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CR 2007/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Monday 19 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 lundi 19 novembre 2007, à 10 heures, au Palais de la Paix,

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

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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H.E. Dato' Seri Syed Hamid Albar, Minister for Foreign Affairs of Malaysia,

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Mme Wu Ye-Min, chargée de mission au ministère des affaires étrangères de la République de Singapour,

comme conseillers.

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

Mr. JAYAKUMAR:

1. Mr. President and Members of the Court, it is my privilege to commence Singapore's second round of oral pleadings.

Distractions by Malaysia

2. During Singapore's first round of oral pleadings, we have focused our presentations purely on legal and factual issues in dispute between the Parties. We have carefully avoided mentioning extraneous matters that may affect the integrity of the proceedings before this honourable Court. In view of the good relations between the two countries, we had expected Malaysia to do likewise.

3. We are therefore surprised and disappointed that Malaysia has, in her oral pleadings, made a series of allegations and insinuations against Singapore. These are of a nature which, unless rebutted, would impeach or diminish Singapore's integrity or could impress on the minds of the Members of the Court that there could be dire consequences for relations in the region if the dispute were decided in Singapore's favour.

4. It would therefore not be right for Singapore to embark on our second round pleadings with these extraneous and prejudicial remarks remaining unanswered. These include:

— an insinuation that Singapore may have concealed a letter from the Court;

— an allegation that Singapore is subverting the existing legal order, and that stability in the region will be affected if sovereignty over Pedra Branca is awarded to Singapore;

— an attribution of sinister motives to Singapore;

— an accusation that Singapore moved its navy belatedly to Pedra Branca and used aggressive methods to assert Singapore's claim; and

— a gratuitous "offer" to continue respecting Singapore's "right" to operate the lighthouse should Malaysia win the case.

5. This morning, I am therefore compelled to point out how baseless and tendentious Malaysia's allegations are and to set the record straight. My colleagues, who will follow me, will deal in detail with the other issues raised by Malaysia.

Malaysia's insinuation of concealment of letter

6. Let me begin by addressing the most disturbing insinuation. During last week's proceedings, Sir Elihu Lauterpacht insinuated that Singapore may have "deliberately concealed" Butterworth's 1844 letters of request addressed to the Sultan and Temenggong of Johor.

7. Sir Eli Lauterpacht said:

> "Like many other documents in this case, these must originally have been in the Singapore archive. Malaysia has requested their production by Singapore, but Singapore has given no reply. In the circumstances we are obliged to consider two possible inferences that may be drawn from the available correspondence read as a whole. *And I leave entirely aside any suggestion of a third inference, namely that Singapore has deliberately concealed these letters.*"[1]

8. This carefully contrived "non-statement" was expressed in public and came after both sides had said, in their written pleadings, that they were unable to locate the letters and after Singapore had repeated this in the first round of our oral pleadings[2].

9. Malaysia's Agent also claimed that, in 1994, Malaysia requested Singapore to furnish a copy of the letter but Singapore did not respond to their request[3].

10. Mr. President, Members of the Court, Singapore does not have a copy of Butterworth's letters. Singapore had searched for the letters over the years, at various archives but to no avail. In fact, I was personally involved in the search when I was then Dean of the Law Faculty and professor.

11. It is a matter of public record and knowledge that Singapore's archives are incomplete. In Dr. Mary Turnbull's history of *The Straits Settlements*, from which Malaysia also has extracted for her own judges' folder last week, she states very clearly that many volumes in a series of files in the Singapore archives are missing or in poor condition[4]. The relevant extracts can be found in

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[1]CR 2007/24, p. 42, para. 35 (Lauterpacht).

[2]CMS, p. 88, para. 5.41; CR 2007/21, p. 28, para. 54 (Pellet).

[3]CR 2007/24, pp. 14–15, para. 18 (Kadir).

[4]Turnbull C. M., *The Straits Settlements 1826-67 — Indian Presidency to Crown Colony* (1972), pp. 392-393.

tab 1 of the judges' folder. In any case, Malaysia will be aware that microfilm copies of Singapore's archival records are available in various institutions outside Singapore. For example, the microfilm copy of the Series "Governor's Letters to Native Rulers" from 1817 to 1872 had been bought by Monash University in 1961. The Butterworth letters are missing also from this microfilm copy.

12. In fact, Singapore has already explained why our records are incomplete in our written pleadings[5]. That was why Singapore decided in 1953 to ask the Johor Government whether they had any documents relating to Pedra Branca.

13. Secondly, it is not true that Singapore did not respond to the request from Malaysia. After the second round of bilateral consultations between Singapore and Malaysia in January 1994, Malaysia sent a diplomatic Note in May 1994 to Singapore asking for copies of various documents. Singapore replied to that request orally in June 1994, through our High Commission in Kuala Lumpur, by asking whether it was Malaysia's intention to continue the work of the bilateral consultations through correspondence, and suggested instead that the Parties should convene a third round of bilateral consultation for this purpose. In the event, the idea of convening a third round of consultations was not pursued because a decision was taken by both Governments, in September 1994, to refer the dispute to this Court[6].

14. Thirdly, let us look at the facts. Why should Malaysia say that these document "must originally have been in the Singapore archive"[7]? Why? This letter was sent *to* Sultan Ali and to the Temenggong of Johor. Would it not be more logical for the *original* of the letters to be in Johor, not Singapore? However, Malaysia has stated that she also does not have the letters. Singapore, on our part, has accepted that in good faith.

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[5]CMS, p. 194, para. 7.25.

[6]MS, p. 26, para. 4.9; MS, Ann. 192.

[7]CR 2007/24, p. 42, para. 35 (Lauterpacht).

Malaysian claims that Singapore seeks to subvert the long-established arrangements

15. I now turn to Malaysia's claim that Singapore "seeks to disrupt the long-established arrangements in the Straits"[8] and to "subvert the arrangements reached between Johor and Great Britain over 150 years ago"[9].

16. Malaysia's allegations are another attempt to impress on the Court that Malaysia is the victim and Singapore the perpetrator of some historic wrong against Malaysia. In fact, it is Malaysia who is trying to alter the status quo by suddenly claiming title to Pedra Branca after 130 years of inaction in the face of Singapore's exercise of Singapore's sovereignty over the island.

17. This is evident from Malaysia's telegram of 20 December 1979[10] informing all her overseas Missions that her 1979 map would "affect":

— Thailand;

— Vietnam;

— Singapore;

— Indonesia;

— Brunei;

— the Philippines; and

— China.

One map, seven countries affected.

18. As Malaysia had anticipated, her map indeed attracted protests from all seven countries[11]. Who then, may I ask, was seeking to upset the existing legal order?

19. Malaysia's Agent also says that if this Court finds in favour of Singapore, the stability of Malaysia's relationship with Indonesia will be affected[12]. This is another attempt to influence the Court with extraneous considerations which have no foundation.

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[8] *Ibid.*, CR 2007/24, p. 16, para. 31 (Kadir).

[9] *Ibid.*, CR 2007/24, p. 13, para. 8 (Kadir).

[10] Malaysia's judges' folder, tab 17.

[11] Haller-Trost R., *The Contested Maritime and Territorial Boundaries of Malaysia — An International Law Perspective* (1998).

[12] CR 2007/24, p. 18, para. 41 (Kadir).

Malaysia attributing sinister motives to Singapore

20. The Agent of Malaysia has also alleged sinister intentions on the part of Singapore. He speculates that Singapore may reclaim the sea around Pedra Branca to create a "maritime domain"[13] with potential adverse impact on the environment, on navigation and on security[14]. He also alleged that Singapore wants to create "a military presence"[15].

21. Malaysia's reference to the impact of possible reclamation plans is an attempt at scare mongering. Singapore is a law abiding country and is proud of its record in this respect.

22. Singapore's economic well-being and, indeed, our very survival depend on our status as a major port of call, which in turn is dependent on the smooth flow of maritime traffic through the Singapore Strait. We have never taken, and we will never undertake, any action which would endanger the marine environment, the safety of navigation and the security situation in the Singapore Strait.

23. Malaysia has also alleged that Singapore has adopted in the present case "an attitude which is more colonialist than the colonial power herself"[16]. This, as well as Malaysia's claim that Singapore is attempting to create a "maritime domain"[17] on Pedra Branca, is ridiculous. Only last Thursday, Malaysia dismissed Pedra Branca as a tiny rock which, in relation to Pulau Pisang, is like *"the nail of a little finger is to the hand as a whole"*[18].

Malaysia's accusation on Singapore navy's methods

24. Next, Malaysia complains about Singapore's "military presence" and alleges that Singapore sent its naval vessels to Pedra Branca in 1986, well after the critical date, raising tensions in the area and chasing away Malay fishermen[19].

25. Mr. President and Members of the Court, Singapore's naval presence around Pedra Branca is not a recent development. Since 1975, when the British navy withdrew from Singapore,

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[13] *Ibid.*, p. 16, para. 33 (Kadir).

[14] *Ibid.*, p. 17, para. 37 (Kadir).

[15] *Ibid.*, p. 18, para. 43 (Kadir).

[16] CR 2007/27, p. 61, para. 48 (Kohen).

[17] CR 2007/24, p. 16, para. 33 (Kadir).

[18] CR 2007/26, p. 44, para. 29 (Lauterpacht).

[19] CR 2007/24, p. 17, para. 38 (Kadir).

the Singapore navy has established a specific patrol sector around Pedra Branca and has regularly patrolled there.

26. The presence of the Singapore navy around Pedra Branca is no different from its presence in any other part of Singapore's territory. It has always been peaceful and non-confrontational and has enhanced security and safety in the area. As for Singapore's policy towards fishermen in Pedra Branca waters, this was clearly stated in our diplomatic Note to Malaysia dated 16 June 1989:

> "Singapore Marine Police and Navy patrols often find Malaysian vessels in Singapore territorial waters, fishing in what they claim to be traditional fishing grounds. Singapore has not arrested these boats. Wherever possible, it has allowed them to continue fishing. Where this is not possible for security or other reasons, the Singapore authorities have asked them to leave instead of arresting them."[20]

This Note can be found at tab 2 of the judges' folder.

27. Mr. President, Singapore has never arrested any Malaysian fishermen in Pedra Branca waters. On the other hand, it is Malaysia which has been aggressively arresting Singapore fishing vessels and raising tensions[21], including through the use of physical violence against Singapore fishermen in the vicinity of Pedra Branca[22]. All these are documented in our written pleadings and can also be found at tab 3 of the judges' folder.

28. As for Malaysia's complaint that its officials could not go anywhere near Pedra Branca without being challenged by the Singapore navy[23], I would like to remind my Malaysian friends that, way back in 1989, Singapore had indicated to Malaysia that we would be happy to invite Malaysian officials to visit Pedra Branca if they wished to do so[24]. This can be found at tab 4 of the judges' folder.

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[20]MS, Ann. 160.

[21]MS, Ann. 160; MS, Ann. 175 and MS, Ann. 177.

[22]MS, Ann. 182.

[23]CR 2007/24, pp. 17-18, para. 38 (Kadir).

[24]MS, Ann. 163.

Malaysia's "offer" to continue to respect Singapore as lighthouse operator

29. Finally, in another attempt to influence the Court with extraneous considerations, Malaysia's Agent told the Court that Malaysia had always respected the position of Singapore as operator of the Horsburgh lighthouse and wished to place on record that it will continue to do so[25].

30. There is no need, and certainly no basis for Malaysia to do so. Singapore's rights in relation to Pedra Branca are the rights of a country having sovereignty over the island, not that of a lighthouse operator. Singapore's activities in relation to Pedra Branca go well beyond the operation of a lighthouse operator. They include various sovereign acts on the island and in its territorial waters. Singapore's sovereign status over Pedra Branca had been recognized as such by Malaysia, until December 1979.

31. The questions for the Court, as agreed by both countries in the Special Agreement, concern sovereignty. This case is *not* about the right to operate the Horsburgh lighthouse.

32. Mr. President and Members of the Court, Singapore has had no choice but to rebut Malaysia's baseless allegations and insinuations. And I have done so with much reluctance. Every State which appears before this honourable Court in any dispute would of course do all it can to persuade this Court to decide in its favour. That is perfectly legitimate. However, we should seek to win by stating objective facts and submitting persuasive legal arguments, and not by resorting to unfounded political statements and making insinuations damaging to the integrity of the opposite Party.

33. Having said this, let me end by reiterating what Singapore's Agent said on 6 November, namely, that both countries agreed to submit our case to this honourable Court instead of allowing the dispute to adversely affect our overall good relations[26]. I have no doubt that both countries are committed to maintaining these friendly and peaceful relations.

34. Mr. President, Members of the Court, I thank you for your patience and attention. May I now request that you please invite the Attorney-General, Mr. Chao, to address the Court.

The VICE-PRESIDENT, Acting President: I thank you, Professor Jayakumar, for your speech and invite the Attorney-General, Mr. Chao, to the podium.

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[25]CR 2007/24, p. 18, para. 43 (Kadir).

[26]CR 2007/20, p. 16, para. 3 (Koh).

Mr. CHAO:

GEOGRAPHICAL SETTING AND MIDDLE ROCKS AND SOUTH LEDGE

Introduction

1. Mr. President and Members of the Court, in this presentation, I will be dealing with two points. The first relates to the issue of proximity of Pedra Branca to the coast of Johor. Secondly, I will be responding to Malaysia's arguments on Middle Rocks and South Ledge.

I. Geographical setting — proximity

2. Professor Kohen devoted a significant part of his presentation last Wednesday attempting to persuade you that Pedra Branca was "near Point Romania" as the phrase was used in the letter from the Temenggong of Johor to Governor Butterworth of 25 November 1844[27]. He showed you J. T. Thomson's 1851 map[28] and made the rather curious argument that because Pedra Branca and the Romania Islands were on the same map, they belonged to the so-called "region" of Romania and therefore were near to each other[29].

3. The 1851 map shows, in fact, the exact opposite of what Professor Kohen contends. You only need to look at the map on the screen and at tab 5 of your folder to appreciate that, from Thomson's perspective, since Peak Rock was the intended location of the lighthouse "near Point Romania" in 1844, Pedra Branca — which was located nearly six times the distance from Point Romania compared to Peak Rock — could not be regarded by the British colonial government as "near Point Romania". And let us not forget that the only contemporaneous official document which actually discussed the relative distance of Pedra Branca from the Johor coast is the 26 August 1846 letter from Governor Butterworth, where he explained his original preference to build the lighthouse at Peak Rock because Pedra Branca was "at so great a distance from the Main Land"[30].

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[27]CR 2007/25, pp. 49-52, paras. 43-53.

[28]CMS, Map Atlas, map 8.

