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*CR 2007/29*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2007**

***Public sitting***

***held on Tuesday 20 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)**

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**VERBATIM RECORD**

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**ANNÉE 2007**

***Audience publique***

***tenue le mardi 20 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)**

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**COMPTE RENDU**

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| *Present:* | Vice-President | Al-Khasawneh, Acting President |
| | Judges | 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. 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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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open and I should like to start by informing you that Judge Ranjeva, for reasons duly communicated to me, is unable to sit this morning. I now give the floor to Mr. Bundy.

Mr. BUNDY: Thank you very much, Mr. President. Mr. President, before I start let me offer an apology for not providing the Court yesterday with a full roster of Singapore's presentations which I think included me at the end and I trust the Court will understand that, when it comes to rebuttal, the choreography of the precise timing of speeches is not always as exact as it is in the first round, but I do offer our apologies.

This morning I intend to pick up where I left off yesterday in discussing Singapore's post-1851 *effectivités* on Pedra Branca and certain matters relating to the Straits Lights. I will be followed by Ms Malintoppi, who will address Malaysia's absence of any competing activities on or around Pedra Branca. She will discuss the maps and also Malaysia and third-party recognition of Singapore's sovereignty to Pedra Branca. Following Ms Malintoppi, Professor Pellet will then take the floor. He will discuss the 1953 disclaimer and certain aspects of the *Indonesia/Malaysia* case, and then he will be followed at the end by Singapore's Agent, who will offer a number of concluding remarks and present Singapore's submissions.

At the end of yesterday morning's session I began my rebuttal of Malaysia's arguments on Singapore's post-1851 conduct, in which I had showed that Malaysia's contention that Singapore's conduct on Pedra Branca is irrelevant, is misplaced and is also contrary to the case law.

## 150 YEARS OF STATE ACTIVITIES PERFORMED BY SINGAPORE ON PEDRA BRANCA AFTER 1851 AND ON THE STRAITS LIGHTS (continued)

20. I would now like to turn to the facts relating to the post-1851 conduct of the Parties with respect to Pedra Branca. Sir Elihu — whom the Singapore delegation is delighted to see in the room today — stressed in his opening presentation that such conduct "will only be relevant if it discloses an *animus occupandi*, not simply in respect of the lighthouse and its associated facilities but specifically in respect of the territory on which the lighthouse is located" (CR 2007/24, p. 51, para. 56).

21. Singapore has no problem with the application of that test or with meeting it. What troubles Singapore, on the other hand, is that Malaysia views this test as a one-way street. It asks the Court to examine Britain's conduct on Pedra Branca from 1847 to 1851 and both Britain's and Singapore's conduct on the island thereafter, through the prism of *animus* and *corpus*. The problem is that what Malaysia studiously fails to do is to apply that same test — the *Eastern Greenland* test — to its own conduct or to that of Johor.

22. Of course, the reason why Malaysia does not embark down this proper legal path is because it fully realizes that it will fail the test. The complete absence of any evidence of Johor's intention to exercise sovereignty over Pedra Branca or an actual display of such authority on the ground either prior to 1847-1851, or afterwards, is a striking feature of this case.

23. Last Tuesday, Sir Elihu effectively conceded that Malaysia has *no* competing actions on the island after 1851. After pointing out that Pedra Branca's size is less than half that of the area of a football pitch, counsel noted that "all of that area — all of the island — was increasingly taken up by the lighthouse and its appurtenances" (CR 2007/24, p. 52, para. 58). And he then rhetorically asked: "What 'competing activities' could there have been on the island?" Was Malaysia expected to build another lighthouse? And he concluded by asserting that Singapore's discussion of the complete absence of any competing activities by Johor or Malaysia is, what he termed, "meaningless verbiage" *(ibid.)*.

24. I realize that Professor Schrijver tried to repair the damage on Friday when he bravely attempted to give weight to Malaysia's own conduct. Ms Malintoppi will come back to that conduct later on this morning. But the plain fact is that Singapore performed numerous activities in a manner which fully reflected the reality that it regarded itself as possessing sovereignty over the island while Malaysia did nothing.

25. I would also note that counsel offered no explanation whatsoever as to why Johor could not have carried out, and did not carry out, a single sovereign act on Pedra Branca *before* 1847 when there was no lighthouse on the island. Indeed, if Malaysia's thesis of the case is accepted, it would produce an unprecedented result: it would be the first time — the first time — that sovereignty over disputed territory would be found to lie with a party which never carried out a single sovereign act on the actual territory in dispute at any time. That would be unprecedented.

26. It is undisputed that, for over 130 years after the British took possession of the island, there was not a single reminder issued from Johor or from Malaysia that Singapore was somehow acting on the island pursuant to a grant, or a permission, an indenture or a servitude accorded by the Sultan of Johor. Had such permission existed, it would have been expected that Malaysia would have referred to it *at least once* during the 130-year-period from 1847 to 1979. But it did not. It did not do so when Britain enacted the 1852 and 1854 Acts; not when Britain expanded the jetty on the island in the 1880s and in 1903 pursuant to open tenders; not when the ruler of Johor reminded Britain that it was necessary to conclude a written indenture for the Singapore-operated lighthouse on Pulau Pisang in 1900; not when Britain enquired about building a lighthouse on Pulau Aur also in the same year; not when Malaysia protested the flying of the Singapore ensign over Pulau Pisang in 1968 but did not protest the same ensign which Britain and Singapore had displayed and have displayed continuously ever since 1851; not when Singapore insisted in 1974 that Malaysian visitors to the island had to obtain Singapore's prior authorization to do so; not when Malaysia's official meteorological publications listed the rainfall station on Pedra Branca as being "in Singapore"; not when Malaysia's official maps were published over a 14-year-period attributing the island to Singapore; not when Singapore carried out search and rescue activities on Pedra Branca and within its territorial waters; not when Singapore investigated shipping incidents; or when Singapore announced land reclamation plans around the island in the 1970s; and not when Johor disclaimed ownership of Pedra Branca — not the lighthouse, disclaimed ownership of the island — in response to a query from Singapore in 1953. Not once was there any reminder of this so-called permission.

27. Equally relevant is the fact that, throughout this entire period, neither Britain nor Singapore referred to the fact that their administration of Pedra Branca was being undertaken on the basis of a grant from Johor. Malaysia has argued that Singapore's conduct on Pedra Branca was consistent with, and undertaken pursuant to, Johor's grant of permission. But not once did Great Britain or Singapore, after 1851 — or before — pause to ask themselves whether the government functions they were carrying out were compatible with this so-called "permission" that Johor had allegedly granted. Not once, and this was for the simple reason that no such permission existed. Singapore simply engaged in a normal exercise of its sovereign prerogatives, whether

lighthouse-related or not, that any State would have carried out on a very small territory having the characteristics of Pedra Branca. Singapore made full use of the island.

28. Now on Friday last week, Professor Crawford posited a hypothetical in which one State — which he termed the "guest State" — uses an island with the consent of another State whose island it is — the "host State". In a clear reference to Singapore's conduct on Pedra Branca, my good friend stated that such use ceases to be adverse to the host State for purposes of the acquisition of sovereignty, and he cited examples such as Hong Kong, Guantanamo Bay, Diego Garcia, and an area covered by the 1994 Israel-Jordan Peace Treaty to support his thesis (CR 2007/27, p. 63, paras. 1-2).

29. You can be sure, Mr. President and Members of the Court, that, unlike the present case, in each of the examples cited by Professor Crawford there were detailed written arrangements governing the terms of the use of the territory. You can also be sure that in none of those examples he cited did 130 years go by without either party to the arrangements making a single reference to them. Yet that is what happened in our case.

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* *

30. I now turn to a number specific elements relating to conduct, starting with the legal régime under which the relevant lights were established.

31. The Court will recall I trust, that in my first round presentation, I pointed out that when Great Britain intended to establish a light on territory belonging to a local Malay ruler, the parties concluded a written agreement to that effect. This was the case with respect to the Cape Rachado lighthouse established in 1860. It was also the case for the lighthouse on Pulau Pisang, which was subject to a written indenture of 1900. And it was the procedure proposed by the British also in 1900 when they were contemplating building a lighthouse on Pulau Aur.

32. Counsel for Malaysia tries to convince the Court that the same procedure was followed with respect to the lighthouse on Pedra Branca. Professor Kohen, for example, went to great lengths in trying to show that Johor's permission extended to Pedra Branca. But, despite his

efforts, the one inconvenient fact that Professor Kohen could not overcome, and which Professor Pellet alluded to yesterday, is that the ruler of Johor *never referred* in this alleged permission to the island of Pedra Branca — the specific territory that is in dispute in this case.

33. That fact alone contradicts Sir Elihu's contention that the Straits Lights were treated in a consistent manner. They were not. The 1860 lighthouse on Cape Rachado was established pursuant to correspondence which expressly referred to the location of the light — Cape Rachado. The Pulau Pisang lighthouse indenture was the same. It clearly referred to the specific territory where the light was to be constructed. Nothing of the sort exists with respect to Pedra Branca.

34. My distinguished opponent argued that no Pulau Pisang-type indenture was required for Pedra Branca because of its small size (CR 2007/26, pp. 43-44, paras. 26 and 29). But this ignores the fact that the consent given by the local ruler for the Cape Rachado lighthouse — this was the permission granted by the Sultan of Selangore — in that correspondence granting the permission, it was noted that the area where the light would be situated was also located on a very small parcel of land. But that did not prevent the ruler from identifying the location of the light for which he accorded his permission.

35. There is yet another factor which is common to both the Cape Rachado and Pulau Pisang lighthouses, but which distinguishes those examples from the permission that is alleged to have been given for the lighthouse on Pedra Branca. Both of the former agreements contained express provisions to the effect that, if the British ever failed to maintain the lighthouses in question, the agreements would lapse, and the area where the light was situated would revert to the local Malay ruler. Nothing of the kind exists with respect to the so-called "permission" for the Pedra Branca lighthouse: there are no terms, no provisions whatsoever, and no mention of the specific area where the lighthouse was to be located — further indications that no such permission ever existed.

36. Equally unconvincing was Sir Elihu's attempt to explain away why Malaysia protested the flying of the Singapore marine ensign on Pulau Pisang but not on Pedra Branca.

37. Counsel admits that the flying of the ensign over Pulau Pisang was seen by an internal Malaysian political constituency as an assertion of authority over a piece of Johor territory and they wanted it removed. Nonetheless, counsel contends that the exact same ensign on Pedra Branca was

different because it "was no more than an indication that the lighthouse was operated by Britain" (actually, the lighthouse was operated by Singapore in 1968) (CR 2007/26, p. 44, para. 30).

38. But that is no explanation at all. The same ensign was displayed at both lighthouses. Why would an ensign flown from the lighthouse on Pulau Pisang be perceived by Malaysia any differently from the same ensign flown from the lighthouse at Pedra Branca? Stated another way, why was the ensign on the Pulau Pisang light not simply an indication that the lighthouse was operated by Singapore, as Malaysia suggests, why wouldn't that also apply to the emblem flying on Pedra Branca? The obvious answer is that the ensign was regarded as a symbol of sovereignty by Malaysia, and that only Pulau Pisang — not Pedra Branca — was regarded as falling under Malaysian sovereignty. Hence the protest.

39. A similar comment can be made about the funding proposals for the lighthouses. Despite Sir Elihu's contention that this practice differentiated between the administration of the lights and sovereignty (CR 2007/26, p. 42, para. 20), he ignored the facts on the record which I referred to in the first round demonstrating that Malaysia made specific offers to fund the lighthouses off its coasts and over which it had sovereignty or jurisdiction, such as the Cape Rachado lighthouse, the Pulau Pisang lighthouse and the light on the 2½ Fathom Bank, but made no such offer with respect to the lighthouse on Pedra Branca (CR 2007/23, pp. 16-18, paras. 30-35). Another clear difference of treatment by Malaysia.

40. On the British side, the different legislative treatment between the 1852 Act, concerning the lighthouse on Pedra Branca, and the 1854 Act dealing with both the Pedra Branca lighthouse and the 2½ Fathom Bank light, is also significant. The 1852 Act vested not simply the management of the lighthouse on Pedra Branca in Great Britain or in the East India Company, but also the lighthouse and all of its appurtenances. The 1854 Act, in contrast, only vested the management, that is all, only the management of the 2½ Fathom Bank light in the East India Company. In the former case the British had sovereignty; in the latter case they did not.

41. Counsel for Malaysia contends that the 1852 Act must be read in conjunction with the 1843 Foreign Jurisdiction Act — a document that was only introduced for the first time in these oral hearings. Amongst other things, counsel claimed that the Foreign Jurisdiction Act provided that Britain could exercise power or jurisdiction over any place outside of Her Majesty's

Dominions and that this is what happened with respect to the lighthouse on Pedra Branca (CR 2007/29, pp. 49-50, para. 53). However, counsel neglected to mention that the scope of the Act, as recorded in the very first sentence, related to power and jurisdiction that had been acquired by treaty, capitulation, grant, usage or sufferance. As my colleagues and I have explained, there was no such instrument dealing with Pedra Branca. Certainly, the 1852 Act never referred to such an instrument and it did not refer to the 1843 Foreign Jurisdiction Act either.

42. My learned friend also argued that Notices to Mariners issued by Britain and Singapore with respect to the lighthouse on Pedra Branca are no more than what lighthouse operators frequently do (CR 2007/26, p. 47, para. 42). But, once again, he avoided recalling what Malaysia itself argued in the *Indonesia/Malaysia* case with respect to Notices to Mariners that Malaysia issued for the light structures erected on those two islands, namely — and this was Malaysia's argument — that such notices were a straightforward reflection of Malaysia's sovereignty (Malaysia's Reply in the *Indonesia/Malaysia* case, p. 74, para. 5.23 and p. 75, para. 5.26). That is what was argued by Malaysia in that case.

