commissioner that if Singapore could get a copy of the map, so could other States (SCM Annex 53), and it now appears that the US did obtain a copy which they copied to their digital intelligence database. As such this particular map in its various editions shows that, at the least, neither the UK nor the US were of the view that PBP belonged to Singapore.

<sup>577</sup> MCM, para. 567 and Maps Section, Map 17, p. 299. This is simply a copy of the 1995 Singapore map, showing PBP as an inset for the first time.

side of not treating PBP as part of Singapore and not attributing any maritime boundaries to Singapore in the area of PBP. At the least, it can hardly be said to be third State conduct supportive of Singapore's view that it has had clear and undisputed sovereignty over PBP for over 150 years.

(iv) *Conclusion*

402. It has never been suggested that the map evidence definitively attributes sovereignty over PBP, Middle Rocks and South Ledge to Johor and Malaysia. What is true is that the maps consistently do not support Singapore's claim that it has had title to PBP since, variously, 1848, 1847-1851, or 1851. In fact, the maps strongly suggest that Singapore did not consider PBP as part of Singapore in 1851, and that third States did not consider that Singapore had an international boundary in the area of PBP. Although Singapore's claims its title over PBP "is not based on... any... map, but on the lawful taking of possession of Pedra Branca in the period 1847-1851 and on the uninterrupted maintenance of her title through administration of the island and the waters around it for more than 150 years",<sup>578</sup> it is striking that at no time until well into the 1990s did the Singapore authorities themselves publish a map of Singapore including PBP.

403. Singapore's repeated assertion that four maps represent an admission against interest<sup>579</sup> calls for a number of responses:

- as observed by both Parties, maps cannot constitute primary evidence of title;<sup>580</sup>
- the maps in question contain a disclaimer as to international boundaries, as Singapore notes;<sup>581</sup>
- the notation is equivocal: the emphasis is on lighthouse and not the island; the feature is shown by a symbol and not a drawing of land. It is not at all clear what the notation is intended to indicate;<sup>582</sup>
- Singapore ignores the significant number of official maps and charts, published over a considerable period both before and after the maps in question, which do not show that PBP is part of Singapore.

<sup>578</sup> SCM, para. 9.37.

<sup>579</sup> SCM, paras. 9.30-9.31.

<sup>580</sup> SCM, para. 9.36; MM, paras. 304, 327; MCM, paras. 571-572.

<sup>581</sup> SM, para. 7.49; SCM, para. 9.25ff; cf. MM, para. 321; MCM, para. 573.

<sup>582</sup> See MM, para. 321.

404. In respect of this last point, reference can be made to the use of map evidence by the Tribunal in the *Eritrea-Yemen* arbitration.<sup>583</sup> As Singapore records:

“Yemen produced a number of official Italian maps published throughout the 1924-1939 which consistently showed that the disputed islands had not been included in the former Italian colony of Eritrea and that, therefore, Italy had never regarded these islands as falling under her sovereignty.”<sup>584</sup>

The Tribunal accepted this point saying that:

“On balance, the evidence seems to establish that Italy, in the interbellum period, did not consider the Islands to be under Italian sovereignty or at least does not establish that Italy in that period did consider the Islands to be under Italian sovereignty.”<sup>585</sup>

As in the example of Italy in *Eritrea/Yemen*, no official map of Singapore published by the Government of Singapore before the 1990s showed PBP as part of Singapore. And this is the key point so far as the maps are concerned. Reviewing the map and chart evidence as a whole, the fact is that Singapore cannot produce a single Singaporean map which unequivocally shows PBP as part of Singapore before the critical date, or any map or chart by Singapore or third States of maritime boundaries in the area of PBP which shows a Singapore maritime boundary in the area. To mirror the words of the *Eritrea/Yemen* Tribunal, the evidence establishes that Singapore did not consider the island to be under Singapore sovereignty; at least it does not establish that Singapore did consider the island to be under Singapore sovereignty. This is quite at odds with Singapore’s claim that it has had sovereignty over the island for at least 150 years.

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<sup>583</sup> SM, para. 7.45.

<sup>584</sup> SM, para. 7.45.

<sup>585</sup> *Eritrea/Yemen Arbitration*, Award of the Arbitral Tribunal in Phase One: Territorial Sovereignty and Scope of the Dispute, 9 October 1998, 114 ILR 2, 96-97 (para. 374).