[29]CR 2007/25, p. 50, para. 48.

[30]MS, Vol. 2, Ann. 16, p. 135.

4. Professor Kohen accused Singapore of maintaining what he called "absolute silence"[31] in relation to John Crawfurd's 1818 diary entry, and here I quote from the entry:

> "Romania is the Eastern part of the Singapore Straits, the entrance is divided into two channels by a cluster of rocks, the largest is 20 feet above the level of the sea named by the Portuguese Pedro Branca."[32]

But what is there in this entry for Singapore to respond to? Point Romania and the Romanian islands are at the eastern entrance of the Singapore Strait and Pedra Branca does divide the entrance to the Strait into the Middle and South Channels. Crawfurd did not speak of a "region" of Romania, as Malaysia claims. That so-called "region" is a figment of the imagination.

5. Malaysia also suggested that Singapore had been engaging in what was termed "photographic tactics" because we did not produce a photograph showing Pedra Branca with the Johor coast in the background[33]. Last week, in an attempt to convey a subliminal message of proximity between Pedra Branca and the coast of mainland Johor, Malaysia produced the photograph which appears on the screen[34]. This was tab 78 in Malaysia's judges' folder.

6. Mr. President and Members of the Court, members of the Singapore team who have visited Pedra Branca were greatly surprised to see this photograph. It did not correspond with their recollection of what Pedra Branca and the Johor mainland looked like when they were there. Nor did it correspond with what J. T. Thomson saw and sketched in 1850[35].

7. Let us examine a close-up of the photograph relied on by Malaysia showing the lighthouse with the hill, Bukit Pelali or Mount Berbukit, in the background, and compare that with a photograph taken a few days ago showing what the human eye actually sees as one looks in the same direction.

8. If we compare the hill in the background with the same hill in Malaysia's photograph, Malaysia's photograph exaggerates the height of the hill by approximately seven times.

9. The cause of this is an effect called "telephoto compression" which occurs when a telephoto lens is used, instead of a lens that gives a perspective similar to the human eye. The lens

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[31]CR 2007/25, p. 50, paras. 46-48.

[32]MM, Vol. 3, Ann. 23.

[33]CR 2007/25, p. 51, para. 51.

[34]*Ibid*., p. 51, para. 50.

[35]MS, Vol. 4, Ann. 61, p. 475.

used for the photograph on the right approximates what the human eye sees. Thomson's sketch, together with all the photographs, are at tab 6 of your folder.

10. I have a few more observations on the photograph relied on by Malaysia. Malaysia attributes its source to a "blog" website[36]. This blog website is a most unusual one. It was created only last month. There is no information on the identity of the blogger and the photograph used by Malaysia was only put on the website on 2 November 2007, four days before the start of these oral proceedings.

II. Middle Rocks and South Ledge

11. I now turn to the question of Middle Rocks and South Ledge. Here I would like to note that my learned counterpart, the Attorney-General of Malaysia, claims that "[t]he dispute concerning these two features only crystallized on 6 February 1993 when, for the first time during the first round of bilateral discussions between the Parties, Singapore included Middle Rocks and South Ledge in addition to its claim to Pulau Batu Puteh"[37].

12. With respect, the assertion is as wrong as it is artificial. What Malaysia describes as Singapore's "claim" over Middle Rocks and South Ledge on 6 February 1993 was, in reality, Singapore's response to *Malaysia's* statement made a day earlier describing Middle Rocks and South Ledge as two Malaysian islands[38]. The reality is that Middle Rocks and South Ledge cannot, by any stretch of the imagination, be considered as distinct from Pedra Branca. It follows that the critical date for all three features must naturally be the same.

13. Last Thursday, we heard the presentation of Professor Schrijver on Middle Rocks and South Ledge. Two key arguments emerged from that presentation:

(a) first, that Malaysia had original title over Middle Rocks and South Ledge; and

(b) secondly, that Pedra Branca, Middle Rocks and South Ledge did not form a group.

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[36] www.leuchtturm3.blogspot.com, screen shots of which are found at tab 7.

[37] CR 2007/24, pp. 31-32, para. 14 (Gani Patail).

[38] CMS, Vol. 1, p. 201, paras. 8.1-8.2.

A. Alleged original title

14. Professor Schrijver's first point can be very briefly dealt with. As with Pedra Branca, Malaysia provides not a single piece of evidence that Johor had any title to or carried out any sovereign act over Middle Rocks and South Ledge.

B. Whether the features form a group

15. This brings me to Professor Schrijver's second point — the assertion that the three features do not form a group and cannot be treated together. Malaysia's position in this regard is wholly contradicted by the way it puts forward its case. The acts of Malaysia which Professor Schrijver cites in support of Malaysia's sovereignty over Middle Rocks and South Ledge are, first, Commodore Thanabalasingham's so-called "Letter of Promulgation", secondly, the 1968 oil concession, and thirdly, the 1985 Fisheries Act[39]. These are the same acts Malaysia relies upon to claim Pedra Branca, which Ms Malintoppi will address tomorrow. This shows that Malaysia has treated them and continues to treat them as a group.

16. Professor Schrijver devoted the better part of his presentation taking issue with the reasons listed by Professor Pellet in support of Singapore's position that the fate of the three features was necessarily linked[40]. I do not propose to respond to every one of the points made. They have already been covered extensively in Singapore's written pleadings[41] and Professor Pellet's presentation[42]. But I note in passing Professor Schrijver's rather astonishing suggestion that the three features could not form a group because Singapore was unable to show all of them in a single photograph[43]. If photography can determine whether features form a single group, we have countless photographs showing Pedra Branca and Middle Rocks in the same frame. These two features were what Commander Kennedy referred to as the "Horsburgh Group" in 1958[44]. As for South Ledge, it is a low-tide elevation within the territorial sea of the Pedra Branca/Middle Rocks group, so its fate follows that of the group.

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[39]CR 2007/26, pp. 24-25, para. 8.

[40]*Ibid*., pp. 26-34, paras. 12-38.

[41]MS, Vol. 1, pp. 180-184, paras. 9.8-9.17; CMS, Vol. 1, pp. 202-209, paras. 8.4-8.10.

[42]CR 2007/23, pp. 52-54, paras. 15-16.

[43]CR 2007/26, p. 28, para. 18.

[44]CMS, Vol. 3, Ann. 37, p. 350.

17. I will focus instead on three aspects of Professor Schrijver's analysis — first, proximity, secondly, geomorphology; and, thirdly, whether there exists navigable channels between the three features.

(1) Proximity

18. On proximity, Professor Schrijver quite erroneously cited dicta from the Arbitral Award in the *Eritrea/Yemen* case to argue that, and here I quote, "The mere extending of the territorial sea from PBP cannot in itself generate sovereignty over Middle Rocks and South Ledge."[45] The passage he cited from *Eritrea/Yemen* was concerned with Eritrea's so-called "leapfrogging" argument that sovereignty exists over island B because it falls within the territorial sea of island A and that sovereignty exists over island C just because it, in turn, lies within the territorial sea of island B, and so on[46].

19. That passage is completely irrelevant to the present case where all three features lie less than 3 nautical miles from each other and Middle Rocks and South Ledge clearly fall within the territorial sea of Pedra Branca. Moreover, the Tribunal in *Eritrea/Yemen*, as is clear from the *dispositif* of its Award, did award sovereignty to the "islands, islets, rocks and low-tide elevations" of the Zuqar-Hanish group and the sovereignty to the "islands, islets, rocks and low-tide elevations" of the Zubayr group to Yemen as *groups* of maritime features[47].

(2) Geomorphology/geology

20. Turning to geomorphology — or, more correctly, geology — Professor Schrijver argued that the same rock type on Pedra Branca, Middle Rocks and South Ledge can be found in other neighbouring islands but not Singapore Island itself[48]. This contention is baffling. Clearly, in determining whether the three features constitute a group, what matters is whether those three features have similar geological characteristics. The answer is "yes". Whether other places do or

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[45]CR 2007/26, p. 27, para. 15.

[46]*Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage of the proceedings *(Territorial Sovereignty and Scope of the Dispute)*, 9 Oct. 1998, 114 *ILR* 1, pp. 132-133, paras. 473-474.

[47]*Ibid.*, p. 147, para. 527.

[48]CR 2007/26, pp. 27-28, para. 17.

do not have such characteristics is beside the point. After all, the issue is not whether Pedra Branca, Middle Rocks, South Ledge *and* Singapore form a group.

(3) Navigable channels

21. I turn now to Professor Schrijver's argument that the three features do not constitute a group because they are separated by navigable channels[49].

22. Malaysia's contention that a navigable channel exists between Pedra Branca and Middle Rocks is quite surreal. No one denies that a stretch of water separates the two features, so some boats must be capable of traversing those waters. But what determines whether a navigable channel exists is whether commercial maritime traffic can safely use that route.

23. The navigable width of the "channel" between Pedra Branca and Middle Rocks, if it can be called that, is less than 200 m, as can be seen on the screen and in the chart at tab 8 of your folder. No prudent mariner will navigate commercial vessels through such waters and, in reality, no one does that. It is not for nothing that British Admiralty Chart 2403 shows a danger line surrounding Pedra Branca and Middle Rocks[50].

24. As for the so-called "navigable channel" between Middle Rocks and South Ledge, I would like to make two comments. First, whether this channel exists does not affect the unity of Pedra Branca and Middle Rocks. As we said last week[51], the material question is whether Pedra Branca and Middle Rocks should be treated as one. Once that is settled, the fate of South Ledge, a low-tide elevation, follows that of Pedra Branca and Middle Rocks. Secondly, the fact is that commercial maritime traffic traversing those waters uses either Middle Channel or South Channel because they are safe routes.

25. Last week, Professor Schrijver referred us to an extract of the sailing directions for the north-eastern approach to the Singapore Strait, which is at tab 10 of your folder. Relying on the sentence which reads "passage between Middle Rocks and South Ledge is possible at LW (low water) provided both are plainly visible", he then boldly asserted "if possible at low water, passage

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[49]CR 2007/26, pp. 29-30, paras. 20-23.

[50]MM, Map Atlas, map 25. A large format of this map is in the sleeve of Malaysia's Counter-Memorial. A close-up of the relevant section is at tab 9 of the judges' folder.

[51]CR 2007/23, pp. 51-52, paras. 12-13 (Pellet).

is easy at high water"[52]. He could not be more wrong. Passage is possible provided *both* features are plainly visible, allowing a pilot to steer clear of South Ledge by sight. At high water, South Ledge, which is a low-tide elevation, is *not* visible at all. Passage between Middle Rocks and South Ledge *becomes* dangerous.

26. This brings me to more general observations on Malaysia's case with respect to Middle Rocks and South Ledge. Malaysia's written and oral pleadings thus far have been almost single-mindedly devoted not to demonstrating acts of sovereignty over the two features — which she has not done and cannot do — but to demonstrating that Middle Rocks and South Ledge are not part of the same group as Pedra Branca. Why? Why is Malaysia so anxious to separate the fate of Middle Rocks and South Ledge from Pedra Branca? Why is Malaysia insisting that, if a group exists at all, it would consist of only Middle Rocks and South Ledge[53]? Is Malaysia hoping that, by doing so, they can salvage something for future maritime delimitation if the Court finds that sovereignty over Pedra Branca belongs to Singapore? Is Malaysia hoping that this Court might hand down a judgment like King Solomon by awarding Pedra Branca to one side and Middle Rocks and South Ledge to the other? The law and the facts simply do not support such a ruling.

Conclusion

27. Mr. President, Members of the Court, I shall conclude with a reiteration of Singapore's case with respect to Middle Rocks and South Ledge.

(a) First, Pedra Branca, Middle Rocks and South Ledge have always been treated together and are so treated in Malaysia's pleadings.

(b) Secondly, Middle Rocks and South Ledge, being less than 3 nautical miles from Pedra Branca, fall within its territorial sea.

(c) Thirdly, Middle Rocks, located only 0.6 nautical miles from Pedra Branca, is a mere geomorphological extension of Pedra Branca. It belongs to and forms a single group with Pedra Branca.

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[52]CR 2007/26, p. 31, para. 27.

[53]*Ibid.*, pp. 33-34, para. 38.

(d) Fourthly, South Ledge, being a low-tide elevation, cannot be independently appropriated. Its fate must follow that of Pedra Branca and Middle Rocks.

(e) Finally, because sovereignty over Pedra Branca belongs to Singapore, sovereignty over Middle Rocks and South Ledge also belongs to Singapore.

28. That concludes my presentation. I would like to thank you for your attention. Mr. President, may I ask you to call upon Mr. Chan to continue with Singapore's presentation?

The VICE-PRESIDENT, Acting President: I thank you, Mr. Chao, for your speech. I now call on Mr. Chan to continue with Singapore's presentation.

Mr. CHAN:

HISTORICAL SETTING

1. Mr. President and Members of the Court, my presentation this morning will address the arguments of Professor Crawford on Malaysia's claim to an original title to Pedra Branca and Professor Schrijver's arguments on the Anglo-Dutch Treaty. Both sets of argument have no merit.

Malaysia's lack of response to Singapore's arguments

2. I begin by observing that Professor Crawford did not respond to my argument that the territorial extent of the Johor Sultanate was indeterminate because it was unstable and its rulers had a conception of sovereignty based on control of people rather than control of territory. He simply dismissed it as a theory of the disappearing Sultanate and labelled it as the discontinuity thesis which has three elements.

3. Professor Crawford claims that all these three elements can be contradicted, firstly, by the expert opinions of Professor Houben and Professor Andaya; secondly, by the documentary and historical evidence; and thirdly, by the conduct of the Parties. In fact, they are not.

The VICE-PRESIDENT, Acting President: I am so sorry to interrupt you. May I ask you to speak a little more slowly, please.

Mr. CHAN: Yes, Mr. President.

Let me elaborate. The first element, that the State of Johor "dates from the mid-nineteenth century" is a quotation from Professor Trocki's book, *The Prince of Pirates*[54], which Professor Houben has endorsed in his report[55]. These passages can be found at tabs 11 and 12 of the judges' folder.

The second element, that traditional Malay sovereignty is "based on the allegiance of subjects and not on the control of land" is the unanimous opinion of all expert historians Singapore has referred to in her Counter-Memorial, including Professor Andaya, who wrote in 1997 in his article, "Writing a History of Brunei": "Historians have accepted the *truism* that in Southeast Asia *it is not the control over land but people* which is the crucial element in statecraft."[56] (Emphasis added.) Professor Crawford's description of a Malay State as "virtually non-territorial" is his, not mine. In my speech last week, I took great pains to make clear that:

> "it is not Singapore's case that the traditional Malay concept of sovereignty means that a Malay sultanate had no territory. What it means is that the only reliable way to determine whether a particular territory belonged to a ruler is to find out whether the inhabitants pledged allegiance to that ruler." [57]

Instead of rebutting this proposition and proving it wrong, Professor Crawford simply ignored it. The proposition creates difficulties for Malaysia in showing when and how the Johore Sultanate acquired title to Pedra Branca.

