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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Thursday 15 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 jeudi 15 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
		Shi
		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
Shi
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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comme conseillers.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open and I give the floor immediately to Sir Elihu Lauterpacht. You have the floor, Sir.

Sir Elihu LAUTERPACHT:

PULAU BATU PUTEH

GREAT BRITAIN HAD NO INTENTION TO ACQUIRE SOVEREIGNTY (continued)

Britain's own standards for evidencing its claims to territory

1. Mr. President, Members of the Court, when the Court rose yesterday I had just begun to consider the element of intention in Britain's conduct towards Pulau Batu Puteh. I was proposing to do so by reference to Singapore's own statement of the ingredients of the intention element.

2. Did Britain at any time manifest an intention to acquire sovereignty over Pulau Batu Puteh?

3. Did Britain take any overt action to implement such intention?

4. Did Britain make that intention known to other States?

5. My submission was that the answer to these questions is No.

6. Permit me to begin by recalling the practices followed by Britain in evidencing its intention to acquire sovereignty over foreign places.

7. I have already mentioned the academic study by Keller, Lissitzyn and Mann on *The Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800*. I have also spoken of Crawfurd's report of 1824 when he wrote of his conduct in relation to the three islands within 10 miles of Singapore — Pulau Ubin, Rabbit and Coney Islands.

8. The importance attached to an explicit assertion of sovereignty persisted and was confirmed by the fact that in 1889 the Law Officers of the Crown approved a Form of Proclamation of an Annexation which contained an express proclamation of the vesting of full sovereignty over a

claimed island in the name of Her Majesty the Queen. Such a proclamation would contain language such as the following[1], which you see now on the screen:

> "I have it in command from Her Majesty Queen Victoria . . . to assert the sovereign rights of Her Majesty over . . . [the name of the islands], . . . the same having been . . . taken possession of by Her Majesty with the consent of the local Chief or Chiefs thereof. Now, therefore, I . . . [that is, the person making the proclamation] do hereby proclaim and declare to all men that, from and after the date of these presents, the full sovereignty of the island . . . vests . . . in Her Majesty Queen Victoria."

That was a form established in 1889 but reflecting previous British practice.

9. The British position in this respect is consistent, as can be seen from a more recent example, the formality of Britain's annexation of the island — it is called an island, it is really just a rock — of Rockall in 1955. Rockall is a distant and small place, 265 miles west of Ireland. The plaque that was then fixed on the island is in your folder at tab 94[2]:

> "By authority of Her Majesty Queen Elizabeth II, by the Grace of God . . . Head of the Commonwealth, Defender of the Faith, and in accordance with Her Majesty's instructions dated the 14th day of September, 1955, a landing was effected this day upon this island of Rockall from HMS Vidal. The Union flag was hoisted and possession of the island was taken in the name of Her Majesty. [Signed] R. H. Connell, Captain, HMS Vidal, 18 September 1955."

10. At this point, I need do no more than look more closely at the legal effect of the eventual selection by Britain of Pulau Batu Puteh as the site for the lighthouse. How did Britain, in the period 1847 to 1851, which Singapore itself has identified as *crucial*, comply with its own standards and manifest an intention to acquire sovereignty over, or annex, Pulau Batu Puteh?

11. The somewhat intricate correspondence that passed between the Governor in Singapore, the Government of India and the authorities in London about the possible location of the proposed lighthouse in the years 1842 and 1844 has just been reviewed by Professor Kohen. In it we look in vain for any indication of the thought on the part of Britain that it might annex to itself whatever location might be chosen for the light. Even the extract in Annex 93 to the Singapore Memorial[3] taken from a despatch by the Governor of Singapore to the Governor-General in Bengal, of 28 November 1844, which states that the Temenggong has willingly consented to cede it — that is,

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[1]See the text as printed in McNair's *International Law Opinions*, Vol. I (1956), pp. 294-295. See judges' folder, tab 94.

[2]See judges' folder, tab 94.

[3]MS, Vol. 3, Ann. 93.

the location — "gratuitously" does not appear to respond to any request by Britain for a cession of territory. Nor was this idea ever repeated in subsequent correspondence. Evidently, no importance was attached to this fleeting reference. And, by itself, it cannot evidence any declared intention by Britain to acquire sovereignty over the location. Nor does the language actually used by the Temenggong in his reply on 25 November 1844[4] lend itself to interpretation as an affirmative reply to a request for a grant of sovereign rights even if such a request had been made, for which, I repeat, there is no evidence.

12. The same is true of the correspondence between the same parties that took place in 1845 and 1846.

13. It is significant also that at just about the time that work was to begin on the lighthouse, the Governor of the Straits Settlements was made aware that the acquisition of territory in his region would involve "steps for obtaining formal possession". This appears from the letter to the Governor dated 19 September 1846 from the Official Secretary to the Government of India in relation to the acquisition of the island of Labuan off the coast of Borneo[5]. Three months later, by a Treaty of Friendship with the Sultan of Borneo, Britain obtained the cession "in full sovereignty and property" of the island of Labuan, following which a formal flag-raising took place[6]. Is this not what might have been expected had Governor Butterworth thought that Britain had acquired title to Pulau Batu Puteh?

14. When, on 30 September 1846, the Governor of Singapore recommended to the Directors of the East India Company the building of the Horsburgh light on Pulau Batu Puteh[7], *nothing* was then said evincing any intention that sovereignty should be acquired over the island.

15. The Singapore Memorial makes much of the fact that overall control of the project from the early days was assumed by the Governor[8]. But that is not an issue in the case. The question is not whether Britain controlled or financed the construction of the lighthouse, but whether British activity openly revealed an intention to claim the island. It is on this question that attention must

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[4]MM, Vol. 3, Ann. 45.

[5]CMM, Vol. 3, Ann. 16.

[6]CMM, Vol. 3, Ann. 17.

[7]MM, Vol. 3, Ann. 53.

[8]MS, Vol. 1, p. 65.

be focused. It is an issue properly raised by Singapore itself, but never satisfactorily answered by it. As will presently be shown, there was never any expression of such an intention, either internally or externally; and the Singapore pretence that there was cannot be sustained.

16. What does Singapore offer? We have it in Mr. Brownlie's speech last week[9]. In effect, he says, there does not have to be any specific indication of intention, no overt indication, no precise communication of intention to any other State. It is sufficient, so he asserts, to look at what Britain actually did, and from that examination, extract or extrapolate what can only be a notional intention sufficient to satisfy the requirements of intention that Singapore has itself laid down as necessary.

17. The theme is presented repeatedly in Mr. Brownlie's speech and I need only give one instance of it. Referring to Malaysia's insistence that there was not a single manifestation of the intention of the Crown to acquire sovereignty in the material period[10], he then continues:

> "[T]his 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 entire pattern.] The analysis of Malaysia rests upon an entirely artificial dichotomy between the taking of control of territory and the intention to acquire sovereignty.
>
> 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."[11]

18. So, let us scrutinize more closely the so-called evidence as a whole.

19. Let us pass to the critical years 1847 to 1851 and look at each of those years. We shall see that in each of them nothing was done that indicates an intention to acquire sovereignty over Pulau Batu Puteh. Attention was focussed exclusively on the construction of the lighthouse.

20. First, 1847: on 24 February 1847 the Court of Directors of the East India Company communicated to the Governor-General of India its approval of the choice of Pulau Batu Puteh as the site for the lighthouse. As can be seen from the first paragraph of the letter [12], no distinction

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[9]CR 2007/21, pp. 34-69.

[10]*Ibid.*, p. 52.

[11]*Ibid.*, p. 53, paras. 88-89.

[12]MS, Vol., 2, Ann. 18, p. 149. See judges' folder, tab 95.

was drawn between the territorial status of Peak Rock and Pulau Batu Puteh. Apparently, they were regarded as indistinguishable in this respect.

21. Two months later, on 24 April 1847, the Secretary of the Government of India wrote to the Secretary of the Government of Bengal[13] forwarding copies of three despatches saying that "the Honourable Court have sanctioned the proposal for the construction of the lighthouse at Pulau Batu Puteh", expressing "their concurrence with the local authorities and with the Government of India in approving the site of the Pedra Branca over Peak Rock . . ." Again, it has to be noted that no distinction is drawn between the territorial status of Peak Rock and Pulau Batu Puteh. Still we have no evidence of any intention to acquire sovereignty over the location of the lighthouse.

22. In the course of the months that followed Thomson, the Government Surveyor of Singapore, pursued negotiations with the Chinese contractors and, in his letter of 9 July 1847 to the Resident Councillor, Singapore, Thomson gives the first — the first —indication of any physical activity in relation to Pulau Batu Puteh[14]. I use the word any overt physical activity. He accompanied the contractor to the spot in the steamer *Hooghly*. He proposed the building of small brick pillars in October. Thomson's visit must have taken place some time before July 1847. But there is no suggestion of acquisition of title to the island.

23. On 22 July 1847 the Governor reported from Penang that conditions on Pulau Batu Puteh would lead to expenses considerably in excess of the estimate originally furnished and that he would visit the spot after his return to Singapore[15]. But that is not evidence of an intention to claim sovereignty over the island.

24. As reported by Thomson, brick pillars were fixed on various parts of the island on 1 November 1847 to test the force of the waves[16]. And that brings us to the end of 1847. No sign, as yet, of any intention by Britain to annex the island.

25. We now pass to 1848.

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[13]MS, Vol. 2, Ann. 19, p. 159.

[14]MS, Vol. 2, Ann. 21, p. 169.

[15]MS, Vol. 2, Ann. 22, p. 178.

[16]See Thomson's *Account*, MS, Vol. 4, Ann. 61, pp. 490-491.

26. The only thing that appears to have happened then was that Thomson returned to the island on 1 March[17] to find that the brick pillars had been swept away. Accordingly, he decided that the lighthouse should be constructed of granite and he prepared plans accordingly.

27. Thomson's *Account*, which is the fullest narrative of what happened in these critical years, contains nothing more regarding the year 1848. And the same is true for 1849, except that on 14 December 1849 Thomson was informed that the East India Company had approved his plans[18]. So, as he then noted, "the early part of the year — that is now 1850 — was devoted to making preparations for the coming season". On 6 March 1850 he proceeded to the island, but because the monsoon had not entirely subsided he soon returned to Singapore. On 1 April he left Singapore, having been preceded by a few days by his principal assistant. However, adverse weather conditions led them temporarily to retreat to Point Romania; but they returned to the island on 11 April. The details and difficulties of the construction work are all set out in Thomson's *Account*. They make fascinating reading, but are not relevant to the assessment of what, if anything, Britain did to manifest an intention to acquire title to the island. The only governmental role in the work was the intermittent presence of a British gunboat to take station as "a tender to our operations"[19]. But the British character of this presence was offset by the arrival of a Dutch gunboat from Rhio and a Dutch offer to keep two gunboats on the station as long as the work was in progress. The offer was accepted and in due course acknowledged by Thomson in his *Account*.

28. At last, on 24 May 1850, it being Queen Victoria's birthday, the foundation stone was laid[20]. It is not necessary to repeat here the details of that occasion. The Governor was present, as was the Master of the Lodge Zetland in the East, Mr. Davidson, with the office bearers of the Lodge, who had been "requested to perform the ceremony of laying the foundation stone with Masonic honours". Note: "Masonic honours" — no mention of any formal assertion of British sovereignty. A copper plate was placed in an aperture cut into the rock. A copy of this is at tab 35

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[17] *Ibid*., p. 492.

[18] *Ibid*., p. 505.

[19] *Ibid*., p. 526.

[20] *Ibid*., p. 530.

in your folders. But, as you can see, it contains no reference to the possibility that the island was British. Nor did the articles deposited under the rock include, as one might otherwise have expected, any document formerly asserting or reflecting British title over the island. This would, of course, have been the occasion for a manifestation of British intention to acquire the island. It was not taken. Nine days later the Temenggong visited the rock, accompanied by 30 of his followers. Thomson described him as "the most powerful native chief in these parts, allied to British interests"[21]. Singapore has not told us why the Temenggong's visit cannot equally be construed as a demonstration by him of his title to the island. That possibility is perfectly open on the documents.

29. But the construction work proceeded rapidly until mid-October when the north-east monsoon set in and work had to be suspended.

30. So now we come to 1851 — the last of the five years claimed by Singapore as being crucial.

31. Work was resumed at the end of March. The Singapore Memorial contends that the cutting of rain channels on Pulau Batu Puteh in May 1851 was an operation which "clearly assumed a lawful and permanent use and possession of Pedra Branca as a whole"[22]. It requires some imagination to see the cutting of rain channels as in any way connected with the intention to take *lawful* possession of the island or as demonstrating an intention to annex it. But, in any case, the operation did not in itself overtly signify an intention to claim title to the island. It was no more than an aspect of the construction of the lighthouse. The workmen needed water in which to wash, that was what Thomson said. On 8 July the Resident Councillor arrived with a party and "minutely inspected all the works and on his departure at noon, he was pleased to express his approval of the building and all other operations"[23]. But there is no record of his having said or done anything indicative of an intention to acquire title. He might at least have said to Thomson: "Nice bit of annexation that, old chap!" — but if he did, Thomson does not record it.

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[21] *Ibid*., p. 533.

[22] MS, p. 69.

[23] MS, Vol. 4, Ann. 61, p. 551.

32. On 24 September, when the lighthouse was due to come into operation, the Government issued a Notice to Mariners. Of this act, the Singapore Memorial says, entirely without any supporting reasons:

> "This document was based on a datum that the island on which the lighthouse stands is British and forms part of Singapore. It was issued by Colonel Butterworth, the most senior British official based in Singapore."[24]

The only accurate element in this assertion is the fact that the Notice was issued by the Governor of Singapore. But this did not show any sign of treating the island as British. It was not, and could not be, anything more than a necessary opening step in the operation of the lighthouse required by good lighthouse practice.

33. On 27 September 1851 the Governor of the Straits Settlements, accompanied by the Recorder of the Straits Settlements, the commander of the troops and the principal merchants of Singapore, arrived at 1 o'clock, minutely inspected the light and re-embarked at 4 o'clock "after expressing themselves in highly favourable terms regarding all the works and the arrangements."[25]. But apparently they said nothing that could be recorded by Thomson as evidence of an intention to treat the rock as British territory. Nor was the occasion accompanied by any proclamation or declaration, whether official or otherwise.

34. Thomson finished writing his *Account* on 15 December 1851[26]. He recorded the placement of a tablet on the wall of the visitors' room[27]: Professor Cohen has already shown you this. It contains no suggestion that the rock was British territory.

