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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Wednesday 7 November 2007, at 10 a.m., at the Peace Palace,

Vice-President Al-Khasawneh, Acting President, presiding

***in the case concerning* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)**

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le mercredi 7 novembre 2007, à 10 heures, au Palais de la Paix,

sous la présidence de M. Al-Khasawneh, vice-président, faisant fonction de président

***en l'affaire relative à la* Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour)**

COMPTE RENDU

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

Présents : M. Al-Khasawneh, vice-président, faisant fonction de président en l'affaire
MM. Ranjeva
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Dugard
Sreenivasa Rao, juges *ad hoc*

M. Couvreur, greffier

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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. Before I give the floor to Professor Pellet to resume his oral arguments, I should like to inform you that Judge Shi, for reasons communicated to me, is unable to sit with us this morning. You have the floor.

M. PELLET : Thank you very much, Mr. President.

JOHOR N'AVAIT AUCUN TITRE SUR PEDRA BRANCA ET N'A PAS DONNÉ SA PERMISSION À LA CONSTRUCTION DU PHARE

I. L'ABSENCE DE TITRE DE JOHOR SUR PEDRA BRANCA

A. L'absence de document probant établissant l'existence d'un titre originel de Johor sur Pedra Branca

18. Monsieur le président, Messieurs les juges, lorsque je me suis interrompu hier, j'avais décrit les quelques rares documents (il n'y en a que trois) invoqués par la Malaisie et qui, selon elle, mentionneraient Pedra Branca et comporteraient la preuve du titre originel dont elle se prévaut. Comme je l'ai montré, c'est faire dire à ces documents beaucoup plus qu'ils ne disent. Mais le fait qu'il s'agisse des principales «cartouches» de la Partie malaisienne, montre à quel point celle-ci manque de munitions. Elle n'en tire pas moins quelques autres cartouches, qui, plus encore, ratent leur cible car elles ne mentionnent nullement Pedra Branca.

2. Les autres documents invoqués par la Malaisie

19. Outre ce que j'ai présenté hier, les prétendus éléments de preuve du titre originel que revendique la Partie malaisienne sont les suivants (et de nouveau leur petit nombre montre, à lui seul, à quel point cette «preuve» se révèle malaisée). Il s'agit :

— d'une lettre de John Crawfurd du 10 janvier 1824 au gouverneur général des Indes ;

— des deux traités de 1824, entre la Grande-Bretagne et les Pays-Bas d'une part, avec le sultan et le temenggong de Johor d'autre part ; et

— du rapport Presgrave de 1828.

En outre, la Malaisie invoque quelques documents postérieurs à la prise de possession de Pedra Branca par les Britanniques, qui, selon elle, confirmeraient aussi le titre originel de Johor sur Pedra Branca bien sûr. Il s'agit cette fois :

— de la sentence Ord du 1er septembre 1868 ;

— de la lettre du sultan de Johor du 20 mars 1886 ;

— de l'accord de 1927 entre Johor et Singapour sur la délimitation de leurs eaux territoriales respectives ; et même

— de l'accord de 1973, également sur la mer territoriale entre l'Indonésie et Singapour.

Ni isolément ni considérés ensemble, ces documents ne viennent au soutien de la thèse malaisienne, qu'ils datent d'avant la prise de possession de Pedra Branca par les Britanniques, ou qu'ils soient postérieurs.

a) ***Les «titres» documentaires antérieurs à 1847***

20. Quelque effort d'imagination que l'on fasse, il est impossible de trouver dans l'un quelconque des documents antérieurs à 1847 la preuve ou la confirmation du titre originel qu'invoque la Malaisie. Cela est tout particulièrement vrai en ce qui concerne la lettre de John Crawfurd du 10 janvier 1824[1], lettre dans laquelle le résident britannique à Singapour décrit l'extension territoriale de la principauté de Johor de la manière suivante en anglais :

> «This principality extends on the Continent from Malacca to the extremity of the Peninsula on both coasts. It had several settlements on the island of Sumatra, and embraced all the islands in the Mouth of the Straits of Malacca with all those in China seas, as far as the Natunas in the latitude of 4º North and the longitude 109º East»[2].

21. Comme Singapour l'a montré, il s'agit là d'une description très générale des possessions du Sultan de Johor quand les Britanniques se sont établis à Singapour («when we formed our settlement in the year 1819» écrit Crawfurd) — description qui, soit dit en passant, ne confirme pas l'impression d'un Etat fort et puissant que veut donner la Malaisie : «The present Sultan when he connected himself with us was not only destitute of all authority, but living in a state of complete indigence.»[3]

22. Quoi qu'il en soit, on ne saurait certainement déduire de cette description que *la souveraineté territoriale* de Johor s'étendait aux îles inhabitées de la région ni, évidemment, aux mers incluses dans cette superficie (la description faite par Crawfurd porte sur plusieurs dizaines de

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[1] CMS, vol. 2, annexe 2.

[2] *Ibid.*, p. 10, par. 20.

[3] *Ibid.*, p. 11, par. 24.

milliers de milles marins carrés !). Le rapport Presgrave de 1828 sur la piraterie dans la région[4] appelle d'ailleurs les mêmes remarques[5].

23. Il est du reste révélateur que ni Crawfurd dans son *Descriptive Dictionary of the Islands and Adjacent Countries* publié en 1856[6], ni Presgrave dans la liste des cinquante-quatre «lieux relevant de la juridiction de Johor» («places within the jurisdiction of [the Sultan of] Johor»)[7], ni Begbie dans son tableau de la population maritime de l'Empire de Johor, qui montre les différentes îles et les tribus par lesquelles elles sont habitées de 1834[8] ne mentionnent Pedra Branca parmi les possessions de Johor, il est significatif aussi que les deux derniers s'en tiennent à l'énumération des seules îles habitées ce qui, comme nous le verrons tout à l'heure lorsque je terminerai cette plaidoirie, n'est pas non plus sans signification. Il n'est d'ailleurs pas sans intérêt que la Partie malaisienne se soit gardée de produire tous ces documents, pourtant tout à fait pertinents…

24. Les traités de 1824 ne confirment pas davantage les prétentions de la Malaisie. S'agissant du traité anglo-néerlandais du 24 mars 1824 — dont M. Chan a rappelé hier les circonstances dans lesquelles il a été élaboré et les effets globaux —, la Malaisie semble interpréter l'article XII de ce traité comme signifiant que les Hollandais avaient reconnu la souveraineté britannique sur le détroit de Singapour dans son ensemble[9]. Ce n'est assurément pas ce que dit cette disposition, dont il n'est peut être pas inutile de rappeler les termes :

> «His Netherlands Majesty withdraws the objections which have been made to the occupation of the Island of Singapore, by the Subjects of His Britannick Majesty.
>
> His Britannick Majesty, however, engages, that no British Establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintang, Lingin, or on any of the Islands south of the Straight of Singapore, nor any Treaty conclude[d] by British Authority with the Chiefs of those Islands.»[10]

25. En réalité, cette disposition n'a rien à voir avec le statut juridique du détroit, qui demeure inchangé. Ceci, au demeurant, n'a guère d'importance en ce qui nous concerne : la seule question

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[4] MM, vol. 3, annexe 27.

[5] Voir CMS, p. 51-52, par. 4.24-4.25.

[6] CMS, annexe 17.

[7] CMS, annexe 7.

[8] Voir CMS, annexe 8.

[9] Cf. CMM, p. 20, par. 32 ou RM, p. 38, par. 83.

[10] MM, vol. 2, annexe 5.

pertinente est celle de savoir si ce texte a pu avoir une incidence quelconque en ce qui concerne le statut juridique de Pedra Branca. A cette question, la réponse est, très clairement, négative.

26. Dans son contre-mémoire, la Malaisie avait affirmé le contraire : «The 1824 Anglo-Dutch Treaty confirmed Johor's title»[11] because, it wrote : «PBP is clearly to the north of the line [defined by the Treaty], as part of the territory of Johor and within the British sphere of influence»[12] ; cette ligne aurait été représentée, selon la Malaisie, sur la carte des Indes orientales néerlandaises de van Hinderstein publiée en 1842[13]. La Partie malaisienne persiste et signe dans sa réplique, sans apporter d'éléments nouveaux[14] sinon quelques citations d'historiens qui, en fait, confirment l'analyse de Singapour[15].

27. Il en résulte en effet — et je cite la réplique malaisienne — que :

> «In order to avoid confusion, Elout (at the time adviser to the Dutch Colonial Minister) had sought to substitute in the draft text of 1 February 1824 the phrase «any of the remaining islands belonging to the ancient kingdom of Johore» by the phrase «any of the Islands South of the Straight of Singapore». This was agreed to. In the final text, Article XII referred not to Johor, but to Carimon, Battam, Bintang, Lingin and other islands South of the Straits.»[16]

Comme l'a expliqué, M. Chan hier, on ne saurait montrer plus clairement que les Parties ont pris grand soin de *ne pas* prendre position sur la possession des îles de la région par Johor — par l'«ancien Royaume de Johor», cela mérite d'être noté.

Projection 3 — Extrait de la carte de van Hinderstein de 1842 (RS, encart 5) (dossier des plaidoiries, onglet n° 17)

28. Au surplus, Singapour a montré, dans sa propre réplique, qu'il résulte des travaux préparatoires du traité de 1824 que les Parties ont délibérément évité de tracer une ligne précise entre les zones d'influence respectives des deux signataires[17] et que la ligne figurant en rouge sur la carte de 1842 montrait simplement les limites de la résidence néerlandaise de Riau[18] (cette

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[11] CMM, p. 21, titre D.

[12] *Ibid.*, p. 22, par. 35.

[13] CMM, section des cartes, p. 277-278, RM, p. 43 ou RS, encart 5, après la p. 22.

[14] RM, p. 34-38, par. 78-83, et p. 42, par. 94.

[15] *Ibid.*, p. 36, par. 82.

[16] *Ibid.*

[17] RS, p. 18-19, par. 2.26-2.27, et p. 21-22, par. 2.34. Voir aussi CMS, p. 52-53, par. 4.26-4.27.

[18] RS, p. 22-23, par. 2.35.

résidence apparaît en plus clair sur la carte projetée en ce moment) mais il ne s'agissait pas des limites de la zone d'influence reconnue aux Pays-Bas par le traité ni, moins encore, relevant de la Grande-Bretagne.

[Fin de la projection 3.]

Projection 4 — Croquis des abords de Pedra Branca indiquant le couloir de navigation (CMS, encart 3) (dossier des plaidoiries, onglet n° 18)

J'ajoute qu'il est discutable de considérer que Pedra Branca soit située «au nord du détroit de Singapour» si, comme cela semble être le cas de la Malaisie, on a de cette voie d'eau maritime une conception extensive, et si l'on veut bien se rappeler que l'île est située au sud du chenal principal menant au détroit proprement dit.

29. Mais il y a davantage. Comme souvent, la Partie malaisienne opère un tour de passe-passe lorsqu'elle affirme benoîtement que la position de Singapour reviendrait à considérer que le traité anglo-néerlandais de 1824 aurait *transformé* Pedra Branca en une *terra nullius* («it somehow *became* terra nullius»)[19]. Avec tout le respect dû à nos contradicteurs, c'est évidemment absurde : le traité de 1824 n'a pas modifié le statut de l'île. Si elle était *terra nullius*, elle l'est demeurée ; si elle avait appartenu à l'ancien Johor, elle aurait continué à lui appartenir. Mais il est clair que le traité n'a ni créé, ni modifié, ni confirmé aucun titre et que la Malaisie ne peut s'en prévaloir à l'appui de l'existence de son prétendu «titre originel».

[Fin de la projection 4.]

30. Il en va de même de la donation effectuée l'année suivante par le sultan Abdul Rahman (celui de Riau) à son frère Hussein (celui de Singapour), donation portant sur les terres et îles lui appartenant dans la sphère d'influence britannique[20]. Ici encore, sans qu'il soit bien nécessaire de polémiquer avec nos contradicteurs sur la signification exacte de cet acte, il suffit de noter que *nemo transferre potest quod non habet*[21] : si Pedra Branca était *res nullius*, elle l'est restée ; si elle ne l'était pas, elle ne l'est pas devenue. Mais, en tout cas, la lettre du 25 juin 1825[22] n'a rien

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[19] RM, p. 35, par. 78 ; voir aussi, par. 78.

[20] Voir CMS, p. 34-35, par. 3.31-3.34.

[21] Cf. CPA, Max Huber, *Ile de Palmas*, sentence arbitrale du 4 avril 1928, *RGDIP*, 1935, p. 168 (texte anglais *in RSANU*, vol. II, p. 842-843). Voir aussi Ian Brownlie, *Principles of Public International Law*, 6e éd., Oxford University Press, 2003, p. 120 et Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 138.

[22] CMS, annexe 5 ; voir aussi l'annexe 6.

changé à la situation et ne prouve en aucune manière l'existence d'un titre préexistant (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 674-675, par. 109).

31. L'utilisation que la Partie malaisienne essaie de faire du traité conclu par Crawfurd avec le sultan et le temenggong de Johor le 2 août 1824[23] ne convainc pas davantage. Bien sûr, par l'article II, ces derniers — le sultan et le temenggong — cèdent à la Compagnie anglaise des Indes orientales «the Island of Singapore, situated in the Straits of Malacca, together with the adjacent seas, straits and islets, to the extent of ten geographical miles, from the coast of the said mainland of Singapore». Singapour ne conteste évidemment en aucune manière que «it clearly follows that this area was not an area which the English East India Company or Singapore could enlarge unilaterally»[24]. Mais, ici encore, ce traité n'a eu strictement aucun effet, ni dans un sens ni dans l'autre, quant à la souveraineté sur les autres îles de la région, y compris Pedra Branca, qui n'entre clairement pas dans ses prévisions. Et il ne conforte évidemment pas la thèse malaisienne quant à l'existence de son introuvable titre originel sur l'île. Dès lors, l'affirmation selon laquelle «[t]itle to other territories and sea areas remains where it was, *namely in the Sultanate of Johor*»[25] demeure une pure pétition de principe sans aucune justification.

32. Je souligne en particulier que la largeur de 10 milles géographiques retenue pour fixer la limite ne peut en aucun cas signifier, comme la Malaisie tente de le soutenir, que dans la région les princes et souverains exerçaient des droits souverains jusqu'à cette limite — arbitraire et sans aucun fondement logique — de 10 milles et seulement dans cette limite. Dans les deux cas sur lesquels la Partie malaisienne s'appuie, le traité Crawfurd et la cession de Labuan, cette limite a été choisie pour de pures raisons de convenance dans le seul but de leur garantir un contrôle effectif et d'éviter les litiges avec l'Etat cédant[26]. Dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan*, la Cour n'a d'ailleurs pas exclu que le sultan de Sulu pût exercer des droits sur les îles litigieuses malgré leur «distance considérable» de Bornéo (21 milles marins pour Ligitan et

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[23] MM, annexe 6.

[24] CMM, p. 25, par. 41.

[25] *Ibid.*, par. 42 ; les italiques sont de nous ; voir aussi RM, p. 35, par. 79.

[26] Voir RS, p. 11-16, par. 2.12-2.21.

une quinzaine pour Sipadan) et bien que ce même sultan — le sultan Sulu — ait cédé tous ses droits et pouvoirs sur l'ensemble de ses possessions à Bornéo et «les îles situées dans la limite de 3 lieues marines [ce qui correspond d'ailleurs à 9 milles marins] à partir de la côte». Et au contraire, la Cour s'est demandée si le sultan disposait d'un titre sur les îlots de quelque nature qu'il soit (ce qui n'a pas pu être prouvé) (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 674-675, par. 108-110).