The third element, that it was only in the late nineteenth century that the concept of territorial sovereignty became apposite for the Malay States, including Johor, is extracted from a passage in Professor Andaya's book *A History of Johore*, which I have quoted during the first round. The passage is found in the judges' folder at tab 13. Professor Houben also endorses this view in paragraph 13 of his report, which can be found in the judges' folder at tab 12, where he also cites another study by Professor Milner published in 1995[58].

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[54]See Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), p. 1.

[55]RM, p. 225, App. II, para. 16.

[56]Andaya L., "Writing a History of Brunei" in Barrington B. (ed.), *Empires, Imperialism and Southeast Asia: Essays in Honour of Nicholas Tarling* (1997), p. 201.

[57]CR 2007/20, p. 44, para. 24 (Chan).

[58]RM, p. 224, App. II, para. 13.

4. Mr. President and Members of the Court**,** Malaysia's case is based on original title. But up to today, Malaysia has produced no evidence whatever to prove her claim. She has produced no evidence whatever that the Johor Sultanate had ever exercised any sovereignty over Pedra Branca or carried out State activities specific to the island. My argument is that the three elements of

(1) the historical instability of the Johor Sultanate throughout its existence,

(2) the indeterminacy of its territorial boundaries, and

(3) the traditional Malay concept of sovereignty

constitute a huge obstacle to Malaysia's claim, which she has not surmounted. Pedra Branca was a small, barren and uninhabited island. There were no inhabitants to pledge allegiance to the ruler, and so this test cannot be satisfied. In the case of Pedra Branca, Malaysia has to show that the Sultanate has carried out acts of a sovereign nature specific to the island.

5. Singapore's case is not that the Sultanate disappeared. Obviously, the Sultanate could not disappear because, as Professor Andaya has stated in his report: "Wherever the ruler settled, there would be a royal capital and the center of the kingdom."[59] This is the underlying basis of my argument. It is precisely because a Malay sultanate is centred entirely on the person of the Sultan that the territorial extent of a Malay kingdom is inherently indeterminate. When the Sultan was driven out of his capital, he lost territory and also, eventually, the allegiance of the subjects whom he could no longer protect. Each time he moved, he had to acquire new subjects to build up a kingdom again. That is the traditional concept of Malay sovereignty, but that does not mean a Malay kingdom has no territory, contrary to what Professor Crawford wants us to say or the Court to think. It simply means that the territory cannot be defined without a reference to the people who live there and pledge allegiance to the ruler.

Malaysia's other arguments

6. Let me now deal with Professor Crawford's other arguments that Pedra Branca was part of the Johor Sultanate.

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[59]RM, p. 209, App. I, para. B.2.

The activities of the Orang Laut

7. His *first* argument is that the territory of the ruler "included islands whose surrounding waters were used by his subjects"[60]. Particular reference is made to the Orang Laut who were the subjects of the Sultanate. The argument appears to suggest that the mere usage of the waters of an island by the Sultanate's subjects is evidence that those waters belong to the Sultanate. That cannot be right. Private acts are not sufficient in law to establish the sovereignty of the Sultan over Pedra Branca and the adjacent waters. In fact, the waters around Pedra Branca have been used by mariners and merchant ships from all over the world for hundreds of years.

8. In any case, not all Orang Laut were subjects of the Sultanate. Orang Laut came from all parts of the archipelago, some as far as the Philippines and Thailand or Vietnam. They were also called sea nomads. Some of them paid allegiance to no one[61]. They both engaged in fishing and in piracy. Begbie referred to the piratical activities of the Lanum — or Illanum — from Mindanao, Philippines, who were not subjects of Johor[62]. Paragraphs 12 to 15 of Presgrave's report on piracy also refer to Orang Laut from Thailand, Trengannu, Selangor, Perak, Sulu, Borneo — all engaging in piracy[63].

The Dutch letters of 1655 and 1662

9. The waters around Pedra Branca have never been the territorial waters of the Johor Sultanate or claimed as such by the Sultanate. In this connection, Professor Crawford has referred to a proposed Dutch scheme, in 1655, to divert Chinese junks from the mouth of the Johor River to Malacca. He claimed that the Sultan protested against this scheme in 1662, seven years later[64]. It is not clear whether the two incidents were related, but the fact was that the scheme and the protest had nothing to do with territory but trade. Professor Crawford, in disregard of the contents of the 1662 letter, interpreted that the Sultan's "great displeasure was at the infringement of its territorial

[60]CR 2007/24, p. 60, para. 10 (Crawford).

[61]See Trocki C., *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore 1784-1885* (1979), p. 56.

[62]Begbie P. J., *The Malayan Peninsula* (1834, reprinted 1967), pp. 264-265.

[63]Report from Presgrave E. (Registrar of Imports and Exports) to Murchison K. (Resident Councillor) dated 5 Dec. 1828 (MM, Vol. 3, Ann. 27).

[64]CR 2007/24, p. 62, paras. 15-16 (Crawford).

rights"[65]. Nothing in the 1662 letter speaks of territorial rights. In fact, the reaction described by the Governor-General shows clearly that the Sultan's great displeasure was against the seizure of the two Chinese junks to prevent them from sailing into the Johor River to trade. The protest was not against either the Dutch or the Chinese encroaching or trespassing in the waters of the Sultanate, but about the diversion of trade away from the Sultan. In this connection, Malaysia appears to have acknowledged her mistake in translating the Dutch word for "express" as "his" in the 1662 letter to convey the idea that the waters around Pedra Branca belonged to the Sultan.

Absence of evidence despite 300 years of history

10. Except for the single article in the *Singapore Free Press* referring to Batu Puteh which Professor Pellet will examine again in his presentation, Malaysia has not managed to harvest from the 300 years of the existence of the Johor Sultanate any evidence that it had an original title over Pedra Branca. The paucity of evidence is a strong indication that Pedra Branca had never belonged to the Sultanate.

The reliance on general descriptions of the Sultanate

11. Professor Crawford also relies on general descriptions of the geographical extent of the Sultanate's possessions given by Crawfurd and Presgrave as evidence of its title to Pedra Branca. But Presgrave and also the Dutch and British negotiators of the Anglo-Dutch Treaty acknowledged that they did not know the territorial limits of the Sultanate[66]. Even the Sultan of Trengganu, *as late as 1875* did not know the extent of his territory[67]. In the context of a Malay sultanate which was people-centric and not territory-centric, general descriptions of the geographical extent of the Sultanate's domains have no probative value at all as attributions of sovereignty. Crawfurd himself was aware of the nature of traditional Malay sovereignty. He had accepted the Temenggong's claim to certain islands on the basis that the inhabitants there had cheerfully pledged their allegiance to the Temenggong[68].

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[65]CR 2007/24, p. 62, para. 16 (Crawford).

[66]See CR 2007/20, pp. 44-45, paras. 24-25 (Chan). See also Report from Presgrave E. (Registrar of Imports and Exports) to Murchison K. (Resident Councillor) dated 5 Dec. 1828 (MM, Vol. 3, Ann. 27), as extracted at CMS, pp. 51-52, para. 4.25 *(b)*.

[67]See Milner A. C., *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (1982), p. 8.

[68]See CMS, p. 22, para 3.9 *(a)*.

12. In any case, as these descriptions do not name Pedra Branca specifically, they have no probative value as evidence of title to the island. As this Court has stated in the *Indonesia/Malaysia* case, which was reiterated at paragraph 174 of your recent Judgment (of 8 October 2007) in the *Nicaragua* v. *Honduras* case: "The Court . . . can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 682-683, para. 136.)

The Sultanate's lack of interest in small, uninhabited islands

13. The nature of traditional Malay sovereignty militates against the ruler showing any interest in small, uninhabited islands, especially an isolated one like Pedra Branca. Begbie and Presgrave only listed inhabited islands as belonging to the Sultanate[69]. The Sultanate's disinterest in Pedra Branca is consistent with and explains the absence of any evidence that the Johor Sultanate had claimed, or had any intention to claim, Pedra Branca as its territory.

Anglo-Dutch Treaty of 1824

14. Mr. President and Members of the Court**,** let me now examine Professor Schrijver's arguments on the Anglo-Dutch Treaty. He argues that:

(a) the Treaty divided up the Straits of Singapore[70];

(b) the 1825 donation by Sultan Abdul Rahman had no legal effect whatever, as the issues were already resolved by the two Treaties of 1824[71]; and

(c) the Treaty, although intended to create spheres of influence between the two Powers, in fact determined the boundaries of the territories of a divided Sultanate[72].

Professor Pellet will also deal with some aspects of the second argument, and also the third argument.

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[69]See Begbie, P.J., *The Malayan Peninsula* (1834, reprinted 1967), pp. 269-272 (CMS, Ann. 8) and List of Islands attached to Presgrave's report of 5 Dec. 1828 (CMS, Ann. 7). Both these documents are referred to at CMS, p. 23, para. 3.10.

[70]CR 2007/25, p. 27, para. 13. (Schrijver).

[71]CR 2007/25, p. 31, para. 29 (Schrijver).

[72]CR 2007/25, pp. 31-32, paras. 29-31 (Schrijver).

15. Professor Schrijver's first argument is wrong. It is contradicted by the negotiating history and the text of Articles 10 and 12 of the Treaty and an internal Note of the Dutch Ministry of Colonies dated 15 October 1858 and correspondence between Crawfurd and the Government of India[73]. A copy of Articles 10 and 12 can be found in the judges' folder at tab 14. Professor Schrijver argued that Singapore's interpretation is untenable and unsustainable because it was "unthinkable that they would have agreed to leave the entire Straits of Singapore open and undivided"[74]. He also claims that not a single shred of evidence can be found to support Singapore's thesis. But then, what evidence has Malaysia produced? Only an imaginative sketch-map on which was traced an imaginary line.

16. However, there is further evidence to show that the "dividing line" was the entire Straits of Singapore. The Court will recall that in 1886 Sultan Abu Bakar requested the British to keep a register of all his islands to keep out other Powers. The Secretary to the Sultan sent a memorandum with the title "The Natunas, the Anambas and the Tambilan Islands" dated 5 May 1886 to the British Colonial Office. This Note can be found in the judges' folder at tab 15. Paragraph 3 of this note states:

> "3. By the English-Dutch Treaty of 1824, the Dutch are excluded from exercising any right or interfering with the islands to the *North* of the Straits of Singapore. The groups in question are situated to the north of that line, with the exception of certain islands of the Tambelan Group, on one of which the Dutch have a coal depot and a fort. This island is *below* the line of the Straits of Singapore."[75]

17. This memorandum was sent after obtaining legal advice from Mr. Rodyk, a lawyer who founded the oldest law firm in Singapore, Rodyk & Davidson, which is still one of the largest law firms in Singapore today. The memorandum clearly identifies *the whole of the Straits of Singapore as the dividing line*, with the British sphere of influence north of the Straits of Singapore and the Dutch sphere of influence south of the Straits of Singapore. To emphasize this meaning, the word "North" is underlined in the original manuscript. This understanding is also significant in another context which I shall discuss later. There is thus a coincidence of the views of the Dutch, the British and the State of Johor itself that the entire Straits of Singapore is "the dividing line".

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[73]CR 2007/20, pp. 47-48, paras. 36-38 (Chan).

[74]CR 2007/25, p. 27, para. 13 (Schrijver).

[75]See Memorandum from Inchi Abdul Rahman (Secretary to the Sultan of Johore) to the British Colonial Office dated 5 May 1886 (CMS, Ann. 21 (iv)).

The donation letter of 1825

18. Mr. President and Members of the Court**,** I will now examine Professor Schrijver's argument that the 1825 donation letter had no legal effect as a matter of international law because the issues had been resolved by the 1824 Treaties. Professor Schrijver cites no applicable international law principle to support this. He does not identify the issues that had been resolved or their relevance to the donation letter. The Anglo-Dutch Treaty created two spheres of influence, not two territories. The Dutch needed Abdul Rahman, as the ruler of the Johor Sultanate, to enhance a "spheres of influence" arrangement into a division of the possessions of the Sultanate. The Sultan was not a civil servant.

19. The 1825 donation was a constitutional act of the highest order. In transferred sovereignty of territory by one ruler to another ruler under Malay *adat* law. Any suggestion that the donation had no legal effect was plainly absurd.

20. Professor Schrijver has carefully avoided any discussion of the text of the donation letter. So, let us have another look at the text of the letter of donation to see what it says. This is now shown on screen and can be found at tab 16 of the judges' folder. I have read out this text earlier (CR 2007/20, p. 50, para. 43) so I will read out only the underlined words:

> "*Your territory, thus, extends over Johor and Pahang on the mainland or on the Malay Peninsula. The territory of your Brother* [Sultan Abdul Rahman] *extends out over the islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands. Whatsoever may be in the sea, this is the territory of Your Brother, and whatever is situated on the mainland is yours.*"[76] (Emphasis added.)

21. The donation letter gives to Sultan Hussein as Sultan of Singapore and all obedient dependencies, Johor and Pahang on the mainland or on the Malay Peninsula, with Sultan Abdul Rahman retaining for himself "all other islands", and "whatsoever may be in the sea." Obviously, "all other islands" and "whatsoever may be in the sea" cannot be given a literal meaning. They cannot refer to islands which did not belong to the Sultanate (such as Pedra Branca) or islands which the donation letter itself gives away. Hence, the extent of the territory donated or retained by Sultan Abdul Rahman cannot be determined by reading the words of donation literally, but contextually. And what is the context? It was, as pointed out by Professor Schrijver, that the Dutch needed Sultan Abdul Rahman to "effectuate" the arrangements made

[76]Letter from Sultan Abdul Rahman to Sultan Hussein dated 25 June 1825 (CMS, Ann. 5).

under the Anglo-Dutch Treaty, and "to include in that arrangement *that part of the Kingdom of Johor which is situated within the British sphere of influence*"[77]. The Dutch wanted Sultan Abdul Rahman to donate his territory within the British sphere of influence to Sultan Hussein.

22. In this context, the extent of the territory donated to Sultan Hussein becomes clear. It extends to all the Sultanate's territory north of the Straits of Singapore. Sultan Abdul Rahman also provided a detailed description of the respective territories of both Sultans: those not donated to Sultan Hussein would be retained to himself, that is, all islands and whatsoever may be in the sea. The effect of the donation was that Sultan Abdul Rahman expressly retained all his former territory not donated to Sultan Hussein.