35. This brings me to the end of the chronology of events from 1847 through 1851, as recorded by Thomson's *Account*. It can be supplemented by reference to the Governor's letter of report of 1 November 1851. This date is at the end of the four-year period which Singapore now advances as being the one during which Britain acquired title to Pulau Batu Puteh. In it, in this report, the Governor speaks of "the distant position of Pedra Branca, an Isolated Rock detached 40 miles from Singapore, at the entrance of the China Sea."[28]. There, if anywhere, one might have

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[24]MS, p. 73.

[25]*Ibid*., p. 71.

[26]MS, Vol. 4, Ann. 61, p. 557.

[27]See judges' folder, tab 69.

[28]MS, Vol. 3, Ann. 58, p. 454.

expected the Governor to have said that he had annexed the "isolated rock" for the British Crown. Instead, he says nothing — his emphasis is solely on the character of the rock "detached 40 miles from Singapore". The same comment may be made about the other documents annexed to the Singapore Memorial relating to the commissioning of the lighthouse; likewise about the Preambles to the two India Acts of 1852 and 1854[29]. If the island had been thought of as having become British territory, one would have expected the extended recitals to those acts to have made some mention of the fact. There is simply nothing that suggests or reveals an intention on the part of Britain to claim sovereign title to Pulau Batu Puteh. It is true that the task of construction of the lighthouse was carried out by the Singapore authorities. But that in itself, in the circumstances, did not manifest an intention to treat the island as British territory.

36. And so we reach the end of this review of the events of 1847 to 1851 — the period within which Singapore now invites the Court to hold that Britain manifested an intention to claim the island. This is, beyond a shadow of a doubt, simply not so. The elements of the task propounded by Singapore itself and which I read at the start of this speech are not satisfied.

37. There is *no* evidence of intention to acquire sovereignty.

38. It follows that there is *no* evidence of a *permanent* intention to do so.

39. It follows *further* that there is no evidence of any *overt* action to implement the quite clearly non-existent intention.

40. And finally, it follows also that there is *no* evidence that Britain made its *non-existent* intention manifest to other States.

41. The conclusion expressed by Singapore, for example in paragraph 5.91 of its Memorial, is simply unsustainable. Let me read that conclusion:

> "The entire episode involving the selection of Pedra Branca as a site for a lighthouse, the preparation for its construction, the persistent official visits, the ceremonial laying of the foundation stone and the final commission of the lighthouse, provides unequivocal evidence of the will of the British Crown to annex Pedra Branca."

The conclusion of this sentence can only be read as a *complete* fiction, a reflection of wishful thinking, the optimistic product of a highly imaginative approach. It cannot be accepted.

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[29]MM, Vol. 3, Anns. 84 and 85.

42. Towards the end of his speech Mr. Brownlie introduced an expression with which we have not previously been familiar in the pleadings of this case — the expression "public works". It was repeated several times, as if it mattered. If I understand him correctly, he equates the accumulation of "public works" with an indication of an intention on the part of Britain to acquire title to the territory. One can conveniently find these "public works" listed in paragraph 13 of his speech, ten items in all — choosing Pedra Branca as the site of the lighthouse, choosing the name of the light, planning of the construction work, funding of the construction work, visits of officials in the course of construction, logistical support provided by government vessels, protection provided by gunboats, provision of lighthouse equipment and tools, conclusion of the construction contract and, lastly, deciding on the specifications and estimates for the construction.

43. These are, of course, and obviously so, the steps that needed to be taken to proceed with the construction of the light. With the possible exception of the first two, they describe exactly what would have had to be done if it had been possible in those days to hire a private contracting firm to plan and undertake the whole work. However, the fact that they were done by the Government does not mean that individually or in total they manifested an intention to claim the underlying territory.

44. What Singapore does is to turn these items into a single process of evolution seemingly evincing a government intent to acquire title to the territory. But the conclusion thus drawn is an extensive — indeed, imaginative — extrapolation from a series of facts that taken at face value amount to a description of exactly what had to be done to build the lighthouse. Malaysia does not deny that Britain built the light. But Malaysia cannot find anything in this process which reflects a co-existing intention — a silent intention — on the part of Britain to assert title to the territory. The remarkable fact is that nowhere in the documentation of that period is a word to be found indicative of the possession of such an intention by Britain.

45. Nor did the internal Dutch document, followed subsequently by the posting of Dutch gunboats near the island, amount to, as they call it, a "recognition" of British title just because the island was spoken of as being within "British territory", their words or that is the word of the translation, an expression that is properly construed, as being within the British sphere of influence.

46. There are two additional points that I should make now, though a full answer to the Singapore case would require many more.

47. First, Singapore has frequently mentioned that the construction of the lighthouse was "funded" by the British Government. This is not correct. In a minute of 30 September 1846 the Governor noted, in relation to the cost of an iron lighthouse estimated to be rupees 30,000, that rupees 17,458 had already been subscribed. It was the subscription of the Hong Kong and other merchants and bankers that was the basis of the whole Horsburgh lighthouse initiative. The government initially provided the balance but only until such time as it could recoup its advances by the collection of lighthouse dues — a somewhat better security than has more recently been had by the providers of sub-prime mortgages.

48. Second point: Singapore has cited the decision of the New Zealand Court of Appeal in the *Pitcairn Island* case in support of a proposition that "a formal act of acquisition is not required. It is the intention of the Crown gathered from its own acts and surrounding acts that determines whether a territory has been acquired for English law purposes."[30] The observations of a court of such high authority cannot be lightly treated. But the important point to note is that the facts of the *Pitcairn Island* case are very different to those in the present case. And the general observation remains valid: that the intention of the Crown is to be gathered from its own acts and surrounding circumstances. But when, as you look at the facts that I have recited, I venture to submit that you will find it difficult to find the intention that Singapore now seeks to draw from those acts.

49. As I have just shown, the acts of the British Government and the surrounding circumstances as presented by Singapore simply *do not add up* to the evidence of an intention to claim the island. It is impossible to escape from the question: why did the Crown never say it was annexing the island, notwithstanding the many occasions on which it could have reasonably have done so? The answer is simple. The Crown never contemplated and therefore never intended such an acquisition.

Mr. President, that brings me to the end of this first contribution for the morning. I thank you very much.

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[30] *Ibid.*, p. 47.

The VICE-PRESIDENT, Acting President: I thank you, Sir Elihu, for your speech. Before giving the floor to the next speaker, I omitted to say that Judge *ad hoc* Rao, for reasons duly communicated to me, was unable to be here this morning, but he will join us after the break. You have the floor, Professor Schrijver.

Mr. SCHRIJVER:

MIDDLE ROCKS AND SOUTH LEDGE

1. Thank you, Mr. President, distinguished Members of the Court, on behalf of the Government of Malaysia I now have the privilege of addressing the claims of Singapore to sovereignty over the other two features, Middle Rocks and South Ledge.

2. As the Attorney-General of Malaysia has explained, it was as late as 1993 that Singapore suddenly, for the first time, advanced the proposition that its claim to sovereignty over Pulau Batu Puteh also extends to Middle Rocks and South Ledge[31]. Ever since, Singapore has asserted that PBP, Middle Rocks and South Ledge form a distinct group of maritime features and one single geographical group, with one common fate and even one common destiny of sovereignty[32]. The purpose of my presentation is to demonstrate that these assertions have no merit and that, on the contrary, sovereignty over the two features belongs to Malaysia.

Characteristics

3. Mr. President, allow me to say a few words on the characteristics of the two features. Middle Rocks and South Ledge are maritime features located at 0.6 and 2.2 nautical miles respectively from PBP and 8.0 and 7.9 nautical miles respectively from the Malaysian mainland at Tanjung Penyusoh, also known in our proceedings as Point Romania. All these features are within easy sailing distance for the Malaysian fishermen from the mainland. By contrast, Singapore's nearest coast is 25.6 nautical miles from Middle Rocks and 25 nautical miles from South Ledge. You can find the graphic on this also under tab 96 of your folder.

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[31]CR 2007/24, pp. 31-32, para. 14.

[32]See MS, pp.181-184, paras. 9.9-9.17; CMS, pp. 212-213, paras. 8.18-8.20; RS, pp. 265-272, paras. 10.6-10.17.

4. Middle Rocks consists of several rocks that are permanently above water and stand 0.6 to 1.2 m high. South Ledge is a low-tide elevation consisting of three features. The northernmost one is 2.1 m above water at low tide. The other two are always under water.

5. As I will demonstrate later, PBP, Middle Rocks and South Ledge are separated by navigational channels, they do not have similar structures and they do not stand on a single raised section of the sea-bed. However, what they have in common is that each of them is situated within Malaysian territorial waters.

Malaysia's original title over Middle Rocks and South Ledge

6. As to Malaysia's original title, Middle Rocks and South Ledge, lying close to the Johor coast, have been part of Johor since time immemorial. Located as they were in the strategic Straits of Singapore they belonged to the extensive, ancient Johor Sultanate, which we discussed over the past few days, and which extended to the lands on both sides of the Straits.

7. The conclusion of the 1824 Anglo-Dutch Treaty did not affect the status of Middle Rocks and South Ledge. They remained within the British sphere of influence as established by that Treaty. Nor were the two features included in Johor's cession of Singapore to the English East India Company of the same year. This cession in the Crawfurd Treaty was explicitly limited to a 10-geographical-mile limit from the mainland of Singapore.

8. It is of course true that, being relatively minor features, little attention was paid to Middle Rocks and South Ledge. But this, Mr. President, was because they were considered as belonging to a wider range of islands appertaining to Johor. As demonstrated in the Andaya expert opinion[33], as well as in two affidavits[34], traditional fishermen from Johor have been fishing the inshore waters around these features for as long as accounts and records show. Contrary to what Singapore may claim[35], before and after independence Johor and subsequently Malaysia also exercised sovereignty over them, obviously within the limits imposed by their character. This is evidenced by their inclusion within the outer limit of the Malaysian territorial waters drawn by

[33]Andaya opinion, RM, App. 1.

[34]CMM, Vol. 2, Anns. 5-6.

[35]CR 2007/23, p. 48, para 2; see also MS, paras. 9.18-9.33, pp. 184-190; CMS, pp. 209-211, paras. 8.12-8.17; RS, pp. 271-272, para. 10.16.

Commodore Thanabalasingam in 1968 on Admiralty Chart 2403 of 1936 and also by their inclusion in the area for which oil concessions were granted and by their designation of the waters under the Fisheries Act 1985[36].

9. On 14 February 1980, when Singapore claimed sovereignty over PBP for the first time, no reference was made to Middle Rocks and South Ledge. It was not until 6 February 1993 (13 years later), during consultations between Malaysia and Singapore over PBP, that Singapore claimed sovereignty over Middle Rocks and South Ledge for the first time. Evidently, Singapore's late claim with respect to these two features is primarily motivated by a desire to enhance the claim to Pulau Batu Puteh.

10. In order to substantiate its claim to Middle Rocks and South Ledge, Singapore advanced the argument that PBP, Middle Rocks and South Ledge form a single group of maritime features: during its first round Singapore referred to "the indivisible group"[37] or "the same island group"[38]. And our colleague Professor Pellet even went as far as to suggest that "the 'archipelago' formed by Pedra Branca and Middle Rocks constitute a unit and, therefore, South Ledge is within their joint territorial sea"[39]. Mr. President, the problem with this proposition is, however, that these three features cannot be described as a group, let alone as a collective unity with common characteristics. Consequently, for the moment, I do not consider it relevant to take the Court's time to delve into the issue of the concept of archipelagic waters as employed under the United Nations Law of the Sea Convention, in particular Article 46 on the use of terms. Let us await the second round to see where Singapore's imagination leads it.

11. In deciding whether a collection of islands, rocks and low-tide elevations form a single group, the chief criteria are: first, their spatial relationship; and second, the conviction of their original discoverers or subsequent users that they form a group, evidenced amongst other things, by the use of a single name for the group.

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[36]See judges' folder, tab 97.

[37]CR 2007/20, p. 18, para. 10.

[38]CR 2007/20, p. 22, para. 31.

[39]CR 2007/23, p. 52, para. 13.

12. During its first round, Singapore advanced a series of arguments underpinning its proposition that the fate of the three features is necessarily linked[40]. At the end of his pleadings on this topic, Professor Pellet summarized the following elements that purport to corroborate this conclusion. Professor Pellet mentioned:

— their proximity;

— the geomorphology;

— the toponomy;

— the location of the three features;

— the cartography;

— the common treatment in pilots and nautical instructions; and

— the impossibility of distinguishing the *effectivités* with respect to the three features[41].

I will address each of these arguments in turn.

The proximity argument

13. Singapore claims that Middle Rocks and South Ledge belong to it by virtue of their proximity to PBP: they are "minor maritime features lying within the territorial waters of Pedra Branca"[42].

14. It can be recalled that arguments similarly relying on proximity were advanced by Eritrea in the arbitration proceedings with Yemen. Basing itself on the so-called "leapfrogging" methods of determining the baseline of the territorial sea, Eritrea enunciated the rather ingenious theory that, since the territorial sea may extend from a baseline drawn to include any islands within the territorial sea, the baseline can therefore lawfully be extended to include an entire chain, or a group of islands, where there is no gap between the islands of more than 12 miles[43].

15. Responding to this theory in the (First Phase) Award, the Arbitral Tribunal noted that the difficulty with leapfrogging in that case was that it begged the very question at issue before the

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[40]CR 2007/23, p. 48, para. 2.

[41]CR 2007/23, p. 53, para. 16.

[42]MS, p. 180, para. 9.7.

[43]*Eritrea/Yemen*, Award of the Arbitral Tribunal in the first stage of the proceedings *(Territorial Sovereignty and Scope of the Dispute)*, 9 Oct. 1998, 114 *ILR* 1, p. 123, para. 473.

Tribunal: to which coastal State do these islands belong? The Tribunal stated that there is a strong presumption that islands within the coastal belt belong to the coastal State, unless there is a fully established case to the contrary (as, for example, in the case of the Channel Islands, *Minquiers and Ecrehos*). However, the Eritrea/Yemen Tribunal observed that:

> "there is no like presumption outside the coastal belt, where the ownership of the islands is plainly at issue. The ownership over adjacent islands undoubtedly generates a right to a corresponding territorial sea, but merely extending the territorial sea beyond the permitted coastal belt, cannot of itself generate sovereignty over islands so encompassed. And even if there were a presumption of coastal-state sovereignty over islands falling within the twelve-mile territorial sea of a coastal-belt island, it would be no more than a presumption, capable of being rebutted by evidence of a superior title."[44]

Similar reasoning, Mr. President, must apply to the present case. The mere extending of the territorial sea from PBP cannot in itself generate sovereignty over Middle Rocks and South Ledge.

