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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Friday 23 November 2007, at 3 p.m., at the Peace Palace,

Vice-President Al-Khasawneh, Acting President, presiding

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le vendredi 23 novembre 2007, à 15 heures, au Palais de la Paix,

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

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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comme conseillers.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. Before giving the floor to the representatives of Malaysia, I should like to pay a brief tribute to a distinguished former Member of the Court who passed away during the night of 17 to 18 November.

Judge Raghunandan Swarup Pathak was born in 1924 at Bareilly, India. Further to his studies in law and political science at Allahabad University, he practised as advocate before the Supreme Court of India prior to his nomination as judge at the High Court of Allahabad and subsequently at the Supreme Court of India. From 1986 to 1989, just before his election to this Court, he served as Chief Justice of India. He was an active and highly regarded Member of this Court from 1989 to 1991.

Let me also say how saddened I was to hear the news that Professor Julio González Campos passed away during the night of 20 to 21 November. He pleaded a number of times before this Court, and was chosen as judge *ad hoc* in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* but had to resign last year for health reasons. Professor González Campos was born in 1932 in Seville, Spain. He enjoyed a long and eminent academic career focusing both on public and private international law. He held a range of high-level academic positions in his country and was also elected member of the Spanish Constitutional Court.

May I invite you to stand for one minute's silence, as a tribute to the late Judge Pathak and Professor González Campos.

The Court observes a minute's silence.

The VICE-PRESIDENT, Acting President: Please be seated. We will now begin today's hearings and I shall give the floor without further delay to Professor Crawford. You have the floor, Sir.

Mr. CRAWFORD:

EFFECTIVITÉS IN THE BRITISH PERIOD

1. Mr. President, Members of the Court, before getting to the substance, I should like to acknowledge the assistance of Ms Michelle Bradfield in the preparation of this speech.

2. It is my task to discuss *effectivités* in the British period which I take, for the sake of convenience, to be the period from 1851 to the late 1960s.

3. Mr. President, having regard to your admonition about the length of reply speeches administered at the end of the first round[1], I propose to make this presentation proportionate to the new material presented by Singapore this week and not to the vehemence with which counsel presented it. I can accordingly be very brief. I will deal with four topics: first, Britain's so-called lighthouse *effectivités*; second, the implications of the 1861 fishing dispute; third, the British and Singapore legislation, and finally the overall appreciation to be drawn from Britain's conduct during this long period.

1. Britain's so-called "lighthouse *effectivités*"

4. Last week I examined the nil effect of the use by a guest State of the territory of the host State when consent had been obtained[2]. Such use ceases to be adverse to the host State for the purposes of the acquisition of sovereignty. Mr. Bundy did not attack the principle — he studiously refrained from accepting it, elementary though it is[3]. Rather, he attempted to distinguish some of the examples I cited, on the basis that there were detailed written arrangements in those cases . . .

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

Mr. CRAWFORD: Yes, of course, Sir. . . . there were detailed written arrangements in those cases and that they did not span, as this one does, 130 years[4]. No doubt the facts differ from

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[1]CR 2007/27, p. 68.

[2]CR 2007/27, pp. 62-63, paras. 1-3.

[3]CR 2007/29, p. 15, para. 28 (Bundy).

[4]CR 2007/29, p. 15, para. 29 (Bundy).

case to case but the basic principle is the same: conduct carried on with consent is not adverse to the territorial sovereign for the purpose of the acquisition of sovereignty. Moreover, the degree of formality of the arrangements depends on the relations between the two States, on the size and significance of the territory in question and, crucially, on the date of the arrangements: the older arrangements tend to be much less formal and detailed. The range of possibilities can be seen from the preamble to the Foreign Jurisdiction Act of 1843 — language repeated in the better known replacement Act of 1890. The preamble referred to foreign jurisdiction "acquired by Treaty, Capitulation, Grant, Usage, Sufferance, and other lawful means" — this is as compendious as may be, covering not only detailed treaty arrangements but much else besides. It is irrelevant in international law how detailed or formal — the principle is that power or jurisdiction exercised by consent is not conduct adverse to the host State. In fact the less detailed the arrangement, the more the host State will depend on the protection of general international law. Singapore's entire argument as to *effectivités* in the British period assumes that Johor did not consent to the construction and operation of the lighthouse. As soon as it is established that Johor *did* consent, the position changes, and to go on and on about the details of its construction and operation, as Messrs. Brownlie and Bundy did, is simply not to the point. The British understood this perfectly, which is why at no stage did they ever lay formal claim to PBP, at no stage fly the Union flag, at no stage publish maps showing it as a dependency of Singapore. The Worshipful Master of the Lodge "Zetland in the East" had no more capacity to claim territory for the Crown by loose language than the Acting State Secretary of Johor had to cede territory of Johor by signing a letter.

2. The 1861 fishing incident

5. My second point relates to the 1861 fishing incident. Sir Elihu explained last week that the correspondence concerning a number of incidents involving fishermen in the early 1860s shows two things: first, that Britain claimed no waters beyond the 10-mile belt around Singapore and, secondly, that Colonel Cavenagh's letter of 15 May 1861 to the Temenggong shows that the Governor was not claiming the waters of PBP as British[5]. The Governor's primary concern was that Singapore residents might be being charged for fishing in Singapore waters within 10 miles of

[5]CR 2007/26, pp. 49-50, paras. 49-50 (Lauterpacht).

the main island. When it became clear that the fishing in question occurred not in Singapore waters but around PBP the Governor's approach changed completely — his concern now was that a regulation in principle valid not be enforced in an oppressive manner. Nowhere did the Governor refer to waters around PBP as waters of the colony.

6. Mr. Chao responded on Monday that, to the contrary, the correspondence "demonstrates very clearly that the Singapore fishermen concerned and the British officials in Singapore had the clear understanding that the Temenggong possessed no jurisdiction and authority around PBP". In his view, the Chinese fishermen lied about where they had been fishing and said it was in the vicinity of PBP rather than in shallow waters near a Johor village because they were afraid that if they did not British authorities would not seek redress on their behalf[6]. Their having lied, in his view, made a theory about Singapore's jurisdiction true.

7. Malaysia addressed this argument in its Reply: and what it said applies equally to Mr. Chao's discussion. There is no contradiction in the documents. There is no reason to suggest the Chinese fishermen were lying about where they had been fishing that day or where they commonly fished, "a little beyond Pulo Pikong and this side of Pedro Branco". The fishermen requested assistance from the Singapore authorities to protect them from attacks by subjects of the Temenggong and from excessive levies exacted for fishing. Colonel Cavenagh read the Chinese complaint as being that they had been attacked in the area of PBP, and his response was to tell the Temenggong to sort it out. This contrasts with the British treatment of fishing incidents in waters within the 10-mile limit around Singapore. In those instances the British authorities reminded the Temenggong in no uncertain terms that he and his subjects could not interfere with British subjects in Singapore waters. Cavenagh's letter clearly shows that he did not consider the waters around PBP were British. Nor is there any suggestion in the correspondence, unlike that concerning the Temenggong's licensing and levies for fishing in Singapore waters, that the Temenggong was not entitled to operate a licence or levy a system for fishing in the area "a little beyond Pulo Pikong and this side of Pedro Branco".

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[6]CR 2007/28, p. 35, para. 27; RS, App. B, para. 20.

3. The British and Singapore legislation prior to 1980

8. My third point concerns the British and Singapore legislation on which Singapore relies. In fact it either supports Malaysia's position or is neutral.

The 1852 and 1854 legislation

9. Singapore attempts to confuse the clear meaning of the 1852 and 1854 legislation which established the Straits Lights System and provided the collection of light dues to defray the cost of Horsburgh lighthouse and other lights.

10. Mr. Bundy argued that some significance can be derived from the difference in legislative treatment of PBP and 2½ Fathom Bank and that this was explained because Britain had sovereignty over PBP and not over 2½ Fathom Bank Light, which was a floating light[7]. His statement — which I will not read — is at paragraph 40 of his speech (CR 2007/29, p. 17). It is true that there is a difference in language, but Mr. Bundy's explanation for it, that Britain was sovereign over PBP but not over 2½ Fathom Bank light, can only be explained as a fit of acute Pedrobrancism. A light buoy, like a lightship, is not a fixture: it is a moveable and there is no need to legislate specially for property in it. Whether located on the high seas or in territorial waters, it belongs, like a ship, to the person who installed it. All the legislation needed to do was to provide for its management.

11. A further difficulty facing Mr. Bundy's explanation is the 1912 Ordinance which repealed in part the 1854 legislation. Section 3 of that Ordinance, which is very similar to the section of the 1852 and 1854 Acts which vested the property of Horsburgh lighthouse in the Government, reads as follows:

> "The light-house known as the Horsburgh Light-house situate on the Island rock called Pedra Branca at the eastern entrance of the Straits of Singapore and all such other light-houses as are now established in or near to the Straits of Malacca or Singapore together with the appurtenances thereof and all the fixtures apparatus and furniture belonging thereto shall remain the property of and be absolutely vested in the Government."[8]

By 1912 Singapore administered five lighthouses, two of them in Singapore, Sultan Shoal and Fort Canning lighthouses, three not, Pulau Pisang, Cape Rachado and Horsburgh lighthouse. This, the

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[7] CR 2007/29, p. 17, para. 39 (Bundy).

[8] MM, Vol. 3, Ann. 90.

section that I have read of the 1912 legislation, applied equally to all five. It is clear the Government was vested with the property of all five lighthouses, irrespective of sovereignty. Moreover, that legislation is clearly extraterritorial in effect, at least in part. It shows that the alleged doctrine of colonial extraterritorial legislative incompetence — it is the first time I have ever heard a Frenchman invoke the doctrine of colonial extraterritorial legislative incompetence, a doctrine of extremely uncertain scope and one which was not established in British law until 1891 — was never applied to legislation concerning property over the Straits lights, whoever's territory those lights were located on. And I refer the Court to the illuminating analysis of the doctrine of colonial extraterritorial legislative incompetence by Professor O'Connell in the *Law Quarterly Review*[9].

12. In any event the terms used in the Acts and Ordinances were not applicable to a light buoy. The 1852 and 1854 Acts refer to the "Light-House, and the appurtenances thereunto belonging . . .", etc.[10]. A mere light buoy does not have the characteristics referred to. Similarly, the 1912 Act does not include lights or beacons in the section on vesting property.

13. Last week Sir Elihu referred to the 1843 Foreign Jurisdiction Act which allowed Great Britain to legislate extraterritorially[11]. Against this Mr. Bundy made two contentions.