## Chapter 6

### THE DISTINCT CHARACTER OF PBP, MIDDLE ROCKS AND SOUTH LEDGE

#### Introduction

405. In its Memorial, Malaysia observed that PBP, Middle Rocks and South Ledge are separate features that do not constitute an identifiable group of islands in either historical or geomorphological terms.<sup>586</sup> The three features are separated by navigational channels. They do not have similar structures and do not stand on a single raised section of the seabed. The Chart produced by J.T. Thomson in 1851, reproduced in Malaysia's Memorial at page 63 and in this Reply at page 73, shows this on the basis of accurate soundings of the three features.

406. Singapore contests this view in its Memorial, arguing that "Middle Rocks, South Ledge and Pedra Branca form a single group of maritime features" and that "Middle Rocks and South Ledge can only be regarded as 'dependencies' of Pedra Branca".<sup>587</sup> Malaysia responded to this argument in its Counter-Memorial in terms that do not require further recitation here.<sup>588</sup> In its Counter-Memorial, Singapore restates its argument, viz. "Middle Rocks forms a single group with Pedra Branca while South Ledge is but a low-tide elevation".<sup>589</sup> Singapore goes on to take particular issue with Malaysia's contention that "Pulau Batu Puteh, Middle Rocks and South Ledge *are separated by navigational channels*",<sup>590</sup> contending that no reasonable ship master would sail his ship between Middle Rocks and South Ledge, that this shallow channel can hardly be regarded as a navigational channel, and that the area between Middle Rocks and PBP is "non-navigable".<sup>591</sup>

407. This Chapter responds to these arguments by Singapore that PBP, Middle Rocks and South Ledge are not separated by navigable channels. It also addresses a number of other minor points made in Chapter VIII of Singapore's Counter-Memorial.

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<sup>586</sup> MM, Chapter 8.  
<sup>587</sup> SM, para. 9.14.  
<sup>588</sup> MCM, Chapter 4.  
<sup>589</sup> SCM, para. 8.3.  
<sup>590</sup> SCM, para. 8.8 (Singapore's emphasis).  
<sup>591</sup> SCM, para. 8.8.

**A. Singapore's assertion that PBP, Middle Rocks and South Ledge are not separated by navigable channels**

408. Singapore's assertions that PBP, Middle Rocks and South Ledge are not separated by navigable channels have no foundation in fact. Appendix III to this Reply is an Report by Captain (rtd.) Goh Siew Chong of the Royal Malaysian Navy.<sup>592</sup> Captain Goh was from 1981 to 1986 the Chief Hydrographer of the Royal Malaysian Navy ("RMN"). As the curriculum vitae attached to his report shows, before becoming Chief Hydrographer, Captain Goh commanded various RMN survey ships. In the period March to May 1967, Captain Goh was on attachment to *HMS Dampier*, a British Royal Navy survey ship which, at the time, undertook a comprehensive hydrographic survey of the waters around PBP, Middle Rocks and South Ledge.

409. The simple point to which Captain Goh attests as expert is that, from a hydrographic perspective, PBP, Middle Rocks and South Ledge are unarguably three distinct and separate features separated by navigational channels. Before setting out his evidence more fully, however, it is worth recalling certain details relating to the *HMS Dampier* survey of the area as this survey has previously been addressed in evidence in Malaysia's pleadings, although for different reasons.

410. In his Affidavit at Annex 4 of Malaysia's Counter-Memorial, Rear-Admiral Thanabalasingam states as follows:

"Another element that I recall, which affirmed Pulau Batu Puteh's Malaysian character, were the requests by the [British] 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

<sup>592</sup> Report of Captain (rtd.) Goh Siew Chong, this Reply, vol. 1, Appendix III, pp. 235-248.

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 the *HMS Dampier*.<sup>593</sup>

411. The Fair Sheet Report of the *HMS Dampier* appended as Attachment 7 to the Rear-Admiral's Affidavit records amongst those who assisted with the survey one "Sub-Lieutenant Goh Siew Chong". The dates of the survey are given as 21 March to 22 May 1967. Depth soundings in fathoms (i.e., units of 6 feet) are given in the Report for the whole of the survey area, including the waters around PBP, Middle Rocks and South Ledge.

412. Addressing this survey, Captain Goh states as follows:

"4.2 This survey covered a large area from Tanjung Ayam (Southern Johore) to Tanjung Punggai (Eastern Johore) and including the Middle Channel, Pulau Batu Puteh, Middle Rocks and South Ledge. The co-ordinates of the survey area were as per the Fair Sheet attached to Rear-Admiral Thanabalasingam's Affidavit.