Projection 5 — Extrait du croquis illustrant le traité Crawfurd de 1824 (MM, encart 7) (dossier des plaidoiries, onglet n° 19)

33. Il est en outre impossible de suivre la Malaisie lorsqu'elle affirme : «Obviously, Johor could not have ceded the territory of Singapore Island and islets situated within ten geographical (i.e. nautical) miles to the English East India Company if Johor did not have a title to it»[27]. En droit strict, ceci est évidemment exact — toujours en vertu de l'adage *nemo dat quod non habet*. Mais, en l'occurrence, il ne faut certainement pas prendre la formule au pied de la lettre — un simple coup d'œil à la carte projetée derrière moi le montre. Il s'agit d'un croquis établi par la Malaisie et figurant à la page 25 de son mémoire. Il montre que, si l'on interprète littéralement l'article II du traité Crawfurd, la Compagnie aurait reçu non seulement de petites îles situées (celles qui clignotent en ce moment) au nord de Bulan et de Batam, mais aussi une partie de l'île de Batam elle-même — qui pourtant, sans aucun doute, ne relevait pas du sultan de Johor établi à Singapour, mais de celui de Riau. En d'autres termes, il faut considérer que le sultan et le temenggong ont cédé celles des îles situées dans la limite des 10 milles leur appartenant — pas les autres —, et au-delà, que la formule utilisée constitue un indice — parmi quantité d'autres — des incertitudes qui régnaient alors quant à l'étendue exacte de l'emprise territoriale des souverains locaux.

[Fin de la projection 5.]

b) ***Les «documents confirmatifs» invoqués par la Malaisie***

34. L'érection du phare Horsburgh sur Pedra Branca constitue une date clé : après elle, le titre de la Grande-Bretagne — s'il a été acquis par celle-ci (ce que M. Brownlie montrera tout à l'heure) — ne pouvait être déplacé que par un accord de cession en bonne et due forme. Il apparaît

[27] CMM, p. 24, par. 40 ; voir aussi RS, p. 41-42, par. 93.

donc à priori curieux que la Malaisie se prévale de documents postérieurs à cette date pour «confirmer» son prétendu «titre immémorial». Singapour est néanmoins prête à admettre que l'on pourrait concevoir des hypothèses où l'existence d'un tel titre pourrait être confirmée ou révélée par des documents plus récents qui en établiraient la continuité[28]. Tel n'est pas le cas de ceux sur lesquels se fondent nos contradicteurs.

35. Nous y reviendrons plus longuement plus tard lorsque nous discuterons la pratique respective des deux Parties à l'égard de Pedra Branca. Et je me bornerai donc à relever qu'aucun des documents que la Malaisie invoque à cette fin ne témoigne, de quelque façon que ce soit, de la conviction d'un titre quelconque de Johor sur l'île.

Projection 6 — Carte 10 de l'atlas cartographique de la Malaisie (carte jointe à la sentence Ord de 1868), annotée (en rouge) pour montrer la zone du différend entre Johor et Pahang (SCM, encart 6) (dossier des plaidoiries, onglet n° 20)

— La «sentence Ord» du 1er septembre 1868[29] tranche un différend opposant le Johor moderne à Pahang ; elle porte sur une aire géographique située très au nord de Pedra Branca et ne concerne nullement cette île ; interpréter la phrase du dispositif décidant que «toutes les îles ... situées au sud de cette ligne [le long du parallèle de 2° 59' 20"» nord] appartiendront à Johore» («all the islands … to the south of [the line of latitude 2° 59' 20"» N belong] to Johore») comme impliquant la reconnaissance de la souveraineté du Sultanat sur Pedra Branca revient à prétendre que Bintan, ou … Bornéo ou l'Australie relèvent de Johor sous prétexte que toutes se trouvent au sud de la ligne en question, ce qui n'a strictement aucun sens ;

[Fin de la projection 6]

— La lettre adressée le 20 mars 1886 au comte de Granville, secrétaire d'Etat aux colonies, par le sultan de Johor[30] qui demandait que soit établi un registre des «îles situées dans la haute mer et les détroits appartenant à l'Etat de Johore» («Islands in the open Seas and Straits belonging to the State of Johore») ne peut pas davantage être interprétée dans le sens de la thèse

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[28] Cf. CPA, M. Huber, *Ile des Palmes*, sentence arbitrale du 4 avril 1928, *RGDIP*, 1935, p. 196 (texte anglais *in RSANU*, vol. II, p. 866) ; sentence arbitrale du 29 septembre 1988, *Taba*, *ILM*, 1988, p. 1469, par. 175. Voir aussi Ian Brownlie, *Principles of Public International Law*, 6e éd., Oxford University Press, 2003, p. 125-126 ou Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 170-171.

[29] MM, vol. 3, annexe 86.

[30] *Ibid.*, annexe 63.

malaisienne ; d'abord, le moins que l'on puisse dire de cette démarche, est qu'elle ne témoigne pas d'une connaissance très sûre de l'extension territoriale de Johor. Ensuite, comme Singapour l'a montré dans son contre-mémoire, l'objet de la requête était, en réalité de faire reconnaître la souveraineté de Johor sur les Natunas et n'avait strictement aucun rapport avec Pedra Branca[31]. Enfin et surtout, comme souvent, le raisonnement de la Partie malaisienne est «sens dessus dessous» : sans doute le sultan estime-t-il que certaines îles de la région ne lui appartiennent pas, mais il ne sait pas lesquelles et on doit en déduire, *a contrario*, qu'il admet que ce n'est pas le cas de toutes les îles de la région. Quant à savoir s'il considérait que c'était ou non le cas de Pedra Branca, bien malin qui pourrait le dire : contrairement à ce qu'il avait annoncé[32], le sultan n'a pas envoyé la liste des îles qu'il estimait lui appartenir et la Grande-Bretagne n'a pas donné suite à la demande[33] ;

— Les deux épisodes suivants dans lesquels la Malaisie croit voir une confirmation de son titre imaginaire sont beaucoup plus tardifs puisqu'il s'agit de l'accord du 19 octobre 1927 entre la colonie des détroits et Johor[34] confirmé en 1995[35], et du traité du 25 mai 1973 entre l'Indonésie et Singapour[36] ; les uns et l'autre se bornent strictement à la délimitation de la mer territoriale autour de l'île de Singapour et sont sans rapport aucun avec Pedra Branca[37]. Et l'on ne peut évidemment rien en déduire en ce qui concerne le titre originel sur cette île, dont se prévaut la Partie malaisienne.

36. D'une façon plus générale, une remarque s'impose : la quasi-totalité des documents sur lesquels la Malaisie fait fond pour affirmer son indispensable mais introuvable titre originel, ne mentionnent pas nommément Pedra Branca. Il ne s'agit que de simples «assertions of sovereignty and jurisdiction that fail to mention any islands whatsoever, and with general references to 'the

[31] CMS, p. 56-58, par. 4.35-4.37.

[32] MM, annexe 63, lettre du 20 mars 1886, par. 5.

[33] Voir CMS, p. 57-58, par. 4.36.*b)*.

[34] MM, vol. 2, annexe 12.

[35] *Ibid.*, annexe 19.

[36] *Ibid.*, annexe 18.

[37] Voir la carte insérée à la page 49 du mémoire de la Malaisie.

islands' with no further specificity»[38]. Comme dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, le fait que l'île en litige ne soit «nommément cité[e] dans aucun des instruments juridiques … que la Malaisie a produits pour démontrer» le titre allégué (*arrêt, C.I.J. Recueil 2002*, p. 674, par. 108) ne plaide certainement pas en faveur de son existence et interdit de considérer les documents en question comme étant «en relation spécifique avec [l'île] en litige pris[e] comme tel[le]» (*ibid.*, p. 683, par. 136). Sans rapport avec Pedra Branca, qu'ils n'identifient pas, et que, bien souvent, ils ne concernent manifestement pas, ces documents n'ont aucune valeur probante pour ce qui nous intéresse.

37. Que déduire de tout ceci, Monsieur le président ? Une chose très simple : à l'exception d'un article de presse isolé et sujet à caution de 1835, dont j'ai parlé hier, il n'existe *aucun* document, *aucun* traité, *aucune* proclamation, *aucune* décision de justice, *aucune* opinion doctrinale qui fasse état, plus même, qui *implique* de quelque manière, que Johor jouissait ou se prévalait d'un titre territorial quelconque sur Pedra Branca avant que la Grande-Bretagne prenne possession de l'île. Même les experts consultés par la Malaisie se gardent bien de l'affirmer. Contrairement à ce qu'elle laisse entendre[39], le professeur Houben ne dit rien de tel : sans doute considère-t-il que la souveraineté ou la suzeraineté *(perentah)* de ce qu'il appelle le Royaume de Johor-Riau «consisted [during the first quarter of the nineteenth century] of a ring of islands in the northwestern part of the Riau Archipelago and included Singapore and a portion of Johor coastline»[40]. Mais il ne va pas au-delà et s'abstient d'en déduire quoi que ce soit en ce qui concerne et les îles précises dont il s'agit, et leur nature. En particulier, il ne s'aventure pas à affirmer que cette *perentah* s'étendait à des îles inhabitées comme Pedra Branca — contrairement à ce que la Malaisie veut faire croire d'ailleurs lorsqu'elle ajoute, juste après avoir cité M. Houben : «Pulau Batu Puteh, Middle Rocks et South Ledge faisaient partie du territoire du temenggong» («PBP, Middle Rocks and South Ledge fell within the Temenggong's territory»)[41] : ceci, c'est ce qu'affirme la Partie malaisienne, pas son expert... Quant au professeur Andaya, il ne dit rien du

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[38] *Erythrée/Yémen, première phase (souveraineté territoriale et portée du différend)*, sentence arbitrale du 9 octobre 1998, *RSANU*, vol. XXII, p. 246, par. 136.

[39] RM, p. 35, par. 80.

[40] RM, appendice II, p. 227-228, par. 28.

[41] RM, p. 35, par. 80.

statut juridique de l'île alors même qu'il n'hésite pas à alléguer, je l'ai dit hier[42], que Johor exerçait (au XVII^{e} siècle il est vrai) sa souveraineté sur les mers environnantes.

38. La prudence de ces experts est compréhensible : à défaut d'être juristes, MM. Andaya et Houben sont spécialistes de l'histoire de la région et, à ce titre, ils ne peuvent ignorer que la conception que les populations locales se faisaient des rapports de l'autorité politique au territoire excluait que la souveraineté territoriale s'étendît à des îles inhabitées et éloignées des côtes comme Pedra Branca — et, on ne saurait trop y insister, aucun document, pas un seul, ne confirme les allégations malaisiennes à cet égard. Une telle prétention est d'ailleurs tout à fait incompatible avec les principes du droit international général qui étaient applicables à l'époque dans les relations entre les souverains locaux et les puissances européennes.

B. Ni les conceptions territoriales des populations locales, ni les principes du droit international général n'établissent l'existence d'un titre originel de Johor sur Pedra Branca

39. Monsieur le président, il ne faut sûrement pas exagérer les différences existant entre ces deux conceptions des rapports au territoire : comme le fait remarquer la Malaisie, qui y consacre inutilement de longs passages de ses écritures, Johor a toujours été considéré comme un Etat indépendant, et traité comme tel par les puissances européennes. A ce titre, il relevait de l'application du droit international général tel qu'il était en vigueur à l'époque (voir *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 38-39, par. 79). Singapour n'a aucune querelle avec cela. Il n'en reste pas moins que, comme l'a noté la Cour dans son avis consultatif de 1975 dans l'affaire du *Sahara occidental*, «aucune règle de droit international n'exige que l'Etat ait une structure déterminée, comme le prouve la diversité des structures étatiques qui existent actuellement dans le monde» (*Ibid.*, p. 43-44, par. 94). Ainsi que cela ressort d'ailleurs des opinions d'historiens que la Partie malaisienne a jointes à sa réplique, Johor, comme tous les royaumes ou principautés de la région, quel que soit leur nom, connaissait une forme d'organisation politique différente de celles qui avaient cours en Europe ; et le pouvoir politique y entretenait, avec sa population et son territoire, des rapports très particuliers qui peuvent contribuer

[42] Voir CR 2007/20, p. 56, par. 11.

à montrer à quel point les prétentions de la Malaisie à un «titre originel» sur Pedra Branca sont infondées.

1. La conception malaise du territoire

40. Je peux cependant être rapide en ce qui concerne la conception malaise du territoire, que Singapour a exposée de manière que je crois très claire aux pages 18 à 24 de son contre-mémoire et que M. Chan a à nouveau expliqué hier. Il me suffit sans doute de dire que les opinions des professeurs Andaya et Houben, que la Malaisie a jointes à sa réplique, confirment plus qu'elles contredisent les vues de Singapour, même si, à certains égards, leurs affirmations doivent sans doute être nuancées — surtout en ce qui concerne les conséquences qu'ils tirent de leurs exposés au point de vue juridique.

41. Au paragraphe 61 de sa réplique, la Malaisie nous reproche d'avoir soumis la formation de l'Etat dans le monde malais à la «théorie du gruyère suisse» (a «Swiss cheese» theory). Ce faisant, elle commet deux erreurs très regrettables : en premier lieu, nos contradicteurs font une fâcheuse confusion entre le gruyère suisse — qui n'a pas de trou — et l'emmental français, qui lui en a[43] ; ensuite, et cela est encore plus grave (en tout cas pour l'affaire qui nous occupe), cette remarque témoigne en réalité d'un eurocentrisme qui n'a pas lieu d'être. Alors qu'en Europe, le pouvoir politique s'est, progressivement, «territorialisé» et que ce mouvement a marqué le passage de la féodalité à l'organisation étatique, il n'en est pas allé forcément ainsi dans le reste du monde où les liens d'allégeance personnelle ont souvent été prédominants.

42. Comme l'a également relevé la Cour dans son avis de 1975 : «[des] liens politiques d'allégeance à un souverain ont souvent été un élément essentiel de la texture de l'Etat» (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 44, par. 95) et c'est d'ailleurs en se fondant sur les «liens de dépendance ou d'alliance qui avaient un caractère essentiellement tribal et non territorial», et «compte tenu des particularités de ce territoire et de cette organisation sociale et politique de la population, que la Cour [a examiné] la question des liens juridiques du Sahara occidental avec le Royaume du Maroc et l'ensemble mauritanien au moment de la colonisation par l'Espagne» (*Ibid.*, p. 42, par. 88-89). Il doit en aller de même en la présente espèce. S'il ne fait

[43] Voir http://www.lagruyere.ch/archives/2003/03.01.14/gruyere2.htm.

guère de doute que les relations du souverain au territoire (qui existaient indiscutablement, contrairement à ce que la Malaisie veut nous faire dire)[44] passaient par l'intermédiation de la population, il est évident que, comme l'a rappelé M. Chan hier, elles ne s'étendaient pas à des îles inhabitées et éloignées des côtes comme Pedra Branca. Et la présence occasionnelle d'Oräng-laut — les pirates des mers — qui n'est d'ailleurs attestée par aucun document, ne change rien à l'affaire.

43. Comme pour s'en persuader elle-même, la Malaisie présente à maintes reprises les Oräng-laut comme des «sujets du temenggong»[45] ; mais il s'agit d'une affirmation pure et simple dont elle n'a jamais établi la réalité. Qu'il y ait eu des liens entre cette tribu et les sultans de Johor (puis le temenggong), c'est probable. Mais les «preuves» qu'avance la Partie malaisienne concernent indifféremment les liens entre les Oräng-laut, d'une part, et les sultans de Johor continental *et* de Johor-Riau-Lingga, d'autre part. Par exemple, lorsque John Crawfurd affirme que les Oräng-laut qu'il a rencontrés «sont des sujets du roi de Johor» («are subjects of the King of Johore»)[46], compte tenu de la date de cette rencontre (1822), il ne peut, à l'évidence, s'agir que du sultan établi à Riau, pas de celui du continent. En second lieu, ces liens, s'ils ont existé, semblent avoir manqué de stabilité, ce qui est d'ailleurs l'une des caractéristiques de ces populations nomades.

