INTERNATIONAL COURT OF JUSTICE

APPLICATION FOR REVISION OF THE JUDGMENT DELIVERED BY THE INTERNATIONAL COURT OF JUSTICE ON 23 MAY 2008 IN THE CASE CONCERNING *SOVEREIGNTY OVER PEDRA BRANCA / PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAYSIA / SINGAPORE)*
(MALAYSIA *v.* SINGAPORE)

WRITTEN COMMENTS OF THE REPUBLIC OF SINGAPORE ON THE ADDITIONAL WRITTEN OBSERVATIONS OF MALAYSIA

12 FEBRUARY 2018

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WRITTEN COMMENTS OF THE REPUBLIC OF SINGAPORE

LIST OF INSERTS

Number	Description	Location
Insert 1	Sketch map in Annex 3 to the Application *annotated* (in red) to show the places in Singapore where the incidents recorded in Annexure C (serial numbers in blue) took place	*after* page 42
Insert 2	Item 34 in Annexure C to the Additional Written Observations	*after* page 44

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WRITTEN COMMENTS OF THE REPUBLIC OF SINGAPORE

CHAPTER I

INTRODUCTION

A. Procedural Background to these Written Comments

1.1 On 2 February 2017, Malaysia filed an application for revision (the "**Application**") of the Judgment delivered by the Court on 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (the "**Judgment**"). The Application is accompanied by three Annexes. On 24 May 2017, Singapore filed its written observations (the "**Written Observations**") on the admissibility of the Application.

1.2 On 9 June 2017, Malaysia requested the opportunity to submit further views on the admissibility of the Application, and to present further documentation. In a subsequent letter to the Court dated 23 June 2017, Malaysia stated that the further documentation "has only been found after the Application was filed" and that the documents "do not constitute a second application for revision".

1.3 On 9 October 2017, the Court acceded to Malaysia's request. On 11 December 2017, Malaysia filed its additional written observations and documentation (the "**Additional Written Observations**"). In accordance with the Court's decision of 9 October 2017, Singapore now submits these written comments on the Additional Written Observations (these "**Written Comments**"). Unless expressly stated otherwise, the terms and abbreviations used in these Written Comments bear the same meaning as those used by Singapore in the Written Observations.

1.4 At the outset, two aspects of the Additional Written Observations symptomatic of Malaysia's general approach towards the Application deserve comment. First, the Additional Written Observations have made even more apparent that the Application is in effect an appeal of the Judgment, and an attempt to obtain a rehearing of the original case, rather than a proper request for revision. This will be elaborated upon in Chapter V below. Second, Malaysia has introduced documents in the Additional Written Observations that contradict the representations it made to the Court when it sought permission to file further written pleadings and documentation. These representations formed the basis of the Court's grant of permission to do so. This is an abuse of process, on which Singapore will elaborate in Chapter II below.

1.5 In the Written Observations, Singapore showed that the Application fails to meet the conditions under Article 61 of the Statute and is therefore inadmissible. The Additional Written Observations do not remedy those deficiencies. On the contrary, Malaysia's pleading:

(*a*) again distorts, and even goes so far as to attack, the reasoning of the Court underlying its decision in the Judgment that sovereignty over Pedra Branca belongs to Singapore;

(*b*) advances the wrong test for "decisiveness" at the admissibility stage of the revision procedure, which ignores the text of the Statute and the jurisprudence of the Court;

(*c*) fails to deal with Singapore's arguments in the Written Observations that Malaysia's "newly discovered documents" have nothing to do with sovereignty over Pedra Branca, and do not affect the reasoning in the Judgment that supported the Court's decision on sovereignty;

(*d*) fails to demonstrate how Malaysia's "newly discovered documents" differ from similar documents that the Court regarded as irrelevant in the Judgment;

(*e*) in an attempt to circumvent the requirements of Article 99 of the Rules, introduces still further documents, which, in any event, are completely irrelevant to the issue of sovereignty over Pedra Branca; and

(*f*) still fails to explain how the Application satisfies the procedural requirements under Article 61 of the Statute, and in fact raises further doubts as to whether such requirements have been met.

B. Overview and Structure of these Written Comments

1. MALAYSIA'S CONTINUED FAILURE TO SATISFY "THE DUE DILIGENCE AND TEMPORAL CRITERIA OF ADMISSIBILITY"

1.6 **Chapter II** of these Written Comments addresses Malaysia's contention in the Additional Written Observations that it has met what it terms the "due diligence and temporal criteria of admissibility"[1]. As Singapore will demonstrate, notwithstanding the amount of ink spilt and voluminous documents annexed, Malaysia has still failed to show that it has overcome the procedural shortcomings in the Application that Singapore highlighted in the Written Observations[2]. On the contrary, the Additional Written Observations contain further evidence that Malaysia has not satisfied the procedural conditions under Article 61 of the Statute.

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1 *See* Additional Written Observations, Chapter III.

2 *See* Written Observations, Chapter V.

1.7 For example, in the Additional Written Observations, Malaysia provided clear evidence that it was informed in January 2017 that the sketch map in Annex 3 to the Application was estimated to have been publicly available *as early as in 1998*[3]. Malaysia not only withheld this information from the Court, it positively asserted in the Application, filed just two weeks after being so informed, that its "newly discovered documents", including Annex 3, "were released to the public by the UK Government only after the Court delivered its Judgment in 2008."[4]

1.8 Further, in the case of Annexes 1 and 2, despite the fact that Professor Shaharil's early 2015 blog clearly referred to them[5], Malaysia would have the Court believe it was pure happenstance that its researchers "discovered"[6] them on the morning of the very first day it claims it commenced its search in The National Archives of the United Kingdom (the "**UK National Archives**") for a "new fact"[7].

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3 *See* Additional Written Observations, Annexure L.

4 Application, para. 23.

5 *See* Written Observations, paras. 5.30-5.31.

6 Additional Written Observations, para. 158 and Annexure H.

7 *See* Additional Written Observations, para. 155 ("The research commenced on 4 August 2016 and took place in the National Archives of the United Kingdom in London.") *See also* Application, para. 23 ("During the period 4 August 2016-30 January 2017, research was undertaken by Malaysia at the United Kingdom National Archives in London. This research identified for the first time documents which demonstrated that Singapore officials at the highest levels did not consider Pedra Branca/Pulau Batu Puteh to fall within Singapore's sovereign territory in the years following the 1953 exchange of correspondence.")

2. MALAYSIA'S MISCHARACTERISATION OF ITS "NEWLY DISCOVERED FACTS"

1.9 Singapore has already demonstrated in the Written Observations that the meaning sought to be ascribed by Malaysia to its "new documents" is not borne out by the documents themselves or their context.

1.10 In **Chapter III** of these Written Comments, Singapore will show that the Additional Written Observations and additional documents have added nothing to Malaysia's case in this respect. In fact, Malaysia has completely failed to respond to Singapore's arguments in Chapter III of the Written Observations that none of Malaysia's "newly discovered documents"—namely, Annexes 1, 2 and 3 to the Application—touch on any understanding on the part of Singapore as to the issue of sovereignty over Pedra Branca, and that, in essence, these documents have nothing to do with the issue of sovereignty over Pedra Branca.

1.11 As for Malaysia's "further documentation" annexed to the Additional Written Observations, none of these documents provide any additional contextual support for Malaysia's contentions with respect to its "newly discovered documents" annexed to the Application. As Chapter III below will demonstrate, they also show nothing concerning Singapore's understanding about who had sovereignty over Pedra Branca, and are equally irrelevant to the issue of sovereignty over Pedra Branca.

3. MALAYSIA'S FLAWED CASE ON DECISIVENESS

1.12 **Chapter IV** of these Written Comments will show that, contrary to Malaysia's case in the Additional Written Observations, it has still not met its burden of showing how the "newly discovered documents", or any

fact they are said to evince, satisfies the "decisive factor" criterion for admissibility. In particular, Singapore will:

(*a*) show that Malaysia posits an arbitrarily low standard for meeting the "decisive factor" requirement of Article 61, which is erroneous;

(*b*) correct Malaysia's mischaracterisation of the Court's reasoning in the Judgment, and show that Malaysia has instead focused on factors the Court did not find relevant, while ignoring or otherwise characterising relevant factors as irrelevant; and

(*c*) demonstrate that none of Malaysia's "newly discovered documents", or any fact they are said to evince, can be a "decisive factor" that affects the Court's reasoning in the Judgment or would influence its decision on sovereignty.

4. MALAYSIA'S DISGUISED APPEAL ON THE MERITS

1.13 As alluded to above, **Chapter V** of these Written Comments will discuss and expose the true nature of the Application – that of a disguised attempt at an appeal on the merits of the Judgment. This is evident from, *inter alia*:

(*a*) Malaysia's criticism of the soundness of the Court's legal methodology on the pretext of reviewing the basis upon which the Court decided that sovereignty over Pedra Branca belongs to Singapore, in order to support the alleged decisiveness of its "new facts"[8]; and

[8] Additional Written Observations, paras. 49 to 68.

(*b*) its overt accusation that the Judgment "rested on a *proprio motu* analysis that had not had the benefit of submissions by the Parties."[9]

1.14 As Singapore will show in Chapter V, neither of these lines of argument is justified. But apart from that, what is clear is that Malaysia's attempt to reargue the merits of its case for sovereignty over Pedra Branca is not only irrelevant to an application for revision under Article 61 of the Statute; it is also contrary to Articles 59 and 60 of the Statute, which provide that judgments of the Court are binding as between the Parties and "final and without appeal".

[9] Additional Written Observations, para. 5. Malaysia has previously made similar insinuations in the Application, which have been addressed in the Written Observations. *See* Application, paras. 41, 45 and 48, and Written Observations, para. 5.6.

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CHAPTER II

MALAYSIA'S FAILURE TO SATISFY THE PROCEDURAL REQUIREMENTS FOR ADMISSIBILITY

2.1 In the Additional Written Observations, Malaysia complains that "Singapore objects to the admissibility of the Revision Application on every conceivable ground"[10]. This is correct insofar as Malaysia's argument is open to criticism on just about every point although, of course, Singapore acknowledged that the Application was filed within the ten-year time limit of Article 61, paragraph 5, of the Statute[11]. However, the Application fails under all the other admissibility conditions laid down in Article 61 of the Statute. Moreover, to the extent Malaysia relies on the Annexures to the Additional Written Observations as evidence of any "new fact", Malaysia has not complied with the procedural requirements under Article 99 of the Rules.

2.2 In **Section A**, Singapore provides a brief description of the documents that Malaysia relies on in the Application and the Additional Written Observations, in order to place the procedural defects in Malaysia's pleadings in context. It also shows how Malaysia's production of Annexures C and D does not satisfy the procedural criteria of the Rules and is in fact an abuse of process.

2.3 In **Section B**, Singapore will show that Malaysia's "new fact" or "facts" were not "unknown" to the Court and to Malaysia when the Judgment was rendered. **Section C** will demonstrate that, in any event, if Malaysia was unaware of its "new fact" or "facts", such ignorance is "due to negligence". Moreover, as **Section D** will show, Malaysia has not

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10 Additional Written Observations, para. 4.

11 *See* Written Observations, paras. 1.3 and 4.9.

demonstrated that the Application was made "at latest within six months of the discovery of the new fact". Any of these procedural shortcomings of the Application, by itself, is a sufficient ground for the Court to dismiss Malaysia's request under Article 61 of the Statute.

A. The Documents that Malaysia Relies on

1. ANNEXES TO THE APPLICATION

2.4 In the Application, Malaysia relies on three sets of documents, contained in the three Annexes to the Application, for revision of the Judgment.

2.5 Annex 1 to the Application consists of two telegrams: the first, dated 18 January 1958, was sent by the Secretary of State for the Colonies to the Governor of Singapore; and the second was the Governor of Singapore's response dated 7 February 1958 to the Secretary of State for the Colonies. Malaysia argues that the 1958 correspondence in Annex 1 showed that the Singapore authorities did not consider Pedra Branca as part of Singapore territory at that time[12].

2.6 Annex 2 to the Application consists of several documents concerning an incident on 25 February 1958 involving the vessel *Labuan Haji* which was *en route* from Singapore to Thailand, namely: a message from one Mr. Wickens dated 25 February 1958, which is accompanied by handwritten internal minutes dated 26 February 1958; and two newspaper cuttings of reports of the incident from the *Straits Times* and *Singapore Standard*. On the basis of these documents in Annex 2, Malaysia alleges that the Singapore authorities at that time did not view the waters around

12 *See* Application, para. 25.

Pedra Branca as belonging to Singapore, but rather, as belonging to Johor[13].

2.7 Annex 3 to the Application is a sketch map dated 25 March 1962 with handwritten annotations, the most recent of which is dated "Feb 66". According to Malaysia, the sketch map shows that the Singapore authorities' understanding of their territorial entitlements was that they did not include Pedra Branca[14].

2.8 In the Written Observations[15], Singapore demonstrated that Malaysia has not satisfied the procedural requirements under Article 61 in respect of the documents in these Annexes.

2. ANNEXURES TO THE ADDITIONAL WRITTEN OBSERVATIONS

2.9 Annexure A consists of three newspaper cuttings, one in the English language dated 27 February 1958 from the *Straits Times* and two in the Malay language dated 26 and 27 February 1958 respectively from the *Berita Harian*. Malaysia claims that these newspaper cuttings provide further corroboration of the location of the incident involving the *Labuan Haji*[16], the primary subject of the documents in Annex 2 to the Application. On the basis of the reference in the 27 February 1958 *Straits Times* cutting to the Prime Minister of Malaya calling for a "full report on the incident in Johore territorial waters"[17], Malaysia further asserts that

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13 *See* Application, para. 30.

14 *Ibid.*, para. 35.

15 *See* Written Observations, Chapter V.

16 *See* Additional Written Observations, para. 85.

17 Cutting from the *Straits Times* (Additional Written Observations, Annexure A).

this newspaper cutting confirms the fact that "the Malayan authorities considered that Johor's territorial waters encompassed the waters to the north of Pedra Branca/Pulau Batu Puteh."[18]

2.10 Annexure B contains the entire archival file consisting of 162 pages in which the sketch map in Annex 3 was found.

2.11 Annexure C contains a copy of the archival file WO 268/802 entitled "Indonesian Offensive Against West Malaysia (Excluding Piracies and Undetected Infiltrations)". It records incidents involving infiltration of Malaysia and Singapore by Indonesian perpetrators in the period 17 August 1964 to 31 December 1965. According to Malaysia, it first discovered Annexure C on 30 May 2017[19].

2.12 Malaysia claims that Annexure C shows why the omission of Pedra Branca from the Annex 3 sketch map is significant[20]. Malaysia makes a further claim that this document indicates that the UK authorities considered Horsburgh Lighthouse to be "situated in East Johor until at least the end of 1965"[21], and "provid[es] yet another new illustration"[22], "valuable in itself"[23], of the Singapore authorities' understanding that Singapore had not acquired sovereignty over Pedra Branca from Johor.

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18 Additional Written Observations, para. 85.

19 *Ibid.*, para. 91.

20 *Ibid.*, para. 95.

21 *Ibid.*, para. 94.

22 *Ibid.*, para. 95.

23 *Ibid.*

2.13 Annexure D comprises a map titled "Johore, 1937" and franked with a stamp of the War Damage Commission (the "**1937 Johore Map**"), as well as the War Damage Commission's report for 1952. Malaysia claims that it first became aware of the existence of the 1937 Johore Map on 9 November 2017, and obtained it on 5 December 2017[24]. According to Malaysia, the 1937 Johore Map confirms that the authorities of Malaya and Singapore both understood that Pedra Branca was situated in Johor's territorial waters[25], and provides evidence that there was no appreciation by the Singapore authorities that Pedra Branca was part of Singapore[26].

2.14 Neither Annexure C nor Annexure D was referred to in the Application. However, contrary to Malaysia's claim that the further documents "do not constitute a second application for revision"[27], it is readily apparent from Malaysia's reliance on Annexures C and D as evidence of the Singapore authorities' "understanding" or "appreciation" of sovereignty over Pedra Branca that Malaysia is also relying on Annexures C and D as independent bases for revision of the Judgment.

2.15 Malaysia relies on Annexure C as evidence of a "new fact": "the UK authorities considered Horsburgh lighthouse to be situated in East Johor until at least the end of 1965."[28] This goes beyond any "fact" Malaysia relies on in the Application.

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24 *See* Additional Written Observations, para. 103.

25 *Ibid.*, para. 102.

26 *Ibid.*, para. 105.

27 Letter from the Co-Agent for Malaysia to the Registrar dated 23 June 2017, para. 5. *See also* para. 1.2 above.

28 Additional Written Observations, para. 94.

2.16 As for Annexure D, it bears absolutely no relation to any of the documents annexed to the Application. Nothing in the Additional Written Observations draws any link between Annexure D and the Annexes to the Application, on which Malaysia's request for revision of the Judgment is based. Contrary to what the Co-Agent for Malaysia stated in his letter of 23 June 2017 to the Court, Annexure D is not "pertinent to the Application", nor can it be said in any way to provide "appropriate contextual explanation of the points Malaysia seeks to make as detailed in the Application itself"[29]. Malaysia claims that it received a copy of the 1937 Johore Map on 5 December 2017[30], six months *after* Malaysia's letter of 9 June 2017 requesting the Court for the opportunity to present further documentation "in support of its Application" that had already allegedly "been found". It follows that the 1937 Johore Map could not possibly have been within Malaysia's contemplation at the time it made that request. Moreover, contrary to Malaysia's assertion at the procedural meeting with the President of the Court on 11 September 2017 that the further documentation Malaysia wished to present was found in the UK National Archives, the map in Annexure D in fact was obtained from a private individual[31].