43. This brings me to the main argument advanced by Sir Elihu and Professor Crawford. Reduced to its essentials, Malaysia essentially seeks to dismiss the relevance of Singapore's conduct on the grounds, if I can again borrow Sir Elihu's words, that "overwhelmingly this is practice concerning the operation of the lighthouse, what you would expect" (CR 2007/24, p. 48, para. 50).

44. In taking up the charge, Professor Crawford argued that my first round presentation was an exercise in circular reasoning: Singapore acquired sovereignty by administering the lighthouse, and that administration was an act *à titre de souverain* because Singapore had sovereignty (CR 2007/26, p. 58, para. 12).

45. Quite apart from the fact that this argument fails to appreciate that Singapore acquired sovereignty over Pedra Branca by virtue of the activities of the British Crown on the island from 1847, counsel's argument is also flawed because it rests on a fundamental *non sequitur*.

46. The gist of Malaysia's argument is that the majority of the activities that Singapore has adduced with respect to its conduct on Pedra Branca were no more than the kinds of activities that any administrator of a lighthouse would engage in regardless of who had sovereignty over the

territory on which the lighthouse was situated. But this line of reasoning assumes that, merely because a number of Singapore's activities on the island are said to be "routine lighthouse activities", this necessarily means that Singapore's conduct was not performed *à titre de souverain*. But the conclusion simply does not follow. A State can perfectly well carry out sovereign acts — routine or otherwise — on its territory where a lighthouse is situated, particularly if there is no room on the territory for much more.

47. Professor Crawford also chides Singapore for not producing experts on lighthouse operations, as Malaysia has done. There is no need for such experts. None of the authors of the lighthouse reports contained in Volume 2 to Malaysia's Counter-Memorial purport to address, or have any expertise whatsoever on, issues of sovereignty. They do no more than identify a number of functions that lighthouse operators sometimes carry out over lights with respect to which they have responsibility. But that does not mean that a State that authorizes and carries out such activities is not acting on its own territory. As I noted in the first round, Malaysia itself, at page 103 of its Counter-Memorial, acknowledged that the construction and administration of lighthouses is usually a matter for the State on whose territory the lighthouse is located: and that is what we have here.

48. So how does the Court resolve this basic difference between the Parties — Professor Crawford's thesis that Singapore's activities on Pedra Branca were only the acts of lighthouse administration, as opposed to Singapore's position that the post-1851 conduct of Great Britain and Singapore demonstrates both the intention to act as sovereign over the islands by acts undertaken also specifically on the territory in dispute. How does that difference get resolved?

49. The solution that I would respectfully invite the Court to consider is to assess the activities undertaken by Great Britain and Singapore on Pedra Branca for over 150 years — to assess those activities as a whole: conduct which even Professor Crawford admits included non-lighthouse activities. Do these activities reflect, to use the Court's words, a pattern of official State conduct over a sufficiently long period of time to evidence sovereignty, particularly when those activities are viewed against Malaysia's own complete *lack* of any *effectivités,* its silence over 130 years, and its admissions against interest, to which colleagues have made reference?

50. I do not intend the recanvass all of the conduct in question which has been fully documented in Singapore's written pleadings and which I discussed in the first round. While Professor Crawford has mounted a machine-gun attack on this conduct, what was revealing was the number of targets that my good friend felt compelled to try to shoot at.

51. We have Britain's and Singapore's legislation relating to Pedra Branca; Notices to Mariners; the constant maintenance and expansion of the facilities on the island including erecting jetties; a helicopter landing pad; radars; communication equipment; as well as reclamation plans; the collection of meteorological data; the flying of the ensign; numerous visits over many years from high-ranking Singapore officials; control of access by Singapore of foreigners, which included Malaysian nationals, to the island; the issue of permits to third parties to undertake scientific research and salvage operations; the exercise of jurisdiction to investigate shipping incidents and accidental deaths; and more. Professor Crawford complained that Malaysia did not know about some of these activities and thus did not protest. But that hardly detracts from the fact that Singapore, in carrying out such activities, acted as sovereign and acted as a sovereign would in performing these acts.

52. Sir Elihu tried to counter this picture last week by referring to Singapore's 1957 and 1958 Light Dues Ordinances. He observed that, while the 1957 Ordinance referred to "navigational aids in the waters of the colony", the 1958 Ordinance replaced this language with "navigational aids in Singapore including those at Pedra Branca (Horsburgh) and Pulau Pisang". And he argued that this surely must indicate that, while both lighthouses were administrated by Singapore, neither fell within the "waters of the Colony" of Singapore (CR 2007/26, p. 46, para. 38).

53. I regret to say that this argument was advanced at the expense of ignoring the very full explanation that Singapore gave as to why the 1958 amendment was necessary at paragraphs 6.52 to 6.56 of Singapore's Counter-Memorial. And rather than repeat what was said there, let me simply refer to two documents which form part of the *travaux* of the 1958 amendment, 1958 Ordinance, which thoroughly rebut counsel's contention.

54. The first, which you will find in tab 26 of your folders, is a letter dated 15 February 1958 from the Singapore Master Attendant to the Permanent Secretary of Commerce and Industry of Singapore. That letter explains the 1958 amendments, and it states in its conclusion:

[Slide]

> "4. The re-wording of section 6 (4) makes the duties of the Board more specific and includes beyond doubt lighthouses at Horsburgh and Pulau Pisang. Horsburgh lighthouse, some 35 miles to the eastward, is Colony territory whereas at Pulau Pisang, some 50 miles to the north-westward, Singapore has only a lease of the land on which the lighthouse is built."

55. The second document is an extract from the Minister's explanations of the 1958 Ordinance before the Singapore Legislative Assembly (CMS, Ann. 38; tab 27). After explaining the purpose of the amendments to the 1957 Ordinance, the Minister stated:

[Slide]

> "The deletion of the definition [this is the definition with respect to the waters of the Colony] would also enable the Light Dues Board to expend monies from the Light Dues Fund on the maintenance of lights and navigational aids within the port limits and on the maintenance of the light at Pulau Pisang which is not within territorial waters."

Needless to say, there was no mention of Pedra Branca not being within the Colony Singapore's territorial waters.

56. Counsel also referred to the fact that, prior to the critical date, two Singapore publications — one was called *Singapore Facts and Pictures* that was published by the Ministry of Culture, and another, the *Annual Reports of the Singapore Rural Board* dealing with electoral boundaries — did not include Pedra Branca and that this shows that Singapore did not consider Pedra Branca to form part of its territory. Rather than repeat what I said in the first round on this matter, I would instead refer to what the Arbitral Tribunal said in the *Taba* Award with respect to a similar argument. It was with respect to Israel's argument in that case that a similar kind of document — a *Statistical Yearbook for Egypt* — did not identify a particular boundary pillar in the manner that Egypt had submitted in the arbitration. And in words that apply *mutatis mutandis* here, the Tribunal in *Taba* with respect to this *Statistical Yearbook* said the following:

> "However, the evidentiary value of such technical publications, designed to provide general information, is low, for such publications are not designed as authoritative statements about boundaries. They fall within the category of what could be described as encyclopaedic reference books and not administrative acts."

(Egypt-Israel Arbitration Tribunal: Award in the Boundary Dispute concerning the *Taba* Area; 27 *ILM* 1421 (1988), p. 1885, para. 220.)

And that is precisely what is applicable to these two documents, *Singapore Facts and Pictures* issued by the Cultural Ministry, and the electoral boundaries discussed by the Rural Board; they fall within that same description.

57. As for counsel's reliance on Pavitt's work, permit me to recall, as I did in the first round, that Pavitt in no way said that Pedra Branca belonged to Malaysia. And indeed, his assistant, as I also indicated in the first round, indicated that precisely the opposite was the case (RS, pp. 155-156, paras. 6.61-6.62; CR 2007/22, p. 36, para. 93).

58. Then there is the question of Singapore's continued administration and control of Pedra Branca after the 1979-1980 critical date. Despite my explanations in the first round and in Singapore's written pleadings, why this conduct represented a normal continuation of earlier acts within the ambit of the statement made by the Court in the *Indonesia/Malaysia* case (RS, pp. 137, 140 and 168; paras. 4.101-4.102, 4.110-4.112, and 4.180; CR 2007/22, pp. 23-24, paras. 48-55), the distinguished Attorney-General for Malaysia did no more, in his opening statement, than assert that Singapore's conduct after the critical date was not a continuation of its prior acts. But he failed to offer any argument whatsoever backing up this assertion. He merely said they were not the continuation, without saying more (CR 2007/24, pp. 30-31, para. 11). And Professor Crawford did no better. He merely repeated the assertion without adding any explanation.

59. But there is a further important point to note about Singapore's post-1980 conduct and Malaysia's attitude with respect to that conduct. In 1989, Malaysia sent a diplomatic Note to Singapore protesting Singapore's installation of a radar station on Pedra Branca as part of Singapore's Vessel Traffic Information System (CMM, Ann. 50). And in 1991, Malaysia protested against the construction by Singapore of a helicopter landing pad on Pedra Branca (CMM, Ann. 51). According to Malaysia's experts on lighthouse operations, these kinds of activities are frequently carried out by the administrator of lighthouses. Professor Crawford, therefore, would consider them to be "routine lighthouse operations, not carried out *à titre de souverain*". But if they were so routine, why did Malaysia feel it necessary to protest them? Prior to 1980, Malaysia never protested any of the other so-called "routine lighthouse activities" undertaken by Britain or Singapore. Could it be, in 1989, Malaysia belatedly woke up to the fact that Singapore was

continuing to act in a sovereign capacity over Pedra Branca and that Malaysia felt compelled to do something? It is sometimes said, Mr. President, that experience is something one acquires after one needs it.

60. The constellation of State activities undertaken by Singapore over such a long period of time is more than enough to support the conclusion, let alone the inference, that Singapore regarded itself as possessing sovereignty over Pedra Branca and acted as such.

61. The fact of the matter is that Singapore made full use of the island. Mr. Brownlie already pointed this out with respect to Britain's activities during the period 1847 to 1851. After 1851, that continued to be the case. Let me place on the screen once again a photograph of the island and its installations. [Slide] And in projecting this photograph, let me recall Sir Elihu's words from the first round, where he said:

> "The fact needs to be borne in mind that Pulau Batu Puteh is a very small place . . . And all of that area — all of that island — was increasingly taken up by the lighthouse and its appurtenances." (CR 2007/24, p. 52, para. 58.)

So, what more was Singapore expected to do?

62. Moreover, it is not simply Singapore's conduct which is relevant to an overall assessment of the issue of sovereignty, Malaysia's conduct is also very telling. In the first place, Malaysia let more than 130 years go by without issuing any protest or reservation over Singapore's activities and without ever mentioning the alleged "permission" claimed to have been given by Johor. Malaysia also disclaimed ownership over Pedra Branca in 1953. Malaysia's meteorological publications listed the rainfall station on Pedra Branca as being "in Singapore", and it published a series of official maps over a 14-year period designating Pedra Branca as Singapore. And it did nothing of its own on the island.

63. Despite Singapore's full use of Pedra Branca and Malaysia's acceptance of that fact, counsel persists in arguing that the operation of a lighthouse is not a basis for a claim to sovereignty. Quite apart from the fact that Singapore also undertook numerous non-lighthouse activities on and around the island, it is instructive, I would suggest, to compare Singapore's use of Pedra Branca with the uses to which other disputed islands have been put in cases recently brought before this Court.

[Slide of Qit'at Jaradah]

64. What you see on the screen now is a photograph of the island of Qit'at Jaradah, taken from the written pleadings in the *Qatar* v. *Bahrain* case. Apart from the presence of a number of private leisure boats around the island, the only thing built on the island was a very modest, unmanned light beacon constructed by Bahrain. But that was sufficient in that case for the Court to determine that sovereignty over the island lay with Bahrain.

[Slide of Pulau Ligitan]

65. Next, let me refer to a photograph of Pulau Ligitan — another small island. All there is on the island in an unmanned light structure and some private fishing huts. And as contrasted with Singapore's long pattern of conduct — and intensive pattern of conduct — relating to Pedra Branca, the only Malaysian *effectivités* that existed with respect to Pulau Ligitan were the light structure, a regulation governing the collection of turtle eggs, and a designation of the island by Malaysia as a protected place, not dissimilar to Singapore's own Protected Places Order with respect to Pedra Branca. Nonetheless, given the absence of any competing Indonesian activities, these acts were sufficient for the Court to rule that Malaysia had sovereignty over the island.

[Slide of Bobel Cay]

66. The photograph that now appears on the screen is one of Bobel Cay. This was one of the islands which was in dispute, as the Court will no doubt recall, in the recent *Nicaragua* v. *Honduras* case. And, although the island is larger than Pedra Branca, there was nothing like the full use of the island that Singapore made with respect to Pedra Branca.

67. Moreover, in contrast to Singapore's activities on Pedra Branca, which, as I said, have been intensive and have spanned a 150-year period, the Honduras activities deemed relevant by the Court were very sporadic and only dated from 1975. Nonetheless, the Court concluded, once again citing both the *Eastern Greenland* and *Minquiers and Ecrehos* cases, that:

> "Having considered the arguments and evidence put forward by the Parties, the Court finds that the *effectivités* invoked by Honduras evidenced an 'intention and will to act as sovereign' and constitute a modest but real display of authority over the four islands." (Judgment of 8 October 2007, para. 208.)