44. Il n'est pas sans intérêt de relever que, dans son arrêt de 2002, la Cour a écarté sans appel le même argument avancé par la Malaisie à l'appui de sa prétention au sujet d'un titre traditionnel sur Ligitan et Sipadan :

> «La Malaisie invoque les liens d'allégeance qui auraient existé entre le sultan de Sulu et les Bajau Laut, qui habitaient les îles au large de la côte de Bornéo et auraient occasionnellement fréquenté les deux îles inhabitées. La Cour pense que de tels liens ont fort bien pu exister, mais qu'ils ne suffisent pas, en eux-mêmes, à prouver que le sultan de Sulu revendiquait le titre territorial sur ces deux petites îles ou les incluait dans ses possessions. De même, rien ne prouve que le sultan ait exercé une autorité effective sur Ligitan et Sipadan.» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 675, par. 110 ; voir aussi, p. 670, par. 98.)

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[44] Voir par exemple, RS, p. 25, par. 54.

[45] Voir notamment, pour la seule réplique : p. 11, par. 22 ; p. 27, par. 59-60 ; p. 29, par. 64-65, ou p. 204, par. 435.

[46] RM, vol. 2, annexe 7.

45. Il en va de même ici : même en admettant que les Oräng-laut aient eu des liens avec Johor et se soient adonnés à leurs activités favorites, la piraterie et la pêche, autour de Pedra Branca — ce que la Malaisie n'a nullement prouvé —, ceci ne saurait en aucune manière établir un titre traditionnel ou originel de Johor sur l'île en litige. Qu'il s'agisse de pêche ou de piraterie, ce sont des activités de personnes privées qui, comme la Cour l'a également dit, dans le même arrêt, «ne sauraient être considérées comme des effectivités si elles ne se fondent pas sur une réglementation officielle ou ne se déroulent pas sous le contrôle de l'autorité publique»[47] (*Ibid.*, p. 683, par. 140). A plus forte raison, elles ne sauraient constituer la preuve du titre originel dont se prévaut la Malaisie.

2. Les règles de droit international applicables

46. Ces considérations valent d'ailleurs tout autant dans la perspective de la conception traditionnelle des rapports du pouvoir politique au territoire, dans laquelle je me suis placé jusqu'à présent dans la ligne de ce qu'a dit M. Chan hier, que dans celle des principes généraux du droit international public qui étaient applicables à l'époque dans les relations entre Etats — et, dès lors, dans celles qui s'étaient nouées entre Johor et les puissances européennes. Etant entendu, je le répète, qu'il n'y a pas de solution de continuité entre ces deux manières de considérer les choses : le droit international général tenait compte des conceptions locales et en tiraient les conséquences. Ceci apparaît à nouveau très clairement dans l'avis consultatif de 1975 dans l'affaire du *Sahara occidental*, dans lequel la Cour a dit :

> «Quelles qu'aient pu être les divergences d'opinions entre les juristes, il ressort de la pratique étatique de la période considérée que les territoires habités par des tribus ou des peuples ayant une organisation sociale et politique n'étaient pas considérés comme *terra nullius*.» (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 39, par. 80)

47. En revanche, les territoires inhabités l'étaient[48]. Et tel était à l'évidence le cas de Pedra Branca qui, nous l'avons vu, ne relevait pas de la souveraineté territoriale du sultan de Johor

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[47] Voir aussi, par exemple, *Ile d'Aves*, sentence arbitrale du 30 juin 1865 *in* A. de La Pradelle et N. Politis, *Recueil des arbitrages internationaux*, vol. II, p. 413 ou *Différend frontalier entre Chardjah et Dubaï*, sentence arbitrale du 19 octobre 1981, *ILR*, vol. 91, 1993, p. 606.

[48] Voir par exemple la sentence arbitrale du roi d'Italie, 28 janvier 1932, *Île de Clipperton*, *RSANU*, vol. II, p. 1105-1111. Voir aussi: Patrick Daillier et Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7e éd., 2002, p. 530 ou Malcom N. Shaw, *Title to Territory in Africa. International Legal Issues*, Clarendon Press, Oxford, 1986, p. 31.

dans la perspective même des conceptions du territoire prévalant dans le monde malais. Il va sans dire qu'elle n'en relevait pas non plus au regard du droit international général.

48. Quant à la théorie de la contiguïté (toute relative d'ailleurs en l'espèce), elle n'a jamais été reconnue par le droit international. Il suffit d'avoir à l'esprit la position limpide prise par Max Huber dans l'affaire de l'*Ile de Palmas*, dans le cadre d'un litige concernant des faits contemporains à ceux qui nous occupent. La citation est suffisamment convaincante et importante pour mériter d'être faite intégralement bien qu'elle soit un peu longue :

> «Bien que des Etats aient soutenu, dans certaines circonstances que les îles relativement proches de leurs côtes leur appartenaient en vertu de leur situation géographique, il est impossible de démontrer l'existence d'une règle de droit international positif portant que les îles situées en dehors des eaux territoriales appartiendraient à un Etat à raison du seul fait que son territoire forme pour elle la *terra firma* (le plus proche continent ou la plus proche île d'étendue considérable). Non seulement il semblerait qu'il n'existe pas de précédents suffisamment nombreux et d'une valeur suffisamment précise pour établir une telle règle de droit international, mais le principe invoqué est lui-même de nature si incertaine et si controversée que même les gouvernements d'un même Etat ont en diverses circonstances émis des opinions contradictoires quant à son bien-fondé. Le principe de la contiguïté, en ce qui concerne les îles, peut avoir sa valeur lorsqu'il s'agit de leur attribution à un Etat plutôt qu'à un autre, soit par un arrangement entre les parties ; soit par une décision qui n'est pas nécessairement fondée sur le droit ; mais comme règle établissant *ipso jure* une présomption de souveraineté en faveur d'un Etat déterminé, ce principe viendrait contredire ce qui a été exposé en ce qui concerne la souveraineté territoriale et en ce qui concerne le rapport nécessaire entre le droit d'exclure les autres Etats d'une région donnée et le devoir d'y exercer les activités étatiques. Ce principe de la contiguïté n'est pas non plus admissible comme méthode juridique pour le règlement des questions de souveraineté territoriale ; car il manque totalement de précision et conduirait, dans son application, à des résultats arbitraires.»[49] (Voir aussi *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 43, par. 92.)

La démonstration me paraît impeccable.

49. Avant d'aller plus loin, permettez-moi, Monsieur le président, je vous prie, de récapituler les constatations faites jusqu'à présent :

i) *aucun* document (à l'exception d'un article de journal sans valeur probante), *aucune* opinion doctrinale antérieure à la date critique, n'avance la thèse d'un titre originel de Johor sur Pedra Branca ;

ii) celle-ci n'est pas davantage corroborée par les activités invoquées par la Malaisie sur l'île (qu'aucun document n'atteste) ou dans les mers environnantes, ni la pêche, ni la piraterie

[49] Arbitrage relatif à l'île de Palmas, Cour permanente d'arbitrage, sentence du 4 avril 1928, Nations Unies, Recueil des sentences arbitrales, vol. II, p. 852. [Traduction française : CH. Rousseau, Revue générale de droit international public, t. XLII, 1935, p. 182] (texte anglais *in RSANU*, vol. II, p. 854-855).

ne pouvant raisonnablement être tenues pour des preuves d'une quelconque volonté d'agir «à titre de souverain» ; au surplus,

iii) les documents attestant de ces activités sont rares, souvent sujets à caution, et les liens entre les Oräng-laut qui s'y livraient et le temenggong ou le sultan de Johor, en admettant qu'ils eussent existé, ce que la Malaisie n'a pas prouvé, sont incertains et, pour paraphraser les conclusions de la Cour dans l'affaire *Indonésie/Malaisie*, «de tels liens ont fort bien pu exister, mais … ils ne suffisent pas, en eux-mêmes, à prouver que le sultan de [Johor] revendiquait le titre territorial sur [cette petite île]» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 675, par. 110.) ; du reste,

iv) les princes et chefs locaux ne considéraient pas les îles inhabitées de la région, éloignées des côtes et situées en dehors de leur mer territoriale, comme relevant de leur souveraineté territoriale ; et

v) Pedra Branca ne peut pas davantage être rattachée à la Malaisie, au nom d'un principe de contiguïté qui n'a jamais été reconnu dans le droit international positif.

II. L'ABSENCE DE «PERMISSION» DONNÉE PAR JOHOR À LA CONSTRUCTION DU PHARE

50. Monsieur le président, la thèse de la Malaisie dans son ensemble dépend entièrement de l'existence d'un titre originel de Johor sur Pedra Branca. En son absence, c'est son argumentation tout entière qui s'écroule et, en particulier, l'argument selon lequel Johor aurait donné sa «permission» à l'érection d'un phare sur l'île. L'absence indiscutable d'un tel titre suffit à en disposer.

51. Selon la Partie malaisienne, «Pulau Batu Puteh, en tant qu'île placée sous la souveraineté de Johor, était comprise dans cette autorisation» («PBP, an island under Johor's sovereignty, was covered by that permission»)[50]. Cet argument repose sur deux prémisses :

— Pedra Branca relevait de la souveraineté de Johor ;

— la prétendue «permission» concernait l'île en question.

L'une et l'autre sont erronées.

[50] RM, p. 94, par. 188 *d)*.

52. Je m'en suis déjà expliqué en ce qui concerne la première. Pour ce qui est de la seconde, elle est tout aussi intenable. Nous l'avons déjà longuement montré dans nos écritures[51], mais je voudrais mettre en lumière le caractère incongru du raisonnement, si c'en est un, tenu par nos amis malaisiens.

53. Dès le départ, ils faussent quelque peu le problème, en écrivant au paragraphe 112 de leur réplique : «Both Parties agree that Governor Butterworth wrote to the Sultan and the Temenggong in order to request permission to construct *the* lighthouse.» *[Les italiques sont de nous.]* Or il ne s'agit pas *du* phare («*the* lighthouse»), Monsieur le président, mais d'*un* phare (*a* lighthouse) dès lors que, comme cela était envisagé alors, il devait être construit sur un emplacement appartenant à Johor, ainsi que je l'expliquerai plus en détail dans un instant. Toutes les allégations qui suivent s'en trouvent biaisées : «They also agree that the Johor authorities gave such permission by letters dated 25 November 1844.» «Such permission» ? «Cette permission» ? Oui : cette permission de construire *un* phare, *si* il devait l'être sur le territoire de Johor ; mais seulement *si* il devait en aller ainsi. La seule chose sure est, assurément, que les Parties «disagree as to the geographical scope of that permission». Mais l'allégation suivante de la Malaisie — la dernière sur ce point — est à nouveau trompeuse : «Singapore's argues that Butterworth's request for permission concerned Peak Rock and only Peak Rock.»[52] Ce n'est, à vrai dire, pas tout à fait ce que nous disons…

54. La vérité est que personne ne sait ce que disaient les lettres que Butterwoth, le gouverneur de la colonie des détroits, avait adressées au sultan de Johor et au temenggong, et que ni Singapour, ni la Malaisie n'ont retrouvées et dont on ne connaît l'existence que par les réponses, fort vagues du premier, le sultan[53], et plus précises du second, le temenggong[54]. Toutes deux sont datées du 25 novembre 1844. Le contenu des lettres du gouverneur ne peut donc qu'être inféré de celles-ci et des autres lettres qu'il avait lui-même écrites à la même époque.

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[51] CMS, p. 82-92, par. 5.28-5.50 et p. 95-108, par. 5.58-5.90 ; RS, p. 38-43, par. 3.8-3.22.

[52] RM, p. 54, par. 112.

[53] MS, vol. 2, annexe 13.

[54] *Ibid.*

Projection 7 — Croquis illustratif (Point Romania-Peak Rock-Pedra Branca)

55. L'argument de la Malaisie se polarise sur la réponse du temenggong qui constate que «[his] friend [read : «the Governor»] is desirous of erecting a Light House near Point Romania» and who (temenggong) goes on by saying that the British «were at full liberty to put up a Light House there, or [at] any spot deemed eligible». Cette phrase, qui est au cœur de l'argumentation malaisienne, appelle deux précisions.

56. En premier lieu, elle implique nécessairement qu'il s'agit de «tout emplacement *appartenant à Johor*» («any spot *belonging to Johor*»). Curieusement, d'ailleurs, la Malaisie l'admet fugitivement, lorsqu'elle écrit, au paragraphe 148 de sa réplique que : «This can only mean that the authorization extended *to any place under Johor's sovereignty* that the EIC would select for the erection of the envisaged lighthouse in honour of James Horsburgh» (les italiques sont de nous) — «tout emplacement sous la souveraineté de Johor», cela pouvait être Peak Rock (comme on l'envisageait alors), ou Point Romania, ou Pulau Mungging. Mais pas Pedra Branca. En prétendant le contraire, la Malaisie se heurte de nouveau à l'obstacle, insurmontable pour elle, de l'inexistence de tout titre de Johor sur Pedra Branca.

57. Et ceci constitue la première réponse, et la plus évidente, à l'allégation de la Malaisie selon laquelle Pedra Branca était couverte par la permission donnée à la Grande-Bretagne de construire le phare Hosburgh sur l'île : si le sultan et le temenggong l'avaient donnée, ils auraient disposé d'un bien qui ne leur appartenait pas, ce qui ne se peut ou n'a aucune valeur juridique, comme je l'ai exposé à propos du traité Crawfurd de 1824[55]. Pas plus qu'ils n'ont cédé à la Grande-Bretagne des îles ou portions d'îles ne relevant pas de leur domaine (mais de celui du sultan de Riau-Lingga) comme Batu Berhenti, Pulau Belakang Padang, ou une partie de Batam, ils ne pouvaient disposer de Pedra Branca. Décidément, *nemo plus juris tranferre potest quam ipse habet*[56].

58. La Malaisie écrit, dans sa réplique, que «ce que Singapour doit montrer est que l'autorisation concernait *exclusivement* Peak Rock» («what Singapour has to show is that the permission *exclusively* concerned Peak Rock»)[57]. Pas du tout, Monsieur le président, le véritable

[55] Voir plus haut, par. 33.

[56] Voir plus haut, note 21.

[57] RM, p. 61, par. 125 ; les italiques sont dans l'original.

défi n'est pas, pour Singapour, de prouver que la permission ne concernait que Peak Rock ; il est, pour la Malaisie de démontrer qu'elle concernait Pedra Branca. Elle ne l'a pas fait ; et elle ne peut le faire : Johor n'avait aucun titre sur cette île…

59. Du reste, en second lieu, si l'accord du temenggong ne concernait pas «exclusivement» Peak Rock (mais aussi, possiblement, d'autres emplacements situés dans les possessions de Johor), il ne portait en revanche certainement pas sur Pedra Branca.

60. La Malaisie écrit dans son mémoire que «la question de l'emplacement du phare resta ouverte jusqu'en 1846» («the location of the lighthouse was an open question until 1846»[58]. Cela se pourrait, Monsieur le président. Mais, en 1844, au moment de l'échange de correspondances qui nous intéresse pour l'instant, le balancier était bien fixé sur Peak Rock qui est, du reste, assurément, «près de Point Romania» — il s'agit de l'un des îlots du groupe des Romania Islands — alors que ceci est beaucoup plus douteux s'agissant de Pedra Branca, qui n'en fait nullement partie[59].