2.17 As Article 99, paragraph 1, of the Rules makes clear, Malaysia bears the burden of demonstrating that the Application contains all the particulars necessary to show that the conditions laid down in Article 61 of the Statute have been met, and any documents in support of the Application are required to be annexed to it. For all the foregoing reasons, Malaysia's presentation of Annexures C and D as "further documentation" pursuant

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29 Letter from the Co-Agent for Malaysia to the Registrar dated 23 June 2017, para. 5.

30 *See* Additional Written Observations, para. 103.

31 *Ibid*.

to the Court's allowing it the opportunity to do so, instead of annexing them to an application as required by Article 99 of the Rules, is an abuse of process. In any event, they do not meet the criteria for admissibility under Article 61 of the Statute.

B. Malaysia's "Newly Discovered Fact" Was Not Unknown When the Judgment Was Given

2.18 In the Application, Malaysia is imprecise on the characterisation of the "new fact" that it allegedly discovered and that would warrant the revision of the Judgment[32]. At some point, it alleges that each of the new documents filed with the Application constitutes a new fact[33]. Yet, in other places, it considers that these documents constitute "evidence of an implicit underlying fact, namely, that Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore."[34] This is clearly not a "new fact", as explained by Singapore[35]. In the Additional Written Observations, Malaysia does not dispute this, but complains that Singapore—which did nothing more than quote from the Application—"misconstrue[s] the facts which Malaysia has newly discovered"[36].

2.19 Conscious of the shortcoming of its own description of the "new fact" or "facts", Malaysia has now changed its understanding of the "new fact" in

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32 *See* Written Observations, paras. 4.6 and 5.3.

33 *See* Application, para. 22.

34 Application, para. 22. *See also* Application, paras. 23 and 40.

35 Written Observations, paras. 5.2-5.6.

36 Additional Written Observations, para. 107.

the sense of Article 61 of the Statute. On the basis of the documents it claims were newly discovered, Malaysia undertakes to

> "establish the existence of a continuing factual situation, of which neither the Court nor Malaysia knew when the Judgment was given: specifically, that no agreement, express or tacit, existed between the parties as to the transfer of Johor's sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore."[37]

2.20 Malaysia further alleges that "[t]he fact that no agreement ever arose between the parties was obviously unknown to the Court itself"[38]. However, this new characterisation or understanding of the "new fact" does not transform it into a fact "unknown" to the Court or to Malaysia. Malaysia again ignores its own pleadings in the original case in which it specifically tried to persuade the Court of Singapore's lack of any "conviction" in respect of sovereignty over Pedra Branca, or, to use Malaysia's words in the Additional Written Observations, of "the apparent Singaporean component of the shared understanding implied in the 2008 Judgment"[39].

2.21 In its Memorial in the original case, Malaysia argued that:

> "Singapore at no time subsequent to [the 1953] correspondence took any steps to claim Pulau Batu Puteh. Nor, evidently, did this affect Singapore's perception that the island was not in its territory. … Singapore at no time

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37 Additional Written Observations, para. 107. *See also* Additional Written Observations, para. 29.

38 Additional Written Observations, para. 109.

39 *Ibid.*, para. 15. *See also*, Additional Written Observations, para. 32.

> prior to 1980 expressed any conviction that Pulau Batu Puteh was part of its territory."[40]

2.22 It further alleged that:

> "[A]t no time in the course of the bilateral relations between the Parties did Singapore manifest any appreciation that it had sovereignty over Pulau Batu Puteh. … There is nothing in Singapore's subsequent practice that shows a different understanding."[41]

2.23 After reviewing Singapore's unilateral conduct in the period between 1953 and 1980, Malaysia finally asserted that:

> "As with Singapore's conduct in its bilateral relations with Malaysia, Singapore's unilateral conduct over the crucial period of its constitutional evolution also confirms that Singapore did not [*sic*] any time prior to 1980 have any sense that it had title to Pulau Batu Puteh."[42]

2.24 In its Counter-Memorial in the original case, Malaysia also relied on what it now considers is a "new fact". It stated that:

> "Moreover [the Singapore authorities] did nothing to give effect to the correspondence: at no point subsequently (until just before the critical date) did Singapore assert a claim to PBP [*ie*, Pedra Branca/Pulau Batu Puteh]. There was not the slightest change in Singapore's conduct: it continued to act as it had done before, that is, to administer the lighthouse and nothing else. There was no extension of Singapore territorial waters nor any other act implying a claim of sovereignty. Nothing more was said of the matter. While Singapore now contends that it did indeed rely upon the statement by the Johor Acting State Secretary, there is no evidence at all to show that this was the case. On the

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40 Memorial of Malaysia, para. 242.

41 *Ibid.*, para. 244.

42 *Ibid.*, para. 267.

> contrary, *further activity of Singapore clearly shows that it continued to treat PBP as not being part of Singapore*."[43]

2.25 In its Reply, Malaysia also revisited the conduct of the Parties before and after the 1953 correspondence and concluded:

> "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."[44]

2.26 Finally, during the hearings held in the original case, counsel for Malaysia addressed the issue of tacit recognition and argued that Singapore never claimed or accepted to exercise sovereignty over Pedra Branca:

> "*Cette pratique [subséquente] montre également, que malgré les souhaits du* Chief Surveyor *et du* Master Attendant *de Singapour, les organes compétents n'ont jamais étendu la mer territoriale de Singapour autour des eaux de Pedra Branca. Il en va de même du souhait du prédécesseur lointain de M. Chao, l'*Attorney-General *: 'nous pouvons revendiquer Pedra Branca' disait-il, mais le fait est que ni le Royaume-Uni ni Singapour l'ont fait.*"[45]

2.27 As can be seen from the above, it is simply not true that Malaysia's "new fact", however characterised, "was not pleaded by either Party during the original proceedings"[46]. Against this background, Malaysia cannot now

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43 Counter-Memorial of Malaysia, para. 510 (Emphasis added).

44 Reply of Malaysia, para. 372.

45 CR 2007/31, 23 November 2007, pp. 38-39, para. 30 (Kohen). ("This [subsequent] practice also shows that, despite the wishes of the Chief Surveyor and the Master Attendant of Singapore, the competent authorities never extended Singapore's territorial sea around the waters of Pedra Branca. The same applies to Mr. Chao's distant predecessor, the Attorney-General: 'we can claim Pedra Branca' he said, but the fact is that neither the United Kingdom nor Singapore did so." [*Translation by the Registry*])

46 Application, para. 45.

claim that the "fact" of the non-existence of an agreement as to the transfer of sovereignty over Pedra Branca was unknown to the Court and to Malaysia. This was exactly what Malaysia argued in the original case[47]. Yet, it did not prevail. In re-opening the issue, Malaysia is simply appealing the findings of the Court in the original case[48].

2.28 In any event, as in the original case, the documents submitted by Malaysia with the Application cannot establish the non-existence of an agreement, tacit or express, between the Parties in respect of sovereignty over Pedra Branca. As Singapore shows in Chapter III below, none of these documents deals with sovereignty or supports the drawing of any conclusion in respect of sovereignty over Pedra Branca.

C. Malaysia Failed to Exercise Reasonable Diligence to Obtain the New Documents Before the Judgment Was Delivered

2.29 Even if Malaysia's new documents, or any "fact" or "facts" they could be said to evince, were unknown to Malaysia when the Judgment was delivered, this ignorance is due to negligence attributable to Malaysia alone. Singapore agrees that "the test of negligence in discovery is … objective, based on what reasonably can be expected of a State's conduct in the circumstances of the case."[49] These documents would certainly have been known to Malaysia had it acted with reasonable due diligence.

2.30 Malaysia contends that it is "not unreasonable in the circumstances of the original case that Malaysia, despite its extensive and systematic efforts,

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47 *See* Written Observations, paras. 5.4-5.5.

48 *See* paras. 5.4-5.11 below.

49 Additional Written Observations, para. 112.

did not locate or obtain the documents which support the newly discovered facts on which this Application is based."[50] In particular, in the Application, Malaysia contends that:

> "It is also worth noting that the negligence standard in this case should take into account the fact that the issue of the Parties' own understanding of the situation concerning sovereignty over Pedra Branca/Pulau Batu Puteh was not pleaded during the original proceedings, and it would be difficult to expect litigants to be characterised as negligent for not discovering information relevant to a point which was not anticipated in the proceedings."[51]

2.31 It is plainly illogical to allege, on the one hand, that the Parties had not pleaded or anticipated an argument used by the Court and, on the other hand, that Malaysia had exercised all due diligence to search for documents in support of that argument.

2.32 Moreover, as shown above[52], the "new fact" on which Malaysia now relies was referred to in the pleadings of Malaysia itself in the original case. In these circumstances, it is reasonable to expect Malaysia, the Party that pleaded a fact, to have taken all possible steps to establish and verify its allegations. In *Tunisia* v. *Libya*, the Court considered:

> "[I]t is to be expected that a State would not assert that such concession extended to its own area of continental shelf without knowing, or making efforts to discover, the exact limits of the concession. It is also to be expected that, in litigation the ultimate purpose of which is the establishment of a continental shelf delimitation, and in the course of which a petroleum concession in the relevant area is described by one party without precision, the other party

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50 Additional Written Observations, para. 114.

51 Application, para. 48.

52 *See* paras. 2.21-2.27 above.

> will not limit itself to commenting on the matter in its pleading, but itself seek out the information."[53]

2.33 If it had been a diligent litigant, Malaysia should have conducted extensive research, including in the UK National Archives, given the history of Singapore and Malaysia. However, neither in the Application nor in the Additional Written Observations does Malaysia provide any evidence that it actually tried to request any documents from the UK National Archives or the UK Foreign and Commonwealth Office (the "**FCO**"). It simply relies in generic terms on the fact that there are exemptions contained in the Freedom of Information Act 2000 (UK) (the "**FOI Act**"), in particular, on Sections 24 (National Security), 26 (Defence) and 27 (International Relations)[54]. Malaysia does not provide any evidence that the documents it submitted with the Application fell or fall under these exemptions. On the contrary, the very fact that these documents were disclosed to the public suggests that they did not fall under these exemptions, and Malaysia has not shown that it tried to gain access to these documents before the Judgment was delivered[55].

2.34 In respect of the National Security exemption under Section 24 of the FOI Act, Malaysia does not produce "[a] certificate signed by a Minister of

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53 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 206, para. 27.

54 *See* Additional Written Observations, para. 148. *See also* Additional Written Observations, Annexure F.

55 *See instead*, Additional Written Observations, para. 116.

the Crown certifying that exemption [from production], is, or at any time was, required for the purpose of safeguarding national security"[56].

2.35 In an attempt to justify its failure to request relevant documents (or even information on whether such documents existed in the UK National Archives or the archives of the FCO), Malaysia contends that "there was no basis during the original case to make any approach to the UK Government to request such documents of which [Malaysia] was unaware."[57] But Malaysia again misses the point. The question is not whether Malaysia was aware of the existence of the documents that it now produces, but rather, whether it should have made—and had made—diligent research concerning the existence and contents of such documents in the circumstances of the case.

2.36 In the Written Observations[58], Singapore has shown that, well before the Judgment was delivered, Malaysia was aware or should have been aware of circumstances and information that, at the very least, should have triggered more detailed research, such as by making requests to the UK Government for documents or information.

2.37 Concerning the 7 February 1958 telegram in Annex 1 to the Application, Malaysia was aware of the ongoing discussions regarding the potential extension of the limits of the territorial sea, arising from contemporaneous developments in the law of the sea[59]. The July 1953 correspondence

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56 Freedom of Information Act 2000 (UK), Sec. 24(3) (Additional Written Observations, Annexure F).

57 Additional Written Observations, para. 116.

58 *See* Written Observations, paras. 5.14-5.22.

59 *See also* Written Observations, paras. 3.3-3.4.

produced by Malaysia in the original case proves this knowledge[60]. In these circumstances, it is entirely reasonable to expect a litigant to carry out the necessary research on related documents and correspondence, including those in respect of the 1958 Geneva Conference on the Law of the Sea. But Malaysia has produced no evidence of any approaches made to the United Kingdom that would have enabled it to discover Annex 1 to the Application before the Judgment was given.

2.38 The same is true in respect of the documents relating to the *Labuan Haji* incident produced in Annex 2 to the Application. The contemporaneous newspaper cuttings that Malaysia produced in Annex 2 to the Application and in Annexure A to the Additional Written Observations show that the incident was well documented. Malaysia should have been aware of this incident and its alleged relevance to the original case. These newspaper articles were publicly available and could have been easily discovered by Malaysia with minimal effort. The circumstances of the *Labuan Haji* incident could not have been unknown to Malaysia ever since the incident occurred. Malaysia does not dispute this fact in the Additional Written Observations. Yet, it has not provided any evidence that it had requested relevant information from the UK National Archives or the FCO.

2.39 Malaysia's negligence is also demonstrated in the case of the sketch map in Annex 3 to the Application. Even if the handwritten annotations on the sketch map show new dates, it is undeniable that almost identical versions of the sketch map were in the public domain and could have been identified easily by Malaysia well before the Judgment was rendered in 2008[61]. Given the importance Malaysia attaches to the sketch map (and

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60 Letter and attachments from A.G.B. Colton, for the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore, dated July 1953 (Memorial of Malaysia, Vol. 3, Annex 68).

61 *See* Written Observations, paras. 5.20-5.24.

apparently to what the map *does not* depict), one would have expected Malaysia to search for and request the production of other versions of the sketch map. Yet, it has not produced any evidence that it ever enquired whether such other versions existed or were held by the UK National Archives.

2.40 The sketch map, even the one bearing the handwritten annotations that is included in the archival file DEFE 69/539, was in fact obtainable by Malaysia, and indeed by everyone, well before the Court rendered the Judgment[62]. Malaysia attempts to cast doubt on Singapore's evidence for the release date of the archival file DEFE 69/539 given the different information it received through its own enquiry[63]. This allegation deserves two remarks.

2.41 First, Singapore's evidence is constituted by a formal response sent by the Chief Executive's Office of the UK National Archives in reply to a request made through the official channels by the Director, National Archives of Singapore. In contrast, Malaysia produces an email exchange that involved an enquiry by one of its researchers using what appears to be his personal email account on the generic contact form found on the website of the UK National Archives, with no indication that this was made other than in a private capacity. Singapore leaves it to the Court to appreciate the weight of the respective evidence brought before it by the two Parties.

2.42 Second, Malaysia made this enquiry on 19 January 2017, more than two months after "discovering" the relevant file in the UK National Archives

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62 *See* Written Observations, para. 5.19. *See also* correspondence concerning the date of release of DEFE 69/539 with the UK National Archives, 4-25 April 2017 (Written Observations, Annex 2).

63 *See* Additional Written Observations, para. 159.

and just 14 days before it filed the Application, and received a response from a Reader Adviser two days later. Yet, when it filed the Application on 2 February 2017, Malaysia failed to disclose to the Court that the Reader Adviser had estimated that the archival file containing Annex 3 to the Application had been made publicly available in December 1998, nearly ten years before the Judgment[64]. Despite the information received through its enquiry, Malaysia did not deem it necessary to carry out further research concerning the release date. Instead, in the Application, Malaysia categorically stated that the annexed documents—including the sketch map in Annex 3—"were released to the public by the UK Government only after the Court delivered its Judgment in 2008."[65] This is not the care expected of a diligent Party, in particular, in revision proceedings.

2.43 Finally, in respect of the 1937 Johore Map that Malaysia included in Annexure D to the Additional Written Observations, it suffices to note that Malaysia must have had official notice of this map ever since the 1950s. Indeed, as Malaysia points out, the War Damage Commission consisted of members "appointed jointly by the High Commissioner of the Federation of Malaya and the Governor of the Colony of Singapore" and among the members were "the Honourable Financial Secretaries of both Malaya and Singapore"[66]. Malaysia would have been aware of all the materials in the archives of or used by the War Damage Commission, including the 1937 Johore Map, from the time they were received by the War Damage Commission, *ie*, from 1 January 1950 when the War

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64 *See* correspondence between Malaysia's researchers and the UK National Archives, dated 19-21 January 2017 (Additional Written Observations, Annexure L).

65 Application, para. 23.

66 Additional Written Observations, para. 104.

Damage Commission was established[67]. It could not have been the case that Malaysia was only made aware of the 1937 Johore Map in November 2017, especially if—as Malaysia asserts—it had been used by the War Damage Commission. Therefore, any ignorance of the 1937 Johore Map on the part of Malaysia when the Judgment was given must have been due to negligence. Malaysia cannot now claim that it only discovered this document under peculiar circumstances from a private individual[68].