23. Professor Schrijver has never been able to rebut Singapore's case that the entire Singapore Strait was the dividing line. Singapore's interpretation on this point was, as I have shown a few minutes ago, also the understanding of the Sultan of the State of Johor in 1886 where he sought the assistance of the British Government to recover the Natunas as his territory on the ground that they were situated north of the Straits of Singapore. The British Government rejected the request on the ground that they had already recognized Dutch sovereignty over the Natunas before 1886. The correspondence on this issue is found in Annex 21 of the Counter-Memorial of Singapore.

24. Accordingly, the scope of the donation did not affect Pedra Branca, even assuming that the island belonged to Sultan Abdul Rahman. It was not donated to Sultan Hussein. This interpretation finds support in Professor Schrijver's account as to the circumstances in which Sultan Abdul Rahman agreed to donate his territory within the British sphere of influence to Sultan Hussein.

25. For this reason, it would not be necessary to discuss whether the donation letter also included all the dependencies of Sultan Hussein (as indicated by the title of the document itself) as such dependencies would naturally be part of his territory north of the Straits of Singapore.

26. The Court will recall that in 1864, a dispute arose between Johor and Pahang as to the ownership of certain islands situated at the boundary separating them. The dispute was referred to

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[77]Extracts of letter from Elout to the Governor-General of the Netherlands East Indies dated 31 Aug 1824 (RM, Ann. 2), as quoted in CR 2007/25, p. 31, para. 27 (Schrijver).

arbitration by Governor Ord and this led to the Ord Award. Malaysia has attempted to construe the Ord Award to include Pedra Branca. This is plainly wrong as there was no dispute between Johor and Pahang as to ownership of Pedra Branca, and also because Pedra Branca was never donated to Johor or Pahang. It would be very odd indeed for the Governor to award Pedra Branca to Johor when the island was not within the terms of reference of the dispute. It would be odder still if, had the Ord Award awarded Pedra Branca to Johor, Johor would disclaim ownership of Pedra Branca in 1953. The Ord Award was a very significant victory for Johor and it is reasonable to assume that the Acting State Secretary of Johor could not have failed to consider its terms when the Government of Johor decided to disclaim title to Pedra Branca in 1953.

The 1861 incident

27. As I am now on the topic of mainland Johor, I wish to take this opportunity to clarify an issue in connection with the 1861 incident involving certain fishermen. Last Thursday, Sir Elihu Lauterpacht referred to two letters from the British Governor to the Temenggong concerning this incident[78]. He argued that certain subtle differences in tone between the two letters revealed that the British Governor did not regard Pedra Branca as falling within British waters. Sir Elihu's conclusion is not borne out by a proper reading of the documents. What he fails to mention is that the two letters in fact refer to the same incident. The full analysis given by Singapore is in Appendix B of our Reply[79], which I do not propose to repeat here, but it demonstrates very clearly that the Singapore fishermen concerned and the British officials in Singapore had the clear understanding that the Temenggong possessed no jurisdiction and authority around Pedra Branca.

Conclusion

28. Mr. President and Members of the Court**:** the crux of the issue is the source of the original title that Malaysia has claimed? Where is the evidence of this source? Malaysia has never been able to provide the answer to this critical issue. Where is the evidence of the Johor Sultanate having claimed or exercised sovereignty over Pedra Branca or its waters before 1847? There is

[78]CR 2007/26, p. 45, paras. 48-52 (Lauterpacht).

[79]RS, App. B.

none, and therefore it is not surprising that Malaysia pleaded time immemorial or possession immemorial.

29. Before I conclude my presentation, I would refer to Professor Crawford's statement that both Parties have to prove their propositions[80]. We agree. For Malaysia, she must prove that Pedra Branca was part of the Johor Sultanate and, assuming that she can prove it, she must further prove that the Sultanate's original title had been transmitted to the Malaysian State of Johor. For the reasons I have given in my speech at the first round[81] and today, I respectfully submit that Malaysia has failed to prove both propositions, and that Malaysia does not have an original title to Pedra Branca.

30. Mr. President and Members of the Court, before I sit down, I would wish to express my deep appreciation of the Court's kindness and patience in listening to my submissions on behalf of the Republic of Singapore in what will be my one and only appearance as counsel before this Court. It is an honour and a privilege I will not forget. But I would like to leave the Court with this submission. Malaysia has been trying to explain away the 1953 letter as a disclaimer of ownership of *property*, not sovereignty. But if that was the intention, Malaysia should have *some* documentary evidence to prove it. There was absolutely no reason for the Johor Government to declare, and it would never have declared, that it "does not claim ownership of Pedra Branca"[82] unless it did *not* own Pedra Branca. The continuous pattern of activities by Singapore and the continuous silence of Malaysia in relation to Pedra Branca from 1847 onwards are consistent with, and confirmed by, the 1953 disclaimer. In truth and logic, Malaysia's absence of any title to Pedra Branca was the source and origin — the *fons et origo* — of the 1953 disclaimer of title. Johor disclaimed title because it had no title. What more can be said?

Mr. President, may I now request that you call on Professor Pellet to continue Singapore's presentations. Thank you.

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[80]CR 2007/24, p. 58, para. 2 (Crawford).

[81]CR 2007/20, p. 52, para 48 (Chan).

[82]Letter from M. Seth bin Saaid (Acting State of Secretary of Johor) to the Colonial Secretary, Singapore, dated 21 Sep 1953 (MS, Ann. 96).

The VICE-PRESIDENT, Acting President: I thank you, Mr. Chan, for your speech. I now call on Professor Pellet.

M. PELLET: Merci beaucoup, Monsieur le président.

LA QUESTION DU TITRE SUR PEDRA BRANCA EN 1847 ET DE LA «PERMISSION» DE JOHOR

1. Monsieur le président, Messieurs les juges, la Partie malaisienne a affirmé avec insistance que «la» question cruciale dans cette affaire est celle de savoir qui possédait le titre originaire sur Pedra Branca[83]. Ce n'est pas *la* question, Monsieur le président, mais c'est certainement *l'une* des questions qui se posent — et une question importante car *si* la Malaisie ne peut établir le titre originaire de Johor, c'en est fini de sa thèse, qui dépend entièrement de cette question comme mon contradicteur et toujours ami le professeur Crawford (contrairement à certains, je considère que le titre de professeur n'a rien de déshonorant…) l'a reconnu ingénument dans son intervention conclusive vendredi dernier.

Projection 1 — Les équations du professeur Crawford

Les équations qu'il a posées et qui sont projetées derrière moi le montrent avec la clarté de l'évidence :

«*if*… :

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

and *[if]*

(2) PBP did not fall within the Dutch sphere under the Anglo-Dutch agreement of 1824,

then,

(3) PBP was part of Johor in 1847.

And … *if* :

(1) PBP was part of Johor in 1847

and *[if]*

(2) Johor's consent to the construction of a lighthouse included PBP…

then

[83] CR 2007/24, p. 34, par. 9-10 (Lauterpacht) ; CR 2007/25, p. 15, par. 9 (Crawford) ; CR 2007/26, p. 35, par. 1 (Lauterpacht) ; CR 2007/27, p. 63-64, par. 4 (Crawford).

(3) Britain's administration of the lighthouse was not as a matter of law an act *à titre de souverain*…»[84]

2. Cela fait beaucoup de «si» ; mais il en résulte que *si* l'une *ou* l'autre des trois conditions annoncées n'est pas fondée, la thèse de Singapour l'emporte sans qu'il soit besoin d'aller plus loin — et c'est à cette démonstration que je vais m'atteler ce matin à la suite de M. Chan.

3. Je tiens cependant à souligner que toute l'affaire ne peut se résumer à cette question, pour importante qu'elle soit. En effet, s'il advenait que la réponse fût positive et que la Malaisie eût passé ces trois obstacles (à notre avis insurmontables), il lui faudrait encore établir que ce titre a été maintenu par la suite car, pour reprendre le célèbre raisonnement de Max Huber dans l'affaire de l'*Ile de Palmas :*

> «Si un différend s'élève en ce qui concerne la souveraineté sur une partie de territoire, il est d'usage d'examiner lequel des Etats réclamant la souveraineté possède un titre … supérieur à celui que l'autre Etat peut éventuellement lui opposer. Cependant, si la contestation est basée sur le fait que l'autre partie a effectivement exercé la souveraineté, ceci est insuffisant pour fonder le titre par lequel la souveraineté territoriale a été valablement acquise à un certain moment ; il faut aussi démontrer que la souveraineté territoriale a continué d'exister et existait au moment qui, pour le règlement du litige, doit être considéré comme décisif.»[85]

4. Au bénéfice de cette remarque, je me propose pour l'instant de montrer, d'une part, que la Malaisie n'a nullement établi l'existence d'un titre territorial de Johor sur l'île et, d'autre part, que nulle permission n'a été donnée aux Britanniques pour s'y établir par le sultan ou le temenggong de Johor.

I. L'absence de document probant établissant l'existence d'un titre territorial originaire de Johor sur Pedra Branca

5. Pour établir le titre originaire de Johor sur Pedra Branca, nos amis de l'autre côté de la barre ont rivalisé d'humour et d'ironie, parfois de férocité, mais ils n'ont, pour autant, prouvé ni que l'île n'était pas *terra nullius*, ni qu'elle ne relevait pas de la sphère d'influence néerlandaise définie en 1824, ni qu'elle faisait partie de Johor en 1847. Ce sont pourtant les trois défis qu'ils devaient relever conformément aux équations de «Mr.» Crawford lui-même.

[Fin de la projection 1]

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[84] CR 2007/27, p. 65, par. 8-9 ; les italiques sont de nous.

[85] *Arbitrage relatif à l'île de Palmas, Cour permanente d'arbitrage, sentence du 4 avril 1928, Nations Unies, recueil des sentences arbitrales,* vol. II, p. 852. [Traduction française : Ch. Rousseau, *Revue générale de droit international public, t. XLII, 1935*, p. 164.] (Pour le texte anglais, *RIAA.*, vol. 2, p. 845.)

6. Aux fins de la définition d'une *terra nullius*, la Malaisie fait grand cas de l'avis de la Cour de 1975 dans l'affaire du *Sahara occidental*[86] ; nous aussi[87]. Et nous pensons également que le passage clé est celui-là même que M. Crawford a cité[88] : «Quelles qu'aient pu être les divergences d'opinions entre les juristes, il ressort de la pratique étatique de la période considérée que les territoires habités par des tribus ou des peuples ayant une organisation sociale et politique n'étaient pas considérés comme *terra nullius*» (*avis consultatif C.I.J. Recueil 1975*, p. 39, par. 80). *«Les territoires habités…»*, Monsieur le président, pas d'immenses étendues marines qui n'étaient ni «habitées» — au sens, en tout cas où l'on habite un territoire, ni susceptibles d'appropriation. Le Sahara et la mer de Chine ou l'océan Indien ce n'est pas tout à fait la même chose et l'on ne peut transposer purement et simplement aux derniers les règles applicables au premier. Le Sahara n'est certes guère hospitalier et est peu habité, mais il est habitable et attribuable ; la mer, ne l'est pas — et il ne suffit sûrement pas de dire que Johor constituait un «empire maritime» pour que les mers et tout ce qui s'y trouvait lui revinssent : lui appartenaient les îles sur lesquelles il pouvait se prévaloir d'un *titre*, c'est-à-dire les îles habitées (et c'est le critère retenu dans l'affaire du *Sahara occidental*), dont la population lui prêtait allégeance (car, nous l'avons longuement montré[89] et M. Chan vient de le rappeler, dans le monde malais traditionnel, c'est ce lien d'allégeance seul qui permettait d'attribuer un territoire à un Etat). Or, nous sommes en présence d'une île minuscule, inhospitalière — donc *nullius* au sens de la jurisprudence de 1975, contrairement, je le dis en passant, à l'île de Singapour qui n'est pas seulement habitable, cela va de soi, mais qui, en 1824 était évidemment habitée, contrairement aux allégations de sir Elihu[90] (j'espère vivement que nous le reverrons rapidement parmi nous), le temenggong avait même sa résidence à Singapour.

7. Et je voudrais, Monsieur le président, ouvrir une brève parenthèse sur ce point. M. Crawford, désireux surement de nous faire passer pour de méchants «colonialistes», nous a expliqué en substance que le droit international était un et que ce n'était pas bien de vouloir priver

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[86] Voir CR 2007/25, p. 13-15, par. 7-8 ; voir aussi MM, p. 48, par. 98 ; CMM, p. 10-11, par. 16-18.

[87] Voir CR 2007/21, p. 22-26, par. 39-48 (Pellet) ; voir aussi RS, p. 9, par. 2.10.

[88] CR 2007/25, p. 13, par. 7.

[89] Voir CR 2007/20, p. 42-45, par. 20-27 (Chan) ; CR 2007/21, p. 23-25, par. 40-45 (Pellet) ; voir aussi CMS, p. 18-24, par. 3.4-3.12.

[90] CR 2007/24, p. 56, par. 72.

Johor du bénéfice des principes universels énoncés par la Cour dans son avis[91]. Puis-je timidement suggérer que c'est peut-être mon contradicteur qui fait preuve d'un eurocentrisme inopportun ? La haute juridiction se montre plus accueillante que lui à la diversité des traditions et des conceptions juridiques : «De l'avis de la Cour, aucune règle de droit international n'exige que l'Etat ait une structure déterminée, comme le prouve la diversité des structures étatiques qui existent actuellement dans le monde.» (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 43-44, par. 94.) Il n'est dès lors pas convenable de transposer purement et simplement la conception eurocentrique du territoire à des parties du monde dans lesquelles, comme c'était le cas des principautés malaises, prévalait une autre conception des rapports du souverain au territoire. Il est «légitime», pour reprendre l'expression de la Cour (*ibid.*, p. 43-44, par. 94), de prendre cette conception pleinement en considération. Telle est aussi l'opinion d'un excellent auteur selon lequel l'allégeance permet de «tenir compte des particularismes propres à certaines formes d'organisation du pouvoir, différentes de la structure étatique traditionnelle d'origine européenne»[92].

8. Ceci étant dit, quelle que soit la conception que l'on retient, ce n'est certainement pas parce que Pedra Branca était parfaitement connue qu'elle n'était pas susceptible d'appropriation par le biais d'une occupation (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975,* p. 39, par. 79) : une *terra nullius* n'a évidemment pas à être *incognita*. Et ce qui est intéressant, justement, c'est que, bien que l'île fût parfaitement connue, elle n'a jamais, dans *aucun* document antérieur à 1847 été revendiquée par Johor.