14. I have already noted that the Act related to "power and jurisdiction acquired by Treaty, Capitulation, Grant, Usage, Sufferance, and other lawful means". We have shown that permission was granted by Johor to build and operate the lighthouse. The Act is apt to cover such a case.

15. Secondly, Mr. Bundy states that the 1852 law did not refer to the Foreign Jurisdiction Act. But at common law the validity of an act does not depend on its citing the source of power, accurately or otherwise, a point made in passing by Lord Hoffman in relation to the British Settlements Act in the *Pitcairn Island* case[12]. The 1912 Singapore Ordinance makes no reference to the source of power, yet on any view it has some extraterritorial application.

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[9]See D. P. O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 *LQR* 318, 324.

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

[11]CR 2007/24, pp. 49-50, para. 53; CR 2007/26, p. 46, paras. 36-37 (Lauterpacht).

[12](2006) *UKPC* 47, para 11.

16. You will find in your judges' folder, for those of you who wish to pursue this arcane topic further, an index to enactments relating to India compiled under the orders of the Government of India. You will see — this is at tab 177 — several references to the Foreign Jurisdiction Act: the Government in India was clearly enabled to act under the 1843 Act, which was very sensible given the wide diversity of territorial arrangements encompassed under the rubric of "British India".

The lights dues legislation

17. I turn to the lights dues legislation. Mr. Bundy sought to cast doubt on the unambiguous meaning of the 1957 and 1958 Acts[13]. At issue is the change in wording from the 1957 Act, "navigational aids in the waters of the Colony" to the wording in the 1958 Act, lighthouses, buoys, beacons and other navigational aids "in Singapore"' distinguished from Pedra Branca — Horsburgh — and Pulau Pisang, which are *not* in Singapore.

18. Mr. Bundy relied on a letter from the Singapore Master Attendant[14]. The letter by Mr. Rickard is hopelessly confused: it treats a lighthouse as if it were itself sovereign territory, as distinct from the rocks on which it stands. But in any event it cannot prevail over the clear wording of the Act.

19. Secondly, Mr. Bundy relies on the explanations given in the Singapore Legislative Assembly in relation to the changed wording of the 1958 Act[15]. This speech does not mention PBP, it refers only to Pulau Pisang. A speech which does not mention the effect of the changed wording for PBP and Horsburgh has no implications for present purposes. In accordance even with modern principles of English statutory interpretation[16] — let alone those applicable at the time — it cannot be used to affect or vary the plain meaning of the legislation in accordance with its terms.

20. The Acts speak for themselves. They do not demonstrate sovereignty over PBP, in fact they do the opposite. Moreover, as I have said, it was for Britain, subsequently Singapore, to make a claim for sovereignty over PBP — and you do not make a claim for sovereignty by internal

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[13]CR 2007/29, pp. 20-21, paras. 52-55 (Bundy).

[14]Singapore's judges' folder, Vol 2, tab 26.

[15]*Ibid.*, tab 27.

[16]Cf. *Pepper (Inspector of Taxes)* v. *Hart* (1993) *AC* 593.

correspondence with a Master Attendant. To bracket Horsburgh with Pulau Pisang and to distinguish them from lighthouses in Singapore is an odd way to make a claim to territorial sovereignty.

4. An overall appreciation of British conduct over 115 years

21. Mr. President, Members of the Court, Singapore is fond of talking of the 150 years of the administration of Horsburgh lighthouse. In fact more than two thirds of this time was the British period and it is clear that Great Britain never annexed or claimed the island and never acted as if it was sovereign over it. This was the basis of Pavitt's appreciation which I cited to you last week[17].

22. Mr. Bundy dismissed this in one sentence, no doubt because there was nothing more he could say. Pavitt, Singapore's Director of Marine, distinguished between navigational aids in Singapore waters and those at Pedra Branca and Pulau Pisang. He continued: "Within Singapore *waters*, the Board maintains Raffles, Sultan Shoal and Fullerton Lighthouses . . ."[18] I will not repeat what I said last week[19]: it is sufficient to say that the meaning is clear and unqualified.

23. Mr. Bundy relies on a letter by Pavitt's assistant to discount Pavitt's opinion, in effect seeking to set the views of the subordinate against his experienced senior. But even if there was a disagreement, the point is that it was *Pavitt's views* which were published by the Singapore Light Dues Board. The internal comments of his subordinate were not published until Singapore's Reply in this case. The further and central point is that what matters in this context is precisely published comment, positions taken by Singapore or its officials in the public domain which reflect an appreciation of Singapore's role as lighthouse operator and/or as sovereign. And in this Britain was consistent and Singapore was consistent after it until the critical date — and in the matter of maps and legislation, long after.

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[17]CR 2007/26, pp. 69-70, paras. 47-51.

[18]MM, Ann. 74.

[19]CR 2007/26, pp. 69-70, paras. 47-51.

Conclusion

24. Mr. President, Members of the Court, Singapore has tried to dismiss the fact that Britain never intended to acquire sovereignty over PBP and in fact never did. But at every turn there is clear evidence to this effect.

Mr. President, could I now ask you to call on Nico Schrijver to continue Malaysia's presentation?

The VICE-PRESIDENT, Acting President: Thank you, Professor Crawford, for your speech. I now give the floor to Professor Schrijver to continue the presentation.

Mr. SCHRIJVER: Thank you, Mr. President.

THE CONDUCT OF MALAYSIA AND THIRD PARTY PRACTICE CONFIRM MALAYSIA'S TITLE OVER THE THREE FEATURES

1. Mr. President, distinguished Members of the Court, I now have the privilege of addressing you on three issues in response to the interventions by Singapore in its second round. First, I will deal with the conduct of Malaysia; secondly, with conduct by or involving third parties; and, lastly, with the separate status of Middle Rocks and South Ledge.

I. Conduct of Malaysia

2. As to the conduct of Malaysia, Ms Malintoppi referred to what she called "a fundamental inconsistency"[20] in Malaysia's pleadings, namely that we seek to demonstrate both an original title and conduct reflecting the display of sovereignty over the three features. Mr. President, Malaysia fails to see why this is contradictory.

3. During the first round of our oral pleadings, I distinguished five main categories of Malaysian conduct with respect to the three features. These were:

— concluding various treaties relating to maritime boundaries and management of marine resources;

— granting oil concessions;

— issuing maps and charts;

[20]CR 2007/29, p. 25, para. 2.

— enacting legislation; and

— regulating fisheries and marine policing[21].

4. In its second round, Singapore labelled these categories of conduct as "episodes"[22], but, Mr. President, with the exception of the actual administration of the lighthouse, they were no more episodic than the alleged British or Singaporean *effectivités* — in any event certainly prior to the critical date.

5. Mr. President, I will now respond to Ms Malintoppi's criticism of our examples of each of these categories.

6. In the category of the conclusion of treaties, we have a difference of view regarding the relevance of the Continental Shelf Agreement between Indonesia and Malaysia[23]. The Agreement was concluded in 1969, at the time when — in line with the emerging trends in the law of the sea — nearly all coastal States also in the region had established a 12-nautical-mile territorial sea: Indonesia, as early as 1960, Thailand in 1966, Malaysia in 1969. Singapore did not do so, since there was no need in view of its semi-enclosed territorial waters. And Point 11 — the key point in our discussions on the 1969 Continental Shelf Agreement is only 6.4 nautical miles away from PBP — already well within the 12-nautical-mile territorial waters generated by Pulau Batu Puteh.

7. Ms Malintoppi claims that the 1969 Agreement "does not concern any of the disputed islands which are not mentioned anywhere in its text"[24]. But the following question immediately poses itself: why should they? The brief 8-article Agreement relates to an extensive maritime area; it does not mention any island. Ms Malintoppi states: "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."[25] This is quite a stretch of imagination, for two reasons. First of all, Article 1 of the Agreement provides: "The boundaries of the Indonesian and the Malaysian

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[21]CR 2007/27, p. 12, para. 4.

[22]CR 2007/29, p. 26, para. 4.

[23]CR 2007/29, p. 28, para. 11, and CR 2007/27, pp. 12-14, paras. 5-8.

[24]CR 2007/29, p. 28, para. 11.

[25]*Ibidem.*

continental shelves in the straits of Malacca and the South China Sea are . . ."[26] Second, the waters surrounding the three features are covered by the Agreement.

8. Did the Agreement really not touch upon the three features and the surrounding waters as Singapore claims? On the screen — this graphic is also under tab 178 of your folder — we can see Singapore Navy's Patrol Sector F5 and the location of naval incidents depicted on the graphic projecting the maritime boundary line at Point 11 of the 1969 Continental Shelf Agreement between Indonesia and Malaysia. Neither in 1969 nor in 1975 did Singapore protest against the Agreement as infringing on the territorial waters of PBP. The reason is simple: at the time Singapore did not consider that it had any territorial interest in the area affected by the Agreement.

9. My *second* category related to the granting of oil concessions[27]. On Tuesday, Singapore argued that "neither Pedra Branca, nor Middle Rocks, nor South Ledge are mentioned anywhere in the Agreement"[28]. Once again I pose the question: why should they? The area covered by the concession included the area of the three features, as you can now see on the screen. It is also under tab 179 of your folder.

10. My *third* category was the issuing of maps and charts[29]. By way of example, I referred to the important Letter of Promulgation by Commodore Thanabalasingam and accompanying chartlets. According to Singapore this letter of the Rear-Admiral and the attachments are "hardly worthy of being described as a 'display of sovereignty' over Pedra Branca"[30]. Moreover, Singapore seeks to argue that this letter is inconsistent with the conduct of Malaysia since no request for the lowering of the ensign at the Horsburgh lighthouse was made, similar to the one relating to the ensign at Pulau Pisang lighthouse[31]. Earlier, my colleague Sir Elihu already explained that the situation of Pulau Pisang is completely different from that of Horsburgh lighthouse. And, as regards the 1968 letter, this was promulgated to the entire naval staff and fleet commanders for their execution. The text of the letter and the accompanying chartlets were

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[26]MM, Vol. 2, Ann. 16.

[27]CR 2007/27, pp. 14-16, paras. 9-15.

[28]CR 2007/29, p. 28, para. 12.

[29]CR 2007/27, pp. 16-17, paras. 16-21.

[30]CR 2007/29, p. 29, para. 14.

[31]*Ibidem.*

available on each and every navy vessel[32]. Each of the three features was included. As such it is just another example of Malaysia's display of sovereignty over its islands, its rocks, low-tide elevations and maritime zones.