4.3 The positioning for the survey was carried out manually by measuring simultaneous sextant angles to fixed marks. No use was made of electronic aids. Sounding were obtained by echo sounders fitted in the ship and in the survey boat. Whilst sounding operation was in progress, tidal observation at Pulau Batu Puteh was observed visually at regular intervals and recorded manually. The tidal observation obtained was for the purpose of reducing all soundings obtained by echo sounder to sounding/chart datum adopted.

4.4 I was among the party that landed on Pulau Batu Puteh for the purpose of setting up a tide pole and establishing the datum on the tide pole by leveling to the existing Bench-Mark. We landed on Pulau Batu Puteh by small boat lowered from *HMS Dampier*. We were dressed in our naval working clothes when we landed on the island. A tide pole was erected on Pulau Batu Puteh. On completion of the setting up of the tide pole, leveling was carried out using an automatic level and a graduated tachstaff. From the leveling observations obtained, sounding datum on the tide pole was deduced. It took us about two hours to complete this work. After completion of the leveling work, we went up to the lighthouse and met the lighthouse keepers and proceeded to observe the view from the top of lighthouse. After that, we returned to *HMS Dampier*. At no stage did we ask permission from the lighthouse keepers to visit the island.

<sup>593</sup> Affidavit of Rear-Admiral (Rtd) Dato' Karalasingam Thanabalasingam, MCM Annex 4, para. 63.

4.5 On a separate occasion, after completion of the sounding operation of the area, a small survey party, including myself, landed on Middle Rocks and on South Ledge to establish the various heights of the high points of the rocks. It took us about three hours to complete the work and, on completion, we returned to *HMS Dampier*.

4.6 On completion of the whole survey, a final survey Fair Sheet was drawn up. This is the Survey Fair Sheet attached to Rear-Admiral Thanabalasingam's Affidavit. As a normal practice, the completed final Fair Sheet would have been sent to the United Kingdom Hydrographic Department and a copy forwarded to the country in whose waters the survey took place, in this case to the Ministry of Defence, Malaysia.

4.7 This survey was used to update all Admiralty Charts covering the area, including British Admiralty Chart 2403 and British Admiralty Chart 3831. Charts produced by Malaysia, Singapore and other countries covering the area also use data from this survey directly or indirectly.<sup>594</sup>

413. Basing his assessment on this survey by *HMS Dampier*, as well as on other surveys of these waters, Captain Goh addresses the question of whether PBP, Middle Rocks and South Ledge are separate maritime features in the following terms:

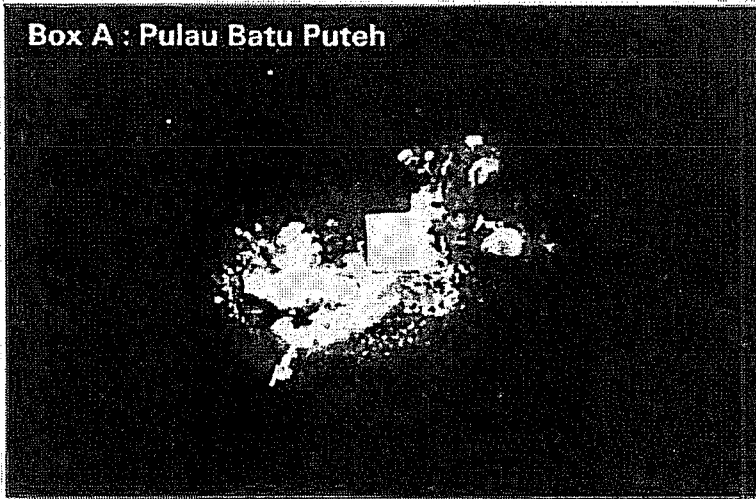
“5.4 Based on these surveys and charts, Pulau Batu Puteh, Middle Rocks and South Ledge are three distinct features separated by navigational channels. Pulau Batu Puteh is one group of rocks. Middle Rocks is another group of rocks and South Ledge is a group of rocks completely submerged at high tide. Pulau Batu Puteh is the largest of many rocks, including submerged rocks, that are generally described by this name. Middle Rocks is a group of rocks with two high points, one at 0.9 metres high and the other 1.5 metres high. South Ledge is a group of submerged rocks, only one of which (the northern-most) dries 1.8 metres at low tide.