[Fin de la projection 7.]

61. La chronologie ne laisse aucun doute :

— en avril 1844, le gouverneur Butterworth charge le capitaine sir Edward Belcher de déterminer l'emplacement le plus approprié pour le phare envisagé[60] ;

— le 1er octobre, celui-ci désigne à cette fin «l'île Romania la plus au large» («the Romania outer island»)[61] — expression qui vise, sans aucun doute, Peak Rock[62] ; il n'y a pas de désaccord entre les Parties sur ce point[63] ;

— le 3 octobre, dans une lettre au capitaine Faber, Butterworth, après avoir rappelé que Pedra Branca fut, un temps, envisagé, endosse le rapport de Belcher et fait part de son intention de visiter Point Romania[64] ;

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[58] MM, p. 59, par. 116.

[59] Cf. CMS, p. 97, par. 5.65, ou RS, p. 39-40, note 85, et encart 6.

[60] Cf. MS, annexe 11.

[61] MS, annexe 11.

[62] Voir MS, p. 42-43, par. 5.34-5.36.

[63] Cf. MM, p. 57, par. 113 ; p. 62, par. 128, ou p. 64, par. 131.

[64] CMS, annexe 10 ; voir aussi l'annexe 9.

— le 20 novembre 1844, Thomson, le géomètre du gouvernement (the «Government Surveyor»), que Butterworth avait chargé de préparer une étude de faisabilité (concernant exclusivement Peak Rock), remet son rapport — il ne porte que sur «Peak Rock Romania»[65]. C'est durant cette période que Butterworth écrivit au sultan et au temenggong pour obtenir leur accord à la construction d'un phare et c'est le 25 novembre (1844) que ceux-ci le donnèrent, dans les termes que j'ai indiqués[66]. Il ne peut faire de doute que celui-ci portait sur Peak Rock ; en tout cas pas sur Pedra Branca.

62. Ceci est du reste confirmé par la lettre que le gouverneur Butterworth a adressée le 28 novembre 1844 au secrétaire du gouvernement des Indes, qui renvoie au rapport Belcher et à la carte préparée par Thomson indiquant la position «of the Rock therein alluded to» (du rocher dont il est question dans le rapport) «with reference to Pedra Branca» (par rapport à Pedra Branca), ce qui montre qu'il ne pouvait s'agir de ce dernier, mais que, à nouveau, seul Peak Rock était en cause[67]. Et Butterworth de préciser : «*This Rock* is part of the Territories of the Rajah of Johore, who, with the Tamongong have willingly consented to cede it gratuitously to the East India Company.»[68] Trois jours après réception des lettres du sultan et du temenggong, le gouverneur de la Colonie des détroits interprétait l'autorisation donnée par ceux-ci comme portant sur «ce rocher» («this Rock»), c'est-à-dire Peak Rock.

63. Ce n'est que, en août 1846 — deux ans plus — que Butterworth changea d'avis et opta — cette fois définitivement — pour Pedra Branca. Et ce n'est surement pas la lettre qu'il adressa au secrétaire du gouvernement des Indes qui modifie les choses[69] :

— le fait que les lettres de 1844 du sultan et du temenggong y fussent à nouveau jointes ne saurait constituer la preuve que la permission s'étendait à Pedra Branca : en demandant une décision finale à ses autorités, le gouverneur joint le dossier complet de l'affaire, mais on ne peut rien inférer de ceci — d'autant moins que d'autres documents concernant exclusivement Peak

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[65] MS, annexe 12.

[66] Voir plus haut, par. 55-56.

[67] Voir aussi la lettre de Butterworth au sous-secrétaire du gouvernement du Bengale, 22 août 1845, MS, annexe 14.

[68] MS, annexe 13 ; les italiques sont de nous.

[69] MM, vol. 3, annexe 51.

Rock, le rapport de Belcher du 1er octobre 1844 et la lettre de Thomson du 20 novembre 1844, y sont également annexés ; et ceci est également vrai en ce qui concerne la dépêche du 3 octobre du gouvernement des Indes au conseil des directeurs de la Compagnie des Indes orientales[70] et, à plus forte raison, le «rapport complet» (Full Report) de Butterworth au sous-secrétaire du gouvernement du Bengale du 12 juin 1848[71] ;

Projection 8 — Extrait de la lettre du 24 août 1846 adressée à G. A. Bushby, secrétaire du gouvernement du Bengale par W.J. Butterworth, gouverneur de l'île du Prince-de-Galles, de Singapour et de Malacca (dossier des plaidoiries, onglet n° 21)

— le rapport d'expertise graphologique de Mme Lee Gek Kwee que Singapour a produit le 21 août dernier[72] confirme ce que Singapour avait indiqué dès son contre-mémoire[73], à savoir qu'il est «hautement probable» que, dans cette lettre, Butterworth renvoyait à : «The whole of the Details for the ca**r**e of Light Houses as set forth in [his] letter under date 28 November 1844…» and not «for the ca**s**e of Light Houses…», ce qui n'a d'ailleurs guère de sens ;

[Fin de la projection 8.]

— mais, et c'est sans doute le plus important, même si l'on admettait que Butterworth avait entendu renvoyer au dossier de Peak Rock, celui-ci ne serait évidemment transposable que *mutatis mutandis* à Pedra Branca ; les distances, par rapport à la côte malaisienne ou à Singapour, sont différentes ; les raisons du choix le sont aussi ; et il en va de même du statut juridique.

Il est du reste extrêmement révélateur que, à partir du moment où le choix s'est fixé sur Pedra Branca, il n'ait plus jamais été question de permission de la part de Johor[74] — jusqu'à l'épisode de 1953, sur lequel je reviendrai vendredi.

[70] MM, vol. 3, annexe 54 ; v. RM, p. 86-88, par. 175-178.

[71] RM, p. 88-89, par. 179-181.

[72] Voir les lettres du greffier aux Parties du 11 octobre 2007.

[73] CMS, p. 104-105, par. 5.83 ; voir aussi RS, p. 41-42, par. 3.18.

[74] Voir, notamment, CMS, p. 105-108, par. 5.86-5.90 ; RS, p. 38-39, par. 3.9-3.11, ou p. 43, par. 3.22.

Projection 9 — Comparaison du texte du rapport Thomson (*Account of the Horsburgh Light-house* -1852) cité par la Malaisie et du texte intégral tel qu'il figure dans le rapport (CMS, p. 114, par. 5.103) (dossier des plaidoiries, onglet n° 22)

64. Et la venue du temenggong à Pedra Branca quelques jours *après* la cérémonie d'inauguration du phare en 1850 ne vient certainement pas conforter la thèse malaisienne de la souveraineté de Johor sur Pedra Branca. Il n'est pas sans intérêt de noter que, pour retourner la situation à son avantage, la Malaisie se soit crue autorisée à tronquer la citation du compte rendu de Thomson relatant la scène. La Partie malaisienne s'est en effet prévalue du fait que le temenggong est «venu dans un magnifique sampan rapide ... gréé de gracieuses voiles latines» («came in a beautiful fast sailing sampan … rigged with grateful latteen sails»[75]). Les trois petits points entre les mots «sampan» et «rigged» dissimulent une précision de la plus haute importance puisque, comme le montre la comparaison avec le texte original, le vrai, qui est projeté à l'écran[76], ce beau sampan rapide appartenait … au gouverneur de la colonie des détroits («a beautiful fast sailing sampan *belonging to the Governor of the Straits Settlements*»[77]). Et je comprends l'embarras de nos amis de l'autre côté de la barre — même si je ne suis pas sûr que cette embarras justifie une citation tronquée — car cela change tout Monsieur le président : contrairement aux affirmations de la Malaisie, le temenggong (dont il est également révélateur qu'il n'ait pas été convié à la cérémonie d'inauguration) ne se comporte pas en souverain mais en invité du gouverneur britannique, qui met l'un de ses sampans à sa disposition, car, contrairement aussi aux affirmations de la Malaisie[78], il est difficile de concevoir que le temenggong eût pu utiliser un navire du gouverneur sans y avoir été invité et qu'il se fût rendu dans l'île par ce moyen sans en avoir reçu la permission.

[Fin de la projection 9.]

65. C'est que, comme M. Brownlie va le montrer maintenant si vous voulez bien lui donner la parole, Monsieur le président, Pedra Branca était sans aucun doute devenue une dépendance de Singapour à la suite de sa prise de possession par les Britanniques. Auparavant, permettez-moi de

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[75] MM, p. 70, par. 148.

[76] Voir CMS, p. 114, par. 5.103.

[77] MS, vol. 4, annexe 61, p. 533 ; les italiques sont de nous.

[78] RS, p. 122, par. 233.

tirer brièvement les conclusions qui me semblent se dégager de la seconde partie de ma plaidoirie de ce matin :

i) en 1844, lorsque le choix d'un emplacement pour la construction du phare Horsburgh semblait fixé sur Peak Rock, le gouverneur de la colonie des détroits s'assure de l'accord du souverain territorial — qui était indiscutablement Johor ;

ii) le sultan et le temenggong donnent l'un et l'autre l'autorisation requise, qui devient sans objet dès lors que le choix définitif s'est porté sur Pedra Branca, qui n'est pas mentionnée dans leurs lettres ;

iii) la Malaisie raisonne «à l'envers» lorsqu'elle postule que cet accord s'étendait à Pedra Branca alors qu'elle n'a jamais établi l'existence d'un titre originel de Johor sur l'île ;

iv) du reste, à compter de 1846, il n'a plus jamais été question de permission ; et

v) la visite du temenggong à Pedra Branca en juin 1850, après l'inauguration du phare, sur un bateau appartenant au gouverneur, ne confirme en aucune manière la «permission» dont la Malaisie fait si grand cas — bien au contraire, elle montre que si permission il y a eu, elle a été donnée au temenggong, ce dignitaire s'est rendu sur l'île à l'invitation et avec la permission des autorités britanniques.

Monsieur le président, Messieurs de la Cour, je vous remercie bien vivement de votre attention.

The VICE-PRESIDENT, Acting President: Thank you, Professor Pellet, for your pleadings. I now call on Mr. Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

THE ACQUISITION OF TITLE TO PEDRA BRANCA IN 1847-1851

1. Mr. President and Members of the Court, it is an honour for me to address the Court today as counsel for Singapore.

2. It is my task to deal with the acquisition of title by Singapore.

3. Singapore possesses sovereignty over Pedra Branca on the basis of the lawful possession of Pedra Branca by Singapore's predecessor in title, the United Kingdom, in the period 1847 to 1851.

4. Prior to 1847 Pedra Branca was *terra nullius*, and had never been the subject of a prior claim, or any manifestation of sovereignty by other means, by any sovereign entity.

5. The available documents support the inference that the British Crown proceeded on the basis that Pedra Branca was *terra nullius*.

6. Malaysia has suggested from time to time that the British officials were not conscious of, or sensitive to, issues of title, and were indifferent to the geographical location of the site to be established: I refer to the Malaysian Counter-Memorial, Volume I, paragraph 104.

7. However, the evidence indicates that the British Crown was conscious of the ramifications of sovereignty in the region. Thus, in the letter dated 28 November 1844, Butterworth, as Governor, refers to the fact that Peak Rock "is part of the Territories of the Rajah of Johore . . ." (MS, Vol. 2, Ann. 13). The Governor was writing to Currie, Secretary to the Government of India. And on the map on screen you will see that Peak Rock was a part of the Romania group of islands, which is tab 23 in the judges' folder. And that is a chart — it is not a sketch — prepared by Thomson. You can also see the letter from Captain Belcher to Butterworth, dated 1 October 1844 (MS, Vol. 2, Ann. 11).

8. The question of title also appears in the letter from Church, the responsible official at Singapore, to Butterworth, dated 7 November 1850, in which the following passage appears:

> "4. I observe Mr. Thomson advocates the Establishment of a Station *near Point Romania*, for the purpose of affording assistance to the inmates of the Light House in case of need, and also to suppress Piracy; an armed party of the strength suggested would, doubtless, be of some Service, but I doubt whether such is absolutely necessary, or commensurate with the permanent expense which such an establishment must necessarily occasion. *Romania moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction*; it will of course, be necessary for the Steamer or Gun Boats to visit Pedro Branca weekly; some benefits would also accrue by requesting His Highness the Tumongong to form a village at Romania under the control of a respectable Panghuloo to render assistance to the inmates of the Light House in a case of emergency." (MS, Vol. 3, Ann. 48; emphasis added.)

9. It is thus clear that the taking of possession of Pedra Branca by the British authorities elicited no protests or reservations of rights from other Powers. The process of construction of the

lighthouse and other public works was necessarily public in character and the operations were referred to in the Singapore newspapers. The building operations which began in 1847 did not necessitate seeking permission from other Powers in respect of shipping movements, which included patrolling by British gunboats for the purpose of protecting ships moving building materials and workmen.

10. The continuous public activities of the British Crown over a period of four years also elicited no reservations from other Powers. And in this general context it comes as no surprise that the Dutch General Secretary in Batavia, writing to the Dutch Resident in Riau in 1850, should refer to ‘‘the construction of a lighthouse at Pedra Branca on *British territory*” (RS, Vol. 2, Ann. 8).

11. Malaysia in response asserts that no protest or reservation of rights was called for (CMM, p. 69, para. 134). This response rests on several unproven assumptions: for example, that the British authorities had the permission of Johor. In any event Malaysia accepts that there was no protest or reservation of rights on the part of Johor.

The funding and construction of the lighthouse and the associated works

12. The entire process of planning, choice of site, and construction of the lighthouse was subject to the control and approval of the British Crown and its representatives.

13. The construction of the lighthouse involved a series of decisions and activities on the ground:

— first, there was the choice of Pedra Branca as the site of the lighthouse;

— second, there was the choice of the name of the lighthouse;

— third, there was the planning of the construction work;

— fourth, there was the funding of the construction work;

— fifth, there were the visits of officials to Pedra Branca in the course of the construction;

— sixth, there was logistical support provided by government vessels;

— seventh, there was protection provided by gunboats;

— eighth, the Government of India was the exclusive source of lighthouse equipment and tools;

— ninth, the Government established and concluded the construction contract;

— tenth, the specifications and estimates for the construction were decided by the Government.

14. This entire procedure was under the authority and control of the British Crown. The East India Company was the relevant organ of the British Crown.

15. It is necessary to introduce the sources of British authority in the Straits Settlements, and these are now on screen and are at tab 25 in the judges' folder. These sources comprised Singapore, Malacca and Penang (also known as the Prince of Wales Island). The Straits Settlements were created in 1826 and were administered by the East India Company.

16. The East India Company acted as an organ of the British Crown and its activities were supervised by the Board of Control in London headed by a British government minister.

17. It will be helpful if the nomenclature is explained. In general, reference to the Government of India involves the Governor-General of India and his Council sitting in Calcutta — all of whom were officers of the East India Company. The Governor-General of India was subject to the authority of the Court of Directors of the East India Company. This, in turn, was under the direction of the Board of Control, which was headed by the Secretary of State, a British government minister. Consequently, all decisions of the Government of India were under the control of the British Crown, that is to say, the British Government in London. Below the Governor-General of India, the administration was divided into four presidencies (Bengal, Bombay, Madras and Agra). The Straits Settlements, including Singapore, were administered as part of the Bengal presidency at the time when the lighthouse was being planned and constructed.

18. The ultimate approval for construction of the lighthouse was obtained from the Court of Directors of the East India Company (sited in London) and this was the appropriate procedure.