2.44 In conclusion, Malaysia could not have been unaware of the existence of these documents. Even if Malaysia did not know of the documents it now produces in order to make its claim concerning the discovery of a "new fact" or "facts", its ignorance was due to negligence. It has not demonstrated that it had made any enquiry concerning the existence or the contents of these documents before the Judgment was rendered. The fact that these documents were obtainable by Malaysia and the fact that, given its arguments and allegations in the original case, it was in its own interests to ascertain them, mean that a condition for admissibility of an application for revision laid down in Article 61, paragraph 1, of the Statute, namely, ignorance of a new fact not due to negligence, is not satisfied[69].

2.45 In addition, Malaysia not only asserts that these documents were available to Singapore before the Judgment was rendered, but also insinuates bad faith on Singapore's part for not producing them in the original case and

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67 *See* War Damage Commission Report for 1952, p. 33 (Additional Written Observations, Annexure D).

68 *See* Additional Written Observations, para. 103.

69 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 28.

yet objecting to Malaysia's request to revise the Judgment based on them[70]. The newspaper cuttings in Annex 2 and Annexure A were publicly available. As for the rest of the documents, Singapore categorically states that it did not have them before the Judgment was given and takes strong objection to Malaysia's baseless suggestion of bad faith.

2.46 In any event, Article 61 of the Statute does not contain any provision concerning knowledge of the "new fact" or evidence of the "new fact" by the Party that is not seeking revision. Moreover, given the circumstances, Malaysia was entirely free to request production of the documents that allegedly were in the possession or custody of Singapore during the proceedings in the original case. But it never did so. Even if it had these documents, Singapore had no reason to produce them given that they were totally irrelevant to the issues of sovereignty before the Court.

D. Malaysia Failed to File the Application Within Six Months of the Alleged Discovery of the "New Fact" or the New Documents

2.47 In the Additional Written Observations, Malaysia belatedly disclosed the date of its discovery of each of the three Annexes to the Application. At the outset, it should be noted that, in accordance with Article 99, paragraph 1, of the Rules, this information should already have been provided in the Application because an application for revision shall contain "the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled." This includes the date of discovery of the documents relied on for revision and the information necessary to ascertain whether the six-month time limit was fulfilled.

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70 *See* Additional Written Observations, paras. 16 and 116.

2.48 According to Malaysia, the documents produced in Annexes 1 and 2 of the Application were first discovered on 4 August 2016[71]. The document in Annex 3 was said to have been discovered on 8 November 2016[72]. In order to substantiate its allegation, Malaysia produces photographs of request slips from the UK National Archives[73]. Although these slips do indicate the dates Malaysia relies on, they can only demonstrate that on those dates Malaysian researchers made a request to retrieve a physical copy of the relevant files.

2.49 However, in respect of at least two of the documents, which Malaysia claims it only discovered on 4 August 2016, the evidence on the record shows that Malaysia knew of them well before that date. Whether or not Professor Shaharil is or was working for Malaysia at the time, in the post dated 29 March 2015 on his blog "In Defence of Research", he clearly quoted the 7 February 1958 telegram produced in Annex 1 to the Application, and described the documents concerning the *Labuan Haji* incident produced as Annex 2 to the Application.

2.50 The blog post contains the following passage, which Malaysia omits to quote in the Additional Written Observations[74]:

> "The Third new fact was the observation of Singapore authorities to the suggested Extension of territorial waters to 6 miles in the Straits of Singapore would not be in Singapore's interests for the following reasons:
>
> (a) The approaches to Singapore are through the channels between the Indonesian Islands on the south and the mainland of the Federation of Malaya [The State and

71 *See* Additional Written Observations, para. 158.

72 *Ibid.*, para. 159.

73 *Ibid.*, Annexures H and J.

74 *Ibid.*, paras. 172-177.

> Territory of Johore] on the north. These channels are only 8 ½ miles wide at their narrowest parts on both the western and eastern side. The effect of extending territorial waters to 6 miles therefore be to close the high seas channels of approach to Singapore.
>
> (b) 2. It is therefore important to Singapore that the present 3 mile limits of territorial waters should be retained. However, if it is necessary in the last resort to agree to a general application of six mile limits, not only must the right of innocent passage through the International Straits so created be reaffirmed, but a special provision should be made for an international high seas corridor one mile wide through the straits between Singapore and Malayan territory on the north and Indonesian territory on the south. This corridor should follow the normal shipping channel from west to east which is approximately as follows. From a point 3 miles north of the Brothers light to a point 3 miles south of Sultan Shoal Light to a point 2 miles south of Raffles Light to a point midway between the southern point of St Johns Islands and Batu Berhenti Light to a point 1 mile north of Horsburgh Light."[75]

This text is identical to the part of the 7 February 1958 telegram that Malaysia relies on in Annex 1 to the Application.

2.51 The same blog post contains the following description:

> "Second, this file reveals another crucial piece of evidence where there was mention of an incident around the Territorial Waters of Pedra Branca/Pulau Batu Puteh and in its official correspondence the local authorities of Singapore mentioned that this incident occurred within the territorial waters of Johore which was also reported in the local press. The incident was never recorded in the List of

[75] Written Observations, Annex 3, p. A23. *See also* Written Observations, para. 5.30.

> Intrusions into the Territorial Waters of Singapore. This is a decisive fact."[76]

The preceding paragraph in the blog explains that the incidents contained in the "List of Intrusions into the Territorial Waters of Singapore" covered the period 1955 to 1958. The documents relating to the *Labuan Haji* incident, which Malaysia relies on in Annex 2 to the Application, therefore match this description. Annex 2 consists of messages and internal minutes by Singapore authorities, which referred to the *Labuan Haji* as being "inside Johore territorial waters"[77], and two newspaper cuttings of reports of the incident.

2.52 It is therefore beyond doubt that Professor Shaharil discovered these documents well before 4 August 2016. That the Malaysian authorities had knowledge of the post and its contents is also undeniable because, as explained by Singapore, access to Professor Shaharil's blog was blocked by Malaysian authorities[78].

2.53 Moreover, it is telling that the Malaysian authorities started their research in the UK National Archives, *ie*, the very same archives to which Professor Shaharil referred in his blog post as having released in 2013 files containing evidence that could be used in an application for revision of the Judgment[79]. It is also telling that, from the UK National Archives request slip produced by Malaysia[80], Malaysian researchers "discovered"

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76 Written Observations, Annex 3, p. A23. *See also* Written Observations, para. 5.30.

77 Note from "ER" to "G.S." dated 25 February 1958 (Application, Annex 2).

78 *See* Written Observations, para. 5.34.

79 *See* Written Observations, Annex 3, p. A23.

80 *See* Additional Written Observations, Annexure H.

and requested the archival file FCO 141/14808, which contains the documents now produced as Annexes 1 and 2 to the Application, at 11.05am on the very first day of their research, *ie*, 4 August 2016,[81] only two hours after the UK National Archives opened for the day. This is even more surprising given the description of the archival file FCO 141/14808 in the catalogue of the UK National Archives: "Singapore: local waters; policy and incidents concerning Indonesia". The description does not say anything about Malaysia, Pedra Branca, or even Horsburgh Lighthouse. It is indeed more likely that the Malaysian researchers knew exactly what they had to look for, *ie*, the file containing the information published by Professor Shaharil on his blog almost two years prior to the filing of the Application.

2.54 It is therefore apparent that Malaysia must have discovered the "new facts" well before 4 August 2016. By submitting the Application only on 2 February 2017, Malaysia has failed to comply with the six-month condition prescribed by Article 61, paragraph 4, of the Statute.

2.55 Moreover, and in any case, it is simply incredible that a document discovered by a former "AGC's historical advisor", in his private capacity as Malaysia now claims[82], could not have been found by the Malaysian team during the preparation for the original case, had it been reasonably diligent.

E. Conclusion

2.56 For the reasons set out in this Chapter, the Application does not satisfy the important procedural conditions of Article 61 of the Statute. The

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81 *See* Additional Written Observations, Annexure H.

82 *See* Additional Written Observations, paras. 163-168.

Application is not based on any fact unknown to the Court and to Malaysia. In any event, any ignorance by Malaysia of the documents annexed to the Application is due to its own negligence. Furthermore, it is apparent that these documents were, in reality, discovered more than six months before the filing of the Application. On each of these grounds, the Application is inadmissible.

CHAPTER III

THE IRRELEVANCE OF MALAYSIA'S DOCUMENTS

3.1 In the Application, Malaysia relied on three Annexes—Annexes 1, 2 and 3—for its request for revision. With the Additional Written Observations, Malaysia filed a further 13 sets of documents as Annexures. With respect to the "decisive factor" requirement, Malaysia purports to rely on three of these Annexures—Annexures A, C and D[83]—in support of the Application to revise the Judgment. In this Chapter, Singapore will demonstrate that none of the documents on which Malaysia relies—neither the Annexes nor the Annexures—touches on sovereignty at all, let alone sovereignty over Pedra Branca.

A. Annex 1 to the Application – the 1958 Correspondence

3.2 In the Written Observations, Singapore showed how Malaysia's argument in the Application—that there would have been no need for the Governor to "advocate the provision of an international passage so near the island"[84] of Pedra Branca if the Singapore authorities had considered Pedra Branca as part of Singapore territory at that time—defies logic. First, it was the normal shipping channel that the Governor had described as "approximately" passing "a point 1 mile north of Horsburgh Light", *not* the envisaged international high sea corridor[85]. Second, the Governor's references to various navigational aids along the normal shipping channel

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83 In the Additional Written Observations, Malaysia makes no serious argument based on Annexure B.

84 Application, para. 25.

85 *See* Written Observations, para. 3.6.

were not based on territorial entitlement to the features on which those navigational aids were located, including Pedra Branca on which Horsburgh Lighthouse is located[86]. Therefore, the Governor's approximate description of the normal shipping channel with reference to navigational aids in the Strait of Singapore had nothing to do with sovereignty over Pedra Branca or any other territorial feature. It follows that the 1958 correspondence gives no indication whatsoever of either Singapore's or Malaysia's component of the "shared understanding" as to sovereignty over Pedra Branca.

3.3 In the Additional Written Observations, Malaysia has not addressed these arguments. Malaysia has also not submitted any further documents to support its arguments concerning the relevance of Annex 1 to sovereignty over Pedra Branca.

3.4 Instead, all that Malaysia asserts is that it finds it "unusual" that the Singapore authorities "apparently did not take Pedra Branca/Pulau Batu Puteh into the reckoning"[87] and that "[f]aced with a clear challenge from the State conduct of its neighbours, … it is remarkable that Singapore's authorities make no mention at all of Pedra Branca/Pulau Batu Puteh and the maritime rights which are generated by sovereignty over that island."[88] These assertions are without merit.

3.5 First, given that the Governor's proposal of the "international high seas corridor" had nothing to do with sovereignty over Pedra Branca, it was not at all "unusual" or "remarkable" that the Singapore authorities did not mention maritime entitlements generated by Pedra Branca in the 1958

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86 *See* Written Observations, para. 3.9.

87 Additional Written Observations, para. 76.

88 *Ibid*.

correspondence. As Singapore has shown in Chapter III of the Written Observations, the 1958 correspondence concerned how the proposal by some States to extend the territorial sea from 3 to 6 nautical miles would have the effect of "clos[ing] the high seas channels of approach to Singapore"[89], thereby making it "territorial sea-locked" by neighbouring States[90] because of the narrowness of the Strait of Singapore. It was to deal with these concerns that the Governor suggested providing for an "international high seas corridor" that should follow the "normal shipping channel", the approximate route of which is depicted in Insert 2 of the Written Observations.

3.6 Second, as Chapter IV will show[91], there was no "challenge from the State conduct of its neighbours" calling for a response from Singapore. None of the documents in Annex 1 emanates from Malaysia or evinces any Malaysian claim to Pedra Branca that might have represented a "challenge".

3.7 In short, none of Malaysia's assertions in the Additional Written Observations adds any weight to the 1958 correspondence at Annex 1 to the Application. Viewed in its proper context, the 1958 correspondence does not concern sovereignty over Pedra Branca at all, much less the understanding at that time by the Singapore authorities of sovereignty over Pedra Branca.

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89 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 1(a) (Application, Annex 1).

90 Written Observations, para. 3.3.

91 *See* paras. 4.34-4.35 below.

B. Annex 2 to the Application and Annexure A to the Additional Written Observations – Documents Relating to the 1958 *Labuan Haji* Incident

3.8 In the Application, Malaysia relied on the description of the incident involving the *Labuan Haji* in Johor territorial waters as "*near* Horsburgh Light" to assert that the Singapore authorities considered the waters around Pedra Branca as belonging to Johor[92].

3.9 In the Written Observations[93], Singapore demonstrated that this assertion is not borne out by the documents in Annex 2. Given the geographical setting of the area, with features belonging to different States situated very close to each other, general terms such as "near" permit no conclusion on exactly where the incident took place[94]. Moreover, none of the documents in Annex 2 precisely indicates the distance between Pedra Branca and the location of the incident involving the *Labuan Haji*, let alone co-ordinates of where the incident took place, or says anything about sovereignty over Pedra Branca[95].

3.10 In the Additional Written Observations, Malaysia makes a bald claim that Annex 2 provides a "reliable indication"[96] of the location of the incident without attempting to address Singapore's arguments.

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92 *See* Application, paras. 27-31.

93 *See* Written Observations, paras. 3.14-3.22.

94 *Ibid.*, para. 3.18.

95 *Ibid.*, para. 3.21.

96 Additional Written Observations, paras. 83 and 86.

3.11 Instead, Malaysia puts forward three more newspaper cuttings in Annexure A as "further corroboration"[97] of the location of the incident involving the *Labuan Haji*, and disingenuously misplaces the location of the incident as being "in the waters *just north* of Pedra Branca/Pulau Batu Puteh."[98]

3.12 However, like the documents in Annex 2 to the Application, the newspaper cuttings in Annexure A are just as vague and imprecise as to the location of the incident.

3.13 All that the newspaper cuttings in Annexure A state is that the *Labuan Haji* was harassed by an Indonesian gunboat "off" or "near Horsburgh Lighthouse, 35 miles northeast of Singapore"[99] and that at some point, it was in Johor territorial waters. It does not, however, follow that just because there are Johor territorial waters in that vicinity, *all* the waters surrounding Pedra Branca are Johor territorial waters and therefore Pedra Branca belongs to Johor. Moreover, none of these reports says that the incident occurred within the territorial waters appertaining to Pedra Branca or that the island belonged to Malaysia, or, for that matter, that the

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97 Additional Written Observations, para. 85.

98 *Ibid.*, para. 86 (Emphasis added).

99 *See* cutting from the *Straits Times* dated 27 February 1958 ("The Indonesian gunboat harassed [the *Labuan Haji*] off Horsburgh lighthouse, 35 miles north-east of Singapore"); cutting from *Berita Harian* dated 26 February 1958, English translation ("an Indonesian gunboat was intruding him [*sic*] near the Horsburgh Lighthouse 35 mile northeast of Singapore"), and cutting from *Berita Harian* dated 27 February 1958, English translation ("The Indonesian gunboat had violated [the *Labuan Haji*] near the Horsburgh Lighthouse, 35 miles northeast of Singapore") (Additional Written Observations, Annexure A).

incident had taken place in waters "just north of Pedra Branca/Pulau Batu Puteh."[100]

3.14 In asserting that the incident had taken place "in the waters *just north* of Pedra Branca/Pulau Batu Puteh"[101], Malaysia purports to rely on the *Singapore Standard* article in Annex 2 to the Application[102], but in fact misrepresents the contents of this article. The *Singapore Standard* states:

> "When the Sunderland arrived in the area, *north of Horsburgh Lighthouse*, the Indonesian gunboat was seen moving off towards Indonesia, while the Labuan Haji steamed north-west within the Federation territorial waters."[103]

It is not stated anywhere in the *Singapore Standard* article, or any other document in Annex 2 or Annexure A, that the *Labuan Haji* incident had taken place in the waters "just north" of Pedra Branca.

3.15 Malaysia also distorts this newspaper article by claiming that the *Singapore Standard* "notes that the Indonesian gunboat and the Labuan Haji were seen in the area north of Horsburgh Lighthouse"[104], whereas it was the Sunderland that was reported as being in the area north of Horsburgh Lighthouse.

3.16 The last point Malaysia raises in the Additional Written Observations concerns the reference in the 27 February 1958 *Straits Times* article that

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100 Additional Written Observations, para. 86.

101 *Ibid.* (Emphasis added).

102 *Ibid.*, para. 84.

103 Cutting from the *Singapore Standard* (Application, Annex 2).

104 Additional Written Observations, para. 84.

the Prime Minister of Malaya had called for a "full report on the incident in Johore territorial waters yesterday"[105]. Based on this newspaper article, Malaysia asserts that the calling for such a report is "confirmation of the fact that the Malaysian authorities considered that Johor's territorial waters encompassed the waters to the north of Pedra Branca/Pulau Batu Puteh."[106]

3.17 This assertion is a non-sequitur. It is a leap of logic for Malaysia to assume from the calling of the report that the Johor authorities considered all the waters to the north of Pedra Branca to be Johor's territorial waters. It is obvious that Johor, which lies northwest of Pedra Branca, possessed territorial waters, but that does not mean that Johor's territorial waters encompassed *all* the waters lying north of Pedra Branca. None of the documents in Annex 2 or Annexure A remotely supports such a contention.