5.5 Pulau Batu Puteh and Middle Rocks are two separate groups of rocks separated by a navigable channel of 970 metres (0.53 nautical miles) wide and with a least a depth of 10.1 metres. Ships with a draft of about 7.0 metres can navigate between Pulau Batu Puteh and Middle Rocks. Singapore's assertion (Counter-Memorial, paragraph 8.8) that no navigational channel exists between Pulau Batu Puteh and Middle Rocks is incorrect. Its assertion that there is a shallow bank linking Pulau Batu

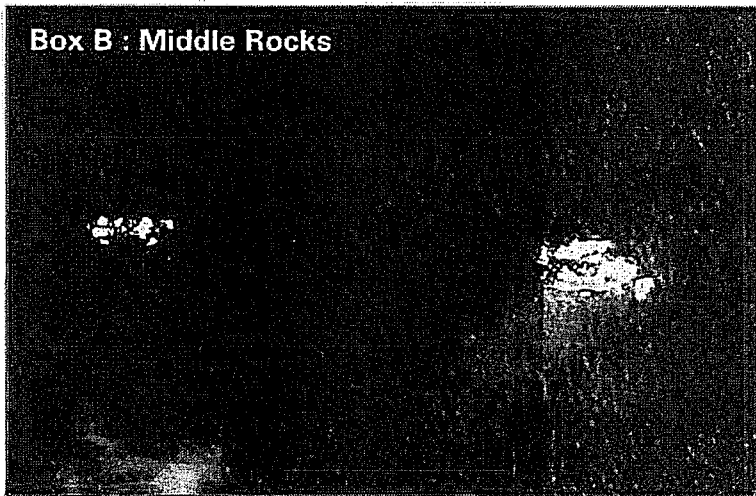
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<sup>594</sup> Report of Captain (rtd.) Goh Siew Chong, this Reply, vol. I, Appendix III, paras. 4.2-4.7, pp. 240-241. It warrants emphasis that “[t]here was no naval officer from Singapore attached to *HMS Dampier* at any time” in connection with this survey: Report of Captain Goh, at paragraph 4.1, pp. 239-240.

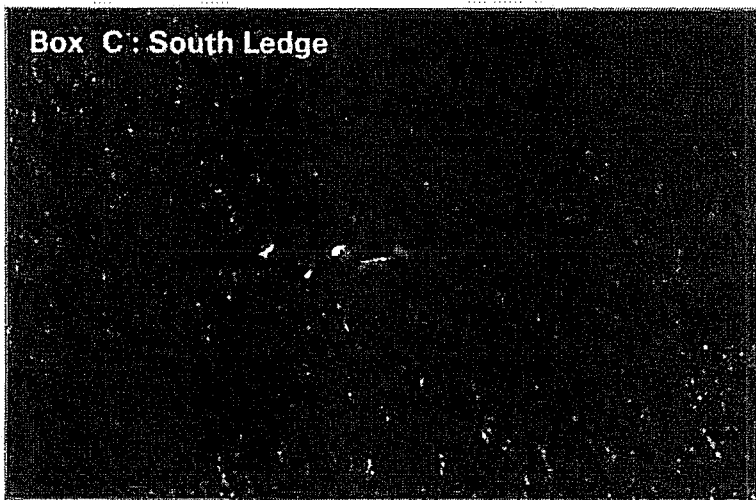
**Box A : Pulau Batu Puteh**



**Box B : Middle Rocks**



**Box C : South Ledge**



Puteh and Middle Rocks which makes the area non-navigable is also incorrect. This is addressed further below.

5.6 South Ledge is a group of submerged rocks separated from Middle Rocks by an expanse of sea of about 3000 metres (1.6 nautical miles) in distance and with depths of water generally more than 20 metres. There is, however, a patch of shallower water with a depth of 18.3 metres about 1000 metres to the north of South Ledge. Avoiding this patch, ships with a draft of 17 metres can easily navigate between Middle Rocks and South Ledge.<sup>595</sup>

414. The physical character of each of these features, each individually composed of a group of distinct rocks, is evident from the satellite photographs reproduced on the preceding page (Figure 16).

415. Commenting specifically on Singapore's characterisation as absurd Malaysia's argument that PBP, Middle Rocks and South Ledge are separated by navigational channels,<sup>596</sup> Captain Goh states:

"6.1 Singapore's assertion (Counter-Memorial, paragraphs 8.6 and 8.7) that the sea bed features between Pulau Batu Puteh and Middle Rocks, with a deepest point of 32 metres, and between Middle Rocks and South Ledge, with a deepest point of 36 metres, are 'extremely shallow' is misleading. Depths of 32 to 36 metres are considered quite deep.