16. It should also be recalled that this Court clearly pronounced in the recent *Nicaragua* v. *Honduras* Judgment that "proximity as such is not necessarily determinative of legal title" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment, 8 October 2007, p. 45, para. 161). The Court rejected Nicaragua's argument that the islands in dispute were closer to Edinburgh Cay, which belongs to Nicaragua. While not relying on adjacency in reaching its findings, this Court observed that, in any event, the islands in dispute were in fact closer to the coast of Honduras than to the coast of Nicaragua[45]. Similarly in the present case, PBP, Middle Rocks and South Ledge lie closer to the coast of Malaysia than to that of Singapore.

Geomorphology

17. Singapore also argues that the three features have the same geomorphological and geological characteristics[46]. However, Singapore fails to make clear whether such characteristics are restricted to the three features only or extend north to the Romania Islands and/or south to Pulau Bintan. Already in 1870 — the reference is in our pleadings — it was known that the three

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[44]*Ibidem*, pp. 123-124, para. 474.

[45]See *ibidem*, p. 46, para. 164.

[46]MS, p. 183, para. 9.16, pp. 195-196, paras. 9.46-9.47; CMS, pp. 203-205, paras. 8.6-8.7; RS, p. 270, para. 10.13.

features were separated by navigational channels and did not stand on one single-raised section of the sea-bed[47]. For that matter, Singapore's claim that the rock type of the three features is more or less the same[48] — Mr. President, that does not say very much. The same rock type can be found in a number of islands, stretching from the coast of Johor across the Straits to Pulau Bintan in Indonesia. One thing is certain: geologically, the three features do not share such characteristics with the island of Singapore. However, Johor does.

Toponomy, single name

18. As to toponomy, in its assertions, Singapore draws attention to the location of these features between the Middle and the South Channels and the description of their names[49]. But the fact that South Ledge is south of PBP and Middle Rocks is between PBP and South Ledge, as you can now see on the screen, that does not in itself justify the view that these features should be identified as a group. You will recall that Professor Koh could not show you the three features in one graphic, because South Ledge was outside, as he said, the photograph's frame[50]. And the uncomfortable fact for Singapore remains indeed that the three features, with one exception, have never been named as a group. The very fact that the features are proximate to one another does not mean that they form part of a single group.

Location and the dependency argument

19. In its Memorial, Singapore argues that Middle Rocks and South Ledge are both "mere dependencies of Pedra Branca"[51]. Singapore's position is that "[w]hoever owns Pedra Branca owns Middle Rocks and South Ledge, which are dependencies of the island of Pedra Branca and form with the latter a single group of maritime features"[52]. In support of its position, Singapore heavily relies on the *El Salvador/Honduras* case, where a Chamber of this Court treated the smaller island of Meanguerita as a dependency of the larger island of Meanguera, on the basis of the

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[47]See CMM, p. 78, para. 154.

[48]MS, p. 183, para. 9.16.

[49]CR 2007/23, p. 53, para. 16; CMS, p. 208, para. 8.9 *(d)*.

[50]CR 2007/20, p. 18, para. 9.

[51]MS, p. 180, para. 9.8, and p. 198, para. 9.52 *(a)*.

[52]MS, p. 180, para. 9.7. See also CR 2007/20, p. 18, para. 10.

former's smaller size, the proximity to the larger island, and the fact that it was uninhabited (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening*), *Judgment, I.C.J. Reports 1992*, p. 570, para. 356). However, the analogy is misguided. Singapore has overlooked an important aspect of that case — which the Chamber did not fail to mention — namely that:

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

As evident from the wording of the Special Agreement in this present case, the Court has been requested to pronounce on the sovereignty of PBP, Middle Rocks and South Ledge respectively, and not on the sovereignty of the three features as a unit. This is also in contrast with the *Minquiers and Ecrehos* case, where the Court was requested — and I quote from the Agreement — "to decide in general to which Party sovereignty over each group as a whole belongs, without determining in detail the facts relating to the particular units of which the groups consist" (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 53). Mr. President, the Special Agreement in the present case requests the Court to determine the sovereignty over each of the three features separately. And this is reflected in the use of "belongs", the single form, and not "belong", the plural form.

Navigation

20. With respect to navigation, Singapore contends that PBP, Middle Rocks and South Ledge are not separated by navigable channels[53]. This is simply incorrect[54].

21. In reality, Pulau Batu Puteh and Middle Rocks are two separate groups of rocks divided by a navigable channel 970 m, that is 0.53 nautical miles, wide, and at least 10.1 m deep. Ships with a draft of about 7.0 m can navigate between Pulau Batu Puteh and Middle Rocks. Between South Ledge and Middle Rocks there is an expanse of water of about 3,000 m wide, that is 1.6 nautical miles, and a depth of generally more than 20 m. There is a patch of shallower water

[53]CR 2007/23, pp. 49-50, paras. 6-8; RS, p. 270, para. 10.13; CMS, pp. 205-206, para. 8.8.

[54]See report of Captain (rtd.) Goh Siew Chong, RM, Vol. 1, App. III.

with a depth of 18.3 m about 1,000 m north of South Ledge[55]. Avoiding this patch, however, ships with a draft of 17 m can easily navigate between Middle Rocks and South Ledge. Singapore's claim that the sea-bed features between Pulau Batu Puteh and Middle Rocks, with a deepest point of 32 m, and between Middle Rocks and South Ledge, with a deepest point of 36 m, are "extremely shallow" is misleading. Any experienced captain will confirm that depths of 32 to 36 m in coastal waters are considered quite deep.

22. And it is not correct, as Professor Pellet suggested, that merely "small intrepid boats can venture there at their risk and peril"[56]. And he stated that for that reason there is "only a limited interest for navigation"[57]. However, the real reason for the limited navigation interest between the two features is that the route through these channels is considerably longer than the usual route through the Middle Channel. Moreover, the fact that the channels can accommodate ships with a draft up to 17 m means that they are not only open to Professor Pellet's *petits bateaux*[58].

23. Singapore suggests that the fact that the main navigational route in the area, Middle Channel, is broader and deeper than the channels between PBP, Middle Rocks and South Ledge somehow supports the proposition that the three features are not distinct[59]. But such a conclusion does not follow at all. The depth and breadth of the Middle Channel is irrelevant to the distinct character of the three features. As Captain Goh states in his evidence, what matters is whether the channels between PBP, Middle Rocks and South Ledge are navigable, which they are. They are able to support traffic by vessels of a significant draft.

Cartography

24. As the historical record presented in Malaysia's written pleadings shows, no evidence has been found in legal instruments, on charts or in documents that the three features have ever been referred to as a group. Nor have they been given a collective name such as the "Pedra Branca

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[55]See judges' folders, tab 98.

[56]CR 2007/23, p. 50, para. 8.

[57]*Ibidem.*

[58]*Ibidem.*

[59]CMS, p. 204, para. 8.7 *(b).*

Rocks" or the "Horsburgh Rocks", with one exception of Pedra Branca and Middle Rocks being referred to colloquially as the "Horsburgh Group" in 1958[60].

25. The fact that this was not done in the present case testifies to the consistent view of mariners and others that the features were separate and distinct.

Pilots and nautical instructions

26. All three features have been long known and during the days of sail they were identified as a danger to shipping which should be avoided by sailing well to the north or to the south. Once engine-driven vessels started plying these waters, they were able to navigate between the features, which were small and separated by channels of varying but sufficient depths[61].

27. Singapore argued that "Malaysia cannot produce the least pilot or the least nautical instruction showing the existence of a navigable channel in this location: it only exists in the imagination — somewhat biased imagination — of Captain Goh"[62], of Singapore. However, Mr. President, among other documents, Malaysia would like to refer the Court to the Pilot Instructions for Singapore Strait North Eastern approach which states "passage between Middle Rocks and South Ledge is possible at LW (low water) provided both are plainly visible". Mr. President, if possible at low water, passage is easy at high water[63]. The document concerned can be found at tab 99 of your folder.

28. In sum, there is no doubt that the three features are separated by navigable channels. Indeed, all the available evidence — geomorphological, hydrographic, navigational, historical — all indicates that these features are properly regarded as distinct maritime features rather than as constituent parts of one single island group.

29. Apart from this list of Professor Pellet, I would also like to address a few remaining arguments by Singapore, put forward in its written proceedings.

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[60]See CMS, p. 207, para. 8.9 *(b)*; RS, p. 268, para. 10.11 *(b)*.

[61]See MM, para. 293.

[62]CR 2007/23, p. 50, para. 8.

[63]British Admiralty Sailing Directions, Malacca Strait and West Coast of Sumatra Pilot (NP 44, 6th ed., 1987, p. 217). See judges' folder, tab 99.

No separate appropriation argument

30. That is, first of all, the no separate appropriation argument. In its written pleadings, Singapore argues that Middle Rocks and South Ledge have not been "independently appropriated by any state"[64]. The facts are, however, different. Middle Rocks and South Ledge have always been under the sovereignty of Johor and subsequently Malaysia. Britain never advanced any claim and not even a request with respect to these two features. In the entire file of correspondence during the period 1844-1851, so meticulously analysed by my colleagues Kohen and Sir Eli, not one single reference to and not one single sign of interest in Middle Rocks and South Ledge can be found. Small wonder that Singapore is silent on this point.

31. Mr President, when the Arbitral Tribunal in the *Beagle Channel* case considered whether there was any ground upon which it could and should divide a group of islands, it observed:

> "Since its terms of reference require it to decide in accordance with international law, a division would have to be based on a difference of a juridical character between the situation of one of the islands as compared with that of the other two." [65]

In the present case, it is an undisputed fact that the British acted only with respect to the particular location of PBP by requesting a licence to construct and operate a lighthouse on the island. The fact that the formal request by the British and the ensuing permission from the Sultan and the Temenggong related to PBP — and to PBP only! — is clearly a "difference of a juridical character", to paraphrase the *Beagle Channel* case, that requires from the Court a separate treatment of PBP, Middle Rocks and South Ledge.

The common destiny of sovereignty argument

32. As to the other argument put forward by Singapore relating to a common destiny of sovereignty: Well, relying on its erroneous assumption that the three features constitute a group, Singapore relies on the principle pursuant to which the islands other than the main one should follow the fate of the latter. In Singapore's view, "sovereignty over both Middle Rocks and South Ledge belongs to Singapore by virtue of Singapore's sovereignty over Pedra Branca"[66].

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[64]MS, p. 180, para. 9.7.

[65]*Beagle Channel Arbitration (Argentina* v. *Chile)*, Award, 18 February 1977, 52 *ILR* 97, p. 169, para. 83.

[66]CR 2007/20, p. 23, para. 31.

33. Mr. President, this could be interpreted as an invitation to apply in international law the adage "the accessory follows the principal". But it is doubtful whether a principle of this kind exists in international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001;* joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma, p. 166, paras. 61-62).

34. As the single Arbitrator King Victor Emanuel of Italy observed in the 1904 *British Guiana* boundary case between Brazil and Great Britain,

> "the effective possession of a part of a region . . . cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*"[67].

35. As the preceding paragraphs demonstrated, the three features cannot be deemed *de facto* a single organic whole, precisely because of their physical configuration, which characterizes them as separate maritime features.

36. Even if the Court were nevertheless inclined to find that the three islands constitute a group, this does not necessarily imply that, because of the fact that PBP may belong to Singapore, Middle Rocks and South Ledge should *ipso facto* fall under Singapore's sovereignty as well. The sovereignty over the islands must, in any event, be considered separately. As observed by the Arbitral Tribunal in the *Eritrea/Yemen* Award of 1998 in the First Phase:

> "It would be wrong to assume that they [the islands] must together go to one Party or the other. In this extent the Tribunal rejects the Yemen theory that all the islands in the group must in principle share a common destiny of sovereignty."[68]

37. At the end of the day, arguments based on the concept of "common destiny of sovereignty" were also not accepted by this Court in the *Qatar* v. *Bahrain* case, as the argument of Bahrain that it had sovereignty over the island of Janan as part of the Hawar Islands was clearly rejected (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, pp. 90-91, paras. 164-165).

38. If a single group of maritime features were to be at all distinguished, Mr. President, Members of the Court, it would constitute Middle Rocks and South Ledge. South Ledge lies

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[67] *Award of His Majesty the King of Italy with regard to the Boundary between the Colony of British Guiana and the United States of Brazil*, Rome, 6 June 1904, XI United Nations, *RIAA* 11, pp. 21-22.

[68] *Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage of the Proceedings (*Territorial Sovereignty and Scope of the Dispute*), 9 October 1998, 114 *ILR* 1, p. 129, para. 491.

1.7 nautical miles from Middle Rocks and 2.2 nautical miles from PBP. This means that the low-tide elevation called South Ledge would attach to Middle Rocks rather than to PBP, for the simple reason that it is located within the territorial sea appertaining to Middle Rocks. As this Court observed in the *Qatar* v. *Bahrain* case in 2001: "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself (*ibid.*, p. 101, para. 204).

Conclusion

39. In conclusion, Mr. President, Members of the Court. We are dealing here with a claim that suddenly came to the fore more than a dozen years after the critical date.

40. However one looks at PBP, Middle Rocks and South Ledge — whether through the prisms of geology, geomorphology, hydrography, navigation or international law —, they are and remain three separate and distinct maritime features. Toponomy, the proximity of the features one to another, and other dimensions that Professor Pellet discussed cannot alter this assessment. Singapore cannot assert sovereignty over Middle Rocks and South Ledge by simply tacking on in passing an addendum to its 1980 claim to sovereignty over PBP. It must demonstrate sovereignty in respect of each feature individually. This it has manifestly failed to do.

41. Mr President, Members of the Court, thank you for your kind attention on the analysis of the legal situation with respect to these two features. Could I now ask you to call upon my colleague Sir Elihu Lauterpacht to continue Malaysia's presentation. Thank you.

The VICE-PRESIDENT, Acting President: I thank you, Professor Schrijver, for your speech and call on Sir Elihu Lauterpacht to take the floor.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court, I am sorry that the circumstances of the case have led to my being imposed on you for a second time today. But you will, I am sure, be relieved to hear that you will not hear from me further this week.