11. My *fourth* category was the enacting of legislation[33], with special reference to the 1969 Emergency (Essential Powers) Ordinance, by which the territorial sea of Malaysia was officially extended from 3 to 12 nautical miles. On Tuesday, Singapore lamented, again, that "Pedra Branca and its related features" are not mentioned at all[34]. And I say again: why should they be mentioned? None of the approximately 1,100 islands and rocks under the sovereignty of Malaysia is mentioned. Furthermore, Singapore says "that the Ordinance does not specify the coast from which the territorial sea is measured"[35]. However, the Ordinance made specific reference to, as well as even annexed, the relevant Articles of the 1958 Convention on the Territorial Sea and the Contiguous Zone, including those Articles addressing the issue of drawing the baselines.

12. Lastly, my *fifth* category related to fisheries regulations and marine policing[36]. The official regulations of Malaysia also applied to the waters of the three features. They were enforced by the Malaysian marine police and navy. Again, Singapore claims that there is no documentary evidence of the regulation of fishing activities or of patrolling that is related specifically to Pedra Branca[37]. Obviously, Mr. President, this was not an area on which daily reporting took place, but — as attested to in the affidavits of Rear-Admiral Thanabalasingam and the two fishermen[38] — patrolling and fishing activities were conducted. As to the legal effect of private acts, such as fishing, Malaysia did not at all claim that they constitute conduct *à titre de souverain*. Rather, they illustrate the perception of the economic users of the area that the waters surrounding all three features belong to Malaysia. As such, they are pertinent for the present case.

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[32]Affidavit of Rear-Admiral (rtd.) Dato' Karalasingam Thanabalasingam, CMM, Vol. 2, Ann. 4, p. 23, para. 69.

[33]CR 2007/27, pp. 17-18, paras. 22-24.

[34]CR 2007/29, p. 29, para. 15.

[35]CR 2007/29, p. 29, para. 16.

[36]See CR 2007/27, p. 18, paras. 25-27.

[37]CR 2007/29, p. 30, paras. 17-18.

[38]Affidavit of Rear-Admiral (rtd.) Dato' Karalasingam Thanabalasingam, CMM, Vol. 2, Ann. 4, pp. 26-27, paras. 76-81; affidavit of Idris Bin Yusof (translation), CMM, Vol. 2, Ann. 5, p. 4, para. 14; and affidavit of Saban Bin Ahmad (translation), CMM, Vol. 2, Ann. 6, p. 4, para. 12.

II. Practice by or involving third States

13. Mr. President, please allow me now to respond to Singapore's arguments relating to the conduct of or involving third States. I first of all would like to put on record that also in this final stage Singapore failed to provide the Court with any example of third State recognition of Singapore's alleged sovereignty over one, let alone two or more of the three features. We can now safely conclude that such third party recognition does not exist. The only piece of alleged evidence that Singapore repeatedly mentions is the 2005 press release of the *Philippines* with respect to the collision between two vessels at sea, "off Pedra Branca, Singapore"[39]. My esteemed colleague Ms Malintoppi claims that "this document recognizes that Pedra Branca is part of Singapore's territory"[40]. Apart from the fact that this singular incident took place 25 years after the critical date, Ms Malintoppi opted for silence with respect to my question to clarify the meaning of this alleged "recognition", a word which is not used by the Philippines but only by Singapore itself.

14. Ms Malintoppi also commented on various *Dutch* documents, some from the nineteenth century, but others even dating back to the seventeenth century[41]. Singapore continues to argue that the particular episode in 1850 "represents evidence of the Dutch attitude that Britain had sovereignty over Pedra Branca"[42]. Mr. President, there is no need to repeat my four arguments put forward during the first round, why the 1850 Dutch letter is certainly not an act of recognition — a letter which, by the way, was not from the Dutch Resident, a high official in Riau, as Ms Malintoppi in a minor mistake stated[43], but from the Dutch Secretary in Batavia. It is out of all proportion to compare this brief correspondence — brief internal correspondence — between two Dutch civil servants concerning the petty issue of extra payment for works carried out with the official Letter of Promulgation of Rear-Admiral Thanabalasingam to his entire naval staff in 1968 concerning the extent of Malaysia's territorial waters.

15. Furthermore, Ms Malintoppi prompts me to make an observation on the translation and the meaning of the Dutch word *grondgebied*[44]. The English translation *territory* is not incorrect,

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[39]CR 2007/29, p. 33, para. 27.

[40]*Ibidem.*

[41]CR 2007/29, pp. 31-32, paras. 21 and 23.

[42]CR 2007/29, p. 31, para. 22.

[43]CR 2007/29, p. 31, para. 21.

[44]CR 2007/29, p. 31, para. 22.

but it should be noted that the word *grondgebied* has a rather generic meaning which can equally be translated by the word *area*. Consultation in the Royal Library of the contemporary 1864 edition of the new dictionary of the Dutch language (*Nieuw Woordenboek der Nederlandsche Taal)* provides other meanings of the word *grondgebied*, such as *jurisdiction* and *city area*[45]. In sum, there was nothing wrong with my colleague Sir Elihu using the expression "within the British sphere of influence"[46].

16. Furthermore, it is simply not correct that we "conveniently passed over in silence" the 1655 letter of the Dutch Governor of Malacca to the Netherlands East India Company in Batavia[47]. Professor Crawford provided an adequate response during our first round[48]. The gist of his response, which I will not repeat, was that even if Singapore's translation is more accurate, the 1655 Dutch letter shows that "the Dutch were careful not to antagonize the Johor ruler because of his control over the Orang Laut, who could wreak havoc on the shipping when they were not fishing"[49].

17. As regards the practice of *Great Britain*, we can be very brief: both before and after independence for Singapore there is not a shred of evidence that Great Britain perceived the three features as forming part of Singapore. Full stop!

18. With respect to the practice, the interesting practice of *Indonesia* in the modern period, it is simply a matter of fact that Indonesia in concluding three important treaties pertaining to maritime boundaries with its neighbours had the firm perception that PBP, Middle Rocks or South Ledge belonged to Malaysia — I am referring here to the 1969 Indonesia/Malaysia Agreement Relating to the Continental Shelves between the Two Countries, and to the 1970 Indonesia/Malaysia Territorial Seas Agreement, and to the 1973 Indonesia/Singapore Agreement — note the title — Stipulating the Territorial Sea Boundary Line between Indonesia and the Republic of Singapore.

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[45]I. M. Calisch and N. S. Calisch, *Nieuw woordenboek der Nederlandsche taal*, Tiel: H. C. A. Campagne (1864).

[46]CR 2007/26, p. 21, para. 45 (Lauterpacht); CR 2007/29, p. 31, para. 22 (Malintoppi).

[47]CR 2007/29, p. 31, para. 23.

[48]See CR 2007/24, p. 61-2, para. 14.

[49]See CR 2007/24, p. 62, para. 15.

19. From these instruments it follows that Indonesia not for a moment thought that another State than Malaysia had sovereignty over the three features. As your predecessor, the Permanent Court of International Justice, observed in the *Eastern Greenland* case of 1933 with regard to treaties entered by Denmark with third States: "To the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general, Denmark is entitled to rely upon them." (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 52.) Likewise, Malaysia is entitled to rely upon treaties that constitute evidence of recognition of its original title over PBP, Middle Rocks and South Ledge.

20. Finally, Mr. President, there was no response from Singapore to Malaysia's rather extensive review of *inter-State co-operation in the Straits* aimed at ensuring maritime safety and security of all shipping and commerce and protecting and preserving the marine environment within the area of co-operation, including the relevant waters around PBP[50].

III. The separate status of Middle Rocks and South Ledge

21. Mr. President, distinguished Members of the Court, in the final part of my speech, I would like to turn to the issue of the separate status of Middle Rocks and South Ledge. In the eighth point of his speech, Professor Koh reasserted that "for reasons of proximity, geology, history and law, the three features are inseparable"[51]. As Professor Koh knows, the number eight (*"ba"* in the Chinese language) is normally a lucky number. Not this time.

22. First of all, *proximity*, as demonstrated in the first round, is not an argument[52]. Mr. Chao nevertheless asserted that on proximity I "quite erroneously cited dicta" from the *Eritrea/Yemen* Arbitral Award[53]. However, Singapore's assessment of whether or not the Award is relevant misses the point. PBP, Middle Rocks and South Ledge lie clearly outside the coastal belt of Singapore. For Singapore there is no issue of proximity. Had the three features been lying within the coastal belt of Singapore, it could have sought to make the argument that the features belonged to Singapore. But as the Tribunal in the *Eritrea/Yemen* case observed, "there is no like

[50]CR 2007/27, p. 29, para. 61.

[51]CR 2007/29, pp. 58-59, para. 9.

[52]CR 2007/26, p. 27, para. 16.

[53]CR 2007/28, p. 23, para. 18.

presumption outside the coastal belt, where the ownership of the islands is plainly at issue"[54]. And here, Mr. President, the sovereignty over PBP, Middle Rocks and South Ledge is "plainly at issue". Therefore, Singapore cannot rely on the extension of its territorial waters from PBP, if its sovereignty over PBP is not established.

23. As to *geology*, Singapore is right in observing that "the issue is not whether Pedra Branca, Middle Rocks, South Ledge and Singapore Island form a group"[55]. If so, indeed, Singapore might seek to satisfy its apparent aspirations of becoming an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea. However, the only issue is whether PBP, together with Middle Rocks and South Ledge, form one group. As argued by Malaysia, this cannot be concluded from the mere fact that the three features have the same rock type. Contrary to what Singapore claims, it is pertinent to point out that the mainland and other maritime features in the area, including rocks at Point Romania and at Pulau Bintan in Indonesia, share the same geological characteristics as well.

24. And with respect to *navigation*, in the second round of oral pleadings, Singapore advanced the new proposition that "what determines whether a navigable channel exists is whether commercial maritime traffic can safely use that route"[56]. At this point, the argument by Singapore, Mr. President — to use its own terminology[57] — becomes "surreal". For it would mean that a channel would be navigable only if tankers or bulk carriers of a specific tonnage could pass through them. Mr. President, this would be subjecting the description of the physical characteristics of a channel to purely economic considerations, substituting nature by commerce. Singapore then suggests that "[n]o prudent mariner will navigate commercial vessels through such waters"[58]. However, the simple reason why commercial vessels do not pass through the waters between PBP, Middle Rocks and South Ledge is that this would lead to a longer route in comparison to the straight passage through the Middle Channel.