68. Mr. President, Members of the Court, in conclusion. When Singapore's and Malaysia's conduct is taken into consideration as a whole, Singapore firmly believes that it has demonstrated both factually and legally that it acquired, confirmed and maintained its title to Pedra Branca by

Britain's conduct on the island between 1847 and 1851, and by the activities and actions carried out by both Britain and Singapore afterwards, up to the present, both on Pedra Branca and within its territorial waters. Conduct that was *à titre de souverain.*

69. Mr. President, thank you very much for your attention and the Court's patience. That concludes my presentation and I would be grateful if you would now call on Ms Malintoppi. Thank you very much.

The VICE-PRESIDENT, Acting President: Thank you, Mr. Bundy, for your speech. I now call on Ms Malintoppi.

Ms MALINTOPPI: Thank you very much, Mr. President.

## THE ABSENCE OF COMPETING ACTIVITIES BY JOHOR AND MALAYSIA, THIRD STATE CONDUCT, THE ROLE OF THE CARTOGRAPHIC MATERIAL AND MALAYSIA'S RECOGNITION OF SINGAPORE'S SOVEREIGNTY

1. Mr. President, Members of the Court, my intervention today will respond to the arguments raised by Malaysia in the first round presentation regarding the absence of Malaysian *effectivités*, third State conduct, the role of the cartographic materials in this case. I will conclude by briefly recalling a number of points regarding Malaysia's recognition of Singapore's sovereignty.

### A. The absence of competing activities by Johor and Malaysia

2. As the Members of the Court will recall, in my first speech two weeks ago I pointed to a fundamental inconsistency in Malaysia's written pleadings: the fact that Malaysia relies on an original title possessed by the Sultan of Johor while at the same time it is at pains to show conduct said to represent sovereign activity relating to Pedra Branca (CR 2007/22, p. 38, para. 45).

3. Not surprisingly, a number of contradictions and double standards have also emerged from Malaysia's oral arguments. Perhaps the most striking inconsistency is Malaysia's overall approach in relation to its alleged acquisition of title. On the one hand, our distinguished opponents vigorously pleaded the existence of an immemorial title vesting in the native sultans. Sir Elihu Lauterpacht insisted that this is a case "of prior title", not of "competing *effectivités*" (CR 2007/26, p. 36, para. 1). On the other hand, counsel for Malaysia attempted to scrape the

bottom of the barrel in search of some acts showing a modicum of display of sovereignty on the ground.

4. In this part of my presentation, I will address, first, Malaysia's attempts to justify the lack of any competing activities on the disputed island and, second, the five episodes cited by Malaysia as conduct allegedly conferring its original title.

5. As Mr. Bundy recalled just a minute ago, last Tuesday, Sir Elihu dismissed Singapore's statements that Johor and Malaysia never carried out any competing activities over Pedra Branca and related features as "meaningless verbiage" (CR 2007/24, p. 52, para. 58). Counsel's proposition was that, since Pedra Branca's surface is entirely occupied by the lighthouse and related installations built by Singapore, there was no scope for any competing activity by Malaysia.

6. By arguing that no room was left on Pedra Branca for any Malaysian activities, as Mr. Bundy has shown, counsel put the accent on a key aspect of this case: the fact that Singapore has taken possession and made full use of the island. I would add that this was not done overnight, but over a period spanning over more than a century, it was not limited to the pure operation of a lighthouse, and it was done in the complete absence of any objection or opposition on the part of Johor or Malaysia.

7. In any event, Pedra Branca's diminutive size and the fact that its surface had been taken up by the lighthouse and other facilities is hardly an excuse for the absence of any Johor or Malaysian competing activities. After all, Malaysia has repeatedly asserted that, in spite of its size, Pedra Branca was a well-known feature in the region, even at the time of the Sultan and the Temenggong of Johor. To quote Professor Kohen, "PBP . . . se trouvait au milieu d'un sultanat maritime et était utilisée par ses pilotes, par ses pêcheurs et par d'autres habitants depuis toujours" (CR 2007/25, p. 49, para. 42). So, if Pedra Branca was so well known and if such a great number of Johor subjects allegedly frequented its waters since time immemorial, why did Johor not carry out any activities on the island prior to the taking of possession by Great Britain?

8. Why did Johor, and subsequently Malaysia, never adopt any laws or administrative regulations, whether in relation to fishing, territorial sea delimitation or any other matter, expressly referring to the island by its name? Surely, Pedra Branca's size could not have been an impediment to that. The ruler of Johor could also have treated Pedra Branca like he treated Pulau Pisang,

irrespective of the two islands' comparative sizes. He could have issued a written grant giving Singapore the right to operate the lighthouse while reserving sovereignty for himself. As for Johor's successor State, Malaysia, it could also have issued a similar grant or, at a minimum, it could have asked Singapore to stop flying its ensign over Pedra Branca, like it did for Pulau Pisang. Malaysia could have insisted that its officials visiting Pedra Branca would go there freely, without the need to ask for Singapore's permission, as they do when they visit Pulau Pisang. Malaysia could also have investigated shipping accidents in the area of Pedra Branca and its waters, as Singapore did all along. But it only did so too late, in 2003, well after the critical date (CMS, pp. 160-168, paras. 4.159-4.178).

9. Measuring Pedra Branca's size in relation to a soccer field may be an entertaining exercise in advocacy, but it does not detract from the fact that the Sultan of Johor manifested no intention, no interest whatsoever in the island prior to Great Britain's taking of possession in 1847-1851 or thereafter, and that Malaysia cannot avail itself of any official act evidencing either the intention to exercise jurisdiction on the island or any State functions over the island and related features. Had Johor or Malaysia considered Pedra Branca as falling under their sovereignty, they would not have sat and watched for over 130 years while first Britain, and then Singapore, took possession and carried out a variety of acts on the ground which expressly concerned the island. With the greatest respect, Mr. President, it is facile to dismiss all of this as "meaningless verbiage".

**B. The irrelevant episodes cited by Malaysia as conduct confirming its original title**

10. Having emphasized that this case is *not* about "competing *effectivités*", Malaysia then surprisingly proceeded to rely on what counsel characterized as "various examples" of conduct that are said to show that Malaysia "always regarded itself as the sovereign of the three features" (CR 2007/27, p. 12, paras. 2 and 3 (Schrijver)). In actual fact, Malaysia could only come up with a total of five episodes of so-called "conduct" on which it relies. Given that I have already discussed these episodes in my first round presentation, I will not dwell on them at length, but I will limit my comments to a response to Malaysia's first round presentation.

**1. 1969 Continental Shelf Agreement between Indonesia and Malaysia**

11. The first example cited by counsel is the 1969 Continental Shelf Agreement between Indonesia and Malaysia. This agreement does not concern any of the disputed islands which are not mentioned anywhere in its text. The map appearing on the screen shows that Pedra Branca was not taken into account in the delimitation and that the resulting line stops short of Pedra Branca, clearly avoiding it. As you will see on the next slide, on the left is the map reproduced by Malaysia. This image is misleading, because it shows Pedra Branca within the delimitation line. The image on the right, which is carefully plotted, shows the actual situation. By not including the area around Pedra Branca, the parties to the Agreement recognized the fact that the island was not under the sovereignty of either one of them.

**2. The 1968 Petroleum Agreement between Malaysia and Continental Oil Company of Malaysia**

12. The second example referred to by Professor Schrijver is the 1968 Petroleum Agreement between Malaysia and Continental Oil Company. This Agreement is now promoted by Malaysia to the rank of "the granting of oil concessions", while in reality there was only *one* single concession and it was very short-lived. There is no oil licensing practice by the Parties in this case that has a bearing on the determination of sovereignty. Neither Pedra Branca, nor South Ledge nor Middle Rocks is mentioned anywhere in this Agreement, which was concluded without regard to the disputed island. Consequently, there was no reason for Singapore to protest.

**3. Commodore Thanabalasingham's "Letter of Promulgation"**

13. The third example in Professor Schrijver's modest collection is Commodore Thanabalasingham's "Letter of Promulgation" of 1968. This letter and attached chartlets are now upgraded by Malaysia to the rank of "issuing of maps" (CR 2007/27, p. 16, para. 16). Perhaps, the combination of the title "Letter of Promulgation" and the notion of the issuance of maps by Malaysia is intended to give greater weight to these documents.

14. However, the fact remains that these were internal confidential documents and, while Professor Schrijver did mention Singapore's arguments in this respect, not only did he not actually respond to them, but he went as far as stating that the 1968 letter "bears evidence of Malaysia displaying its sovereignty" over the disputed island (CR 2007/27, p. 17, para. 21). Mr. President,

this letter and its attachments are hardly worthy of being described as a "display of sovereignty" over Pedra Branca. They were not open and they were not directed to the territory in dispute. Needless to say, Rear-Admiral Thanabalasingham's visit to Pedra Branca in 1962 also hardly represents evidence of *animus* and *corpus* to act as sovereign. As Professor Crawford noted, this was "not anything like an official visit" and lasted "only for a short time" (CR 2007/26, p. 62, para. 24). Further, as I recalled in the first round (CR 2007/22, p. 40, para. 10), this letter is inconsistent with the conduct of Malaysia. Because in the same year when the letter was written, 1968, Malaysia demanded the lowering of the ensign on the Pulau Pisang lighthouse, while no similar request was made in relation to Pedra Branca. Professor Schrijver chose not to address this point.

**4. The 1969 Territorial Sea Ordinance**

15. The fourth element cited by Malaysia was the 1969 Territorial Sea Ordinance. This legislation was evoked by the distinguished Agent for Malaysia last Tuesday (CR 2007/24, p. 16, para. 34 (Kadir)) and by Professor Schrijver on Friday (CR 2007/27, pp. 17-18, paras. 22-24). However, Malaysia's arguments do not change the fact that the Ordinance does not mention Pedra Branca and its related features at all. The relevant provision, Section 3 (1), is in your folder at tab 28. As you will see, the Ordinance simply refers to "the breadth of the territorial waters of Malaysia". There is no mention of the base points or the territory from which the territorial sea would be measured, and certainly no mention of Pedra Branca, Middle Rocks or South Ledge. The Ordinance thus begs the question of sovereignty entirely.

16. Malaysia asserted in its Counter-Memorial that this legislation "included waters around PBP" (CMM, p. 263, para. 555) and that, "[c]learly in defining its territorial sea Malaysia conceived that PBP fell within it, that it was not Singapore's territory" *(ibid.)*. For his part, Professor Schrijver stated that the "sole conclusion that can be logically deduced" from this Ordinance is that Pedra Branca "was . . . not part of Singapore's territory" (CR 2007/27, p. 18, para. 24). However, Malaysia's contentions do not logically follow because the Ordinance does not specify the coast from which the territorial sea is measured. The fact of the matter is that the

1969 Ordinance bears no relation to sovereignty over Pedra Branca, does not refer to the island, and is irrelevant for the present case.

**5. Alleged fishing by Johor fishermen and alleged policing of waters**

17. The fifth and final element of conduct on which Malaysia relies concerns alleged fishing by Johor fishermen and policing of waters. Professor Schrijver referred to this part of his presentation as "Fisheries regulations and policing". In actual fact, this nomenclature is inaccurate and misleading. As I explained during the first round, the isolated episodes evoked in the affidavits of Johor fishermen, produced by Malaysia with its written pleadings, refer to private and sporadic activities and have nothing to do with sovereign title. There is no evidence of the regulation of fishing activities by Malaysia, and consequently there is no display of sovereign authority. In sum, private acts do not constitute conduct *à titre de souverain*, and no useful conclusions can be drawn from these statements other than noting the rather desperate lengths to which Malaysia has been forced to go to conjure up *effectivités*.

18. As to the alleged policing of waters in the vicinity of Pedra Branca, the documentary evidence produced by Malaysia does not constitute evidence of patrolling that is related specifically to Pedra Branca. Moreover, as Singapore discussed in its first round presentation, the coastal defence of the Parties was conducted jointly for several years and Malaysian vessels were based in Singapore until 1997. Even assuming that Malaysian ships may have occasionally transited in the area of Pedra Branca, the evidence put forward by Malaysia shows no relation between these activities and sovereignty over the disputed features.

**C. Rebuttal of Malaysia's arguments on third State practice**

19. In Malaysia's first round presentation, Professor Schrijver argued that third parties "have never recognized Singapore's sovereignty over the islands" (CR 2007/27, p. 12, para. 2). Notably, he did not go as far as asserting that third States ever recognized Malaysia's sovereignty over the islands, which of course they did not.

20. The description of the evidence of Dutch practice put forward by Professor Schrijver started with two maps of 1842 and 1883 that are said to place the three disputed features outside of the Dutch sphere of influence. In the case of both maps, I would simply note that, if Pedra Branca

appears to be outside the Riau Residency, this does not mean that it was considered by the authors of the maps to fall within the British sphere of influence and certainly not that it belonged to Johor. These maps contain no attribution of sovereignty, and therefore they do not provide any useful indication for purposes of sovereignty.

21. Professor Schrijver also advanced some very defensive arguments concerning the 1850 letter of the Dutch Resident in Riau. He complained that Singapore "upgraded" this letter "out of all proportion" and he referred to it dismissively as just an "internal slip of paper", "not a public document", but "part of an internal correspondence between two Dutch officials", and evidence "so flimsy as not worthy of being taken seriously" (CR 2007/27, 16 November 2007, pp. 21-22, para. 36,). This is another example of Malaysia's double standards. When a document runs against Malaysia's interests, it becomes a mere "slip of paper". However, when a document suits its interests, notably in the case of the internal letter by the then Commodore Thanabalasingham to his officers, then it becomes a display of Malaysia's sovereignty. Malaysia cannot have it both ways.

22. What is significant is that Professor Schrijver, whose mother tongue is Dutch, did not challenge Singapore's translation of the letter's text: "a lighthouse on Pedra Branca *on British territory*". Evidently, he did not subscribe to the comment made by Sir Elihu Lauterpacht in his opening speech that the expression used "is properly construed, as being within the British sphere of influence" (CR 2007/26, p. 21, para. 45). The fact remains that a high-ranking Dutch official clearly considered Pedra Branca to be "on British territory" and this letter, and the presence of Dutch gunboats when the British were undertaking their building activities on the island, represent evidence of the Dutch attitude that Britain had sovereignty over Pedra Branca.