BRITISH PRACTICE CONCERNING PBP

The nature of Britain's actions as lighthouse operators

1. The task to which I now turn is to respond to the Singapore arguments regarding the effect of the administration of the lighthouse by Britain during the period from the commencement of the operations of the lighthouse in 1851 until 1965 when Singapore became independent. I do so with the greatest reluctance. And that is not because I do not enjoy addressing you, it is the firm conviction of Malaysia that once it has been shown that Pulau Batu Puteh was not *terra nullius* in 1847 and belonged to Johor, Britain's conduct thereafter cannot properly be taken into account. It should therefore not be necessary to examine that conduct. I apologize for having repeated this quite fundamental point so many times. There are, however, certain passages in Mr. Bundy's speech on 8 November that suggest he may not share this view[69]. On the one hand, he quite properly acknowledges that "an argument . . . predicated on the notion of prescription . . . has no role to play in the present case"[70]. But on the other hand, in the neighbouring paragraphs Mr. Bundy indulges in some verbal gymnastics that may perhaps be intended to give the impression that, notwithstanding the exclusion of prescription, there is still some way in which the Court can override Johor's title on the basis of Britain's post-1851 conduct. This is what he does: he starts from a hint at the opening of paragraph 67 of the *compte rendu* that the title to Pulau Batu Puteh might somehow be indeterminate in 1851. He then goes on to say: "even if that situation existed, title today would still vest in Singapore by virtue of its subsequent conduct on the island . . . In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration." And then he continues,

> "In such a case the Court would be faced by the same kind of situation it confronted in the *Minquiers and Ecrehos* case, the *Indonesia/Malaysia* case, the recent *Nicaragua* v. *Honduras* case, . . . the *Eritrea/Yemen* case . . . where the issue of sovereignty was decided on the basis of which party could show the better title based on sovereign acts undertaken on the disputed territory *à titre de souverain*."

The present case, however, is not in the same category as those cases. In none of them was the starting-point of the examination of the conduct of the parties a pre-existing determination (as Malaysia contends there must be in this case) that one of them had a clear title and the other did not

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[69]CR 2007/22, pp. 28-29.

[70]*Ibid*., p. 29, para. 69.

rely on prescription. The *Minquiers* case was a straightforward dispute as to which of the two parties had achieved title, neither of them being acknowledged to have had a prior title; the same was true of the other cases mentioned by Mr. Bundy. Here the position is quite different; the starting-point of Singapore's post 1851 efforts must be the acceptance of Johor's prior title. Singapore may disagree, but this is emphatically not a case about competing *effectivités* — nor one in which Johor's title to the island, if found to exist in 1847, "might somehow be indeterminate in 1851". So I repeat — I apologize once more — that the discussion into which I shall now enter is strictly speaking irrelevant.

2. Singapore contends that during this period Britain performed acts on and in relation to Pulau Batu Puteh which confirmed and maintained the title already established by Britain by its activities during the years 1847 to 1851.

3. Once again it has to be said by way of introduction that nothing that happened after 1851 could confer title on Britain if it had not acquired title by 1851. Singapore acknowledges this. Accordingly, it is not strictly necessary to return to this topic again. But by reason of Singapore's repeated emphasis on these facts, Malaysia believes that it should address at least some of them. The evidence that I will now rehearse will demonstrate that Britain's activity in relation to the Horsburgh lighthouse and Pulau Batu Puteh after 1851 was purely operational; it did not reflect any intention to acquire sovereignty nor was it effective to do so. It was just what one would expect from a responsible lighthouse operator.

4. I will focus on a number of specific areas. The first will be the British practice in the nineteenth and twentieth centuries concerning the establishment and administration of lighthouses generally. This demonstrates that Britain established navigational aids on the territory of other States without any intention thereby of acquiring sovereignty over the locations concerned. This will lead me, secondly, to recall briefly the jurisprudence on lighthouses. This fully accords with State practice and confirms that the administration of lighthouses is not a determinant of sovereignty. I will then turn, thirdly, to the Straits Lights system in the Straits of Singapore and Malacca as another example of British practice involving only administration and not sovereignty. This will involve a consideration of Britain's conduct specifically related to the Horsburgh lighthouse, with a view to demonstrating that the British acts were no more than administrative or

operational in nature. Lastly, I shall revert to the correspondence of 1953 as confirming that Britain did not consider that Pulau Batu Puteh was subject to its sovereignty.

1. British practice in the nineteenth century regarding the administration of overseas lighthouses[71]

5. So I start with British practice in the nineteenth century regarding the administration of lighthouses outside British territory. There is a considerable body of State practice demonstrating that there is a distinction between sovereignty over territory and the routine administration of a lighthouse. This distinction was a prominent feature of British practice from the mid-nineteenth to the mid-twentieth centuries and even continues today. British practice in the construction and administration of lighthouses around the world never constituted, and was never considered by Britain as amounting to, a taking of lawful possession of territory on which the lighthouse was situated for the purpose of establishing sovereignty.

6. In this connection, it is helpful to appreciate the motivation of Britain when establishing navigational lights. The key objective was to secure the safety of navigation for the promotion of Britain's commercial and imperial activities. Britain was not concerned to acquire tiny islets, rocks or other portions of territory on which the lighthouses might be constructed. Malaysia's Counter-Memorial explores British practice in depth, so today I will only summarize it. Of the many examples of British practice, I will mention only one of the most significant, in what is now simply called the Gulf[72]. In 1911 Britain took control of the aids to navigation in the Gulf and the Government of India undertook the task of administering these lights. The British and Indian Governments shared the costs of administering them. Together they established important lights in the Gulf including those on Tumb Island, on Quoin or Didamar Island, which is on the territory of the Sultan of Muscat, now Oman, as well as the Muscat Beacon, which is off the coast of Oman[73], and you can see them all on the screen in front of you. By the late 1940s, there were 31 aids to navigation, some of which were constructed by the British or Indian Governments with the permission of local rulers, while in other cases no such permission seems to have been given. In

[71]Generally — CMM, Chap. 6

[72]CMM, paras. 216-217; 221-227.

[73]See judges' folder, tab 100.

1947 control of the administration and financing of the Gulf lights was transferred to the British Government alone. In 1950 responsibility for the lights was transferred to a non-profit company incorporated under English law. In 1966 its name was changed to the Middle East Navigation Aids Service (MENAS). MENAS continues to administer lighthouses and other aids to navigation on the territories of Kuwait, the United Arab Emirates and Qatar. But there is no suggestion of acquisition of British sovereignty in those places.

7. When the Omani Government indicated that it wished to assume control over the aids to navigation situated on its territory, there was no doubt that it was entitled to do so, even though those lights had been, in many cases, constructed, owned and operated by MENAS. Ownership and control of the lights were transferred to Oman and MENAS was compensated.

8. A further example of Britain administering a lighthouse on the territory of another State is provided by Britain's responsibility for the administration and maintenance of Sombrero lighthouse in Anguilla between 1984 to 2001[74].

9. Britain is not the only country to have administered lighthouses without claiming sovereignty. The Cape Spartel lighthouse was established by a treaty of 1865 which set up an International Commission to administer the lighthouse on the territory of the Sultan of Morocco. Likewise, the Republic of Ireland, acting through the Commissioners of Irish Lights, the statutory lighthouse authority of the Republic of Ireland, administers aids to navigation in Northern Ireland, which remains part of the United Kingdom[75].

10. Singapore has sought to distinguish examples such as these from Pulau Batu Puteh because they involved the grant of permission by the local sovereign to the administering authority. As you have heard from Professor Kohen, such permission was granted in the case of Pulau Batu Puteh by the Sultan and Temunggong of Johor in 1844. As these examples illustrate, what Britain did in respect of Pulau Batu Puteh, that is constructing and administering a lighthouse with the permission of the local rulers, was completely in line with its practice concerning lighthouses

[74]CMM, para. 219. See further, CMM, Vol 2, Ann. 1, para. 19. See reference to Gibraltar, paras. 20-22.

[75]CMM, para. 218. This is an example of aids to navigation situated in one State being administered by the authority of another State.

elsewhere. British concern was with maritime safety and commerce, not with the acquisition of sovereignty.

Mr. President, at your convenience I could pause.

The VICE-PRESIDENT, Acting President: I think this might be a convenient moment to have a short break. We will resume after the break.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

The Court adjourned from 11.20 a.m. to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. Would you continue please, Sir Elihu.

Sir Elihu LAUTERPACHT:

2. Jurisprudence on administration of navigational aids[76]

11. Mr. President, Members of the Court, at this point, I turn to recall the various references by this Court to the question of lighthouses.

12. The judgments of the Permanent Court in the *Lighthouses case between France and Greece* and the *Lighthouses in Crete and Samos* can only be read as affirming the view that administration of lighthouses has no bearing on sovereignty over the underlying territory[77]. Likewise, in the *Minquiers and Ecrehos* case[78] the principle that underlay the Court's view was that conduct in the administration of a lighthouse could not, without more, be taken as evidence of sovereignty. This principle was echoed by the Arbitral Tribunal in the *Eritrea/Yemen* case[79].

13. In order to counter this trend in the jurisprudence Singapore advances the *Qatar* v. *Bahrain* case where the Court has observed that the construction of navigational aids can be legally relevant in the case of very small islands. The Court's conclusion does not contradict its previous jurisprudence. The construction of aids to navigation may be relevant to questions of sovereignty

[76]CMM, paras. 228-237.

[77]CMM, para. 228.

[78]*I.C.J. Reports 1953*, p. 47.

[79]40 *ILM* 900 (2001), paras. 221, 226, 328, 510.

in cases where there is no other basis of title and the construction and administration of navigation aids evidence the intention of the State concerned to act *à titre de souverain*. This conclusion is also confirmed by the *Indonesia/Malaysia* case. Both Parties advanced *effectivités* to support their claims. As regards Malaysia's reliance on its conduct in respect of the maintenance of the lighthouses, the Court recalled the passage in the judgment in the *Qatar* v. *Bahrain* case, which was prefaced with the observation that "the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority"[80]. The Court expressly relied on its reasoning in the *Minquiers and Ecrehos* case.

14. These judicial observations are consistent with State — and particularly British — practice which I have just mentioned. The general rule is that conduct associated with the administration of a lighthouse does not, without more, serve to establish sovereignty. As I have already said, such conduct will only be relevant if it discloses an intention to acquire title, not simply ownership of the lighthouse and its associated facilities, but specifically to the territory on which the lighthouse is located. Such an intention will not itself be sufficient in circumstances in which title to the territory already lies with another State which has shown no intention of abandoning it.

3. Straits Lights System[81]

15. So, I must now recall the Straits Lights System which included the Horsburgh lighthouse as a further indication that Singapore's role in relation to the Horsburgh light was purely administrative.

16. Britain established the Straits Lights which developed into a system of lighthouses and navigational aids in the Straits of Singapore and Malacca in the period 1850 to 1946. By 1912, 13 lighthouses had been established as part of this system[82], including the Horsburgh light. Here is a map on the screen, which appears at tab 6 of your folders, which displays the Straits Lights. By 1938 the number of lighthouses, light beacons, light buoys and light ships had reached 65[83].

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[80]Judgment of 17 December 2002, para. 147.

[81]CMM, Chap. 7.

[82]CMM, paras. 298, 322.

[83]CMM, para. 323.

17. Management of the Straits Lights System was vested in the Governor of the Straits Settlements in Singapore. Like Horsburgh light, the other lights comprising the Straits Lights did not all fall within the territory of the Straits Settlements or of Singapore. Examples of this were Cape Rachado lighthouse situated on the territory of Malacca, the Pulau Pisang lighthouse situated on the territory of Johor and the Screw Pile lighthouse, later known as One Fathom Bank lighthouse, situated on a bank in the Straits of Malacca then in the high seas[84]. To operate the Straits Lights System, each lighthouse was assigned to a "station" responsible for its operations. The system as a whole was run from Singapore. Although Singapore was assigned a number of lights, in respect of only some of these did Britain have sovereignty over the territory on which the lighthouses were constructed. For the others it did not[85].

18. Malaysia's pleadings provide a comprehensive analysis of the relevant pieces of legislation that relate to the Straits Lights[86] and I will today only provide a brief overview. The Straits Lights System was initiated with the 1852 Indian Act which defrayed the costs of the Horsburgh light. The preamble of that Act provides that "it may hereafter be deemed expedient to establish other Lights or beacons in the Straits of Malacca, or elsewhere near thereto . . ."[87].

19. The 1852 Act was replaced by the 1854 Act which made provision for defraying the costs not only of Horsburgh but also of "a Floating Light established in the Straits of Malacca . . . and for the establishment and maintenance of such further Lights in or near the said Straits as may be deemed expedient". It declared that these lights "shall be called 'The Straits Lights'"[88].

20. The Straits Lights System was referred to as such in legislation and documents between 1854 and 1946. In 1912 an Ordinance, which repealed in part the 1854 Act, clearly affirmed the existence of the Straits Lights System and abolished the levying of light tolls on vessels putting into Singapore harbour[89]. The motivation for this latter change was that the Straits Settlements Legislative Council considered the burden of the light tolls were making the British ports in the

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[84]CMM, para. 320.

[85]CMM, para. 324.

[86]CMM, paras. 306-324.

[87]MM Ann. 84; CMM, para. 306.

[88]MM, Ann. 85; CMM, para. 307.

[89]MM, Ann. 90; CMM, paras. 309-312.

region less competitive than the rival Dutch ports. The now-increased costs of maintaining the system were to be shared by the Colony of Singapore and the Governments of the Federated Malay States. The latter contributed a disproportionately large amount to these costs. When explaining the need for the contribution, the Chief Secretary of the Federal Council of the Federated Malay States stated that the Colonial Government had the expertise in administering and maintaining the lights and it was best that the Federation of Malaya contributed only financially to the lights system despite the fact that the lights fell within its territory[90]. The clear distinction — the clear distinction — between sovereignty and administration was implicit in his reasoning.

21. A further 1915 Straits Settlements Ordinance provided for the collection of lights dues by the Straits Settlements for lights that were indisputably located on non-Straits Settlements territory[91].

22. In 1946, with the dissolution of the Straits Settlements and the establishment of Singapore as a separate colony, the Straits Lights System ceased to be administered by the Straits Settlements. The operation of each lighthouse continued to rest with the station that had previously been responsible for it. At no point did these and subsequent developments alter the status of the territory on which the lights in question were based. After 1946 both Singapore and the Malayan Union reintroduced the levying of light dues as the means of funding the maintenance of lights and both established Light Dues Boards[92].

23. It was commonly acknowledged, not simply by the Federated Malay States but also by the British representatives, that the maintenance and administration of a lighthouse by the Colony of the Straits Settlements had no bearing on the sovereignty of the territory on which the lighthouse was situated. Rather, this administration was rooted in the Straits Settlements' expertise.

24. The arrangements under the Straits Lights System proceeded without regard to questions of sovereignty over the territory on which the various lighthouses that formed part of the Straits Lights System were constructed. The fact that a lighthouse was managed by the Governor of the Straits Settlements as part of the Straits Lights System had *no* bearing on the sovereignty over the

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[90]CMM, paras. 313-314.

[91]CMM, para. 318.

[92]CMM, para. 319.

territory on which the lighthouse was situated; *nor* were such lighthouses administered as part of the territory of Singapore. Practice in the establishment of both the Straits Lights System and other lighthouses around the world confirms that the construction and administration of lighthouses neither constituted a taking of possession of the underlying territory for purposes of sovereignty nor, as such, a display of State sovereignty.

