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International Court of Justice	Cour internationale de Justice
THE HAGUE	LA HAYE

YEAR 2007

Public sitting

held on Friday 16 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 vendredi 16 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
	Tomka
	Abraham
	Keith
	Sepúlveda-Amor
	Bennouna
	Skotnikov
Judges *ad hoc*	Dugard
	Sreenivasa Rao
Registrar	Couvreur

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Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Tomka
Abraham
Keith
Sepúlveda-Amor
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MM. Dugard
Sreenivasa Rao, juges *ad hoc*

M. Couvreur, greffier

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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. This morning Judge Simma, for reasons duly communicated to me, is unable to sit with us. I will now give the floor to Professor Schrijver. You have the floor, Sir.

Mr. SCHRIJVER: Thank you.

MALAYSIAN AND THIRD-PARTY PRACTICE

Introduction

1. Good morning, Mr. President, distinguished Members of the Court.

2. This morning I would like to address you on the practice of Malaysia and third parties in relation to Pulau Batu Puteh, Middle Rocks and South Ledge. A review of the practice of Malaysia demonstrates that Malaysia has always regarded itself as the sovereign of the three features. In the second part of my speech, I show that third parties, particularly Great Britain, the Netherlands, Indonesia, have never recognized Singapore's sovereignty over the islands. Together, this evidence confirms Malaysia's sovereignty over the three features.

Part I: Malaysia's practice after gaining independence

3. Contrary to Singapore's statements in the first round, various examples of Malaysia's exercise of sovereignty over PBP, Middle Rocks and South Ledge can be provided.

4. Malaysia displayed sovereignty over its territory — that is to say, the islands — and exercised its sovereign rights to the marine resources in the area surrounding the three features by way of concluding various treaties, enacting legislation, concluding contracts such as the 1968 Oil Concession Agreement, issuing fishing regulations, drawing up maps, surveying marine areas, and policing the area. Please allow me to provide you with five particular examples of Malaysia's practice that deserve special attention.

(i) The Indonesia-Malaysia Continental Shelf Agreement 1969

5. On the issue of treaties in which Malaysia openly exercised its sovereign rights, I first of all refer the Court to the Indonesia-Malaysia Continental Shelf Agreement, concluded on 27 October 1969. The text of the agreement is under tab 110 of the judges' folder. The map, as annexed to the agreement, is now on the screen. The facts of the negotiations, and the Agreement

itself, are a matter of public record, in a joint Press Statement of 22 September 1969. Indonesia and Malaysia noted that they "had reached agreement on the delimitation of the continental shelf boundaries between the two countries in the Straits of Malacca, off the East Coast of West Malaysia and off the Coast of Sarawak"[1].

6. The maritime boundary line established by the 1969 Agreement runs very close to PBP. You can see from the enlargement of the map, currently on the screen, that Point 11 of the boundary line was only 6.4 nautical miles from PBP, well within the territorial waters of PBP. Singapore's argument that the 1969 Agreement "carefully avoided any intrusion into the area in the vicinity of Pedra Branca"[2] is simply not correct.

7. In spite of the close proximity of the boundary line to PBP, Singapore did not at any point assert any interest, let alone raise any objection regarding the maritime delimitation. This silence, Mr. President, suggests that Singapore did not consider it had any territorial rights in the area affected by the delimitation. Should this have been otherwise, Singapore might have been expected to register at least some form of public objection or expression of interest, inasmuch as the outcome of the negotiations was public. A form of protest would even have been required, had Singapore perceived the Indonesia-Malaysia Agreement to encroach on parts of its sovereign territory. None of this happened. At the time, simply Singapore had not yet developed its claim to sovereignty over PBP.

8. Singapore now tries to belittle the importance of the 1969 Agreement by saying that "it was *res inter alios* as far as Singapore was concerned"[3] and that it was "without prejudice to the rights of third States"[4]. A suitable riposte to this position can be found in the words of the Arbitral Tribunal in the *Eritrea/Yemen* award,

> "Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*."[5]

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[1]MM, Vol. 1, p. 123, para. 280.

[2]CMS, Vol. 1, p. 173, para. 6.93; RS, Vol. 1, p. 185, para. 5.23 *(c)*. See also CR 2007/22, p. 45, para. 27.

[3]CR 2007/22, p. 49, para. 41. See also CMS, Vol. 1, p. 172-173, para. 6.92; RS, Vol. 1, p. 185, para. 5.23.

[4]CR 2007/22, p. 45, para. 27.

[5]*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. 48, para. 153.

In the absence of Singapore's title over PBP, such a claim of *res inter alios acta* is without legal import.

(ii) The 1968 Oil Concession Agreement

9. As regards contracts, on 16 April 1968 Malaysia concluded a Petroleum Agreement with the Continental Oil Company of Malaysia in respect of off-shore areas comprising approximately 24,000 square miles of the continental shelf adjacent to the east coast of West Malaysia[6]. The area in which the Continental Oil Company was entitled to explore for petroleum was described by reference to geographical co-ordinates and indicated on the map attached to the Agreement, all under tab 111 of your folder. The limits of the area broadly followed the anticipated boundaries of the 1969 Indonesia-Malaysia Continental Shelf Agreement.

10. This concession area extended along the south eastern coast of west Malaysia, following a line 3 miles from the baselines from which the territorial waters of the States of Johor, Pahang and Terengganu were measured. On the seaward side, the concession area extended to and beyond PBP, enclosing within it PBP and other islands of Johor, as well as Pahang and Terengganu, although the territory and territorial waters of all these islands were expressly excluded from the concession area.

11. The latter was an indiscriminate provision. It related to *all* islands within the concession area, not simply to PBP and — contrary to what Singapore infers from this[7] — has no bearing on any question of status regarding any island within the area. In fact, had the three features not been under the sovereignty of Malaysia, account would have been taken in the Agreement of the potential continental shelf of Singapore in the area around PBP. But the Concession Agreement clearly does not allow for such a possibility. Instead, the exclusion of all islands from the concession area simply manifests the intention of Malaysia to limit the exploration and possible exploitation of oil to its continental shelf, excluding territorial waters.

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[6]A similar agreement was signed on the same day between Malaysia and Esso Exploration Malaysia Inc. covering a further area of continental shelf along the north eastern coast of west Malaysia, i.e., an area to the north of the Continental Oil Company concession but along the same coastline; MM, Vol. 1, p. 119, para. 275.

[7]CR 2007/22, p. 42, para. 18; and RS, Vol. 1, p. 184, para. 5.23.

12. Malaysia does not adopt a position here any different from the position in the *Indonesia/Malaysia* case. As the Court noted in that case, the limits of the oil concessions granted by the Parties did not encompass the islands of Ligitan and Sipadan, but were fixed at 30" to either side of the parallel in the vicinity of the islands (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment*, *I.C.J. Reports 2002*, p. 664, para. 79). In contrast, it is evident from the 1968 Concession Agreement that PBP, Middle Rocks and South Ledge were clearly included in the concession perimeters. It was merely the territorial waters surrounding the three features that were excluded from the scheduled area.

13. The award of the concession agreement was an open display of Malaysian sovereignty which would surely have resulted in a Singapore protest if there had been any hint of a dispute at the time. The agreement was concluded openly, was widely published, including coverage in trade journals and by the *Straits Times*. Singapore must have been fully aware of the agreement. While the precise co-ordinates of the concession area were not published, the fact that it covered the full length of the east coast of West Malaysia was known. Moreover, the concessionaire, Continental Oil Company, initially operated from Jurong Marine Base, which belonged to Singapore Port Authority. Hence, the general region of the concession area would likely have been familiar to the Singaporean authorities.

14. Singapore, however, not only made no protest against the agreements but did not even enquire as to their territorial extent. The best explanation for this silence on the side of Singapore is that it had no territorial interests in the area off the east coast of Malaysia along Johor and the waters thereof.

15. Singapore contends that "neither Malaysia nor her concession holder ever carried out any petroleum operations either on Pedra Branca or within its territorial waters"[8]. Singapore also alleges that "a few years after the agreement was signed, Continental relinquished a large portion of the concession including the entire southern area off the coast of Johor in the vicinity of Pedra Branca"[9]. Such contentions are irrelevant, for the validity of the concession agreement was not

[8]CMS, Vol. 1, p. 169, para. 6.85.

[9]CMS, Vol. 1, pp. 170-171, para. 6.89.

dependent on the actual exploration of the area and, more importantly, the relinquishing of the southern part of the concession area was not as a consequence of protests of Singapore.

(iii) Issuing of maps

16. I now proceed, Mr. President, to the third element: the issuing of maps as a manifestation of sovereignty. Malaysia virtually always included the three features and their surrounding waters in its territorial waters in the maps it issued.

17. In response to Singapore, it is pertinent to say first of all a few words on the issuing by the Royal Malaysian Navy of charts depicting Malaysian territorial waters. Of particular interest is the issuance, in July 1968, of a Letter of Promulgation and accompanying chartlets by then Commodore Thanabalasingam — Admiral Tan Sri is here in the courtroom. At that time he had just been appointed Chief of the Royal Malaysian Navy and this Letter of Promulgation demonstrates the naval practice of affirming Malaysia's sovereignty over Pulau Batu Puteh.

18. The Letter of Promulgation — it is under tab 112 — of your folder, described the outer limits of Malaysian territorial waters and so-called foreign claimed waters in West Malaysia for purposes of Royal Malaysian Navy patrols. One of the accompanying chartlets — No. 2403 — marked PBP, Middle Rocks and South Ledge clearly within Malaysian territorial waters ("MTW").

19. The reasons for drawing up the 1968 Letter of Promulgation are addressed more fully in Rear-Admiral Thanabalasingam's affidavit. As he recalls, two factors weighed heavily in the process of drawing up the Letter. The first was the need to identify the limits of Malaysian territorial waters, pending the expected extension of a 3-nautical-mile to a 12-nautical-mile territorial sea, at that time. The second was to identify the limits of the foreign claimed waters, notably those claimed by Indonesia and the limits of Singapore's territorial waters, in order to ensure that Malaysian naval operations were sensitive to the limits of these waters. You will recall that at that time Malaysia had just emerged from the period of confrontation with Indonesia, and after Indonesia made unilateral claims of a territorial sea of 12 nautical miles as early as 1960, it was necessary for Malaysian ships to be aware of and to respect the Indonesian claimed waters. This was important, as PBP lies less than 8 nautical miles from the Indonesian island of Pulau Bintan, which is in turn about 5.6 nautical miles from South Ledge.

20. Singapore dismisses the 1968 Letter of Promulgation as "an internal and confidential letter, intended only 'for the information of Senior and Commanding Officers'"[10] and characterizes it as a misnomer. At the same time, in its effort to show that it exercised jurisdiction over territorial waters surrounding PBP, Singapore relies heavily on naval patrols that were allegedly taking place in a so-called specifically delineated area — the F5 area[11]. But Singapore conveniently forgets that the designation of the F5 area was not a public fact, and that at that time definitely not a fact known to Malaysia.

21. The 1968 Letter of Promulgation bears evidence of Malaysia displaying its sovereignty and shows that Malaysia regarded PBP, as well as Middle Rocks and South Ledge and their surrounding waters, as Malaysian territory. This letter came from none other than the Chief of the Malaysian navy and not from some junior officer. Furthermore, it goes without saying that, before promulgation, the letter was cleared by the Minister of Defence, at the time the Deputy Prime Minister of the country.

(iv) Emergency (Essential Powers) Ordinance, No. 7 1969

22. The fourth example, Mr. President, which unequivocally demonstrates Malaysia's sovereignty over the three features is the Emergency (Essential Powers) Ordinance of 1969, which extended Malaysia's territorial waters from 3 to 12 nautical miles, thus encompassing the territorial waters of PBP and Middle Rocks.

23. Singapore contends that the Ordinance "does no more than indicate the methodology which Malaysia intended to adopt in subsequently negotiating the delimitation of its territorial sea"[12] and "that the Ordinance does not provide for any delimitation"[13]. Such an argument is misconstructed. As evident from Section 3, paragraph 1, of the Ordinance, "the breadth of the territorial waters of Malaysia shall be twelve nautical miles". These areas of the territorial waters can be modified[14] only "pursuant to any agreement entered into between Malaysia and another

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[10]CR 2007/22, p. 40, para. 9.

[11]CR 2007/22, p. 25, para. 57.

[12]CR 2007/22, p. 44, para. 24. See also RS, Vol. 1, p. 184, para. 5.23.

[13]CR 2007/22, pp. 44-45, para. 26. See also CMS, Vol. 1, p. 171, para. 6.90.

[14]See Section 6 of the Emergency (Essential Powers) Ordinance, No. 7 1969. See also MM, Vol. 3, Ann. 111.

coastal State". Contrary to what Singapore claims, the Ordinance, in effect, extended Malaysia's territorial waters to 12 nautical miles, subject to the proviso noted above.

24. On the one hand, the 1969 legislation attests to the fact that, in 1969, Malaysia had no doubt that PBP and its surrounding waters fell well within Malaysia's territorial waters and that Malaysia clearly had title to PBP. On the other hand, the silence, the lack of protest by Singapore with regard to this 1969 Ordinance, confirms the absence of any appreciation by Singapore that Malaysia's conduct in any way infringed upon Singapore's territorial interests. The sole conclusion that can be logically deduced is that the island was clearly not part of Singapore's territory. I now proceed, Mr. President, to my final example and that relates to:

(v) Fisheries regulations and policing

25. Fishing by Malaysian fishermen in the waters around PBP was based on "official regulations" — to paraphrase this Court's observations in the *Indonesia/Malaysia* case (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 683, para. 140) — which were enforced by the Malaysian marine police and navy.

26. Since gaining its independence, Malaysia has regularly policed the waters around PBP. As attested to in the affidavit of Rear-Admiral Thanabalasingam, on many occasions during the period of confrontation with Indonesia the Royal Malaysian Navy would board fishing vessels in the area around PBP. According to the Rear-Admiral, most of these vessels at that time were of Malaysian origin. Usually, the Malaysian marine police boats would be anchored somewhere between PBP and Pulau Lima. Singapore did not protest against any of these manifestations of Malaysian sovereignty.

27. Mr. President, all these examples in the exercise of Malaysian sovereignty over the three features contrast with the practice of Singapore. Prior to the critical date, Singapore made no public claim of its own to PBP, Middle Rocks and South Ledge. Moreover, Singapore never enacted legislation extending the limits of its territorial waters beyond 3 nautical miles. The fact is that Singapore never regarded itself sovereign over PBP. Otherwise, it would of course have claimed 12-nautical-mile territorial waters and it would have raised their delimitation with Indonesia and Malaysia. It did not do so.

Part II: Third-State practice

28. Mr. President, Members of the Court, I now would like to proceed to the second part of my speech and turn your attention to the practice of third States in their dealings with Singapore and Malaysia.

(i) The Netherlands

29. Please allow me to review first the practice of the Netherlands in the region. As reviewed in the written pleadings, the Netherlands was an important player in the region for a long time, by virtue of the Dutch East India Company until 1800 and subsequently the colonial administration over the Netherlands East Indies until 1946.