9. Nos contradicteurs en ont cité plusieurs — pas beaucoup, mais plusieurs. *Aucun*, sauf l'article du *Singapore Free Press* de 1843 sur lequel je reviendrai — ne mentionne Pedra Branca comme relevant de la souveraineté de celui-ci :

— L'anecdote du raja Muda[93] ? Il n'est pas question de Pedra Branca.

— La position de sir Stamford Raffles[94] ? Rien sur Pedra Branca.

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[91] CR 2007/25, p. 14, par. 8.1.

[92] Marcelo Kohen, *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 236.

[93] CR 2007/25, p. 18-19, par. 24 (Crawford).

[94] *Ibid.*, p. 19, par. 24.

— La lettre envoyée par Crawfurd au gouverneur général de l'Inde le 10 janvier 1824[95] ? Rien sur Pedra Branca.

— La lettre datée du 3 août 1824 adressée au secrétaire du gouvernement de l'Inde par Crawfurd[96] ? Toujours rien sur Pedra Branca.

— Celle datée du 1er octobre 1824, de Crawford au même secrétaire du gouvernement de l'Inde[97] ? A nouveau rien sur Pedra Branca.

— Et le rapport Presgrave de 1828[98] ? Toujours aucune mention de Pedra Branca.

10. Les deux seuls documents postérieurs à la prise de possession de l'île par les Britanniques et cités par la Partie malaisienne, sont tout aussi peu convaincants. Il s'agit

— de la lettre datée du 20 mars 1886 adressée au comte Granville, principal secrétaire d'Etat aux colonies, par le sultan de Johor[99], qui est également muette sur Pedra Branca ; et

— de la notice de l'*Encyclopaedia Britannica* écrite par sir Hugh Clifford en 1926[100], qui garde également un silence obstiné sur Pedra Branca — et commet, je l'indique en passant, une inexactitude flagrante, puisque cette notice place la limite entre Pahang et Johor au parallèle 2° 40' sud, alors qu'il résulte de la sentence Ord qu'elle suit le parallèle 2° 59' 20" nord[101].

11. Ne reste que l'article du *Singapore Free Press* de 1843. Je pourrais, tant c'est évident, me contenter, Monsieur le président, de dire qu'il est de peu de poids face au silence assourdissant dans lequel il dénote — et c'est, en effet, une toute petite note qu'il fait entendre. Mais c'est aussi une fausse note, fausse parce que les arguments que j'avais fait valoir à l'encontre de sa valeur probante le 6 novembre[102] n'ont pas été réfutés la semaine dernière (y compris, je le souligne, en ce qui concerne son auteur — dont le professeur Crawford a parlé longuement et savamment mercredi et vendredi derniers alors qu'il s'agit d'un auteur anonyme[103] ! — la seule chose certaine c'est que

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[95] CR 2007/24, p. 37-38, par. 20-22 (Lauterpacht) ; CR 2007/25, p. 19, par. 24 (Crawford).

[96] CR 2007/24, p. 39-40, par. 28-29 (Lauhterpacht).

[97] *Ibid.*, p. 40, par. 30.

[98] *Ibid.*, p. 40-41, par. 31 (Lauterpacht) ; CR 2007/25, p. 19, par. 24 et p. 25-26, par. 26 (Crawford).

[99] CR 2007/25, p. 20, par. 24 (Crawford).

[100] CR 2007/24, p. 33-34, par. 4-8 (Lauterpacht) ; CR 2007/25, p. 20, par. 24 (Crawford).

[101] Voir MM, annexe 86.

[102] CR 2007/20, p. 54-56, par. 7-9.

[103] CR 2007/25, p. 21-22, par. 28 ; CR 2007/27, p. 64, par. 6.

ce n'était assurément pas le sultan de Johor ou le temenggong — dont la position sur ce point aurait, assurément eût plus de poids…). Mais fausse note aussi parce que, contrairement à ce qu'a affirmé avec une égale assurance mon contradicteur et ami, il est loin d'être certain que Pulau Tinggi que l'article attribue à Johor relevait en réalité de Pahang ; si la Cour de Calcutta semble avoir été d'un avis contraire (à en croire en tout cas un — autre — article du *Singapore Free Press* qui résume l'arrêt)[104], telle est la conviction de Crawfurd — que c'était Pahang — dans sa description des îles de la région, dont il avait une connaissance intime[105].

12. Donc, en dehors de ce document douteux et, en tout cas, secondaire, et n'émanant pas du sultan de Johor et du temenggong, il n'y a que le silence : Pedra Branca n'est nommée dans *aucun* des documents sur lesquels la Partie malaisienne fonde la revendication de son titre originaire. Je le sais, elle ne manquera pas de nous accuser de «Pedra Branca centrisme»[106]. C'est que nous sommes «Pedra Branca centristes», Monsieur le président ! Nous le sommes car, ainsi que cela résulte de l'arrêt de la Cour de 2002 dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan*, les documents dans lesquels les îles revendiquées par une partie ne sont pas «nommément citées» n'ont pas de valeur en matière de revendication de titre (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 674, par. 108 ; voir aussi *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 161). C'est ce qui avait conduit la Cour à écarter, en particulier, les instruments juridiques qui se bornent à mentionner «tout l'archipel [ou l'île] de Sulu et ses dépendances» ou «toutes les îles qui se trouvent…» dans une aire déterminée (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 674-675, par. 109). C'est précisément ce que fait la litanie de documents égrainée par la Malaisie la semaine dernière et que je viens d'énumérer : tous visent «toutes les îles» se trouvant ici ou là ; aucun ne mentionne Pedra Branca, dont il n'est pas non plus possible de

[104] Calcutta Supreme Court, 12 July 1837, *R* v. *Malay Prisoners*, résumé *in Singapore Free Press*, 3 août 1837, reproduit *in* : http://catalogue.bl.uk/F/KQPN852XAC5LMHJAGREHFNJEK3IBYJ3TF4ACD9GX23YFRYYKAF-83970?func=fullset-set&set_number=011225&set_entry=000005&format=999.

[105] CMS, annexe 17, p. 167 ; voir aussi CMS, p. 59, par. 4.39.

[106] CR 2007/25, p. 19, par. 24 ; CR 2007/27, p. 64, par. 6 (Crawford).

prétendre décemment qu'elle peut être considérée «comme «se rattachant» géographiquement» à la côte de Johor (voir *ibid.*, p. 657, par. 64).

13. Comme M. Chan l'a montré s'agissant de la donation de 1825, il n'est pas possible de prendre, dans les documents de cette époque (et relatifs à cette région du monde), l'expression «toutes les îles» au pied de la lettre.

Projection 2 — Extrait de MM, encart 7 (Le traité Crawfurd, 1824), modifié pour montrer les effets d'une interprétation littérale du traité Crawfurd

Mais d'autres exemples l'établissent également. Pensez seulement, Messieurs les juges, je vous prie, au traité Crawfurd de 1824 lui-même et au résultat auquel conduirait son interprétation littérale. Cette conséquence apparaît à nouveau à l'écran : cela permettrait à Singapour de revendiquer des îles qui, pourtant, ne lui appartiennent certainement pas.

14. «Toutes les îles» cela veut dire (et ne peut vouloir dire que) : «toutes les îles appartenant à l'Etat en vertu d'un titre établi», conformément au droit en vigueur à l'époque dans cette région du monde, c'est-à-dire soit sur le fondement de l'allégeance, soit sur celui du rattachement géographique au sens de proximité immédiate des côtes, comme vous l'avez admis dans votre arrêt de 2002 (et je me permets de vous renvoyer sur ce point, Messieurs de la Cour, à ce qu'a dit tout à l'heure M. Chao sur cette question de la proximité). Mais on ne peut pas raisonner «dans l'autre sens» comme le voudrait la Malaisie et faire de l'expression «toutes les îles» une sorte de baguette magique dont on pourrait faire sortir un titre comme un magicien fait sortir un lapin d'un chapeau. «Toutes les îles» cela veut dire «toutes les îles dont on se soucie».

[Fin de la projection 2.]

15. Et c'est aussi de cette manière qu'il faut comprendre l'opinion de Charles Alexandrowicz dont sir Elihu se prévaut[107] : certes les Etats européens ne pouvaient acquérir les territoires relevant de souverains locaux dans cette partie du monde par l'occupation ou la découverte, mais ceci ne nous renseigne pas sur la consistance de ces territoires. Comme l'indique Harding, juriste respecté et membre des *Doctors' Commons*, à propos d'une île inhabitée voisine des côtes d'un rajah local (dossier de plaidoiries, onglet 18) :

[107] CR 2007/24, p. 34-35, par. 11-14.

> «[A]lthough the circumstance of the Island in question being uninhabited is not in my opinion by any means decisive, yet that on the assumption that it does not in fact belong to any nation, and that no acts of ownership have been hitherto exercised over it by any recognition authority, I conceive that the British Crown may lawfully take possession of and appropriate to its own use the Island in question.»[108]

Cette opinion très autorisée date de 1853.

Monsieur le président, j'en ai encore pour un petit moment mais je m'aperçois que le temps passe et si vous le souhaitez je pourrais peut-être suspendre pour la pause.

The VICE-PRESIDENT, Acting President: I think we should have a break now, Professor Pellet. We will resume when we come back. We will take a break for 10 minutes.

The Court adjourned from 11.35 to 11.45 a.m.

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

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

[Retour à la projection 1.]

16. Monsieur le président, pour faire le point à ce stade :

— Pedra Branca était *res nullius*, à la veille de la prise de possession par les Britanniques ; et

— la Malaisie n'a établi aucun titre territorial appartenant à Johor sur l'île.

Voici déjà deux des «si» de M. Crawford qui ne sont pas vérifiés — et, de son aveu même, cela doit suffire, Messieurs de la Cour, à attribuer Pedra Branca et ses dépendances à Singapour, puisque, je le rappelle, il s'agit de conditions *cumulatives*, qui doivent *toutes* être satisfaites. Le troisième «si» — la troisième condition — pour que la Malaisie gagne son affaire n'est, du reste, pas davantage rempli. Il n'est en effet pas établi que Pedra Branca fût incluse dans la sphère d'influence britannique à la suite du traité de 1824. Et, au surplus, je ne pense pas que la question se suffise à elle-même. Je ne ferai que deux remarques à cet égard — mais je les crois importantes.

17. La première est que l'objet du traité de 1824 n'était pas de fixer une frontière mais d'établir les sphères d'influence respectives de la Grande-Bretagne et des Pays-Bas. Il en résulte, d'une part, que la limite pouvait, sans inconvénient, être assez approximative — et elle l'a été puisque l'article 12 de notre traité fixe au «détroit de Singapour», sans autre précision, la limite qui

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[108] Lord McNair ed., *International Law Opinions*, Cambridge U.P., 1956, p. 312.

sépare la zone britannique de la zone hollandaise[109]. D'autre part, il ne pouvait en résulter une «attribution» quelconque de territoires, et sûrement pas de petites îles inhabitées : «l'influence» avait vocation à s'exercer sur des entités politiques.

18. Au surplus, et c'est ma seconde remarque, un tel instrument ne pouvait, en aucune manière, priver les sultans locaux ni de leur souveraineté, ni de leurs territoires et, comme l'a fait remarquer M. Chan, il est assez étonnant, choquant à vrai dire, que le professeur Schrijver ait dénié à la donation de 1825 tout effet juridique au prétexte que le partage avait été effectué par le traité de l'année précédente[110] : la Malaisie ne peut pas à la fois se poser en champion de la souveraineté de Johor et prétendre que les puissances européennes pouvaient, benoîtement, dépecer son territoire. En réalité, le traité de sphère d'influence était, pour le sultanat, *res inter alios acta*, et, même si c'est certainement sous la pression des Pays-Bas que le sultan Abdul Rahman a cédé une partie de ses territoires à son demi-frère le sultan Hussein, il n'en reste pas moins que c'est *cet instrument*, la donation, qui a réalisé le partage juridiquement parlant.

Projection 3 — Lettre datée du 25 juin 1825 adressée par le sultan Abdul Rahman au sultan Hussein (extraits) (dossier des plaidoiries, onglet 16)

19. Et celui-ci est clair : à Hussein le Johor continental, péninsulaire ; mais les îles — toutes les îles —, à Abdul Rahman, et ceci assorti d'une précision importante sur laquelle j'attire votre attention : «On the basis of these premises I earnestly beseech you that your notables, the Paduka Bendhara of Pahang *and Temenggong Abdul Rahman, will not in the slighest concern themselves with the islands that belong to Your Brother*.»[111] La donation a pour objet de préciser ce qui n'était pas précis dans le traité de 1824, de préciser «our respective empires» dont, comme M. Chan l'a montré, les limites étaient fixées de manière trop vague au détroit de Singapour par le traité de sphère d'influence. Et puis suit la description :

> «Your territory, thus, extends over Johor and Pahang on the mainland or on the Malay Peninsula. The territory of Your Brother extends out over the Islands of Lingga, Bintan, Galang, Bulan, Karimon and all other islands. *Whatsoever may be in*

[109] Voir CR 2007/20, p. 48, par. 37 (Chan) ; voir aussi CMS, p. 30-31, par. 3.23 ; RS, p. 17-19, par. 2-24-2.27 et p. 21-22, par. 2.34.

[110] CR 2007/25, p. 31-32, par. 29.

[111] CMS, annexe 5 ; les italiques sont de nous.

the sea, this is the territory of Your Brother [de Riau], and whatever is situated on the mainland is yours. On the basis of these premises I earnestly beseech you...»[112]

20. En d'autres termes :

— le traité anglo-néerlandais de 1824 ne pouvait imposer à Johor, Etat souverain — nous ne contestons nullement l'autorité de Grotius sur ce point[113] —, un démembrement de son territoire, par le biais d'un traité auquel il n'était pas partie ;

— ce partage n'est intervenu qu'avec la donation de 1825, par laquelle le sultan Abdul Rahman (celui qui restait à Riau) cédait à Hussein la partie continentale de l'ancien Sultanat de Johor, mais se réservait l'intégralité des îles *(«toutes les autres îles»)* ;

— si bien que *si* Pedra Branca devait ne pas être considérée comme une *terra nullius quod non*, elle serait, juridiquement, demeurée dans le giron de Riau-Lingga.

[Fin de la projection 3.]