4. Pulau Pisang[93]

25. The severability of the administration of a lighthouse and the question of sovereignty over the underlying terrain is well illustrated by the position of the Pulau Pisang lighthouse. This is administered by Singapore but is indisputably located on Malaysia's territory. Singapore does not question Malaysia's sovereignty over Pulau Pisang.

26. It is an island located 7 nautical miles off the west coast of Johor in the Straits of Malacca. The Straits Lights System provided the framework for Singapore's role as administrator of the lighthouse. It was built as part of the Straits Lights System in 1885 on a plot of land granted by Johor to the Government of the Straits Settlements. This grant was confirmed by an indenture — that is a private law instrument — of 6 October 1900 which was required to delineate the area of the island which was the subject of the grant and to distinguish it from the remaining area of the island. Pulau Batu Puteh did not require such an indenture because its small size obviated any need to distinguish between the area made available for the lighthouse and any other area on the island.

27. The similarities between Pulau Pisang and Horsburgh lighthouses are striking:

— both were part of the Straits Lights system;

— both were administered by the Singapore "station" as part of the System, although they were not situated in Singapore territory;

— both were constructed by the British on land that was part of Johor pursuant to permission granted by Johor for the construction of the lighthouse.

28. Singapore attempts to mask these similarities by stating that each island had a different legal and factual history and was subject to entirely different legal régimes. Malaysia is not

[93]CMM, paras. 304-305. RM, paras. 319-323.

claiming that the situations were identical. But Singapore cannot disguise the fact that in all relevant respects the situations are the same and that there are two lighthouses administered by the Singapore Port Authority which are both on Johor territory. This illustrates clearly the distinction between sovereignty over an area and the administration of a lighthouse.

29. The physical differences between the Pulau Pisang light and the Horsburgh light should be appreciated[94]. On the screen is a map of Pulau Pisang. Superimposed on it, *on the same scale*, is a map of Pulau Batu Puteh: you can hardly see it, it is right there in the middle. As can immediately be seen, there is *no* comparison between them. Pulau Batu Puteh is to Pulau Pisang as the nail of a little finger is to the hand as a whole.

30. And that is the reason why the flying of the flag at Pulau Pisang was so different from the flying of the flag at Pulau Batu Puteh. The flying of the flag at Pulau Pisang was seen by local people as an assertion of authority over a substantial piece of Johor territory and they wanted it removed. The flying of the flag over the Horsburgh light was no more than an indication that the lighthouse was operated by Britain. It was entirely in keeping with the flying of the Malaysian flag over the Malaysian naval base at Woodlands Base in Singapore and with the flying of the British flag over the leased area of Hong Kong.

5. Operational nature of Britain's actions in relation to Pulau Batu Puteh

31. I turn next, Mr. President, to emphasize further the point that Britain's actions in relation to Pulau Batu Puteh are all connected to the administration of the lighthouse and do not demonstrate any entitlement to sovereignty.

No British legislation incorporated Pulau Batu Puteh into the Colony of the Straits Settlements

32. Singapore relies heavily on the argument that both it, and Britain, enacted a series of laws relating to Pulau Batu Puteh, including measures to defray the costs of establishing and maintaining Horsburgh light, and that such legislation is clearly a sovereign act undertaken *à titre de souverain*. I will only address the legislation passed prior to 1963. Professor Crawford will presently deal with the legislation passed subsequently by Singapore.

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[94]See judges' folder, tab 101.

33. I should mention first that no item of legislation ever refers to Pulau Batu Puteh in isolation. A majority of the references are to Horsburgh lighthouse or, if Pulau Batu Puteh is mentioned, it is associated with the Horsburgh lighthouse or, alternatively, it appears in the expression "the lighthouse on Pulau Batu Puteh".

34. Singapore relies on the 1852 and 1854 Acts passed by the Governor-General of India in Council concerning the levying and collection of light dues. The 1852 Act states:

> "The Light-house *on Pedra Branca* aforesaid shall be called 'The Horsburgh Light' and the said Light-House, and the appurtenances thereunto belonging or occupied for the purposes thereof, and all fixtures, apparatus, and furniture belonging thereto, shall become the property of, and absolutely vest in, the East India Company and their successors."[95] (Emphasis added.)

The 1854 Act contains an almost identical provision. The language of the section is clear. It plainly focuses on ownership and control of the lighthouse and its appurtenances as a matter of private law rather than on sovereignty over the island as a matter of international law. Singapore claims that Pulau Batu Puteh itself was the subject of the measures in question. Pulau Batu Puteh is obviously not the subject, the subject of the sentence is clear: "the Lighthouse on Pedra Branca"[96].

35. Singapore claims that this is a straightforward example of territorial legislation expressly concerned with Pedra Branca and that the Government of India assumed the power to legislate on the status of Horsburgh lighthouse precisely because it considered Pulau Batu Puteh to be British territory. One may ask: if this was the assumption of the Government of India, why was it not expressed? This is especially so if, as Singapore argues, the Government believes that the island, having been a *terra nullius*, had recently been acquired. But in truth, as I explained on Tuesday, the legal basis of the 1852 Act is not territorial sovereignty, but the power to exercise jurisdiction extra-territorially in foreign places recognized in the 1843 Foreign Jurisdiction Act.

36. Mr. Bundy has addressed the subject of the Straits Lights System. The 1852 and 1854 Acts were not assertions of legislative authority over Pulau Batu Puteh as such. They were, rather, legislation essential to the operation of the Straits Lights as a whole. It was also a common feature of British practice not to retain title to lighthouses. In effect, Section 1 of the 1852 Act was

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[95]MM, Ann. 84; CMM, para. 348.

[96]CMM, para. 348.

simply an indication that the Governments of Singapore and India would not in the future claim title to the lighthouse. Moreover, as I have already explained, the 1852 and 1854 Acts were adopted in the exercise of the power acknowledged by the United Kingdom Parliament in 1843 to legislate extraterritorially.

37. The significance of the 1843 Act cannot be disregarded or underestimated. Its existence is the complete answer to the Singapore contention that the subsequent statutes were adopted in the exercise of territorial sovereignty. The 1843 Act provided in Section I quite clearly that

> "it shall be lawful for Her Majesty to . . . exercise . . . any Power of Jurisdiction which Her Majesty now hath or may at any time hereafter have within any country or place out of Her Majesty's Dominions, in the same and as ample a manner as if Her Majesty had acquired such Power of Jurisdiction by the Cession or Conquest of the Territory"[97].

In other words, this provision recognized that statutes might be enacted by Britain, or under the authority of Britain, that might have effect in territory over which Britain was not sovereign and so could not be regarded as an assertion of sovereignty over that territory.

38. Singapore then prays in aid the legislation regarding the light dues[98]. As to these, it should be noted that the words "navigational aids in the waters of the colony" that appear in Section 6 of the 1957 Ordinance were replaced by Section 4 of the 1958 Ordinance by the words "lighthouses, buoys, beacons and other navigational aids in Singapore including those at Pedra Branca (Horsburgh) and Pulau Pisang". Why this amendment? It must surely indicate that Pedra Branca (Horsburgh) and Pulau Pisang, although administered by Singapore, did not fall within the "waters of the Colony" of Singapore. If they did, and if they were thought of as doing so, there would have been no reason to make such an amendment[99].

Administration only of the lighthouse

39. Of course, Britain performed a number of activities that related to the operation of the Horsburgh lighthouse. It provided maintenance and improvements to the light, issued Notices to Mariners, exercised jurisdiction over the lighthouse personnel, collected meteorological

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[97]See judges' folder, tab 37.

[98]CMM, paras. 6.52-6.58.

[99]CMM, para. 352.

information and flew the British marine ensign. Singapore says that these acts were the "exercise of State functions on Pedra Branca". However, none of them can properly be classified as conduct *à titre de souverain*. These acts were *specific* to the lighthouse and were carried out as part of Britain's role as operator of the lighthouse and in accordance with its role in the Straits Lights System. Experts from Trinity House[100] — which, as you know, is a British organization with worldwide responsibilities in the administration of lights — and MENAS[101] attest to these activities performed by Britain as being the normal conduct of a lighthouse operator. Professor Crawford will address in detail the acts of Singapore which it claims to be *à titre de souverain* and will demonstrate that these activities are overwhelmingly the actions of a lighthouse operator, nothing more.

40. But to demonstrate this point, I will examine in more detail the two instances of the conduct that Singapore claims to be conduct *à titre de souverain*: Notices to Mariners and the investigation into navigational hazards and shipwrecks.

(i) Notices to Mariners

41. Now, first as to Notices to Mariners: the first Notice was issued by Britain in 1851 and provided details of the commissioning of the Horsburgh lighthouse[102]; the second was in 1887 and dealt with the installation of new lighting equipment and the date of removal of a shipwreck[103].

42. Professionals in lighthouse management have indicated that such Notices are frequently issued by lighthouse authorities. As a matter of course, Trinity House, MENAS, the Commissioners of Irish Lights, among other lighthouse authorities, issue Notices to Mariners. Trinity House considers the issuing of such Notices to be necessary for the proper discharge of its statutory duty as a lighthouse authority[104]. Also, as Captain Glass and Mr. Brewer state in their affidavits:

> "There is an implicit obligation under SOLAS [International Convention for the Safety of Life at Sea] Chapter V to advise mariners of the provision of new marks or

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[100]Captain Glass and Mr. Brewer. Report, CMM, Ann. 1.

[101]Commander Christmas. CMM, Ann. 2.

[102]MS, Ann. 56.

[103]MS, Ann. 72.

[104]CMM, Ann. 1, para. 26.

> changes to the position or characteristics of existing marks. Failure to issue Notices to Mariners in respect of any changes to navigational marks or a navigational hazard of which an authority was aware would be negligent and could expose a lighthouse operator to a major liability risk."[105]

(ii) Investigation of navigational hazards and shipwrecks

43. I go now to the investigation of navigational hazards and shipwrecks. Singapore also claims that it demonstrated its sovereign authority over Pulau Batu Puteh by investigating and reporting on maritime accidents. Britain carried out two investigations, one in 1920 and then the next in 1963.

44. In 1920, a Court of Investigation was established to investigate the collision between a British and a Dutch vessel some 1½ miles north of Pulau Batu Puteh[106]. But the record of the Court of Investigation does not specify the basis on which it was convened and only provided that it was an investigation into the circumstances of the collision involving a British ship at sea in which there was a question about the propriety of the conduct of the Master. In other words, the investigation did not depend on proximity to Pulau Batu Puteh or the application of Pulau Batu Puteh legislation.

45. Next, Singapore cites the running aground on Pulau Batu Puteh of a British registered cargo vessel, *The Woodburn*, in 1963[107]. The Master Attendant of Singapore investigated the incident, as did a Court of Investigation[108]. Singapore claims that the establishment of the Court of Investigation was on the basis that the incident occurred "on or near the coast of Singapore". However, the Merchant Shipping Ordinance that is relevant provides other grounds on which the investigation can be undertaken that are not linked with proximity to Singapore. Singapore then tries to meet this point by quoting from a case called *The Fulham*[109] — one heard in the British High Court — to the effect that the words "near the coast" cannot be read as "covering a place 20 miles off the coast"[110]. However, Singapore fails to inform this Court that the case was

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[105]CMM, Ann. 1, para. 26.

[106]MS, Ann. 78; CMM, para. 457.

[107]CMM, para. 458.

[108]MS, Ann. 78.

[109][1898] P206 (High Court of England and Wales).

[110]RS, para. 4.165.

appealed to the Court of Appeal, which stated that it was unnecessary to determine the meaning of the words "near the coast" despite these words being "much debated at the bar"[111]. So one does not rely on that case either.

46. Additionally, in order to demonstrate that the Merchant Shipping Ordinance was used by Britain beyond a 20-mile distance from its coast, I should mention the Court of Investigation into the stranding of the British steamship, *The China*, on Perim Island where the proceedings were held in March 1883[112]. Perim is an island located off the coast of Yemen, more than 20 nautical miles from the coast of the then British colony of Aden, where the proceedings were held. It is definitely not "on or near the coast" of, in the words of the Ordinance, Britain or one of its colonies[113].

47. The reports into these two investigations do not indicate the jurisdictional basis for the establishment of the Courts of Investigation. Because the Merchant Shipping Ordinance provides a number of grounds for the exercise of jurisdiction we are not entitled to assume, though Singapore does, that jurisdiction is in any way connected to the proximity of any specific set of rocks, not mentioned in the case papers. In particular Singapore has produced no evidence of any incident that could only have been investigated on the basis of proximity to Pulau Batu Puteh, nor has it shown any actual reference to the island as a basis for jurisdiction in these, or any other, cases.

The 1861 incidents show that there were no jurisdictional changes after the construction of the lighthouse[114]

48. I turn now to a number of incidents involving fishermen in the early 1860s. These make it perfectly plain that Britain did not believe it had jurisdiction in the waters surrounding Pulau Batu Puteh. These incidents involved Chinese fishermen resident in Singapore and Malay subjects of Johor. Some related to the payment of licences for fishing; others to violence inflicted against the fishermen.

49. As to the licences, a Johor pass was issued by the Temunggong giving permission "to catch fish in the Johore territory". It appears that British subjects were being required to take out

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[111][1899] P 251 (Court of Appeal); 1899 WL 11769 (CA).

[112]See judges' folder, tab 102.

[113]See judges' folder, tab 103.

[114]RM, paras. 269-277.

permits to fish, even though they rarely proceeded 10 miles beyond Singapore Island. The Secretary of State for India made it clear on 9 January 1862 "that the prevention of persons from fishing within ten miles of the British shores is a direct interference with the rights of the British Government"[115]. He continued: "Colonel Cavenagh has accordingly been directed to make the Tumongong understand that he will not be allowed to demand payment for Licences from any persons who fish within British limits only." This letter and others like it contain no indication that Britain claimed any waters beyond the 10-mile belt around Singapore, as would have been the case had Britain then regarded Pulau Batu Puteh as belonging to it and generating its own belt of territorial waters.

50. The fact that Britain considered that it had no jurisdiction in the waters of Pulau Batu Puteh is confirmed by an incident that took place in 1861 near Sungai Ringit on the Johor coast. Mr. Bundy has presented a detailed picture of this case but Malaysia sees it somewhat differently. Fish caught by British subjects "in the neighbourhood of Pedra Branca Lighthouse" were confiscated by a Malayan village head. Governor Cavenagh wrote, on 15 May 1861, to the Temunggong regarding the incident "in our friend's territory" and describing it as "the serious molestation to which they have been subjected whilst pursuing their ordinary avocation in the neighbourhood of the Pedro Branco Light House"[116]. Note the words: "in our friend's territory". The words, when read with the mention of "the neighbourhood of the Pedro Branco Light House" suggest that the Governor was not claiming the waters within 3 miles of the island as being British. And it is within these waters that the fishing is most likely to have taken place. We know that fish congregate in large quantities around the rock.[117]

51. As an indication of Britain's understanding of the limits of its jurisdiction, the Governor's letter may be compared with one that he wrote to the Temunggong only two weeks previously, on 4 May 1861. This referred to an incident which occurred "in the neighbourhood of

[115]CMM, para. 117. CMM, Ann. 24, p15.