30. The Dutch referred to the island of Pulau Batu Puteh in specific sailing directions as far back as the late sixteenth century. As noted by my colleague Professor Crawford, from the beginning of the seventeenth century the Dutch East India Company entered into formal and friendly relations with the Sultan of Johor. On the screen you see an enlarged extract of the original manuscript of the book *De Iure Praedae* by Hugo Grotius, written in 1604. You can also find that under tab 113. At the time of the Dutch capture of the Portuguese vessel *Catarina* in 1604 on the shore of Johor, Grotius identified Johor as a sultanate which "for long had been considered a sovereign principality"[15]. This demonstrates that at this early stage the Dutch thus concluded international relations with Johor as an independent State.

31. On 17 March 1824, Great Britain and the Netherlands concluded a treaty determining their spheres of influence in the Malay region — the so-called Anglo-Dutch Treaty —. Pursuant to the agreement — and I quote from Article 12 — any "Islands south of the Straights of Singapore" were left to the Dutch. In return, the Dutch would no longer seek territory within or to the north of the Straits, and would accept British "occupation" of Singapore itself.

32. Earlier this week I had the privilege of addressing you on the consequences of the Anglo-Dutch Treaty of 1824. After 1824, . . .

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[15]Hugo Grotius, *De Jure Praedae Commentarius* [Commentary on the Law of Prize and Booty] 1604 (G. L. Williams and W. H. Zeydek (trans.), Oxford: Clarendon Press, 1950), p. 314, Latin original p. cccv.

The VICE-PRESIDENT, Acting President: Could you kindly stop for a minute. I think Sir Elihu Lauterpacht is not feeling well. The Court will adjourn for 15 minutes.

The Court adjourned from 10.35 to 10.50 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. We shall continue without another break, and I ask you, Professor Schrijver, to continue, please.

Mr. SCHRIJVER: Thank you, Mr. President. On behalf of Malaysia, I would like to thank you for your understanding and we are pleased to report that Sir Eli is feeling quite well. He told us to continue and to send his greetings — and he said so with a smile!

Mr. President, Members of the Court, I interrupted the speech while reviewing the third States practice and I started with reviewing the practices of the Netherlands. Earlier this week I had the privilege of addressing you on the consequences of the Anglo-Dutch Treaty of 1824 under which the Dutch agreed to remain below the Straits of Singapore, south of the Straits of Singapore and ever since they never sought to encroach upon the British sphere of influence.

33. And this recognition of Johor's sovereignty is in particular also evident from an official map of the Netherlands East Indies produced in 1842 — that is graphic 9 —, and this map was part of a fine, extensive 8-sheet map of the Netherlands East Indies, made by order and submitted to the King of the Netherlands around the same time as the British were seeking permission to construct a lighthouse near Point Romania in Johor. As such, it is authoritative. It can be clearly noted that PBP, or Pedra Branca as it is shown on the map, is to the *north* of the line identifying the territorial extent of the Dutch Residency of Riau. As far as the Dutch were concerned, the Dutch sphere of influence, and therefore the extent of the Riau-Lingga Sultanate, did *not* include PBP, or "all the islands in the sea" off the Johor mainland.

34. Now, Mr. President, Singapore argues that the map depicts the Riau Residency only. However, there can be no doubt that the north of the Riau Residency in this particular area is also the most northern point of the Netherlands East Indies. As the legend of the map shows, the dotted line depicts the *Algemeene Grensscheiding* that is the general boundary demarcation. Furthermore, if the Court could once again take a glance at this enlarged section of the 1842 map it will note

nothing special as to the location of the words *Straat Singapoera*, Straits of Singapore. These two words are placed in the main navigation channel. It appears to be plain silly to infer, as Singapore does, that thus Pedra Branca is to the south of the Singapore Straits, since the name of the Straits is not placed to the south of PBP.

35. The extent of the Dutch sphere of influence can also be viewed from the 1883 Count de Bylandt map of the Dutch East Indies prepared to accompany the 1882 and 1883 Conventions with Native Princes[16]. The three features are also indicated to the north of the Dutch sphere of influence on this map. See under tab 114 of your folder.

36. Singapore, for its part, relies heavily on a brief letter from the Dutch General Secretary in Batavia to the Dutch Resident in Riau dated 27 November 1850 — under tab 115 — in which the former allegedly recognized that PBP was on "British territory"[17]. This letter, occasionally upgraded out of all proportion by Singapore to the level of an official memorandum or an act of recognition, was cited almost a dozen times by Singapore during its first round. For four reasons Singapore's heavy reliance on this letter is flawed:

— First, as a matter of fact, it is just a slip of paper rather than a report, let alone an act of recognition.

— Second, the letter concerned a request for granting gratuities to the commanders of the cruisers stationed at Riau and there is only a cursory reference to "a lighthouse at Pedra Branca on British territory". It is a far cry to link this petty issue to the question of sovereignty over PBP. It does not become credible no matter how many times Singapore refers to it. For example, Mr. Brownlie referred to it five times in his speech. Far from demonstrating a recognition of British sovereignty over PBP, this internal slip of paper — with due respect — shows more of a general lack of knowledge of the Dutch General Secretary — in Batavia at a distance of 880 km away from the region — a lack of general knowledge of the area beyond the Dutch sphere of influence.

— Third, the letter does not imply the phrase "under British sovereignty". And how could it since — if we adopt for a moment Singapore's complex theory — the process of the lawful

[16]MM, Vol. IV, map 11.

[17]RS, Vol. 1, pp. 238-239, paras. 8.13-8.15.

taking of possession had not yet been completed. Mr. President, throughout its State practice the Netherlands is not particularly known as a front runner in acts of recognition.

— Fourth, the letter was not a public document; in fact, far from it, it was part of an internal correspondence between two Dutch officials, and as such cannot be employed as evidence of the official position of the Netherlands as to who had sovereignty over PBP. To paraphrase the Court's observations in the *Gulf of Maine* case, this letter, being a matter of Netherlands internal administration, does not authorize Singapore to rely on its contents, as though it were an official declaration of the Netherlands Government on that country's position with regard to the question of sovereignty over PBP (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), *Judgment*, *I.C.J. Reports 1984*, pp. 307-308, para. 139). It is also pertinent to recall here the fine general observation made by the Arbitral Tribunal in the *Eritrea/Yemen* case (First Phase) with regard to the legal validity of internal documents, and for the sake of time, I will include the quote in the verbatim record of today's proceedings:

> "internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made"[18].

37. Mr. President, what could I add, in sum, if this is the best and only evidence of Dutch recognition of British sovereignty over PBP, it is so flimsy as not worthy of being taken seriously.

(ii) Great Britain/United Kingdom

38. Let me now turn your attention to the practice of Great Britain and its perception of the maritime boundaries in the Straits of Singapore. As both Malaysia and Singapore were subject to British rule of one kind or another until their independence it is pertinent to distinguish between two periods of independence.

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[18] *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. 31, para. 94.

39. As Sir Eli Lauterpacht has demonstrated yesterday, the British Government *never* claimed sovereignty over PBP. On the contrary, it requested and obtained permission from Johor to construct the lighthouse. *The Union Jack was never flown* on PBP.

40. Subsequent British conduct before the independence of Singapore confirms Britain's views with regard to sovereignty over PBP, Middle Rocks and South Ledge. This can be inferred from various British maps from the time before and after independence, which my esteemed colleague Ms Nevill will show you.

41. The British perception of PBP as belonging to Malaysia is also affirmed by the request of 20 February 1967 by the British Royal Navy for permission for the survey ship HMS *Dampier* to survey off PBP. The request came from the Royal Navy office of the Commander of the Far East Fleet, Singapore, and the request was submitted to the Ministry of Defence (Navy), in Kuala Lumpur. On that occasion, clearance was requested "for HMS Dampier and detached parties to carry out surveys in West Malaysia". The survey included the waters around PBP. It is well known that on that occasion, several British officers landed on Pulau Batu Puteh in order to set up a tidal pole. The landing on PBP was carried out by a small boat lowered from HMS *Dampier*, while at no stage was permission sought from the lighthouse keepers to visit the island[19].

42. Singapore[20] now claims that the 1967 request of the British Royal Navy *did not* include a specific permission to survey the territorial waters around PBP. Singapore apparently concludes this from the observation that "the co-ordinates provided do not approach the proximity of Pedra Branca"[21]. Such a reading of the 1967 request is flawed. The details in the enclosure to the 1967 request show that permission was sought with reference to co-ordinates that specified the start and endpoints of the surveys which were to be conducted off the coasts of south-east, as well as south-west, Johor. It is clear from the purpose of the surveys — that is, reconnaissance, triangulation, hydrographic soundings — that the request was related to the general areas between the specified points. It would be absurd — as Singapore now suggests[22] — to interpret the request

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[19]See Affidavit of Rear-Admiral (rtd.) Dato' Karalasingam Thanabalasingam, CMM, Vol. 2, Ann. 4, p. 21, para. 63; and Report of Captain (rtd.) Goh Siew Chong, RM, Vol. 1, App. III, pp. 240-241, para. 4.4.

[20]CR 2007/22, p. 48, paras. 39-40. See also RS, Vol. 1, p. 182-183, paras. 5.19-5.20.

[21]RS, Vol. 1, p. 183, para. 5.20.

[22]*Ibid.*, pp. 182-183, para. 5.19. See also CR 2007/22, p. 48, para. 40.

so as to imply that the surveys were restricted merely to lines connecting the start and end co-ordinates. Mr. President, a line so constructed would be situated on land, and not on sea!

43. Furthermore, it is evident from the final Fair Sheet that the surveys covered the entire area off south-eastern and south-western Johor. As normal practice, the final Fair Sheet of the survey would have been sent to the United Kingdom Hydrographic Department and a copy forwarded to the country in whose waters the survey took place, in this case to the Ministry of Defence of Malaysia. The 1967 surveys were used to update all Admiralty Charts covering the area, including British Admiralty Chart 2403 and Chart 3831[23].

44. Contrary to what Singapore claims, the British practice of requesting permission to conduct the 1967 survey confirms that, in the perception of the United Kingdom, the three features form part of *Malaysian* territory. This is particularly important, since the British — operating from the naval base in Singapore — were well aware and very conversant with Singaporean and Malaysian territorial limits and boundaries, especially in this particular area.

(iii) Indonesia

45. Mr. President, as regards third-party practice, particularly telling is the attitude of Indonesia in the context of the delimitation of its continental shelf with Malaysia. The conclusion of the 1969 Agreement, to which I referred the Court earlier, not only confirms the perception of Indonesia that Singapore did not have any maritime boundaries in the area around PBP, but also bore clear evidence of Singapore's acquiescence to Malaysia's sovereignty over the three features. It is evident that Indonesia did not consider that it had a maritime boundary with Singapore in the area around PBP.

46. Only a few years later, after the conclusion of the 1969 Agreement, in 1973, Indonesia and Singapore signed a territorial sea agreement which subsequently entered into force in 1974. The Agreement laid down, by reference to a series of geographical co-ordinates, the territorial sea boundaries between the two countries in the Straits of Singapore. As Professor Crawford discussed yesterday, the 1973 Agreement neither refers to PBP, nor purports to delimit the territorial sea between PBP and Pulau Bintan. The language of the Agreement — the text of which you can find

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[23]Report of Captain (rtd.) Goh Siew Chong, RM, Vol. 1, App. III, p. 241, para. 4.7.

under tab 116 — is definite and unequivocal: because the particular words used in Article 1 are: "The boundary line of the territorial seas of the Republic of Indonesia and the Republic of Singapore in the Strait of Singapore shall be a line . . ."[24]

47. There is little reason to assume that Singapore merely "forgot" about PBP in 1973. The Agreement, therefore, supports the conclusion that in 1973 Singapore did not consider it had sovereignty over any of the three features: PBP, Middle Rocks and South Ledge.

48. In both cases Singapore failed to act in a manner consistent with its claim to long-established sovereignty over PBP — a claim that Singapore advanced only in 1978. Mr. President, Members of the Court, is this — I ask you — the behaviour of a State which considers itself to have had sovereignty over a strategically located and highly visible island for over 150 years? Singapore's behaviour — or rather, the lack thereof — clearly demonstrates that we are dealing with a very recently conceived claim. Singapore's silence in matters of delimitation at least suggests, if not confirms, its acquiescence in the fact that it did not have sovereignty over PBP, Middle Rocks and South Ledge before the critical date.

49. Moreover, the two examples of border delimitation also clearly show that Indonesia did not consider — and neither was it aware of the fact — that it had a maritime border with Singapore in the area around PBP. Had it had a maritime border in this area, this would have been reflected in the Indonesia/Singapore 1973 Agreement and of course Indonesia would have recorded its reservation of rights at the time of conclusion of the 1969 Continental Shelf Agreement between Indonesia and Malaysia.

(iv) Australia, New Zealand and United States

50. I now would like to turn the Court's attention to the practice of other States in the region. As will be seen, this practice likewise confirms the view that there was never a recognized Singapore boundary line around PBP, Middle Rocks and South Ledge.

51. During the period of confrontation — the Indonesian-backed insurgency against Malaysia between 1963 and 1966 — the Royal Malayan Navy was given considerable assistance in

[24] MM, Vol. 2, Ann. 18.

responding to the threats by the *Australian* and *New Zealand* navies, as well as the British[25]. This broadly took place under the framework of the 1957 Anglo-Malayan Defence Agreement and took the form of co-ordinated naval patrols by the four navies. The defence agreement is under tab 117. In this context, not only did the Royal Malaysian Navy conduct patrols in the waters around PBP, but it did so for a period of years in close co-ordination with the British, Australian and New Zealand navies on the basis of a common appreciation that PBP was a Malaysian island. And this is also affirmed by the Rear-Admiral Thanabalasingam in his affidavit[26].

52. Equally telling is evidence stemming from *United States* maps. For example, the 1965 United States map of "Malaysia and Singapore" does not depict PBP as being within Singapore area[27]. Likewise, there are other maps of the United States to which no doubt with great skill my colleague Ms Nevill will introduce to you later this morning.

(v) The Philippines

53. Mr. President, as regards the Philippines, despite the fact that Singapore introduced an issue that took place well after the critical date, I will nevertheless quickly address it. Singapore seeks to introduce evidence of practice by the *Philippines*, with the aim of showing that PBP and the waters around it belong to Singapore. Singapore refers to the events following the collision between the vessels *Everise Glory* and *Uni Concord* on 4 June 2005 in the waters around PBP. A press release dated 17 June 2005 from the Philippine Ministry of Foreign Affairs characterized the incident as taking place "at sea, off Pedra Branca, Singapore"[28].

54. Singapore maintains that "the Philippines recognition merits particular attention and significance"[29] — in its words. Singapore lays great importance on this incident on the ground that it emanates "from a neighbouring State of Singapore and Malaysia, which is presumably well informed of the state of affairs regarding sovereignty in the region"[30]. However, Singapore fails to

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[25]CMM, Vol. 2, Ann. 4, p. 9, para. 22, Affidavit of Rear-Admiral (rtd.) Dato' Karalasingam Thanabalasingam.

[26]CMM, Vol. 2, Ann. 4, pp. 20-21, paras. 60-62, Affidavit of Rear-Admiral (rtd.) Dato' Karalasingam Thanabalasingam.