23. It should also be emphasized in this connection that Malaysia has conveniently passed over in silence the 1655 letter of the Dutch Governor of Malacca to the Netherlands East Indies Company in Batavia. As the Court will recall, during Singapore's first round presentation, Professor Pellet pointed to the incorrect and misleading translation of this text made by Malaysia. Malaysia's translation reads: "without his [meaning the ruler of Johor's] command", which is meant to suggest that the Dutch authorities did not dare to take their trading ships in the area without the order of the ruler of Johor. Professor Pellet showed that the possessive "his" has been

gratuitously added by Malaysia and that the correct translation of the text is "in the absence of an express command", referring to the command of the Dutch authorities. Professor Crawford, while mentioning this letter in passing, did not question Singapore's translation (CR 2007/24, pp. 61-62, para. 14). Consequently, what Singapore stated in its written pleadings and in the first round presentation still stands (RS, pp. 25-26, paras. 2.41-2.43; SR, Ann. 8;. CR 2007/20, pp. 56-58, paras. 11-14 (Pellet)).

24. As to the practice of Great Britain, permit me to respond briefly to Professor Schrijver's arguments regarding the survey undertaken by the British ship HMS *Dampier*. As the Court will recall, clearance was requested by the British Royal Navy with the Malaysian Ministry of Defence "to carry out surveys in West Malaysia". There was no mention in this request of Pedra Branca or related features. Moreover, the request took place in 1967 at a time when the British fleet was based in Singapore and did not need Singapore's permission to travel to and from Singapore's waters. It is a remarkable stretch of the imagination to conclude, as Malaysia does, that this episode represents "the perception of the United Kingdom [that] the three features form part of *Malaysian* territory" (CR 2007/27, p. 24, para. 44 (Schrijver); emphasis in original).

25. With respect to the so-called "Indonesian practice" referred to by Malaysia, I have already dealt with the 1969 Indonesia/Malaysia Continental Shelf Agreement. As to the 1973 Territorial Sea Agreement between Indonesia and Singapore, as pointed out in Singapore's Counter-Memorial (pp. 159-160, paras. 6.67-6.70), this treaty was not intended to carry out a complete maritime delimitation of the Contracting Parties' zones. The authoritative study on maritime boundaries by Charney and Alexander observes in this regard that "the delimitation in this agreement has been left 'unfinished' except in the heavily navigated portion of the Strait of Singapore" (*International Maritime Boundaries*, Vol. I (1993), p. 1052). What is more, the same approach was adopted in the Malaysia/Indonesia Territorial Sea Agreement of 1970, which also did not effect a complete delimitation but was limited to the busy area of the Malacca Strait. In that agreement as well Pedra Branca was "forgotten", to use Malaysia's terminology. The fact of the matter is that none of these agreements concerned Pedra Branca, Middle Rocks or South Ledge.

26. What Professor Schrijver calls "the practice of other States in the region" is represented by the naval patrols jointly undertaken by Malaysia with Australia, New Zealand and the United

Kingdom within the framework of the 1957 Anglo-Malayan Defence Agreement, and certain United States maps that do not depict Pedra Branca. This material is said to be evidence of an appreciation that Pedra Branca was Malaysian. Frankly, it is impossible to see where such an appreciation can be found. The fact that these were *joint* patrols cannot provide evidence of an *opinio juris*. Moreover, Malaysia fails to mention that scope of the defence agreement covers the territory of Singapore. As for the United States maps, Malaysia finds them significant for what they do *not* show, i.e., for the fact that they do *not* depict Pedra Branca or that they do *not* show maritime lines around or near Pedra Branca. But attribution of sovereignty cannot be established by the absence of a feature or the absence of a maritime delimitation line on a map.

27. Before I leave the subject of Malaysia's treatment of third-State practice, I would like to add a few words about the press release of the Philippine Ministry of Foreign Affairs regarding the 2005 collision of the *Everise Glory* and *Uni Concord* in the waters off Pedra Branca. The Court will recall that the communiqué of the Philippine Foreign Ministry stated that the incident took place "off Pedra Branca, Singapore". Malaysia has found nothing better to say in response to these facts than to argue that the Philippines was biased against Malaysia due to its "long-standing claims over parts of Malaysian territory" (CR 2007/27, p. 27, para. 54 (Schrijver)). This argument is not only speculative, but it is also *non sequitur*. What do the Philippines territorial claims in the area of Sabah have to do with its acknowledgment of Singapore's sovereignty over Pedra Branca? In any event, this Court is concerned with facts and not speculation and the fact is that this document recognizes that Pedra Branca is part of Singapore's territory.

**D. The role of the cartographic material**

28. I now turn to the role of the cartographic material. Malaysia's treatment of maps, like many other aspects of its case, is inconsistent. The Court is invited to assign weight to maps when Malaysia thinks they support its case, but when Malaysia's own official cartography shows Pedra Branca as appertaining to Singapore — and this applies not to one, but to six maps published over a period of 13 years, well before the critical date — then Malaysia asks the Court to disregard them as irrelevant.

29. In spite of the efforts of our opponents to deploy maps to buttress Malaysia's claim, the basic proposition made by Singapore in its first round presentation still stands: in most cases maps are the evidence of a confirmatory kind and can establish sovereign title only in exceptional circumstances. Where the Parties disagree is on the role to be assigned to the official maps issued by Malaysia supporting Singapore's claim. I shall revert to these maps momentarily. But first, I would like to recall two international precedents that have discussed the relevance of maps in territorial disputes. Perhaps the most celebrated dictum on the subject is that pronounced by the Chamber of the Court in the *Burkina Faso/Mali* case. It is so well known that I will not read it into the record, but the citation can be found in the transcript later:

> "merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; also cited with approval *Kasikili/Sedudu Island (Bostwana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84. See, also, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Judgment of 8 October 2007, para. 215.).

30. But, going back in time, in the *Island of Palmas* arbitration, Max Huber summarized very effectively the role of maps in territorial disputes. The relevant passage of the Award is quite lengthy, but it deserves to be quoted in full: it is also at tab 29 of the judges' folders:

> "[O]nly with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute — supposing that they are accurate — to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps — as seems very often to be the case — but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.
>
> If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.
>
> The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy." (*Island of Palmas (Netherlands/United States of America)*, 4 April 1928, *RIAA*, Vol. II, pp. 852-853.)

31. This passage, which was cited with approval by this Court no later than last month in the *Nicaragua* v. *Honduras* Judgment (para. 214), highlights the main points which can be made in relation to cartography in the present dispute:

[On screen]

— maps should also be taken with great caution in deciding sovereignty issues;

— ancient maps are particularly wanting in accuracy;

— maps that do not indicate precisely political attributions should be rejected outright, unless they contribute to the accurate location of geographical names;

— official maps have special interest when they do not assert the sovereignty of the government that issued them;

— no weight can be attached to the maps if the Court is satisfied that legal facts exist contradicting the statements of cartographers.

**Maps should be taken with great caution, ancient maps are wanting in accuracy: the early maps in this case**

32. If we now apply these principles to the present case, the notion that maps should be treated with great caution in matters relating to sovereignty becomes apparent. With respect to the early maps, it is a truism to say that they often lack accuracy or geographic precision. In the present case, the sources of the majority of these maps are unknown, there is rarely evidence that they were commissioned or even seen by the local rulers, or that they were based on accurate surveys of the relevant regions. Moreover, the colours, labels and various designations appearing on them are inconsistent and do not show that Pedra Branca was attributed to any particular sovereign. Not only are these maps irrelevant to prove the existence of a sovereign title over Pedra Branca vesting on Johor, they also do not demonstrate a general opinion or repute that the islands appertained to Johor.

33. On Wednesday, Professor Crawford argued that Pedra Branca was not *terra nullius* because it appeared "by name in the earliest maps of the region and was marked as falling within the domains of Johor" (CR 2007/25, p. 15, para. 10). He cited four maps. None of these early maps contain any attribution of territory to any specific ruler. The mere fact that an old map may depict a feature such as Pedra Branca does not mean that such feature was not *terra nullius* or that

it necessarily belonged to any particular sovereign entity. The same reasoning applies to the early maps shown by Ms Nevill in her presentation.

34. In this connection, it is worth recalling that the Tribunal in *Eritrea/Yemen* was also confronted with a large number of maps from the eighteenth and early nineteenth centuries adduced by Yemen in support of its arguments based on an historic title. The Tribunal concluded that the maps contained no attribution of the disputed islands to Yemen, and stated as follows, in relevant part (tab 30 of the judges' folders):

> "It appears not unreasonable to infer from the map evidence that rulers (including in particular the Imam of Yemen) of Southern Arabia before the 1872 Ottoman conquest probably did perceive that the Islands fell within their territorial claim as part of Yemen or of the Arabian coast. However this impression must be qualified by the fact that it is not possible to evaluate the *colour* of maps produced during periods when hand-colouring had to be applied to maps at a second stage. These factors are therefore not determinative with regard to the issue of reversionary historic title. Moreover, there is no evidence that Southern Arabian rulers themselves ever saw or authorized these maps. Conclusions based on this material would be tenuous at best." (*Eritrea/Yemen*, Award in the First Stage, 9 October 1998, para. 370; emphasis in the original.)

35. Similarly to *Eritrea/Yemen*, there is no evidence in the present case that the maps in question had any official "imprimatur" from a local ruler, and there is no attribution of territory in them. The colours applied to islands and continents are meant to embellish, not to indicate political attributions, just like the mythical animals and sea monsters that appear here and there are drawn not to reflect reality, but to underline the exotic nature of faraway lands. This has nothing to do with the attribution of territory.

36. With respect to the 1849 map of Singapore and dependencies that was relied on by Ms Nevill as confirmatory evidence that Pedra Branca was not part of Singapore at the time (CR 2007/27, p. 42, para. 48), Pedra Branca may not appear on this map, but what legal conclusion can be drawn from that? In 1849, the British Government was still undertaking the building activities on Pedra Branca. The same can be said of the 1852 copy of the map of Singapore and dependencies (RM, Vol. 2, map. 1); this merely repeats the information already contained in the first map.

**Maps that do not indicate precisely political attributions: maps showing lines at sea and maps of Singapore not showing Pedra Branca**

37. Ms Nevill displayed last week a series of twentieth century maps depicting lines at sea and repeated, like a comforting mantra, the words "again, and again and again" to signify that these maps showed Pedra Branca appertaining to Johor or Malaysia (CR 2007/27, pp. 35-40, paras. 21-39). However, flashing on the screen a successive series of maps, each one with a different history, provenance and purpose, may be superficially suggestive, but it falls far short of proving sovereignty where sovereignty does not exist.

38. If one looks closely at these maps, it becomes apparent that the provenance of the lines at sea shown is unexplained and without legal pedigree. Dotted lines appear to have been drawn quite arbitrarily without regard to where the lines were derived from. Consequently, they have no import for purposes of delimitation of boundaries or attribution of territory, for the only lines that do have legal relevance are those that result from existing maritime delimitations.

39. As can be seen from the map shown on the screen, which is also in the folders under tab 31, the only maritime boundary in the region prior to 1969 was the boundary between the main island of Singapore and Johor agreed in 1927. The rest of the waters was completely undelimited until the 1969 Malaysia/Indonesia Continental Shelf Agreement, which was followed by the 1970 Malaysia/Indonesia Territorial Sea Agreement and the 1973 Singapore/Indonesia Territorial Sea Agreement.

40. The lines shown on this illustrative map are the only genuine boundary lines existing in the area. The remaining maritime zones are undelimited, including, notably, the area around Pedra Branca. As for the "territorial or maritime allocations lines", which Ms Nevill, using a curious terminology, States are depicted on certain maps, they have no legal import. Either there is a boundary delimitation or there is not one.

41. The map on the screen — only one map, Mr. President, showing the actual maritime delimitations in the area — is sufficient to show that the only delimitations that do have legal relevance, the only "legally relevant facts", did not concern Pedra Branca, Middle Rocks or South Ledge.

42. Finally, Malaysia attaches importance to the maps of Johor showing Pedra Branca while stating that little weight can be placed on the maps of Johor which *do not* show Pedra Branca. But

such maps exist, and this is a fact. It is also a fact that none of the maps shown by Malaysia can be dispositive of title. Let us not forget Max Huber's lesson, which I mentioned earlier, and which was recently recalled by this Court in *Nicaragua* v. *Honduras*: "Any maps which do not precisely indicate the political distribution of territories . . . clearly marked as such, must be rejected forthwith." (*Island of Palmas*, 4 April 1928, *RIAA*, Vol. II, pp. 852-853; *Nicaragua* v. *Honduras*, Judgment of 8 October 2007, para. 214.)

43. It is also worth recalling this statement when Malaysia asserts that the absence of maps issued by Singapore including Pedra Branca is "completely at odds with its claim" (CR 2007/27, p. 46, para. 63.) However, these maps are not political maps. Pedra Branca is very small and uninhabited, and the maps' geographical scope is limited to the main island of Singapore and the islands in the immediate vicinity. Moreover, none of the maps of Singapore indicate that Pedra Branca belongs to Malaysia as do official maps of Malaysia issued between 1962 and 1975.

**Official maps that do not assert the sovereignty of the government that issued them: Malaysia's admissions against interest maps**

44. These maps, the maps issued by Malaysia, are entitled to considerable probative weight as evidence of Malaysia's own view as to Singapore's title over Pedra Branca. It is telling that only one of these so-called maps as "admissions against interest" was reproduced by Malaysia in its judges' folders. After all, Malaysia was certainly not stingy in its compilation, since it reproduced a large number of maps in its folders, practically another atlas. Five more maps would hardly have made a difference. Be that as it may, Malaysia's own official maps are indeed embarrassing as they stand as clear statements of Malaysia's view that Pedra Branca belonged to Singapore just as did the other territory labelled as "Singapore" that I showed in my first round presentation.