21. Très bien me direz-vous ! Alors, Pedra Branca doit revenir aujourd'hui à un tiers ? Si tel était le cas, cela se saurait, Monsieur le président ! Mais tel n'est pas le cas, car Pedra Branca est singapourienne : Singapour en a hérité du Royaume-Uni qui en a pris possession et l'a occupée constamment et pacifiquement depuis la construction du phare Horsburgh en 1847-1851. Mais comment a-t-il pu acquérir ce titre ? Notre ferme conviction est que c'est parce que, lorsqu'il l'a occupée, l'île était *res nullius* — je crois l'avoir montré. Et, si elle ne l'était pas, elle serait en tout cas tombée en déshérence du fait du désintérêt constant qu'a manifesté son seul maître potentiel, le sultan de Riau, vis-à-vis de l'île et des activités que les Britanniques, puis Singapour, y ont menées depuis cent cinquante ans. Mais, dans les deux cas, le résultat est le même : la souveraineté appartient à Singapour.

II. La prétendue «permission» donnée par Johor

22. Monsieur le président, il me faut encore dire quelques mots de la prétendue «permission» donnée par Johor en 1844 — sans cependant, au risque de décevoir mon ami Marcelo Kohen, qu'il me paraisse indispensable d'entrer à nouveau en matière dans les méandres des échanges de correspondances qui ont entouré cette pseudo-autorisation. Pour deux raisons : d'abord tout a déjà

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[112] *Ibid.*

[113] Cf. CR 2007/24, p. 35, par. 12 (Lauterpacht) ; ou CR 2007/25, p. 36, par. 41 (Crawford) ; CR 2007/27, p. 19, par. 30 (Schrijver).

été dit[114] ; ensuite, parce que toute la stratégie de la Partie malaisienne repose sur un postulat spécieux. Au lieu de partir d'un titre prouvé pour démontrer l'existence d'une permission sur un territoire donné, la Malaisie opère un double tour de passe-passe : elle part d'«une» permission concernant un territoire indéterminé pour affirmer que «donc» cette permission concernait Pedra Branca et que, «donc» encore, Pedra Branca appartenait à Johor.

23. Car c'est bien ainsi que procèdent nos amis de l'autre côté de la barre :

— ainsi, sir Elihu n'hésite pas à classer la «correspondance Butterworth de 1844» parmi les huit éléments sur lesquels il entend se fonder pour établir que «Pulau Batu Puteh n'était pas *terra nullius* en 1847»[115] — et c'est l'élément auquel il consacre le plus de temps[116] ;

— de même, le professeur Kohen inverse la problématique lorsqu'il prétend qu'«une telle permission ne peut signifier qu'une affirmation de souveraineté de Johore…»[117].

Mais sur quoi ? C'est mettre la charrue avant les bœufs, Monsieur le président : la permission ne peut porter que sur un territoire sur lequel Johor exerce sa souveraineté ; or, il ne la possède pas sur Pedra Branca qui, comme je l'ai montré, est soit *terra nullius*, soit, peut-être, *terra sultanatis Riau* — mais en tout cas pas *johoris*. Et puis, de toute manière, il est tout de même assez téméraire de la part de la Malaisie de faire dépendre toute son affaire (elle porte, ne l'oublions pas, sur la souveraineté *sur Pedra Branca*) d'une lettre qui ne mentionne pas ce nom — et dont il est invraisemblable qu'elle s'y réfère implicitement.

24. Laissant de côté l'allusion blessante pour Singapour, et gratuite comme l'a montré le professeur Jayakumar, selon laquelle nous aurions pu posséder le texte de la demande britannique sans le produire, je partage — une fois n'est pas coutume — l'avis de sir Elihu selon lequel «[i]n the circumstances, we are obliged to consider two possible inferences that may be drawn from the available correspondance read as a whole»[118] :

— ou bien la lettre du gouverneur Butterworth se référait spécifiquement à Pedra Branca, ce qui aurait donné à penser qu'il reconnaissait l'appartenance de l'île à Johor ;

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[114] CMS, p. 82-92, par. 5.28-5.50 ; RS, p. 38-43, par. 3.8-3.22 ; CR 2007/21, p. 27-34, par. 50-65 (Pellet).

[115] CR 2007/24, p. 36, B.

[116] Cf. *ibid*., p.42-43, par. 34-36.

[117] CR 2007/25, p. 48, par. 40.

[118] CR 2007/24, p. 42, par. 35.

— ou bien il ne mentionnait aucun lieu spécifique et, dans ce cas, on ne peut tout simplement rien inférer du tout, ni de la lettre du gouverneur, ni de la réponse.

25. S'agissant de la première hypothèse : on peut toujours spéculer à l'infini sur le contenu de la demande du gouverneur, mais, ce qui est clair c'est que la réponse ne mentionne pas Pedra Branca ; c'est tout ce que nous savons. Au demeurant, la supposition de la Malaisie paraît tout à fait abracadabrante tant il semble évident que, si Butterworth avait mentionné Pedra Branca, le temenggong n'eût pas manqué de reprendre l'expression, comme il a parlé de Peak Rock.

26. En revanche, quelle qu'en soit l'origine, la réponse du temenggong comprend l'expression : «any place deemed eligible». Cela ne pouvait vouloir dire que «tout autre lieu qu'elle jugera approprié *se trouvant dans les possessions de Johor*» car, bien sûr, la demande d'autorisation ne pouvait porter que sur celles-ci. Mais cela ne voulait pas dire à l'avance que l'emplacement finalement retenu «tomberait» du même coup sous la souveraineté de Johor. Un tel raisonnement est assez extravagant — c'est pourtant le discours que tiennent nos contradicteurs[119].

Projection 4 — Carte des environs du phare Horsburgh et de la côte malaise adjacente, dressée par J. T. Thomson (1851) *annotée* pour marquer les distances qui le séparent de la côte malaise (RS, encart 6) (dossier des plaidoiries, onglet 19)

27. Je ne reviendrai pas en détail sur une chronologie qui a été abondamment commentée par Singapour[120] et que je ne pense pas que Marcelo Kohen ait mise à mal[121]. Et il ne suffit certainement pas de proclamer comme il l'a fait qu'«[i]l s'agit du *même* projet, du *phare Horsburgh*, quel que soit son emplacement final»[122] pour répondre à la question car, notre problème, justement, ce n'est pas le phare, mais son emplacement. Et, comme je l'ai déjà montré sans avoir besoin de m'y attarder à nouveau, en 1844, lorsque Butterworth écrit au sultan et au temenggong, le balancier est bien fixé sur Peak Rock, même si d'autres emplacements «near Point Romania» (à proximité de Point Romania) ne sont pas complètement abandonnés — d'où, sans doute, l'expression «ou en tout autre lieu qu'elle jugera approprié». Je ne reviens pas non plus sur la question de la proximité dont a parlé tout à l'heure M. Chao. Mais le croquis projeté derrière

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[119] Voir plus haut par. 23.

[120] CR 2007/21, p. 30-31, par. 61 (Pellet) ; voir aussi CMS, p. 82-88, par. 5.29-5.41.

[121] CR 2007/25, p. 44-46, par. 26-34.

[122] *Ibid.*, p. 46-47, par. 34 ; les italiques sont dans l'original.

moi rivalise sans doute d'éloquence sur ce point avec l'*Attorney-General* : il montre que Pedra Branca *n'est pas* «près de Point Romania».

28. Je ne reviens aussi que pour mémoire sur deux autres arguments qui semblent avoir fait les délices du professeur Kohen :

[Fin de la projection 4.]

— Le fait que la correspondance de 1844 eût été jointe au rapport final et «complet» («full Report») de Butterworth sur la construction du phare me paraît n'avoir strictement aucun effet juridique : ceci relève de la bonne pratique administrative et il n'est rien de plus normal pour un fonctionnaire consciencieux, une fois un dossier bouclé, que d'y inclure tous les documents y relatifs. Je ne connais pas de l'intérieur les usages britanniques à cet égard, mais lorsque l'on pratique même un peu les archives du Foreign Office, comme j'ai eu l'occasion de le faire parfois, on ne peut qu'être frappé par le soin, presque maniaque (et admirable) mis à tout archiver ; le rapport de Butterworth en témoigne une nouvelle fois.

Projection 5 — Comparaison case et care

— Et je ne veux pas croiser trop longtemps le fer à nouveau sur la question graphologique (qui, je l'avoue ne me passionne pas beaucoup personnellement) ; une seule remarque : Marcelo Kohen a agrémenté sur ce point sa plaidoirie d'une projection, qui m'avait troublé sur le moment et qui figure à nouveau sur l'écran. Mais, après plus ample examen, ce n'est qu'à moitié troublant car la Malaisie s'est soigneusement bornée à juxtaposer le mot litigieux avec les autres «case» figurant dans le rapport ; mais, il me semble que l'on est au moins aussi «à moitié troublé» lorsque l'on fait le même exercice en confrontant le même mot à ceux du même document comprenant les lettres «r e», ce que fait le tableau que nous avons préparé… Je vous laisse, Messieurs de la Cour, méditer sur cette grave question ; mais, pour ma part, je dois dire que «care» ou «case», je n'y vois pas malice : que ce soit l'un ou l'autre, pas grand-chose ne me paraît pouvoir en être inféré, même si, compte tenu du contexte, «care» semble plus logique et si, contrairement à ce que prétend la Malaisie[123], il n'est pas rare de rencontrer dans la littérature relative aux phares, l'expression «care of the light» ou «of the lighthouse» — elle

[123] Voir RM, p. 79, par. 158, ou CR 2007/25, p. 55-56 (Kohen).

apparaît par exemple dans l'ouvrage (contemporain de l'épisode dont je parle puisqu'il date de 1848) de Alan Stevenson sur le phare Skerryvore[124] — vous trouverez ceci sous l'onglet 21 de votre dossier.

[Fin de la projection 5.]

29. Il reste, en revanche, un argument autrement plus sérieux qui mérite quelques mots. A maintes reprises, la Malaisie s'est targuée de ce que jamais les autorités coloniales n'avaient invoqué l'argument de la souveraineté de Johor comme un élément à prendre en compte pour le choix de l'emplacement du phare[125] et M. Kohen a redit ceci la semaine dernière. Ceci n'est pas exact. Dans la lettre qu'il à écrite au gouverneur Butterworth le 7 novembre 1850, Thomas Church, le conseiller résident à Singapour[126], a, très clairement, expliqué que l'une des raisons militant en faveur du choix de Pedra Branca sur «a Station near Point Romania» was that Romania «belongs to the Sovereign of Johore, where the British possess no legal authority»[127]. Il s'en déduit bien sûr *a contrario* que la situation était différente à Pedra Branca, sur laquelle les Britanniques pouvaient se réclamer d'une autorité pleine et entière — et cela s'appelle la souveraineté.

[Retour à la projection 1.]

30. Thomas Church avait raison, Monsieur le président,

— lorsque les Britanniques en ont pris possession, Pedra Branca était *terra nullius* ;

— s'il fallait, à toute force, l'attribuer à un souverain local, elle aurait relevé du sultan de Riau-Lingga et sûrement pas de celui du nouveau Johor ; et

— en aucune manière, l'autorisation donnée par le sultan et le temenggong ne s'étendait à notre île, qui n'est pas mentionnée dans leurs lettres, qui ne se trouve pas «à proximité de Point Romania» au sens où le professeur Kohen l'entendait[128], et qui, en 1844 n'était pas envisagée comme un emplacement convenable pour construire le phare Horsburgh.

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[124] *Account of the Skerryvore Lighthouse with Notes on the Illumination of Lighthouses*, Adam and Charles Black, North Bridge, Edinburgh/Longman and Co., London, 1848, p. 46.

[125] CR 2007/25, p. 40, par. 10 (Kohen).

[126] MS, annexe 48.

[127] MS, annexe 48 ; voir aussi CMS, p. 100, par. 5.72, ou p. 107-108, par. 5.88-5.90 ; RS, p. 36-37, par. 3.5-3.7.

[128] CR 2007/25, 14 novembre 2007, p. 49-52, par. 43-53.

C.Q.F.D. selon James Crawford.

[Fin de la projection.]

Messieurs de la Cour, grand merci de m'avoir écouté. Puis-je vous prier, Monsieur le président, de bien vouloir donner la parole à mon éminent collègue et ami, M. Brownlie ?

The VICE-PRESIDENT, Acting President: Thank you so much, Professor Pellet. I shall now give the floor to Mr. Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

THE ACQUISITION OF TITLE TO PEDRA BRANCA IN 1847-1851

The general approach of Malaysia

1. Mr. President, Members of the Court, this Great Hall of Justice is a pleasant environment for an advocate in several respects. And, in particular, it provides the pleasure of listening to the practised eloquence of old friends on the other side of the Bar. But, Mr. President, the pleading of my friends on the other side has, I have to say, been disappointing, because the eloquence has not been matched by the substance of the arguments.

2. The general approach of Malaysia has been characterized by a series of flaws.

3. In the first place, there was a marked tendency to produce discontinuities in the sequence of the pleadings. These discontinuities appeared in two forms. The first was the settled habit of Sir Elihu Lauterpacht to refer to the Memorial of Singapore, but not, in his response to my first round speech, to either the Counter-Memorial or the Reply.

4. And it will be obvious, given the simultaneous exchange of written pleadings, that it is a serious matter if the relevant part of the Reply is ignored. The fact is that many of the matters raised by counsel for Malaysia are examined in detail in Singapore's Reply at pages 35 to 94.

5. The tendency to ignore the content of the Reply is matched by the tendency of Malaysia to avoid a response to the first round presentation on behalf of Singapore. In relation to our presentation on acquisition of title, Sir Elihu maintained silence on the following topics: first, the question of the applicable law; second, the misleading use by Malaysia of the fifth edition of *Oppenheim's International Law*; third, Malaysia's patent disregard for the sources of applicable inter-temporal law; and last, the nature of acts *à titre de souverain*.

6. A second major flaw is the sudden reassessment of key matters of fact. Thus, in his presentation on Thursday, Sir Elihu was prepared to recognize the significant status of Thomson as the author of what Sir Elihu describes as "the fullest narrative of what happened in these critical years" (CR 2007/26, p. 17, para. 27). This is in contrast to the treatment of Thomson in the written pleadings of Malaysia, in which he is described as though he were some kind of private interloper. I refer here to the Counter-Memorial of Malaysia, paragraphs 105 to 106.

7. A third major flaw is the repetition of the distortions of legal logic to be found in the written pleadings of Malaysia.

8. The first such distortion concerns the nature of activity *à titre de souverain*. Counsel for Malaysia insist that the building of a lighthouse, even if the project is organized and funded by a government, does not constitute evidence of an intention to acquire title to the territory. I refer here to the argument of Sir Elihu Lauterpacht on Thursday (CR 2007/26, p. 21, paras. 42-44.)