19. The evidence of the entire process of planning and construction consists, in large part, of correspondence between three linked pairs of officials of the Government of India, who were instrumental in the planning and execution of the enterprise. The three pairs of officials can be seen mentioned on the screen and in the judges' folder at tab 26.

20. The three pairs of officials functioned in this way:

— first, the Government of India, through the Bengal presidency, had authority over, and corresponded with, Colonel W.J. Butterworth, Governor of the Straits Settlements (hereinafter referred to as "Governor Butterworth");

— second, Governor Butterworth had authority over, and corresponded with, Thomas Church, the Resident Councillor at Singapore; and

— third, Thomas Church had authority over, and corresponded with, J.T. Thomson, the Government Surveyor at Singapore, who was the architect and engineer responsible for planning and constructing the lighthouse on Pedra Branca (hereinafter referred to as "Thomson").

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

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

23. Thomson was in charge of the entire construction project, and it was under his direct control. Not only did he make regular visits to Pedra Branca, but he spent long periods living on the island in a house. The correspondence between the key officials, together with Thomson's *Account*, produces a detailed and reliable volume of evidence.

Mr. President, it would help me if we could have a slightly early coffee break. I have a break point here but not an easy one for some time afterwards.

The VICE-PRESIDENT, Acting President: Then I think it will be convenient to take the coffee break now.

Mr. BROWNLIE: Thank you very much.

The Court adjourned from 11.20 to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. Please continue, Mr. Brownlie.

Mr. BROWNLIE: Thank you.

The question of the applicable law

24. Mr. President, Members of the Court, I must now move to the question of the applicable law. The position of Singapore has been set forth in detail in the Memorial (pp. 79-87). The submission of Singapore is that title was acquired by the United Kingdom in accordance with the legal principles governing acquisition of territory in the material period, that is, 1847 to 1851. The contemporary doctrine is consistent in requiring both an intention to acquire sovereignty and the taking of possession.

25. On this basis the legal claim of Singapore can now be formulated in more detail as follows:

— First, the basis of the claim to sovereignty in respect of Pedra Branca is the lawful possession of Pedra Branca effected by a series of official actions in the period 1847 to 1851, beginning with the first landing on Pedra Branca by Thomson some time between 21 June and 9 July 1847, and ending with the ceremonial official commissioning of the lighthouse on 27 September 1851.

— Second, the decision to build the lighthouse on Pedra Branca was taken by the Court of Directors of the East India Company as an official organ of the British Crown.

— Third, the entire process of planning, choice of site, and construction, was subject to the exclusive control and approval of the British Crown and its representatives.

— Fourth, the pattern of activities and official visits in the period 1847 to 1851, constitutes an unequivocal manifestation of the will of the British Crown to claim sovereignty in respect of Pedra Branca for the purpose of building the Horsburgh lighthouse and its appurtenances, and maintaining them on a permanent basis.

— Fifth, the acts of taking possession were peaceful and public and elicited no opposition from other Powers.

— Sixth, in 1850 the Dutch authorities referred in official correspondence to the construction of a lighthouse "at Pedra Branca on British Territory" (RS, Ann. 8).

— And, finally, title to Pedra Branca was acquired by the British Crown in accordance with the legal principles governing acquisition of territory in the period 1847 to 1851.

26. The evidence and relevant legal considerations establish that the British Crown acquired sovereignty in the period 1847 to 1851, an entitlement subsequently inherited by the Republic of Singapore.

27. The other aspect of the applicable law is the absence of any support in the evidence for the claim of Malaysia to an "original title". As Professor Pellet has demonstrated, Malaysia has failed to explain the legal basis of her claim to an original title to Pedra Branca.

28. The approach of Malaysia to the question of the applicable law is never clearly defined. In the first place, arguments are deployed which avoid a careful examination of the principles of general international law governing acquisition of title. Thus, in her Memorial, Malaysia relies upon three concurrent arguments: the alleged existence of permission of Johor; the alleged special character of a British practice; and the assertion that the lighthouse did not raise an issue of sovereignty (MM, paras. 104-177).

29. In her Counter-Memorial, Malaysia adopts the same arguments (paras. 52-142). There is also emphasis on the argument that on the facts there was no intention to acquire sovereignty on the part of the British Crown (paras. 63-72).

30. In the Reply, Malaysia leans heavily on the argument that there is no evidence of the taking of possession by the British Crown (paras. 191-216), and further that there was no evidence of a British intention to acquire sovereignty (paras. 247-278).

31. The Reply of Malaysia also includes the baseless assertion that, in her Counter-Memorial, Singapore has misrepresented the "doctrinal sources" (RM, paras. 195-203).

32. Mr. President, the approach of Malaysia to the question of the applicable law is both tangential and evasive. At the same time in a general way Malaysia appears to accept that the

principles of general international law apply in accordance with the doctrine of inter-temporal law (RM, paras. 191-216).

33. But Malaysia also relies on the subsidiary argument that there was permission in any case, and this issue has been examined by my friend Professor Pellet.

34. A further subsidiary argument is to the effect that Britain had no intention of establishing sovereignty over Pedra Branca (MM, paras. 157-64; CMM, paras. 63-72, and RM, paras. 247-259).

35. As I have already said, Malaysia appears to accept that the principles of general international law apply, but this position is somewhat obscured by the insistence by Malaysia on the argument that British practice required a formal taking of possession of territories as the basis of sovereignty (Memorial, paras. 157-164; Counter-Memorial, paras. 73-92, and Reply, paras. 204-216).

36. For the present, it is necessary to emphasize the confusion which emerges from the arguments of Malaysia. Thus, in the Counter-Memorial, in particular, the argument is based exclusively upon the alleged "British practice" of taking possession and an alleged absence of a taking of possession. In this section no reference is made to the principles of general international law (CMM, paras. 73-92).

37. However, both in her Counter-Memorial and in her Reply Malaysia includes sections on the theme that various British actions relating to Pedra Branca were not accompanied by the requisite intention to acquire sovereignty (CMM, paras. 63-72, and RM, paras. 247-259).

38. In these sections, Malaysia refers to general international law instead of British practice. While Malaysia does not explain whether her description of British practice is compatible with general international law in the relevant period, the significant fact is that neither general international law nor British practice required any kind of formalities in the relevant period, nor has the legal position changed since the relevant period. Thus, as a matter of general international law, the presence of formalities in relation to Christmas Island was not regarded as conclusive by the United States Department of State (see Hackworth's *Digest*, Vol. 1 (1940), pp. 507-508; RS, Vol. 1, paras. 3.104-3.106).

39. In this context the official position of other sovereigns in the region is of key significance. In relation to Pedra Branca the Government of the Netherlands East Indies

recognized that the island constituted British territory in November 1850, some time before the commissioning of the lighthouse in September 1851. The Dutch document consists of a letter, dated 27 November 1850, from the General Secretary, Dutch East Indies, to the Dutch Resident in Riau (judges' folder, tab 27). The relevant passage reads as follows:

> "As commissioned, I have the honour of informing Your Excellency that the government has found no grounds for granting gratuities to the commanders of the cruisers stationed at Riau, as proposed in your despatch of 1 November 1850, number 649, on account of their shown dedication in patrolling the waterway between Riau and Singapore, lending assistance to the construction of a lighthouse at *Pedra Branca on British territory*." (RS, Ann. 8 (English translation); emphasis added.)

40. The Dutch recognition had practical consequences and the Resident in Riau sent a gunboat to Pedra Branca which arrived on 6 May 1850 and, with British approval, was maintained during the term of the building operations (see Thomson, *Account*, pp. 424 and 473, MS, Vol. 4, Ann. 61, pp. 527 and 576).

41. In her Reply Malaysia asserts that the description of the "doctrinal sources" by Singapore is flawed, essentially because the sources cited do not support the taking of lawful possession as a mode of acquisition of title (see the Reply, paras. 195-203). This exercise in obfuscation is rejected by Singapore. The authorities governing acquisition of territory in the middle and late nineteenth century are set forth in the Singapore Memorial (paras. 5.108-5.111). Nine authorities are indicated, published in the period 1864 to 1906.

42. The Memorial of Singapore also concludes the relevant section as follows:

> "5.109. In looking at the legal doctrine of the second half of the 19th century there can be no doubt that the appropriation of Pedra Branca to the exclusive use of the British Crown in 1847-1851 constituted title by occupation, that is, by the taking of possession. The literature requires an intention to acquire sovereignty, a permanent intention to do so, and overt action to implement the intention and to make the intention to acquire manifest to other States. It is difficult to conceive of a manifestation of sovereignty and exclusive possession as unmistakable in meaning as the taking of possession of Pedra Branca by persons acting with the authority of the British Crown, more particularly in the light of the purpose of taking possession and the construction which followed.
>
> 5.110. The doctrine quoted in this Chapter is compatible with the practice of States at the material time. On this aspect of the matter reference can be made to McNair's *International Law Opinions*, which cites *Reports of the Law Officers* dated 1842 and 1868. The *Reports* stress the need to establish title by means of effective occupation, as McNair points out in his commentary."

The Memorial refers here to McNair's *International Law Opinions*, 1956, Volume 1, at page 285. And, lastly, we say:

> "5.111. The sources confirm that an uninhabited island (such as Pedra Branca) was perfectly capable of appropriation by the taking of lawful possession."

That is the end of the quotation of the analysis from the Memorial.

43. This presentation of the authorities on the part of Singapore attracted a minimum of detailed comment in the Malaysian Counter-Memorial, paragraphs 3 to 7. The Government of Malaysia, however, purports to find the phrase "lawful possession" controversial (see the Counter-Memorial, paras. 52-62).

44. This reaction is an artifice. The term "lawful possession is synonymous with the effective occupation of *terra nullius*, and this is evident from the quotations from the authorities set forth in the Singapore Memorial: and see also the Reply of Singapore, Appendix A, at pages 285 to 290.

45. The Malaysian argument rejects the use of the term "possession" but it is difficult to understand why. The term "possession" is the normal general term used in the technical literature, and in the judgments of this Court to describe the basis of title otherwise than by treaty of cession. This is also seen in standard academic references including:

(a) Professor O'Connell, *International Law*, 3rd edition, 1970, at pages 405 to 421;

(b) Sir Robert Jennings, *Acquisition of Territory in International Law*, published in 1963, at pages 4 and 20; and

(c) Professor Rousseau, *Droit International Public*, published in 1977, Volume III, at pages 151 to 173.

46. The older sources sometimes refer to "occupation" or '"effective occupation". The modern judicial usages are primarily "possession" or a predominant pattern of *effectivités*.

47. For examples of "possession" the Court can refer to *Minquiers and Ecrehos*. The Court used the term possession in several key statements in successive pages. Thus, on page 55:

> "Basing itself on facts such as these, the United Kingdom Government submits the view that the Channel Islands in the Middle Ages were considered as an entity, physically distinct from Continental Normandy, and that any failure to mention by name any particular island in any relevant document, while enumerating other Channel islands, does not imply that any such island lay outside this entity . . . If the Ecrehos and Minquiers were never specifically mentioned in such enumerations, this was probably due to their slight importance. Even some of the more important Islands, such as Sark and Herm, were only occasionally mentioned by name in documents of that period, though they were held by the English King just as were the three largest Islands. *The Court does not, however, feel that it can draw from these*

> *considerations alone any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers, since this question must ultimately depend on the evidence which relates directly to the possession of these groups*." (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953;* emphasis added.)

And, for a second example, in the same report, at page 57, the Court, having summarized the history of the islets since 1204, observed:

> "In such circumstances it is difficult to see why the dismemberment of the Duchy of Normandy in 1204 should have the legal consequences attributed to it by the French Government. *What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.*" (*Ibid.*, p 57: emphasis added.)

48. The Court has sometimes referred to a predominant pattern of *effectivités*, as in the Judgment in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, (*I.C.J. Reports 2002*, pp. 685-686, paras. 148-149).

49. In parenthesis it is worth pointing out that whilst the significance of the decision in the *Minquiers and Ecrehos* case is not to be underestimated, the basic elements of the Judgment reflected a particular model, namely the existence of contemporaneous and competitive State activities of the two parties. The circumstances of the present case are qualitatively different and the absence of any competition from Malaysia and its predecessors persisted until 1979.

50. In her Reply Malaysia reiterates her criticism of what she calls Singapore's "theory of lawful possession" (paras. 190-203). However, the emphasis in this part of Malaysia's written pleading is upon the facts, that is to say, what may constitute a taking of possession of territory.

51. In addition the Malaysian Reply makes complaints of Singapore's references to authorities. Thus, Malaysia asserts that Singapore quotes from the authority W.E. Hall, but fails to explain the relevance of what he says. But the text of Hall is characteristically clear and speaks for itself: and the Court may refer to the Singapore Counter-Memorial at paragraph 5.11. Hall makes clear that the ultimate criterion is the manifestation of the will of the Crown.

52. The Malaysian Reply also reproves Singapore for not quoting from the 5th edition of *Oppenheim's International Law*, described by Malaysia as a "classic British work". Singapore does not deny that Oppenheim is a "classic British work". However, the particular edition cited by Malaysia — the 5th edition — was published in 1937, which makes it neither relevant as a source of inter-temporal law nor useful as a digest of the most current judicial thinking.

53. According to Malaysia, the 5th edition of *Oppenheim* stands for the proposition that the proof of *animus occupandi* requires some formal act. Malaysia is wrong. She refers to the passage which reads:

> "For this purpose [that is, the purpose of taking possession by an occupying State] it is necessary that it should take the territory under its sway *(corpus)* with the intention of acquiring sovereignty over it *(animus)*. This can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty."

54. One wonders why Malaysia does not cite the latest edition of *Oppenheim*, which would be more relevant for having collected and digested the most current jurisprudence emanating from this Court. In contrast to the 5th edition, the 9th edition of *Oppenheim* reads:

> "For this purpose it is necessary that it should take the territory under its sway *(corpus)* with the intention of acquiring sovereignty over it *(animus)*. This — at least for considerable and habitable areas — *normally involves* a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty." (*Oppenheim*, 9th edition, II, p.689)

55. The 9th edition provides a footnote at the end of this passage I have just read, and the footnote is as follows:

> "Earlier editions of this volume suggest that settlement is a *sine qua non* of effective occupation. While this is doubtless true of large areas of habitable terrain, it might not apply to, for example, offshore islets. The rocky islets of Jersey in the *Minquiers and Ecrehos* case [*I.C.J. Reports 1953*, p. 47], could hardly be 'settled' in any true sense of the word; but they surely could be 'occupied' if not subject already to a sovereignty?"

56. Clearly the editors of the 9th edition interpreted previous editions of *Oppenheim* as suggesting that effective occupation requires a settlement, and not, as Malaysia alleges, that effective occupation requires some formal act. Similarly, Sir Humphrey Waldock also interprets the passage from earlier editions of *Oppenheim* as making settlement — and not formal acts, — an essential element of effective occupation. Writing in 1948 Waldock notes:

> "The most recent edition of *Oppenheim* still asserts categorically that territory can only be taken into possession by settlement upon it and that otherwise the occupation is only fictitious. But this theory has been decisively rejected by arbitral and judicial decisions in the present century." (25 *BYBIL* 311 (1948), p. 315.)

In the same article, Waldock made clear his view that no formal acts are required. He explained that evidence of the intention to acquire sovereignty "may consist either of published assertions or

acts of sovereignty" (p. 334). This, together with the 9th edition of *Oppenheim,* confirms that Malaysia is wrong to rely on the 5th edition of *Oppenheim* for a proposition which it does not support.