45. The importance of these maps as admissions against interest is not diminished by the disclaimers they carry. In fact, Malaysia's treatment of the disclaimers appearing on its official maps provides yet another example of its double standards. No attention is called to disclaimers when they appear on maps that suit Malaysia's purposes, but suddenly they become important when it comes to Malaysia's admissions against interests. However, Malaysia forgets the dictum in *Eritrea/Ethiopia* when the Boundary Commission stated that, even in the presence of a disclaimer,

a "map still stands as a statement of geographical fact, especially when the State adversely affected itself produced and disseminated it, even against its own interest" (Decision of 13 April 2002, 41 *International Legal Materials* 1057 (2002), p. 28, para. 3.27).

46. Ms Nevill resorted to punctuation to explain away this map evidence when she looked for assistance at the presence or absence of brackets, while at the same time she was anxious to label as "factual" her speculative explanations regarding the notation "SINGAPORE" appearing on the maps. In reality, Ms Nevill's "factual" arguments were entirely the fruit of her imagination. I need not repeat them, I will simply let the maps speak for themselves, for these maps [put on screen maps and legends] represent the true facts, as they stood in 1962, again in 1962, 1965, 1970, 1974 and 1975.

**E. Malaysia's recognition of Singapore's sovereignty**

I now turn to my final topic, with your permission: Malaysia's recognition of Singapore's sovereignty.

47. During Singapore's first round presentation, Professor Pellet recalled how — by its acts and omissions — Malaysia recognized Singapore's sovereignty over Pedra Branca. Significantly, this part of Singapore's presentation was largely ignored by Malaysia last week. Notwithstanding this, Malaysia's acts of recognition represent yet another piece of the puzzle that is consistent with Singapore's case. Rather than repeat all that Singapore had to say on the subject, I will stress a few points discussed by Professor Pellet in the first round. And with his permission, I will borrow his words, which can serve as a preface to my brief comments: "Tout s'enchaîne, Monsieur le président."

— Leaving aside the map evidence, which constitutes the first element of the express recognition by Malaysia, we have Malaysia's 130 years of silence in the face of Singapore's open, continuous, peaceful and uninterrupted activities on Pedra Branca. This stands as evidence of its implied recognition and/or acquiescence.

— The third element is represented by Malaysia's further acts of express recognition of Singapore's sovereignty, which include:

(i) the disclaimer by Johor in 1953 which Professor Pellet will come back to after my presentation;

(ii) the 1969 Continental Shelf Agreement concluded with Indonesia, which deliberately refrained from extending the limit of the Parties' respective continental shelves to the vicinity of Pedra Branca;

(iii) the requests for permission addressed by Malaysian entities to Singapore authorities to undertake activities on Pedra Branca and surrounding waters before and after the publication of the 1979 map;

(iv) the elements relating to the Straits Lights that Mr. Bundy has discussed; and

(v) the listing of the rainfall station on Pedra Branca as being "in Singapore" in Malaysia's official meteorological publications, which he also mentioned earlier.

**Conclusion**

48. In conclusion, Mr. President, distinguished Members of the Court, despite the eloquence displayed by our colleagues on the other side of the Bar, Malaysia has simply been unable to prove the underlying prerequisite for its claim, namely that it had prior title. Malaysia's theory of immemorial title is nothing but a house of cards. The puzzle that Singapore has assembled on the other hand fits perfectly well. Every piece has its place and all the pieces assembled together confirm that Singapore has sovereign title over Pedra Branca and the other two disputed features.

Mr. President, Members of the Court, I thank you very much for your attention. This brings me to a conclusion, and may I ask you to call on Professor Pellet to continue with this presentation.

The VICE-PRESIDENT, Acting President: Thank you very much, Ms Malintoppi, for your speech. I shall call on Professor Pellet after the brief and customary break that I think is now a convenient time to take.

*The Court adjourned from 11.25 to 11.40 a.m.*

The VICE-PRESIDENT, Acting President: Please be seated. Professor Pellet, please take the floor.

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

## LE «DISCLAIMER» DE 1953 ET LA PERTINENCE DE L'ARRÊT DE 2002 *(LIGITAN ET SIPADAN)*

1. Monsieur le président, Messieurs les juges, il m'appartient ce matin de faire deux choses assez différentes. Dans un premier temps, je vais revenir sur la «renonciation» — le *disclaimer* de 1953. Puis, dans un second temps, je m'efforcerai de mettre en lumière à la fois les ressemblances, très frappantes, et les différences, qui existent entre l'affaire qui nous réunit et celle qui a donné lieu à votre arrêt de 2002 sur la *Souveraineté relative à Pulau Ligitan et Pulau Sipadan*.

### I. Le «disclaimer» de 1953

2. Monsieur le président, nos amis de l'autre côté de la barre se sont efforcés, avec une belle constance, de minimiser l'importance de la correspondance de 1953. Je les comprends, mais — ça ne vous étonnera pas beaucoup — je ne partage pas ce point de vue :

— la demande de Singapour constituait une précaution tout à l'honneur de l'administration coloniale britannique, mais, si elle reflétait un doute de la part de certains fonctionnaires de la colonie, elle ne pouvait avoir, en elle-même, la moindre conséquence sur le statut de l'île, surtout lorsqu'on la remet en perspective ;

— l'utilisation du mot «propriété» («ownership») ne saurait faire oublier que cette démarche portait sur l'île de Pedra Branca (afin d'en fixer, le cas échéant, la mer territoriale) et non sur le phare Horsburgh ; et

— la réponse du secrétaire d'Etat de Johor constitue bien davantage qu'un «official geographical statement», «une déclaration officielle ayant trait à la géographie», à laquelle la Malaisie s'efforce de la réduire[1].

Avec votre permission, je vais, Monsieur le président, réagir à ces trois arguments — les seuls avancés par la Malaisie sur ce problème crucial. Mais, pour le reste, je me permets de vous renvoyer, Messieurs de la Cour, à nos précédentes plaidoiries, tant écrites qu'orales[2].

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[1] Voir CR 2007/24, p. 54, par. 64 (Lauterpacht).

[2] Voir MS, chap. VII, «Johor's Express Disclaimer of Title to Pedra Branca», p. 161-178 ; CMS, chap. VII, «The 1953 Correspondence Confirms Singapore's Title», p. 181-199, et RS, chap. VII, «Malaysia's Formal Disclaimer of Title», p. 221-232 ; voir aussi CR 2007/20, p. 22, par. 29 (Koh), p. 30, par. 27 (Chao) ; CR 2007/23, p. 21-33 (Pellet).

3. Monsieur le président, dans les deux brèves interventions qu'il a consacrées à la lettre de 1953, sir Elihu Lauterpacht, que je suis heureux de revoir parmi nous aujourd'hui, réduit cet épisode à la demande d'information formulée par la lettre du *Master Attendant* au nom du secrétaire colonial en date du 12 juin 1953, et à la réponse du secrétaire d'Etat de Johor du 21 septembre suivant[3]. Ce faisant, il néglige une partie importante du dossier, qui concerne ce qui s'est passé aussi bien avant qu'après cet échange de lettres et qui en éclaire la portée.

4. Contrairement à ce qu'affirme mon éminent contradicteur, «nous ne devons [pas] partir de la lettre de Singapour du 12 juin 1953…»[4]. Comme je l'avais indiqué le 9 novembre[5], le véritable point de départ de cette affaire dans l'affaire remonte au moins à septembre 1952, lorsque l'administration des domaines (le Land Office) de Singapour fut chargé «to investigate the facts of the position regarding the erection of lighthouses *by the Straits Settlements Government* on Pulau Pisang and also on Pedra Branca…»[6]. Et je note au passage, Monsieur le président, «by the Straits Settlements Government» (par le gouvernement des Etablissements des détroits), pas par des marchands dans le cadre de je ne sais quelle initiative privée.

5. Que se passe-t-il ensuite ? D'abord, le *Chief Surveyor* rappelle sa ferme position de 1937 : «Singapore should claim a 3 mile limit round this point», et le *Master Attendant* semble endosser cette position et, quelques mois plus tard, s'impatiente de ce qu'aucune décision n'ait été prise à cet égard[7]. C'est important car cela montre la raison pour laquelle, peu après, Singapour s'enquiert du statut juridique de Pedra Branca par la lettre du 12 juin 1953 : cette démarche est liée à la délimitation de la mer territoriale de l'île ; et les autorités de Johor ne pouvaient avoir aucun doute sur cet objectif, que rappelle le premier paragraphe de la lettre de Higham[8], et qui relève éminemment de préoccupations de droit public.

6. Monsieur le président, en relisant le compte rendu de l'audience de mercredi dernier, j'ai eu un peu de mal à comprendre ce qu'a voulu dire mon ami Marcelo Kohen sur la portée de cette

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[3] Voir CR 2007/24, p. 53-55, par. 62-67 ; et CR 2007/26, p. 51-55, par. 54-66.

[4] CR 2007/26.

[5] CR 2007/23, p. 23, par. 7.

[6] MS, annexe 90 ; les italiques sont de nous.

[7] MS, annexe 91.

[8] MS, annexe 93.

lettre[9]. Je retiens cependant qu'il reconnaît que «la demande d'information formulée à Johore par les autorités coloniales britanniques … reposait sur une information erronée»[10]. Nous en sommes d'accord et, comme je l'avais expliqué moi-même, cette erreur tient à l'ajout manuscrit erroné de «Pedra Branca» sur une annexe qui, en réalité, concernait Peak Rock[11]. Je note au demeurant que ni le professeur Kohen ni sir Elihu n'ont expliqué comment il aurait pu s'agir de Pedra Branca alors que le gouverneur Butterworth, auteur de l'annexe en question, définit le «rock» dont il s'agit «with reference to Pedra Branca» («par rapport à Pedra Branca»).

**Projection 1 — Lettre de Higham, au nom du Colonial Secretary au British Adviser (Johore) (MS, annexe 93) (dossier de plaidoiries, onglet 32)**

7. Au demeurant, il va de soi, que la lettre de Higham ne témoignait d'aucune conviction — sinon de celle que Singapour avait, en tout cas, des droits et des obligations à l'égard de l'île du fait de la construction et de l'entretien du phare *par le gouvernement de la colonie* — et je note à nouveau : *«by the Colony Government»*, et décidément pas par des marchands. Mais pour le reste, Higham se borne à poser une question. Et, quoi qu'en dise la Malaisie[12], celle-ci n'excluait évidemment pas que Singapour exerçât la souveraineté sur l'île : «The matter» he wrote «is relevant to the determination of the boundaries of the Colony's territorial waters». C'est du statut *de l'île* qu'il s'agissait.

[Fin de la projection 1.]

**Projection 2 — Lettre du State Secretary (Johore) du 21 septembre 1953 (MS, annexe 96) (dossier de plaidoiries, onglet 33)**

8. Et c'est bien ainsi que la demande a été comprise par Johor. Adressée au *British Adviser*, avec copie au *Chief Secretary* de la Fédération de Malaya, c'est à ce dernier qu'il revint de répondre, après des consultations soigneuses, «sur la question du statut de Pedra Branca» («on the question of the status of Pedra Branca»)[13] — de l'île de Pedra Branca, pas du phare Horsburgh ; du statut et pas simplement de la propriété — ce qui montre que Johor à l'époque n'a pas donné de la

[9] Voir CR 2007/25, p. 61, par. 83-84.

[10] *Ibid.*, par. 84.

[11] Voir CR 2007/23, p. 24-25, par. 9.

[12] Voir surtout CR 2007/26, p. 52-53, par. 60-62 (Lauterpacht).

[13] Voir MS, annexe 97 ; voir aussi CR 2007/23, p. 25, par. 10, et p. 26-27, par. 13.

demande de Higham l'interprétation étroite que la Malaisie affecte de retenir aujourd'hui. Et c'est dans cette perspective que le *State Secretary* (*Acting State Secretary* — mais ceci ne change rien à la portée juridique de sa réponse : je plaide aujourd'hui devant un *Acting President*, il a envers moi et nous tous dans cette salle, les mêmes droits que le président si elle présidait elle-même cette audience) — le *State Secretary* donc répond : «the Johore Gouvernement does not claim ownership of Pedra Branca» («le gouvernement de Johore ne revendique pas la propriété de Pedra Branca»).

9. Le contexte le montre clairement : le terme «ownership» est utilisé ici comme un équivalent de «sovereignty». Et l'on ne saurait le reprocher aux autorités de Johor ; la Malaisie moins que personne, qui, dans ses écritures, fait elle-même ce qu'elle considère être une confusion malencontreuse — par exemple lorsqu'elle soutient que «Singapore fails to provide any evidence as to why the article in the *Singapore Free Press* would not have given an accurate account of the *ownership* of PBP at the time it was written»[14]. Il est pourtant clair que la Partie malaisienne ne voulait pas dire ici «propriété», de Pedra Branca dans le sens du droit privé, mais bien «souveraineté».

[Fin de la projection 2.]

10. On retrouve d'ailleurs cette utilisation interchangeable des deux termes dans la jurisprudence arbitrale. C'est le cas de la sentence rendue dans l'affaire opposant l'Erythrée au Yémen, qu'a citée sir Elihu[15]. Pour n'en donner qu'un seul exemple, mais particulièrement pertinent dans notre affaire, le tribunal considère que «[t]he ownership over adjacent islands undoubtedly generates a right to a corresponding territorial sea»[16]. Et l'on ne peut pas raisonnablement prétendre que le tribunal avait à l'esprit la propriété en tant qu'institution de droit privé. Seule la souveraineté sur l'île peut générer une mer territoriale. Et telle est précisément la question qui était à l'origine de la correspondance de 1953. Et ce n'est sûrement pas mon ami le professeur Schrijver qui me démentira : il a cité sans ciller ce même extrait de la sentence de 1998 dans sa plaidoirie de jeudi dernier[17].