3.18 In short, neither the documents that Malaysia relies on in Annex 2 to the Application nor those in Annexure A to the Additional Written Observations say anything about sovereignty over Pedra Branca, much less Singapore's understanding about sovereignty over Pedra Branca.

C. Annex 3 to the Application and Annexures B and C to the Additional Written Observations – Documents Relating to the Sketch Map

3.19 Malaysia relies on the sketch map in Annex 3 to the Application for its assertion that since the sketch map does not include Pedra Branca, it is

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105 Cutting from the *Straits Times* dated 27 February 1958 (Additional Written Observations, Annexure A).

106 Additional Written Observations, para. 85.

evidence of Singapore's understanding at the time that its territorial entitlements did not extend to Pedra Branca[107].

3.20 In an attempt to bolster its arguments regarding Annex 3, Malaysia submitted in Annexure B to the Additional Written Observations the entire archival file, consisting of 162 pages, in which the sketch map was found[108], but fails to make any serious argument on the basis of this Annexure. In contrast, in the Written Observations, Singapore extracted paragraph 6 of Annex B to the "Orders for Ships Patrolling in Defence of Western Malaysian Seaboard", which showed that the restricted areas depicted on the sketch map were limited to the waters south of the main island of Singapore. That paragraph 6 stated:

> "SINGAPORE PORT RESTRICTED AREAS
>
> 6. *In the waters South of Singapore Island.* Restricted areas, night curfew areas and night fishing areas are in force. Details are given in Appendix One to this Annex."[109]

Singapore also extracted text from Appendix One to Annex B, which provided the details of the restricted areas, night curfew areas and night fishing areas in force in the waters south of Singapore island[110], and explained that all of the designated curfew areas and fishing areas detailed

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107 Application, paras. 33-35.

108 Singapore notes that the documents in Annexure B were not "found subsequent to the filing of the Application" (*see* Malaysia's letter of 9 June 2017 to the Court), and thus fall outside the scope of the additional documentation that Malaysia requested, and the Court allowed, the opportunity to submit.

109 Written Observations, Annex 1, p. A4 (Emphasis added).

110 *See* Written Observations, para. 3.31.

in Appendix One and marked on the sketch map were south of the main island of Singapore[111].

3.21 Malaysia has avoided addressing the crucial context for the sketch map, a context which shows that Malaysia's claim that this piece of "additional documentation" provides a "clearer and more complete understanding of the context in which the sketch map was produced"[112] is unsustainable. Malaysia also has not provided a response to the inherent inaccuracies in the depiction of the so-called "territorial boundary" shown on the sketch map. As Singapore highlighted in the Written Observations[113], these inaccuracies show that the sketch map was not prepared as an authoritative or official map to depict the territorial boundaries of Singapore, and is therefore irrelevant to the issue of sovereignty over Pedra Branca.

3.22 Instead, Malaysia introduces as "further documentation" the document in Annexure C to the Additional Written Observations on "Indonesian Offensive Against West Malaysia", and relies on it to make two arguments. The first argument is that this document shows that "there was a palpable need for Singapore to include Pedra Branca/Pulau Batu Puteh in its security arrangements and curfew orders"[114] and thus there was "every reason for Singapore to depict Pedra Branca/Pulau Batu Puteh in the Annex 3 sketch map."[115] A closer examination of Annexure C disproves this argument. Annexure C does not show that there was a need

111 *See* Written Observations, paras. 3.32-3.33.

112 Additional Written Observations, para. 88.

113 *See* Written Observations, paras. 3.25-3.27.

114 Additional Written Observations, para. 99.

115 *Ibid.*

for Singapore to include Pedra Branca in the security arrangements and curfew orders.

3.23 There is not a single incident recorded in Annexure C that involved an incursion by Indonesian infiltrators on the island of Pedra Branca. Out of the 124 "hostile interactions with Indonesian antagonists"[116] recorded in Annexure C, 54 are recorded as having taken place in Singapore. Of these 54 incidents, 17 involved bomb explosions or the recovery of explosives at locations on the main island of Singapore[117]. The other 37 incidents involved bomb explosions, sea interceptions, landings or attempted landings along the southern coast of the main island of Singapore and on or around the islands off the southern coast of the main island of Singapore. At **Insert 1** on the facing page is the sketch map from Annex 3 annotated with the locations of all the places in Singapore where the Indonesian offensive incidents recorded in Annexure C had taken place.

3.24 It is clear from the locations of the Indonesian incursions on Singapore that the security threats to Singapore were posed primarily to areas in the south of the main island of Singapore—in particular, the areas around St John's Island, Sisters' Islands, Pulau Blakang Mati and Raffles Lighthouse—and along the southern coast of the main island of Singapore. Thus, as **Insert 1** shows, restricted areas, night curfew areas and night fishing areas were put in place in these areas specifically in order to guard against such security threats. Given that the orders were limited to the areas south of the main island of Singapore, there was no reason for Singapore to depict Pedra Branca in the sketch map.

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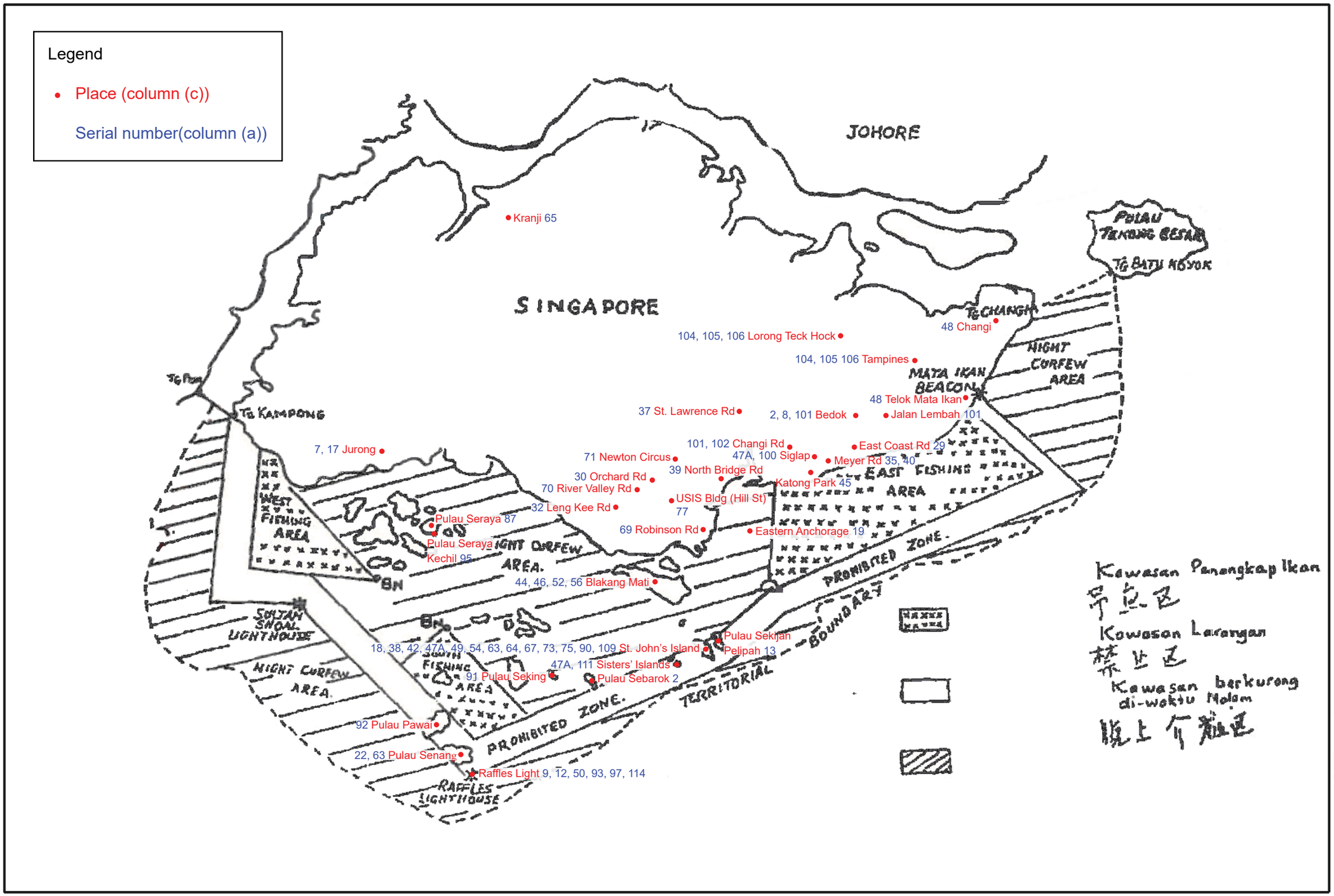
116 Additional Written Observations, para. 98.

117 These are recorded as items 29, 30, 32, 35, 37, 39, 40, 65, 69, 70, 71, 77, 101, 102, 104, 105 and 106 in Additional Written Observations, Annexure C.

Insert 1 - Sketch map in Annex 3 to the Application *annotated* (in red) to show the places in Singapore where the incidents recorded in Annexure C (serial numbers in blue) took place



For illustrative purposes only

Insert 1 – Sketch map in Annex 3 to the Application *annotated* (in red) to show the places in Singapore where the incidents recorded in Annexure C (serial numbers in blue) took place

3.25 Malaysia ignores all the incidents in Annexure C that took place in Singapore, but focuses instead on item 34 on page 8 of Annexure C. For ease of reference, **Insert 2** (after page 44) shows the text in item 34.

3.26 On the basis of item 34, Malaysia asserts that the "threat to security posed by the Indonesian agitators during the *Konfrontasi* campaign spread throughout the region, and certainly encompassed the area of Pedra Branca/Pulau Batu Puteh"[118]. This assertion is misconceived. The target of the Indonesian agitators' attempted landing, recorded in item 34, was the Tanjung Punggai area on the eastern coast of mainland Johor[119]. The location of Tanjung Punggai is shown in **Figure 1** overleaf. That is why item 34 records the place of the incident as "EAST JOHORE – TG. PUNGGAI area". The only thing that happened at Horsburgh Lighthouse, 9 nautical miles from Tanjung Punggai, was merely the subsequent capture of one of the Indonesian infiltrators. Horsburgh Lighthouse was not the Indonesian infiltrators' target.

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118 Additional Written Observations, para. 99.

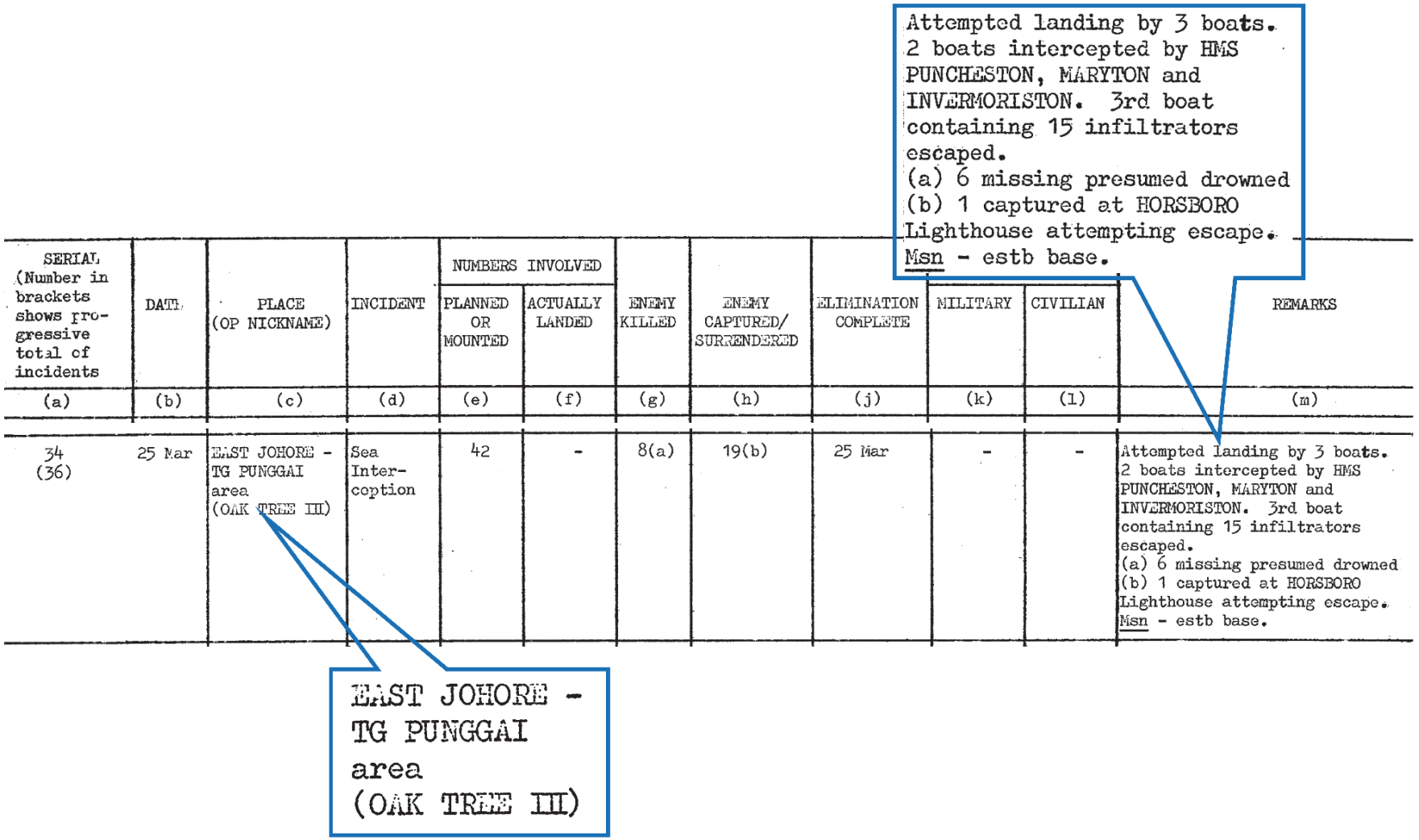
119 The location of Tanjung Punggai is shown in several maps and inserts submitted in the original case. *See*, *eg*, Memorial of Singapore, Vol. 1, Map 3; and Memorial of Malaysia, Vol. 1, Inserts 1, 2 and 21.

Figure 1 – Locations of Tanjung Punggai and Horsburgh Lighthouse

3.27 Malaysia has therefore not shown that there was a threat to the area of Pedra Branca requiring the extension of the security arrangements and curfew orders to Pedra Branca. By the same token, Malaysia has not shown that there was any reason for Pedra Branca to be included in a sketch map that depicts those security arrangements and curfew orders. So long as those specific restrictions did not extend to Pedra Branca, there would have been no need for the sketch map depicting these restrictions to include Pedra Branca. This accounts for why, as of February 1966, there were no changes in the arrangements described on the map[120].

3.28 Further, Malaysia claims that the incident involving the *Labuan Haji* described in the documents in Annex 2 to the Application is a "clear indication that the danger posed by Indonesian infiltration forces

120 *See* Application, para. 34.



SERIAL (Number in brackets shows progressive total of incidents	DATE	PLACE (OP NICKNAME)	INCIDENT	NUMBERS INVOLVED		ENEMY KILLED	ENEMY CAPTURED/ SURRENDERED	ELIMINATION COMPLETE	MILITARY	CIVILIAN	REMARKS
				PLANNED OR MOUNTED	ACTUALLY LANDED						
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(j)	(k)	(l)	(m)
34 (36)	25 Mar	EAST JOHORE - TG PUNGGAI area (OAK TREE III)	Sea Inter-coption	42	-	8(a)	19(b)	25 Mar	-	-	Attempted landing by 3 boats. 2 boats intercepted by HMS PUNCHESTON, MARYTON and INVERMORISTON. 3rd boat containing 15 infiltrators escaped. (a) 6 missing presumed drowned (b) 1 captured at HORSBORO Lighthouse attempting escape. Msn - estb base.

Attempted landing by 3 boats. 2 boats intercepted by HMS PUNCHESTON, MARYTON and INVERMORISTON. 3rd boat containing 15 infiltrators escaped.
(a) 6 missing presumed drowned
(b) 1 captured at HORSBORO Lighthouse attempting escape.
Msn - estb base.