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[54] *Eritrea/Yemen,* Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 Oct. 1998, 114 *ILR* 1, pp. 123-124, para. 474.

[55] CR 2007/28, pp. 23-24, para. 20.

[56] CR 2007/28, p. 24, para. 22.

[57] *Ibidem.*

[58] CR 2007/28, p. 24, para. 23.

25. With regard to passage between Middle Rocks and South Ledge, Singapore now agrees that there is a navigable channel. However, Singapore now alleges that passage is only possible "provided both features are plainly visible, allowing a pilot to steer clear of South Ledge by sight". And at high water, according to Singapore, it would be dangerous[59]. Singapore, however, ignores that what matters with respect to passage through a channel is, above all, its depth. And the channel is certainly deeper at high water than at low water. It is as simple as that. And whether or not South Ledge is visible is today hardly relevant now that most vessels are equipped with Global-Positioning Systems (GPS) and other navigational aids.

26. In sum, the three features do not necessarily share the same fate. In accordance with the Special Agreement between the Parties, your Court has been requested to pronounce on the sovereignty of Pulau Batu Puteh, Middle Rocks and South Ledge individually, and not on the sovereignty of the three features as a group. Johor had an original title over each of the three features individually.

27. Mr. President, Members of the Court, this concludes my intervention on the conduct of Malaysia and third party practice which confirm Malaysia's original title over PBP, Middle Rocks and South Ledge. I thank you for your kind attention to my pleadings during these weeks and, Mr. President, could I now respectfully ask you to call upon my colleague Professor Kohen.

The VICE-PRESIDENT, Acting President: I thank you, Professor Schrijver, for your pleadings and call on Professor Kohen. You have the floor, Sir.

M. KOHEN :

LES NOUVELLES BASES DE REVENDICATION DE SINGAPOUR

1. Monsieur le président, Messieurs les juges, dans son second tour de plaidoiries, Singapour s'est vu obligée de développer un nouvel argumentaire juridique. Si formellement la «prise de possession licite au nom de la Couronne britannique» est toujours là, l'accent n'est plus mis sur l'acquisition d'un titre originaire par la Grande-Bretagne sur une *terra nullius*. Non. Maintenant, il est question soit d'une renonciation de la Malaisie à son titre originaire, soit de l'établissement de

[59]CR 2007/28, pp. 24-25, para. 25.

la souveraineté par des prétendues effectivités qui devraient l'emporter non seulement sur un titre originaire malaisien, mais même sur un éventuel titre originaire du sultan de Riau-Lingga[60] ! Ainsi, il n'y a rien d'étonnant à ce que Singapour vous invite maintenant à trancher l'affaire sans vous prononcer sur les titres originaires que les Parties elles-mêmes ont avancées[61].

2. Je comprends les doutes de la Partie adverse à l'égard du titre qu'elle a invoqué. La Malaisie n'éprouve pas les mêmes craintes. La Cour jugera de la cohérence et de la pertinence de l'un ou de l'autre des titres revendiqués par les Parties.

3. Je me propose maintenant d'examiner ce qu'est dans la croyance de Singapour la pièce maîtresse de son dossier : la lettre du secrétaire d'Etat suppléant de Johore du 21 septembre 1953, qu'elle qualifie à tort de renonciation au titre ancien[62] et de reconnaissance du titre britannique originaire[63]. Nous prenons acte toutefois que Singapore ne revendique pas cette lettre comme valant un titre ou même comme constituant la racine d'un titre[64].

A. La correspondance de 1953

4. Singapour est confrontée à des problèmes insurmontables pour pouvoir tirer de cet échange de correspondance le profit qu'elle prétend. Ces problèmes, les voici :

a) la personne des correspondants eux-mêmes ;

b) l'information transmise par le requérant de l'information ;

c) le contenu de la réponse et

d) le comportement des parties après l'échange de correspondance.

a) *La personne des correspondants*

5. Il convient de rappeler la nature à l'origine triangulaire de cette correspondance. Le secrétaire colonial de Singapour s'adressa au conseiller britannique de Johore, lequel à son tour se tourna vers le secrétaire d'Etat suppléant de Johore. La qualité des personnes qui interviennent est d'une nature tout à fait particulière. Il ne faut pas perdre de vue que Singapour est une colonie

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[60] CR 2007/28, p. 46, par. 21.

[61] CR 2007/29, p. 51, par. 26 .

[62] CR 2007/29, p. 41, par. 1 et p. 47, par. 16.

[63] CR 2007/29, p. 47, par. 17.

[64] CR 2007/29, p. 47, par. 16.

britannique et que Johore une composante de la Fédération de Malaya, entité protégée du Royaume-Uni. Comme l'a clairement expliqué Tan Sri Gani hier, les questions relatives à la conduite des affaires étrangères — y compris les relations avec des composantes de l'Empire britannique —, ne relevaient pas des membres de la Fédération[65]. Les questions de souveraineté territoriale, inutile de le dire devant votre Cour, relèvent des affaires étrangères des Etats. Car, malgré ce qu'ait pu croire un fonctionnaire colonial local, et malgré le fait que l'Etat protecteur de l'une (la Fédération de Malaya) et la puissance coloniale de l'autre (Singapour) soit le même — le Royaume-Uni —, Johore et Singapour ne constituaient pas des composantes d'un même Etat.

6. Alain Pellet lui-même a affirmé que c'était au *Chief Secretary* de la Fédération de Malaya d'y répondre[66]. Malheureusement pour Singapour, ce n'était pas lui ou même une autre autorité de la Fédération qui a répondu, mais le secrétaire d'Etat suppléant de Johore. Cet élément est déjà décisif pour écarter toute valeur juridique en matière de souveraineté territoriale à la réponse du secrétaire d'Etat suppléant. Nous sommes donc très loin d'une situation semblable à celle du ministre norvégien des affaires étrangères Ihlen devant l'ambassadeur danois dans l'affaire du *Groënland oriental* (*Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53,* p. 71). Si comparaison il y a, cela devrait être plutôt avec la «lettre Hoffman» dans l'affaire du *Golfe de Maine*, dont l'analyse de votre Cour a déjà été citée par mes amis Nico Schrijver et Penelope Nevill[67] (*Délimitation de la frontière maritime dans la région du golfe du Maine, arrêt, C.I.J. Recueil 1984*, p. 307-308, par. 139).

b) ***L'information transmise par le requérant d'information***

7. Singapour reconnaît que la demande d'information contenue dans la lettre Higham du 12 juin 1953 partait d'un faux postulat : que Pulau Batu Puteh avait été cédée par Johore en 1844. C'est la Partie adverse elle-même qui invoque l'existence d'une *erreur*. Mais Singapour vous dit que «cette erreur tient à l'ajout manuscrit erroné de «Pedra Branca» sur une annexe qui, en réalité, concernait Peak Rock»[68]. Pas du tout, Monsieur le président. C'est la lettre Higham elle-même

[65] CR 2007/30.

[66] CR 2007/29, p. 43, par. 8.

[67] CR 2007/27, p. 22, par. 36 (Schrijver) ; p. 35, par. 19 (Nevill).

[68] CR 2007/29, p. 43, par. 6.

qui le dit. Je cite les passages pertinents de la lettre, que vous avez dans vos dossiers à l'onglet 180 :

> «It appears this rock [Pedra Branca] is outside the limits ceded by Sultan Hussain and the Dato Tumunggong to the East India Company with the island of Singapore in the Treaty of 1824 (extract at «A»). *It was however mentioned in a dispatch from the Governor of Singapore on 28th November 1844* (extract at «B»).»[69]

8. L'erreur se trouve donc dans la demande d'information elle-même, pas seulement dans l'annexe ou par le fait que quelqu'un ait précisé dans cette annexe que «this Rock» signifiait «Pedra Branca». Par ailleurs, que l'on lise l'annexe avec ou sans l'additif «[Pedra Branca]», le résultat sera le même. La lettre fait croire que Johore avait cédé Pedra Branca en 1844. Le fait fondamental, qui vicie la demande d'information elle-même et donc la réponse qu'elle induit, est que la lettre Higham reposait sur une information erronée. En fait, il n'y a rien d'extraordinaire à ce qu'un fonctionnaire d'un Etat protégé fasse confiance de ce que l'informe son conseiller de l'Etat protecteur. Le Royaume-Uni ne pouvait pas profiter d'une réponse obtenue de l'un des ses sujets protégés, sur la base d'une information fausse qu'il lui avait transmise. En fait, j'avais déjà évoqué cela lors du premier tour de plaidoiries, mais Singapour a préféré ne pas analyser cet élément essentiel de la question[70] lors de son second tour.

c) ***Le contenu de la réponse***

9. Comme on le sait, la réponse laconique, sans aucune explication, ni quant au fond ni quant aux démarches entreprises, est que «the Johore Government does not claim ownership of Pedra Branca»[71].

10. Singapour insiste que le mot «propriété» doit être compris comme synonyme de «souveraineté»[72]. Pour ce faire, la Partie adverse évoque plutôt ce qui relève du souhait de certains fonctionnaires coloniaux à Singapour, à savoir la possibilité que la colonie étende ses eaux territoriales. Mais ce qui compte, aux fins d'interpréter la réponse, c'est plutôt ce que l'on a suggéré au secrétaire d'Etat suppléant de Johore de faire. En effet, le secrétaire du conseiller

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[69] Lettre du 12 juin 1953 adressée au conseiller britannique de Johore par J. D. Higham (MM, vol. 3, annexe 67 ; MS, vol. 6, annexe 93) ; les italiques sont de nous.

[70] CR 2007/25, p. 61, par. 84, CR 2007/29, p. 42-43, par. 6.

[71] MM, vol. 3, annexe 69 ; MS, vol. 6, annexe 96.

[72] CR 2007/29, p. 44, par. 9.

britannique à Johore évoque que le secrétaire d'Etat voudra bien consulter le commissaire des domaines et des mines ainsi que le géomètre en chef [Commissioner for Lands and Mines and Chief Surveyor]. Il évoque aussi — mais vaguement — toute autre archive existante, mais le fait est que les seules autorités concernées qui y sont nommément citées sont ces deux là[73].