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[14] RM, p. 46, par. 99 ; les italiques sont de nous.

[15] CR 2007/26, p. 54, par. 64.

[16] Sentence arbitrale du 9 octobre 1998, *RSA*, vol. XXII, p. 317, par. 474. Voir aussi p. 219, par. 19.

[17] CR 2007/26, p. 27, par. 15.

11. L'*Attorney-General* ne s'est pas non plus mépris sur le sens de la réponse : sans sembler partager non plus l'opinion catégorique de sir Elihu selon laquelle «ownership» ne pourrait être qu'un concept de droit privé[18], cet éminent juriste en déduit aussitôt que Singapour peut revendiquer Pedra Branca comme faisant partie du territoire de Singapour («We can claim Pedra Branca as Singapore territory»)[19]. Ou dans les termes du *Master Attendant* cette fois tels qu'ils apparaissent sous sa plume dans la lettre du 15 février 1958 que Rodman Bundy a citée tout à l'heure — cette lettre se trouve sous l'onglet 26 du dossier de plaidoiries — «Pedra Branca is a colony territory».

12. «Claim»… Voici un autre mot que le savant avocat de la Malaisie s'efforce d'interpréter en le séparant de son contexte. Commentant la position de l'*Attorney-General*, il affirme : «That observation looks to the future. As to the past, it merely reflects Singapore's uncertainty regarding its title prior to 1953.»[20] Outre que c'est là une interprétation bien restrictive du mot «claim», je relève que, quand bien même elle serait avérée, il y a une singulière communauté de vues entre le *State Secretary* de Johor et l'*Attorney-General* de Singapour. Tous deux (à en croire notre contradicteur) se projettent vers l'avenir : l'un au nom de Johor dit «nous n'avons pas de revendication» ; l'autre au nom de Singapour dit : «nous avons une revendication» — et, comme je l'ai montré, dans les deux cas, cette revendication ou non-revendication porte sur la souveraineté sur Pedra Branca. La conclusion me paraît s'imposer (comme elle s'est imposée à la Cour permanente dans l'affaire du *Groënland oriental* — et sur la base de faits pourtant autrement moins convaincants que ceux de la présente affaire)[21] : la Malaisie n'a pas de revendication ; Singapour a une revendication ; en l'absence de contestation par un tiers, je vois mal comment la Cour pourrait ne pas y faire droit.

13. Au surplus, il paraît difficile de confiner à l'avenir la portée de la correspondance de 1953 car si Johor indique n'avoir aucune revendication sur Pedra Branca, c'est évidemment qu'il estime n'avoir aucun droit sur celle-ci. Et, je l'ai rappelé[22], il ne s'agit pas d'une indication donnée

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[18] CR 2007/26, p. 53, par. 63.

[19] MM, annexe 70.

[20] CR 2007/26, p. 54, par. 64.

[21] Voir CR 2007/23, p. 31-33, par. 25-31.

[22] CR 2007/23, p. 25, par. 10 et p. 29, par. 19 (Pellet).

«comme ça», «en l'air» — les Etats agissent rarement aussi légèrement lorsque leur intégrité territoriale est en jeu ; et, en l'espèce, le *State Secretary* a pris son temps pour répondre et a consulté le *Commissioner for Lands and Mines*, le *Chief Surveyor* et les archives existantes[23]. Certes, il ne s'agit pas d'une cession de territoire[24], mais c'est la constatation par Johor, une constatation raisonnée et informée, de l'absence de titre sur Pedra Branca.

14. M. Lauterpacht, s'abritant derrière l'autorité de Hyde, a eu l'idée singulière d'assimiler ce *disclaimer* — très formel, quoi qu'il en ait dit — à un «official geographical statement»[25]. Mais il ne s'agit en aucune manière d'une «déclaration géographique» ! Le *State Secretary* n'est pas un cartographe ou un géographe — professions parfaitement estimables mais qui, en effet, ne donnent aucun titre à leurs membres pour engager l'Etat dans ses relations internationales. Il en va bien sûr différemment du *State Secretary* dont j'ai indiqué dans ma précédente présentation sur ce point qu'il était, en vertu de la Constitution de Johor (on le cite dans celle qui était en vigueur alors), «le *plus haut fonctionnaire* en charge des affaires administratives de l'Etat»[26].

15. Monsieur le président, la correspondance de 1953 revêt une valeur confirmative. Sir Elihu affecte de s'en gausser[27]. Mais ce qui me conduit à cette constatation ce n'est pas le dilemme dont il nous dit prisonniers ; ce sont les circonstances particulières de l'affaire que la Malaisie et Singapour vous ont soumise. Mon éminent contradicteur affirme que, pour apprécier la portée de la lettre du 21 septembre 1953 «there were only two possibilities… Either Singapore had sovereignty … or it did not have sovereignty.»[28] Voici qui relève assurément du bon sens le plus robuste. Et, comme c'est, bien sûr, la première de ces deux éventualités qui est vérifiée, ainsi que nous avons eu l'honneur de le montrer tout au long de ces plaidoiries, je vois mal ce que la lettre de 1953 pourrait faire d'autre que de confirmer la souveraineté acquise par la Grande-Bretagne plus d'un siècle plus tôt, et maintenu constamment depuis lors.

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[23] Cf. MS, annexe 95.

[24] Voir CR 2007/27, p. 66, par. 11 (Crawford).

[25] CR 2007/24, p. 54, par. 64.

[26] MS, annexe 88, art. VI 1) ; voir CR 2007/23, p. 32, par. 28.

[27] CR 2007/26, p. 52, par. 58.

[28] *Ibid.*, p. 51, par. 55.

16. Imaginons maintenant, Monsieur le président, aux seules fins de la discussion, que Singapour n'ait pas eu de titre à ce moment-là. La lettre de 1953 aurait-elle pu le lui conférer ; constituer ce titre ou la «racine d'un titre» («a root of title»)[29] ? Nous ne le prétendons pas. Mais je crois qu'elle pourrait au moins constituer la preuve que le titre ancien, «immémorial» dont la Malaisie se prévaut s'était éteint et que celle-ci ne le revendiquait plus faute de l'avoir maintenu durant une très longue période. Elle ne le revendiquait plus en 1953, elle ne pourrait pas le ressusciter aujourd'hui.

17. Mais, je le répète, ce n'est pas ainsi que le problème se pose : en réalité Singapour *avait* un titre que sa prise de possession de l'île en 1847-1851 a établi et qui s'est perpétué par une occupation paisible et incontestée se traduisant par l'exercice continu des fonctions étatiques. Ce titre a été confirmé par la reconnaissance dont il a bénéficié de la part des autres Etats — y compris la Malaisie et, de façon particulièrement éclatante, par l'échange de correspondance de 1953.

## II. De la souveraineté sur Ligitan et Sipadan à la souveraineté sur Pedra Branca, Middle Rocks et South Ledge

18. Monsieur le président, j'en viens maintenant, sans autre transition, à la partie conclusive de mon exposé. Elle sera pour moi l'occasion de mettre en parallèle l'affaire qui nous occupe avec celle sur la *Souveraineté sur Pulau Ligitan et Pulau Sipadan* qui a fait l'objet de l'arrêt du 17 décembre 2002 ; ou plutôt, de les comparer, car il est difficile de parler de parallèles (des lignes parallèles se définissent par le fait qu'elles ne se rencontrent jamais aussi loin qu'on les prolonge : en l'occurrence, les lignes forces des deux affaires se rencontrent, pour dire le moins). Pour dire les choses simplement : les deux affaires se «ressemblent» en ce sens que les problèmes juridiques s'y posent, *mutatis mutandis*, de la même manière et que Singapour peut (avec encore plus de vraisemblance) faire valoir à l'appui de sa thèse les arguments qui ont permis (il serait plus exact de dire : *l'*argument qui *a* permis) à la Malaisie de voir reconnaître son titre sur Ligitan et Sipadan ; mais elles sont différentes car nombre des moyens que la Cour a écartés dans son arrêt de 2002 sont ici avérés — à l'avantage de Singapour qui peut, en outre, se prévaloir d'un titre indiscutable, qui faisait défaut dans l'affaire des deux îles.

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[29] Cf. *ibid.*, p. 52, par. 57.

19. Monsieur le président, l'arrêt de 2002 est construit comme un véritable roman policier (qui pourrait s'intituler : *A la recherche du titre caché*) :

— la Cour s'interroge d'abord, longuement, sur la question de savoir si la convention de 1891 entre la Grande-Bretagne et les Pays-Bas avait créé un titre conventionnel sur les îles en faveur de l'Indonésie ;

— ayant répondu à cette question par la négative, elle se demande si l'une ou l'autre des Parties ne serait pas devenue détentrice du titre sur Ligitan et Sipadan par voie de succession ; elle répond à nouveau négativement ;

— ne restent alors que les effectivités, dont elle constate que «faute de mieux», elles doivent conduire à reconnaître la souveraineté de la Malaisie sur les îles contestées.

20. Si l'on refait la même enquête dans notre affaire, Monsieur le président, les investigations se révèlent moins difficiles et conduisent à des conclusions moins décevantes :

1) le titre originel dont se prévaut la Malaisie est imaginaire — mais l'arrêt de 2002 montre que là n'est pas la question, contrairement à ce que nos amis de l'autre côté de la barre s'obstinent à essayer de faire croire ;

2) en revanche, le titre acquis par Singapour du fait de sa prise de possession de Pedra Branca est bel et bon ; et

3) plus nettement encore que la Malaisie s'agissant de Ligitan et Sipadan, Singapour peut invoquer des activités nombreuses «révélant l'intention d'exercer des fonctions étatiques à l'égard» de l'île (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 685, par. 148).

Ce sont ces trois aspects que je développerai brièvement. Ma première proposition est la suivante.

## 1. L'arrêt de 2002 montre que la question du titre originel n'est pas déterminante pour régler la question posée à la Cour

21. L'un des points communs aux deux affaires est que les Parties se sont longuement affrontées, aussi bien oralement qu'à l'écrit, sur la question de savoir s'il existait un titre originel

— ou originaire — sur les îles en litige[30] — avec, il est vrai, une nuance. Dans celle qui a donné lieu à l'arrêt de 2002, elles soutenaient toutes deux que Ligitan et Sipadan n'étaient pas des *terrae nullius* (*ibid.*, p. 669-670, par. 94-100). Dans celle qui nous intéresse aujourd'hui, la Malaisie se fonde (et se fonde exclusivement) sur le titre originaire qu'elle prétend lui revenir en tant que successeur du sultan de Johor (du Johor continental, celui d'après le démembrement de 1825) ; Singapour, pour sa part, estime — sans que ce soit pour elle un élément indispensable — que Pedra Branca était, avant qu'elle n'en prenne possession — avant que les Britanniques n'en prennent possession —, une *terra nullius* avant que les Britanniques n'en prennent possession, c'est-à-dire un territoire (très petit en l'occurrence) sur lequel aucun titre préexistant ne peut être prouvé et qui, par suite, était susceptible d'appropriation par tout Etat.

22. Ce faisant, il nous semble que nous tirons simplement les leçons de l'arrêt de 2002, dans lequel la Cour, malgré les arguments très poussés qui lui étaient présentés de part et d'autre, n'a pas été convaincue qu'il avait «été établi avec certitude que Ligitan et Sipadan faisaient partie des possessions du sultan de Sulu» (*ibid.*, p. 678, par. 124) — sultan de Sulu qui était lui aussi un empire maritime —, non plus d'ailleurs que de celles du sultan de Bouloungan (*ibid.*, p. 669, par. 96). Si elles ne relevaient d'aucun des chefs locaux concernés tout en étant susceptibles d'appropriation, c'est, nous semble-t-il, qu'elles étaient *terrae nullius*.

23. Quoi qu'il en soit, deux leçons importantes peuvent être tirées de l'arrêt de 2002 sur ce premier point.

24. La première est que plusieurs des raisonnements de la Cour mettent à mal les arguments que la Malaisie et l'Indonésie avaient invoqués alors et que la Malaisie réitère aujourd'hui. Il est en particulier révélateur que, dans l'arrêt relatif à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan*, la Cour ait très fermement rejeté les «preuves» avancées par les deux Parties, dès lors que «les îles en litige ne sont nommément citées dans aucun des instruments juridiques internationaux»

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[30] MM, p. 37-51, par. 72-103 ; CMS, p. 41-72 ; CMM, p. 9-28, par. 15-51 ; RS, p. 7-33 ; RM, p. 25-52, par. 54-109 ; CR 2007/20, p. 52-60, par. 1-17 (Pellet) ; CR 2007/21, p. 12-27, par. 18-49 (Pellet) ; CR 2007/24, p. 57-66, par. 1-22 (Crawford) ; CR 2007/25, p. 12-24, par. 1-34 (Crawford). En ce qui concerne l'affaire relative à la *Souveraineté sur Pulau Litigan et Pulau Sipadan*, voir mémoire de l'Indonésie, p. 37-60 ; mémoire de la Malaisie, p. 29-40, par. 5.1-5.16 ; contre-mémoire de l'Indonésie, p. 11-42 ; contre-mémoire de la Malaisie, p. 9, par. 2.2 ; réplique de l'Indonésie, p. 81-101 ; réplique de la Malaisie, p. 23-39 ; CR 2002/28, p. 45-46, par. 10-16 (Bundy) ; CR 2002/30, p. 30, par. 12 (Lauterpacht), p. 37-46 (Schrijver), p. 46-60 (Crawford) ; CR 2002/33, p. 33-34, par. 2-5 (Soons), p. 44-46, par. 3-5 (Bundy) ; CR 2002/35, p. 20-26 (Schrijver), p. 27-31, par. 3-13 (Crawford).

produits à l'appui de leurs prétentions respectives (*ibid.*, p. 674, par. 108 ; voir aussi p. 674-675, par. 109). Il en va très exactement de même ici : à part l'article du *Singapore Free Press* de 1843, *aucun* des documents qu'a invoqués avec véhémence sir Elihu ne mentionne Pedra Branca[31] (je laisse de côté la «correspondance» de Butterworth de 1844, qui relève d'une autre problématique, mais il fallait sans doute faire masse).