[27]CMM, Vol. 1, Map Section, map 10.

[28]See RS, Vol. 1, p. 244, para. 8.27.

[29]CR 2007/23, p. 46, para. 49.

[30]*Ibid.*

clarify the meaning of this alleged "recognition". For, what is meant by recognition? Is it recognition of sovereignty, is it recognition of possession, it is recognition of what? Even in the unlikely case that this solitary statement of the Philippines implies a recognition of Singapore's sovereignty over PBP, it must not be overlooked, Mr. President, that the Philippines has long-standing claims over parts of Malaysian territory. As the Court will recall, the Philippines sought to intervene in the proceedings in the *Indonesia/Malaysia* case precisely "to preserve and safeguard the historical and legal rights of . . . the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene, Judgment, I.C.J. Reports 2001*, p. 580, para. 7). As was noted by Judge Kooijmans, however, "in the present case the Philippines has . . . failed to make its claim sufficiently plausible" (*ibid.*; declaration of Judge Kooijmans, p. 629, para. 16). Mr. President, it would be wise policy for Singapore not to place emphasis on a single incident by a State that failed so manifestly in its claims to sovereignty over Malaysian territory on its own behalf.

(vi) Inter-State co-operation in the Straits

55. I would like to say a few words on inter-State co-operation in the Straits. In its effort to provide evidence of conduct by third parties that would support its sovereignty over PBP, Singapore tirelessly invokes the proceedings of a 1983 meeting of the Tripartite Technical Experts Group (TTEG), during which "the experts were informed that two wrecks had been identified in the vicinity of Horsburgh Lighthouse and that Singapore had issued Notices to Mariners notifying the position of the wrecks"[31].

56. This Expert Group on Safety of Navigation in the Straits of Malacca and Singapore is a tripartite forum for discussion of technical issues relating to the safety of navigation in the whole area of the Malacca and Singapore Straits by experts from Indonesia, Malaysia and Singapore. This group is not a forum for dealing with bilateral issues. No importance should be attached to Singapore's argument that Malaysia did not assert sovereignty over PBP in a meeting of the Experts Group in May 1983 — in any event after the critical date. As so eloquently explained by

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[31]RS, Vol. 1, pp. 239-240, para. 8.16.

my colleague Sir Eli yesterday, acts by Singapore in relation to the lighthouse should be regarded as consistent with best lighthouse practice and have no relevance for underlying sovereignty. Singapore's reference to the "two wrecks in the vicinity of the Horsburgh Lighthouse" is part of this remit.

57. Singapore fails to mention other examples of co-operation in the maritime context, where Singapore itself failed to raise the issue of sovereignty over PBP. Malaysia, together with Singapore and Indonesia, has participated actively over many years in joint hydrographic surveys of the waters of the Malacca and Singapore Straits, including the waters around PBP. On several occasions, these joint surveys included the setting up of a tide pole at Horsburgh lighthouse.

58. These and other joint hydrographic surveys do not represent exclusively Malaysian conduct. The surveys took place in the waters of all three participating States, with participants of third States such as Japan. These surveys show that Malaysia and Malaysian personnel have always been involved in charting the waters around PBP, that they have used the lighthouse on PBP as an inspection point for these surveys, and that they have landed on the island to take measurements.

59. In sum, this inter-State co-operation confirms Malaysia's commitment to maritime safety in the relevant waters around PBP — a commitment that properly took the form of co-operative arrangements with Indonesia and Singapore, as the two other interested coastal States, notwithstanding the recent dispute with Singapore over title to PBP.

Conclusions

60. To conclude, Mr. President and distinguished Members of the Court, the continued practice of Malaysia, as well as that of third parties, all confirm the perception that PBP, Middle Rocks and South Ledge form part of Malaysian territory and that Singapore has never had any maritime boundaries in the area around PBP.

61. Four facts are particularly relevant here:

— First of all, Malaysia's extensive practice attests to the fact that Malaysia has always had sovereignty over PBP, Middle Rocks and South Ledge. The practice of Malaysia consisted of the conclusion of treaties relating to the maritime boundaries and marine resources, the

granting of oil concessions, enacting relevant legislation, the drawing of maps, enforcing fisheries regulations, patrolling the area, surveying the area for hydrographic purposes, etc.

- Secondly, the practice of the Netherlands and Great Britain — two former colonial Powers and important players in the region throughout history — also reflects Johor's and subsequently Malaysia's sovereignty over the three features.
- Thirdly, even more telling, as I reviewed with you is the practice of Indonesia — particularly in its delimitation dealings with Malaysia in 1969 and with Singapore in 1973 — for it is this Indonesian practice, coupled with Singapore's silence and inaction, that clearly bears evidence of Singapore's acquiescence to Malaysia's continuous sovereignty over the three features.
- Fourthly, the consistent and regular co-operation of Malaysia with its neighbours for ensuring the maritime safety and security of all shipping and commerce and for protecting and preserving the marine environment of the Straits of Singapore[32].

62. Mr. President, Members of the Court, thank you for your attention. Mr. President, I would like to ask you to call on my colleague Penelope Nevill to continue Malaysia's presentation. I have no doubt that she will ably navigate you through all these maps during her first appearance before your Court. Thank you.

The VICE-PRESIDENT, Acting President: Thank you, Professor Schrijver for your speech. I now call on Ms Nevill to make her speech. You have the floor, Madam.

Ms NEVILL:

THE MAP EVIDENCE

1. Mr. President, Members of the Court, it is my great honour to make my first appearance in this Court before you today on behalf of the Government of Malaysia.

2. In this presentation it is my task to take you through the map evidence. I will show that, overall, the map evidence supports Malaysia's claim that it has sovereignty over Pulau Batu Puteh, and Middle Rocks and South Ledge, and it belies Singapore's claim that it has had sovereignty over PBP on the basis of occupation of *terra nullius* since 1847 to 1851. To assist the Court you

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[32]See the opening address by the Agent Tan Sri Kadir, CR 2007/24, p. 16, para. 30, and p. 17, para. 37.

will find, in tab 118 of your folders, a list, in chronological order, of all the maps of the area which are reproduced in the written pleadings of both Parties. There are nearly 100 maps, excluding those produced specifically for the case.

3. As Ms Malintoppi said last week, none of the maps reproduced in the pleadings has — to invoke the well-known words in *Burkina Faso/Mali* — "intrinsic legal force" (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 582, para. 54). They are not a physical expression of the will of the Parties for the purpose of establishing territorial rights over PBP, Middle Rocks and South Ledge, and the Parties are agreed on this[33]. But we also agree that the map evidence nevertheless has some importance. Map evidence can be, again in the words of the Chamber in *Burkina Faso/Mali*, "extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts" (*I.C.J. Reports 1986*, p. 582, para. 54).

4. Note that I say "map evidence" rather than "maps". This is because the map evidence is as important for what it does not say, as for what it does. The map evidence has to be viewed as a whole, as a continuum, in which the gaps in the record — the lack of maps — are significant.

5. The most significant gap revealed by the map evidence is that Singapore and its predecessors never pictured PBP as part of the territory of Singapore until 1995, 15 years after the critical date, and 144 years after Horsburgh lighthouse was completed. This omission undermines the claim Singapore now makes that it indisputably has had sovereignty over PBP since 1847 to 1851. The graphic representations of Singapore by its British forebears, and by Singapore itself, suggest nothing of the sort.

6. Today, I will focus on the map evidence from 1824 onwards. The Parties between them produced 16 maps from the period from the late sixteenth century up to 1824[34]. As Professor Crawford showed earlier this week, early maps by Portuguese, Chinese, Dutch, English and French cartographers of the region illustrate that PBP was, in spite of its small size, within the Sultanate of Johor and well known.

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[33]CR 2007/23, p. 34, para. 1.

[34]CMS, Map Atlas, maps 1-6; MM, Map Atlas, maps 1-5; CMM, Vol. 1, Maps Section, maps 2-5; MR, Map Ann. 1

7. The post-1824 map evidence will be presented in three sections. The first responds to Singapore's main argument on the map evidence: that six of these nearly 100 maps are an admission against interest by Malaysia. The second section looks at maps of Johor and the region, which show Pulau Batu Puteh, Middle Rocks and South Ledge as part of Johor and Malaysia. The third section is on maps of Singapore. It looks at the way Singapore has been consistently represented in the periods before and after independence. You will see that the maps graphically reflect the evidence drawn from other sources. They show, on the one hand, that PBP was considered to be part of Johor and, on the other, that Britain and Singapore did not consider Britain had acquired title to PBP in 1847 to 1851 as Singapore now claims.

I. Alleged admissions against interest

8. Singapore argues that a map of Pengerang in Johor, Malaya, published by the Surveyor General of the Federation of Malaya in 1962, is an admission against interest because it includes the word Singapore under the word Horsburgh on the notation for PBP[35]. The map shown is the first of the maps which Singapore has alleged are an "admission against interest". Singapore singles out this map and five others from all the other map evidence, and says they recognize that PBP belongs to Singapore[36].

9. There are two responses to Singapore's argument, legal and factual, and I will start with the factual. What, in fact, do these six maps actually show? The short answer is that they do not show what Singapore says they do. This 1962 map is representative of five of the six maps in question, which are further editions of the Pengerang map from 1962, 1965, 1974 and 1975[37]. They are reproduced by Singapore at tab 45 of its judges' folder, and so it is unnecessary to reproduce them for you again now, but the points I make on this map apply equally to the other four.

10. The 1962 map shows the island is part of Pengerang, Malaya, being included on a map which depicts this area. If we take a close up of the notation, you can see that there is a lighthouse symbol, and the island is named by its Malay name "Batu Puteh". Middle Rocks and South Ledge

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[35]CMS, Map Atlas, map 26; judges' folder, tab 119.

[36]CR 2007/23, p. 35, para. 4.

[37]Maps 33, 34, 39 and 41 of Malaysia's Map Atlas.

are small marks nearby. The word "(Horsburgh)" in brackets appears under the name Batu Puteh, and below that the word "(SINGAPORE)" appears, also in brackets. This shows that the lighthouse, Horsburgh, belongs to Singapore because "Horsburgh" and "Singapore" are both in brackets and Batu Puteh is not. That is, the word "Singapore" belongs to the lighthouse and not the island.

11. This reading is supported by other aspects of the same map. The dimensions of the map have been set so as to ensure PBP is included. There is no reason to show the extent of the maritime area on the eastern side of the peninsula otherwise. This is confirmed by the index to the map which shows the outline of this sheet of the map series against others in the same series which are adjacent to it. As you can see, the Pengerang sheet juts out further to the right than sheet 132 of the map series above it because this is necessary in order to include PBP, and PBP is indicated on the index by a small dot. Moreover, although each of these maps includes a State or international boundary line between Singapore and Malaysia, the 1974 and 1975 maps, published after Malaysia extended its territorial sea to 6 nautical miles in 1969, do not show a boundary line in the region of PBP, as would be fitting if the cartographers considered it was part of Singapore.

12. Singapore argues that this cannot be the correct interpretation of the notations because the same notation of Singapore, in brackets, has been added under the name of the island Pulau Tekong Besar, part of which is shown on the left-hand side of the map[38]. This does not assist Singapore's argument. There is no question but that Pulau Tekong Besar belongs to Singapore, which is why the notation has been added. Equally, there is no question but that Horsburgh lighthouse belongs to Singapore, which is why the notation has been added under the word "Horsburgh". If the cartographer had intended to make clear that the notation "Singapore" belongs to the island and not to Horsburgh lighthouse, the word "Singapore" could have been added directly under the name of the island, as with Tekong Besar. But it was not: "Horsburgh" and "Singapore" are linked, and separate from the notation for the island Batu Puteh.

13. This brings me to Singapore's second argument as to why this is not the correct reading. Singapore compares the notation on the Pengerang map to the notation relating to the island of

[38]CR 2007/23, pp. 36-37, para. 11.

Pulau Pisang on a map of Pontian Kechil in the same map series[39]. Singapore argues that because the word "Singapore" does not appear under the word "lighthouse" on the depiction of Pulau Pisang, this means that the notation on the map of Pengerang indicates that PBP belongs to Singapore. Malaysia disagrees. It is plain from the map that, had the cartographers considered adding such a notation, logistical reasons would count against doing so. Pulau Pisang is much bigger than PBP, and the lighthouse is in the middle of the island. There is no space to add a notation without interfering with the land contours and the road running to the lighthouse which this topographical map is designed to show. The second point is that there is no reason to add a reference. The lighthouse on Pulau Pisang is not well known and named after a famous hydrographer like that on PBP. Many earlier maps and charts refer to the lighthouse on PBP by the name Horsburgh. It is therefore appropriate to include the name "Horsburgh" on the Malaysian maps to reflect earlier charts and maps of the same area to ensure continuity. However, as the Malay name of the island, Batu Puteh, is also included, it is appropriate to distinguish the attribution of the lighthouse from that of the island.

14. That the notation "Singapore" on these six maps is not intended to relate to the island but to the lighthouse instead is evident from another of the six maps on which Singapore relies. The map now being shown was printed in 1970 by Malaysia's Director of National Mapping. This map is entitled "Kampong Sungai Rengit, West Malaysia". It is a closer view of part of the peninsula shown on the five Pengerang maps[40]. Pulau Batu Puteh is shown on an inset because, otherwise, it would fall well outside the margins of the map. Just how far PBP would otherwise fall outside the margin is shown on this graphic. This map supports the conclusion that the reference to "Singapura" in brackets is meant to be a reference to "Horsburgh", also in brackets, and not to Batu Puteh. The inset is obviously included because Batu Puteh is part of Malaysia.

15. In light of these considerations, it is just not possible to elicit from these six maps what is, to adopt the words of the *Eritrea/Ethiopia* Boundary Commission cited by Singapore, a "statement of a geographical fact"[41]. The notation could possibly be read as Singapore suggests. It

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[39]CMS, Map Atlas, map 25; judges' folder, tab 120.

[40]MM, Map Atlas, map 38; judges' folder, tab 121.

[41]MS, para. 7.49, Decision of 13 April 2002 reprinted in 41 *ILM* 1057 (2002), para. 3.27; CR 2007/23, p. 38, para. 15.

could be read as Malaysia reads it. The other evidence from the maps themselves supports Malaysia's reading. There are no shared boundary lines in the area of Pulau Batu Puteh, Middle Rocks and South Ledge, as are indicated between Singapore and Malaysia in the Johor Strait. The island is called by its Malay name, not Pedra Branca. All six maps of this part of Malaysia have been designed to ensure Pulau Batu Puteh is shown as part of it. There would be no reason to do so if the cartographers did *not* consider it to be part of Malaysia.

16. I move now to the legal point about these six maps. Even if these maps could be considered to show what Singapore claims, which they cannot, as a matter of law they are incapable of conferring sovereignty. Indeed, Singapore acknowledges this[42]. They do not have intrinsic legal force. None of the six are annexed to a treaty. Nor have they been considered subsequently by the Parties to reflect a territorial allocation set out in a treaty in the way the Annex 1 maps did in the *Temple* case (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6).