11. Monsieur le président, on ne consulte pas le commissaire des domaines et des mines ou le géomètre en chef s'il s'agit de questions de souveraineté. Je le répète, la question de souveraineté n'était même pas du ressort du secrétaire d'Etat. La seule chose pour laquelle le commissaire du domaine et le géomètre en chef pouvaient donner des avis c'était précisément la propriété, pas la souveraineté. On nous dira que dans le cas de Pulau Pisang il y avait une écriture notariale [«indenture»]. Fallait-il qu'il y en ait eu une à PBP aussi ? Non, Monsieur le président. On l'a vu pour Pulau Pisang : entre 1885, année de la permission du sultan, et 1900, année de l'écriture notariale, il n'y avait que la permission du sultan à la construction le phare, sans que cela ne signifie que Johore était le souverain de l'île et la Grande-Bretagne propriétaire du phare et des installations connexes. La Malaisie vous a déjà expliqué les raisons de cette écriture et je ne reviendrai pas sur la question[74]. Donc, on ne pouvait pas déduire de la seule absence d'une écriture notariale que Johore n'avait pas la souveraineté sur PBP.

12. La réponse du secrétaire d'Etat suppléant ne peut se lire que comme désignant ce que le mot signifie en termes juridiques. Propriété, non souveraineté. Par ailleurs, ce n'est pas la première fois que la question de la propriété de toute une île est ventilée devant votre prétoire. La question s'est également posée dans l'affaire du différend *El Salvador/Honduras*, où il est mentionné la vente par le Honduras des îles El Tigre et Zacata Grande à des ressortissants des Etats-Unis d'Amérique, à peu près à la même époque de la construction du phare Horsburgh. Bien évidemment, il s'agissait de la propriété et non de la souveraineté, laquelle restait hondurienne (*Différend frontalier terrestre, insulaire et maritime, (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 568, par. 352).

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[73] MS, vol. 6, annexe 95.

[74] CR 2007/26, p. 43, par. 26, aussi RM, par. 319-323.

13. Le plus que Singapour puisse tirer de cette lettre est donc que Johore ne revendiquait pas la propriété sur l'île, sur laquelle la présence du phare ne laissait à vrai dire rien de disponible en matière de propriété foncière.

14. Poursuivons encore notre analyse. Supposons un instant, que nos amis et adversaires aient raison, *quod non*, et que le mot «propriété» doive se lire comme «souveraineté». Supposons encore, *quod non*, que le secrétaire d'Etat suppléant de Johore ait pu engager son Etat, déjà membre d'une fédération, et donc la Fédération elle-même. Cela fait vraiment beaucoup à supposer, Monsieur le président, mais faisons quand même l'exercice. Comparons alors ce que le secrétaire d'Etat suppléant de Johore a dit en 1953 avec l'analyse que votre Cour a faite dans l'affaire de l'*Interhandel* six ans plus tard. La Cour, dans cette affaire, n'a pas donné d'importance à une position claire prise au cours des échanges diplomatiques par l'une des parties et à son détriment, mais qui ne correspondait pas à la réalité. En effet, la Suisse faisait valoir que les Etats-Unis eux-mêmes avaient admis que la compagnie Interhandel avait épuisé les voies de recours internes. Selon votre Cour :

> «Il est vrai que les représentants du Gouvernement des Etats-Unis avaient émis cette opinion à plusieurs reprises et notamment dans l'aide-mémoire annexé à la note du secrétaire d'Etat du 11 janvier 1957. Cette opinion reposait sur une appréciation qui s'est révélée mal fondée. En réalité, la procédure que l'Interhandel avait introduite devant les tribunaux des Etats-Unis était alors en cours.» (*Interhandel (Suisse c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1959*, p. 27.)

15. C'est une note du secrétaire d'Etat des Etats-Unis (donc d'une personne spécialement habilitée pour représenter les Etats-Unis, y compris pour conclure des traités en leur nom). Je suppose que, malgré l'identité des noms des deux fonctionnaires, nos amis de Singapour ne voudront pas nous faire croire que le secrétaire d'Etat suppléant de Johore disposait des mêmes prérogatives sur le plan international que le secrétaire d'Etat des Etats-Unis d'Amérique ! Même si l'on pourrait prêter à ses propos la portée que veut Singapour, son affirmation serait donc «une opinion qui s'est révélée mal fondée». En témoigne le comportement qui a suivi, tant de la Malaisie que celui de Singapour, comme nous le verrons dans quelques instants.

16. Dans l'affaire du *Golfe du Maine*, la Cour n'a pas accepté non plus que des affirmations étasuniennes, pourtant claires, relatives à la ligne médiane comme critère de délimitation aient fixé une fois pour toutes la position du gouvernement de Washington :

> «il est peut-être vrai que l'attitude des Etats-Unis en matière de limites maritimes avec le voisin canadien s'est caractérisée jusqu'à la fin des années soixante par des incertitudes et par un certain manque de cohérence. Cette remarque n'empêche pas toutefois de constater que les faits allégués par le Canada ne permettent pas de conclure que le Gouvernement des Etats-Unis aurait par là *reconnu une fois pour toutes* la ligne médiane comme limite des juridictions sur le plateau continental.» (*Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 307, par. 138 ; les italiques sont de nous.)

17. Que dire donc de la prétendue renonciation au titre de Johore que Singapour croit déceler ici ? Dans l'affaire des *Pêcheries*, votre Cour a placé la barre très haut pour pouvoir dégager un abandon de la position propre ou l'acquiescement de celle de l'autre partie : «[O]n ne saurait s'appuyer sur quelques mots empruntés à une note isolée pour en conclure que le Gouvernement norvégien se serait départi d'une attitude que ses actes officiels antérieurs avaient nettement fixée.» (*Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951*, p. 138.)

18. Je connais l'objection de nos amis singapouriens : Quelle attitude antérieure, nous diront-ils ? Ni plus ni moins, Messieurs les juges, que l'autorisation donnée par Johore pour ériger le phare Horsburgh. C'est au fond une question de bonne foi aussi. Cent cinquante ans de service d'un phare pour lequel on a reçu une permission ne changent rien quant à la situation juridique existante.

19. Dans la même affaire des *Pêcheries* :

> «La Cour estime qu'il n'y a pas lieu d'attacher trop d'importance aux quelques incertitudes ou contradictions, apparentes ou réelles, que le Gouvernement du Royaume-Uni a cru pouvoir relever dans la pratique norvégienne. Elles s'expliquent assez naturellement si l'on prend en considération la diversité des faits et des situations au cours de la longue période qui s'est écoulée depuis 1812, et ne sont pas de nature à modifier les conclusions auxquelles la Cour est arrivée.» *(Ibid.)*

20. Il y a encore d'autres affaires territoriales portées devant votre Cour dans lesquelles les questions de souveraineté et de propriété étaient présentes, parfois entremêlées, mais ont toujours été différenciées par vous. J'ai déjà mentionné le *Différend frontalier (Bénin/Niger)* à propos de la propriété des ponts[75]. J'ajoute aujourd'hui la citation suivante tirée de votre arrêt dans l'affaire de *Certaines parcelles frontalières*, qui peut, à certains égards, être d'un grand intérêt dans cette affaire :

> «La valeur à attacher aux actes invoqués par les Pays-Bas doit s'apprécier en tenant compte du système complexe d'enclaves entremêlées qui existait. Les

[75] CR 2007/27, p. 59, par. 40.

> difficultés que rencontrait la Belgique à découvrir les empiétements sur sa souveraineté et à exercer celle-ci sur ces deux parcelles, entourées comme elles l'étaient par le territoire néerlandais, sont manifestes. Dans une large mesure, les actes invoqués sont des actes courants et d'un caractère administratif, accomplis par des fonctionnaires locaux et sont la conséquence de l'inscription par les Pays-Bas des parcelles litigieuses à leur cadastre, contrairement à la convention de délimitation.» (*Souveraineté sur certaines parcelles frontalières (Belgique/Pays-Bas), arrêt, C.I.J. Recueil 1959*, p. 229 ; voir RM, par. 289-292.)

d) ***Le comportement ultérieur des parties montre que rien n'a changé par rapport au titre originaire***

21. Singapour invoque que le contexte de la lettre Higham est constitué par la possibilité d'étendre les eaux territoriales de Singapour pour y inclure les eaux autour de PBP. Pour nous, c'est plutôt ce qu'on a demandé au secrétaire d'Etat suppléant de faire : aller regarder du côté du commissaire du domaine et des mines et du géomètre en chef.

22. Admettons un instant, pour le besoin de la plaidoirie, que Singapour ait raison sur ce point. L'évaluation de l'attitude des Parties au sujet des espaces maritimes sera alors de la plus grande importance. S'il est vrai que Johore avait renoncé à son titre de souveraineté et que Singapour s'est fiée à cette renonciation, le comportement des parties qui s'en est suivi devrait le témoigner. Regardons donc ce que chaque partie a fait. La puissance coloniale d'abord, et Singapour ensuite, d'un côté ; la Fédération de Malaya avant et après son indépendance en 1957 et sa transformation en Malaisie en 1965, de l'autre.

23. Que s'est-il passé au sujet des espaces maritimes ? La puissance coloniale a-t-elle étendu la mer territoriale de Singapour pour inclure les eaux autour de PBP, comme le réclamaient les deux agents britanniques sans succès ? Non. Singapour, a-t-elle étendu sa mer territoriale après son indépendance ? Non. Singapour a-t-elle inclus les eaux autour de PBP lors de la délimitation de la mer territoriale avec l'Indonésie dans le détroit de Singapour[76] ? Pas du tout. Au contraire, la législation singapourienne relative aux phares a continué de traiter ensemble la situation du phare Horsburgh et de celui de Pulau Pisang, les différenciant ainsi de ceux se trouvant dans les eaux territoriales de Singapour, comme il ressort du Light Dues (Amendment) Ordinance 1958 et du Singapore Light Dues Act 1969[77].

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[76] CR 2007/26, p. 71, par. 56.

[77] CR 2007/26, p. 56-57, par. 4-7.

24. Et que voit-on de l'autre côté du détroit de Johore ? La Malaisie a inclus les eaux autour des trois formations dans sa mer territoriale, comme en atteste la lettre de promulgation du commodore Thanabalasingam de 1968[78]. Et, Monsieur le président, s'il y a un Etat qui a pris en considération PBP aux fins de mesurer l'étendue de son plateau continental, cet Etat c'est la Malaisie, pas Singapour, comme le démontre le fait que le point 11 de la délimitation avec l'Indonésie de 1969 se trouve à 6,4 milles nautiques de l'île, en fait, PBP étant le territoire le plus proche du point 11[79]. A cela s'ajoute qu'il n'y a eu qu'un seul Etat à inclure les trois formations objet du différend dans une concession pétrolière en 1968 et que cet Etat c'est encore la Malaisie[80].