EAST JOHORE - TG PUNGGAI area (OAK TREE III)

Insert 2 – Item 34 in Annexure C to the Additional Written Observations

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stretched to Pedra Branca/Pulau Batu Puteh and its surrounding waters"[121]. This claim is without merit. The incident involving the *Labuan Haji* had no relevance at all to the security threats posed to Singapore during the period of *Konfrontasi*. The incident occurred on 25 February 1958, more than five years before the threats to Singapore arising from *Konfrontasi* or "Confrontation" began in August 1963 when the Federation of Malaysia was formed. As outlined in the introduction to the "Orders for Ships Patrolling In Defence of Western Malaysian Seaboard" contained in Annexure B to the Additional Written Observations:

> "1. When Malaysia came into being in the Autumn of 1963, President Soekarno of Indonesia announced a policy of 'confrontation' and began a campaign to 'crush Malaysia'. In the first phase, action took the form of propaganda, sabotage and fostering racial strife, the latter particularly in the susceptible areas of Singapore. The struggle entered a new phase in August, 1964 with the landing of infiltrators on the mainland of West Malaysia by sea at Pontian, by air in September at Labis and by subsequent landings."[122]

3.29 The second argument that Malaysia relies on Annexure C to make is that item 34 indicates that "the UK authorities considered Horsburgh Lighthouse to be situated in East Johor until at least the end of 1965."[123] Annexure C indicates no such thing.

3.30 For each item in the tables contained in Annexure C, column (c) simply refers to the place where the incident described in column (d) took place. For item 34, column (d) records the "sea interception" incident, described

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121 Additional Written Observations, para. 98.

122 *Ibid.*, Annexure B.

123 *Ibid.*, para. 94.

in column (m), by the *HMS Puncheston*, *HMS Maryton* and *HMS Invermoriston* of two of the three Indonesian boats that had "attempted landing" in the Tanjung Punggai area on the mainland in the eastern part of Johore, hence the description in column (c) "EAST JOHORE – TG PUNGGAI [*ie*, Tanjung Punggai] area". The subsequent capture of the Indonesian infiltrator attempting escape "at HORSBORO Lighthouse" had nothing to do with the place recorded in column (c). This is also apparent from how other entries in Annexure C are described. For example, for item 30, which records a well-known bombing of MacDonald House, a building on Orchard Road on the main island of Singapore, column (c) records its location as "SINGAPORE – ORCHARD RD [*ie*, Orchard Road] area", even though column (m) records that the perpetrators were subsequently captured on Pulau Sebarok, an island to the south of Singapore and nowhere near Orchard Road itself[124]. Therefore, contrary to Malaysia's assertion, item 34 does not indicate that the UK authorities considered Horsburgh Lighthouse to be part of Johor territory.

3.31 In summary, nothing in the documents that Malaysia submitted in Annexures B and C to the Additional Written Observations provides any reason for Pedra Branca to be depicted in the sketch map. Its omission from the sketch map does not provide any indication of the Singapore authorities' understanding of sovereignty over Pedra Branca.

D. Annexure D to the Additional Written Observations – the 1937 Johore Map

3.32 With the Additional Written Observations, Malaysia submitted as part of Annexure D a so-called "newly discovered map" titled "Johore, 1937",

[124] The locations of Orchard Road and Pulau Sebarok are indicated in Insert 1.

franked with a stamp of the War Damage Commission (*ie*, the 1937 Johore Map) together with the report of the War Damage Commission for 1952. What Malaysia does not, however, clarify is that these are in fact two entirely unrelated documents. Unlike the 1937 Johore Map, the report of the War Damage Commission was not obtained from a private individual, but is a report held by the National Archives of Malaysia, as is apparent from the stamp with the words "Pengarah Arkib Negara - Malaysia" (reproduced as **Figure 2** below) at the top left corner on the first page of the report and the stamp with the words "Arkib Negara Malaysia" (reproduced as **Figure 3** below) at the bottom right corner of every page of the report.

Figure 2. Stamp with the words "Pengarah Arkib Negara – Malaysia" ["Director National Archives – Malaysia"]

Figure 3. Stamp with the words "Arkib Negara Malaysia" ["National Archives Malaysia"]

3.33 In the Additional Written Observations, Malaysia claims that the 1937 Johore Map "very clearly includes Pedra Branca/Pulau Batu Puteh as part of Johor"[125], of which Singapore, whose Financial Secretary was a member of the War Damage Commission, had "clear official notice … and it made no protest"[126].

3.34 Nothing in Annexure D, including the 1937 Johore Map, bears these assertions out.

3.35 First, there is nothing on the face of the 1937 Johore Map that indicates that Pedra Branca is included as part of Johor. The so-called "dotted boundary line"[127] in the Johor Strait between Singapore and Johor shown on the 1937 Johore Map shows the territorial waters boundary between Singapore and Johor in the Johor Strait that has been in existence since the United Kingdom and Johor entered into the Straits Settlements and Johor Territorial Waters Agreement in 1927[128] (the "**1927 Agreement**"). It does not indicate that Pedra Branca is included as part of Johor territory in the 1937 Johore Map. In the original case, Malaysia exhibited a map showing that boundary[129] to support its argument that the 1927 Agreement was "evidence of the continuing appreciation that Pedra Branca/Pulau Batu Puteh and its surrounding waters were not part of the

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125 Additional Written Observations, para. 104.

126 *Ibid.*

127 *Ibid.*

128 *See* Written Observations, para. 3.26. The same territorial waters boundary in the Johor Strait between Singapore and Johor is shown in Insert 3 of the Written Observations. *See also* Counter-Memorial of Singapore, paras. 6.20-6.25 and 6.97-6.99.

129 *See* Memorial of Malaysia, Vol. 1, Insert 17.

territory of Singapore."[130] In its Memorial, Malaysia had in fact made exactly the same argument it now makes about this boundary line. It asserted that:

> "[a]s the map annexed to the Agreement shows … , the Article [defining the boundary line] defines an arc within which falls the land territory and territorial waters of Singapore and outside of which falls the land territory and territorial waters of Johor or of third States."[131]

3.36 As the Court found in the Judgment, Pedra Branca was not included in the scope of the 1927 Agreement, which only covered the areas within 10 miles of the main island of Singapore[132]. The Court concluded that "the 1927 Agreement does not assist the Malaysian case"[133].

3.37 Second, there is nothing in Annexure D, whether on the face of the 1937 Johore Map or the report of the War Damage Commission for 1952, which shows that the 1937 Johore Map was even referred to, much less "used"[134], by the War Damage Commission at all. Indeed, Malaysia acknowledges as much[135]. The Commission assessed claims by Singapore and Malayan individuals and entities for compensation as a result of the Japanese invasion and occupation of Malaya and Singapore during the Second World War. The Commission's task had nothing to do with identifying sovereignty over territory. Its purpose was, as the documents

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130 Judgment, p. 71, para. 182.

131 Memorial of Malaysia, para. 220.

132 *See* Judgment, p. 72, para. 188.

133 *Ibid.*

134 Additional Written Observations, para. 104.

135 *Ibid.*, footnote 113 ("It is to be noted that none of the reports of this Commission explicitly refer to the map").

filed by Malaysia attest, to assess claims as part of an effort to rehabilitate the economy of Malaya[136]. Indeed, there would have been no reason for the War Damage Commission to attach any particular significance to the map or to view the map as a claim to sovereignty over any particular territory, including Pedra Branca. The Commission's task was of an entirely different nature.

3.38 By itself, the franking of the War Damage Commission stamp on the 1937 Johore Map indicates at most that this copy was in the archives of the Commission. It does not indicate that the Commission used the 1937 Johore Map, or, even if it did, the purpose for which it did. Even if the 1937 Johore Map was "used" by the War Damage Commission, as explained above[137], the map itself does not indicate Pedra Branca as being in Johor territory. Thus, there was nothing for the Singapore officials in the War Damage Commission to protest against. The lack of protest by Singapore against the 1937 Johore Map is therefore completely irrelevant to the issue of sovereignty over Pedra Branca.

E. Conclusion

3.39 For all the reasons above, none of the documents that Malaysia annexed to the Application or the Additional Written Observations is relevant to the issue of sovereignty over Pedra Branca at all. They do not say anything about sovereignty, much less either Malaysia's or Singapore's understanding as to sovereignty over Pedra Branca, and therefore do not constitute evidence of any fact of such a nature.

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136 *See* War Damage Commission Report for 1952, p. 63 (Additional Written Observations, Annexure D).

137 *See* paras. 3.35-3.36 above.

CHAPTER IV

MALAYSIA'S FAILURE TO MEET THE "DECISIVE FACTOR" REQUIREMENT FOR ADMISSIBILITY

4.1 In addition to the procedural conditions, discussed in Chapter II above, that Malaysia must satisfy under Article 61 of the Statute for the Application to be admissible, Malaysia has to show that the "new fact" it alleges to have discovered after the Judgment is of such a nature as to be a "decisive factor". As this Chapter will show, Malaysia has not even remotely met that requirement. Indeed, the Additional Written Observations contain lengthy sections regarding the Court's methodology that are more in the nature of an appeal of the Judgment than a genuine request for revision.

4.2 In **Section A**, Singapore will provide an overview of the "decisive factor" requirement. This will involve showing that Malaysia's pleadings fail to appreciate the exceptional nature of revision proceedings and posit an erroneous standard for meeting the "decisive factor" condition.

4.3 In **Section B**, Singapore will explain the basic deficiencies in Malaysia's case with respect to the "decisive factor" criterion. In order to assess whether Malaysia's new documents evince any fact of such a nature, it is necessary to recall the facts that the Court did find relevant, or cumulatively "decisive", in reaching its decision that, by 1980, sovereignty over Pedra Branca had passed to Singapore and that consequently, as held in the *dispositif*, sovereignty over Pedra Branca "belongs to Singapore". Malaysia not only shows a marked reluctance to focus on the truly relevant factors, it fails to sustain its burden of demonstrating how its new documents have the slightest effect on those factors.

4.4 **Section C** will then focus on each set of Malaysia's new documents, and will demonstrate that none of them, which were discussed in Chapter III, evinces a new fact that is of such a nature as to be a "decisive factor", or that would have affected the Court's reasoning in the Judgment or influenced its decision on sovereignty. On the contrary, as Singapore has already explained in the Written Observations[138], far from being a "decisive factor", Malaysia's new documents are similar in nature to documents that were submitted in the original case, to which the Court attached no relevance for the purposes of its decision.

4.5 The end result is that Malaysia has not satisfied the "decisive factor" condition for the Application to be admissible.

A. Overview of the "Decisive Factor" Requirement

1. THE EXCEPTIONAL NATURE OF REVISION

4.6 In the light of the basic principle reflected in Article 60 of the Statute that judgments of the Court are "final and without appeal", it is well established that a request for the revision of a judgment of the Court pursuant to Article 61 of the Statute, just like a request for interpretation under Article 60, involves an exceptional procedure. As Rosenne observed:

> "Those provisions themselves are couched and placed in the Statute in such a way as to emphasize the exceptional nature of the two procedures, as possibly impairing the stability of the jural relations established by the *res judicata*."[139]

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138 *See* Written Observations, paras. 6.14-6.27.

139 M. Shaw: *Rosenne's Law and Practice of the International Court: 1920-2015* (5th ed.) (Brill Nijhoff: 2016), §III.394.

4.7 The Advisory Committee of Jurists who were charged with drafting the original Statute of the Permanent Court, including what was then Article 59 (now Article 61), were well aware of the exceptional nature of revision. In its 1920 Report on the draft Statute of the Court, the Committee underscored that revision is a very serious matter that strikes against the *res judicata* effect of judgments, which, for the sake of international peace, should be viewed as finally settled[140].

4.8 This is consistent with Charles de Visscher's observation that, as a general principle,

> "*il est de l'intérêt général que les litiges ne recommencent pas indéfiniment relativement au même objet:* ut sit finis litium."[141]

4.9 The exceptional character of revision is also reflected in the fact that, prior to the Application, there have only been three requests for revision that have come before the Court and none before its predecessor, the Permanent Court. In none of those cases were the requests found to be admissible.

2. THE REQUIREMENT THAT THE NEW FACT BE OF A DECISIVE NATURE

4.10 Malaysia purports to recognise the exceptional nature of requests for revision. As it noted in the Application: "Revision proceedings are exceptional."[142] However, in the Additional Written Observations,

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140 *See Proceedings of the Committee, 18th June – 24th July 1920,* p. 744.

141 *Revue belge de droit international*, 1965, p. 14 ("it is in the general interest that litigation does not resume indefinitely with respect to the same subject matter" [*Singapore's translation*]).

142 Application, para. 6.

Malaysia argues with respect to the "decisive factor" condition laid down in Article 61 that, in order for the Application to be admissible, it only has to show that there is a new fact "of such a nature as to be *capable* of affecting or altering the Judgment of the Court."[143] This is not what Article 61 says, and it is not how the drafters of the provision and the jurisprudence have treated the "decisive factor" criterion.

4.11 Rather than adhering to the actual language employed in the first part of Article 61, paragraph 1, for admissibility—"An application for revision of a judgment may *only* be made when it is based on the discovery of some fact *of such a nature as to be a decisive factor*" [emphasis added]—Malaysia would have the provision read: "An application for revision of a judgment may be made when it is based on the discovery of some fact *that may be capable of affecting or altering the judgment*". However, it is quite clear that Article 61 calls for a more demanding standard. The new fact must be of a "decisive nature". That means that the new fact must have a direct and material influence on the Judgment.

4.12 The Report of the Advisory Committee of Jurists bears this out. As noted above[144], the Committee was conscious of the fact that revision was an exceptional procedure that could adversely affect the fundamental principle of *res judicata* or the *autorité de la chose jugée.* The Committee thus noted in connection with the wording of Article 61 (then Article 59) that

143 Additional Written Observations, para. 37.

144 *See* para. 4.7 above.

> "a new fact is required which is of a nature to exercise a *decisive influence*, and which, before pronouncement of sentence, was unknown to the Court"[145].

This stringent formula is reflected in the French text of Article 61, paragraph 1, of the Statute, which provides in relevant part that:

> "*La revision de l'arrêt ne peut être éventuellement demandée à la Cour qu'en raison de la découverte d'un fait de nature à exercer une influence décisive …*"

4.13 The Court had occasion to expand on the import of the "decisive factor" requirement in its Judgment in *Tunisia* v. *Libya*. The "new fact" advanced by Tunisia in that case concerned the co-ordinates of a Libyan oil concession (Concession No. 137), which showed that its limits did not precisely align with Tunisia's own concessions. After explaining that the Court's reasoning in its original Judgment was "wholly unaffected"[146] by the evidence produced by Tunisia of the boundaries of the Libyan concession, the Court went on to state the following:

> "This is of course not to say that if the co-ordinates of Concession No. 137 had been clearly indicated to the Court, the 1982 Judgment would nevertheless have been identically worded. The explanation, given above, of the distinction between the bearing of the actual boundary of Concession No. 137 (24°57'03") and the bearing of the boundary from Ras Ajdir implied by the choice of the point 33°55'N, 12°E (26°), might usefully have been included. If the Court had found it necessary to enter into such precise cartographic detail, it might also have made more precise its finding that 'the phenomenon of actual overlapping claims did not appear until 1974, and then only in respect

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145 *Proceedings of the Committee, 18th June – 24th July 1920*, p. 744 (Emphasis added).

146 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 213, para. 38.

> of areas some 50 miles from the coast' (para. 117). But what is required for the admissibility of an application for revision is not that the new fact relied on might, had it been known, have made it possible for the Court to be more specific in its decision; it must also have been a 'fact of such a nature as to be a decisive factor'. So far from constituting such a fact, the details of the correct co-ordinates on Concession No. 137 would not have changed the decision of the Court as to the first sector of the delimitation."[147]

It follows that Malaysia must show that any "new fact" said to be evinced by the documents on which it relies is of such a nature as to exercise a decisive influence on the Judgment.

4.14 For example, had the new documents on which Malaysia relies in these proceedings been introduced in the original case, the Court might have addressed them just as it did with respect to other materials the Parties filed that the Court did not find relevant. In other words, the Judgment might not have been identically worded. But just as in the *Tunisia* v. *Libya* and *El Salvador* v. *Honduras* revision cases, none of those documents would have changed the decision of the Court, which was based on other factors that Malaysia's new documents leave wholly unaffected. Thus, not only do the new documents relied on by Malaysia not constitute a "decisive factor" by any stretch of the imagination, even accepting Malaysia's lower standard of decisiveness (*quod non*), they are not capable of affecting the Judgment in any way.

147 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), I.C.J. Reports 1985*, pp. 213-214, para. 39.

B. The Basic Deficiencies of Malaysia's Case and Its Mischaracterisation of Singapore's Analysis of the Judgment

4.15 Malaysia contends that the new documents contained in the three Annexes it filed with the Application, together with Annexures A to D it filed with the Additional Written Observations, evince not so much a "new fact", but rather the *non-existence* of fact – namely, the non-existence of any shared understanding between the Parties that, by 1980 (the critical date[148]), sovereignty over Pedra Branca had passed to Singapore[149].