17. The maps reflect this lack of status. They carry disclaimers which state they are *not* to be considered authority as to international or other boundaries. Singapore argues these disclaimers have nothing to do with the attribution of territory, but concern only the delimitation of boundaries, because of the possibility of inaccuracies in boundaries[43]. This reasoning suggests that cartographers could *never* make errors in the attribution of territory. However, inaccuracies over attribution of land territories, especially in the case of very small islands, are just as likely as they are in matters of land boundaries. The point of the disclaimer is that these maps are intended to provide information about the area mapped, and they are not intended to determine sovereignty.

18. In terms of their circumstantial value, falling as they do within the third category of maps identified in *Burkina Faso/Mali*, these maps cannot confirm a sovereignty which Singapore did not have. Singapore has failed to show that it acquired sovereignty to PBP in 1847 to 1851 by occupation of *terra nullius*. This is borne out by the maps of Singapore after 1847, as I will shortly show you.

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[42]CMS, paras. 9.30-9.31.

[43]CR 2007/23, p. 37, para. 14.

19. As for the argument of an admission against interest, the Court has held that even relatively clear statements in letters between mid-level officials of two States regarding technical matters cannot be admissions against interest. In *Gulf of Maine* the Chamber of the Court held that Canada was not entitled to rely on the contents of a letter by a United States official, which appeared to accept a delimitation by median line, "as though it were an official declaration of the United States Government on that country's international maritime boundaries" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 308, para. 139). This holds true even more so in respect of a notation on a map carrying a disclaimer. It cannot be considered an official declaration by a State as to its territory. As Singapore said in its written pleadings, "when a map carries a disclaimer, the map . . . cannot be interpreted as attributing any legal recognition to that geographical situation for purposes of territorial attribution"[44]. In any event, these six maps simply do not represent in fact the admission against interest which Singapore has claimed.

20. I will now turn to the second part of my speech, on maps of Johor and the region published by Johor, Malaysia and third States which show PBP, Middle Rocks and South Ledge as part of Johor and Malaysia. As I have already noted, a great number of maps have been produced in this case. I will not go through all 100 of them, but I will go through a reasonable number at a quick pace. All the maps shown on screen are reproduced in the judges' folder.

II. Maps of Johor and the region show Pulau Batu Puteh, Middle Rocks and South Ledge in Johor and Malaysia

(a) *Maps of Johor and the region before the critical date*

21. Maps of Johor published under the direction of the Surveyor General of the Federated Malay States and the Straits Settlements include PBP as part of Johor. This 1926 map entitled "Part of Kota Tinggi District, Johore" marks "Pedra Branca Horsburgh"[45]. This map of Johor, also from 1926, shows Pedra Branca Horsburgh, and was published under the direction of Surveyor General of the Federated Malay States and the Straits Settlements. This map is of the State and

[44]CMS, para. 9.25.

[45]MM, Map Atlas, map 18; judges' folder, tab 122.

territory of Johor and is perhaps the most comprehensive map of Johor at that time. It carries the imprimateur of "His Highness Sir Ibrahim, the Sultan of the State and Territory of Johore". The co-ordinates covered by the map have been taken far enough eastwards to include PBP, and the Pulau Aur islands which sit further off the Johor mainland coast outside the margins of the map are shown by inset[46].

22. PBP, labelled "Batu Puteh", is also shown on the map of the State of Johore, appended to the Johore Annual Report of 1928[47].

23. On this 1927 British Admiralty Chart entitled the "Malay Peninsula-East Coast, State of Johore, Horsburgh Light to Jason Bay", special allowance has been made to show PBP below the border of the map[48]. These lines on the map were drawn later in 1968 by Royal Malaysian Naval staff. They show the then outer limit of Malaysian waters, including around PBP, and I will return to this aspect of the map.

24. And PBP is shown as part of Johor on this 1932 map of part of the Kota Tinggi District of Johor published under the direction of the Surveyor General of the Federated Malay States and the Straits Settlements[49].

25. There are maps of Johor that do not show PBP: a map of 1887 presented by the Sultan of Johor to the Government of Australia[50], and a Royal Geographic Society map of 1893[51]. Indeed, Singapore placed particular emphasis on these two maps, suggesting that they are especially significant because Johor officials were involved in their production[52].

26. But little weight can be placed on the omission of PBP from these two maps. The maps do not show the Johor islands of Pulau Aur, or the Natunas, Anambas and Tambelan island groups, which sit further out into the South China Sea. It has never been questioned but that Pulau Aur is Johor territory. Certainly around the time of the 1887 map at least, the Sultan considered the other

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[46]MM, Map Atlas, map 19; judges' folder, tab 123.

[47]CMS Map Atlas, map 14; judges' folder, tab 124.

[48]MM, Map Atlas, map 20; judges' folder, tab 125.

[49]MM, Map Atlas, map 23; judges' folder, tab 126.

[50]CMS, Map Atlas, map 9; judges' folder, tab 127.

[51]CMS, Map Atlas, map 10; judges' folder, tab 128.

[52]CMS, Map Atlas, maps 9 and 10. CR 2007/23, pp. 39-40, paras. 20-21.

islands which were not shown were also part of Johor, as evidenced by his 1886 correspondence with Britain over Johor's islands. The Memorandum entitled "Charts of the Islands belonging to Johore" of 20 March 1886 submitted by the Sultan includes [Ord Award map] chart 2041 which was the same as that used for the 1868 Ord Award map and covers an area inclusive of PBP[53]. A copy of the memorandum is at tab 130. It is a new copy of the original as the first copy deposited as Annex 63 with Malaysia's Memorial does not show the chart numbers clearly[54]. Given the Sultan's understanding of the extent of his territory and islands, it seems the only reason that islands such as PBP are not included in the 1887 and 1893 maps is because they focus on the mainland territory of Johor, then newly developed by the Sultan, and the islands fell outside their margins. In particular, the right-hand side margin of the 1893 map falls at co-ordinate 104º 20' East, and PBP is at 104º 24' 27" East.

27. Likewise, neither Pulau Aur nor PBP are included on the maps of the State of Johor appended to the Johor Annual Reports from 1931 to 1937[55]. The 1938 and 1939 maps attached to the Johor Annual Report do however include Pulau Aur, but not PBP[56]. And Singapore has drawn attention to this inconsistency in maps of Johor, suggesting it shows PBP was not considered to be part of it. There is some inconsistency in maps of Johor, but as you have seen, there are nevertheless maps of Johor which show PBP as part of it. By contrast, as you will shortly see, there is great consistency in maps of Singapore. PBP is never shown as part of Singapore.

28. The view that PBP was not part of Singapore but part of Johor is supported by maps of the region by other States. What these maps share in common is the depiction of maritime allocations in the area of PBP which place PBP in Johor, Malayan or Malaysian waters. If Singapore does not have a maritime allocation in the area evidently it does not have a land territory either. For example, this 1943 map of Lagoi, Sumatra, published by the United Kingdom War Office, draws maritime allocation lines which completely enclose Singapore. PBP is not shown,

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[53]MM, Map Atlas, map 10; judges' folder, tab 129.

[54]MM Vol. 3, Ann. 63.

[55]CMS, Map Atlas, maps 15-21.

[56]CMS, Map Atlas, maps 22-23.

but it would fall in the waters of Johor in the Unfederated Malay States–Straits Settlements and outside Singapore[57].

29. A map of "Sedili Besar, Malaya" of 1944 printed at the Survey of India Offices is the same. PBP and Middle Rocks are shown inside the Malayan waters and outside Singapore waters[58].

30. And again, this 1945 map of Lagoi, Sumatra, published by the United Kingdom War Office, does not show PBP, but draws territorial allocation lines which completely enclose Singapore and place the area in which PBP sits in the waters of Johor in the Unfederated Malay States–Straits Settlements[59].

31. And again, the same is shown on a 1950 map published by the United Kingdom War Office of "Sedili Besar, Malaya"[60]. This map was shown on screen by Singapore in its presentation. PBP and Middle Rocks are shown outside Singapore waters and inside the waters of the Federation of Malaya. Singapore suggests that as Singapore was part of Malaya at that time along with Johor the term British Malaya encompassed both Singapore and Johor[61]. Singapore does not however attempt to explain the tri-point of the State boundaries which completely encloses Singapore, and separates its waters from those of Johor, and places PBP in Johor waters.

32. Another map of "Sedili Besar, Malaya" published in 1950 by the United Kingdom War Office but in a different map series draws the same line again. PBP and Middle Rocks are in the waters of the Federation of Malaya, outside Singapore waters and in Johor waters[62].

33. And, again, in this map of the region published by the United Kingdom War Office in 1954, Singapore is shown as completely enclosed in a territorial allocation line which excludes PBP[63]. PBP is not shown but the area in which it is located falls in Malayan waters just on the side of the Malayan-Netherlands East Indies maritime boundary and outside Singapore waters.

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[57]CMS, Map Atlas, map 24; judges' folder, tab 131.

[58]MM, Map Atlas, map 27; judges' folder, tab 132.

[59]CMM, Vol. 1, Map Section, map 9; judges' folder, tab 133.

[60]MM, Map Atlas, map 28; judges' folder, tab 134.

[61]CR 2007/23, p. 42, para. 32.

[62]MM, Map Atlas, map 29, CMM, Vol. 1, Maps Section, map 7; judges' folder, tab 135.

[63]MR, Vol. 2, Ann. 4; judges' folder, tab 136.

34. And again, in this 1959 RAF Aeronautical Chart, based on the United States Air Force World Aeronautical Chart, PBP, marked by a star symbol, is shown outside Singapore and Indonesian waters and inside Malayan waters[64].

35. And again, this United Kingdom military chart for Operation Mason of 1965 shows complete maritime boundaries between Singapore, Indonesia and Malaya, respectively. PBP, shown by a star, is in Malayan waters and outside Singapore waters[65].

36. And again, this 1967 map of "Johor Baharu & Singapore" published by the United Kingdom Ministry of Defence for both Malaysia's Director of National Mapping and Singapore's Chief Surveyor shows PBP in Malaysia[66]. While incomplete lines are drawn between Singapore and Indonesia in the area of Singapore Island and between Malaysia and Indonesia in the area of PBP, there is no indication of any Singapore allocation lines in the area of PBP.

37. And again, on this 1968 map of part of Sumatra published by the United Kingdom Ministry of Defence the only boundary indicated in the area of PBP is the boundary between Malaysia and Indonesia[67]. Singapore's boundaries with Malaysia and Indonesia are shown in the area of Singapore only, and are consistent with Singapore's 1824 boundaries together with the 1927 retrocession of part of the Johor Strait back to Johor.

38. And again, this 1974 Operational Navigational Chart of Indonesia, Malaysia and Singapore by the United States Defense Mapping Agency Aerospace Center shows a boundary in the area of PBP between Malaysia and Indonesia[68]. This 1974 United States map, and the other United States maps shown, are inconsistent with any understanding that Singapore has a maritime area and therefore a land territory in the vicinity of PBP, and does not accord with the United States *Gazetteer* No. 10 of 1970 which included PBP under Singapore rather than Malaysia: and in any event, the *Gazetteer* includes a disclaimer[69].

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[64]MM, Map Atlas, map 31; judges' folder, tab 137.

[65]CMM, Vol. 1, Map Section, map 8; judges' folder, tab 138.

[66]MM, Map Atlas, map 35; judges' folder, tab 139.

[67]MM, Map Atlas, map 36; judges' folder, tab 140.

[68]CMM, Vol. 1, Maps Section, map 15; judges' folder, tab 141.

[69]CMS, Vol. III, Ann. 46, p. vi.

39. The last map I will show you in this section of my speech is the 1979 map published by Malaysia's Directorate of Mapping[70]. It shows the territorial waters and continental shelf boundaries of Malaysia. Malaysia's territorial sea and continental shelf boundary take into account PBP and the two features. It evidences Malaysia's understanding that PBP, Middle Rocks and South Ledge belong to Malaysia, as do the five Pengerang maps and the 1970 map of Sungei Rengit, for the reasons that I discussed earlier.

(b) *Malaysian conduct relevant to maps*

40. Other Malaysian conduct consistent with its sovereignty over PBP, Middle Rocks and South Ledge was described by Professor Schrijver just earlier this morning and so I will only dwell on two aspects of that conduct relevant to maps. The first is that PBP was used by Federation of Malaya officials as a triangulation point for mapping the south-eastern part of Johor. This is shown by the Johor survey compilation sheet of 1957 which shows that Batu Puteh has been used as a triangulation point for sheet 135 of Johor[71]. Singapore's main response to this is that the sheet forms the basis for the so-called admission against interest maps and that this is crucial. As has already been explained, these maps cannot be read as an admission against interest. Moreover, whether or not the compilation sheet formed the basis of the maps — and Malaysia has never denied this possibility — is irrelevant to the point the survey sheet illustrates. The point is that PBP was used as a triangulation point for Johor by Federation of Malaya surveyors.

41. Singapore argues that it would have been possible to draw this compilation without a surveyor travelling to the feature to carry out a field survey. But, as Malaysia points out in its Reply, the records show surveyors did travel to PBP to conduct field surveys, as when in 1959 Mr. Velu Pillai travelled to the island to take observations over several days. He used PBP as a plan control point for survey sheet 135, the sheet represented by the 1957 Survey Compilation Sheet. At this point I would like to correct Ms Malintoppi's suggestion that Malaysia made an error in its chronology by suggesting that Mr. Pillai's work in 1959 was the basis of the 1957 compilation sheet[72]. What Malaysia said, responding to Singapore's argument in its

[70]MM, Map Atlas, map 44; judges' folder, tab 142.

[71]MM, Map Atlas, map 30; judges' folder, tab 143.

[72]CR 2007/23, p. 43, para. 37.

Counter-Memorial that surveyors need not travel to the island to collect the type of data referred to on the 1957 compilation sheet, was that the records show that surveyors *did* travel to the island to collect data, as evidenced by Mr. Pillai's records[73]. Malaysia did not say that the 1959 data was used for a 1957 compilation sheet. Mr. Pillai's angle book, Annex 19 to Malaysia's Reply, shows detailed recordings of PBP, Middle Rocks and South Ledge, the other islands off the Johor coast, and the mainland coast. Malaysian officials also travelled to PBP in 1978 to take triangulations: and these instances evidence official Malayan and Malaysian activities in respect of and on the island.

42. The second aspect of relevant mapping conduct by Malaysia are the lines drawn to depict Malaysian territorial waters in 1968 by Malaysian naval staff onto the 1927 United Kingdom Admiralty Chart and other charts[74]. As Professor Schrijver has just explained, this was attached to instructions promulgated internally to the Malaysian forces. The territorial boundaries drawn trace Malaysian waters around the three features, reflecting the understanding that they are Malaysian.

III. Maps of Singapore do not show Pulau Batu Puteh, Middle Rocks and South Ledge as part of Singapore

43. I turn now to the final section of my presentation which looks at maps of Singapore and Singapore's mapping conduct. You might think that, given Singapore's argument that it had acquired title to PBP, Middle Rocks and South Ledge in 1847 to 1851, that PBP and the two features would have been represented on maps of Singapore ever since. But this is not the case.