25. La pratique subséquente en matière d'espaces maritimes permet donc de tirer deux conclusions par rapport à la correspondance de 1953 :

a) que loin d'avoir abandonné sa souveraineté sur PBP, Middle Rocks et South Ledge, la Malaisie l'a fait valoir dans l'aspect qui, compte tenu de leur caractère exigu et de leur nature, est le plus important qui soit : en les prenant en considération aux fins de l'étendue de ses espaces maritimes ;

b) que la puissance coloniale d'abord, les autorités autonomes ensuite et enfin celles de la République de Singapour, ont toujours fait la sourde oreille aux souhaits du *Chief Surveyor* et du *Master Attendant* exprimés avant et après l'échange de correspondance. En effet, contrairement à leur souhait, Singapour n'a jamais proclamé, ni n'a revendiqué avant la date critique, une mer territoriale autour de Pulau Batu Puteh.

26. La similitude entre la prétention de Singapour d'une renonciation malaisienne due à la correspondance de 1953 et la prétention nigériane d'un abandon de souveraineté du Cameroun à Bakassi est frappante, à la différence près que Singapour ne peut même pas se targuer de quelque véritable effectivité qui soit avant la date critique. Votre Cour rejeta la thèse du Nigéria se référant aux négociations en vue de la délimitation des espaces maritimes et l'octroi de concessions pétrolières par le Gouvernement camerounais, «témoignant encore du fait qu'il n'avait pas abandonné son titre malgré une présence nigériane significative sur Bakassi ou toutes effectivités

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[78] MM, annexe 76.

[79] Agreement Between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental Shelf Between the Two Countries, 27 October 1969 : MM, vol. 2, annexe 16

[80] CR 2007/27, p. 14-16, par. 9-15.

nigérianes *contra legem*» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 416, par. 223).

27. Le comportement subséquent des Parties en matière d'espaces maritimes offre donc un démenti catégorique à la thèse de Singapour d'une renonciation à la souveraineté malaisienne. Au contraire, ce comportement démontre non seulement que la Malaisie a exercé sa souveraineté sur PBP, Middle Rocks et South Ledge, mais aussi que Singapour ne s'est pas comportée comme souverain ni n'a réagi quand la Malaisie l'a fait.

28. Examinons maintenant les efforts de mon ami Alain Pellet pour tenter d'expliquer la formule employée par l'*Attorney-General*, «we can claim [Pedra Branca] as Singapore territory»[81]. Tout d'abord, il a incorrectement traduit cette formule, prétendant que cela voulait dire en français «nous avons une revendication». Monsieur le président, pendant ces deux semaines je vous ai infligé de suivre mon anglais de temps en temps et je m'en excuse, mais je crois être en mesure de prétendre que la bonne traduction de «we can claim [Pedra Branca]» est plutôt «nous *pouvons* revendiquer [Pedra Branca]» et non «nous avons une revendication». La réalité, à ce stade terminal des plaidoiries, nous la savons déjà : il n'y avait même pas de revendication de souveraineté car le Gouvernement britannique n'a jamais eu l'intention d'acquérir la souveraineté sur PBP.

Mr. President, maybe you wish to make a stop at this point.

The VICE-PRESIDENT, Acting President: Yes, I do wish to have a brief break for about 10 minutes. Thank you.

The Court adjourned from 4.25 p.m. to 4.55 p.m.

The VICE-PRESIDENT, Acting President: Please be seated. It escaped me to thank you, Professor Kohen, for your pleadings and I do so belatedly. Now . . . Oh, you have not finished. I am so sorry!

[81] CR 2007/29, p. 45, par. 11-12.

M. KOHEN :

B. Il n'y a eu ni renonciation du titre ni acquiescement à une quelconque revendication singapourienne

29. Monsieur le président, les conditions posées par le droit international pour établir un abandon sont strictes, comme il ressort de la jurisprudence : *primo*, la renonciation ne se présume pas ; *secundo*, elle doit être interprétée restrictivement et limitée à l'objet précis visé ; *tertio*, même si l'on admet la possibilité d'une renonciation tacite, elle doit s'induire de faits qui n'admettent pas une autre interprétation dans les circonstances d'espèce[82]. Les affaires des *Phares en Crète et à Samos* et du *Groënland oriental* que les Parties ont abondamment citées devant vous en contiennent des exemples en matière de souveraineté territoriale, dans lesquels la Cour a rejeté l'idée d'une renonciation ou abandon (*Phares en Crète et à Samos, arrêt, 1937, C.P.J.I. série A/B n° 71*, p. 103-104 ; *Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53*, p. 47).

30. Dans la présente affaire, la prétendue renonciation de 1953 n'en est pas une. Je résume :

— *premièrement*, le secrétaire d'Etat suppléant de Johore n'avait pas la capacité d'engager qui que ce soit en matière de souveraineté territoriale ;

— *deuxièmement*, la demande formulée par Higham, indiquant que Johore avait cédé PBP en 1844 contenait donc une sérieuse erreur qui ôte à la démarche toute efficacité juridique ;

— *troisièmement*, le secrétaire d'Etat suppléant, après s'être informé auprès du commissaire du domaine et des mines et du géomètre en chef, informe que Johore n'a pas la propriété sur Pedra Branca ;

— *quatrièmement*, la pratique subséquente des parties montre que la Fédération de Malaya et la Malaisie non seulement n'ont pas abandonné le titre originaire, mais l'ont au contraire exercé. Cette pratique montre également, que malgré les souhaits du *Chief Surveyor* et du *Master Attendant* de Singapour, les organes compétents n'ont jamais étendu la mer territoriale de Singapour autour des eaux de Pedra Branca. Il en va de même du souhait du prédécesseur

[82] Affaire Campbell (Portugal/Royaume-Uni), sentence arbitrale du 10 juin 1931 (*RSA*, vol. II, p. 1156).

lointain de M. Chao, l'*Attorney-General* : «nous *pouvons* revendiquer Pedra Branca» disait-il, mais le fait est que ni le Royaume-Uni ni Singapour l'ont fait.

31. Pourquoi les autorités de l'époque — nous sommes dans les années 1950 — ne l'ont pas fait ? Peut-être peut-on trouver l'explication dans la position que le Royaume-Uni lui-même avait avancée ici-même dans l'affaire des *Minquiers et des Ecrhéous*. Le Gouvernement britannique écarta toute valeur, aux fins de la souveraineté, aux aides à la navigation. Par la même occasion, il expliqua qu'il n'avait aucune raison de protester du fait que la France assurait l'établissement des bouées et l'illumination des Minquiers, même à l'intérieur des 3 milles marins des îlots.

32. En voici l'explication :

> «His Majesty's Government have not objected to the establishment of these buoys, being unwilling, unless in case of absolute necessity and in rebuttal of a direct claim of right, to assert British sovereignty in opposition to a work of public utility which *per se* prejudiced in no way British interests.» (*C.I.J. Mémoires, Minquiers et Ecréhous (Royaume-Uni/France)*, vol. 1, p. 555 (Extract from Foreign Office Memorandum of 17 August 1905 to the French Government cited by the United Kingdom in its Reply, 3 November 1952.))

33. Cette position du gouvernement britannique exposée devant votre propre Cour correspond à la même époque de celle de la correspondance de 1953. On peut ainsi mieux comprendre l'absence de réaction des autorités britanniques compétentes aux appels de certains fonctionnaires locaux d'étendre la souveraineté à PBP du fait du service du phare. On peut également comprendre les raisons pour lesquelles cet échange de correspondance peu orthodoxe, n'a pas eu de suites. On peut également comprendre pourquoi l'argument de l'absence de protestation durant cent trente ans avancé par Rodman Bundy n'a aucune pertinence[83]. Nous persistons : comme la propre position officielle britannique le montre, il n'y avait rien à protester. Un siècle et demi de service du phare ne permet pas de transformer un titre de propriété en titre de souveraineté.

34. Prétendre une telle interversion unilatérale de titre équivaut à saper les bases mêmes de la confiance réciproque entre les Etats et bouleverse la sécurité juridique. Je me suis déjà référé à la situation dans laquelle une puissance mandataire voulait transformer unilatéralement son titre d'administrateur en titre de souveraineté et à la manière dont votre Cour a rejeté cette prétention[84].

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[83] CR 2007/29, p. 23, par. 62.

[84] CR 2007/25, p. 62-63, par. 89.

35. Inutile de répéter devant vous le *dictum* devenu classique de la relation titres/effectivités que vous appliquez systématiquement dans votre jurisprudence relative au contentieux territorial (*Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 586-587, par. 63). Je me contenterai de dire que l'invitation de Singapour à trancher l'affaire sur la base de prétendues effectivités, sous couvert d'évoquer les hypothèses de l'absence de titre ou d'un titre imprécis, dissimule mal son objectif de renverser la solution que vous avez fournie dans le cas où le fait ne correspond pas au droit : il y a lieu de préférer le titulaire du titre.

36. «La Cour fait droit au principe *ex injuria jus non oritur*» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997,* p. 76, par. 133), avez-vous affirmé il y a une décennie. Personne ne saurait valablement se prévaloir d'un comportement qui dépasse l'étendue de ses compétences pour créer de nouvelles compétences, pour transformer un fait contraire au droit en droit. Ni l'échange de correspondance de 1953, ni les comportements ultérieurs des Parties n'ont modifié la situation juridique existante au moment de la construction du phare Horsburgh, à savoir Johore était le souverain sur Palau Batu Puteh, Middle Rocks et South Ledge.

37. Je vous remercie, Monsieur le président, et vous prie de bien vouloir donner la parole à ma collègue Penelope Nevill.

The VICE-PRESIDENT, Acting President: I thank you, Professor Kohen, for your pleadings and give the floor to Ms Nevill. You have the floor, Madam.

Ms NEVILL:

SINGAPORE'S CONDUCT AND THE MAP EVIDENCE

1. Mr. President, Members of the Court, my brief presentation today will respond to the points made by Singapore in its reply concerning Singapore's conduct after 1965 and the map evidence.

I. Singapore's lack of relevant conduct

2. In reply, Singapore made reference to Professor Crawford's "machine-gun" attack on its conduct, as if this was a point in its favour[85]. But if we shoot at so many targets, it is because Singapore has provided so many. It has performed many works in its administration of the lighthouse, as well as a very limited number which it claims are non-lighthouse related. It lists these repeatedly and at great length — as if to make up through the public words of counsel the paucity and privacy of the facts. Malaysia has responded in detail to these claims of conduct in its written and oral pleadings and, the Court will be relieved to hear, I will not do so again now.