4.16 It will be recalled that the Judgment regarding sovereignty over Pedra Branca was based on the combination of four elements relating to the conduct of the Parties, which the Court characterised in paragraph 276 of the Judgment as the "relevant facts". Briefly stated, these elements, which the Court had reviewed and summarised in the preceding paragraphs of the Judgment, were as follows:

(*a*) The explicit statement of 21 September 1953 by the Acting State Secretary of Johor that "the Johore Government does not claim ownership of Pedra Branca" – a statement that the Court viewed as showing that "as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh"[150] (the "**1953 Johor Understanding**");

(*b*) Numerous activities that Singapore and its predecessors carried out on and around Pedra Branca *à titre de souverain*, coupled with

148 Judgment, p. 28, para. 34.

149 Additional Written Observations, paras. 28-29.

150 Judgment, p. 80, para. 223.

Malaysia's acceptance of, or failure to react to, these activities despite having notice of almost all of them[151]. These activities included: (*i*) several examples dating from 1920, 1963, 1979, and 1985 to 1993 where Singapore investigated vessel groundings and other maritime incidents around the island – conduct that the Court concluded "gives significant support to the Singapore case"[152]; (*ii*) Singapore's exercise of control over visits to Pedra Branca, including visits by Malaysian officials, which the Court also stated "does give significant support to Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh"[153]; (*iii*) the contrast in the conduct of the Parties relating to the display of Singapore's ensign over Pedra Branca and at the lighthouse on Pulau Pisang, a Malaysian island[154]; (*iv*) Singapore's installation of military communications equipment on the island, action that the Court viewed as conduct *à titre de souverain*[155]; and (*v*) Singapore's

151 Judgment, pp. 95-96, para. 274 ("Malaysia and its predecessors did not respond in any way to that conduct [*ie*, Singapore's acts *à titre de souverain*], or the other conduct with that character identified earlier in this Judgment, all of which (but for the installation of the naval communication equipment) it had notice").

152 *Ibid.,* p. 83, para. 234.

153 *Ibid.,* p. 85, para. 239.

154 *Ibid.,* p. 87, para. 246.

155 *Ibid.,* p. 88, para. 248. At paragraph 64 of the Additional Written Observations, Malaysia asserts that the Court attached no weight to the installation by Singapore of military communications equipment on Pedra Branca. This is plainly wrong. As Singapore pointed out in the Written Observations (paras. 2.21-2.22), although the Court was unable to assess whether Malaysia knew, or should have known, about the installation by Singapore of this equipment, the Court found that: "What is significant for the Court is that Singapore's action is an act *à titre de souverain.* The conduct is inconsistent with Singapore recognizing any limit on its freedom of action." (Judgment, p. 88, para. 248).

proposed reclamation plans for the island, which the Court observed was "conduct which supports Singapore's case"[156];

(*c*) Malaysia's own publications and maps, including official maps dating from the 1960s and 1970s, which, by labelling Pedra Branca as "Singapore" or "Singapura", indicated, as the Court stated, "an appreciation by it [*ie*, Malaysia] that Singapore had sovereignty"[157]; and

(*d*) The complete absence of any action by the Johor authorities and their successors on Pedra Branca "from June 1850 for the whole of the following century or more."[158]

4.17 These were the elements of conduct of the Parties that the Court considered to "reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh."[159]. It was on the basis of this mutually consistent conduct that the Court concluded that "by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore."[160]

4.18 In the Additional Written Observations, Malaysia refers to these four elements. However, it then asserts that Singapore's analysis of them "clearly proposes that the Court had four *independent legal reasons* for

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156 Judgment, p. 89, para. 250.

157 *Ibid.,* p. 96, para. 275.

158 *Ibid.*

159 *Ibid.*, p. 96, para. 276.

160 *Ibid.*

holding that Singapore had title to Pedra Branca/Pulau Batu Puteh"[161], and that Singapore's comments manifest a misunderstanding of the Court's decision[162].

4.19 Malaysia has blatantly misrepresented what Singapore said. Nowhere did Singapore suggest that there were four independent legal reasons on which the Court based its decision. On the contrary, Singapore very clearly noted that the Court's conclusion at paragraphs 276 and 277 of the Judgment that sovereignty over Pedra Branca belongs to Singapore was based on a "constellation of factors" relating to the conduct of the Parties that the Court referred to at paragraphs 273 to 275 of the Judgment[163]. That hardly constitutes a "misunderstanding of the Court's decision"[164].

4.20 As Singapore will once again show, none of the documents filed by Malaysia in these proceedings, whether the three Annexes attached to the Application or the Annexures to the Additional Written Observations, in any way changes the facts or reasoning upon which the Judgment was based. In particular:

(*a*) None of them refers to sovereignty over Pedra Branca or states that Pedra Branca belongs to Johor.

(*b*) None of them alters the significance of Johor's 1953 express affirmation that it did not claim ownership or sovereignty over Pedra Branca.

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161 Additional Written Observations, para. 40 (Emphasis added).

162 *See* Additional Written Observations, para. 41.

163 Written Observations, para. 2.46.

164 Additional Written Observations, para. 41.

(*c*) None of them has any bearing on the various activities Singapore carried out on and around Pedra Branca *à titre de souverain* up to 1980 (indeed, most of Malaysia's documents in these proceedings date from 1958 or earlier, with just one—the small sketch map at Annex 3—having a notation from a later date – 1966). Apart from the 1953 Johor Understanding, most of the conduct of the Parties that the Court found relevant occurred after 1966.

(*d*) None of Malaysia's new documents changes the fact that Malaysia recognised Singapore's sovereignty over the island by acceding to Singapore's control of visits to the island by Malaysian officials in the 1970s, publishing official maps labelling the island as belonging to Singapore, failing to protest the flying of the Singapore ensign over Pedra Branca despite protesting the display of a similar ensign on the Malaysian island of Pulau Pisang[165], and ceasing to list Horsburgh Lighthouse as a meteorological station in Malaysia's annual report of its meteorological service after Singapore's independence from Malaysia in 1965.

(*e*) And none of them provides evidence of any Malaysian sovereign activities on Pedra Branca, thus leaving entirely intact the Court's observation that for more than a century after 1850, Malaysia and its predecessors never carried out any such activities.

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165 At paragraph 64 of the Additional Written Observations, Malaysia asserts that the Court attached no weight to the display of the British and Singapore ensigns over Pedra Branca. This is plainly wrong. As Singapore pointed out in the Written Observations (paras. 2.19-2.20), at paragraph 246 of the Judgment, the Court stated that "some weight may nevertheless be given to the fact that Malaysia, having been alerted to the issue of the flying of the ensigns by the Pulau Pisang incident, did not make a parallel request in respect of the ensign flying at Horsburgh lighthouse."

4.21 Rather than trying to demonstrate that its "newly discovered facts" constitute a "decisive factor" that would have influenced the reasoning and decision of the Court, Malaysia focuses in the Additional Written Observations on the factors that the Court did not find relevant, and erroneously characterises two relevant factors (the installation by Singapore of military communications equipment on Pedra Branca and the display of the British and Singapore ensigns on Pedra Branca) as irrelevant[166].

4.22 In contrast, when it comes to discussing the factors that the Court actually considered as the "relevant facts" leading to its decision, Malaysia's pleading is remarkably economical. First, it lists (incompletely, it should be noted) these elements in just one paragraph of the Additional Written Observations (paragraph 64) without explaining how its "newly discovered documents" change the legal significance of any of them. Then, it jumps into the realm of speculation by asserting that "[i]n view of the character, number and significance of these activities as analysed by the Court, it [*ie*, the decision that by 1980 sovereignty had passed to Singapore] must have been a fine call."[167] This assertion is not backed up by any evidence. It ignores all the elements of the Parties' conduct that the Court found to be relevant to its decision, and does nothing to demonstrate that Malaysia has satisfied the "decisive factor" requirement imposed by Article 61 of the Statute.

4.23 In Chapter II of the Additional Written Observations dealing with the "decisive factor" criterion, Malaysia also embarks on a long, and highly critical, commentary on the Court's methodology that led to its decision on sovereignty. As Chapter V below will show, not only does this

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166 *See* Additional Written Observations, paras. 63-64. *See also* footnotes 155 and 165 above.

167 Additional Written Observations, para. 67.

discussion distort the Judgment by attributing to the Court legal analyses that the Court did not employ, it also reveals that Malaysia's real aim in these proceedings is to appeal the Judgment in derogation of Article 60 of the Statute, rather than to present a proper request for revision.

4.24 In short, Malaysia not only wants the Court to reopen the case on the basis of an unimpressive selection of wholly immaterial new documents it purports to have discovered since the Judgment was delivered, it also wants to reargue the legal basis on which the Court reached its decision.

C. Malaysia's New Documents Do Not Meet the "Decisive Factor" Requirement

4.25 In the Additional Written Observations, Malaysia argues that the new documents it has filed "establish the occurrence of a series of incidents which all demonstrate that no such agreement [*ie*, a tacit agreement that sovereignty over Pedra Branca was transferred to Singapore] came into existence."[168] On the basis of this assertion, Malaysia contends that its new documents are "capable of altering the Judgment" and thus "are of such a nature as to be a decisive factor."[169]

4.26 In Chapter III above, Singapore showed that, as a matter of fact, none of the new documents submitted by Malaysia refers to sovereignty over Pedra Branca or provides any indication that Malaysia considered it had sovereignty over the island while Singapore did not. Indeed, the documents now relied on by Malaysia were concerned with entirely

168 Additional Written Observations, para. 70.

169 *Ibid.*

different issues that had nothing to do with the extent of territorial sovereignty.

4.27 Singapore also showed that Malaysia's contention that its new documents undermine the notion of a "shared understanding" or "tacit agreement" between the Parties during the relevant period is meritless. Quite apart from the fact that the Court's conclusion on sovereignty was based on a "convergent evolution"[170] of the positions of the Parties, the new documents, whether considered individually or collectively, cannot by any stretch of the imagination exercise a decisive influence over the Judgment or constitute a "decisive factor". If anything, they are similar to the kinds of documents submitted in the original case to which the Court attached no relevance in reaching its decision regarding sovereignty over Pedra Branca.

1. ANNEX 1 – 1958 INTERNAL CORRESPONDENCE CONCERNING DELIMITATION OF TERRITORIAL WATERS

4.28 Annex 1 to the Application consists of two telegrams, dated 18 January 1958 and 7 February 1958 respectively, in which Singapore officials were considering the proposal of some States to extend the breadth of the territorial sea from three to six nautical miles. As Singapore recalled in Chapter III above[171], to protect Singapore against being "territorial sea-locked" owing to the narrowness of the Strait of Singapore, Singapore officials were considering whether an "international high seas corridor"[172]

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170 Judgment, p. 96, para. 276.

171 *See* paras. 3.2 and 3.5 above.

172 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 2 (Application, Annex 1).

following the existing "normal shipping channel"[173] should be established[174].

4.29 Malaysia has not submitted any further documents on this matter with the Additional Written Observations. However, Malaysia argues that the consideration of such a proposal in 1958 showed that Singapore appreciated that the 1953 letter of the Acting State Secretary of Johor, which stated in clear terms that "the Johore Government does not claim ownership of Pedra Branca"[175], was not dispositive of the question of sovereignty; otherwise, the internal correspondence would have asserted Singapore's rights over the waters surrounding Pedra Branca[176].

4.30 Singapore has already shown that the 1958 correspondence did nothing of the kind[177]. It was not concerned with the question of sovereignty over either Pedra Branca or any other features situated in the Strait of Singapore[178], and it certainly has no bearing on the evolution of the positions of the Parties between 1953 and 1980, some 22 years after the correspondence on which Malaysia relies and which was based on a whole host of relevant factors, most of which post-date Malaysia's new documents.

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173 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 2 (Application, Annex 1).

174 *See also* Written Observations, paras. 3.3-3.4.

175 Letter from M. Seth Bin Saaid (Acting State Secretary of Johor) to the Colonial Secretary, Singapore, dated 21 September 1953 (Memorial of Singapore, Vol. VI, Annex 96).

176 *See* Application, para. 25.

177 *See* Written Observations, paras. 6.8-6.13.

178 *See* paras. 3.2-3.7 above. *See also* Written Observations, paras. 3.2-3.13.

4.31 Singapore also showed that the 1958 correspondence was similar in nature to internal Singapore correspondence from a Mr. Colton on behalf of the Colonial Secretary in Singapore in July 1953 (the "**Colton Letter**") that had raised similar territorial sea concerns[179]. The Court was fully familiar with this correspondence, to which it attached no particular relevance other than to say that the fact that the authorities in Singapore or London took no action at that time "is not at all surprising."[180]

4.32 Equally important is the fact that the 1958 correspondence in no way affects the significance that the Court attached to the 1953 Johor Understanding[181] that Johor did not have ownership or sovereignty over Pedra Branca. Indeed, nothing in the 1958 correspondence signals either a Malaysian retraction of the 1953 Johor Understanding or an acknowledgement by Singapore or the United Kingdom that sovereignty over Pedra Branca did not belong to Singapore. Sovereignty is simply not mentioned in the 1958 correspondence.

4.33 The Additional Written Observations gloss over the importance of what Malaysia terms the "notorious letter dated 21 September 1953"[182] by the Acting State Secretary of Johor and leave unanswered how the 1958 correspondence affects the significance of that letter. Instead, Malaysia focuses on the Colton Letter, which, as the Court noted, "indicates that the Foreign Office and Colonial Office in London were involved in a wider examination of issues relating to territorial waters, with the then

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179 Written Observations, para. 6.16.

180 Judgment, p. 81, para. 225.

181 *See* para. 4.16(*a*) above.

182 Additional Written Observations, para. 74.

recent Judgment of this Court in the *Fisheries* case … constituting an important element"[183].

4.34 Malaysia's argument is that the Colton Letter could not have taken into account the 1953 Johor Understanding, which only came two months later, while the 1958 correspondence "must be viewed in the light of the 1953 correspondence concerning sovereignty over Pedra Branca/Pulau Batu Puteh"[184]. According to Malaysia, the fact that five years after the 1953 Johor Understanding, the Singapore authorities "apparently did not take Pedra Branca/Pulau Batu Puteh into the reckoning" when considering the territorial sea issue in the Strait of Singapore "is unusual, to say the least."[185] In a bizarre leap of logic, Malaysia then argues that the failure of a State (Singapore) to react in circumstances where it is reasonable to expect a reaction when "[f]aced with a clear challenge from the State conduct of its neighbours" provides "a basis for ascertaining or interpreting the intent of that State."[186]

4.35 But in 1958 there was no challenge to Singapore by Malaysia or any other State with respect to sovereignty over Pedra Branca calling for a reaction. None of Malaysia's new documents emanates from Malaysia, none of them deals with issues of territorial sovereignty, and none of them shows any conduct by Malaysia on Pedra Branca *à titre de souverain* which might have warranted a Singaporean response. Rather, the 1958 correspondence was internal to the Singapore authorities and devoted to an entirely different subject matter – the position the United Kingdom

183 Judgment, pp. 80-81, para. 225.

184 Additional Written Observations, para. 76.

185 *Ibid.*

186 *Ibid.*

should take in connection with the forthcoming Geneva Conference on the Law of the Sea[187].

4.36 Moreover, Malaysia's attempt to show that the 1958 correspondence is dissimilar in nature to the Colton Letter, because the Colton Letter pre-dated the 1953 Johor Understanding and is said to have pertained to "fishing grounds"[188], is misconceived. In the original case, Malaysia labelled the Colton Letter (sent in July 1953) and the 1953 Johor Understanding (sent in September 1953) as "virtually contemporaneous correspondence"[189]. Moreover, the Colton Letter was concerned primarily with the extent of the territorial waters of Singapore and other States, the same subject-matter as the 1958 correspondence[190]. To the extent that "fisheries, policing and control" were discussed in the Colton Letter, this was in the context of the issue of territorial waters as a whole.

4.37 Equally misplaced is Malaysia's effort to distinguish the 1958 correspondence from another document dealing with a ship routeing system to which the Court attached no relevance in the original case – the 1977 Straits of Malacca and Singapore routeing system[191]. The 1977 ship routeing system was not, as Malaysia describes, merely about "the placement and upkeep of navigational aids."[192] It defined traffic lanes and

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187 *See* confidential telegram from Secretary of State for the Colonies to Governor [of] Singapore dated 18 January 1958, para. 1 (Application, Annex 1).

188 *See* Additional Written Observations, paras. 76 and 77.

189 Memorial of Malaysia, para. 238.

190 *See* Letter and attachments from A.G.B. Colton, for the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore, dated July 1953, para. 4 (Memorial of Malaysia, Vol. 3, Annex 68).

191 Additional Written Observations, para. 78.

192 *Ibid.*

deep water routes through the Straits[193]. But just as the Court stated that the 1977 documents "are not concerned with territorial rights but with the facilitation and safety of navigation through the Straits as a whole"[194], so also was the 1958 correspondence not concerned with territorial rights but, rather, with navigation along a high seas corridor through the Strait of Singapore.

4.38 Not only is Malaysia's convoluted argument thus devoid of merit, it ignores an additional event that did take place in 1958, which disproves Malaysia's thesis that Singapore must have appreciated that it did not have sovereignty over the island at that time.

4.39 The event in question concerns Singapore's amendment in 1958 of the Light Dues Ordinance it had enacted in 1957. Unlike the 1957 Ordinance, which the Court did not find relevant because it made no distinction between the lighthouses on Pedra Branca and Pulau Pisang[195], the statement of purpose in the 1958 amendment did make such a distinction by stating that only the lighthouse at Pulau Pisang was not within Singapore territorial waters, without saying the same thing about the lighthouse at Pedra Branca. What is more, the drafting history of the amendment included, as the Court observed, "a statement that Pedra Branca/Pulau Batu Puteh is Singapore's."[196] The Court viewed this as significant. In the words of the Judgment:

> "The Court considers that the change, particularly given the express reference to Pulau Pisang in the statement of

193 *See* Memorial of Singapore, Annex 134, Annexes I-IV.