57. What is more significant for the present purpose is Malaysia's complete disregard for the sources of applicable inter-temporal law. The Singapore Memorial cites nine works published between 1864 and 1906, including such classic British works as Sir Robert Phillimore's *Commentary upon International Law* (published in 1879) and Sir Travers Twiss' *The Law of Nations in Peace* (published in 1884). None of these authorities considered formal acts to be an essential element of effective occupation. It is notable that Malaysia has made no attempt to address any of these authorities directly.

58. In this context I shall turn to Malaysia's treatment of British practice. In her Memorial, Malaysia describes this as "the traditional and consistent British practice of formally taking possession of territories under its sovereignty" (MM, p. 73, para. 157). The Malaysian Counter-Memorial calls it "standard practice" (CMM, pp. 38-39, para. 76). In support of her claim that there is such a "standard practice", Malaysia refers to a number of examples where formalities were undertaken in the course of taking of possession. In doing so, Malaysia has committed the logical fallacy of leaping directly from a descriptive account to a normative conclusion. As the Singapore written pleadings have made clear, there is no evidence that British State practice requires the performance of formalities as a positive rule. In fact, the evidence points the other way.

59. While formalities are commonly performed, it is clear that British officials do not consider formalities to be either "necessary" or "required". One example is the United Kingdom Application before this Court in the *Antarctica* case, which Malaysia so heavily relied on. In her Counter-Memorial, Malaysia quotes half a sentence from paragraph 17 of the United Kingdom Application: "Great Britain's title to the islands and territories of the Dependencies was thus formally confirmed and defined by the issue of the Letters Patent of 1908 and 1917 . . ." The second half of the sentence, which Malaysia omits to quote, reads: "but, as has been shown, it did not originate or depend on these Letters Patent, and had been in existence for many decades

previously". Clearly, the drafters of the United Kingdom Application did not consider formalities to be a requirement of British practice.

60. The Singapore Reply also cited the example of Pitcairn Island. A British Foreign Office official noted in 1893 in relation to Pitcairn Island that: "No record of the hoisting of the British flag, or of its having been declared British territory, but so considered." (RS, p. 80, para. 3.102.) Here was yet another British official who had no difficulty accepting that territory can be acquired without formalities. While still on the subject of Pitcairn Island, Members of the Court may recall that, two years ago, certain Pitcairn islanders attempted to dispute British sovereignty over the island. The Pitcairn Island Court of Appeal, consisting of three judges from New Zealand, whose judgment is found at tab 28 of the judges' folder, held that:

> "It is not necessary to define with accuracy the time at which Pitcairn Island did become a British possession. Sometimes there may be a gradual extension of jurisdiction over a territory, as was recognised in *Attorney General for British Honduras* v. *Bristowe* (1880) 6 App Cas 143. British Honduras was formally annexed in 1862, but there were grants of land by the Crown made as early as 1817. The Privy Council [that is, the final Appeal Court of the British Empire] held that sovereignty was acquired on or before that earlier year. Similarly, *a formal act of acquisition is not required. It is the intention of the Crown, gathered from its own acts and surrounding circumstances*, that determines whether a territory has been acquired for English law purposes. The same principle applies in the resolution of international disputes as to sovereignty." ((2005) 127 *ILR* 232, pp. 294-295; emphasis added.)

61. In short, the judges, after examining the British practice applicable in the mid-nineteenth century, found that "a formal act of acquisition is not required" and that, as a matter of English law, the intention of the Crown is to be "gathered from its own acts and surrounding circumstances". This is a clear, unequivocal and authoritative refutation of the Malaysian thesis on British practice.

62. Finally, Singapore referred to Sir Kenneth Roberts-Wray. Roberts-Wray joined the Dominions Office, subsequently the Commonwealth Relations Office and Colonial Office in 1931 and rose to be the Legal Adviser to the Commonwealth Relations Office and Colonial Office in 1945, holding that position for 15 years until his retirement in 1960. He wrote the book *Commonwealth and Colonial Laws* as a guide and manual for future generations of lawyers in the Commonwealth Relations Office and Colonial Office. If there is indeed a rule of British practice requiring formalities in every case, one would have expected the chief legal adviser to the Commonwealth Relations Office and Colonial Office to say so in his book. He does not. Instead,

where formalities are concerned, Roberts-Wray only records that they are "preferable" — not essential — merely preferable.

The evidence of acquisition of title

63. Mr. President, I must now move on to examine the evidence of acquisition of title. In the period 1847 to 1851 the British Crown acquired title by the taking of lawful possession or, which is the same thing, a process of effective occupation. Malaysia seeks to gain some advantage by suggesting that the length of the process is in some sense anomalous. But, of course, it is not. The process of taking possession and the appropriation of Pedra Branca for the purpose of building a lighthouse simply did take that period. It seems academic to speculate at what point in time title was established. The acknowledgment of title by the Dutch authorities took place in 1850.

64. In any event, the very public process of construction began in the months of January to March 1850: I refer here to Thomson's *Account*, pages 402 to 407. The operations were supported by the steamer *Hooghly* and the gunboat *Charlotte*, together with decked lighters called tonkangs (Thomson, p. 401).

65. Mr. President, by the time that the lighthouse was commissioned on the 27 September 1851, Pedra Branca had been the subject of a major sequence of official acts set on foot by the British Crown, and involving the taking of exclusive possession of Pedra Branca as a whole.

66. The Malaysian contention that the possession was only for the purpose of acquiring room for the lighthouse flies in the face of common sense.

67. The strong evidence of the taking of lawful possession or effective occupation by the British Crown has induced my distinguished opponents to produce a whole armoury of obfuscation, and I shall now review those different forms of Malaysian obfuscation.

(a) ***Forms of Malaysian obfuscation***

Malaysia: The requirement of a formal act of taking possession

68. In the first place Malaysia contends that there is a legal requirement of a formal act of taking possession and that the (alleged) absence of any formal act of possession of Pedra Branca

constituted evidence that Britain had no intention of establishing sovereignty over it (MM, paras. 157-164; CMM, paras. 63-72).

69. As we have already explained to the Court, in fact Malaysia produces no credible evidence of a requirement of a formal act of taking possession either in British practice or in general international law.

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

— first, Lord McNair, *International Law Opinions* (1956) Volume 1, page 285; and

— second, T.J. Lawrence, *The Principles of International Law* (1895), page 147.

71. However, neither of these works indicates that a formal taking is necessary. Like the doctrine generally, these sources make the assumption that a formal taking is only a *sufficient* but not necessary proof of intention.

72. On this question the position of Singapore is to be found in her Reply, where we say:

> "Singapore, in her Memorial, quotes Sir Kenneth Roberts-Wray, a leading authority. This is dismissed in Malaysia's Counter-Memorial as a 'doctrinal quotation', whatever that might mean. But the passage from Roberts-Wray makes the position absolutely clear: the unilateral manifestation of the will of the Crown is sufficient. (P. 78, para. 3.96.)

(b)*Malaysia misrepresents the character of activity* à titre de souverain

73. The second form of obfuscation involves the argument, often reiterated, that the "mere" administration of a lighthouse is entirely divorced from any question of sovereignty or title. This argument forms the theme of Chapter 6 of the Malaysian Counter-Memorial.

74. The argument is stated in passages at paragraphs 203 and 204 which will appear in the transcript: I shall not read them out.

> "This Chapter also addresses the extensive body of practice by lighthouse authorities around the world, whether governmental or non-governmental, concerning the administration of lighthouses. Such practice, which neither hinges on the sovereignty of the territory on which the lighthouse is situated nor is in any way determinative of it, reflects the general conduct that would be undertaken by any operator of a lighthouse as part of its administrative responsibilities.

> In particular, this Chapter illustrates these points by reference to the practice of lighthouse administration in the Red Sea, in the Arabian/Persian Gulf, by Trinity House, and in a number of other cases involving individual lighthouses. As will be shown, the construction and administration of lighthouses around the world, especially during the period from the mid-19th to the mid-20th centuries, combined imperial interest and the commercial objectives of private undertakings operating under an imperial mantle. The practice of Britain, France and other European States during this period focused on the objective of securing maritime safety and was driven by commercial needs and the interests of international navigation rather than by concerns to acquire tiny islets, rocks or other portions of territory on which the lighthouses were to be constructed." (CMM, pp. 99-100, paras. 203-204.)

75. Malaysia distorts the concept of activity *à titre de souverain*. The motivation involved in taking possession of territory may be to acquire access to space for an airfield or port facilities, or natural resources, but the legal vehicle for acquiring access is the acquisition of sovereignty. As Singapore has pointed out in the Reply, the precise legal context is paramount in each case. This context includes the evidence of intention. It does not include facile typologies about lighthouses or navigational aids.

(c) ***Malaysia separates the question of the intention of the British Crown from the process of the taking of possession***

76. The third form of obfuscation involves the separation of the question of intention and the taking of possession. This separation is artificial. In the present case it is inappropriate to apply the legal criteria of intention and taking of possession in separate compartments. In terms of the detailed process of decision-making and construction of the lighthouse, the two criteria are interdependent and complementary.

77. The entire sequence of planning and activities on Pedra Branca concerned the manifestation of sovereignty over the island as a whole by the British Crown.

(d) ***The tendency of Malaysia to fragment the evidence***

78. The fourth type of obfuscation involves the constant practice of the authors of Malaysia's pleadings to fragment the substantial body of evidence and consequently to divorce intention from the manifestation of intention. There are many examples of this fragmentation.

79. In the Malaysian Counter-Memorial we find the following on the subject of the placing of the seven brick pillars on Pedra Branca in 1847:

> "What is presented by Singapore as either the beginning of the taking of possession of PBP, or the completed act of 'taking of lawful possession' in 1847, was

> nothing more than Thomson's visit to study the feasibility of the construction of the lighthouse and place seven brick pillars to test the strength of the waves. Leaving aside that these acts neither constituted a material act of seizure of the island nor demonstrated the slightest intention to acquire sovereignty, it should be noted that Thomson also visited Peak Rock for the same purpose of assessing its feasibility for constructing the lighthouse." (P. 54, para. 106.)

80. In this passage the placing of the pillars is taken out of its context. Malaysia fails to record that the building of the brick pillars on Pedra Branca was preceded by the decision of the British Crown, after much deliberation, to select Pedra Branca as the site of the lighthouse. Thomson was checking on the feasibility of the building materials to be employed, and the decision to build on Pedra Branca had already been taken. In the circumstances, it is not surprising that no brick pillars were placed on Peak Rock. No decision had been taken to construct a lighthouse on Peak Rock.

81. A further example is the manner in which Malaysia analyses the laying of the foundation stone on 24 May 1850. Malaysia insists that the ceremony was simply one of "the various formalities undertaken in the course of the construction of the lighthouse" and did not indicate any intention to acquire sovereignty (CMM, para. 66, and see paras. 69-72). According to the Malaysian argument, these "various formalities" related exclusively to the matter of private law ownership, and did not even indicate the taking of exclusive possession (*ibid*., para. 70). Yet, Mr. President, this characterization ignores the fact that the foundation-laying ceremony was organized entirely by the British authorities, and that the persons in attendance, which included civil and military officials, as well as foreign consuls, had been invited by Governor Butterworth, the highest ranking government official of the Straits Settlements. Moreover, Pedra Branca was described as a "dependency" of Singapore during the ceremony.

The acts involved as evidence of taking possession

82. I must next examine the evidence relied upon by Singapore in establishing title to Pedra Branca, as acquired in the period 1847 to 1851.

83. Certain observations are called for by way of introduction. In the first place, Malaysia admits the predominantly governmental character of the enterprise to acquire Pedra Branca in order to build a lighthouse. In her Counter-Memorial, in a discussion of the "taking of possession", Malaysia makes the following admission:

> "The point at issue here is not who constructed the lighthouse and operated it, but whether this construction can be considered as an act of taking of possession of that island. There is no question that Horsburgh Lighthouse was constructed by the East India Company and that it belonged to it. Understandably, this construction was carried out and supervised by British authorities. The question at issue is whether the construction was conducted with the intention to acquire sovereignty over PBP." (CMM, para. 61.)

84. This statement is less than complete. The British Crown was not merely the instrument of construction, it authorized and funded the construction. But nonetheless this statement constitutes an admission of the essential character of the enterprise as a British official project. Moreover, in the circumstances, there was a presumption of an intention to acquire title. As a matter of stability and effectiveness it would be appropriate and necessary to take possession of the island as a whole.

85. In her Counter-Memorial, Malaysia remarks that: "This is the first time in the history of territorial litigation that a taking of possession is presented as a complex act lasting at least four years and without a single manifestation during that period of the intention to acquire sovereignty." (CMM, para. 61.)

86. But, Mr. President, Members of the Court, there is no reason, legal or otherwise, why the taking of possession should not be a complex act. In the *Clipperton Island Arbitration* the Award states, in the English translation:

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

The original French text of the Award will appear in the transcript.

> "Il est hors de doute que par un usage immémorial ayant force de loi juridique, outre *l'animus occupandi*, la prise de possession matérielle et non fictive est une condition nécessaire de l'occupation. Cette prise de possession consiste dans l'acte *ou la série d'actes* par lesquels l'État occupant réduit à sa disposition le territoire en question et se met en mesure d'y faire valoir son autorité exclusive." (*Subject of the Difference Relative to the Sovereignty over Clipperton Island (France* v. *Mexico*), Arbitral Award dated 28 Jan. 1931, (1928) 2 United Nations, *RIAA* 1107, p. 1110 (for the original French text) and 26 *AJIL* 390 (1932), p. 393 (for the English translation); emphasis added.)

87. In her pleadings Malaysia insists that there was not a single manifestation of the intention of the British Crown to acquire sovereignty in the material period (CMM, already quoted and MR, paras. 249-256).

88. Mr. President, this is an extravagant position. The entire pattern of the decisions and activities of the British Crown constitutes the evidence of an intention to acquire sovereignty. The analysis of Malaysia rests upon an entirely artificial dichotomy between the taking of control of territory and the intention to acquire sovereignty.

89. The key point is the assessment of the evidence as a whole. In the result, the physical and administrative actions of the officials of the British Crown form a part of the evidence of intention.

90. In many cases involving title the significant evidence consists of assemblages of evidence of State activity and acts of jurisdiction. A good example is the *Beagle Channel* Arbitration in which the Court addressed the issue of the interpretation of the 1881 Treaty on the basis of the evidence of the acts of jurisdiction performed by Chile (see *International Law Reports*, Vol. 52, pp. 220-226, paras. 164-175). The evidence of such an assemblage of State activities and administration creates a strong inference of the existence of a title.

91. In face of this pattern of activity by the British Crown, Malaysia contends that no protest or reservation of rights was called for (CMM, p. 69, para. 134). But this bold assertion is based upon the equally bold assertion that there had been no formal or informal taking of possession by the British Crown.

92. And Singapore has responded to this argument in her Reply (pp. 88-89) where she says:

> "3.121. The failure to protest in face of the flow of public activity, and especially the continuous operations attending the construction of the lighthouse, must cast a deep shadow upon Malaysia's claim to 'original title'. Johor had very complete knowledge of the intentions of the British Crown through the correspondence concerning the site for a lighthouse. The visit of the Temenggong is significant in this respect, and the laying of the foundation stone was reported in the local press. As Malaysia has herself indicated, the time frame was a period of four years.
>
> 3.122. The criteria indicating that a protest is called for have been stated succinctly by Sir Gerald Fitzmaurice:
>
> > 'There must of course be knowledge, actual or presumptive, of the events or circumstances calling for a protest . . . Subject to that, it might be said generally that a protest is called for whenever failure to make it will, in the circumstances, justify the inference that the party concerned is indifferent to the question of title, or does not wish to assert title, or is unwilling to contest the claim of the other party.' (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. I, p. 299, note 3.)