9. Sir Elihu refers to the public works involved in building the lighthouse and then he says:

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

And Sir Elihu continues:

> "44. What Singapore does is to turn these items into a single process of evolution seemingly evincing a government intent to acquire title to the territory. But the conclusion thus drawn is an extensive — indeed, imaginative — extrapolation from a series of facts that taken at face value amount to a description of exactly what had to be done to build the lighthouse. Malaysia does not deny that Britain built the light. But Malaysia cannot find anything in this process which reflects a co-existing intention — a silent intention — on the part of Britain to assert title to the territory." (CR 2007/26, p. 21, paras.43-44.)

10. Mr. President, this provides a very appropriate example of the legal logic by which Malaysia seeks to distract the Court from the overall picture of law and fact. And it is a logic which lacks any legal foundation. If I can elaborate.

11. In the first place, of course it would not make any difference if the work was done by a private contracting firm. In fact, the work was carried out by a private contractor. The point is that the private or public character of the contractor is irrelevant providing the construction was

undertaken on the instructions of the British Crown. As Sir Elihu says: "Malaysia does not deny that Britain built the light."

12. In the second place, there is no evidence that the British interest consisted of an intention to create an asset which only represented private property. To the contrary, there is documentary evidence to the effect that the British authorities were very conscious of the significance of the attribution of sovereignty as between the Powers in the region. And I refer to my speech in the first round (CR 2007/21, pp. 35-36, paras. 7-11).

13. The general context was that of co-existing political entities. There was a natural relation between the exclusive *use* of territory and the existence of sovereignty over that territory. It is thus appropriate that the General Secretary, Dutch East Indies, should refer, in 1850, to "the construction of a lighthouse on British territory". Moreover, no private law instrument, such as an indenture, was involved.

14. In the third place, the analysis of counsel for Malaysia without legal justification divorces the question of intention from the process of taking possession. This is a part of the tendency of our distinguished opponents to fragment the evidence of title. The construction of the lighthouse involved the implementation of the intention of the British Crown as expressed in numerous official documents.

15. The issue of proof is approached by Malaysia on the basis that the applicable law requires the making of a formal act of annexation. This is an assertion and no more. It is not the case that proof of sovereignty cannot be based upon other forms of evidence.

The taking of lawful possession

16. Mr. President, Members of the Court, I would invite the Court to put itself in the place of the British authorities. The decision is made to build a lighthouse upon an island, which does not form part of Johor, and the necessary operations involve the use of the island as a whole and the exclusive use of the island. Any government completing such an enterprise would seek one of two forms of political and legal security. The choice would be between making an arrangement with the relevant territorial sovereign, *if such existed*, or assuming sovereignty on the basis of a peaceful process of taking of possession.

17. There is clear evidence to the effect that the British Government made the second choice. On the facts, the first choice was simply not applicable. Once the decision had been made not to build on Peak Rock, the choice of Pedra Branca did not involve the territories of the Sultan of Johor. And it is absolutely clear that Pedra Branca was not to be confused with Peak Rock: I refer to the letter from Governor Butterworth to Currie, dated 28 November 1844, Singapore Memorial, Annex 13.

18. In addition, the position of Malaysia on the issue of acquisition of title avoids the basic elements of causation in this case. The fact is that, without a decision of the British Crown to fund the construction of a lighthouse on Pedra Branca, no lighthouse would have come into existence. Thus, first, it was the Government which decided on the final site of the lighthouse; second, it was the Government which provided the funding; third, it was the Government which decided the modalities of the funding; and last, it was the Government which took the final decision to build.

19. When the Court of Directors of the East India Company decided on Pedra Branca as the site of the project in February 1847, the issue of public funding assumed prominence. When the Court of Directors approved the scheme in September 1849, the decision was on the basis that a levy would be made on shipping as soon as the lighthouse was completed. As the Court will readily appreciate, such a method of funding would be the result of government action.

20. The key documents are as follows. First, the letter from the Court of Directors of the East India Company to the Governor General of India in Council dated 5 September 1849, which is at tab 22 of the judges' folder. This letter reads as follows:

> "Our Governor General of India in Council.
>
> Para: 1. Your letter No. 3 dated 3rd March last on the subject of the proposed Horsburgh Light House, informs us that the cost of that Building which originally was not expected to exceed 7,000 Dollars, or rupees 15,750 is now estimated at rupees 29,417 exclusive of the cost of a lantern, which together with other expenses, will raise the total amount to rupees 50,917 and this does not include the conveyance of the workmen and materials for which it is proposed that the Government shall be responsible. It is evident that even this increased estimate which is subject to several contingencies is very likely to be considerably exceeded in a work of such difficult construction.

[And the letter continues]

> 2. The increased charge has been occasioned by the selection (made after communication with the Lords of the Admiralty) of the Island of Pedra Branca instead

> of Peak Rock, as the site of the Light House, the former being not only much more distant from Singapore and much less accessible, but being also so much more exposed to the influence of the waves during the North East Monsoon, as to render it absolutely necessary that the Structure should be 'entirely faced with granite set in Cement', with a back work of Masonry instead of being composed of brick and Chunam Materials which would have sufficed on Peak Rock which is situated on the Northern Shore of the Straits.
>
> 3. The subscriptions hitherto received for the Light House amount to rupees 22,194 leaving a deficit of rupees 28,723, which you propose should be advanced by Government, and to ensure repayment of this loan, you further propose that the duty authorized by us to be levied on Vessels touching at Singapore or clearing out from Indian Ports to China or the Eastward of Singapore should be raised from one rupee to two dollars or 4½ rupees per 100 tons.

[And the letter is completed with the paragraph]

> 4. As the smaller rate would be quite inadequate to meet the expenses of a Light House on Pedra Branca and as there seems no more unobjectionable mode of providing for its construction and maintenance than the imposition of a suitable tonnage duty on Shipping, we authorize you to levy a duty as soon as a light is exhibited on that Station: but as we have no doubt that the expense will exceed the amount you have estimated we direct that a Tonnage duty of 2½ Dollars per 100 Tons be levied on the Shipping above described." (MM, Vol. 3, Ann. 31)

21. And the second key document is the letter from the Under-Secretary to the Government of India to Seton Karr, Under-Secretary to the Government of Bengal dated 27 October 1849. This is at tab 23 of the judges' folder, and I quote:

> "With reference to the correspondence noted in the margin, I am directed by the President in Council to transmit the accompanying copy of a Despatch from the Hon'ble the Court of Directors, No 3, dated 5th September 1849, relative to the construction of a Light House on Pedra Branca, and to request that authority may be given to the Governor of Singapore for the immediate commencement of the building.
>
> 2. It will be observed that a duty of 2½ dollars per 100 tons is to be levied on the shipping as soon as the Light House is completed. A Law will be necessary for the purpose and Colonel Butterworth should be directed to take an early opportunity of submitting the draft of an Act containing such provisions as may be deemed requisite." (MS, Vol. 3, Ann. 32.)

22. Thus the question of funding by the Government formed the critical stage of the decision-making process which led to the decision to build the lighthouse. Moreover, in the correspondence in the period 1842 to 1845 it had always been assumed that the lighthouse envisaged would be financed by the Government of India.

23. These documents, and the documentary record as a whole, provide the necessary corrections to the misleading picture presented by Professor Kohen in his presentation on Wednesday (CR 2007/25, paras. 3-11).

24. In his evaluation the planting of the brick pillars on Pedra Branca was of little importance. But, Mr. President, it was a significant development which demonstrated the intention of the Government to build a lighthouse on Pedra Branca. Because, at this stage, the only issue still to be determined was the nature of the materials to be used for the construction of the lighthouse on Pedra Branca. The decision to use granite, as opposed to brick, had major financial implications. It was only when the nature of the materials had been determined that the funding could be assessed. The decision to build was then possible. And so, Mr. President, Members of the Court, the placing of the brick pillars, in order to determine which materials would resist the force of the monsoon, was central to the process of decision making by the Government of India.

25. Moreover, the entire process had the necessary implication that the Government of India envisaged the use of the island as a whole, and that such use would be exclusive. Moreover, it was clear that no other political authority was involved in the process of decision making.

26. Mr. President, in the circumstances, the suggestion that a formal annexation was required, or that possession was not obtained, is the product of wishful thinking.

27. During the lengthy process of decision making relating to Pedra Branca, there is no single reference to the need for the agreement of the Sultan of Johor or of his co-operation in any form. No third State expressed any protest or reservation in face of the public activity of the British authorities on the island. The only reaction of the other powers in the region was in fact acquiescence. The Dutch authorities expressed no opposition because, as the relevant Dutch document expressly indicated, the lighthouse was being constructed on British territory.

I now move to the Malaysian propositions denying the title of Singapore.

Malaysian propositions denying title

First proposition: that aids to navigation do not constitute evidence of sovereignty

28. The first proposition is that aids to navigation do not constitute evidence of sovereignty. Counsel for Malaysia strenuously maintain that aids to navigation do not constitute evidence of the acquisition of sovereignty. On Tuesday, Sir Elihu Lauterpacht insisted that:

> "The accumulation of case law and practice is completely at odds with Singapore's proposition that the construction and maintenance of the Horsburgh lighthouse somehow in and of itself constituted a 'taking of lawful possession' of Pulau Batu Puteh for the purpose of acquiring sovereignty. The jurisprudence is clear

> [he says]. Conduct in the administration of a lighthouse does not, without more, evidence sovereignty." (CR 2007/24, para. 56.)

29. Mr. President, Members of the Court, this is not Singapore's case. It is, with respect, entirely misleading to propose that Singapore has offered the lighthouse as a form of *effectivité* in respect of the taking of possession in the period 1847 to 1851. The position of Singapore is that the process of decision making and operations in relation to the construction constitute incontrovertible evidence of the taking of lawful possession. It is unacceptable to seek to divide this network of evidence into artificial fragments.

30. Moreover, Sir Elihu himself is careful to qualify his assertions by stating that the operation of lighthouses and navigational aids is "not normally taken as a test of sovereignty" (CR 2007/24, para. 55).

31. The correct legal position is surely that the standard of proof of title is that of the intention to acquire sovereignty and, in his presentation on Thursday, Sir Elihu actually adopted that position (CR 2007/26, pp. 15-20, paras. 16-37.)

32. And, in conclusion, the jurisprudence is not uniformly negative, as Sir Elihu asserts. And the Court is respectfully referred to the examination of the case law in Singapore's Counter-Memorial at paragraphs 5.121 to 5.128.

The second proposition of Malaysia is that British practice required a formal act of acquisition of sovereignty

33. In his presentations both on Tuesday and Thursday, Sir Elihu Lauterpacht repeated the assertion of the written pleadings that the British practice in acquiring sovereignty over territory required a formal act (see CR 2007/24, pp. 44-45, paras. 43-44; and CR 2007/26, pp. 12-14, paras. 1-13).

34. Malaysia in this context avoids the authoritative work, which is that of Roberts-Wray. In the first round I explained why Roberts-Wray is authoritative (CR 2007/21, p. 47, para. 62). Singapore relies upon the following materials for the proposition that resort to a formal act is sufficient but it is not a legal requirement. The first authority is Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, 1966, pages 107-108; and the second is Sir Humphrey Waldock, in the *British Year Book of International Law*, Volume 25 (1948) at page 334.

Waldock puts the matter in this way, and we see this is at tab 24 of the judges' folder:

> "Effective occupation is a term of art denoting not physical settlement but the actual, continuous, and peaceful display of the functions of a state. The Permanent Court in the *Eastern Greenland* case did not in fact use the phrase effective occupation but referred to a title derived from 'continued display of authority' involving two elements each of which must be shown to exist. These elements are (1) the intention and will to act as sovereign (i.e., *animus occupandi*) and (2) some actual exercise of display of such authority (i.e., *corpus occupandi*). The first element seems to mean no more than that there must be positive evidence of the pretensions of the particular state to be the sovereign of the territory. This evidence may consist either of published assertions of title or of acts of sovereignty."

35. Counsel for Malaysia has chosen to leave these authorities aside in spite of the professional status of the writers. But Sir Elihu will surely remember Sir Humphrey Waldock, who was a colleague of his in the counsel appearing in the *Beagle Channel* case, and, of course, Waldock became President of this Court.

36. In response, Sir Elihu has quoted the monograph by Keller, Lissitzyn and Mann (CR 2007/24, p. 44, para. 43). But the formulation from this work is far from dogmatic in tone. Moreover, the passages which follow the passage quoted by Sir Elihu make it very clear that the practice was not at all consistent. This is at tab 25 of the judges' folder and is highlighted accordingly. Thus, the authors observe:

> "On occasion, however, English practice did display a definite tendency toward simplicity in form; thus, all that was done, in some instances, was the erection of a plain wooden cross bearing the royal arms. It is doubted, however, if this comparative informality had any adverse effect whatsoever upon the validity in law of the title so acquired. Such an occurrence was, at the most, an inessential modification of the customary procedure. In the final analysis it was clearly the simple fact of the performance of a symbolic act alone, whatever its form, which was of significance and never the degree of formality observed in the course of such an act." (*Creation of Rights of Sovereignty through Symbolic Acts 1400-1800*, pp. 98-99.)

37. If these passages are compared with the more authoritative writers cited by Singapore, it will be seen that there is little or no discrepancy in any event.

38. Counsel for Malaysia suggests the relevance of certain episodes of British practice involving certain types of formality (see CR 2007/26, pp. 13-14, paras. 9-13). Mr. President, the citation of selected episodes of British practice, such as Rockall or Labuan, can be of little assistance to the Court at this stage. The Parties are agreed that a formal annexation of territory is a *sufficient* basis of title. But the practice offered by Malaysia fails to address the real question whether a formal annexation is legally necessary. In any case, the practice has been examined in

the written pleadings at some length: and I refer now to the Singapore Reply, pages 76 to 85, and 301 to 308.

The third proposition of Malaysia is that sovereign acts may be performed on the territory of another State without this necessarily involving an intention to acquire sovereignty over the area concerned

39. This proposition was advanced by Sir Elihu on Wednesday and was linked, somewhat precipitately, to the concepts of international leases and servitudes (CR 2007/25, pp. 65-66). The subject was also referred to briefly by Professor Kohen and by Professor Crawford in his final presentation.

40. Mr. President, with a certain regret, I shall leave these interesting topics on one side. No case has been made for the existence of this type of legal interest in favour of Singapore or Malaysia in relation to Pedra Branca. And it is perfectly obvious that, when Malaysia began to make claims to Pedra Branca late in the last century, no claim of the type envisaged by Sir Elihu was produced.