[116]CMM, Ann. 24, pp. 17-20.

[117]CMM, Vol. 1, para. 526.

Punjurin, about six miles from Changie"[118], which is within the 10 mile limit referred to in the 1824 Crawfurd Treaty. The Governor stated:

> "I deem it right to point out to my friend that the Sea in which the above offences were committed being within the limit prescribed by Article 11 of the Treaty of the 2nd August 1824, the fishermen were within British waters, and consequently none of my friend's subjects could in any way have been justified in interfering with them."[119]

52. The contrast between this letter and the one I first mentioned makes it clear that the British authorities were conscious of their rights in their treaty waters. No doubt, if they had considered Pulau Batu Puteh to be British, the Governor would have couched his protest in more specific terms.

53. I should add that, though decried by the other side, the affidavits of local fishermen included in Malaysia's pleadings confirm that they regularly use the waters around Pulau Batu Puteh and have done so for generations. This has already been mentioned by Ambassador Noor Farida[120].

6. The 1953 letter

54. So, it will be convenient at this point once again for me to turn to the well-known "1953 letter", to discuss again the nature and effect of that letter. This has been described by Singapore as an act "of particular importance", and again as a "formal disclaimer of title" and as "crucial". Those are big words for a small letter.

55. Permit me to begin by making one rather basic point. The Court should bear in mind that prior to the Singapore letter of 12 June 1953[121] there were only two possibilities regarding Singapore's sovereignty over Pulau Batu Puteh. Either Singapore had sovereignty, acquired over a century earlier, or it did not have sovereignty. If Singapore had sovereignty, then the Malaysian reply of 21 September 1953 has no relevance to the question of title. The letter could not confer on Singapore a sovereignty that it already possessed.

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[118]CMM, Ann. 24, pp. 17.

[119]CMM, Ann. 24, pp. 17.

[120]CMM, paras. 516 532.

[121]MM, Vol. 3, Ann. 67.

56. If, on the other hand, Singapore did not possess sovereignty over Pulau Batu Puteh in June 1953, then Singapore is effectively treating the Malaysian September 1953 letter as its root of title. This would imply that nothing that Britain or Singapore had done in the preceding century had been effective to reflect or establish title and that it is only the Malaysian reply of September 1953 that effectively created Singapore's title. And bear in mind the opening adjectives by which that letter is described: "of particular importance", a "formal disclaimer of title" and as "crucial".

57. As to the last possibility — that the letter might be treated as a root of title — this verges on the absurd. The Court only needs to be reminded that a cession of territory, which on this analysis is how this letter must effectively be viewed, can hardly be achieved by a letter written by even an Acting Secretary of a Government in reply to a question posed by a junior official of another Government, albeit on behalf of the Colonial Secretary, Singapore.

58. Faced by this dilemma, of either asserting that it had a good title before 1953 and that therefore the letter serves no purpose, or that it did not have a good prior title and that the letter is therefore the basis of its claim, Singapore has understandably chosen a middle course: the letter is a confirmation of a pre-existing title. But even so, according to Singapore, it is of "crucial importance". Why it should be so important remains to be seen. So let us scrutinize the episode more closely.

59. We must start from the Singapore letter of 12 June 1953 to "The British Adviser, Johore". The "British Adviser", it may be noted in passing, did not have authority to respond to this kind of question. Only a copy was sent to the Chief Secretary in Kuala Lumpur. When a reply was forthcoming it came from the Acting State Secretary.

60. But let us look at the words of the Singapore letter, which is in tab 104 in your folder and should now be on the screen before you. The first paragraph does no more than "ask for information". It refers to the presence of the lighthouse by stating that it "was built in 1850 by the Colony Government who have maintained it ever since". No mention is made of the many acts of sovereignty which Singapore now claims were associated with its presence on the rock; only the fact that "the Colony Government . . . have maintained it ever since". Added to this is the observation that this "'no doubt' confers some rights and obligations on the Colony". Note the

words "no doubt" rather than "undoubtedly" — a rather hesitant and uncertain approach to the matter. Note also: "some rights", not "sovereign rights".

61. The letter continues with an allusion to the situation on Pulau Pisang, in respect of which the Singapore letter said: "it has been possible to trace an indenture" showing that "part" of the island was granted to the Crown for the purpose of building a lighthouse[122]. This was evidently a document of a private law character, not a treaty. And the letter acknowledges that "there was no abrogation of the sovereignty of Johor". The paragraph concludes: "The status of Pisang is quite clear."[123]

62. The next paragraph of the letter begins by stating that "it is desired to clarify the status of Pedra Branca" and four possibilities are mentioned: a lease, a grant, a cession or a disposition in any other way[124]. There is no specific suggestion here that the status of Pedra Branca was that of a part of the colony of Singapore. Again, it is to be noted, there is no assertion of any existing claim by Singapore to sovereignty over the rock — only an allusion to the mere possibility, amongst others, of a grant or a cession.

63. Now let us look at the reply: the Acting State Secretary's letter of 21 September 1953[125] (tab 105). He did no more than "inform [Singapore] that the Johor Government does not claim ownership of Pedra Branca". Again, we must note the important words: "does not claim ownership" — a private law concept, not sovereignty. It carries the implication that someone else, presumably Singapore, could claim "ownership" in a manner comparable to the "grant" obtained by the Crown in respect of the land on which Pulau Pisang lighthouse was built.

64. So what does Singapore build upon this exchange of letters? It is said to be a confirmation of a sovereign title already possessed by Singapore. If so, it accords strangely with the terms in which the Colonial Secretary of Singapore commented on the reply on 13 October 1953: "On the strength of this [that is the reply from Johor], the Attorney-General [that is of Singapore] agreed that we can claim it as Singapore territory."[126] That observation looks to

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[122]See judges' folder, tab 104.

[123]MS, Vol. 6, Ann. 93.

[124]See judges' folders, tab 104.

[125]MM, Vol. 3, Ann. 69. See judges' folder, tab 105.

[126]MS, Vol. 6, Ann. 97.

the future. As to the past, it merely reflects Singapore's uncertainty regarding its title prior to 1953. Certainly, it contains no indication of so explicit a confirmation. Singapore argues[127] that "ownership" and "sovereignty" are "in this particular context . . . indistinguishable". It invokes the frequent use in the *Eritrea/Yemen* Arbitral Award of the word "ownership" to mean sovereignty. There can be no doubt there of the equation in that specific context between "ownership" and "sovereignty". But this is not the position here as is evident from examination of the footnote references in the Reply of Singapore. One of them may, however, be recalled as having particular pertinence here. The Reply of Singapore refers to paragraph 510 of the Award in the *Eritrea/Yemen* case[128]. This says:

> "It will be clear from the history of the Red Sea Lighthouse . . . that, although, or perhaps even because, lighthouses were so important for nineteenth and early-twentieth-century navigation, a government could be asked to take responsibility, or even volunteer to be responsible for them, without necessarily either seeming to claim sovereignty over the site or acquiring it."

65. If the Johor reply had been intended to be a "formal disclaimer" it is easy to think of the language in which it could have been expressed, but certainly not the short letter from the Acting Secretary. The word "formal" much used by Singapore is just a word used to puff up the significance of the letter.

66. As to the letter creating an estoppel, the Court is familiar with the concept. The Court has accepted that to have the legal effect of an estoppel, the party invoking it must show that it has relied and acted upon the asserted fact in some manner. As stated in the *El Salvador/Honduras* case[129]. Here, there is no evidence of such reliance. When one looks at Singapore's list of its activities pursued in relation to Pulau Batu Puteh, one cannot find any change in that course of conduct between the period prior to September 1953 and the period after that date. It is unnecessary to rehearse the details. Singapore has admitted as much in its Reply[130]. After stating that Malaysia has made the point that there was no change in Singapore's conduct and that it continued to act as it had done before, Singapore said:

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[127]RS, fn. 593.

[128]114 *ILR*, at p. 135.

[129]*I.C.J. Reports 1990*, p. 118, para. 63.

[130]RS, para. 7.16.

> "This is certainly true. Singapore had no reason to change its behaviour — she had continuously acted *à titre de souverain* vis-à-vis the island after her acquisition of title in 1847-1851, and Johor's disclaimer only reinforced the position. *A fortiori*, Singapore continued to act as such after the 1953 disclaimer, including by peacefully maintaining and administering the lighthouse and by using the island for various other purposes."

Mr. President, that brings me to the end of what I wish to say to the Court on the subject of the 1953 letter and this part of the case, and I now respectfully ask you to call upon my colleague, Professor Crawford.

The VICE-PRESIDENT, Acting President: Thank you very much, Sir Elihu, for your statement. I now call Professor Crawford. You have the floor.

Mr. CRAWFORD:

SINGAPORE'S SUBSEQUENT PRACTICE

Introduction

1. Mr. President, Members of the Court, Sir Elihu has just addressed Britain's activities after 1851 and has shown that they related to the operation of the lighthouse or involved activities incidental to that operation — things which operators of a substantial lighthouse on a major shipping route will normally do. I will examine the Republic of Singapore's conduct after its separation from Malaysia in 1965, responding to Mr. Bundy's presentation last week.

2. My presentation will be in three parts. I will first examine Singapore's conduct in relation to Horsburgh lighthouse, which it claims to be conduct *à titre de souverain*. Secondly, I will turn to Singapore's non-lighthouse conduct which it claims is relevant to sovereignty over PBP. Thirdly, I will look at various statements made about PBP by Singapore or Singapore officials before the critical date evident in the period after 1965. What the evidence shows is that Singapore's activities in respect of PBP before the critical date were the normal activities of a lighthouse operator. As to non-lighthouse conduct there were only a few items, none unequivocal and none calling for the sort of protest that Thailand was held to have been required to make when presented with the Annex 1 map in the *Temple* case (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6). Moreover throughout the relevant period

Singapore continued to represent in its laws and official publications that PBP was not in Singapore waters and was not a Singapore island. Given these representations, Malaysia had no reason to scrutinize Singapore's conduct in any minute interrogatory way. Overall, a study of Singapore's own conduct in the relevant period leaves the situation as it was — with nothing capable of displacing a title that already existed. I turn then to the first part of the speech.

Part I: Singapore's conduct in relation to Horsburgh lighthouse

3. Mr. President, Members of the Court, Singapore has systematically conflated routine conduct in the administration of the lighthouse and conduct that can properly be characterized as *à titre de souverain.* Let me demonstrate this — and I apologize in advance for the tedium implicit in the method of an item-by-item presentation. So, me after Sir Eli, tedium after tedium — best I can do!

(i) Enacting legislation relating to PBP and Horsburgh lighthouse

4. The first claim advanced by Singapore is that it enacted a series of laws relating to PBP. Sir Eli has addressed the few laws enacted by Britain which related to ownership of the lighthouse.

5. After 1965 Singapore passed two Acts which it claims to be evidence of conduct *à titre de souverain*. The first was the Singapore Light Duties Act of 1969, which is tab 106 in your folder. Singapore relies on the definition of "Singapore" which reads:

> "the Republic of Singapore shall be deemed to include the Island of Singapore and all islands and places which on the 2nd day of June, 1959, *were administered as part of Singapore and all territorial waters adjacent thereto*"[131] (emphasis added).

Section 7 sets out the duties of the newly-constituted Singapore Light Dues Board. It states:

> "It shall be the duty of the Board to aid the safe navigation of ships by providing and maintaining, as the Board considers necessary, lighthouses, buoys, beacons and other navigational aids in Singapore and the approaches thereto, at Pedra Branca (Horsburgh), at Pulau Pisang and at such other places as the Board may think fit."[132]

6. This places the Horsburgh and Pulau Pisang lighthouses in a special category relative to aids in Singapore. *Specifically* referencing these lighthouses means that the legislation would not have otherwise covered them. It would have been unnecessary if the Horsburgh and Pulau Pisang

[131]MM, Vol. 3, Ann. 112, Sect. 2. See judges' folder, tab 106.

[132]*Ibid.*, Sect. 7.

lighthouses were located "in Singapore" as defined by the legislation. This interpretation is supported by the earlier ordinances referred to by Sir Elihu, which make this distinction, as well as by the fact that Horsburgh lighthouse is coupled with Pulau Pisang lighthouse, which is also within Malaysia's territory. It follows as the night the day, Mr. President, that PBP, like Pulau Pisang, was not "administered as part of Singapore" in 1959 or in 1969, according to Singapore's own legislation.

7. It is important to place this legislation in the context of the Straits Lights System. The 1969 Act provided the legislative basis in the newly independent Republic of Singapore for it to manage the five lighthouses under its administration. The legislation reflects the intention to maintain the status quo of the Straits Lights System: some of the lighthouses fell within Singapore and others, by name, Horsburgh and Pulau Pisang, did not.

8. The second piece of legislation which Singapore relies on is the Protected Places (No. 10) Order 1991. As to this Order, Mr. President, I am reminded of counsel's situation whenever a piece of evidence comes in that is too late, far too late in date: Where were you when I needed you? The Protected Places (No. 10) Order 1991 was enacted more than a decade after the critical date. It is significant in only one way: this is the first piece of legislation since 1851 that specifically treats PBP as being within Singapore — the very first. My second item on the list.

(ii) Claims concerning the maintenance and improvement of the lighthouse

9. You have heard Singapore belabour the activities concerning the maintenance and improvement of the lighthouse, these activities being said to represent concrete examples of State authority.

10. Every activity described by Singapore is that which would be undertaken by any operator of a lighthouse as part of its administrative responsibility. Professionals in the field of lighthouse management attest to the administrative character of Singapore's activities. In Volume 2 of its Counter-Memorial, Malaysia presented substantial expert testimony about the management of lighthouses. Again, Singapore has presented *no* expert testimony in its Reply but has chosen to rely on assertion. Where is the lighthouse professional, for example, Captain Douglas Glass of Trinity House, who says, on behalf of Singapore, that changing the bulbs, polishing the reflectors

and checking the rain gauge strengthens the sovereignty of Singapore? To this question, in the words of Lewis Carroll, "answer came there none" from Singapore. There was no evidence whatever about lighthouse practice: and this, Mr. President, was not because Malaysia had eaten all the lighthouse experts in the world, as happened to the oysters in "The Walrus and the Carpenter"[133], from which I have quoted.