3.123. And Fitzmaurice, in the same source, describes the consequences of silence:

> 'a *failure* to protest, where a protest is called for, must have a detrimental effect on the position of the party concerned and may afford evidence of non-existence of title'." (*Ibid.*, p. 299.)

93. In the *Beagle Channel* Arbitration the distinguished Court of Arbitration accepted that acts of jurisdiction were confirmatory and corroborative evidence in relation to the issue of treaty interpretation which was central to the dispute.

94. In the words of the Court of Arbitration:

> "The Court does not consider it necessary to enter into a detailed discussion of the probative value of acts of jurisdiction in general. It will, however, indicate the reasons for holding that the Chilean acts of jurisdiction while in no sense a source of independent right, calling for express protest on the part of Argentina in order to avoid a consolidation of title, and while not creating any situation to which the doctrines of estoppel or preclusion would apply, yet tended to confirm the correctness of the Chilean interpretation of the Islands clause of the Treaty." (*International Law Reports*, Vol. 52, pp. 220-221, para. 165.)

95. In the analysis of the evidence which then follows, the Court of Arbitration in the *Beagle Channel* accepts that the pertinent activities of Chile were "well-known to the Argentine authorities" and "again public and well-known to Argentina" (see the *Decision*, paras. 166 and 169).

96. And I shall complete this analytical exercise by repeating the warning that the methodology adopted by Malaysia has a basic flaw, namely, the insistence of Malaysia upon a simplistic typology of "relevant acts" which are supposedly to be assessed individually. In other words Malaysia persists in fragmenting the evidence and divorcing intention from the practical ways of manifesting intention.

Acts invoked by Singapore as evidence of sovereignty

97. In presenting the acts invoked by Singapore as evidence of the acquisition of sovereignty in the period 1847 to 1851, I shall follow the categories outlined in the Singapore Memorial.

First: the selection of the site of the lighthouse

98. The British Crown had an exclusive role in respect of the selection of a site for the construction of the lighthouse (MS, paras. 5.33-5.44). In the response to a request for advice from

the Governor in 1844, Sir Edward Belcher proposed the Romania outer island, that is, Peak Rock, and did so in the interests of general navigation.

99. The remainder of the history is straightforward, and appears in Singapore's Memorial, as follows:

> "In due course, the results of a further survey of the Straits by Thomson and Captain Congalton, which disclosed many previously unknown rocks and shoals, came to Governor Butterworth's attention. He instituted further enquiries regarding both Pedra Branca and Peak Rock as sites for the lighthouse. On 26 August 1846, he wrote to the Government of India urging that the lighthouse be built on Pedra Branca. In doing so, he reversed his long-standing position that the lighthouse should be built on Peak Rock. In October 1846, the Government of India agreed, and recommended the Pedra Branca site to the Court of Directors of the East India Company. In February 1847, the East India Company agreed to the change of site; and in May 1847, Governor Butterworth was instructed to begin work on the Horsburgh Lighthouse on Pedra Branca." (Para. 5.44.)

100. The ultimate choice of Pedra Branca was politically and legally significant. In the British documents it is recognized that Peak Rock "is part of the territories of the Rajah of Johor . . .". However, no document links the issue of Johor title to Pedra Branca (CMS, pp. 92-108). The question of whether Johor had granted permission to build a lighthouse has been addressed by my colleague, Professor Pellet. It is clear that once Pedra Branca had been selected as the site, the question of permission became moot and was never raised by Johor at any time afterward.

Second: the decision to construct the lighthouse

101. The decision to construct the lighthouse has to be taken in conjunction with the decision on its location and the basis of the funding. The planning of the construction has been described in Singapore's Memorial (paras. 5.47 to 5.53).

102. The decision to build the lighthouse followed the final discussion of the location and the decision to use Pedra Branca. The key document is the letter dated 24 February 1847 from the Court of Directors of the East India Company to the Governor-General of India in Council (MS, Vol. 2, Ann. 18). The key paragraph is the first, which reads as follows:

> "Your letter dated 3rd October 1846 in reply to our Despatch of the 6th May preceding, forwards Copy of a Report received from the Governor of Prince of Wales Island, Singapore and Malacca, *which leaves no doubt as to the superiority of Pedra Branca over Peak Rock* on the outer Romania Island as a site for the Lighthouse proposed to be erected in the neighbourhood of Singapore to the memory

> of Mr. Horsburgh. We concur therefore in your approval of the choice of the former site." (Emphasis added.)

103. In 1847 and 1848 certain practical measures were put in hand, and these are recorded in the documents available.

104. The process of taking lawful possession of Pedra Branca for the purpose of constructing and maintaining a lighthouse began in 1847. It was in the period 1846 and 1847 that the Government of India decided that Pedra Branca was to be the site of the project rather than Peak Rock. In a letter dated 21 June 1847, Church, the Resident Councillor in Singapore, instructed Thomson to submit preliminary plans and estimates. Thomson responded in a letter dated 9 July 1847 in which he reviewed a long series of practical matters, including the engagement of a contractor, labour requirements, the housing of workmen on Pedra Branca, and the need to build pillars to assess the force of the monsoon (MS, Ann. 21).

105. As a consequence of the instructions received from Church, Thomson, in his role as Government Surveyor, made his first landing on Pedra Branca. The purpose was to build brick pillars on the rock in order to assess the action of the waves at the worst season. This assessment was directed to the making of an informed decision on the building materials to be used. The decision to build on Pedra Branca had already been taken and it was the modalities of the construction which were in issue at this stage.

106. On 1 March 1848, Thomson revisited Pedra Branca to examine the state of the pillars. In the event he decided that it would be necessary to use granite for the edifice rather than brickwork. These findings are also recorded in the letter dated 12 June 1848 from Governor Butterworth to W. Seton Karr, the Under-Secretary to the Government of Bengal (MS, Ann. 27).

107. On 6 March 1850, Thomson again inspected the island prior to commencing operations. Further public activity took place in the course of April 1850, when houses for the workmen were built on Pedra Branca.

108. The entire process of preparation for the construction, and the construction itself, was public, and this particularly so in the relatively narrow seas of the region. The key stages in the construction were the subject of contemporary reports in the local newspapers. Thus the laying of

the foundation stone was reported in the *Straits Times and Singapore Journal of Commerce* on 28 May 1850 (MS, Ann. 45).

109. The completion of the lighthouse and the visit of the Governor of the Straits Settlements on 27 September 1851 were reported in the *Straits Times and Singapore Journal of Commerce* on 23 September 1851 and 30 September 1851, respectively (MS, Ann. 56). The *Singapore Free Press and Mercantile Advertiser* carried a report on 3 October 1851 *(ibid.)*.

Third: the funding of the construction work

110. I move now to the process of funding the construction work which has been chronicled in detail in Singapore's Memorial (paras. 5.60-5.65). In response to the evidence presented Malaysia claims that the idea to build a lighthouse was the private initiative of certain merchants in Canton (CMM, p. 50, para. 95). This is true but it does not have the legal consequences desired by Malaysia. The fact is that the British Crown was alone responsible for taking the decision to build the lighthouse. These facts are accepted by Malaysia in her Counter-Memorial. There it is stated: "In fact, the East India Company twice rejected the proposal to build the lighthouse. The Court of Directors only acted in response to repeated requests by the merchants." (*Ibid.*, p. 50, para. 95.) In other words, Mr. President, the decision was that of the British Crown.

111. And the conclusion can only be that the final decision to proceed was based upon a number of political and economic considerations connected with the issue of levying a duty on shipping.

In my examination of the evidence of title the next item is the:

Ceremonial laying of the foundation stone

112. On 24 May 1850 the foundation stone of the lighthouse was laid in the presence of an official party transported to the island by two government vessels. The official account is provided by Thomson, and it reads in part:

> "The 24th day of May being the birthday of Her Most Gracious Majesty, Queen Victoria, was fixed upon as the day on which the foundation stone was to be laid. Her Majesty's Steam frigate 'Fury' arrived off the rock at 11½ A.M. on that day, having in tow the H.C. ['Honourable Company'] Steamer 'Hooghly' and the merchant vessel 'Ayrshire' carrying the Hon'ble Colonel W.J. Butterworth C.B., the Governor of the Straits Settlements, who had invited his Excellency Admiral Austin the Naval

> Commander-in-Chief of the East India Station, and the Hon'ble T. Church, Esquire, Resident Councillor at Singapore to accompany him; also M.F. Davidson, Esq., Master of the Lodge Zetland in the East, No. 748, who with the office-bearers of the Lodge and other members of that Lodge, had been requested to perform the ceremony of laying the foundation stone with Masonic honours. Various other civil and military members of the Singapore community, together with the foreign Consuls had come by invitation to witness the ceremony . . ." (Thomson, *Account*, p. 427.)

113. During the ceremony the Master of the Lodge Zetland in the East made the following statement in the presence of Governor Butterworth and all of the other invited officials and guests (tab 29 of the judges' folder). He said: "May the All Bounteous Author of Nature bless our Island, of which this Rock is a dependency . . ." (Source: *Straits Times and Singapore Journal of Commerce*, 28 May 1850; Singapore Memorial, Ann. 45.)

114. This reference to "our island" is clearly a reference to the main island of Singapore from which the party had come, and it confirms the status of Pedra Branca as a dependency of Singapore.

115. The standard dictionary definition of a dependency is "the condition of being dependent, contingent logical or causal connection . . . something dependent or subordinate" (source: *Shorter Oxford English Dictionary* (1974), p. 521).

116. As Singapore has stated in her Reply, the connotation of the term in public international law is essentially the same. Thus, the authoritative *Dictionnaire de droit international public*, edited by Jean Salmon, provides the following guidelines in an English translation:

> "Dependency: . . . Part of a territory linked with another in a subordinate way. Thus:
>
> — maritime territory, dependency of the land territory . . .
>
> — an island, dependency of another island or group of islands."

And then two examples are set forth. The first example is a quotation from the *Minquiers and Ecrehos* Judgment:

> "When the British Embassy in Paris, in a Note of November 12th, 1869, to the French Foreign Minister, had complained about alleged theft by French fishermen at the Minquiers and referred to this group as 'this dependency of the Channel Islands' . . ." (*Minquiers and Ecrehos (France/United Kingdom*), *Judgment, I.C.J. Reports 1953*, p. 71.)

And the second example is:

> "The small size of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited, allow its characterization as a 'dependency' of Meanguera, in

> the sense that the Minquiers group was claimed to be a 'dependency of the Channel Islands'." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 570, para. 356.)

And the text of the French original will be in the transcript:

> "Dépendance: . . . Partie d'un territoire se rattachant de manière subordonnée à un autre. Ainsi:
>
> — Le territoire maritime, dépendance du territoire terrestre: . . .
>
> — Une île, dépendance d'une autre île ou d'un groupe d'îles."
>
> "Quand l'ambassade britannique à Paris, dans une note du 12 novembre 1869 au ministre français des Affaires étrangères, s'est plaint de prétendus vols par les pêcheurs français aux Minquiers et s'est référée à ce groupe en disant: 'cette dépendance des Îles de la Manche' . . ." (*Minquiers et Ecréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953*, p. 71.)
>
> "L'exiguïté de Meanguerita, sa proximité de la plus grande île et le fait qu'elle est inhabitée permettent de la qualifier de 'dépendance' de Meanguera, au sens où il a été soutenu que le groupe des Minquiers était une 'dépendance' des îles de la Manche." (*Différend frontalier terrestre, insulaire et maritime, (El Salvador/Honduras; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 570, par. 356.)

117. In her written pleadings Malaysia asserts that the ceremony of 24 May 1850 did not relate to the question of sovereignty (see MM, paras. 151-164; CMM, paras. 66, 69-72; RM, paras. 219-230).

118. In face of the evidence of the inauguration of the lighthouse Malaysia resorts to a series of weak and self-serving arguments. The first principal argument is that the Masonic element in the ceremonial allegedly outweighed the governmental and official elements. But, Mr. President, the ceremony was organized under the authority of the Governor of the Straits Settlements, Lieutenant-Colonel Butterworth, and the Masonic Brethren had been requested by the Governor to participate in the ceremonial. Thus the ceremony originated with the British Crown and was organized for its official purposes. The second argument used by Malaysia is to the effect that the laying of the foundation stone was simply one of the "formalities" undertaken in the course of the construction and that none of these formalities manifested any intention to acquire sovereignty or to claim exclusive possession of the island (see the CMM, para. 66).

119. However, as Singapore has pointed out in her Reply:

> "The substance of the matter is that the laying of the foundation stone was not an isolated event. The newspaper account relied upon by Malaysia makes it clear that the ceremony was held under the auspices of the Governor of the Straits Settlements.

> The Governor had requested the Worshipful Master and Brethren of the Lodge Zetland in the East to lay the Foundation Stone, and the distinguished visitors listed were there at the invitation of the Governor. In fact, the laying of the foundation stone formed part of a long process of decision-making and preparation for the construction of the lighthouse under the control of and on behalf of the British Crown." (Pp. 46-47, para. 3.31.)

In face of all this evidence of British title Malaysia argues that:

The construction of the lighthouse was related exclusively to administration and ownership

120. Thus, in the Memorial Malaysia contends "that the construction and maintenance of lighthouses or other aids to navigation are not *per se* considered manifestations of sovereignty" (MM, p. 78, para. 171). The argument is expressed in two ways. First, on the basis that navigational aids are not relevant to the issue of sovereignty and, secondly, that the construction involved only the acquisition of the ownership of a lighthouse on the territory of another sovereign, namely Johor.

121. The first argument, the alleged irrelevance of navigational aids is based upon an erroneous characterization of the legal criterion. The criterion is not based upon an abstract proposition to the effect that navigational aids are, or are not, manifestations of sovereignty, but consists of the intention to acquire sovereignty as revealed in all the relevant circumstances.

122. As Singapore has stated in her Counter-Memorial, the jurisprudence invoked by Malaysia does no more than demonstrate that each case depends on the legal and historical circumstances. Thus, in the *Minquiers and Ecrehos* case the Court examined the evidence of competing State activity as a whole and found that the British activities on the Minquiers predominated. As the excerpts from the Judgment offered by Malaysia show, in the circumstances the lighting and buoying carried out by France "can hardly be considered as sufficient evidence of *the intention of that Government*, to act as a sovereign over the islets . . ." (MM, pp. 78-79, para. 172; emphasis added). Thus the criterion *was* the intention of the Government concerned in the light of the evidence generally. On the other hand, in appropriate circumstances the construction and maintenance of lighthouses may constitute evidence of sovereignty, as in the cases of *Qatar* v. *Bahrain* and *Indonesia/Malaysia*. In the latter case, it was Malaysia who invoked this

proposition in her favour (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 684-685, para. 146).

123. In addition, Malaysia invokes the Award in the first phase of the *Eritrea/Yemen* arbitration. The Malaysian Memorial asserts that: "The Arbitral Tribunal . . . rejected the assertions that the establishment or maintenance of lighthouses constituted acts of sovereignty." (MM, p. 79, para. 173.) But, with respect, this categorical statement does not reflect the language of the Award. The quotation given by Malaysia states that: "The operation or maintenance of lighthouses and navigational aids is *normally* connected to the preservation of safe navigation, and not *normally* taken as a test of sovereignty." (Emphasis added.) And then the quotation continues: "Maintenance *on these islands of lighthouses by British and Italian companies and authorities* gave rise to no sovereign claim or conclusions. The relevance of these activities and of Yemen's presence at the 1989 Red Sea Lights Conference are examined in Chapter VI." (Emphasis added.)