44. Here is a map of Singapore which shows what Singapore would look like if PBP was included on a map of Singapore[75]. PBP is shown as an inset. The map was published in the Singapore Government publication, *Singapore Facts and Pictures*, in 1995, 15 years after the critical date. This is the first map of Singapore which shows PBP as part of Singapore. As I am about to show you, there is no depiction of PBP on any map of Singapore published by Britain or Singapore or anyone else before 1995.

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[73]RM, Vol. 1, para. 397.

[74]MM, Map Atlas, map 20; judges' folder, tab 125.

[75]MM, Map Atlas, map 48; MM, insert 31; judges' folder, tab 144.

(a) ***Maps of Singapore Island and its Dependencies to 1852***

45. There are three maps of Singapore from the period between the creation of the Settlement of Singapore in 1824 and 1852, by which year Singapore alleged Britain had acquired title over PBP.

46. The first map, now on screen, is entitled "Sketch of the British Settlement of Singapore, according to the treaty of the 2nd of August 1824" by the Assistant Engineer, Lieutenant Jackson. This is of course the Crawfurd Treaty under which the Sultan and Temenggong of Johor ceded the Island of Singapore and the seas, straits and islets to the extent of 10 geographical miles from its coast to the East India Company[76]. There is a fine dotted line joining the Johor mainland on either side of Singapore Island, and enclosing Singapore completely. As the line is quite faint, it is now being highlighted in red. The map says in a note at the bottom that "The red dotted line denotes the limits of the treaty."

47. At this point it is worth briefly recalling the 1842 map of the Dutch East Indies published by the Dutch and shown to you just now by Professor Schrijver[77]. This map confirms that the Dutch and English division of their spheres of influence in the area covered by the Sultanate of Johor let PBP in the British sphere. The 1842 map places PBP outside the boundary of the Dutch residency of Rhio.

48. A second map of Singapore Island and its Dependencies of January 1849[78], reduced from surveys executed by the Government Surveyor, J. T. Thomson, is to similar effect as the sketch of Singapore according to the 1824 Treaty. Again, you can see a dashed line which completely encloses the Settlement of Singapore. This map is dated two years after 1847, the year that Singapore has said that Britain acquired, or started to acquire, title to PBP. Quite clearly there is no sign of that here.

49. The third map in this sequence is dated 1852, the year after Singapore alleged that Britain had finished acquiring title to PBP. This is entitled "Map of Singapore Island and its Dependencies" and has been copied by permission from the Government Surveyor[79]. Like the

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[76]RM, Vol. 2, map 2; judges' folder, tab 145.

[77]CMM, Map Section, map 1, p. 277; judges' folder, folder 2, tab 61.

[78]MM, Map Atlas, map 8; judges' folder, tab 146.

[79]RM, Vol. 2, map 1; judges' folder, tab 147.

sketch-map of Singapore according to the 1824 Treaty, you can see a dashed line which completely encloses Singapore and its waters. There are two dashed lines coming off the circling line which go off the margins of the sheet. The notation along the dashed line around the bottom says that this is the "boundary of the British and Dutch residencies of Singapore and Rhio". The map shows the boundaries of Singapore Island and its Dependencies, and illustrates the division of the Dutch and British spheres. Given Singapore's claim that by the close of the year 1851 it had gained sovereign title over PBP, you might have expected that this 1852 map would have proudly displayed the Settlement's new dependency. It does not.

50. This is especially surprising when you consider that the Government Surveyor referred to in the 1849 and 1852 maps was Mr. J. T. Thomson, the very same individual who was the architect and surveyor responsible for constructing the lighthouse on Pulau Batu Puteh. He was, as Mr. Brownlie put it last week, the "authoritative witness"[80]. If anyone could be expected to know that Britain had acquired sovereignty over the island in the period 1847 to 1851, it was him. He stood by at the foundation laying in 1850 when the Worshipful Master uttered the magic word "Dependency". It seems to have left him entirely unmoved, since on maps of Singapore Island and its Dependencies published on his authority, PBP is not shown. The only conclusion to be drawn from this is that J. T. Thomson did not think that PBP was part of Singapore.

51. These three maps of the Settlement of Singapore illustrate graphically the evidence from other sources in two key respects. First, they show the British understanding that the extent of Singapore's territory was that ceded by the Sultan and Temenggong of Johor to the East India Company in the Crawfurd Treaty of 1824, and no more. Second, the 1849 and 1852 maps support the evidence that Britain never sought, nor acquired, nor thought it had acquired, sovereign title to PBP by building a lighthouse on it. PBP is never shown as a dependency of Singapore on maps of Singapore Island and its Dependencies after 1847 or 1851. The map evidence supports the other evidentiary sources from the period which support Malaysia's case.

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[80]CR 2007/21, para. 22, p. 38.

(b) ***Maps of Singapore after 1852***

52. After 1852 nothing changes. Crucially, Singapore, as depicted by Britain and Singapore, never included PBP before the critical date, not once in 130 years.

53. We may start with an 1885 "Map of the Island of Singapore and its Dependencies" by the Colonial Engineer and Surveyor General of the Straits Settlements[81]. It does not include PBP. Not all of Singapore's dependencies are shown on this map as some fall outside the margin.

54. But this was subsequently amended in this 1898 "Map of the Island of Singapore and its Dependencies" produced by the Colonial Engineer and Surveyor General of the Straits Settlements[82]. A larger area is covered by the map, which allows for the islands closer to the middle of the Strait which fall within the 10-geographical-mile limit to be shown. Allowance is made in the black border around the map to show the islands which fall below it, including Coney Island on which Raffles lighthouse by then stood. But PBP is not shown.

55. Nor is PBP shown on this 1911 map of Singapore and its Dependencies[83].

56. Nor on a map of Singapore of 1924[84]. This map is especially telling because it is very detailed. While we have shown the entire map in one piece here, it is in fact on a scale of 20 chains, or 402 m to the inch, and is made up of 16 sheets. It was published under the direction of the Surveyor General of the Federated Malay States and Straits Settlements. Islands which fall outside the margin of the compilation are shown by insets. But PBP is not shown as an inset.

57. Nor is PBP shown on maps of Singapore published by the United States Central Intelligence Agency[85]. There is no PBP on this 1967 map.

58. Nor is PBP shown on this United States CIA map of Singapore of 1968[86]. Nor on the inset of Singapore on the CIA map of Malaysia and Singapore of 1969[87]. Nor on this CIA map of Singapore of 1973[88].

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[81]MM, Map Atlas, map 12; judges' folder, tab 148.

[82]MM, Map Atlas, map 13; judges' folder, tab 149.

[83]MM, Map Atlas, map14; judges' folder, tab 150.

[84]MM, Map Atlas, map 15; judges' folder, tab 151.

[85]CMM, Vol. 1, Maps Section, map 11; judges' folder, tab 152.

[86]CMM, Vol. 1, Maps Section, map 12; judges' folder, tab 153.

[87]CMM, Maps Section, map 13; judges' folder, tab 154.

[88]CMM, Vol. 1, Maps Section, map 14; judges' folder, tab 155.

59. And nor is PBP depicted on maps of Singapore at the time by Singapore. This locality map of Singapore published by its local Works Department in 1976 does not show PBP[89]. And what about this topographical map of Singapore, published by Singapore's Ministry of Defence in 1978[90]? It does not show PBP.

60. A clear, if somewhat repetitive, theme emerges. PBP is not shown on any map of Singapore published by Singapore or anyone else until 1995. Not once since 1847. Singapore's own mapping conduct is hardly in line with its claim that it has had territorial sovereignty over PBP since 1847 to 1851. It raises the question, why would not PBP be on maps of Singapore? The obvious conclusion is that it is not on maps of Singapore because the cartographers did not think it was part of Singapore.

Conclusion

61. Mr. President, Members of the Court, to conclude. What the map evidence as a whole shows is that:

— first, the pre-1824 maps of the region show that PBP was well known and was squarely within the pre-1824 Sultanate of Johor;

— second, the 1842 Dutch map shows a division of the British and Dutch spheres of influence which treats the island as falling in the British sphere and thus the Sultanate of Johor;

— third, maps of Singapore by Britain and others after 1824 consistently depict it as consisting of the main Island of Singapore and the islands within the 10-geographical-mile limit established by the 1824 Crawfurd Treaty;

— fourth, this situation did not change after 1847 or 1851. Maps of Singapore by Britain and Singapore never included PBP until Singapore published a map in 1995;

— fifth, although there are maps of Johor which do not show PBP, there are nevertheless maps published by Johor, Britain, Malaya and Malaysian authorities which do show PBP as part of Johor and Malaysia;

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[89]MM, Map Atlas, map 42; judges' folder, tab 156.

[90]MM, Map Atlas, map 43; judges' folder, tab 157.

- sixth, Malaysia, unlike Singapore, has published a map expressly showing the three features as generating Malaysian continental shelf and territorial sea, that of 1979. This is consistent with internal maps produced by the Royal Malaysian Navy in 1968 using the three features to generate territorial waters;
- seventh, maps produced by third States reflect Malaysia's understanding of the maritime boundaries in the area of PBP. Both United Kingdom and United States maps consistently depict maritime allocation lines, which place PBP in Johor, Malayan or Malaysian waters and do not show any Singapore waters in the area of PBP, Middle Rocks and South Ledge.

62. Turning now to the six maps. As to these six maps, which Singapore claims are an admission against interest, not only can they not carry in law the weight which Singapore attributes to them and carry disclaimers, but they do not show in fact what Singapore says they do.

63. Mr. President, the map evidence, as a whole, illustrates and supports Malaysia's case based on other evidence. By contrast, Singapore has failed to explain why there are no maps of Singapore which include PBP before 1995, even though it has had supposed title to the island since 1847 to 1851. The absence of official maps of Singapore including PBP as part of Singapore before the critical date is completely at odds with its claim that it has had sovereignty over PBP since 1847 or 1851.

Mr. President, Members of the Court, I thank you for your patient attention, and Mr. President, I would now ask you to call on my colleague, Professor Kohen, to continue Malaysia's presentation.

The VICE-PRESIDENT, Acting President: Thank you, Ms Nevill. As you have just suggested, I will call now on Professor Kohen.

M. KOHEN :

LE PRÉTENDU TITRE DE SOUVERAINETÉ REVENDIQUÉ PAR SINGAPOUR

1. Monsieur le président, Messieurs les juges, il m'appartient d'examiner la pertinence de la revendication d'un titre de souveraineté britannique sur Pulau Batu Puteh, Middle Rocks et South Ledge, auquel Singapour aurait succédé. Tout d'abord, je tiens à relever que la

Grande-Bretagne ne s'est jamais proclamée souveraine de PBP ni des autres formations maritimes aujourd'hui revendiquées par Singapour. En d'autres termes, Singapour se revendique successeur à une souveraineté territoriale que son Etat prédécesseur n'a jamais déclarée ni n'a exercée.

2. L'articulation de la position juridique singapourienne a été — et demeure — tortueuse. Comme mon ami James Crawford l'a expliqué mercredi, Singapour ne savait pas lors du dépôt de son mémoire si PBP était ou non une *terra nullius* au moment de la prétendue «prise licite de possession» britannique[91]. Dans sa réplique et en plaidoirie, Singapour invoque «par déduction» («by inference») que les autorités britanniques ont construit le phare à PBP sur la base que l'île était *terra nullius*[92].

3. Singapour ne sait toujours pas à quel moment la soi-disant «prise licite de possession» aurait eu lieu, doutant entre 1847, 1850, la période 1847-1850 ou 1851[93]. La réplique de la Partie adverse semble cependant préférer la thèse de la prise de possession comme un processus s'étendant de 1847 à 1851, tout en persistant à invoquer «1847 when the British took possession of the island»[94]. Nous avons attiré l'attention sur ces doutes dans la phase écrite, mais la question reste encore ouverte après ce premier tour des plaidoiries : la chronologie qui vous a été présentée par Singapour dans le «dossier des juges» la semaine dernière commence par l'indication suivante : «1847 : British Government takes possession of Pedra Branca»[95]. L'agent de Singapour a estimé que la prise de possession licite avait eu lieu il y a plus de cent cinquante ans et en même temps a avancé la thèse de la période 1847-1851[96]. Quelques minutes plus tard, M. Chao a réaffirmé que cette prise de possession eut lieu en 1847[97]. Le lendemain, M. Brownlie est revenu à la thèse de la période 1847-1851, ce qui était aussi la position d'Alain Pellet mardi 6 novembre[98]. Le

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[91] CR 2007/25, p. 12-13, par. 4 (Crawford).

[92] RS, par. 3.7 ; CR 2007/21, p. 35, par. 5 (Brownlie).

[93] MS, par. 3.6, 5.5, 5.102, 5.109, 6.1, 6.101, 7.1, 8.19 ; CMS, par. 1.9, 3.2, 3.29, 3.39, 3.40, 3.42, 3.43, 4.43, 5.3, 5.4, 6.4, 6.8, 6.14, 6.19, 6.71, 9.37. Voir aussi RM, par. 192-194.

[94] RS, p. 16, par. 2.21.

[95] Plaidoiries orales de Singapour, dossier de plaidoiries, vol. 1, «Chronology of Key Events Relevant to the Case», onglet 5.

[96] CR 2007/20, p. 18, par. 10 et p. 21, par. 23 (Koh).

[97] CR 2007/20, p. 28, par. 18 (Chao).

[98] CR 2007/21, p. 35, par. 3, p.39-40, par. 24-26, p. 56, par. 104 (Brownlie) ; CR 2007/22, p. 43, par. 3 (Pellet).

9 novembre, cependant, mon ami Pellet a finalement endossé la thèse de la prise de possession en 1847[99], de même que M. Jayakumar[100].

4. Saurons-nous lors du second tour de plaidoiries quand cette soi-disant «prise de possession» a eu lieu pour Singapour ? Si l'on croit M. Brownlie, rien n'est moins sûr. Je cite : «It seems academic to speculate at what point in time title was established»[101]. Pas tout à fait académique, Monsieur le président. En réalité, Singapour laisse la question ouverte pour jouer avec les dates selon ses convenances argumentatives. Dans son contre-mémoire, Singapour invoque 1847 pour expliquer pourquoi une prise de possession de l'île au nom de la Couronne britannique n'a pas été faite lors des deux occasions particulièrement propices qui s'étaient présentées à elle, c'est-à-dire lors des cérémonies de mise de la première pierre du phare Horsburgh en 1850 et de l'inauguration de celui-ci en 1851. «Sovereignty already existed», nous disent nos amis singapouriens, sans craindre la contradiction[102]. Apparemment, cette souveraineté — nous le savons — résulterait du fait que J. T. Thomson s'est rendu sur l'île pour planter les piliers de briques en 1847. Il en va de même pour justifier leur interprétation tordue du document interne néerlandais de 1850 qui parle du «British territory» et qui se réfère par cette expression à la zone d'influence britannique, conformément au traité anglo-néerlandais de 1824[103]. Si la prise de possession britannique s'est achevée en 1851, il est difficilement concevable de justifier l'interprétation singapourienne du document interne néerlandais de 1850 comme se référant à la *souveraineté* britannique et non à la *zone d'influence* britannique.