11. Captain Glass and Mr. Brewer make it clear that the list provided by Singapore is entirely in keeping with the normal conduct of a lighthouse operator. They say:

> "These improvements — the extension of living accommodation, the repair and strengthening of the pier, the fitting of a radio telephone, repainting, the installation of boat davits, dihedral radar reflectors and a radio beacon — are all in keeping with those undertaken from time to time by any competent lighthouse operator. The modernisation of the station, with the installation of an electric optic, new cooling systems and solar panels, is an integral part of the evolution of lighthouse technology."[134]

Captain Glass and Mr. Brewer observe that the installation of the Vessel Traffic Service equipment and the construction of helicopter landing facilities are common. These conclusions are confirmed, in general terms, in the report by Commander Christmas and in the Note by Rear-Admiral Leclair.

12. Singapore argues that the fact that these were ordinary tasks that any lighthouse administrator would undertake "does not detract from their sovereign nature in this case". But this is simply circular, like much of Singapore's reasoning in this case. For example, we heard from Mr. Brownlie — I paraphrase: Pedra Branca was *terra nullius* because we acquired it by occupation, and we acquired it by occupation because it was *terra nullius*. Mr. Bundy's circularity was slightly different: We acquired sovereignty by administering the lighthouse, and our administration of the lighthouse was an act *à titre de souverain* because we had sovereignty. First, we have the roller coaster which mostly goes down and never up. And now, we have the vicious circle that never ends!

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[133]Lewis Carroll, "The Walrus and the Carpenter"

> "But answer came there none —
> And this was scarcely odd, because
> They'd eaten every one."

L. Carroll, *Through the Looking Glass* (1872), available on http://www.jabberwocky.com/carroll/walrus.html.

[134]CMM, Vol. 2, Ann. 1, para. 56.

13. The material submitted by Singapore in support of its claims underlines Malaysia's point. The *Annual Reports of the Marine Department of the Straits Settlements and the Colony of Singapore*, like the legislation, refer to the Singapore Group of Lighthouses, which Singapore administered under the Straits Lights System. It is clear from these documents that the activities undertaken, before and after independence, to administer and maintain the lighthouse on territory that belonged to Singapore, and on territory which did not, were the same: no distinction was made. I turn to my third item in the list.

(iii) Issue of Notices to Mariners regarding PBP

14. There was only one occasion in the relevant period when Singapore issued a Notice to Mariners. This was in 1981 and related to the stranding of a vessel[135]. The first point to make is that it is after the critical date. The two Notices issued by Britain in 1851 and 1887 were examined by Sir Elihu and the same point applies equally to Singapore's Notice.

15. Singapore's supporting records show that the Master Attendant of the Singapore Shipping Office published Notices in respect of waters over which Singapore had no territorial jurisdiction, and quite properly so[136]. And that, I am afraid is all I will say about Notices to Mariners unless the Court calls on me for more.

(iv) Exercise of jurisdiction over personnel on the island and the maintenance of order

16. Singapore claims that it exercised jurisdiction in a territorial sovereign capacity over personnel on the island and maintained order amongst them. It relies on the Merchant Shipping Ordinance of 1928 and later editions, as well as successive editions of the Standing Orders and Instructions, issued in respect of lighthouses, which address the conduct of lighthouse keepers, access to lighthouses, the flying of flags and other matters. Whilst most of these occurred in the British period, for convenience I will address them together.

17. I would make three points. First, the sections Singapore refers to in the Merchant Shipping Ordinances are general and relate to misconduct by any person employed in any lighthouse. If the lighthouse operator at Pulau Pisang gets drunk and throws bottles at the local

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[135]MS, Ann. 150. See also RS, para. 4.104.

[136]MS, Ann. 82.

people, he will be committing an offence under those Ordinances — not, Mr. President, that I would for a moment suggest he would do such a thing. These provisions are not specific to Horsburgh lighthouse and do not refer to it by name.

18. Second, the Standing Orders and Instructions — Lighthouses are also of general application. They cover all the lighthouses for which Singapore is responsible. It explicitly refers to all the lighthouses administered by Singapore and lists Horsburgh lighthouse alongside Pulau Pisang lighthouse, and quite properly so.

19. Third, the evidence of Captain Glass and Mr. Brewer attest to the fact that such acts were purely administrative in character[137]. The Trinity House Lighthouse Service Regulations are similar in content to the Singapore Standing Orders[138]. Trinity House is not a sovereign entity. This is not conduct *à titre de souverain.*

(v) Collecting meteorological information

20. Singapore claims that the use of Horsburgh lighthouse for meteorological purposes was conduct *à titre de souverain.* But the collection of meteorological data is routinely undertaken by lighthouse operators and has nothing to so with sovereignty. It is an undertaking specified in SOLAS[139]. This is confirmed in the IALA *Navguide*[140], — references will be found in the text. It is confirmed by Rear-Admiral Leclair[141], by Captain Glass, by Mr. Brewer[142], and Commander Christmas[143]. A crowd of witnesses, you might say. The reasons for this are both the location of lighthouses, often on rocks or islands or remote points along the shore, and the importance of reliable meteorological information for the purposes of marine navigational safety.

21. In light of these facts, pointed out in our written pleadings, Singapore's argument shifts. It now points to the Summary of Observations in the years 1959 and 1966 published by, respectively, the Malayan Meteorological Service and Meteorological Services, Malaysia and

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[137]CMM, Ann. 1, paras. 38-39.

[138]CMM, Ann. 1 (Annex 4 of the Report).

[139]Regulation 5.

[140]CMM, Ann. 53, para. 3.5.1.3.

[141]CMM, Ann. 3, Answer 4.

[142]CMM, Ann. 1, paras. 27-29.

[143]CMM, Ann. 12, paras. 8.8-8.9.

Singapore. It says that they describe the rain station on PBP as being in Singapore[144]. What the documents say is that Horsburgh lighthouse is a Singapore rainfall station. Well, it was. Sultan Shoal and Raffles lighthouses are also listed as Singapore rainfall stations. Singapore points to the sub-clause in the first sentence of the Summary of Observations — just the point where you would look for an acknowledgment of sovereignty — saying that there are "29 rainfall stations in Singapore". It observes that Singapore rainfall stations were omitted from the 1967 observations by the Malaysian Meteorological Service. No point in observing them twice. According to Singapore, together these two facts are a "recognition of Pedra Branca's sovereign status"[145]. Mr. President, Members of the Court, condemned to lengthy residence in The Hague, you may think that the weather is an important matter but it is not that important! Rainfall gauge is collected by neighbour, the idea that that amounts to an acknowledgment of British or any other sovereignty is fanciful.

Flying the Singapore marine ensign

22. Singapore claims that flying the Singapore marine ensign was a sovereign act. The British marine ensign was flown on Horsburgh lighthouse for more than a century. This was replaced in 1953 with the marine ensign of the Colony of Singapore and later by the marine ensign of the Republic of Singapore. As far as we are aware, neither the Union Jack, the Union Flag as it is sometimes called, nor Singapore's national flag has ever been flown from Horsburgh lighthouse.

23. The essential point is that the flying of the marine ensign above a lighthouse is not an *act à titre de souverain.* The flying of flags and the use of national emblems by one State on the territory of another State or on territory having an international status – is commonplace. *A fortiori*, the flying of ensigns by lighthouse authorities is a routine matter. Ensigns are not marks of sovereignty but of nationality and are principally flown by ships. Trinity House has its own ensign. Captain Glass and Mr. Brewer indicate that little significance attaches to the flying of ensigns above a lighthouse. There is no appreciation amongst the professional lighthouse

[144]CR 2007/23, p. 19, para. 42 (Bundy).

[145]CR 2007/22, p. 22, para. 47 (Bundy).

community, which is mostly made up of national authorities, that the flying of an ensign above a lighthouse has any bearing on sovereignty.

24. The *Temple of Preah Vihear* case is distinguishable. The Siamese Prince's visit to the temple was of a quasi-official character and there was a failure to react to the flying of the French national flag. Singapore draws an analogy between this event and the situation where Rear-Admiral Thanabalasingam landed on PBP in 1962. Well, Rear-Admiral Thanabalasingam is a distinguished man but he is not a Siamese prince. He was on the island only for a short time, and this was not anything like an official visit. Rear-Admiral Thanabalasingam has given evidence that, as a naval officer, he understood the flying of the ensign only as an indication that Singapore managed the lighthouse and that it had nothing to do with the sovereignty of PBP[146]. That was a reasonable view.

25. Finally, Singapore complains of the divergence in approach taken by Malaysia in relation to the flying of the Singapore marine ensign on Pulau Pisang lighthouse as compared with Horsburgh lighthouse. The issue of flying the flag above Pulau Pisang arose due to a specific complaint by the Youth Movement of the United Malays National Organization in 1968[147]. In response to this potential political issue Malaysia requested Singapore to remove its ensign. Malaysia did not regard the flying of the ensign over Pulau Pisang as a mark of sovereignty – and no more did Singapore; it did not claim sovereignty over Pulau Pisang. Rather it was a matter of domestic political sensitivity and it was sorted out between the two States. It was not an acknowledgment of sovereignty in relation to an issue not under dispute, far removed from the location.

(vii) Control of access to the island, official visits and granting permission for surveys

26. Singapore contends that it controlled and authorized access to the island by personnel from Singapore and other States. It also claimed that it issued permits to Malaysian official wishing to visit the island to conduct scientific surveys; that it denied Malaysian personnel access to PBP; and that it gave permission to Malaysia and other States to enter the waters around PBP.

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[146]CMM, Ann. 4, para 35.

[147]CMM, Ann. 40.

Singapore mischaracterizes its control over the lighthouse as control over the island. Captain Glass and Mr. Brewer make it very clear that control over access to a lighthouse facility and its surrounding waters, including for purposes of technical and scientific surveys, is routine practice in lighthouse administration and part of the normal responsibilities of any lighthouse operator[148]. Commander Christmas similarly states: "All lighthouse authorities are responsible for the security of, and access to, the lighthouses operated by them, as well as any activity by personnel within them."[149]

27. Singapore relies on the Standing Orders and Instructions of 1961 and 1974 which regulate the conduct of lighthouse keepers. Such Orders are normal practice. The Orders here are not specific to Horsburgh lighthouse, they are generic instructions which apply to the conduct of lighthouse personnel in all the lighthouses for which Singapore is responsible.

28. Second, Singapore states that due to the many requests to visit PBP the Master Attendant was obliged to establish a logbook in 1946. It characterizes the logbook as evidence of Singapore's control over PBP. The material provided by Singapore in support of this claim is insubstantial and the requests to visit PBP are in fact requests to visit the lighthouse. The claim that the Master Attendant established rules "due to the number of applications that were received to visit the lighthouse" is overstated: the document annexed in support of this claim regards "Visits to Lighthouses by Staff and family or friends onboard the m.v 'Berkas'"[150] and focuses on visits to lighthouses in general, not to Horsburgh lighthouse in particular.

29. Additionally, the logbook of visits shows that the vast number of entries related to routine inspection and maintenance visits associated with the normal operation and upkeep of the lighthouse and associated facilities. Singapore places much emphasis on the fact that Singaporean dignitaries attended the lighthouse, but this is not surprising. As observed in the Glass-Brewer report, which refers to Trinity House lighthouses, it was common for Trinity House personnel to conduct inspections of the lighthouses for which they were responsible and that they were

[148]CMM, Ann. 1, paras. 49-50.

[149]CMM, Ann. 2, para. 8.7.

[150]MS, Ann. 104.

"accompanied by dignitaries"[151]. Mr. President, Members of the Court, even a dignitary is entitled to a day out at a lighthouse.

30. Singapore contends that foreigners including Malaysian officials who wished to visit the island were obliged to obtain permits and it cites four examples covering this substantial period.

31. The first example was the 1974 visit of a joint hydrographic research team to the Rumenia Channel. It consisted of members from Malaysia, Japan, Indonesia and Singapore and took place over a seven- to eight-week period. The annexed material shows that a few of these officers wished "to stay at Horsburgh lighthouse for tidal observations"[152]. While Malaysian officials stayed in the lighthouse, permission had been sought for and granted to members of the joint survey team and not specifically the Malaysian members. Permission was not required to access the island, but to stay in the lighthouse.

32. The second example was a Note of 9 May 1978 requesting clearance for a Malaysian government vessel to enter Singapore territorial waters and conduct an inspection of tide gauges[153]. The Note then lists 13 co-ordinates. It refers to both Horsburgh Lighthouse Station and Pulau Pisang Station. Areas listed in that list fall within the territorial waters of Malaysia, Indonesia and Singapore. The Note does not state that PBP falls within Singapore's territorial waters.

33. Third, Singapore contends that it controlled access by foreign parties to territorial waters around PBP and that this was a form of recognition of Singapore's territorial sovereignty[154]. There is no evidence regarding foreign parties at large, only exchanges with one private company, Regis Ltd., between May and July 1981 regarding a salvage survey in an area "about 6-10 miles north-east of Horsburgh Light"[155], and therefore outside Singapore territorial waters on any view. The request by Regis Ltd. referred to the territorial waters "of the islet on which Horsburgh Light House stands", an evident circumlocution[156]. But there are three short answers to this complaint in any event. First, the whole incident occurred after the critical date. Secondly, Malaysia was

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[151]CMM, Ann. 1, para. 39.

[152]MS, Anns. 112-121.

[153]MS, Ann. 137.

[154]CR 2007/23, p. 19, para. 41 (Bundy).

[155]MS, Ann. 151.

[156]MS, Ann. 152.

unaware of the correspondence and was not in a position to respond to it. Third, recognition of sovereignty is not a matter achieved by private parties. Mr. President, Members of the Court, you will be relieved to hear that that ends my list. It does not, unfortunately, end my presentation. Let me turn to:

Part II: non-lighthouse related conduct of Singapore

34. The conduct I have just taken you through all related to the operation of the lighthouse, or of lighthouses generally. The non-lighthouse related conduct which Singapore relies on is extremely limited. While Singapore claims these activities to be *à titre de souverain*, there is still no evidence of a connection between them and sovereignty over PBP.

(i) Naval patrols

35. Singapore claims that its naval patrols are acts undertaken *à titre de souverain* with respect to PBP.

36. In fact the Royal Malaysian Navy engaged in naval patrols in the waters around PBP from 1957 including during the period of confrontation. Isolated instances of naval patrols by the Singapore Navy, after its formation in April 1975, are insufficient to undermine the long-established pattern of Royal Malaysian Navy patrols in this area. Professor Schrijver will deal with this point further tomorrow.