The fourth proposition of Malaysia: that the official ceremony of laying the foundation stone did not constitute evidence of an intention to acquire sovereignty

41. I come now to the fourth proposition of Malaysia, which involves the denial that the laying of the foundation stone of the lighthouse on 24 May 1850 constituted evidence of an intention to acquire sovereignty. My distinguished opponents have sought to disparage the evidential significance of this ceremony on at least four occasions in the first round of these hearings. Mr. President, Malaysia has some difficulties in deciding which target to aim for. They are anxious to assert that the episode did not amount to a formal annexation. But, of course, Singapore has not contended that the ceremony had that character. In any event, the ceremony was undeniably official. It was a government occasion, and it was a Singapore occasion.

42. The role of the Master of the Masonic Lodge was subordinate — clearly subordinate — to that of the Governor, who was the organizer and host of the occasion. The reference by the Master of the Masonic Lodge to Pedra Branca as a dependency of Singapore was made in the presence of the Governor and all the other invited officials and guests.

43. The entire enterprise had an official character and the laying of the foundation stone formed part of the long expected construction of the lighthouse on the exclusive basis of government planning and government funding (see the Singapore Memorial, pp. 50-58; and my presentation in the first round, CR 2007/21, pp. 54-59, paras. 97-119.)

Conclusion

44. In coming to my conclusion, Mr. President, I would return to the question of the evidence of an intention to acquire sovereignty. The approach adopted by counsel for Malaysia, especially Sir Elihu Lauterpacht and Professor Kohen, faces insurmountable obstacles. In the first place, the approach involves a repudiation of the long-established legal principles governing acquisition of territory.

45. The intention to acquire sovereignty can be, and very commonly is, based upon acts of sovereignty, that is, the exercise or display of sovereignty. Sir Humphrey Waldock explains these principles very clearly in his well-known *British Year Book* article. The placing of the brick pillars by Thomson was directly related, directly linked, to the assessment of the cost of the construction and, as I have shown, provided the basis of the final decision to build.

46. There is, secondly, the significance of the purpose of the enterprise. This necessarily involved the control of the island as a whole and, of course, the element of exclusive use.

47. In the third place there was a natural relation between the exclusive use of territory and the existence of sovereignty over the territory. And, in this context, the attitude of the Dutch authorities in the region is legally significant. The Dutch Resident in Riau sent gunboats to Pedra Branca which arrived on 6 May 1850 and which, with British approval, were maintained during the term of the building operation. I refer here to Thomson, *Account*, pages 424 and 475 in Singapore's Memorial, Annex 61, in Volume 4, with the pagination, pages 527 and 576. This Dutch official assistance, furnished with British approval, provides the practical context of the letter of November 1850 in which the General Secretary, Dutch East Indies, refers to "the construction of a lighthouse at Pedra Branca on British territory" (RS, Ann. 8 (English translation)). This Dutch attitude clearly relates to sovereignty in respect of territory, and not to the acquisition of private property.

48. And, then, there is the element of legal and political security. There could have been no need to effect a formal annexation of Pedra Branca. There were no sources of political opposition to the title and control of the British Crown. Thus, there was no political need, or legal requirement, for a formal annexation. The display of sovereignty was palpable and continuous. There was no controversy with Johor or with the Dutch. And during the lengthy process of decision making relating to Pedra Branca, there is no reference to the need for the co-operation of the Sultan of Johor in any form.

49. Finally, there was no consideration of law, of politics, or of common sense, which required the British Crown to do anything further to establish title. All that was necessary was for title to be maintained.

50. As I reach the end of my speech, I would like to reaffirm the views of Singapore on the relevance of the decision of the Pitcairn Island Court of Appeal (CR 2007/21, p.47, paras. 60-61). The Agent of Singapore has asked me to assure the Court that the question put by Judge Keith last Friday will be answered in writing.

I would thank the Court for its customary patience and consideration and would ask you to call on my colleague, Mr. Bundy.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Brownlie. I now call on Mr. Bundy.

May I ask you what is the theme of your statement, because I do not have a transcript of it?

Mr. BUNDY: The subjects I will be addressing — and I will certainly spill into tomorrow morning, following on Mr. Brownlie, will be Singapore and Britain's conduct after 1851 and the maintenance of its title and I will also be touching on issues relating to the Straits Lights. I think I can find an appropriate breaking point in that speech after about 15 minutes, if that is ok?

The VICE-PRESIDENT, Acting President: Thank you, please go ahead.

Mr. BUNDY: Thank you, Mr. President.

150 YEARS OF STATE ACTIVITIES PERFORMED BY SINGAPORE ON PEDRA BRANCA AFTER 1985 AND ON THE STRAITS LIGHTS

1. As I said, Mr. President, Members of the Court, my task this morning, and to be continued tomorrow, is to turn to Singapore's conduct on Pedra Branca and within its territorial waters after 1851 and also to the relevance of Malaysia's conduct relating to the Straits Lights during this same period.

2. In my first round presentation two weeks ago, I reviewed the numerous examples of State conduct — *effectivités* — that Singapore undertook on Pedra Branca after 1851 and I pointed out how this conduct evidences how Singapore confirmed and maintained the title it acquired to Pedra Branca during the period 1847 to 1851, discussed by my colleague, Mr. Brownlie, and this was maintained by concrete actions on the ground. Now the maintenance of title — the maintenance of title — is an important element of sovereignty, although I can well understand Malaysia's sensitivity to this point given its complete absence from the island, whether before 1851 or afterwards.

3. Malaysia's written reply labelled Singapore's conduct "peripheral" to the main issues in this case. Last Tuesday Sir Elihu Lauterpacht was more extravagant in downgrading that description. He asserted that Britain's and Singapore's conduct on Pedra Branca after 1851 is "irrelevant" and he went on to say that "it is unnecessary for Malaysia to respond at all". Given the alleged irrelevance of Singapore's conduct, it was interesting and perhaps revealing to find both Sir Elihu and Professor Crawford devoting a considerable time to addressing that conduct last Thursday, even though Sir Elihu, I admit, confessed that he was dealing with the subject "with the greatest reluctance".

4. Now, counsel's main point was that unless by 1851 there really existed British title over Pedra Branca, then "there was nothing that could be maintained or confirmed, either by Britain's or Singapore's subsequent conduct" (CR 2007/24, p. 47, para. 49). To recall my distinguished colleague's schoolboy tale, zero multiplied by any number produces zero, and it was on the basis of this reasoning and, dare I call it the "lobsterpot theorem", that Sir Elihu went on to say: "Either Britain acquired title by 1851 or it did not. If it did, Singapore is right. If it did not, Singapore loses, and loses without more. It is as simple as that." (CR 2007/24, p. 53, para. 59).

5. The problem with this line of argument is that the situation we have here is not one of multiplication, zero times some other number. It is a question of addition, involving the fact that while there is absolutely nothing on Malaysia's side of the equation, on Singapore's side there are the activities of the British Crown during the period 1847 to 1851 *plus* the numerous activities that Britain and Singapore carried out thereafter on the island. In other words, one plus much more than one.

6. Now, counsel's assertion also runs against all of the recent jurisprudence on the issue of disputed sovereignty to small islands, despite my learned friend's confident assertion that "Malaysia's position is entirely in line with the Court's case law and that of arbitral tribunals" (CR 2007/24, p. 51).

7. To appreciate the point, I would respectively ask the Court, once again, to consider what the position would be if, *quod non*, Malaysia was somehow correct in its thesis that Great Britain's activities on Pedra Branca between 1847 and 1851 did not evidence the intention to acquire sovereignty over the island at that time — a proposition which Mr. Brownlie has thoroughly rebutted. In other words, what would be the position if sovereignty remained indeterminate as of 1851, bearing in mind that Malaysia has not shown any intention on the part of Johor to exercise sovereignty over the specific territory in dispute nor a single sovereign act carried out on these features before that time.

8. As I pointed out in my first round presentation, the Court would then be faced with the question as to which Party could show the better title to the specific territory in dispute, based on their conduct relating to that territory. That was the question that the Court ultimately had to deal with in the *Minquier and Ecrehos* case. It was also the determinative issue in the *Qatar* v. *Bahrain* case, with respect to the small island of Qit'at Jaradah; in the *Indonesia/Malaysia* case, with respect to both Pulau Ligitan and Pulau Sipadan; and in the *Nicaragua* v. *Honduras* case with respect to the four cays claimed by Honduras. And it was also an issue that the Arbitral Tribunal, which was presided over by a former President of this Court, was confronted with in the *Eritrea/Yemen* case dealing with a number of uninhabited islands in the Red Sea.

9. In *every one*, *every one*, of those cases the conduct of the parties was assessed to determine which one had demonstrated a greater intensity of State activities undertaken on the

islands in question *à titre de souverain* and the question of sovereignty was decided on that basis. Professor Schrijver complains that Singapore never claimed title to Pedra Branca before 1980. Of course, neither did Johor nor Malaysia. But as this Court so clearly articulated just last month in its Judgment in *Nicaragua* v. *Honduras* — and it is a statement that can be applied to Great Britain's and Singapore's conduct on Pedra Branca: "A sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory." (Judgment of 8 October 2007, para. 172.) Or, to borrow the words of the sole arbitrator in the *Island of Palmas* case: "the continuous and peaceful display of territorial sovereignty is as good as title" (*RSA*, Vol. II, p. 839).

10. In these circumstances, I fail to see how Singapore's exclusive, peaceful, open and long-standing conduct with respect to its administration and control over Pedra Branca, including its territorial waters, both *between* 1847 and 1851, *and* from 1851 all the way up to the present, can *possibly* be categorized as either "peripheral" or "irrelevant".

11. In his second intervention on post-1851 conduct last Thursday, Sir Elihu attempted to distinguish the cases that I just mentioned from the present one. He argued that in none of those cases was the starting-point of the determination of the conduct of the Parties a predetermination that one of them had a clear title — as Malaysia contends — and the other did not rely on prescription (CR 2007/26, pp. 35-36, para. 1). And he added: "Here the position is quite different; the starting-point of Singapore's post-1851 efforts must be the acceptance of Johor's prior title." (*Ibid*., p. 36, para. 1.)

12. Now that line of argument is flawed in three fundamental respects.

13. First, the assertion that the starting-point for assessing Singapore's post-1951 activities on the islands must be the acceptance of Johor's prior title simply begs the proposition that Malaysia has so utterly failed to prove. How can a claim to an historic title over Pedra Branca survive when Johor *never* demonstrated any intention to act as sovereign, to claim sovereignty over Pedra Branca, never once *mentioned* the island by name, and *never* set foot on Pedra Branca in *any* sovereign capacity? How can historic titles survive those facts?

14. Second, counsel assumes away the actions of Great Britain in taking possession of the island from 1847 to 1851. Although, to be fair, I should recall that Sir Elihu *did concede* that if

Britain had acquired title by 1851, as Mr. Brownlie has shown, Singapore is right — it has sovereignty (*ibid.*, p. 35, para. 1).

15. Third, it is incorrect to assert that cases such as *Minquiers and Ecrehos*, or *Eritrea/Yemen*, or *Indonesia/Malaysia*, did not involve a prior examination of whether a claim to an historic title had been made out. In *Minquiers and Ecrehos*, the Court rejected France's claim of an historic title because it had not been proved before the Court went on to take up the issue of the conduct of the parties on the disputed territory. In *Eritrea/Yemen*, the Arbitral Tribunal also rejected Yemen's claim of an historic title to the islands based on ties to the Ottoman Empire before deciding the case on the basis of the *effectivités*. Moreover, with respect to that case, counsel fails to mention the fact that the administration of the Red Sea lights in the case was not relevant because the colonial Powers — Great Britain and Italy — had agreed a specific understanding: it was the 1927 Rome Understanding, referred to in the Award, that provided that those kinds of acts would be without prejudice to the issue of sovereignty. And in the *Indonesia/Malaysia* case, the Court rejected both parties' claims of an historic chain of title before deciding the case on the basis of the *effectivités*. Professor Pellet will be coming back tomorrow to say more about the *Indonesia/Malaysia* case.

16. In addressing the relevance of Singapore's post-1851 conduct on Pedra Branca, counsel for Malaysia also exhibited an acute sensitivity to the doctrine of prescription: so much so, that Sir Elihu mentioned prescription *both* in his first speech, where he suggested that Singapore was trying to induce the Court to accept a kind of "pseudo"-prescriptive conduct (CR 2007/24, p. 53) and in his last speech, where he accused me of engaging in "verbal gymnastics" in giving the impression that Britain's post-1851 conduct can override Johor's earlier historic title (CR 2007/26, p. 35, para. 1). And for good measure, Professor Crawford also felt it necessary to make a reference to prescription in his closing arguments (CR 2007/27, p. 63, para. 4).

17. In my first round presentation, I pointed out that it was Malaysia, in its written pleadings, that argued that Singapore was trying to displace a prior Malaysian title: and I said that the Court does not need to address this issue because of three main factors. First, Malaysia has in no way demonstrated an historic title to the specific territory in dispute — in other words, there was no Johor title to displace; second, because Great Britain established title to the island by its actions

from 1847 to 1851, discussed by my colleague; and third, because, even if title was somehow indeterminate as of 1851, Singapore has demonstrated that it was *the only party* to carry out sovereign acts on Pedra Branca thereafter. I also pointed out that *it is Malaysia, it is Malaysia,* which previously told this Court — five years ago — that in the face of the complete inactivity of one party which asserts a prior title to disputed territory, the subsequent administration of the territory in question over a long period of time by the other party is sufficient to establish title in that party.

18. Now I realize that I have cited from Malaysia's oral argument in the *Indonesia/Malaysia* case in the first round. But given that counsel for Malaysia neglected to mention this fact last week — and I can perhaps understand why —, it is appropriate to recall Malaysia's own discussion of the issue: a discussion which post-dated by several years the *Kasikili/Sedudu Island* case to which Professor Crawford made reference last Friday. To quote again from counsel's statement of principle in the *Indonesia/Malaysia* case: "A title based on a peaceful and continuous display of State authority would in international law prevail over a title of acquisition of sovereignty not followed by an actual display of State authority." (CR 2002/30, pp. 35-36, para. 22.) That is *Malaysia* speaking to the Court.

19. If nothing else, this observation shows that Malaysia itself recognizes the need for a party claiming title at least to maintain that title — something that Malaysia never did even if one accepts, for purposes of argument, our opponent's far-fetched theory of an original title: one that has not been proved.

Mr. President, with your permission, I find that would be an appropriate place for me to break. Thank you very much.

The VICE-PRESIDENT, Acting President: I thank you, Mr. Bundy. We shall listen to the remainder of your statement at tomorrow's sitting. I should like to interject a thought though: your name was not inscribed on the list and whilst I understand the need for full and optimal utilization of the time available, I would appreciate it if, in the future, a full list of the speakers is given to us beforehand.

This brings to an end this morning's sitting. The Court is adjourned and will meet tomorrow morning at 10 o'clock.

The Court rose at 1 p.m.

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