5. Certes, Singapour comprend qu'il est difficile de convaincre qui que ce soit de la prise de possession de l'île par Thomson en 1847 avec ses piliers de briques. La Partie adverse a donc développé sa thèse suivant laquelle la prise de possession serait le processus de construction du phare lui-même, qui s'est achevé en 1851. Si c'est le cas, Monsieur le président, si c'est la deuxième alternative que Singapour avance qui doit être retenue comme étant sa position (c'est-à-dire la période 1847-1851), alors tant l'explication de Singapour concernant l'absence de

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[99] CR 2007/23, p. 21, par. 2 et 4 (Pellet).

[100] CR 2007/23, p. 61-62, par. 29 (Jayakumar).

[101] CR 2007/21, p. 48, par. 63 (Brownlie).

[102] CMS, par. 5.112.

[103] RS, Annexe 8.

prise de possession lors des cérémonies de 1850 et 1851, que son interprétation du document interne néerlandais de 1850, sont dépourvues de fondement. Singapour ne peut pas souffler le chaud et le froid.

6. Retenons un instant la deuxième thèse de Singapour, c'est-à-dire la période 1847-1851. Une prise de possession d'une île plus petite qu'un terrain de football aurait requis à la Grande-Bretagne *quatre ans*. On peut se demander pourquoi il a pris à Crawfurd *quatre jours* à peine pour prendre possession de l'île de Singapour et d'une pluralité d'îles cédées par Johore (y compris de toutes petites îles inhabitées)[104] et que la prétendue prise de possession de PBP a exigé *quatre* ans ! La réponse est simple : il n'y a pas eu de «prise licite de possession de Pedra Branca au nom de la colonie britannique» du tout.

7. Les jours précédents, nous avons prouvé chacun des aspects qui démontrent que le titre de souveraineté invoqué par Singapour est dépourvu de tout fondement. Je me propose maintenant de vous présenter un tableau général de la question.

A. Les conditions pour l'acquisition de la souveraineté territoriale par occupation effective ne sont pas réunies

8. Singapour reconnaît que sa prétendue souveraineté sur PBP, Middle Rocks et South Ledge n'est pas fondée sur un quelconque traité de cession ni sur aucun autre titre juridique particulier. Il a ajouté à son argumentaire que sa prétendue «prise licite de possession» sur PBP constituerait une occupation effective.

9. Les conditions pour acquérir la souveraineté par occupation effective sont bien connues. Il est donc requis : que le territoire en question soit sans maître *(terra nullius)*, «l'intention et la volonté d'agir en qualité de souverain *[animus]*, et quelque manifestation ou exercice effectif de cette autorité *[corpus]*» (*Statut juridique du Groënland oriental, arrêt, 1933*, *C.P.J.I. série A/B n° 53*, p. 45-46. Cité aussi dans : *Sahara occidental, avis consultatif*, *C.I.J. Recueil 1975*, p. 43, par. 92, *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 682, par. 134 et *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 172 ;

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[104] CMM, par. 61.

les italiques sont de nous). Mon ami James Crawford a démontré mercredi que les trois formations objet du différend ne sont pas des *terra nullius*.

10. Les deux Parties sont d'accord pour considérer que PBP ne tombe pas sous le coup de la cession faite par Johore à la Grande-Bretagne en vertu du traité Crawfurd de1824.

11. Il n'y a pas eu prise de possession de PBP au nom de Sa Majesté britannique. Le comportement britannique entre 1847 et 1851 ne témoigne ni de l'existence du *corpus* ni encore moins de celle de l'*animus*. Il n'y a pas eu des lettres patentes ou autres instruments législatifs incorporant ultérieurement PBP, Middle Rocks et South Ledge à la colonie de Singapour non plus.

a) ***L'élément matériel de la possession n'est pas rempli***

12. Singapour reconnaît qu'il n'y a pas eu une prise de possession formelle de PBP, moyennant une manifestation explicite de l'intention d'acquérir la souveraineté. La Malaisie a apporté à la Cour une preuve abondante de la façon dont la Grande-Bretagne prenait possession des territoires sur lesquels elle voulait établir sa souveraineté. Nous avons mentionné plus d'une trentaine de cas concrets de prise de possession britannique entre la fin du XVIIIe siècle et le début du XXe siècle, pour la plupart des cas qui se réfèrent à des îles, y compris des îles inhabitées et de dimensions réduites comme PBP[105]. Pour sa part, Singapour a été incapable d'apporter la moindre preuve d'une pratique britannique qui pourrait étayer sa position suivant laquelle la construction du phare Horsburgh équivaudrait à une prise de possession et à une incorporation de PBP aux territoires de Sa Majesté britannique.

13. Mon collègue Ian Brownlie à mentionné à l'appui de la thèse singapourienne les cas de Pitcairn et de l'*Antarctique*[106]. Ces exemples confortent la position malaisienne selon laquelle la Grande-Bretagne a toujours établi sa souveraineté par un acte ayant formellement ce caractère et qu'elle a incorporé le territoire en question sous sa souveraineté par un acte législatif ultérieur.

14. Examinons en effet le cas de Pitcairn, en nous servant des sources et de la documentation fournies par Singapour[107]. Le capitaine Elliott prit possession de Pitcairn au nom de la Couronne britannique le 29 novembre 1838. L'ouvrage de Kenneth Roberts-Wray, que Singapour

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[105] CMM, par. 73-92.

[106] CR 2007/21, p. 46-47, par. 59-60.

[107] RS, vol. 2, annexes 9, 10, 13.

affectionne citer, fournit aussi cette information, apparemment passée inaperçue chez nos amis et adversaires. Vous trouvez le résumé historique de Pitcairn par Roberts-Wray dans vos dossiers à l'onglet 158[108]. Voilà qui explique la réponse donnée par les autorités britanniques lorsque les habitants de l'île ont demandé en 1853 un document constituant Pitcairn comme une possession britannique. Cette réponse disait qu'il n'y en avait aucun besoin, qu'une telle déclaration pourrait suggérer des doutes là ou il n'y en avait pas. Donc, aucune autre formalité n'était requise tout simplement car Pitcairn avait déjà fait l'objet d'une prise formelle de possession au nom de Sa Majesté britannique !

15. Quant à l'exemple de l'*Antarctique*, il est également contraire à la revendication singapourienne. Je laisserai de côté la déformation par Singapour de la position malaisienne. M. Brownlie affirme qu'avant l'incorporation formelle d'un territoire à la Couronne britannique par des lettres patentes, le Gouvernement britannique pouvait s'estimer déjà souverain du territoire en question. Nous ne disons pas le contraire. Mais, Monsieur le président, ce que Singapour ne dit pas, c'est que l'incorporation est la suite logique d'un acte préalable d'acquisition de la souveraineté. Dans les affaires de l'*Antarctique*, le Royaume-Uni invoquait des prises de possession préalables et formelles des territoires tombant sous le coup des lettres patentes de 1908 et 1917 (*C.I.J. Mémoires*, *Antarctique (Royaume-Uni c. Argentine) ; (Royaume-Uni c. Chili)*, p 11-13 et p. 51-53).

16. La réalité, Messieurs les juges, saute aux yeux : les autorités britanniques à Singapour, ou en Inde, ou à Londres, n'ont jamais planifié, accompli ou considéré avoir accompli un acte de prise de possession de PBP et n'ont jamais eu la moindre intention d'établir la souveraineté sur PBP. A vrai dire, Monsieur le président, il aurait été infiniment plus facile à Thomson en 1847 de planter l'Union Jack que les sept piliers de briques. Ou à Butterworth de faire de même en 1850, qui plus est, le jour de l'anniversaire de la reine Victoria, et de proclamer la souveraineté britannique sur l'île. Mais non, à la place, il y a eu une cérémonie maçonnique, considérée comme l'un des «événements maçonniques majeurs du Sud-Est asiatique dans les dernières cent cinquante années»[109].

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[108] Roberts-Wray, Kenneth, *Commonwealth and Colonial Law*, Londres, Stevens & Sons, 1966, p. 906.

[109] RM, vol. 2, annexe 25.

17. Contrairement à ce que nos adversaires feignent, la Malaisie ne prétend pas que le territoire de Singapour serait devenu immuable avec le traité Crawfurd. C'est la Malaisie qui s'est attachée à démontrer dans son mémoire que d'autres territoires ont été incorporés à Singapour durant la période coloniale, mais suivant une procédure claire et manifestant une intention dépourvue de toute ambiguïté. Tel a été le cas des îles Cocos (Keeling) et de l'île Christmas. Des lettres patentes ont été émises, déterminant formellement l'incorporation de ces îles aux Etablissements des détroits. Vous les avez dans vos dossiers aux onglets 159 et 160[110]. Rien de semblable par rapport à Pulau Batu Puteh., Middle Rocks et South Ledge.

18. Pour récapituler, non seulement il n'y a pas eu de prise de possession de l'île au nom de la Couronne britannique, mais jamais, je dis bien *jamais*, PBP, Middle Rocks et South Ledge n'ont été incorporées à une colonie quelconque relevant de la souveraineté britannique.

19. On pourrait croire de prime abord qu'au moins l'élément matériel de la possession est présent car il n'y a pas de doute quant à l'utilisation et la gestion du phare par les autorités britanniques et le caractère exigu de l'île. Mais peut-on pour autant parler de possession de PBP au sens technique du terme ? La possession comme condition pour l'acquisition de la souveraineté par occupation effective exige plus que la simple présence sur l'île pour la gestion du phare. La possession présuppose l'exercice de fonctions étatiques qui dénotent la maîtrise ou le contrôle du territoire. Sir Elihu vous a démontré que la Grande-Bretagne s'est bornée au service du phare et aux activités nécessaires à ce service[111]. N'oublions pas par ailleurs que la présence britannique provient de la *permission* donnée par Johore pour construire le phare. Ce sont deux données fondamentales.

20. La possession comme condition pour l'acquisition de la souveraineté exige aussi l'exclusivité[112]. Ou comme le dit le roi Victor-Emmanuel III dans la sentence *Clipperton*, «l'Etat occupant réduit à sa disposition le territoire en question et se met en mesure d'y faire valoir son autorité exclusive». Et il ajoute «dès le premier moment où l'Etat occupant y fait son apparition,

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[110] MM, par. 60.

[111] CR 2007/26 (Lauterpacht).

[112] Sentence arbitrale dans l'affaire de l'*Ile de Palmas*, *RSA*, vol. II, p. 838.

[le territoire se trouve] à la disposition absolue et incontestée de cet Etat»[113]. La Grande-Bretagne avait-elle la jouissance exclusive de l'île ? Non, les pêcheurs continuaient d'y aller, le temenggong s'y installa avec sa cohorte avec l'intention d'y rester un laps de temps indéfini, les instructions aux gardiens du phare étaient de ne pas permettre les Orang Laut d'entrer au phare, ce qui présuppose qu'ils étaient déjà sur l'île ou les eaux avoisinantes[114]. Avait-elle la disposition absolue et incontestée de l'île ? La Compagnie des Indes orientales avait certes le droit d'y construire le phare et d'accomplir tous les actes nécessaires à cette fin. Cela n'équivaut pas à une «capacité de disposition absolue et incontestée» de l'île. Assurément, les autorités britanniques n'auraient pas pu, au lieu de construire le phare, décider par exemple d'utiliser l'île à d'autres fins, ou céder PBP à une autre puissance.

21. La présence remarquable du temenggong sur l'île, ainsi que la présence continue sur l'île ou ses eaux des sujets de Johore, pêcheurs et autres Orang Laut, n'était pas non plus le fruit d'une permission quelconque de la part des Britanniques. C'est tout simplement la continuité d'une activité ou d'une présence immémoriales, qui datent de bien avant l'arrivée des Britanniques dans la région. La raison en est simple : la Grande-Bretagne n'était pas possesseur à titre de souverain de PBP, elle n'était que propriétaire du phare Horsburgh.

b) ***La Grande-Bretagne n'a jamais eu l'intention d'acquérir la souveraineté territoriale***

22. M. Brownlie vous a dit la semaine dernière que «[t]he evidence concerning the intention of the British Crown in respect of Pedra Branca is voluminous and definitive».[115] Certainement, Monsieur le président. Et elle prouve que l'intention britannique était de construire un phare pour aider la navigation à l'entrée de la mer de la Chine méridionale. Après trois tours de plaidoiries écrites et un tour de plaidoiries orales, je n'ai aucune difficulté à affirmer ceci : pas un seul document officiel britannique, je dis bien, pas un seul document officiel britannique n'exprime l'intention britannique d'acquérir la souveraineté sur Pulau Batu Puteh.

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[113] *RSA.*, vol. II, p. 1110.

[114] MM, par. 143-144.

[115] CR 2007/21, p. 62, par. 127 (Brownlie). Voir aussi RS, p. 62, par. 3.66.

23. Tout ce que la Partie adverse a trouvé c'est une description équivoque faite par le vénérable maître d'une loge maçonnique. On a même affirmé qu'il avait procédé à une «attribution de souveraineté» à cette occasion[116].

24. Voyons ce que le vénérable maître, M. Davidson, a dit : «May the All Bounteous Author of Nature bless our Island, of which this Rock is a dependency, with Corn, Wine and Oil, and with all the necessary comforts and conveniences of life.»[117]

25. On peut discuter de ce que M. Davidson, un commerçant, entendait par «dependency». Je renvoie à la définition de «dependency» et «dependent territory» donnée par le *Halsbury's Laws of England* :

> «These are words of no technical meaning; they are wider and usually vaguer than «colony». They refer to a country, province or territory which is subject to the control of the government of a state or country of which it is not an integral part; such control need not extend beyond responsibility for the conduct of the external relations of the dependency.»[118]

26. Mon collègue Brownlie a essayé de déterminer la portée de cette qualification, citant la définition du dictionnaire dirigé par Jean Salmon[119], prétendant assimiler ce que M. Davidson a dit à ce que votre Cour a décidé dans les affaires des *Minquiers et des Ecréhous* et *El Salvador/Honduras*. Je cite ce que votre Chambre a dit en 1992 :

> «L'exiguïté de Meanguerita, sa proximité de la plus grande île [Meanguera] et le fait qu'elle est inhabitée permettent de la qualifier de «dépendance» de Meanguera, au sens où il a été soutenu que le groupe des Minquiers était une «dépendance» des îles de la Manche (*Minquiers et Ecréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953*, p. 71).» (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992,* p. 570, par. 356.)

27. Vous voyez à l'écran, dans quelques instants, la situation des Minquiers par rapport aux îles Anglo-Normandes, et celle de Meanguerita par rapport à Meanguera. Tout autre est la situation de PBP par rapport à Singapour. On aurait pu s'attendre à ce que nos amis singapouriens nous montrent l'une des nombreuses cartes de Singapour «et ses dépendances». Mais non.

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[116] CR 2007/20, p. 21, par. 21 (Koh).

[117] J. A. L. Pavitt, *First Pharos of the Eastern Seas. Horsburgh Lighthouse* (Singapore: Singapore Light Dues Board by Donald Moore Press, 1966), p. 26.