3. Singapore attempts to elevate its lighthouse-related conduct to sovereign acts by reference to Malaysia's diplomatic protests in respect of the installation of a Vessel Traffic Information System (VTIS) radar station in 1989 and a helicopter pad in 1991, comparing these instances to the lack of protest of lighthouse-related activities before 1980[86]. Mr. Bundy said that experience is something someone acquires after one needs it. Certainly, it was only after the dispute arose in 1980 that Malaysia acquired the experience that Singapore considered its activities administering the lighthouse as conduct *à titre de souverain*. Singapore's position was contrary to Malaysia's understanding of the basis of Singapore's activities on PBP. In light of the nature of the dispute, which had by then arisen, it is hardly surprising that Malaysia protested such conduct. According to Singapore, Malaysia is damned when it does not protest and damned when it does. But Singapore cannot make non-sovereign, lighthouse-related activities into sovereign activities by some reverse inference from protests made in these circumstances.

4. From his discussion of post-critical date protests, Mr. Bundy went on to say that the constellation of activities Singapore carried out is more than enough to support the conclusion or the inference that Singapore regarded itself as possessing sovereignty over PBP. The problem for Singapore is that if it did regard itself as possessing sovereignty over PBP, as distinct from being the administrator of the lighthouse on it, it did a rather poor job of showing it. In fact, one might say it did not do the job at all. As we have shown, there is nothing in Singapore's territorial sea

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[85]CR 2007/29, p. 20, para. 50 (Bundy)

[86]CR 2007/29, pp. 22-23, para. 59 (Bundy).

delimitation with Indonesia, its 1969 Lights Dues legislation, or in other representations of itself after 1965 and before 1980 that PBP was Singapore territory.

5. Singapore's reply to the point about its failure to delimit a territorial sea in the area of PBP in its 1973 Agreement with Indonesia was to refer to an "authoritative study on maritime boundaries" by Charney and Alexander of 1993[87]. Although Malaysia has already responded to the arguments made by Singapore in its written pleadings[88], Singapore's reply calls for some comment. The first point to note is that the Charney and Alexander study was published well after the critical date, and the authors note Singapore's dispute over PBP with Malaysia in terms which suggest that they have been advised on the matter by Singapore[89]. But this is a relatively minor point. The main point is that Singapore's reference to a 1993 secondary text on international maritime boundaries cannot possibly answer its failure in the agreement itself to either delimit territorial seas with Indonesia in the area of PBP, or to reserve its position in this respect. If PBP, Middle Rocks and South Ledge are considered by Singapore to lie in the entrance of Singapore Straits, as Singapore has said[90], then the Agreement would have delimited the territorial sea between it and Pulau Bintan in Indonesia. After all, the full title of the Agreement is the "Agreement Stipulating The Territorial Sea Boundary Lines Between Indonesia and the Republic of Singapore in the Strait of Singapore"[91]. And it should be stressed that there was nothing prospective about the conflict of maritime claims: in 1973 Indonesia had already asserted a 12-nautical-mile territorial sea. Singapore cannot point to any aspect of the Agreement itself which supports its reply that future delimitation was left open[92].

6. Regarding Pavitt's representation that PBP was not in Singapore waters, Singapore says in reply that he in no way said that Pedra Branca belonged to Malaysia[93]. This rather ignores the point that Pavitt — then Singapore's long-standing Director of Marine — said, in effect, that the

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[87]CR 2007/29, p. 25, para. 32 (Malintoppi).

[88]RM, Vol. 1, paras. 324-328.

[89]CMS, para. 6.70, citing Charney J. and Alexander L. (eds.), *International Maritime Boundaries*, Vol. 1 (1993), p. 1050.

[90]For example, CR 2007/20, p. 18, para. 8; p. 19, para. 13 (Koh); p. 26, para. 19 (Chao).

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

[92]CR 2007/29, p. 32, para. 25 (Malintoppi).

[93]CR 2007/29, p. 22, para. 57 (Bundy).

island did not belong to Singapore, in spite of what his assistant may or may not have thought, as suggested by the internal correspondence. Pavitt's external statement, in a publication published by the Singapore Light Dues Board, is clear[94]: it indicates that PBP does *not* lie in Singapore waters.

7. Nor did Singapore in reply explain its failure to include PBP in representations of its territory in the lists of its islands and islets in the *Singapore Facts and Pictures* publications and elsewhere. Instead it cited from the *Taba* Award in which the Tribunal said, regarding the omission of a boundary pillar from the 1909 *Statistical Yearbook for Egypt*, that the evidentiary value of such publications is low[95]. In that case, however, the Egyptian-Israeli boundary pillar claimed by Egypt was marked on maps and trig lists published by Egypt and Britain during the Mandate period[96]. To paraphrase Oscar Wilde, omitting a boundary pillar from one edition of a yearbook may be regarded as misfortune; to omit an entire island from all lists of islands and all maps of your own territory for a period of over 140 years looks like more than just carelessness. The cumulative evidential effect of such omissions must be considerable.

8. If we compare Singapore and Malaysia's conduct after 1965, Singapore cannot point to any oil concessions being granted which include the area of PBP, cannot point to any documents, internal or otherwise, which show PBP and the two features generating Singapore waters, cannot point to territorial waters legislation including the waters of PBP, and cannot point to any delimitations with third States which take PBP into account, or even to any reservation of rights in that regard.

II. The map evidence

9. Looking now to the map evidence, Singapore argues that Malaysia's treatment of the maps is inconsistent, on the one hand, inviting the Court to assign weight to maps when Malaysia thinks they support its case, but, on the other, asking it to disregard the six Malaysian maps which Singapore alleges show PBP as appertaining to Singapore[97]. Singapore misunderstands Malaysia's

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[94]See CR 2007/26, pp. 69-70, paras. 47-48 (Crawford).

[95]CR 2007/29, p. 21, para. 56 (Bundy); Award of 11 September 1986, 27 *ILM* 1427.

[96]*Ibid.*, p. 120, para. 235.

[97]CR 2007/29, p. 33, para. 28 (Malintoppi).

argument. What Malaysia said is that the maps do not in fact show PBP as belonging to Singapore, but show Horsburgh lighthouse as belonging to Singapore. Indeed, the maps show Batu Puteh as part of Malaya and then Malaysia, having been designed so as to ensure it is depicted on these topographical maps of the south-eastern part of Johor, showing the cartographers appreciation that PBP, Middle Rocks and South Ledge are part of Johor. The maps do not support Singapore's claim because they cannot be read as the unequivocal statements of political attribution or geographical fact which Singapore repeatedly asserts they are.

10. It is therefore a misapprehension to say, as Singapore suggested in reply, that "Where the Parties disagree is on the role to be assigned to the official maps issued by Malaysia supporting Singapore's claim"[98], because this is not simply a disagreement over the role to be assigned to these maps in law. Even so, the authorities on which Singapore relies call for some comment. Singapore cites Max Huber's general discussion of maps in the *Island of Palmas* Award. It evidently wants the Court to focus on one aspect of his discussion, that official maps would be of special interest when they do not assert the sovereignty of the Government that issued them. The maps produced by the United States in that case included maps published by the Netherlands which excluded the Island of Palmas from Dutch possessions[99]. Yet, in spite of the general proposition on the weight of such maps, nothing turned on the maps in the outcome[100]. Singapore again referred to the discussion of disclaimers in the Eritrea-Ethiopia Boundary Commission Award[101]. The question there was the *admissibility* of the maps, the tribunal ending the discussion cited by Singapore with the observation that although it might influence the weight to be assigned to it, a disclaimer did not exclude a map's admissibility[102]. Malaysia has never disputed the admissibility of the so-called admission against interest maps in this case, and it produced the maps in question in its Memorial.

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[98]CR 2007/29, p. 34, para. 29 (Malintoppi).

[99]*Island of Palmas (Netherlands/USA)*, 4 April 1928, *RIAA* 831, Vol. II, pp. 853-854.

[100]*Ibid.*, pp. 853-854.

[101]CR 2007/29, pp. 38-39, para. 45 (Malintoppi).

[102]Eritrea-Ethiopia Boundary Commission, *Decision Regarding the delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 1 January 2001, 41 *ILM* 1057, p. 1077, para. 3.28.

11. Finally, as to the fact that no maps of Singapore exist prior to 1995 which portray PBP as part of it, Singapore responds that the maps are not political maps, PBP is very small and uninhabited, the maps' geographical scope is limited and, in any event, none of the maps of Singapore indicate that PBP belongs to Malaysia[103]. Not one of these points disguises or adequately answers why Singapore did *not* publish *any* maps, political or otherwise, showing PBP, Middle Rocks and South Ledge as belonging to Singapore.

12. If, as we have established, Malaysia has original title to PBP, and Horsburgh lighthouse was built and maintained with the consent of Johor, then it is necessary at some determinate time prior to the critical date for Singapore to make an adverse claim to PBP. The fact is it never did so — and the complete absence of Singapore maps before 1995 is one amongst several indications of this.

13. In short, Singapore's conduct in respect of PBP does not evidence its claim of sovereignty, and this is supported by its failure, in its mapping conduct and in other key respects, to act consistently with an understanding that it had sovereignty over PBP, Middle Rocks and South Ledge.

Mr. President, Members of the Court, thank you for your continued attention. Mr. President, can I ask you to call on Professor Crawford.

The VICE-PRESIDENT, Acting President: I thank you, Ms Nevill, for your pleadings and now give the floor to Professor Crawford.

Mr. CRAWFORD: Sir, the promises of counsel are not to be trusted! Yesterday I promised you an early minute. I have to say, I think the early minute has already been taken and if you will forgive me, I will go relatively slowly in this speech, even if it means that I trench on supper time.

THE PARTIES' CLAIMS AND THE COURT'S JURISPRUDENCE

1. In its second round this week, Singapore went to great pains to present Malaysia's claims as unprecedented. It was suggested by Mr. Bundy that the Court had never decided in favour of a

[103]CR 2007/29, p. 38, para. 43 (Malintoppi); p. 58, para. 8 (Koh).

State in Malaysia's position[104]. I thought I would respond, Mr. President, Members of the Court, to that suggestion by taking you through your jurisprudence and by providing guidance based on your jurisprudence in relation to original title. I will do that by looking first at the *Island of Palmas* case and then at your four most relevant decisions in contentious cases.