25. Autre exemple de similitude entre les deux affaires, qui ne tourne pas à l'avantage de la thèse malaisienne : dans l'affaire relative à *Ligitan et Sipadan*, la Malaisie avait fait grand cas des liens d'allégeance qu'auraient entretenus les Bajau Laut avec le Sultanat de Sulu[32], exactement comme, dans notre affaire, elle s'appuie sur les liens qui auraient existé entre ces autres «gitans des mers» (c'est peut-être les mêmes d'ailleurs) que sont les Orang Laut et le Sultanat de Johor (en se gardant bien d'ailleurs de dire de *quel* Johor il s'agit)[33]. La Cour a écarté sommairement cet argument en 2002 — et je me permets de vous citer à nouveau :

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

Il suffit de changer les noms — et ceci peut être transposé mot pour mot à la présente espèce.

26. La seconde leçon que l'on peut tirer de l'arrêt rendu il y a cinq ans quant à la question du titre originaire, c'est que celui-ci n'a évidemment pas l'importance exclusive que la Partie malaisienne voudrait lui conférer[34] : la Cour ne s'y est pas prononcé sur l'appartenance (ou la non-appartenance) de Ligitan et Sipadan à l'un des sultans qui, selon les Parties, auraient pu en revendiquer la souveraineté. Cette indétermination ne l'a nullement empêchée de trancher le différend, exactement comme, dans l'affaire des *Minquiers et des Ecréhous*, elle avait indiqué que «[c]e qui … a une importance décisive, ce ne sont pas des présomptions indirectes déduites

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[31] [Voir CR 2007/24, p. 37-44, par. 20-40.]

[32] Voir *Souveraineté sur Pulau Litigan et Pulau Sipadan*, mémoire de la Malaisie, p. 12-13, par. 3.7, p. 33-36, par. 5.7-5.8, p. 61-65, par. 6.5-6.8 ; contre-mémoire de la Malaisie, p. 15, par. 2.16, p. 17, par. 2.20 *d)*, p. 52, par. 3.1 *c)*, p. 55-56, par. 3.9, p. 72, par. 4.3 ; réplique de la Malaisie, p. 9-10, par. 2.6. Voir aussi CR 2002/30, p. 23, par. 11 (Ariffin), p. 55-56, par. 24-25 (Crawford) ; CR 2002/35, p. 50, par. 11 (Lauterpacht).

[33] Voir CR 2007/24, p. 21-23, par. 8-12 (Ariffin) ou p. 60-61, par. 10 (Crawford).

[34] Cf. CR 2007/24, p. 14, par. 12 (Kadir), p. 24, par. 17 (Ariffin), p. 34-36, par. 9-16 (Lauterpacht), p. 55, par. 71 (Lauterpacht) et p. 58, par. 3 (Crawford) ; CR 2007/25, p. 12-24 (Crawford).

d'événements du moyen âge, mais les preuves, se rapportant directement à la possession des groupes» d'îles litigieux (*Minquiers et Ecréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953*, p. 57). Il en résulte clairement, Messieurs de la Cour, que, si vous le jugez préférable, vous pouvez, de la même manière, laisser la question du titre originaire indéterminée dans la présente affaire, sans que ceci vous empêche de trancher le différend que les Parties vous ont soumis. Et ceci me conduit à ma deuxième proposition.

**2. A la différence de ce qui était le cas dans l'affaire relative à *Ligitan et Sipadan*, le titre de Singapour sur Pedra Branca ne fait pas de doute**

27. La Cour consacre vingt-cinq pages imprimées de son arrêt de 2002 à la question de savoir si l'Indonésie pouvait se prévaloir d'un titre fondé sur la convention de 1891, par laquelle la Grande-Bretagne et les Pays-Bas définissaient les frontières entre leurs possessions respectives (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 643-668, par. 34-92). A l'issue de cette enquête très méticuleuse, la Cour répond fermement par la négative (*ibid.*, p. 668, par. 92).

28. A nouveau, cet aspect de l'arrêt est riche d'enseignements en ce qui nous concerne.

29. Et d'abord par le fait que, bien que les Parties aient, comme je viens de le rappeler, longuement plaidé à propos d'un titre originaire insaisissable, la Cour *commence* par s'interroger sur l'existence d'un titre conventionnel. Exactement comme, en l'espèce, Singapour a toujours considéré que son titre était fondé sur la prise de possession de Pedra Branca par des agents de la Couronne britannique entre 1847 et 1851 et que, cette prise de possession était suffisante à cette fin[35]. Il en serait allé de même, dans l'affaire de 2002, du titre conventionnel dont se prévalait l'Indonésie si celui-ci avait été avéré. Ceci confirme ma remarque précédente : dès lors que Singapour a pu acquérir un titre conformément aux règles de droit international en vigueur à l'époque, il n'est pas nécessaire de se poser la question du titre originel ; la construction de votre arrêt de 2002 l'atteste.

30. L'autre élément important — et cette fois il s'agit d'une différence (et d'une différence considérable) entre les deux affaires — est celui-ci : dans *Ligitan et Sipadan*, la Cour n'a pas perçu

[35] Voir par exemple MS, p. 30, par. 5.5 ; CMS, p. 73, par. 5.3, ou RS, p. 44, par. 3.24.

la convention de 1891 comme créant un titre sur les îles en faveur de l'Indonésie ; au contraire, dans la présente espèce, comme l'ont montré nos écritures d'abord[36], M. Brownlie en plaidoirie ensuite[37], Singapour peut se prévaloir d'un titre ; il ne s'agit pas d'un titre conventionnel certes, mais il s'agit d'un titre qui est conforme aux modes d'acquisition qui avaient cours alors dans les relations entre Etats (et Johor était un Etat souverain ; c'est un des rares points sur lesquels les Parties sont d'accord) : la prise de possession de Pedra Branca par la Grande-Bretagne, suivie de son occupation continue et incontestée sur une période de plus de cent trente années est constitutive d'un titre opposable aux autres Etats — Johor inclus — conformément au droit international.

31. Cette position est amplement confortée par la «pratique ultérieure des parties», sur laquelle la Cour s'est également soigneusement penchée dans son arrêt de 2002 (pour y trouver la confirmation de ses conclusions sur la prétention indonésienne) (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 655-668, par. 78-91). A la différence de ce qui était le cas alors, la pratique suivie, dans notre affaire, par Johor et la Malaisie, d'une part, la Grande-Bretagne et Singapour, d'autre part, témoigne au contraire de leur conviction bien ancrée de l'appartenance de Pedra Branca à cette dernière.

32. Deux éléments, abordés expressément dans l'arrêt de 2002, méritent d'être soulignés à cet égard :

— en premier lieu, la Cour y a sommairement examiné l'argumentation que la Malaisie avait cru pouvoir fonder sur les concessions pétrolières accordées par les Parties ; elle l'écarte en constatant que, comme dans l'affaire qui nous occupe, les limites de ces concessions n'englobaient pas les îles litigieuses (voir *ibid.* p.664, par. 79) (alors même qu'elles se situaient de part et d'autre de la ligne revendiquée par l'Indonésie) ; auparavant, la Cour avait noté que la Partie malaisienne avait plaidé qu'«[a]ucune activité découlant des concessions indonésiennes n'était en rapport avec les îles» (*ibid.*, p. 664, par. 78) ; il en va de même ici ;

— en second lieu, toujours dans l'arrêt de 2002, la Cour se penche sur l'«ensemble de cartes de nature et d'origine diverses» produites par les Parties (*ibid.*, p. 665, par. 81 ; voir p. 665-668, par. 81-91) et relève «que chacune de ces cartes a été établie à des fins particulières et que, par

[36] MS, p. 29-87, CMS, p. 73-128 ; RS, p. 35-94.

[37] CR 2007/21, p. 34-69 et CR 2007/28, p. 51-61.

suite, elle ne saurait tirer de l'examen de ces cartes une conclusion claire et définitive» quant aux prétentions territoriales de l'Indonésie et de la Malaisie (*ibid.*, p. 668, par. 90) ; la portée des cartes dans la présente affaire, et en particulier, de celles de la région Pengerang publiées en 1962, 1965 et 1974 sous la responsabilité du directeur de la Cartographie nationale de Malaisie[38], est toute différente : elles témoignent clairement de la conviction de la plus haute autorité cartographique malaisienne que Pedra Branca relève de Singapour[39].

33. Et, bien sûr, il n'y a pas que cela : la Malaisie a reconnu à maintes reprises la souveraineté de Singapour sur Pedra Branca[40] et, plus remarquable encore, elle a formellement décliné tout titre sur l'île en 1953. Bien évidemment, aucune des Parties ne pouvait se prévaloir d'une reconnaissance aussi éclatante de son titre dans l'affaire de 2002. En outre :

### 3. Beaucoup plus nettement encore que la Malaisie s'agissant de Ligitan et Sipadan, Singapour peut invoquer des activités nombreuses «révélant l'intention d'exercer des fonctions étatiques à l'égard» de l'île

34. Faute de titre discernable, la Cour, dans *Ligitan et Sipadan*, a déterminé à qui appartenait la souveraineté sur les deux îles en fonction des effectivités sur lesquelles s'appuyaient les Parties. Dans un premier temps, elle rappelle les principes applicables en la matière, posés par sa devancière dans l'affaire du *Groënland oriental* (*Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53,* p. 45-46 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 682, par. 134). Elle observe ensuite «qu'elle ne saurait prendre en considération des actes qui se sont produits après la date à laquelle le différend … s'est cristallisé, à moins que ces activités ne constituent la continuation normale d'activités antérieures et pour autant qu'elles n'aient pas été entreprises en vue d'améliorer la position juridique des Parties qui les invoquent…» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002,* p. 682, par. 135) ; et elle «relève enfin qu'elle ne peut tenir compte de ces activités en tant que manifestation pertinente d'autorité que *dans la mesure où il ne fait aucun doute qu'elles sont en relation spécifique avec les îles en litige*

[38] MS, cartes 12, après p. 158 ; 13, après p. 160 ; 14, après p. 160, et 15, après p. 160.

[39] Voir notamment CR 2007/23, p. 35, par. 4-6 (Malintoppi).

[40] CR 2007/22, p. 50-62 (Pellet).

*prises comme telles*» (*ibid.*, p. 682-683, par. 136 ; les italique sont de nous) — précision qui est loin d'être négligeable dans le cas qui nous occupe.

35. Ces principes posés, la Cour examine dans un premier temps les effectivités invoquées par l'Indonésie :

— elle constate «qu'aucune d'entre elles ne revêt un caractère législatif ou réglementaire» (*ibid.*, p. 683, par. 137) tel est aussi le cas de celles, fort rares, invoquées par la Malaisie dans notre affaire qui au demeurant ne concerne pas l'île en litige prise comme telle ;

— la Cour s'intéresse ensuite à «l'expédition du destroyer néerlandais *Lynx*» et déclare qu'elle ne peut en déduire «que les autorités maritimes concernées considéraient Ligitan et Sipadan, ainsi que les eaux environnantes, comme relevant de la souveraineté des Pays-Bas ou de l'Indonésie» (*ibid.*, p. 683, par. 139) ; l'épisode est pourtant autrement plus troublant que celui du «débarquement» du vice-amiral Thanabalasingam sur Pedra Branca en 1962[41] ;

— et elle termine cet examen en constatant :

> «L'Indonésie déclare pour finir que les eaux entourant Ligitan et Sipadan ont traditionnellement été utilisées par des pêcheurs indonésiens. Toutefois, la Cour fera observer que les activités de personnes privées ne sauraient être considérées comme des activités si elles ne se fondent pas sur une réglementation officielle ou ne se déroulent pas sous le contrôle de l'autorité publique.» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 683, par. 140.)

Il en va bien sûr de même des activités des pêcheurs malais ou Orang Laut autour de Pedra Branca, dont la Malaisie fait si grand cas[42].

36. Se tournant ensuite vers les effectivités invoquées par cette dernière — dans l'affaire relative à *Ligitan et Sipadan*, la Cour de 2002 se dit «d'avis que tant les mesures prises pour réglementer et limiter le ramassage des œufs de tortue que la création d'une réserve ornithologique doivent être considérées comme des manifestations d'autorité réglementaire et administrative sur un territoire mentionné par son nom» (*ibid.*, p. 684, par. 145). Et c'est à peu près tout, Monsieur le président ! Il me semble vraiment que les effectivités nombreuses, constantes, diversifiées, dont,

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[41] Voir CMM, p.250, par. 538. Voir aussi RS, p. 149, par. 4.129-4.130 et p. 181-182, par. 5.16-5.17.

[42] CMM, p. 240-248, par. 516-532; RM, p. 132, par. 162 ; CR 2007/24, p. 21, par. 8, p. 22-24, par. 12-16 (Ariffin) ; CR 2007/25, p. 49, par. 42 (Kohen) ; CR 2007/27, p. 53, par. 20-21 (Kohen).

comme Rodman Bundy l'a montré[43], Singapour peut se prévaloir à l'égard de Pedra Branca, peuvent soutenir avantageusement la comparaison avec le ramassage des œufs de tortue et la réserve d'oiseaux de l'affaire de 2002.