37. Singapore places much weight on the Operating Instructions issued in 1975 concerning its F5 patrols[157]. You will remember the image of this on the screen. In fact, some of the co-ordinates provided in these Instructions would have taken the patrols within 1-1½ miles of the Johor coast and adjacent Malaysian islands such as Pulau Lima and Pulau Pemanggil. Singapore's reasoning would imply that it also possessed sovereignty over the Johor coast. In fact the patrol areas were not limited to the area 3 miles from PBP. They were referable to the protection of navigation and immigration control in relation to Singapore itself at a time of significant movement of boat peoples, not to sovereignty over PBP.

[157]MS, Ann. 123.

(ii) Installation of military equipment

38. The second point is the installation of military equipment. Singapore claims that military communications equipment was installed by it in 1977. As the Agent has stated, Malaysia was not aware of this until the receipt of Singapore's Memorial. Evidently a lighthouse can operate navigational radar for perfectly proper radar and lighthouse purposes. Malaysia did not know at the time that the radar was for other purposes entirely, if indeed that was the case.

(iii) Claims concerning investigation of navigational hazards and shipwrecks

39. I turn to the third point — the investigation of navigational hazards and shipwrecks. Singapore claims that it exercised sovereign authority over PBP by investigating and reporting on maritime hazards and shipwrecks within PBP's territorial waters. Sir Eli has dealt with the 1920 and 1963 investigations. Britain's investigations had nothing to do with sovereignty over PBP, as he showed.

40. In fact, despite Singapore's heavy reliance on this argument, it carried out only one investigation prior to the crystallization of the dispute in February 1980. This concerned the grounding of the merchant vessel *Yu Seung Ho* on 16 November 1979. An investigator was appointed under the Merchant Shipping Act in early December to investigate the grounding at Horsburgh[158]. The Merchant Shipping Act provides other grounds on which investigation can be undertaken that are not linked to the incident occurring in Singapore waters[159]. And in terms of Singapore legislation it did not occur in Singapore waters. There is nothing in the record of the incident, either in the request or the report, that explains the basis of the investigation. In fact, the incident occurred only 600 m east of the lighthouse and it is entirely in line with Singapore's position as the lighthouse authority to investigate the incident, as attested in the Glass-Brewer report and affirmed by Admiral LeClair.

41. All the other examples of investigations that Singapore gives were well after the critical date. Notwithstanding this, in each of the five incidents that Singapore cites between 1985 and 1998 there is a clear connection with Singapore and it is not surprising that it undertook the investigations. In two cases, the ships were registered in Singapore. In four cases, the ships were

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[158]MS, Vol. VI, Ann. 139.

[159]CR 2007/22, p. 26, para. 59 (Bundy).

dry-docked in Singapore for repairs. In all cases, the ships had just departed from Singapore after taking on cargo, and the ship contacted the Singapore Port Authority after the incident, either to request assistance or, in one case, to indicate that it would be returning to Singapore under its own steam. None of these investigations had anything to do with sovereignty over PBP.

(iv) Investigation of accidental death in waters around PBP

42. The fourth point — investigation of an accidental death or accidental deaths in waters around the lighthouse. Singapore claims that the State Coroner's enquiry into the very unfortunate death of three members of the Singapore armed forces when their naval vessel capsized off PBP in 1980 constituted conduct *à titre de souverain.*

43. This incident occurred after the dispute had crystallized. In any event, it is a well-established principle of international law that warships have absolute immunity from the jurisdiction of a foreign States in whose waters they are found. Immunity of warships was expressly affirmed in Article 22, paragraph 2, of the 1958 Convention on the Territorial Sea and the Contiguous Zone and in Article 32 of UNCLOS. The most that a coastal State could lawfully do in this circumstance would be to require the warship "to leave the territorial sea immediately". Thus, the jurisdiction to investigate the deaths on this naval vessel rested with the Singapore State Coroner, not because of PBP, but because of the status of the crew. The current coronial investigation would quite properly have been held wherever that ship had sunk.

(v) Sea reclamation plans

44. Finally, I refer to the fifth point — sea reclamation plans. Singapore relies on claimed reclamation plans of 1978 as demonstrating its sovereignty over PBP. The Court will have become aware that in the period between 1977 and 1980, things were going on, parties were reconsidering their position, and that is when the dispute broke out. I shall say some more about the conduct of the Parties in that crucial period tomorrow. In one Singapore newspaper, of 27 January 1978, the details of which are not specific and which only refer to shore protection works at the Horsburgh lighthouse[160], there was a reference to reclamation. The advertisement is at tab 107 of your

[160]MS, Ann. 135, p. 1065.

folders — it was very small, as you can see. The reference to "Reclamation and shore protection works at Horsburgh Lighthouse" takes up four lines. It is about one-tenth of the space of this advertisement on this one day. The details of the reclamation plans were secret, as Singapore's documentation shows[161]. Singapore further claims that it had considered reclamation projects around PBP in 1973 and then again in 1974. It has not produced any evidence that its considerations were made public, and of course, no reclamation occurred, this was simply planning. Malaysia could not have had, and did not have, any knowledge of them and none of this constituted conduct of which Malaysia would have been required to protest.

(vi) Other conduct

45. A final compendious category is other conduct. Singapore also claims that several other acts were undertaken *à titre de souverain* with respect to PBP. These include: the ferrying on navy boats of Singapore dignitaries; the evacuation of an injured contractor and of a distressed Singapore fisherman by navy boats; the response of a navy boat to aid a Singapore boat being robbed. These incidents either directly involved the lighthouse because they involved people on the lighthouse or they involved people from Singapore. Again, they had nothing to do with PBP as an island. How else would dignitaries visit the lighthouse or Singaporeans be rescued?

Mr. President, I need to go on to deal with Singapore's representations as to its territory but this section will take rather more time than we have available and I think the Court, after all of that detail, the minute examination of minutiae, deserves an early minute.

The VICE-PRESIDENT, Acting President: I think we can go on.

Mr. CRAWFORD: If the Court is prepared, but I am afraid I would like to take this section as a whole. It will take me about ten minutes.

The VICE-PRESIDENT, Acting-President: Yes.

Mr. CRAWFORD: Thank you.

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[161] *Ibid.*, pp. 1066 *et seq.*

Part III: Singapore's representations as to its territory

46. Mr. President, Members of the Court, this meagre miscellany of minutiae in which for 30 minutes I have engaged your attention — if engage is not too strong a word — is to be contrasted with a much more impressive fact. In the period between 1965 and 1980, Singapore's own representations of PBP never placed it within Singapore. PBP was treated as somewhere else, which of course it was. I will list five items of conduct.

(i) J. A. L. Pavitt's appreciation

47. The first is Pavitt's appreciation. Pavitt was for many years the Director of Marine, Singapore and the author of a book *First Pharos of the Eastern Seas: Horsburgh Lighthouse*, published in 1966 by the Singapore Light Dues Board. For those Members of the Court who enjoy books about lighthouses — I infer it may be a minority — it is quite a good read. But one passage is of particular interest. Referring to the responsibility of the Singapore Light Dues Board — you do not have to read the book, but read this passage — it reads (tab 108):

> "The Board, formed by statute in 1957, is responsible for the provision and upkeep of all ship navigational aids in Singapore waters, and for the outlying stations at Pedra Branca (Horsburgh) in the South China Sea and Pulau Pisang in the Malacca Strait. Within Singapore waters, the Board maintains Raffles, Sultan Shoal and Fullerton Lighthouses."[162]

Evidently Pavitt thought that Horsburgh lighthouse did not fall within Singapore's territorial waters. He draws a clear distinction between ship navigational aids "in Singapore waters" and those at the "outlying stations" of Horsburgh and Pulau Pisang. He refers to both of them as "outlying stations". He excludes Horsburgh lighthouse from the statement "Within Singapore waters, the Board maintains" and then lists the three lighthouses.

48. Singapore argues that Pavitt's reference to "Singapore waters" "simply refers to the waters around the Island of Singapore". It goes on to suggest that Horsburgh lighthouse and Pulau Pisang lighthouse were distinguished as "outlying stations", simply for convenience. In its oral pleadings it simply says that Pavitt says nothing to suggest that PBP did not belong to Singapore[163]. This contradicts the plain meaning of the words. In my experience of Directors of Marine they are plain men who call a spade a spade and a hawser a hawser. Anyway, Pavitt spoke plainly:

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[162]MM, Ann. 74. See judges' folder, tab 108.

[163]CR 2007/22, pp. 35-36, para. 93 (Bundy).

> "The Board . . . is responsible for the provision and upkeep of all ship navigational aids *in Singapore waters*, and for the outlying stations at Pedra Branca (Horsburgh) in the South China Sea and Pulau Pisang in the Malacca Strait. *Within Singapore waters*, the Board maintains [the other three lighthouses]." (Emphasis added.)

As I read it, he did not think that Pedra Branca or Pulau Pisang were within Singapore waters. This seems to me to follow from his words.

49. Singapore relies on a 1967 letter from D. T. Brown, who says "I have been advised that the waters within 3 miles of Horsburgh lighthouse may be considered to be Singapore territorial waters."[164] We do not know who advised Brown, the context in which the letter was written, nor whether he was offering a definitive view about the status of the waters around PBP. Anyway, the letter was not published by the Singapore Light Dues Board, unlike Pavitt's book.

50. Pavitt was a noted authority on the activities of the Singapore Light Dues Board, including those concerning Horsburgh lighthouse — who better to know the status of the lighthouse? He is clear: Pulau Pisang and Horsburgh lighthouses were not within Singapore waters but only administered by the Singapore "Station".

51. Exactly the same distinction is drawn in the Singapore legislation, the light dues legislation of 1969, to which I have referred you.

(ii) Singapore's mapping practice and listing of its islands

52. The second point: Singapore's mapping practice and the listing of its islands. Singapore's representation of its territorial extent by a very small State, very conscious of its territorial sovereignty in maps and in other descriptions of its territory, is entirely consistent with Pavitt's understanding that PBP was not a Singaporean island. There are no maps of Singapore which show PBP as part of Singapore before the critical date, not one map in 130 years. Ms Nevill will explain Singapore's mapping practice in her debut tomorrow.

53. Similarly, Singapore never listed PBP in the detailed lists of islands compiled for the Annual Report of the Rural Board of Singapore between 1953 and 1956, and in its government publication, *Singapore Facts and Pictures*. *Singapore Facts and Pictures* has been published each year or so since the 1960s. Each edition includes a map of Singapore and a list of its 54 islands,

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[164]CMS, Ann. 42.

including reef islands and tiny uninhabited islands even smaller than PBP — you could not even play football on them — such as Pulau Biola and Pulau Satumu and Pulau Ular, which is two thirds the size of PBP; you could probably play handball![165]. An example of the list from the 1972 *Singapore Facts and Pictures* is included in tab 109.

54. In short, Singapore was assiduous in listing its reefs, islands and rocks within its waters, including the very smallest rocks — every skerrick over which it had sovereignty. But PBP was never included in the list of Singapore islands until 1992, 12 years after the critical date[166]. Where were you, list, when I needed you?

55. Singapore responds that the Rural Board publication is irrelevant and that the publication *Singapore Facts and Pictures* had nothing to do with the legal definition of PBP. It was, after all, they say, published by the Department of Culture. Well, one department is as good as another. In any event, it was consistent behaviour of the Department of Culture. According to Singapore, it was a tourist publication irrelevant to PBP because it did not have any tourist facilities[167]. But we are not aware that each of the 50 or so islands that were listed, all had tourist facilities. Those smaller than PBP can be presumed not to have had them. More to the point, Singapore's argument masks the fact that Singapore cannot refer to *any* lists of islands published under the government imprimatur which *did* include PBP.

(iii) Singapore's territorial waters practice

56. Singapore's territorial waters practice has been completely inconsistent with its asserted belief in sovereignty over PBP. Singapore has never enacted legislation extending its territorial waters beyond 3 nautical miles. It did not delimit the area of PBP in its 1973 Territorial Waters Agreement with Indonesia even though PBP and Bintang in Indonesia lie opposite and require territorial sea delimitation if PBP belongs to Singapore. Singapore now claims this was a partial delimitation only[168]. But this is not what the Agreement says. There is no proviso. There is no reference to any areas which remain to be delimited between the two Parties. You would have

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[165]*Singapore Facts and Pictures, 1972;* MM, Vol. 3, Ann. 79.

[166]*Singapore Facts and Pictures, 1992;* MM, Vol. 3, Ann. 83.

[167]CR 2007/22, p. 35, para. 91 (Bundy).

[168]E.g., CR 2007/20, p. 32, para. 35 (Chao).

expected such a proviso in the case of a partial delimitation, and it appears in the case of other partial delimitations in the region.

57. Similarly, it would also have been consistent with Singapore's view of its sovereignty over PBP to object to the 1969 Indonesia/Malaysia Continental Shelf Agreement, which would affect its possible continental shelf. Singapore did not.

Conclusion

58. Mr. President, Members of the Court, Singapore is the administrator of Horsburgh lighthouse and nothing more. Britain's and Singapore's activities in respect of the lighthouse did not and do not amount to conduct *à titre de souverain.* You have heard that the experts in lighthouse practice conclude that the activities relied on by Singapore, prior to the crystallization of the dispute, are either acts required of a lighthouse administrator or acts that may be categorized as falling within the usual practice of a lighthouse administrator. This conclusion is supported by the history of the Straits Lights System and the similar treatment of the Pulau Pisang lighthouse, administered by Singapore on Malaysian territory. It is significant that there is, prior to the critical date, *no evidence* of a publicly manifested intention to assert sovereignty over PBP by either Britain or Singapore. This is confirmed by Pavitt's statement, and by the other material I have cited. In the face of all this material, the title to PBP at the critical date — and therefore also at today's date — lies with the State which had sovereignty over it in 1965, which, as we have demonstrated, was Malaysia.

59. Further — and in the face of this material — Singapore's claim that the conduct on the island went completely unopposed by Malaysia is not to the point[169]. There was no open conduct à *titre de souverain* to be opposed. Singapore's conduct was at all times consistent with that of a lighthouse administrator and littoral State, neighbouring State, in the Singapore Straits. In the former capacity, as a lighthouse administrator, Johor had consented to the establishment and operation of the lighthouse. As to the latter, littoral State, the activity was in general not referable to the lighthouse, as such at all, but to the ordinary management of navigation and to Singapore's

[169]CR 2007/22, p. 12, para. 2; p. 13, para. 3 (Bundy).

own affairs in the Straits. In neither capacity was there anything specifically territorial about PBP for Malaysia to protest to.

Mr. President, Members of the Court, thank you for your patient attention. Mr. President, thank you for the extra five minutes. This concludes Malaysia's presentation this morning.

The VICE-PRESIDENT, Acting President: Thank you, Professor Crawford, for your speech. This brings to an end this morning's sitting. We will rise now and meet tomorrow at 10 o'clock.

The Court rose at 1.10 p.m.

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