6.2 In paragraph 8.8 of its Counter-Memorial, Singapore asserts that Malaysia's argument that Pulau Batu Puteh, Middle Rocks and South Ledge are separated by navigable channels is absurd. On the contrary, it is not absurd. It is a fact based on the survey by *HMS Dampier* in 1967 as well as on the detailed hydrographic survey conducted by the Maritime and Port Authority of Singapore in 2003. Based on data from these surveys, it can be stated conclusively that there are navigable channels between the three features.

6.3 Singapore's Counter-Memorial, at paragraph 8.8(a), affirms that South Ledge and Middle Rocks are separated by a navigable channel of about 20 metres depth. From a general navigational point of view, 20 metres of water is not shallow.

6.4 Whether a channel is navigable depends on its width, the depths of water available in the channel, the size and draft of the vessel. From a navigational point of view, the channels between Pulau Batu Puteh and

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<sup>595</sup> Report of Captain (rtd.) Goh Siew Chong, this Reply, vol. 1, Appendix III, paras. 5.4-5.6, p. 243.  
<sup>596</sup> SCM, para. 8.8.

Middle Rocks and between Middle Rocks and South Ledge are both navigable. Vessels with a draft of around 7 metres can navigate between Pulau Batu Puteh and Middle Rocks and vessels of a draft of around 17 metres can navigate between Middle Rocks and South Ledge. Vessels which grounded on either Middle Rocks or South Ledge were due to poor navigation.”<sup>597</sup>

416. As this evidence attests, the three features are separated by navigable channels. Indeed, all the available evidence—geomorphological, hydrographic and navigational—all indicate that these features are properly regarded as distinct maritime features rather than as constituent parts of a single island group.

**B. Additional observations on assertions made in SCM Chapter VIII**

417. A number of other brief observations are warranted on various assertions made in Chapter VIII of Singapore’s Counter-Memorial.

418. In paragraph 8.5 of its Counter-Memorial, Singapore asserts that the fact that PBP, Middle Rocks and South Ledge are more remote from Singapore than they are from Malaysia is irrelevant. It goes on to contend that “[t]he key point ... is that South Ledge and Middle Rocks lie within the territorial sea of Pedra Branca itself”. With respect, this is simply asserting what must be proved in the hope that the assertion itself will generate sufficient momentum to establish the point. It is unarguable that South Ledge is closer to Middle Rocks than it is to PBP. Middle Rocks are just as capable in law of generating a territorial sea as is PBP. To say that Middle Rocks and South Ledge lie within the territorial sea of Pedra Branca is thus to say nothing at all. If the Court accepts Malaysia’s contention that PBP and Middle Rocks are distinct features, it would follow that South Ledge would lie within the territorial sea generated by Middle Rocks, not by PBP. Singapore’s assertion on this point is simply wrong.

419. It also bears recollection that the Special Agreement of the Parties submitting this dispute to the Court explicitly requests that the Court determine sovereignty over each of the three features. This case is not simply about sovereignty over PBP.

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<sup>597</sup> Report of Captain (rtd.) Goh Siew Chong, this Reply, vol. 1, Appendix III, paras. 6.1-6.4, pp. 244-245.

420. On the question of proximity, Malaysia acknowledges that proximity to the Malaysian mainland cannot of itself form a basis of title.<sup>598</sup> It has never made such a claim. However, proximity is not irrelevant. The proximity of PBP, Middle Rocks and South Ledge to the Malaysian mainland is relevant at a number of levels. PBP is visible from the Johor coast. As Malaysia showed in its Counter-Memorial, through evidence, PBP is an important part of local Johor fishing culture. Johor fishermen have been fishing in its waters for generations. Access to these waters is easy, quick and direct. None of this applies in the case of Singapore. PBP is geographically remote from Singapore. It plays no part in local culture and experience. Access to these waters for Singapore fishermen is not easy, quick and direct. Proximity, in this case, is a feature of and supports evidence of conduct advanced by Malaysia.

421. In paragraphs 8.6 and 8.7 of its Counter-Memorial, Singapore suggests that the fact that the main navigational route in the area, Middle Channel, is broader and deeper than the channels between PBP, Middle Rocks and South Ledge somehow supports the proposition that the three features are not distinct. This does not follow at all. The depth and breadth of the Middle Channel is irrelevant to the distinct character or otherwise of the three features. As Captain Goh states in his evidence, what matters is whether the channels between PBP, Middle Rocks and South Ledge are navigable. They are. They are able to support traffic by vessels of a significant draft. The fact that a super-tanker may not take such a route, in preference to a deeper, wider and more direct route elsewhere, does not for a moment rebut the contention that there are navigable channels between the three features.