[118] *Halsbury's Laws of England*, 4e éd., Londres, 1974, vol. 6, p. 321, par. 802 (réimpr. 2002: vol. 6, p. 414, par. 702) ; CMM, p. 26, par. 43.

[119] CR 2007/21, p. 58-59, par. 116 (Brownlie).

Comme nous venons de le voir, PBP n'y est pas, sauf à partir de 1995. C'est curieux, un an avant la cérémonie, J. T. Thomson avait établi une carte montrant l'île de Singapour … «et ses dépendances». Vous les avez vues tout à l'heure et vous les avez devant vous maintenant. Comment se fait-il alors qu'il n'a pas mis un encadré incluant PBP, alors que c'était lui-même qui avait «pris licitement possession» de l'île en 1847 ?

28. Quoi qu'il en soit, Messieurs les juges, le président d'une loge maçonnique — un simple particulier n'étant revêtu d'aucune autorité publique — ne pouvait faire aucune «attribution de souveraineté». Plus important, finalement, est ce que le gouverneur Butterworth a affirmé dans son discours à la même occasion. Vous l'avez dans vos dossiers à l'onglet 161. Il parle des sommes collectées par des particuliers et de l'aide du gouvernement de l'Inde et de la Cour des directeurs (de la Compagnie des Indes orientales), «as our presence here this day bears evidence»[120]. Pas un seul mot qui permette d'«inférer» une quelconque souveraineté britannique.

29. Singapour mentionne que les autorités de Johore n'ont pas réagi face à ce que M. Davidson avait affirmé[121]. Mais il n'y avait aucune raison de réagir. Aucun Etat n'a l'obligation de réagir face à des considérations formulées par des particuliers. Qui plus est, le sultan et le temenggong avaient déjà donné l'autorisation de construire le phare et les autorités britanniques se sont limitées à poser la première pierre du phare Horsburgh.

30. Nos contradicteurs essaient d'«inférer» l'intention de la décision de construire le phare et de la construction du phare elle-même. Mais, Monsieur le président, Messieurs les juges, l'intention qui a une pertinence en droit international est l'intention manifestée, la volonté exprimée, pas une prétendue intention que l'Etat semble garder pour soi, *in petto*, la cachant aux autres[122]. Il semblerait que nos contradicteurs vous invitent à vous livrer à une analyse psychologique, ou plutôt à une psychanalyse dirais-je, afin d'établir qu'en construisant le phare, l'inconscient britannique voulait établir la souveraineté sur Pulau Batu Puteh, même si le conscient ne le voulait pas.

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[120] Pavitt, *First Pharos of the Eastern Seas. Horsburgh Lighthouse* (Singapore: Singapore Light Dues Board by Donald Moore Press, 1966), p. 29.

[121] CR 2007/20, p. 21, par. 21 (Koh).

[122] Jean Barale, «L'acquiescement dans la jurisprudence internationale», *AFDI*, 1965, vol. XI, p. 421 ; Philippe Cahier, «Le comportement des Etats comme source de droits et d'obligations», faculté de droit et IUHEI, *Recueil d'études de droit international en hommage à Paul Guggenheim,* Genève, *Tribune de Genève*, 1968, p. 249.

31. La réalité, Messieurs les juges, demeure inexorable : aucune autorité britannique, ni à Singapour, ni en Inde, ni à Londres, n'a jamais manifesté la moindre intention d'acquérir la souveraineté sur PBP, fût-ce par la construction du phare ou autrement.

32. L'élément subjectif lui manque cruellement. Non pas qu'il n'y ait pas d'intention, non. L'intention clairement affichée a tout simplement été celle de construire un phare et d'en devenir le propriétaire. Si *animus* il y a, c'est l'*animus domini* par rapport au phare. L'acte n° VI de 1852 de la Compagnie des Indes orientales est très clair à cet égard. Il est uniquement question de la propriété du phare Horsburgh. Il aurait été tellement facile de procéder de la même manière pour proclamer la souveraineté britannique sur Pulau Batu Puteh. Pourquoi au lieu d'une cérémonie maçonnique n'a-t-on pas fait une cérémonie hissant l'Union Jack et proclamant la souveraineté de la Couronne britannique sur la Pierre Blanche ? Pourquoi n'a-t-on pas édicté une simple législation, qui ne dépendait de personne d'autre que des autorités britanniques, proclamant cette même souveraineté ? Pourquoi n'avoir pas fait la même chose que ce que les différentes autorités britanniques ont fait de par le monde — et à Singapour elle-même ! — chaque fois qu'elles ont souhaité déclarer la souveraineté de Sa Majesté britannique ? La réponse est simple. Il ne peut pas y avoir deux explications possibles. Là réside tout le problème de Singapour. L'*animus imperi*, l'intention d'agir à titre de souverain, n'apparaît nulle part. Ni explicitement — et cela Singapour semble le reconnaître —, ni implicitement. Ce que votre arrêt dans l'affaire des *Minquiers et des Ecréhous* affirme est parfaitement applicable ici :

> «[L]es divers actes du XIXe et du XXe siècles ..., y compris le balisage autour des récifs du groupe, ne sauraient être considérés comme preuve suffisante de l'*intention* de ce gouvernement de se comporter en souverain sur les îlots ; d'autre part, ces actes ne présentent pas un caractère permettant de les considérer comme une *manifestation de l'autorité étatique* sur les îlots» (*Minquiers et Ecréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953*, p. 71 ; les italiques sont de nous).

c) ***Les aides à la navigation et la souveraineté territoriale***

33. Parce que, au fond, Monsieur le président, Messieurs les juges, nous sommes confrontés à des actes visant à la construction et à la mise en service d'un phare. Vous n'avez pas manqué de relever la cohérence de la jurisprudence à cet égard, malgré les efforts de Singapour pour faire apparaître une certaine contradiction entre votre jurisprudence récente et celle de l'arrêt des

Minquiers et des Ecréhous. Dans l'affaire *Pulau Ligitan et Pulau Sipadan* vous avez rappelé que la règle est «que la construction et l'exploitation de phares et d'aides à la navigation ne sont généralement pas considérées comme une manifestation de l'autorité étatique» (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 99, par. 197 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 685, par. 147). La prise en considération de ces aides, telles que définies dans l'affaire *Qatar c. Bahreïn*, constitue donc l'exception.

34. La question de savoir pourquoi la jurisprudence est constante dans la relativisation de la valeur juridique des phares pour l'établissement de la souveraineté territoriale est très simple. C'est parce que ces aides à la navigation ne sont pas conçues et mises en œuvre en vue de l'acquisition de la souveraineté territoriale. Le gouverneur Butterworth ne s'est pas lassé de le répéter et de le répéter encore : c'était une œuvre philanthropique[123]. Messieurs les juges, nous connaissons plusieurs définitions de la souveraineté depuis Jean Bodin jusqu'à nos jours. Vous serez tous d'accord avec moi pour dire que la philanthropie n'entre pas dans les éléments qui caractérisent la souveraineté.

35. Une anecdote bien connue des marins et de celles et ceux qui s'intéressent aux phares décrit mieux la situation des phares que des dizaines de pages écrites par des juristes. Elle se rapporte à la fin du XVIIe siècle, à l'époque de la construction du célèbre phare d'Eddystone, près de Plymouth. La France et l'Angleterre étaient en guerre. Une nuit, des corsaires français débarquèrent sur le chantier d'Eddystone et s'emparèrent des gardiens et de plusieurs ouvriers qui logeaient dans le phare. Les prisonniers furent ramenés en France. La fureur de Louis XIV lorsqu'il apprit la nouvelle fut grande. Il eut alors cette phrase : «Je suis en guerre avec l'Angleterre et non avec l'humanité !» Les corsaires durent alors ramener les gardiens et les ouvriers du phare sur les côtes anglaises[124].

36. Singapour a fait des efforts considérables pour présenter la Malaisie comme plaidant le contraire de ce qu'elle a affirmé dans l'affaire relative à *Pulau Ligitan et Pulau Sipadan*. Mais la

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[123] CR 2007/25, p. 40-41, par. 13 (Kohen).

[124] Louis Le Cunff, *Feux de mer* (Saint Malo : B. de Quénetain, 1992), p. 207-208. Voir aussi: http://www.trinityhouse.co.uk/interactive/gallery/eddystone.html.

Malaisie ne plaide pas le contraire que ce qu'elle a avancé dans l'affaire l'opposant à l'Indonésie, ni ne demande rien qui soit en contradiction avec votre décision dans cette précédente affaire. Voici ce que la Malaisie a dit devant vous en l'affaire relative à *Palau Ligitan et Palau Sipadan*, en commentant la situation des Etats concernés par les phares dans la sentence arbitrale *Erythrée/Yémen* :

> «[T]he States concerned did not, in their special situation, regard the construction of a lighthouse *with the knowledge and consent* of the other interested States as leading to the conclusion that the State constructing the light thereby intended to act *à titre de souverain* in respect to the location of the light.»[125]

37. La position de la Malaisie est donc tout à fait cohérente. Elle estimait que la situation précédemment décrite n'était pas celle des phares à Ligitan et Sipadan et elle considère que telle situation est celle existante dans cette affaire. Par ailleurs, votre arrêt du 17 décembre 2002 n'est pas fondé sur la seule base de la construction des phares. Ces actes étaient compris dans un ensemble d'activités clairement indicatives de l'intention d'agir à titre de souverain, tels que des actes législatifs, administratifs et quasi judiciaires qui «couvrent une période considérable et présentent une structure relevant l'intention d'exercer des fonctions étatiques à l'égard des deux îles, dans le contexte de l'administration d'un ensemble plus vaste d'îles» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 685, par. 148). Rien de semblable ici. A Ligitan et Sipadan, la Malaisie et ses prédécesseurs ont construit et fait fonctionner les phares parce qu'ils considéraient que ces territoires relevaient de leur souveraineté. A Pulau Batu Puteh, le phare a été construit après avoir demandé et obtenu la permission du souverain. De l'aveu même de Singapour, la Grande-Bretagne n'a pas construit le phare à PBP parce qu'elle considérait que le territoire était déjà britannique. A Ligitan et Sipadan, le service des phares était doublé d'un exercice public d'activité étatique dans le domaine du contrôle des ressources naturelles. Rien de semblable à PBP non plus.

38. En résumé, la présence d'un phare britannique sur un territoire appartenant à Johore, du fait de la permission donnée par Johore, n'est pas un acte qui dénote l'exercice d'une fonction

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[125] RM *(Souveraineté sur Pulau Ligitan and Pulau Sipadan (Indonésie/Malaisie))*, p. 75, par. 5.26 ; les italique sont dans l'original.

étatique. Il s'agit tout simplement d'une aide à la navigation. En tant que tel, il ne peut constituer l'élément matériel de la possession.

B. La distinction entre la souveraineté sur PBP et la propriété du phare Horsburgh

39. Messieurs les juges, l'analyse juridique de la situation qui se présente devant vous est des plus simples : la Malaisie détient la souveraineté sur PBP, Middle Rocks et South Ledge et Singapour la propriété sur le phare Horsburgh. Cette distinction entre souveraineté et propriété est des plus courantes dans la pratique internationale. Il suffira d'ajouter aux exemples déjà cités cette semaine celui de la forêt de Mundat, propriété de la France en territoire allemand[126], ou celui de la zone de Tiwinza, propriété de l'Equateur mais sous souveraineté du Pérou[127]. D'autres distinctions existent entre la souveraineté d'un Etat sur un territoire et l'exercice des compétences par un autre[128]. Mais Singapour ne saurait les invoquer dans la présente instance. En effet, avant la date critique les activités britanniques et celles de Singapour constituaient de simples actes d'administration et de service du phare et non des actes d'exercice de l'autorité publique. On ne peut même pas parler d'une *administration* britannique ou singapourienne *de l'île*.

40. Dans l'affaire du *Différend frontalier (Bénin/Niger)*, l'arrêt a dû établir cette distinction entre souveraineté et propriété, au sujet des deux ponts sur le fleuve Niger. Paraphrasant l'arrêt du 12 juillet 2005, on peut conclure en affirmant : la question de la souveraineté de la Malaisie sur Pulau Batu Puteh est entièrement indépendante de celle de la propriété du phare Horsburgh, qui appartient à Singapour (*Différend frontalier (Bénin/Niger), arrêt, C.I.J. Recueil 2005*, p. 142).

C. Singapour ne peut valablement invoquer aucun *autre* titre de souveraineté sur PBP

41. Messieurs de la Cour, l'une des particularités de cette affaire est que les deux Parties invoquent un titre originaire. Il vous appartient de décider si la Malaisie a succédé au titre originaire de Johor ou si Singapour a fait de même avec le prétendu titre britannique originaire d'occupation effective d'une *terra nullius*.

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[126] Voir l'échange de notes franco-allemand du 10 mai 1984 réglant la question dans *RGDIP*, 1985, t. 89, p. 585-588.

[127] Acte de Brasília du 26 octobre 1998.

[128] Alfred Verdross, Bruno Simma et Rudolf; Geiger, «Territoriale Souveränität und Gebietshoheit», *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, 1980, vol. 31, p. 223-245.

42. Nos contradicteurs sont conscients de la faiblesse de leur position juridique. D'une manière à peine voilée, Me Bundy vous a invités à faire prévaloir de prétendues effectivités à l'encontre même du titre originaire malaisien, et ce de deux manières différentes. En premier lieu, il a évoqué la possibilité pour la Cour de trouver que la situation en 1851 à l'égard des titres était «indéterminée». Ce serait selon lui une situation dans laquelle le titre ne coexiste pas avec l'effectivité et donc cette dernière devrait être prise en considération. En deuxième lieu, en prétendant que si l'on pouvait invoquer un titre prescriptif, les effectivités l'emporteraient même sur un titre. Il a lui-même écarté cette deuxième hypothèse et la Malaisie ne le contredira pas[129].

43. A supposer même que l'on considère que le titre originaire de Johore doive faire face à une prétendue effectivité britannique, la position désormais classique de la Cour en ce qui concerne les rapports titres–effectivités est dépourvue d'ambiguïté : «Dans le cas où le fait ne correspond pas au droit, où le territoire objet du différend est administré effectivement par un Etat autre que celui qui possède le titre juridique, il y a lieu de préférer le titulaire du titre.» (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 587, par. 63.)

44. Quoi qu'il en soit, les événements de 1847-1851, le maintien et la gestion du phare, ne constituent pas des effectivités susceptibles d'être prises en considération aux fins de l'établissement de la souveraineté territoriale. Il leur manque — tout simplement, mais de façon essentielle — l'élément subjectif indispensable : l'intention d'agir à titre de souverain. Ce n'est qu'après la date critique que certains actes de Singapour pourraient être considérés comme des effectivités. En tant que tels, ils sont tardifs et ne sauraient être pris en considération.

45. Singapour croit trouver un appui à sa prétention dans l'absence de protestation de Johore vis-à-vis de la construction et de l'opération du phare par la Grande-Bretagne. Il n'y avait rien à protester.