194 Judgment, p. 91, para. 260.

195 *Ibid.*, p. 68, para. 174.

196 *Ibid.*

> purpose and the statement that Pedra Branca/Pulau Batu Puteh is Singapore's in the drafting history, does give support to Singapore's contentions."[197]

4.40 It follows that Malaysia's assertion that the 1958 correspondence "weighs heavily against the notion that a convergence in the understanding of the parties concerning Pedra Branca/Pulau Batu Puteh had formed, or even begun to form, in 1958", and that Malaysia's Annex 1 "tips the balance of the factual record on which the Court determined that there was a tacit agreement between the parties"[198], is pure wishful thinking.

4.41 Furthermore, much of the Court's reasoning which led it to conclude that, as of 1980, sovereignty over Pedra Branca had passed to Singapore was based on conduct of the Parties that post-dated 1958. Malaysia has not shown, and cannot show, that the 1958 correspondence has any effect on:

(*a*) Singapore's various acts *à titre de souverain* on and around Pedra Branca, especially in the 22-year period between 1958 and 1980;

(*b*) Malaysia's failure to react to any of those acts, coupled with its recognition of Singapore's sovereignty over Pedra Branca by, *eg*, seeking permission and complying with Singapore's conditions for Malaysian officials to visit the island in 1974 and 1978;

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197 Judgment, p. 68, para. 174. This was in contrast with Malaysia's own conduct with respect to the upkeep of lighthouses. As the Court noted shortly thereafter in the Judgment: "What is of some significance however is that in 1952 the Director of Marine of the Federation of Malaya of which Johor was then a part raised the question whether the Federation should assume responsibility for the Pulau Pisang lighthouse, 'as it is close to the coast of the Federation' but made no such suggestion in respect of Pedra Branca/Pulau Batu Puteh." (Judgment, p. 70, para. 178.)

198 Additional Written Observations, para. 80.

(*c*) Malaysia's official maps published after 1958 labelling Pedra Branca as belonging to Singapore, and its ceasing in 1967 to list Horsburgh Lighthouse as a meteorological station in Malaysia's annual reports of its meteorological service after Singapore's independence from Malaysia; and

(*d*) Malaysia's inability to adduce any evidence of its own sovereign activities carried out on the island for more than 100 years after 1850.

4.42 In the light of the foregoing, the 1958 correspondence on which Malaysia relies does not remotely rise to the level of a "decisive factor" justifying the admissibility of the Application. Nothing contained in that correspondence affects the reasoning of the Court that underlay its decision on sovereignty.

2. ANNEX 2 – DOCUMENTS CONCERNING THE 1958 *LABUAN HAJI* INCIDENT

4.43 Similar considerations undermine the relevance of the documents Malaysia filed under Annex 2 to the Application relating to the *Labuan Haji* incident, which also took place in 1958. Just as with respect to the 1958 correspondence, none of the materials on which Malaysia relies, including the additional press cuttings it submitted in Annexure A to the Additional Written Observations, refers to sovereignty over Pedra Branca. None of them changes the significance that the Court attached to the 1953 Johor Understanding. As discussed above, none of them affects the conduct that the Court found relevant relating either to the year 1958[199] or during the ensuing years up to 1980[200]. And none of them

[199] *See* paras. 4.38-4.40 above.

[200] *See* para. 4.41 above.

evinces any Malaysian claim to sovereignty over the island, let alone Malaysian *effectivités.*

4.44 Neither the documents filed by Malaysia in Annex 2 to the Application nor the press cuttings submitted in the Additional Written Observations indicate with any precision exactly where the *Labuan Haji* incident occurred. The Annex 2 documents simply refer to the incident as having taken place "near Horsburgh Light"[201]. The new press cuttings report the incident as taking place "off"[202] or "near the Horsburgh lighthouse, 35 miles northeast of Singapore"[203]. Significantly, none of these reports says that the incident occurred within the territorial waters appertaining to Pedra Branca or that the island belonged to Malaysia.

4.45 On the contrary, as discussed above[204], the same year the incident occurred, Singapore had specifically stated in connection with its amendment to the Light Dues Ordinance in 1958 that Pedra Branca is Singapore's. There was thus no doubt in Singapore's mind that it had sovereignty over the island. Indeed, the situation was no different from that which existed in late 1953 after Singapore had received the letter stating the 1953 Johor Understanding. As the Court stated in the Judgment with respect to the situation pertaining at that time:

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201 Application, para. 27

202 Cutting from the *Straits Times* (Additional Written Observations, Annexure A).

203 Cuttings from the *Berita Harian* (Additional Written Observations, Annexure A).

204 *See* para. 4.39 above.

> "in light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island."[205]

4.46 This contemporaneous evidence dispels any notion that Singapore was in doubt about its understanding that it possessed sovereignty over Pedra Branca. In the Written Observations, Singapore also pointed out that the reports of the location of the incident were too vague to have any bearing on the question of sovereignty, and that the Court had dismissed the relevance of similarly vague geographical descriptions in the Judgment[206].

4.47 In the Additional Written Observations, Malaysia contests the pertinence of just one of the references from the Judgment that Singapore cited for the irrelevance of general geographical descriptions: the 1844 correspondence concerning the site of the proposed lighthouse. Malaysia tries to distinguish this example by noting that the correspondence did not refer specifically to Pedra Branca, unlike the documents it has annexed in these proceedings, and the Court did not deem it necessary to rule on Malaysia's arguments because it had already found an original title vesting in Johor[207]. But this does not detract from the Court's observation that the difficulty with Malaysia's argument that the expression "near Point Romania" encompassed Pedra Branca was that "the correspondence appears to be in the most general terms"[208]. Moreover, Malaysia has no answer to the fact that the Court also dismissed the relevance of a number

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205 Judgment, p. 82. para. 230.

206 *See* Written Observations, paras. 6.19-6.23.

207 *See* Additional Written Observations, para. 82.

208 Judgment, p. 55, para. 134.

of other documents because they contained general geographical references that shed no light on the question of sovereignty.

4.48 For example, Singapore also pointed out that the Court did not find relevant an 1861 incident involving attacks on Singapore fishermen described as having taken place "near to the Pedro Branco Light House" or "in the neighbourhood of the Pedro Branco Light House"[209]. Notwithstanding the specific reference to the lighthouse on Pedra Branca in these reports, the Court stated that:

> "on the basis of the available records, the facts cannot be clearly established and the wording of the Singapore reports are too vague to provide any assistance in determining the understanding at that time by the authorities in Singapore of sovereignty over Pedra Branca/Pulau Batu Puteh."[210]

Malaysia offers no response to this point other than to label Singapore's arguments as "similarly weak claims"[211] without providing the slightest justification for such an assertion.

4.49 Elsewhere in the Judgment, the Court also dismissed the relevance of other general descriptions that were of a geographical nature. Thus, with respect to what Malaysia claimed were official publications of Singapore that did not list Pedra Branca as part of Singapore[212], the Court noted that:

> "Given the purpose of the publications and their non-authoritative and essentially descriptive character, even if

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209 *See* Written Observations, para. 6.21.

210 Judgment, p. 72, para.191.

211 Additional Written Observations, para. 82.

212 *See* Judgment, p. 92, para. 261.

> official, the Court does not consider that they can be given any weight"[213].

Further, in the original case, Malaysia also relied on a monograph—by an individual who was for many years Singapore's Director of Marine—which apparently distinguished between navigational aids in Singapore waters and those on "outlying stations" at Pedra Branca and Pulau Pisang. Malaysia argued that this showed that the latter two had a common status[214]. With respect to Malaysia's argument, the Court agreed with Singapore's position that the descriptions were "simply geographical"[215].

4.50 Similarly, when it came to assessing the relevance of Malaysia's 1969 territorial waters legislation, which, like the 1958 documents relating to the *Labuan Haji* incident, did not refer to territories, baselines, outer limits and areas of territorial waters, the Court again stated that "the very generality of the 1969 legislation means that Malaysia's argument based on it must fail."[216]

4.51 In the light of the above, Malaysia's contention that the 1958 documents relating to the *Labuan Haji* incident, which do not even show that the incident occurred in Pedra Branca's territorial waters, constitute a "decisive factor" within the meaning of Article 61 of the Statute, is untenable.

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213 Judgment, p. 92, para. 262.

214 *See* Judgment, p. 93, para. 263.

215 *Ibid.,* p. 93, para. 264.

216 Judgment, p. 90, para. 256. *See also* Written Observations, para. 6.22, to which Malaysia offers no response.

3. ANNEX 3 – SKETCH MAP OF RESTRICTED AND PROHIBITED AREAS

4.52 The document submitted as Annex 3 to the Application is a sketch map dated 25 March 1962 depicting "Restricted and Prohibited Areas – Singapore Territorial Waters" with a handwritten annotation from 1966. It showed certain restricted and curfew areas imposed by Singapore as a security measure as a result of *Konfrontasi* by Indonesia. Malaysia's discussion of this sketch map in the Application was very brief, and appeared to be that, since the sketch map does not include Pedra Branca, it is evidence of Singapore's understanding at the time that its territorial entitlements did not extend to Pedra Branca[217].

4.53 Singapore has demonstrated that Malaysia's thesis is fanciful and can have no possible impact on the Judgment, let alone a decisive influence[218]. First, Singapore showed that the sketch map was not designed to be an authoritative depiction of the territorial extent of Singapore; it only depicted the areas south of the main island of Singapore that were affected by restrictions to guard against threats from the south. This was clear from the fact that no restricted areas were shown either to the north of the main island of Singapore or off other Singapore islands such as Pulau Tekong Besar and Pulau Ubin[219]. Similarly, these restrictions did not extend to Pedra Branca, and there was accordingly no need to include Pedra Branca on the sketch map. Second, Singapore produced Annex B to the Orders from which the sketch map was taken, and which Malaysia had not submitted with the Application, confirming the limited scope of the restrictions. That document stated very clearly that the Singapore Port

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217 *See* Application, paras. 33-35.

218 *See* Written Observations, paras. 6.8-6.13 and 6.24-6.27. *See also* paras. 3.19-3.28 above.

219 *See* Written Observations, paras. 3.26-3.27.

Restricted Areas pertained to "the waters South of Singapore Island", not to the entire territory of Singapore[220]. Third, Singapore pointed out that, in the original case, Malaysia had attempted to rely on the omission of Pedra Branca from a similar document—a 1948 Curfew Order—as evidence that Singapore authorities appreciated that Pedra Branca was not part of the territory of Singapore, but the Court did not accept that argument because

> "there was no reason in terms of its purpose for extending the ban to such a distant island"[221].

4.54 With the Additional Written Observations, Malaysia has filed further documents relating to the Indonesian *Konfrontasi*. However, as Chapter III above has shown[222], these new documents not only fail to contradict what Singapore said about the sketch map in the Written Observations, they confirm Singapore's position.

4.55 One of the new documents on which Malaysia relies is a UK War Office tabulation of the details of numerous incidents involving Indonesian infiltrators in both Singapore and Malaysia in the period from 17 August 1964 to 31 December 1965[223]. As discussed in Chapter III above[224], what is significant about this document is that it shows that all of the incidents perpetrated by Indonesian activists against Singapore took place on the main island of Singapore or in the waters to its south. There is not a single

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220 *See* Written Observations, para. 3.30. *See also* para. 3.20 above.

221 Judgment, p. 72, para. 189. *See also* Written Observations, para. 6.25.

222 *See* paras. 3.19-3.31 above.

223 *See* Additional Written Observations, para. 92. *See also* Additional Written Observations, Annexure C.

224 *See* paras. 3.22-3.27 above.

incident listed in Annexure C that involves an incursion on the island of Pedra Branca.

4.56 Malaysia tries to counter this by arguing that Singapore "understates the scale of the danger caused by *Konfrontasi*"[225] when it notes that the threat was one arising from the south of the main island of Singapore. In support of its argument, Malaysia points to the fact that the newly furnished War Office document lists numerous hostile interactions with Indonesian antagonists over 16 months "in an area encompassing the Malacca and Singapore Straits and the south-eastern coast of Johor"[226], and that the *Konfrontasi* campaign "spread throughout the region, and certainly encompassed the area of Pedra Branca/Pulau Batu Puteh"[227].

4.57 As Chapter III above has explained, it is true that the campaign by Indonesian infiltrators was directed against both Singapore and Malaysia. But it is not true that the infiltrations encompassed Pedra Branca or that there was a need for Singapore to extend its restricted areas depicted on the sketch map to that island[228]. Moreover, all this had nothing to do with identifying the extent of Singapore's territory.

4.58 Malaysia tries to counter this in the Additional Written Observations by drawing attention to one incident (item 34 on the list) which took place

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225 Additional Written Observations, para. 97.

226 *Ibid.,* para. 98.

227 *Ibid.,* para. 99.

228 *See* paras. 3.20-3.28 above.

on 25 March 1965 where an Indonesian infiltrator was captured at Horsburgh Lighthouse[229].

4.59 Chapter III above showed how Malaysia has misrepresented what actually happened. The incident to which Malaysia refers did not take place on Pedra Branca, but rather was directed at the east coast of the Johor mainland[230]. The only thing that happened at the Horsburgh Lighthouse on Pedra Branca was that one of the Indonesian infiltrators attempting escape was captured there[231]. Contrary to Malaysia's assertion, this scarcely demonstrates that "the UK authorities considered Horsburgh lighthouse to be situated in East Johor"[232].

4.60 As for the views of the Parties regarding sovereignty at the time of the incident, Malaysia fails to recall that in 1953 Johor had already conveyed its understanding that it does not claim ownership or sovereignty over Pedra Branca, and that Malaysia thereafter published two official maps in 1962[233], and another map in 1965[234] (the year of the incident), designating Pedra Branca as belonging to Singapore[235]. Three more similar maps were

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229 *See* Additional Written Observations, para. 93.

230 *See* paras. 3.25-3.26 and 3.30 above.

231 *See* paras. 3.26 and 3.30 above.

232 Additional Written Observations, para. 94.

233 Memorial of Malaysia, Vol. 4, Maps 32 and 33. *See also* Counter-Memorial of Singapore, Vol. 4, Maps 26 and 27.

234 Memorial of Malaysia, Vol. 4, Map 34. *See also* Counter-Memorial of Singapore, Vol. 4, Map 28.

235 Judgment, p. 94, para. 269.

published by Malaysia subsequently[236]. As the Court noted, "those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore."[237] The notion that a small sketch map that was only intended to show the restricted areas established for security purposes and not the territorial extent of Singapore, when compared with six official maps published by Malaysia that clearly labelled Pedra Branca as "Singapore", "may tip the balance of the factual record on which the Court based its determination that a tacit agreement emerged"[238] is not credible. In contrast, Singapore had carried out an investigation into the grounding of a British vessel on a reef adjacent to Pedra Branca just two years earlier, in 1963[239], which was one of a number of such examples of Singaporean conduct that the Court found "gives significant support to the Singapore case."[240]

4.61 Needless to say, Malaysia's invocation of an incident that occurred in 1965 also has no impact on all of the other elements of the Parties' conduct after 1965 that the Court found relevant to its decision on sovereignty. It follows that Malaysia's assertion that its newly found document provides "yet another new illustration that the 'understanding at that time by the authorities in Singapore' [was] that it had not acquired sovereignty over Pedra Branca/Pulau Batu Puteh from Johor"[241] is entirely unfounded. Neither the sketch map nor the documents relating to

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236 These were published in 1970 (Memorial of Malaysia, Vol. 4, Map 38), 1974 (Counter-Memorial of Singapore, Vol. 4, Map 30) and 1975 (Memorial of Malaysia, Vol. 4, Map 41).

237 Judgment, p. 95, para. 272.

238 Additional Written Observations, para. 101.

239 *See* Judgment, p. 83, para. 233.

240 Judgment, p. 83, para. 234.

241 Additional Written Observations, para. 95.

incidents concerning the *Konfrontasi* with Indonesia adduced by Malaysia had anything to do with sovereignty over Pedra Branca. As such, they cannot possibly constitute a "decisive factor" within the meaning of Article 61 of the Statute.

4. THE 1937 JOHORE MAP

4.62 The last document on which Malaysia relies is a 1937 map titled "Johor, 1937". It was apparently only "discovered" by Malaysia on 5 December 2017, some ten months after Malaysia filed the Application[242], and some six months after Malaysia requested the opportunity to present further written observations and documentation.

4.63 The 1937 Johore Map is included in Annexure D to the Additional Written Observations along with a lengthy report by the War Damage Commission for 1952. In Chapter III above[243], Singapore showed that the Commission's task had nothing to do with identifying sovereignty over territory, and there would have been no reason for the War Damage Commission to attach any particular significance to the 1937 Johore Map for that purpose.