422. In paragraph 8.9(b) of its Counter-Memorial, Singapore relies on a 1957 report prepared by Commander R.H. Kennedy as part of the preparatory documents of the 1958 United Nations Conference on the Law of the Sea.<sup>599</sup> Citing an extract from this report, Singapore states that Commander Kennedy "referred to Pedra Branca and Middle Rocks collectively as the 'Horsburgh group', 'Horsburgh group of rocks' and 'group of rocks on which stands Horsburgh Light'".

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<sup>598</sup> MR, Chapter 1, paras. 14-15.

<sup>599</sup> An extract of this report is at SCM Annex 37.



423. As with so much of the documentary material relied upon by Singapore—addressed in exhaustive detail in Chapter 8 of Malaysia’s Counter-Memorial—the report by Commander Kennedy does not support the proposition for which it is advanced. In paragraph 2 of the relevant section of the report, which describes the Singapore Strait, Commander Kennedy states:

“... the eastern end [of the Strait may be considered] as the intersection of similar arcs centred on the low-water line of Tanjong Berakit and on the easternmost drying rock of the group of above-water and drying rocks on which stands the Horsburgh Lighthouse, which is maintained by the Government of Singapore.”<sup>600</sup>

424. The report later goes on to describe in more detail the limits of the Singapore Strait and, in this context, describes the eastern end of the Strait in the paragraph extracted in Singapore’s pleadings.

425. Three observations are warranted on this element. First, the careful language used by Commander Kennedy in his report is instructive. Addressing the Horsburgh Lighthouse, he says that it “is maintained by the Government of Singapore”. This phrase is both very precise and particular, and curious. Nowhere else in his description of the Singapore Strait does the Commander refer to specific lighthouses, although the Strait is bounded by them at every turn and the report notes that “[i]t is well marked for both day and night navigation”.<sup>601</sup> In addressing the Horsburgh Lighthouse, Commander Kennedy might have said nothing at all about which State maintained it. Conversely, he might have observed that the lighthouse was situated on a Singapore island lying off the Johor coast, in keeping with references elsewhere in the report to “Indonesian islands lying off the Sumatra coast”. He did neither. Instead, the language used to describe the island states that the Horsburgh Lighthouse *is maintained by the Government of Singapore*, the implication of the phrase being that the island on which the lighthouse stood was not necessarily a Singapore island.

426. Second, it is by no means clear that the report’s reference to “the easternmost drying rock of the group of above-water and drying rocks on which stands the Horsburgh Lighthouse” (in the quotation above) is in fact a reference to PBP and Middle Rocks. As

<sup>600</sup> Report of Commander R.H. Kennedy, SCM Annex 37, page 349, para. 2.

<sup>601</sup> Report of Commander R.H. Kennedy, SCM Annex 37, page 350, para. 3.

Images 3, 4 and 16 in Singapore's Memorial (following pages 10 and 102) make plain, PBP is not itself a single rock but is comprised of a whole series of above-water and drying rocks in the immediate vicinity of the main PBP island. Commander Kennedy's reference to "the group of rocks on which stands the Horsburgh Light" is, by its context, very much more likely to have been a reference to the rocks, above-water and drying, that comprise PBP and PBP alone.

427. Third, nor do the references, relied upon by Singapore in the extract which it cites—to "the group of rocks on which stands the Horsburgh Light", the "Horsburgh group", and the "Horsburgh group of rocks"—advance Singapore's case. In the light, in particular, of the preceding observations, it cannot be assumed that Commander Kennedy was, by this passing comment, characterising PBP and Middle Rocks as a single maritime feature. In any event, even if this is wrong, the extract on which Singapore relies itself makes it explicitly clear that South Ledge is not part of the "Horsburgh group", thereby undermining the very argument which Singapore propounds.

428. In reality, however one reads the various extracts from Commander Kennedy's report, it is evident that his reference to "the group of rocks on which stands the Horsburgh Light" cannot in any way be taken as a dispositive statement of either the singular or the distinct character of PBP, Middle Rocks and South Ledge. Singapore places more weight on Commander Kennedy's report than it can bear. As it has done at every turn in its pleadings, Singapore contorts the meaning of the document in a vain attempt to bolster an argument that otherwise can find little support.