124. Both the content of this statement by the Tribunal and the content of Chapter VI of the Award confirm that the legal significance of the operation of lighthouses depended on the particular historical circumstances and, in particular, *the overall evidence of intention to claim*. The criterion was thus the intention of the States concerned. The relevant passages of the Award are set forth in Singapore's Counter-Memorial (pp. 122-124).

125. These passages constitute a sufficient sample of the reasoning of the Tribunal in Chapter VI of the Award in Phase One. They establish, without any shadow of doubt, that the significance of the lighthouses was assessed in the precise historical context, and in relation to the evidence of the intention and attitude of each Government at the material time, as evidenced by available documents and the general circumstances. The implications for sovereignty or not, as the case might be, were intention-related.

126. In this context it is useful to recall a part of Malaysia's argument in the *Indonesia/Malaysia* case. Thus in her Reply Malaysia observed:

> "The second part of the Indonesian response draws upon two cases — the *Eritrea/Yemen* case and the *Minquiers and Ecrehos* case — to support the contention that the establishment of lights and buoys is not normally taken as a test of sovereignty and does not constitute proof of occupation *à titre de souverain*. It is true that in those two cases the Arbitral Tribunal and this Court respectively did not find that the construction of the light was sufficient evidence of the intention of the Government

> concerned to act as sovereign over the territorial location of the lights. But that conclusion was reached on the basis of the facts particular to each of the two cases, and cannot be applied to the two islands here." (Para. 5.25.)

And Malaysia continues:

> "The circumstances in which the Tribunal in the *Eritrea/Yemen* case made its remarks about the effect of the establishment of lighthouses are peculiar to that case, whereas a reading of the whole of the relevant part of the Award, and not merely the lifting of a line out of context, shows that the States concerned did not, in their special situation, regard the construction of a lighthouse *with the knowledge and consent* of other interested States as leading to the conclusion that the State constructing the light thereby intended to act *à titre de souverain* in respect of the location of the light." (Para. 5.26; emphasis in the original.)

127. The conclusion must be that it is the historical and political circumstances that determine the nature of the intention. The evidence concerning the intention of the British Crown in respect of Pedra Branca is voluminous and definitive. There is a great deal of evidence to show that the British Government selected Pedra Branca, funded the construction and provided every kind of logistical support and protection during the process. Moreover, given the physical circumstances of Pedra Branca and the purpose of the appropriation, to suggest that there was no appropriation of the island as a whole is to defy common sense.

128. In any event, the Malaysian pleadings in the present case have reiterated the argument of the Memorial, and this can be seen in the Counter-Memorial (paras. 228-37) and the Reply (paras. 247-59).

I shall move now to the evidence of visits to Pedra Branca by British officials.

The visits of British officials

129. During the preparation for construction of the lighthouse, and the process of construction, British officials made regular visits to the site.

130. In the period before construction began and together with the period of actual construction, there were at least 19 visits by officials to Pedra Branca. These visits are chronicled in the Singapore Memorial (paras. 5.66-5.68). At least 13 landings involved senior representatives of the British Crown, Governor Butterworth, Councillor Church, and Thomson, the Government Surveyor. On six other occasions, Government vessels landed workmen and building materials, acting under the instructions and supervision of Thomson.

131. In this very specific context I would draw the Court's attention to the contemporary paintings by Thomson (see judges' folder, tab 30).

If the Court will observe the screen, we see images 11 and 12 from the Singapore Memorial. These are paintings which show the supervision by Thomson of the construction activities on the island. Also on screen is image 13 from the Singapore Memorial, which is a painting showing Pedra Branca with the living quarters of the construction workers in the background.

132. In addition there were several significant visits by senior officials after the completion of the lighthouse (MS, paras. 5.81-5.84).

133. In response to this evidence, Malaysia argues that the visits did not constitute evidence of sovereignty (CMM, para. 123). Singapore considers such a view to be disingenuous. The full record available shows that the visits formed an integral part of the process of the construction and the concomitant exercise of the authority of the British Crown. The visits formed part of the implementation of an enterprise authorized and funded by the British Crown.

134. In any event, Malaysia contends that the visits of officials cannot be invoked as evidence of sovereignty (CMM, para. 124). And in this connection the decision of this Court in the *Minquiers and Ecrehos* case is relied upon. In fact, the passage quoted from the Judgment does not rely upon a principle that the visits of officials cannot qualify as evidence of title. The Court was clearly taking the view that, in the circumstances, these facts were not "sufficient to show that France has a valid title to the Minquiers". It is useful to recall that, in the *Minquiers* case, both sides had exercised acts of jurisdiction in the group of islets and the Court's decision on title was based upon an assessment of the relative strength of the claims. Similarly, in relation to the Ecrehos the Court stated that it was "now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos . . ." (*Judgment, I.C.J. Reports, 1953*, p. 67). The situation in the *Minquiers* involved contemporaneous and competing acts of jurisdiction by the two claimants in sharp contrast to the facts of the present case.

Logistical support provided by British government vessels

135. During the preparation for the construction and the construction itself, continuous logistical support was provided by Government vessels, namely:

(a) the steamer *Hooghly*;

(b) the gunboat *Charlotte*;

(c) the gunboat *Nancy*: and

(d) two lighters (that is to say, flat-bottomed barges).

136. The Governor of the Straits Settlements sent various letters to the Resident Councillors of Singapore and Malacca ensuring the availability of the gunboats for conveying supplies to Pedra Branca (MS, p. 62, para. 5.70).

Mr. President, that would be a convenient place to stop, thank you.

The VICE-PRESIDENT, Acting President: I would not but if you prefer we can stop here. You may go on because yesterday, part of the time allotted to Singapore was used by me for my introductory remarks and the swearing in of the two *ad hoc* judges, so if you would like to go on for a few more minutes, please?

Mr. BROWNLIE: Fine, thank you very much.

Protection by gunboats

137. In addition to the question of logistical support, the government also provided protection by gunboats of the operations, and there were two gunboats always in attendance at the works. As Thomson makes clear in the pertinent passage of his report, the prevalence of piracy "in the immediate neighbourhood" made the protection of the gunboats a necessity. The gunboat *Charlotte* was a vessel of 23 tons, carried two 6-pounder guns, and had a crew of 27 men. The other gunboat, the *Nancy*, was a vessel of the same size.

138. The provision of a government steamer and gunboats to assist in the movement of building materials and to provide protection against pirates formed a regular feature of the various plans and financial estimates relating to the construction of the lighthouse.

139. In her Counter-Memorial Malaysia asserts that the activities of the gunboats "did not manifest the exercise of the sovereign functions" (CMM, p. 55, para. 108). However, earlier in the same paragraph, Malaysia states more moderately that the activity of gunboats "does not *in itself* constitute a manifestation of sovereignty" (emphasis added).

140. Whilst Malaysia does not deny the logistical role of the government ships in the course of the construction, she denies that the activities relate to "sovereign functions" (CMM, p. 55, para. 108). This denial involves an artificially conceived view of State functions. Malaysia, in the same paragraph, asserts that the procuring of water and provisions and the carriage of workmen were not sovereign functions. But such activities, along with the provision of protection against pirates, were intrinsically a part of the Crown's operations in relation to the construction of the lighthouse.

141. In the same general setting, it can be recalled that the Dutch recognition of British title in 1850 had the direct result that the Dutch Resident in Riau offered the assistance of two gunboats as long as the lighthouse operations were in progress (see Thomson, *Account*, pp. 424 and 473). The Dutch letter referring to the construction of a lighthouse "on British territory" was addressed to the Resident in Riau, and related to naval patrols lending assistance to the construction of a lighthouse "at Pedra Branca on British territory" (RS, Ann. 8).

Display of the marine ensign on Pedra Branca

142. The practice since the lighthouse first began to function was for the marine ensign of Great Britain to be flown. The arrangements for the operation of the lighthouse were reviewed by Thomson, the Government Surveyor, in a letter to Church, Resident Councillor at Singapore, dated 20 July 1851 (MS, Ann. 54). In this letter Thomson wrote: "The Lighthouse flag, I presume is different from the national one." The use of the ensign represented contemporary British practice.

143. In addition, during the construction of the Lighthouse, the marine ensign was flown from the structure in the course of building. The evidence consists of the contemporary paintings by Thomson, the Government Surveyor, and we refer to images 13 and 15 in the Memorial and on the slide (judges' folder, tab 30).

144. In the Singapore Reply (p. 74), it is emphasized that Singapore's argument is to the effect that the subsequent flying of the marine ensign was evidence that possession had *already* been taken, and thus constituted a manifestation of sovereignty *already* acquired.

Conclusions on evidence of the acquisition of sovereignty in the period 1847 to 1851

145. I must now present my conclusions and in doing so, I shall not reiterate all the various forms of evidence but focus upon a single aspect of evidence of sovereignty and State activities.

146. In summary, Mr. President, the activities of the British Crown constituted a major public works project which included the following elements:

— first, the planning and design of the lighthouse itself;

— second, the logistical arrangements for the construction, including the use of government vessels;

— third, the procurement and transport of the necessary building materials;

— fourth, the building of a wooden pier including a loading boom (Thomson, p. 420). This pier, by the way, was washed away in the subsequent monsoon season;

— fifth, the procurement and installation of a derrick crane (Thomson, pp. 425-426);

— sixth, the laying of the foundation stone on 24 May 1850;

— seventh, the building of a lighter of the required dimensions (Thomson, pp. 428-429);

— eighth, the erection of a jetty (Thomson, pp. 434-435);

— ninth, the placing of a mooring buoy in 1850 (Thomson, p. 429);

— tenth, the building of a south pier in 1851 (Thomson, pp. 445-448);

— eleventh, the building of a platform near the entrance to the lighthouse (Thomson, pp. 442-443, 445);

— twelfth, the cutting of rain channels around all the higher rocks in 1851 (Thomson, pp. 447-448);

— thirteenth, the installation of the lantern, dome, machinery and apparatus for the lighthouse (Thomson, pp. 449-453); and,

— finally, the commissioning of the lighthouse during a visit by the Governor on 27 September 1851 (see Thomson, pp. 453-454; and MS, paras. 5.81-5.84).

147. There is strong judicial authority for the status of public works as evidence of title to territory. Thus, in the *Minquiers* case this Court relied upon various public works constructed on the Ecrehos by the British authorities. These constructions were as follows (*I.C.J. Reports 1953*, p. 66):

(a) a customs house established in 1884;

(b) a slipway in 1895;

(c) a signal post in 1910; and

(d) the placing of a mooring buoy in 1939.

148. Evidence of a similar character was relied upon in relation to title in respect of the Minquiers. In the words of the Judgment:

> "It is established that contracts of sale relating to real property in the Minquiers have, as in the case of the Ecrehos, been passed before the competent authorities of Jersey and registered in the public registry of deeds of the Island. Examples of such registration of contracts are given for 1896, 1909 and some later years.
>
> In 1909 Jersey customs authorities established in the Minquiers a custom-house with the arms of Jersey. The islets have been included by Jersey authorities within the scope of their census enumerations, and in 1921 an official enumerator visited the islets for the purpose of taking the census.
>
> These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Minquiers during a long period of time.
>
> Of other facts throwing light upon the dispute it should be mentioned that Jersey authorities have made periodical official visits to the Minquiers since 1888, and that they have carried out various works and constructions there, such as a slipway in 1907, a mooring buoy in 1913, a number of beacons and buoys in 1931 and later years and a winch in 1933."

And the Judgment continues:

> "The evidence thus produced by the United Kingdom Government shows in the opinion of the Court that the Minquiers in the beginning of the seventeenth century were treated as a part of the fief of Noirmont in Jersey, and that British authorities during a considerable part of the nineteenth century and in the twentieth century have exercised State functions in respect of this group." (*Judgment, I.C.J. Reports 1953*, pp. 69-70).

149. The weight accorded to the emplacement of public works and ancillary features, such as slipways, is significant, obviously, for the present case. Above all, it is clear that the British authorities used Pedra Branca *as a whole*. The erection of a jetty and of the piers involved a use of Pedra Branca as a unit and for public purposes. The cutting of the rain channels around all the higher rocks in 1851 provides further evidence of the appropriation for public use of the island as a whole.

150. There is other relevant judicial authority on the evidential significance of public works. Thus in Phase One of the *Eritrea/Yemen* dispute concerning certain Red Sea islands, the

Arbitration Tribunal recognized the evidential significance of the building and use of an airstrip on Greater Hanish, an uninhabited island.

The relevant passages in the Award will be seen in the transcript:

> "419. Incidental as it may have been to Total's Petroleum Agreement, the building and use of an airstrip on Greater Hanish is in the view of the Tribunal a material *effectivité*. It demonstrates the exercise by Yemen of jurisdiction over Greater Hanish, a recognition of that jurisdiction by Total, and the conduct of visible indicia of that jurisdiction — an airstrip in active use — over a period of time. Eritrea appears to have been unaware of it and in any event made no protest . . ." (*International Law Reports (ILR)*, Vol. 114, p. 109.)

> "502. It was later that there was more activity; notably the construction in 1993 by the Total Oil Company of an air landing strip on Hanish, for the recreational visits of their employees, and as a by-product of their concession agreement with Yemen. That agreement did not encompass either Zuqar or Hanish. Nevertheless, the fact that there were regular excursion flights constitutes evidence of governmental authority and the exercise of it. Nor did it apparently attract any kind of protest from Eritrea; though of course by this time the civil war was over and Eritrea was established as an independent State." (*Ibid.*, p. 132.)

> "507. Yemen has more to show by way of presence and display of authority. Putting aside the lighthouse in the north of the island, there was the Ardoukoba expedition and campsite which was made under the aegis of the Yemeni Government. There is the air landing site, as well as the production of what appears to be evidence of frequent scheduled flights, no doubt mainly for the off-days of Total employees; and there is the May 1995 licence to a Yemeni company (seemingly with certain German nationals associated in a joint venture scheme) to develop a tourist project (recreational diving is apparently the possible attraction to tourism) on Greater Hanish." (*Ibid.*, pp. 133-134.)

151. These authorities confirm the significance of public works, more especially in the case of uninhabited islands, as evidence of sovereignty.

152. Mr. President, I shall now examine the thesis of Malaysia according to which the British Crown only took possession of a part of the island for the purpose of building a lighthouse and then only gained an item of property and not a title to a parcel of territory. Two points immediately arise. In the first place, international tribunals have had no difficulty in classifying public works as State functions. And, secondly, in making their determinations of law and fact, tribunals have shown no tendency to decide that public works only produce title, so to speak, to the subsoil and the space they actually occupy. No court, and no writer, has taken such a view.

153. In this connection the cutting of rain channels around the higher rocks in May 1851 is typical of the State functions involved. Such improvements were ancillary to the purpose for which

possession was taken and, like the lighthouse, the outside platform and the piers, constituted evidence of the intention to appropriate the island as a whole for a use which was both permanent and exclusive. In the circumstances the Malaysian assertion that the cutting of the rain channels had no bearing on the question of sovereignty is without merit (MS, para. 580; CMM, para. 125; RS, paras. 386-87).

154. The construction of public works is not, as such, conclusive evidence of an intention to acquire sovereignty. In the present case, however, the taking of possession was accompanied by a substantial flow of documents manifesting the intention of the British Crown to acquire an exclusive control of Pedra Branca for public purposes. As I have demonstrated, the works involved access to and use of the island as a unit.

Mr. President, Members of the Court, I would like to thank you for your patience and consideration. Thank you very much.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Brownlie. We meet tomorrow morning at 10 o'clock. The sitting is closed.

The Court rose at 1.15 p.m.