4.64 Malaysia does not purport to rely on the War Damage Commission's report itself. Instead, its argument is that because the 1937 Johore Map includes the island of Pedra Branca and bears a stamp of the War Damage Commission, and the Commission included a number of Singapore

242 *See* Additional Written Observations, para. 103.

243 *See* para. 3.37 above.

officials, "Singapore had clear official notice that this map included Pedra Branca/Pulau Batu Puteh as part of Johor and it made no protest."[244]

4.65 Malaysia's attempt to draw support from the 1937 Johore Map for the proposition that its new documents in Annexure D show that there was no "shared understanding" with respect to sovereignty over Pedra Branca is baseless. In the first place, the 1937 Johore Map is not even mentioned in the report. Moreover, not one of the claims discussed in the War Damage Commission's report dealt with a claim relating to Pedra Branca. Indeed, Pedra Branca is not even mentioned in the report. Rather, in so far as the report addressed claims from Malaya, it focused on claims relating to the East Coast district of Malaya. This area, as the report noted, included Kelantan, Trengganu and East Pahang[245]. Pedra Branca was not identified as being part of those localities.

4.66 Apart from the irrelevance of the Commission's stamp on the map for sovereignty purposes, it is important to recall that the War Damage Commission engaged in its work in the 1950s and that the report Malaysia relies on is for the year 1952. This was one year *before* the 1953 Johor Understanding, and it *pre-dated* all the conduct of the Parties between 1953 and 1980 that the Court found relevant for its decision on sovereignty. In other words, whatever the purpose of the 1937 Johore Map was for the Commission—and this is not explained by Malaysia—it does not have any impact on the elements that the Court relied on for reaching its conclusion that, by 1980, sovereignty over Pedra Branca had passed to Singapore.

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244 Additional Written Observations, para. 104.

245 *See* War Damage Commission Report for 1952, p. 67 (Additional Written Observations, Annexure D).

D. Conclusion

4.67 This Chapter has shown that none of the new documents filed by Malaysia, whether in the Application or in the Additional Written Observations, evinces a new fact of a decisive nature that has any influence on the Court's reasoning or Judgment that sovereignty over Pedra Branca belongs to Singapore. That being the case, Malaysia has not satisfied the "decisive factor" requirement under Article 61, paragraph 1, of the Statute, and the Application is therefore inadmissible.

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CHAPTER V

THE TRUE NATURE OF MALAYSIA'S REVISION APPLICATION: AN APPEAL

5.1 The previous Chapters have shown that Malaysia has not satisfied the conditions for admissibility of the Application under Article 61 of the Statute. This Chapter will show that the Additional Written Observations confirm that the effect of Malaysia's applications for revision, and, in separate proceedings[246], for interpretation of the Judgment is to appeal the Judgment on the merits. It goes without saying that no appeal can be brought against the Judgment. Article 60 of the Statute cannot be clearer: "The judgment is final and without appeal."

5.2 Malaysia is aware of the *res judicata* effect and the *autorité de la chose jugée* attached to the Judgment. Indeed, it claims—probably to convince itself—that the "Application is not an appeal against the 2008 Judgment."[247] Despite its assertions to the contrary, Malaysia is simply re-pleading its case.

5.3 In the Additional Written Observations, Malaysia engages in a lengthy exegesis on what it terms the Court's "legal methodology" in reaching its decision that sovereignty over Pedra Branca belongs to Singapore[248]. This exposition, which addresses concepts such as the presumption against

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246 *See Request for Interpretation of the Judgment of 23 May 2008 in the case concerning* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) *(Malaysia* v. *Singapore)*, Written Observations of the Republic of Singapore, 30 October 2017, paras. 1.5, 1.31, 1.35 and 4.41.

247 Application, para. 7.

248 *See* Additional Written Observations, paras. 42-67.

abandonment of title, the relationship between a prior title and *effectivités*, acquisitive prescription and historical consolidation, is nothing less than a criticism of the Court's reasoning.

5.4 Malaysia is criticising the Judgment when it asserts that: the Judgment "has unusual features"[249]; the evidence relating to Malaysia's conduct relied on in the Judgment was "implied" and "always doubtful"[250]; the evidence relating to Singapore's conduct relied on in the Judgment was "construed from limited and and [*sic*] shifting practice"[251]; "the appreciation of the Court was unavoidably finely balanced"[252], a "fine call"[253]; and "[t]he 2008 Judgment rested on a *proprio motu* analysis that had not had the benefit of submissions of the Parties."[254] It insinuates that "the Judgment might have gone either way"[255] and that it "turned on limited practice and nuanced appreciations."[256]

5.5 Malaysia also engages in an extended discussion of legal principles that did not figure in the Court's own reasoning. First, it discusses at length the presumption against the abandonment of title[257], and argues that "the burden of proof rests upon the party claiming that sovereignty has been

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249 Additional Written Observations, para. 5.

250 *Ibid.*, para. 8.

251 *Ibid.*, para. 5.

252 *Ibid.*, para. 11.

253 *Ibid.*, para. 67.

254 *Ibid.*, para. 5.

255 *Ibid.*, para. 7.

256 *Ibid.*, paras. 7 and 11.

257 *Ibid.*, paras. 49-51.

relinquished."[258] This is no more than an attempt to reargue points of law that (*i*) were addressed in the original case; or (*ii*) in Malaysia's opinion, should have been addressed by the Court in the original case. It is quite clear that the Court fully appreciated the fact that it was addressing a situation where the question was whether, by virtue of the Parties' subsequent conduct, sovereignty had passed to Singapore. Yet the Court's decision was not based on the notion of Malaysian abandonment of title, but rested on the mutual conduct of the Parties.

5.6 Second, Malaysia further asserts in the Additional Written Observations that the principle articulated by the Court in *Frontier Dispute* that legal title has priority over *effectivités* formed part of the "essential legal framework"[259] of the Judgment[260]. Again, this is no more than an attack on the Court's finding that Singapore's activities *à titre de souverain* on and around Pedra Branca, coupled with Malaysia's failure to react to those activities, constituted *one* of the elements—*but by no means the only* element—leading to the Court's determination that, by 1980, sovereignty over Pedra Branca had passed to Singapore.

5.7 Third, while Malaysia acknowledges that, in the original case, "the two Parties accepted that the notion of acquisitive prescription had no role to play in the case", and that "the Court itself did not refer explicitly to this concept nor to that of historical consolidation", it nonetheless asserts that

258 Additional Written Observations, para. 52.

259 *Ibid.*, para. 55.

260 *Ibid.*, paras. 53-54.

"in effect the Court drew upon their key elements in analysing the case."[261] Indeed, Malaysia goes even further by stating that:

> "After 1953, the Court perceived, on the evidence before it, a shared understanding in favour of acquisitive prescription or historical consolidation by Singapore."[262]

But nowhere in the Judgment did the Court rely on either acquisitive prescription or historical consolidation as part of its reasoning.

5.8 All this further exposes the Application for what it really is: an appeal rather than a genuine request for revision. Malaysia is trying to reargue, with the benefit of hindsight, the legal basis on which the Court reached—or apparently (according to Malaysia) should have reached—its decision, in contrast to how the Court actually approached the issue of sovereignty.

5.9 However, revision is not "*une deuxième instance*"[263]. Revision is also not a form of rehearing permitting the parties to question the legal reasoning upon which a judicial decision was based. As the Yugoslav-German Mixed Arbitral put it, revision is not

> "*une voie de recours ordinaire, permettant aux parties de remettre directement en question le raisonnement juridique ou la méthode qui sont à la base de la décision attaquée*"[264].

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261 Additional Written Observations, para. 56.

262 *Ibid.,* para. 11.

263 *Heim and Chamant c. Etat allemand,* Franco-German Mixed Arbitral Tribunal, *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. III, p. 50, 54 ("a second instance" [*Singapore's translation*]).

264 *Epoux Ventense c. Etat S.H.S.*, Yugoslav-German Mixed Arbitral Tribunal, *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. VII, p. 79, 83 ("an ordinary remedy, allowing the parties to question directly the legal reasoning or method on which the decision is based" [*Singapore's translation*]).

In the words of another mixed arbitral tribunal:

> "*[L]a procédure de révision instituée par le Tribunal constitue une voie de recours extraordinaire [et] ne peut être considérée comme une voie indirecte, permettant de revenir par une nouvelle instance sur des décisions déclarées définitives … [L]e Tribunal ne saurait se montrer trop rigoureux dans cet examen avant d'accueillir une demande qui ne tend rien de moins qu'à remettre en discussion des questions définitivement jugées …*"[265]

5.10 Malaysia also repeatedly asserts that the essential questions were not argued by the Parties[266]. In the Application, Malaysia insinuates that "the Court's appreciation that sovereignty passed in consequence of the emergence of an informal agreement between the Parties was not the subject of submission by the Parties or enquiry by the Court in the original proceedings"[267], or that its "new fact" or "facts" were "not pleaded by either Party during the original proceedings"[268]. It also contends that "the issue of the Parties' own understanding of the situation concerning sovereignty over Pedra Branca/Pulau Batu Puteh was not pleaded during the original proceedings"[269]. It finally asserts that "the Court would, if the Revision Application is found to be admissible, for the first time, be

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265 *Battus c. Etat bulgare*, Franco-Bulgarian Mixed Arbitral Tribunal, *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. IX, p. 284, 285 ("The revision procedure instituted by the Tribunal is an extraordinary remedy and cannot be regarded as an indirect means of challenging through new proceedings on decisions declared final … [T]he Tribunal cannot but be extremely rigorous in its examination before allowing an application which tends nothing less but to re-open the discussion of issues finally decided ..." [*Singapore's translation*]).

266 *See* Application, paras. 41, 45 and 48. *See also* Additional Written Observations, paras. 5, 15 and 187(d).

267 Application, para. 41.

268 *Ibid.*, para. 45. *See also* Additional Written Observations, para. 5.

269 Application, para. 48.

addressed, by reference to the new facts, on the implied shared understanding, or tacit agreement, on which the 2008 Judgment was based."[270] This is tantamount to arguing, "*If we had known how the Court would decide, we would have argued the case differently.*" It again illustrates the point that Malaysia is seeking to appeal the Judgment under the guise of a request for revision.

5.11 Singapore has demonstrated that Malaysia's allegations are plainly wrong and that both Parties, including Malaysia, extensively pleaded the "new fact" or the "new facts" on which Malaysia now relies in the original case[271].

5.12 But in any event, while the Court is bound by the *petitum* of the Parties as defined by their Submissions and needs to address this *petitum* in full, it remains free to select the arguments and grounds for its decision. In the *Guardianship of Infants* case, the Court held in this respect:

> "The Court has to adjudicate upon the subject of the dispute … It retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose."[272]

5.13 This freedom to select the ground on which it bases its decision, which is an essential corollary of the *iura novit curia* principle, was reaffirmed by

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270 Additional Written Observations, para. 17. *See also* Additional Written Observations, para 68.

271 *See* Written Observations, para. 5.5. *See also* paras. 2.20-2.27 above.

272 *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)*, *Judgment*, *I.C.J. Reports 1958*, p. 62.

the Court in several other cases[273]. In his Separate Opinion in the *Arrest Warrant* case, Judge Koroma referred to this essential freedom of the Court in the following terms:

> "In other words, according to the jurisprudence of the Court, it rules on the *petitum*, or the subject-matter of the dispute as defined by the claims of the Parties in their submissions; the Court is not bound by the grounds and arguments advanced by the Parties in support of their claims, nor is it obliged to address all such claims, as long as it provides a complete answer to the submissions."[274]

5.14 Judge *ad hoc* Dugard confirmed in his dissenting opinion in the original case that:

> "The Court is not bound, in reaching its decision, by the submissions of counsel representing parties before the Court. It may invoke reasons of its own *proprio motu* when it considers that there is a sounder basis for decision than that advanced by parties."[275]

5.15 Malaysia seeks to put into question the Court's power to decide the dispute submitted to it in accordance with the international law it considers applicable and relevant. In a nutshell, it wants to reopen the case to present the case it would have presented had it been aware of the

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273 *See*, *eg*, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 29; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 180, para. 37; and *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 298-299, para. 46.

274 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Separate Opinion of Judge Koroma, I.C.J. Reports 2002*, p. 60, para. 3.

275 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Dissenting Opinion of Judge* ad hoc *Dugard, I.C.J. Reports 2008*, p. 152, para. 45.

Court's decision. However, as the Franco-German Mixed Arbitral Tribunal put it in its judgment in the 1927 *Baron de Neuflize* case:

> "*[L]a revision ne se motive pas devant une juridiction souveraine, par le bien ou mal jugé de la sentence, ni par conséquent par la critique d'une doctrine de droit ou par l'appréciation différente des faits* ..."[276]

5.16 What Malaysia seeks now is nothing more than an appeal that runs counter to the principle of *res judicata*. As the Court recently recalled:

> "the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, pp. 90‑91, para. 116)."[277]

5.17 As can be seen from the above, despite the fact that the present proceedings are devoted to the question whether Malaysia has satisfied the conditions of Article 61 for the admissibility of the Application, Malaysia has seized the opportunity the Court afforded to it to file an additional written pleading to reargue legal points that were not accepted

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276 *Baron de Neuflize v. Diskontogesellschaft et al.*, *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. VII, p. 629, 632. To quote from an English language summary of the case: "Revision ought not to be confused with appeal. In order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or both. It is only lack of knowledge, on the part of the judge *and* of one of the parties, of a material and decisive fact, which may in law give rise to the revision of a judgment." (*Annual Digest of Public International Law Cases – Years 1927 and 1928* (Grotius Publications Ltd: 1981), p. 492.)

277 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 125, para. 58.

in the Judgment and on which the Court did not rely to reach its decision. Singapore submits that Malaysia's approach does nothing to meet its burden under Article 61, and that Malaysia's arguments are tantamount to an appeal of the Judgment, not a proper request for revision.

5.18 It is indisputable that the Judgment is *res judicata*. It cannot be the subject of an appeal as Malaysia now claims through the Application.

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SUMMARY OF SINGAPORE'S REASONING

1. In accordance with the Court's Practice Direction II, Singapore presents a short summary of the reasoning developed in these Written Comments.

2. Malaysia has still not shown that it has overcome the procedural shortcomings of the Application. Specifically:

   (*a*) The "new fact" or "facts" relied upon by Malaysia were not unknown to Malaysia or the Court at the time of the Judgment.

   (*b*) Malaysia has not exercised reasonable diligence to obtain the documents annexed to the Application before the Judgment was delivered. In particular, Malaysia has now produced evidence in the Additional Written Observations that it was informed before filing the Application that Annex 3 was estimated to have been made available in 1998, well before the Judgment was rendered.

   (*c*) Malaysia has still failed to provide evidence that it filed the Application within six months of the discovery of its "new fact" or "facts". Instead, Malaysia's own evidence now produced in the Additional Written Observations only raises further doubts about whether it did indeed file the Application within this time period.

3. Even with the production of further documentation and further arguments, Malaysia has still not shown that the documents annexed to the Application, even when taken together with the further documentation now annexed to the Additional Written Observations, have anything to do with sovereignty, let alone the Parties' understanding as to sovereignty over Pedra Branca.

4. Malaysia's "newly discovered documents", or any fact they are said to evince, do not meet the "decisive factor" criterion of admissibility. In this respect:

(*a*) Malaysia has articulated an arbitrarily low standard of "decisiveness" required of the "new fact" supporting an application for revision. Malaysia has to show that its "new fact" would have had a decisive influence on the Judgment for the Application to be admissible.

(*b*) Malaysia has mischaracterised the reasoning underlying the decision in the Judgment and the proper context against which Malaysia's "new facts" should be examined for decisiveness. The Judgment was, in actuality, based on a confluence of four key elements: (*i*) the 1953 correspondence showing Johor's understanding that it did not have sovereignty over Pedra Branca; (*ii*) Singapore's conduct *à titre de souverain*, almost all of which post-dated the documents annexed to the Application, and Malaysia's acceptance of or failure to object to that conduct; (*iii*) Malaysia's publications and maps, most of which also post-dated the documents annexed to the Application, indicating Pedra Branca as belonging to Singapore; and (*iv*) the lack of any competing *effectivités* by Malaysia.

(*c*) None of Malaysia's "newly discovered documents", or any fact they are said to evince, can be a "decisive factor" for the purposes of admissibility. Even if Malaysia's arbitrarily low threshold for admissibility is applied, none of the "newly discovered documents" affects the reasoning on which the Judgment was based or has "the potential" to lead to a different decision.

5. The Additional Written Observations bear all the hallmarks of an abuse of the revision procedure in order to seek an appeal of the Judgment or rehearing on the merits of the original case. Such an approach bears no relevance to the criteria for admissibility of a revision application under Article 61 of the Statute, and, moreover, runs contrary to the clear wording of Articles 59 and 60 of the Statute that the Court's Judgments are binding as between the Parties and "final and without appeal" .

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SUBMISSION

For the reasons set out above and in the Written Observations, the Republic of Singapore requests the Court to adjudge and declare that Malaysia's request for revision of the Judgment is inadmissible.

Attorney-General Lucien Wong
Agent for the Government of the Republic of Singapore