429. In paragraph 8.9(c) of its Counter-Memorial, Singapore refers to Maps 27, 28 and 29 in the Map Atlas annexed to Malaysia's Memorial noting that these have adopted "the composite label 'Pedra Branca Horsburgh (Middle Rock)', clearly treating Pedra Branca and Middle Rocks as one single group". The maps in question, which are not navigational charts, are drawn on a scale of 1:253,440. They do not depict individual maritime features within any great clarity. On this scale, PBP and Middle Rocks would be 1/8 of an inch, or about 3 millimetres, apart. The reference to "Pedra Branca Horsburgh (Middle Rock)" on these maps cannot in any way be relied upon as evidence that Malaysia regarded these features as a group; it is simply an accommodation to scale.

430. In paragraph 8.9(d) of its Counter-Memorial, Singapore asserts a toponomy argument, contending that Middle Rocks and South Ledge "are named in clear relation to Pedra Branca". It attempts to bolster this argument by reference, in paragraph 8.9(e), to Judge Carneiro's Separate Opinion in the *Minquiers and Ecrehos* case. Even assuming *arguendo* that Middle Rocks and South Ledge are named in relation to PBP, this does not advance the case. The fact that features are named in relation to one another does not establish that they form part of a single composite whole. It reflects proximity, not an integrated relationship. There is nothing of substance to this particular argument by Singapore.

431. The question of both Singapore and Malaysia's conduct in relation to Middle Rocks and South Ledge has been addressed fully in Malaysia's Memorial and Counter-Memorial. It remains only to say that, in respect of Malaysia's conduct, this has consistently proceeded on the basis that each of the three features formed part of Malaysian sovereign territory. The fact that the features are proximate to one another does not mean that they form part of a single group. As regards the conduct which Singapore advances at paragraphs 8.18-8.20 of its Counter-Memorial in support of its case, this largely restates what was said in Singapore's Memorial and to which Malaysia responded in detail in its Counter-Memorial. There is therefore no need to repeat these arguments here. It should simply be emphasised that the surveys to which Singapore refers were evidently associated with Singapore's responsibilities as operator of the lighthouse rather than being conduct that could in any way be considered *à titre de souverain*.

### C. Conclusions

432. As Malaysia's successive pleadings on this point have demonstrated, however one looks at PBP, Middle Rocks and South Ledge—whether through the prisms of geology, geomorphology, hydrography or navigation—they constitute three separate and distinct maritime features. Toponomy, and the proximity of the features one to another, cannot alter this assessment. Singapore cannot assert sovereignty over Middle Rocks and South Ledge simply as a passing by-product of its claim to sovereignty over PBP. It must demonstrate sovereignty in respect of each feature individually. This it has failed to do.

433. As Malaysia observed in its Counter-Memorial, Middle Rocks and South Ledge have been part of Johor since time immemorial. This was confirmed by the 1824 Anglo-Dutch Convention and the Crawford Treaty of the same year. There is no basis now for any claim by Singapore to sovereignty over these features.

## SUMMARY

434. Malaysia's sovereignty over Pulau Batu Puteh, Middle Rocks and South Ledge, is based on the original title of the Sultanate of Johor to the three features. The basis of the original title over the three features can be summarised as follows:

- (a) The three features and other islands in and around Singapore Strait were part of the maritime empire of the Sultanate of Johor, which was established around 1511 and covered parts of the Malay peninsula, part of the island of Sumatra, islands in the China Sea and the Riau Archipelago. The sovereignty and international status of the Sultanate of Johor since the 16<sup>th</sup> century were well-known and recognised.
- (b) The Sultanate of Johor was exposed to some reconfiguration as the result of Dutch and English interference; in particular, in 1824 the Anglo-Dutch Treaty resulted in the Sultanate being split into two in accordance with the English and Dutch spheres of influence established by the Treaty. The Dutch sphere lay south of the Singapore Strait, under Sultan Abdul Rahman, and came to be called the Sultanate of Riau-Lingga. The British sphere covered the northern part of the Sultanate, under Sultan Hussain, and retained the name of the Sultanate of Johor. The Sultanate of Johor subsequently became a constituent part of the modern-day State of Malaysia.
- (c) Pulau Batu Puteh was not an island south of the Strait of Singapore. It fell within the British sphere of influence and remained the territory of the Sultanate of Johor. The Dutch never claimed the island and were careful to ensure that the Sultan of Riau-Lingga observed the separation effected by the 1824 Anglo-Dutch Treaty.
- (d) The territory of Johor thus remained intact, except for that part which became the Sultanate of Riau-Lingga and that part (including islands just north of the southern shore of the Strait) which Johor ceded to

Great Britain in 1824 for the establishment of the Colony of the Singapore;

- (e) After 1824 Britain acknowledged the Sultanate of Johor's sovereignty over its territory in all its dealings with the Johor rulers, for example in 1886 when Sultan Abu Bakar of Johor confirmed the extent of his territory with the British, and in the 1927 Territorial Waters Agreement between Britain and Johor.