46. J'ajouterai, qu'à partir du moment où le souverain accorde un permis de construire un phare sur son territoire à un autre Etat et que ce dernier se borne au service et à l'administration du phare, il n'y a aucune possibilité d'invoquer un quelconque acquiescement. D'ailleurs, à quoi ? A une effectivité inexistante et insusceptible de faire acquérir la souveraineté territoriale. Quant aux

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[129] CR 2007/22, p. 28, par. 67 (Bundy).

effectivités tardives accomplies par Singapour, elles ont donné lieu à une réaction appropriée de la Malaisie, qui a toujours maintenu sa souveraineté sur PBP, Middle Rocks et South Ledge.

47. Monsieur le président, il faut prendre les positions des Parties telles qu'elles sont. Ces positions étant claires, et argumentées, il s'agit de déterminer lequel des titres invoqués par l'une ou l'autre des Parties l'emporte. La tâche de la Cour est donc de décider lequel des deux titres originaires invoqués par les Parties sur PBP constitue la source de la souveraineté.

48. Messieurs les juges, en examinant les titres de souveraineté pertinents en l'espèce, vous devez prendre en considération la nature de la situation juridique existante devant vous. En effet, ceci n'est pas un différend entre deux puissances européennes se disputant un territoire lointain à l'autre bout de la planète. Ni d'un différend entre ces deux mêmes puissances concernant des îlots se trouvant en Europe, comme c'était le cas des *Minquiers et des Ecréhous*. Ni même d'un différend entre deux Etats issus de la décolonisation invoquant les titres de souveraineté de leur colonisateur respectif ou des limites administratives d'une même puissance coloniale. Non. Ce différend oppose les prétentions de souveraineté d'un Etat séculaire sur un territoire se trouvant dans sa propre région, à très peu de distance de ses côtes, contre les prétendues prétentions de souveraineté d'une puissance européenne qui serait venue acquérir la souveraineté sur une petite île se trouvant dans la région du premier. Je dis bien, «les prétendues prétentions de souveraineté d'une puissance européenne». Car en réalité Singapour a adopté dans la présente instance une attitude plus colonialiste que la puissance coloniale elle-même. La Grande-Bretagne n'a en effet jamais considéré la construction du phare Horsburgh comme valant extension de sa souveraineté sur PBP, Middle Rocks et South Ledge.

Conclusion

49. La conclusion qui découle de la preuve avancée par les Parties est accablante pour la prétention de Singapour : il ne ressort aucune intention britannique d'acquérir la souveraineté sur PBP. Un phare construit sur une île avec la permission du souverain ne permet même pas de parler de l'existence de l'élément matériel de la possession.

50. Monsieur le président, Messieurs les juges, en *déclarant* que Pulau Batu Puteh, Middle Rocks et South Ledge relèvent de la souveraineté de la Malaisie vous maintenez la situation

juridique réellement existante. Le phare Horsburgh continuera de remplir la fonction qui est la sienne, même si son importance pour la sécurité de la navigation est moindre aujourd'hui, compte tenu des progrès technologiques. Chaque Etat se verra finalement reconnu ce qui lui revient : la Malaisie, sa souveraineté sur PBP et les autres formations maritimes et Singapour, la propriété sur le phare. Aucun bouleversement des espaces maritimes de la région ne résultera d'une décision en ce sens de la Cour. Et ce serait finalement le vrai hommage que l'on pourrait rendre à J. T. Thomson, celui qui a planifié et construit le phare pour aider la navigation dans le détroit, le grand connaisseur de la région, celui qui y a laissé des traces magnifiques de son œuvre, l'ami des Malais, passionné et fin connaisseur de leur langue et de leur culture.

51. Je vous remercie, Monsieur le président, et vous prie de donner la parole à mon collègue James Crawford.

The VICE-PRESIDENT, Acting President: Thank you, Professor Kohen, for your statement. I now give the floor to Professor Crawford. Professor Crawford, I think we will have to go beyond 1 o'clock, so do not let this fact cause you to speak faster; just take your time.

Mr. CRAWFORD: I will do my best to maintain my normal pace, Sir: though even that may be too fast!

I am pleased to be able to tell the Court that Sir Elihu Lauterpacht is resting and is in no danger, some tests are being done. This is a good thing, because he was discussing with me this morning the long-term planning for his next case before the Court!

CONCLUSIONS

1. Mr. President, Members of the Court, as Singapore said in paragraph 4.47 of its Reply, it makes *"a world of difference"* whether an island is used by one State — let us call it the guest State — with the consent of another whose island it is — let us call that the host State. Such use ceases to be adverse to the host State for the purpose of the acquisition of sovereignty. It may involve the exercise of the sovereign authority of the guest State — as with every military base abroad — but *for the purposes of the acquisition of sovereignty* it is not a use adverse to the title of the host State. In other words it is not, for that purpose, conduct *à titre de souverain* on the part of

the guest State. Moreover the fact — as sometimes happens — that the guest State uses the island for purposes going beyond those initially envisaged or consented to does nothing in point of acquisition of title. A guest State may be permitted to set up a military hospital or a military transport facility on the territory of the host State. Assume the guest State uses the facility to intercept government communications of the host State or for other extraneous purposes; it has been known. That may be an infringement of the terms of the original consent, but whether or not that is so it does not even begin to give the host State any claim to *title*.

2. This is important not only in terms of the theory of acquisition of title but as a matter of practice. There are many examples of long-lasting guest-host arrangements in international law. Sir Eli mentioned the New Territories of Hong Kong; one could also mention Guantanamo Bay, Diego Garcia or the Naharayim/Baqura Area under Annex I *(b)* of the Israel-Jordan Peace Treaty of 1994[130]. Some of those arrangements — and especially in the case of the older arrangements — did not have the details spelled out at the time consent was given. The basic principle is still the same: consent to use of territory prevents such use from being adverse, and the guest State, *as a matter of law,* cannot rely on its use as a source of title.

3. The position is *a fortiori* with lighthouses. Sir Elihu took you through the jurisprudence concerning lighthouses, which is at least as restrictive as that concerning claims by guest States.

4. Mr. President, Members of the Court, in the *Cameroon* v. *Nigeria* case you discarded from the vocabulary of international law the hybrid notion of historical consolidation of title. You also demonstrated extreme reserve, in the *Kasikili/Sedudu* case, as to the notion of prescription, on which, anyway, Singapore does not rely. For the reasons I explained the other day, the original title of States to their territory is just as much a form of legal title as title obtained by cession or by the extremely marginal notion of occupation of *terra nullius*. The Court should — with the greatest of respect — not allow questionable reliance on arguments redolent of consolidation or prescription to feed back into the determination of original title. That would be — again with the greatest respect — intellectually questionable. Who had title to these rocks in 1844, when Johor consented to the construction of a lighthouse at the entrance of the Straits? That question must be

[130]Text in 34 *ILM* 43, 56.

determined on its merits. The allegation that at a later date Johor or Malaysia failed to protest some alleged use of the resulting lighthouse facility has nothing — nothing whatever — to do with the issue of original title.

5. Mr. President, Members of the Court, our colleagues opposite spent happy hours last week trying to replay your decision in the *Indonesia/Malaysia* case to our disfavour. That decision, welcome as it was to Malaysia at the time, remains welcome! Only it has nothing to do with our case. In *Indonesia/Malaysia* the Sultan of Sulu in the nineteenth century — like the Sultan of Lingga, not one of the world's survivors — was at the extreme limit of his historic range on the coast of Borneo. The two "little known" islands — as you quite fairly called them (*I.C.J. Reports 2002*, p. 652, para. 51) — were much further offshore than is PBP. There were other explanations for the uses to which Sipadan was put at relevant times, limited uses as they were, than that they were part of the former Sultanate of Sulu which, by 1878, was at the end of its tether. There was nothing like the 1824 Anglo-Dutch Treaty in that case, no careful delimitation of spheres of influence — the 1891 Anglo-Dutch Convention extended only to the island of Sebatik, 50 miles to the west. Nor was there anything so precise as the Crawfurd Treaty, with its cession of territory by the sovereign in question, within 10 geographical miles of a named island, excluding the rest. Here, by contrast to *Indonesia/Malaysia*, you have a well-known island, close inshore, of historic significance, in the middle of the Sultanate of Johor and significantly mentioned as part of its history, which is — wildly implausibly — said to be *terra nullius*. Nor is there any parallel to the consent of Johor for the construction of a lighthouse in the history of the *Indonesia/Malaysia* dispute. The two situations are quite different.

6. Mr. President, Members of the Court, Singapore never confronts Malaysia's case. If the Sultanate of Johor did not include PBP in 1847, then it is obvious that nothing has happened since to change that situation. But the well-informed *Singapore Free Press* under William Napier affirmed that the Sultanate *did* specifically extend so far — and Raffles, Crawfurd, Presgrave, Thomson and Ord all affirmed that it extended much further. What a cast of the actors of the time! I wish we had had them in *Indonesia/Malaysia.*

7. The point is that the converse is also true, and if the Sultanate of Johor *did* include PBP in 1847, then the whole case changes entirely. It is Singapore's failure to contemplate that which was

the distinguishing feature of their pleadings last week, at whatever length the Court may have been informed of how to build and operate a lighthouse!

8. So what if — let us look at the case on that premise — what if, as we have shown:

(1) PBP was not *terra nullius* in 1847

and

(2) as we have shown, PBP did not fall within the Dutch sphere under the Anglo-Dutch agreement. of 1824,

then, then

(3) PBP was part of Johor in 1847. Law is rarely syllogistic but this is as close as it gets.

9. And what if — the conclusion of the previous syllogism:

(1) PBP was part of Johor in 1847

and

(2) Johor's consent to the construction of a lighthouse included PBP, as Professor Kohen showed you,

then

(3) Britain's administration of the lighthouse was not as a matter of law an act *à titre de souverain* nor as a matter of fact is there the slightest evidence that Britain intended that it would be.

10. I should add a rider to this last conclusion. If PBP *was* part of Johor in 1847, then that alone is a reason for you saying that the consent of Johor extended to building a lighthouse on PBP if the documents are equivocal. In a situation in which a State *does* have authority over a particular area, if the area is included in its territory and it consents to the construction of a lighthouse and it is aware through its senior personnel that the lighthouse is constructed and makes no protest, that itself is indication that the consent extended so far. This is the only way in fact to make sense of what happened during those years.

11. If my two conclusions hold — that is, if we have shown that Great Britain built PBP on Johor territory with Johor's consent, then Singapore's case as pleaded collapses. What Professor Brownlie said at some length is fascinating about lighthouses but *wholly* irrelevant to the case before you. Of course, Singapore built a lighthouse — that is to say, Great Britain built a

lighthouse. In that circumstance, Singapore has to rely either on prescription, which they disavow, or on the 1953 letter as a cession, which it manifestly was not.

12. If these two conclusions hold, then PBP was not "in Singapore" in 1965 and the waters around PBP were not "Singapore waters" at that time. That is precisely what Director Pavitt said in 1966 and precisely what the 1969 Singapore Act said — I took it to you yesterday . PBP remained part of Johor.

13. To this conclusion, as at 1969, three additional points may be added:

(1) It is relevant that, as I showed yesterday, Singapore never publicly claimed PBP in the period prior to 1978. Singapore never publicly claimed PBP in that period. There were internal notes, maybe, but no public claim of any kind.

(2) Secondly, the events of 1978-1980 prior to the crystallization of the dispute cannot possibly have changed the position at that time.

(3) Thirdly, conduct since the critical date in 1980 is irrelevant, as you held in *Indonesia/Malaysia* — and applied it strictly against us because most of our conduct was after the critical date.

14. Mr. President, Members of the Court, that is the substance of our case, put simply. Last week you heard a lot of atmospherics about inaction on the part of Malaysia. But why should Malaysia have done anything? The Sultan and Temenggong gladly consented to the construction and operation of the lighthouse. You have heard the Agent of Malaysia say that this consent continues and will continue. This case is not about the continued management of a celebrated lighthouse, that is not the dispute. Rather, it is about the maintenance of the carefully calibrated, co-operative situation accurately described by Director Pavitt in *Pharos of the Eastern Seas* in 1966.

Mr. President, Members of the Court, on behalf of my colleagues may I thank you for your attention in a case where the facts and arguments lie rather thickly on the tiny surface of the three features.

The VICE-PRESIDENT, Acting President: I thank you, Professor Crawford, for your speech and for the good news you brought us regarding Sir Elihu's good health. Now there are a few things to transact.

First of all, I was just informed that Sir Arthur Watts passed away today. This is sad news for Sir Arthur Watts's many friends and admirers the world over. He was a truly distinguished international lawyer, one of the best in our times. His writings and speeches were always closely argued with a constant and subtle allusion to humour in the best traditions of British scholarship. Sir Arthur was also a gentleman of exquisitely good manners. We at this Court have had numerous chances to listen to his persuasive and, some would even say, dangerously seductive oratory, delivered with a grace from a bygone era. Little wonder that we join in lamenting his untimely death. May his soul rest in peace. And I would ask you, Ladies and Gentlemen, to rise for a minute's silence in Sir Arthur Watts's memory.

The Court observed a minute's silence.

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

Secondly, I have been informed by Judge Keith that he wishes to pose a question, a question, I think, addressed to both Parties, and I give him the floor.

Judge KEITH: Thank you, Mr. President.

The appeal to the Judicial Committee of the Privy Council from the decision of the Pitcairn Court of Appeal, referred to by both Parties, was dismissed on 30 October 2006. The reference is *Christian & others* v. *The Queen* [2007] 2 *WLR* 120, [2006] UKPC 47.

The question for each Party is as follows: is there anything in the judgments of the Judicial Committee in that case of significance for the present proceedings? Thank you, Mr. President.

The VICE-PRESIDENT, Acting President: Thank you, Judge Keith. The written text of this question will be sent to the Parties as soon as possible. The Parties may decide, if they deem it convenient, to respond to the question during the second round of oral argument. It will also be possible for them to provide written responses to the question within one week as from the closure of the present oral proceedings, that is to say, by Friday 30 November 2007 at the latest. In the

latter case, any comments a Party may wish to make, in accordance with Article 72 of the Rules of Court, on the responses by the other Party may be submitted by Friday 7 December 2007.

This marks the end of today's sitting and brings to a close the first round of the oral proceedings. I wish to thank each of the Parties for the statements presented in the course of this first round of oral argument. The Court will meet again on Monday 19 November, from 10 a.m. to 1 p.m. and on Tuesday 20 November from 10 a.m. to 1 p.m. to hear the second round of oral arguments of Singapore. At the end of the sitting on Tuesday 20 November, Singapore will present its final submissions.

Malaysia will then present its oral reply on Thursday 22 November, from 3 p.m. to 6 p.m. and on Friday 23 November from 3 p.m. to 6 p.m. At the end of the sitting on Friday 23 November, Malaysia will present its final submissions.

Therefore, each Party will have a total of two full sessions of three hours for the whole of its oral reply. Pursuant to Article 60, paragraph 1, of the Rules of the Court, the oral presentations must be as succinct as possible. The purpose of the second round of oral argument being to enable each of the Parties to reply to the arguments advanced orally by the other Party, it must not constitute a repetition of earlier statements. And naturally, the Parties are not obliged to avail themselves of the entire time allowed to them! Thank you very much and I would like to thank, in particular, the interpreters for their patience.

The sitting is closed.

The Court rose at 1.15 p.m.

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