37. C'est à peu près tout, ai-je dit. Mais pas tout à fait : la Cour en effet accepte ensuite l'argument de la Malaisie qui avait «fait valoir que la construction et l'entretien [des phares construits sur Ligitan et Sipadan] [Rodman Bundy vous en a montré un de ces phares tout à l'heure] «participent d'un ensemble de manifestations d'autorité étatique, appropriées par leur caractère et leur portée à la nature du lieu concerné»» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 685, par. 146), car, avez-vous dit, en citant (*ibid.*, p. 685, par. 147) l'arrêt rendu dans l'affaire *Qatar c. Bahreïn*, de telles activités «peuvent être considérées comme suffisantes pour étayer» une revendication de souveraineté «dans le cas de très petites îles» (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 99-100, par. 197). Ceci peut sûrement s'appliquer à Pedra Branca — tout autant que la remarque faite ensuite par la Cour, qui a relevé que

> «ni l'Indonésie ni son prédécesseur, les Pays-Bas, n'ont jamais exprimé de désaccord ni élevé de protestation. La Cour relève à ce propos que les autorités indonésiennes n'ont même pas rappelé en 1962 et 1963 aux autorités de la colonie du Nord-Bornéo, ou à la Malaisie après son indépendance, que les phares construits alors l'avaient été sur un territoire qu'elles regardaient comme indonésien ; même si elles considéraient ces phares comme simplement destinés à la sécurité de la navigation dans une zone revêtant une importance particulière pour la navigation dans les eaux situées au large du Nord-Bornéo, une telle attitude est inhabituelle.» (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 685, par. 148.)

Dans notre affaire, non seulement la Malaisie et son prédécesseur Johor ont observé la même attitude «inhabituelle» durant cent trente ans, mais encore, en 1953, le Sultanat a formellement indiqué qu'il n'avait pas de revendications sur Pedra Branca.

38. Monsieur le président, Messieurs les juges, selon James Crawford, l'arrêt que vous avez rendu en 2002 n'aurait «rien à voir avec notre affaire» («nothing to do with our case»). Il est, bien sûr, *res judicata* entre d'autres parties (ou, plus exactement, entre la Malaisie et une autre Partie ; et n'a juridiquement que cette autorité relative) mais il n'en est pas moins, décidément, riche

[43] CR 2007/22, p. 12-37 ; voir aussi MS, p. 89-137 ; CMS, p. 151-163, par. 6.51- 6.73 ; RS, p. 95-170.

d'enseignement pour celle qui nous réunit en ce moment dans ce grand hall de justice : il l'est par son contexte et les par circonstances qui entouraient l'affaire que vous avez tranchée ; il l'est par les principes que vous y avez rappelés et par les raisonnements que vous avez suivis (que vous ayez accueilli ou non les prétentions des Parties) ; et il l'est par sa solution car même si, par impossible, vous n'accueilliez pas la thèse principale que la Partie singapourienne vous a présentée durant ces trois semaines de plaidoiries, vous ne pourriez, je pense, que la transposer — la solution de 2002 — en la présente espèce et adjuger ses conclusions à Singapour : ses effectivités sont équivalentes à celles qui vous ont permis de reconnaître la souveraineté de la Malaisie sur Ligitan et Sipadan «à la puissance 13». Et ceci, à l'unanimité des juges à la vaillante exception près du juge *ad hoc* nommé par l'Indonésie.

39. Avant d'en terminer, une petite touche personnelle si vous le voulez bien, Monsieur le président. Dans l'affaire relative à *Ligitan et Sipadan*, j'ai eu le privilège de plaider pour l'Indonésie ; et j'en demeure honoré. Mais, je me permets dans un esprit de confraternité amicale, de faire une remarque : je ne suis pas sûr qu'il soit bien utile à nos collègues de l'autre côté de la barre — qui ont, sans aucun doute, de plus gros poissons à pêcher en ce moment — d'éplucher mes plaidoiries d'il y a cinq ans pour me mettre, peut-être, en contradiction avec moi-même : la voix d'un conseil se tait lorsque la haute juridiction a parlé. La Cour ayant tranché, le droit a été dit.

40. Et puisque j'ai parlé de «puissance 13» et que les mathématiques ont dans ce second tour acquis le statut récréatif qu'avait le gruyère dans le premier, je me permets, Monsieur le président, de dire respectueusement à mon ami sir Elihu, par votre intermédiaire, que, comme Rodman Bundy, avec lequel nous n'avons pas très bien coordonné ces remarques de détente, je me demande si l'élève «Lobster pot» a très bien profité des leçons de son maître d'école[44], car si, assurément, 0 x 0 = 0, 0 + 1 et + 2 et + 3 et + 4, n'égalent pas 0, mais 1, 2, 3 ou dans notre affaire au moins 4. Car c'est ici, d'addition qu'il s'agit : la souveraineté de Singapour sur Pedra Branca et les îlots environnants est fondée sur la prise de possession de l'île par les Britanniques en 1847-1851 ; elle est confirmée par diverses reconnaissances de ce titre par la Partie malaisienne, par des effectivités nombreuses et concordantes, et par le «disclaimer» de 1953. Et si, par

[44] Voir CR 2007/24, p. 48, par. 49.

impossible, l'un ou plusieurs de ces éléments ne vous convainquait pas, *chacun des autres*, pris isolément, pourrait y suppléer. Ensemble, ils forment un tout particulièrement impressionnant.

41. Messieurs de la Cour, je vous remercie très vivement de m'avoir écouté, une nouvelle fois, avec bienveillance. Et je vous prie, Monsieur le président, de bien vouloir donner la parole à M. l'agent de Singapour pour la présentation de nos conclusions — both "conclusions" and "submissions". Thank you very much.

The VICE-PRESIDENT, Acting President: Thank you very much, Professor Pellet, for your speech and I now call on Professor Tommy Koh. You have the floor, Sir.

Mr. KOH:

## THE AGENT'S CONCLUDING STATEMENT AND FINAL SUBMISSIONS

### Concluding statement

1. Mr. President and Members of the Court. I have the honour to deliver the concluding statement and the final submissions for Singapore. I will do so by recapitulating our key points.

2. *First*, Singapore has shown that in 1847, Pedra Branca was *terra nullius*. Malaysia disputes this and argues that it was not *terra nullius* but was part of the Sultanate of Johor. Malaysia has, however, failed to produce any evidence that this particular island, Pedra Branca, was subject to the sovereignty of Johor. Malaysia has failed to prove her only argument in this case, that she has an historic title to Pedra Branca. She has failed to show: *(a)* that Pedra Branca was part of the Sultanate of Johor; and *(b)* that an original title had been transmitted to the State of Johor.

3. *Second*, Singapore has shown that between 1847 and 1851, Britain was in possession of Pedra Branca without the consent of any native ruler. Malaysia argues that she had given permission to Britain for the construction of the lighthouse on Pedra Branca. Again, she has not provided any evidence of such permission. All that Malaysia can rely upon are the indirect inferences from letters which do not even mention Pedra Branca.

4. *Third*, Singapore has shown that in the period 1847-1851, the British acquired sovereignty over Pedra Branca by satisfying the two requisite criteria: *animus* or intention, and *corpus* or

activities undertaken *à titre de souverain*. Malaysia has repeated *ad nauseum* her argument that the British lacked the *animus* and the *corpus* and all the activities that they undertook were merely those concerned with the construction of a lighthouse. The Malaysian argument is flawed and it remains flawed, no matter how many times it is repeated.

5. *Fourth*, from 1847 to 1979, a period of 130 years, Singapore's sovereignty over Pedra Branca was open, continuous and notorious. It was acknowledged by all concerned and challenged by none. It was only in 1979 when, like a bolt out of the blue, Malaysia published her infamous map which claimed, for the very first time, that Pedra Branca belonged to her.

6. *Fifth*, in 1953, when Johor was a sovereign State under international law, the State Secretary of Johor, writing in an official capacity, informed the Singapore Government that, "the Johore Government does not claim ownership of Pedra Branca". This disclaimer, Mr. President, is binding on Malaysia under international law. Malaysia is clearly embarrassed by this disclaimer. Discarding her earlier argument that the disclaimer "is not a model of clarity", Malaysia has invented a new argument, which is that Singapore is seeking to use the letter as the root of her title. But this has never been Singapore's case. Mr. President, Singapore's case is that the disclaimer confirms Singapore's title and is further evidence that Johor has no prior title.

7. *Sixth*, in 1968, three years after Singapore separated from Malaysia, the Malaysian Government demanded that Singapore lower its marine ensign from its lighthouse in Pulau Pisang. Since Pulau Pisang was under Malaysian sovereignty, Singapore promptly complied with Malaysia's demand. However, Malaysia failed to make the same demand with respect to the flying of the Singapore marine ensign on Pedra Branca. The conclusion which I urge the Court to draw from this difference is that Malaysia's conduct is recognition of Singapore's sovereignty over Pedra Branca.

8. *Seventh*, between 1962 and 1975, Malaysia published six maps which attributed Pedra Branca to Singapore. Singapore never published a single map — not one — attributing the island to Malaysia.

9. *Eighth*, Malaysia has argued that Pedra Branca, Middle Rocks and South Ledge should not be treated as a group but as three separate and distinct maritime features. This is an untenable argument. Mr. President, the truth is that for reasons of proximity, geology, history and law, the

three features are inseparable and must be treated together. Pedra Branca and Middle Rocks form a group. South Ledge is a low-tide elevation within the territorial sea of Pedra Branca and Middle Rocks and its fate must necessarily follow that of Pedra Branca and Middle Rocks.

10. *Ninth*, Malaysia has repeatedly argued that this case is about title and not about competing *effectivités*. With respect, this is not correct. Singapore's case is that Pedra Branca was *terra nullius* in 1847 and that we had acquired sovereignty over the island between 1847 and 1851 and have maintained it ever since. However, should this Court find that the title to Pedra Branca was indeterminate at that time, and were to examine the competing *effectivités* of the two Parties, Singapore has clearly shown that it has sovereignty. I can understand why Malaysia would be concerned if the Court were to decide to walk down this path. The reason is that Malaysia has zero *effectivités*.

11. *Tenth*, Malaysia has, in the first round, said that Singapore may continue to own and operate the Horsburgh lighthouse should sovereignty over Pedra Branca be awarded to her. This may sound magnanimous but, make no mistake, it is in reality an attempt by Malaysia to change a legal order which has existed for 160 years.

12. Mr. President and Members of the Court, the evidence in this case presents a remarkably consistent picture. All of Singapore's actions are entirely consistent with that of a country that has sovereignty over Pedra Branca. In contrast, all of Malaysia's actions and inactions are entirely consistent with that of a country which has no title over Pedra Branca.

13. In fact, all the pieces of the puzzle fit neatly together. The picture that emerges is that Singapore has sovereignty over Pedra Branca. The British activities from 1847 to 1851 in taking lawful possession of the island are simply the other side of the coin of the complete absence of Johor's original title or of any sovereign acts by Johor on the island. Singapore's continuous stream of sovereign activities on Pedra Branca and within its territorial waters, from 1851 to the present, is the reverse side of the coin of the complete absence of any Malaysian *effectivités* on the island at all relevant times. Singapore's actions were open and public and are the counterpart of Malaysia's silence in the face of these activities over a period of over 130 years. Malaysia's official disclaimer in 1953 and its series of official maps attributing the island to Singapore are

further confirmation of this picture. The whole story fits perfectly together. There can therefore be no doubt that Pedra Branca, Middle Rocks and South Ledge belong to Singapore.

14. Mr. President, my colleagues and I would like to thank you and the distinguished Members of the Court for your patience, attentiveness and courtesy. For me, as a student of international law, the opportunity of pleading before this honourable Court is a high point in my career. I will always treasure this memory.

15. Mr. President, I would also like to thank the distinguished Registrar and his able staff for ensuring the smooth running of the oral proceedings, the prompt delivery of the transcript of each day's hearing and for looking after all the other administrative details.

16. I would also like to thank our excellent interpreters who have enabled the anglophones and the francophones to understand each other perfectly. In our multilingual world, good interpreters and good translators play an important role which is often — too often — taken for granted.

17. Mr. President, I would also like to thank Ms Laurence Blairon, the Head of the Information Department and her staff who have been very helpful to the two Parties and to the representatives of our media.

18. Mr. President and Members of the Court, I have come to the end of my concluding statement. Before I go on to the next point, I would like to express my great pleasure in seeing my friend of 30 years, Sir Elihu Lauterpacht, back with us in the Court today. I wish him continued good health.

19. Concerning the question posed by Judge Keith, the Singapore delegation will reply in writing by the deadline of 30 November 2007.

**Final submission**

20. Now I turn to my final submissions. In accordance with Article 60, paragraph 2, of the Rules of Court, I hereby present Singapore's final submissions:

The Government of the Republic of Singapore requests the Court to adjudge and declare that:

*(a)* the Republic of Singapore has sovereignty over Pedra Branca/Pulau Batu Puteh;

*(b)* the Republic of Singapore has sovereignty over Middle Rocks; and

*(c)* the Republic of Singapore has sovereignty over South Ledge.

21. Mr. President, distinguished Members of the Court, I thank you very much for your attention. Thank you.

The VICE-PRESIDENT, Acting President: I thank you very much Professor Tommy Koh for your speech.

The Court takes note of the final submissions which the distinguished Agent for Singapore has read on behalf on Singapore.

Malaysia will present its oral reply on Thursday 22 November, from 3 p.m. to 6. p.m. and on Friday 23 November, from 3 p.m. to 6 p.m.

Thank you. The Court is now adjourned.

*The Court rose at 12.45 p.m.*