435. Pulau Batu Puteh, lying at the entrance of the busy Strait of Singapore into the South China Sea, was not *terra nullius*, but was (and still is) a very well known land mark and navigational point of reference which has been featured by name on the earliest maps and charts of the region (since at least 1552). It was used by the Orang Laut, who owed allegiance to the Temenggong of Johor and were subjects of the Sultanate of Johor.

436. Singapore argues that its title to the three features derives from "a taking of lawful possession" of Pulau Batu Puteh in 1847, or 1851, or at any rate in the period 1847-1851, by virtue of the preparation for or construction of the Horsburgh Lighthouse on the island. 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? In assessing this, the following points are determinative:

- (a) Britain's conduct at the time of the construction of the Lighthouse indicated clearly that it did not do so with a view to claiming sovereignty, but with a view to assisting navigation in the public interest: there is no evidence at all of intention to acquire sovereignty over the island.
- (b) The lighthouse was constructed on Pulau Batu Puteh with the permission of the Johor rulers. The British correspondence relating to the construction of the lighthouse makes it clear that the British authorities believed that they were constructing the lighthouse on

Pulau Batu Puteh with the permission of the Johor rulers. This type of arrangement was quite common in the region and elsewhere at the time: Britain and other European States built and operated lighthouses on the territory of local rulers.

- (c) At no stage prior to Singapore's independence did the character of British conduct change; at no stage did Britain publicly assert sovereignty over Pulau Batu Puteh. Nor did Singapore act any differently in the period until 1980 when the dispute broke out. There was never any annexation or incorporation of Pulau Batu Puteh into the British Colony of the Straits Settlements.
- (d) Singapore cannot show any conduct in respect of the island of the character of *à titre de souverain*. The only thing that Britain or Singapore ever did in relation to the island was operate the lighthouse, which was a part of the regional Straits' Lights system.

In those circumstances the location of sovereignty remains unchanged: it remains with the sovereign whose consent was sought and given to establish the lighthouse.

437. The absence of any original title on the part of Great Britain to the island was reflected in British and Singaporean practice at all stages prior to the critical date. Until 1980 no Singaporean authority ever referred to PBP as belonging to Singapore; it was never included in any maps of Singapore before the 1990s; was never referred to in lists of Singapore Islands before the 1990s; was never incorporated into Singapore legislation during the 19<sup>th</sup> or 20<sup>th</sup> century. The territory and dependencies of Singapore have always been carefully described and were consistently limited to the 10-mile limit of Singapore Island established in 1824. They have never included PBP.

438. 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. The features are separated by navigable channels.

Singapore's late claim to Middle Rocks and South Ledge is merely an effort to enlarge its territorial claim.

439. 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:

- (a) The waters of PBP continued to be used as traditional Malay fishing waters right up until modern times (only ceasing when Singapore's actions prevented Malay fishermen from doing so), and the Royal Malaysian Navy patrolled the waters around PBP.
- (b) Malaysia's delimitation practices, as well as those of Singapore and other States in the Singapore Strait and South China Sea are consistent with and supportive of Malaysia's sovereignty over PBP and inconsistent with Singapore's claim.

440. The core question before this Court, according to both Parties, is the question of title over the island at the time of the inauguration of the lighthouse. Singapore's claims its title was established by planning and constructing the lighthouse on PBP; Malaysia's case is that it did not, and that original title to the island remained with Johor, with whose permission the lighthouse was built. The case concerns a title which, according to both States, existed in 1851 and has not changed since. In accordance with basic principle, subsequent *effectivitiés* cannot change that situation. In any case, both Parties' subsequent conduct has been entirely consistent with the state of affairs which existed in 1851. All Britain ever intended and all it ever did was to build and operate a lighthouse on an island belonging to Johor with its permission. All it ever claimed was ownership of the lighthouse, not sovereignty over the island. Prior to the critical date Singapore did no more, and Malaysia never conceded any more at any time. Consequently, sovereignty over PBP (and *a fortiori* the other features) remains with the successor to the Sultanate of Johor, viz., Malaysia.



## **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 November 2005