Part I. The jurisprudence of original title

Island of Palmas (1928)[105]

2. So, starting with the *Island of Palmas* case. It was, of course, decided at a time when the idea of the legal personality of indigenous kingdoms — I should say, non-European indigenous kingdoms — tended to be devalued, and post-colonial *effectivités* were sometimes seen as the only relevant consideration. Yet just as the British did customarily deal with native rulers such as the Temenggong or the Imam of Muscat, acquiring sovereignty through, not in despite of them, so arbitrators had regard to their transactions, whether they referred to them as treaties or contracts. These were themselves *effectivités* of the indigenous States or entities. The Crawfurd Treaty was an *effectivité* of *our* Johor, not of the Sultan of Lingga — which is why Singapore gave it so little air time this week. Yet you are asked to say — by Singapore, the direct descendant of the Crawfurd Treaty — that Johor should be so remarkably effective in the centre of the Straits and so ineffective and non-existent at their eastern entrance!

3. In short, in order to ground their sovereignty, the Powers which acted in this region had recourse to cession agreements concluded with local authorities. This enabled Max Huber to assert in the *Island of Palmas* case: "From the time of the discoveries until recent times, colonial territory has very often been acquired, *especially in the East Indies*, by means of contracts with the native authorities."[106] In that case, the decisive factor was that the Netherlands could prove that the islands neighbouring Palmas — and they were not very close to it — were under their suzerainty by virtue of contracts concluded between the Dutch East India Company and the local princes, and that the Island of Palmas, Miangas, depended on those princes[107]. The Island of Palmas is an

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[104]CR 2007/28 pp. 63-4, para. 9 (Bundy); CR 2007/29 p. 13, para. 25 (Bundy).

[105](1928) 2 *RIAA* 829.

[106]*Ibid.*, 858.

[107]*Ibid.*, pp. 857, 865-869.

isolated mid-oceanic island, as you can see on your screen. But it was not *terra nullius* and it was attributed to the Netherlands principally on the basis that it fell within the scope of "contracts with the native authorities".

***Minquiers and Ecrehos* (1953)**

4. I turn to the first of your Court's decisions that I will review, the *Minquiers and Ecrehos* case (*Judgment, I.C.J. Reports 1953*, p. 47). Your Judgment is perhaps known for the following statement, quoted by Singapore — and I quote: "What is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups." (*Ibid.*, p. 57) Now, the contrast you drew in that passage was between "indirect presumptions" and "direct evidence", and it is entirely appropriate, but it calls for the following comments.

5. As to the *Minquiers and Ecrehos* case itself:

— First, despite that remark, the Court paid great attention to the actual evidence and transactions of the Middle Ages, including transactions governed by feudal law, not international law. I note especially your discussion of the Charter of 1203, which is, as far as I know, the most authoritative discussion by a modern court of the institution of *"frankalmoin" — (la franche aumône)* (*ibid.*, pp. 60-62) — that there is an existence.

— Second, the Court was not reluctant to draw inferences from the transactions which were relevant to the outcome of the case, provided the inferences were "necessary or natural" (*ibid.*, p. 66).

— Third, the parties agreed, and the Court accepted, that the islands and rocks were not *terra nullius* (*ibid.*, pp. 52, 53).

— Fourth, the dismemberment of the Duchy of Normandy in 1204, not a recent date, could not be presumed to have established a French original title But this was not because of any *a priori* reason, it was due to the incomplete, temporary and partial implementation of that dismemberment, as well as many subsequent contrary treaties (*ibid.*, p. 57).

— Fifth and finally, for that reason France had no original title. Britain *did* have original title over both groups, and its original title in the case of the Ecrehos dated to the Middle Ages. It was

expressly upheld (*ibid.*, p. 67 (Ecrehos); *ibid.*, p. 70 (Minquiers)). Given that both original title and preponderant *effectivités* favoured Great Britain, no issue of conflict between them arose.

6. As to our case, by contrast with *Minquiers and Ecrehos*:

(a) First, we are concerned with the first half of the nineteenth century, and with transactions governed by international law, not by feudal law or *adat* law.

(b) Second, substantial sources of evidence are available including expert evidence adduced by Malaysia, as to the history.

(c) Third, it is, with all respect to my colleagues opposite, obvious that PBP was not *terra nullius*.

(d) Fourth, the dismemberment of the old Kingdom of Johor is well documented and was accompanied by transactions *recognizing* the original title of Johor to islands in the Straits. It was fully implemented. The continuity of that situation was, in turn, expressly recognized by Great Britain in 1927 and Singapore in 1995.

***Libya/Chad* (1994)**[108]

7. I turn to the second of your cases, *Libya/Chad*: I need spend very little time on it. Libya claimed an original tile by succession to lands to the south of a line described in a treaty of 1899 between Great Britain and France and unilaterally drawn by France on the so-called *livre jaune* map. Chad denied the existence of an original title although it eventually — through its counsel Professor Higgins, as she then was — conceded that the disputed area, vast and remote, was not *terra nullius*. But the Court found there was a subsequent treaty between Libya and France which adopted the *livre jaune* line; that treaty title determined the matter and prevailed over whatever might have been the legal *status quo ante* in the regions claimed by Libya[109]. The Court, with what seemed at the time to be considerable self-satisfaction, listed all the issues it did not need to decide. I will revert to that when I talk about the issues that, in our respectful submission, you *do* need to decide in this case.

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[108] *I.C.J. Reports 1994*, p. 6.

[109] *Ibid.*, pp. 38-39, para. 76.

***Indonesia/Malaysia* (2002)[110]**

8. I turn to the next case, *Indonesia/Malaysia.* Not content with having been counsel for Indonesia in that case, Professor Pellet then acted more or less as counsel for Malaysia — but, I think without fee! He gave you an extended account of *Indonesia/Malaysia*[111]. I had already analysed the key differences between the two and I am not going to repeat them[112]. Let me take just one contrast — a tale of two treaties. In *Indonesia/Malaysia*, Malaysia claimed a title of succession from a third party, the United States, via a treaty, the 1930 Treaty, which both the United States and Britain *thought* affected the two islands in dispute. But Indonesia was *not* a party to the 1930 Treaty, and you protected Indonesia from its effects in accordance with the *pacta tertiis* rule. Hence Malaysia had to prove its title as against Indonesia *de novo*, so to speak — which we did, in significant part because the history of dealings in the region showed British and then Malaysian involvement and Dutch and then Indonesian non-involvement in these remote and little-known islands. By contrast in the present case — as soon as it is established that the Sultanates of Lingga and Johor adhered to the delimitation of spheres of influence established by the Anglo-Dutch Treaty — *there is no third party*. The delimitation of the Dutch sphere excluded the three features; the correlative delimitation of the British sphere included them. The conduct of all concerned made that clear. There was then an internal division within the British sphere, immediately effected by the Crawfurd Treaty between the Honourable East India Company and Johor, which dealt with islands in the Straits and left the three features to Johor. All these transactions are opposable to Singapore as successor to Britain: the contrast is perfectly clear.

***Nicaragua* v. *Honduras* (2007)**

9. Let me turn to your most recent decision, *Nicaragua* v. *Honduras*. The question whether small off-shore islands were *terra nullius* was raised in that case as well and you said:

> "the mere invocation of the principle of *uti possidetis juris* does not of itself provide a clear answer as to sovereignty over the disputed islands. If the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be *assumed* that they had been under the rule of the Spanish Crown. However, it does not necessarily follow that the successor to the disputed islands could only be

[110] *I.C.J. Reports 2002*, p. 625.

[111] CR 2007/29, pp. 47-56, paras. 18-39.

[112] CR 2007/27, p. 64, para. 5.

> Honduras, being the only State formally to have claimed such status."[113] (Emphasis added.)

It is "generally recognized" that the islands off the coast, such as those under discussion, which are further from the coast than PBP, small and apparently unknown to Nicaragua even in its Application, were not *terra nullius* in 1821. "It must be assumed that they had been under the rule of the Spanish Crown." Why? Because Spain had sovereignty over the continent. Does this assumption only apply to a colonial power such as Spain? Not to a long-standing non-European States such as Johor? Is there any reason to believe that this assumption is only applicable in Latin America, or in the context of *uti possidetis,* and not in Asia? The problem in *Nicaragua* v. *Honduras* was that there was no Spanish attribution of the islands to one or other of the administrative units. Here the Anglo-Dutch Treaty excludes any possible discussion about which of the two Sultans had sovereignty.

Some conclusions from the jurisprudence

10. Mr. President, Members of the Court, this has been a compressed account, more compressed than it might otherwise have been, but let me draw some general conclusions from this brief review.

(a) The first is that each case depends on its own facts and claims; each case is its own case and has to be decided on its own merits. The need for each party to prove its claims — applicable in cases commenced by Special Agreement as well as unilateral Application — does not produce, *de jure* or *de facto*, a presumption against original title. The State with the better title prevails, it is as simple as that.

(b) Second, if either party has a clear treaty title opposable to the other, then you give effect to that title at once, ignoring any earlier original title whether derived from occupation of *terra nullius* or from long-standing indigenous right, or whatever. That is what you did in *Libya/Chad*.

(c) Third, the mode of occupation applies only to *terra nullius*, as you said in *Western Sahara*. The test for *terra nullius* is that set out in *Western Sahara*, a test of social and political organization.

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[113] Judgment of 8 October 2007, para. 158.

(d) Fourth, where the territory in question is not *terra nullius*, it still has to be shown that the territory falls within the boundary of the claimant State or its predecessor: it might after all have belonged to some third party, whether or not still existing.

(e) Fifth, if this cannot be shown, so that the position of the two claimant States is the same in point of title, then the balance of *effectivités* prevails: that is the rule stated by the Chamber in *Burkina Faso/Mali*[114]. So in *Indonesia/Malaysia*, Malaysia could not show that the two islands fell within the Sultanate of Sulu, thence Spain, thence the United States; so the 1930 Treaty, to which Indonesia was not a party, or privy, could not be shown to have been Britain's, thence Malaysia's, root of title. Hence *effectivités* prevailed, subject to the important point that the history of dealing with the islands as between Britain and the United States shed considerable light on the actual administration of the islands over a long period[115].

11. Mr. President, Members of the Court, Malaysia has shown that Great Britain and the Netherlands proceeded on a basis of a division of the Sultanate of Johor, which had extended north and south of the Straits and east and west of them too. The criterion of division was stated in Article XII of the Anglo-Dutch Treaty. The Sultan of Lingga and the Sultanate of Johor complied with that division, reluctantly on both sides no doubt, but within a few years of 1824 it was effective in the region. It established the criterion for the allocation of territory between the Dutch and the British spheres to which all concerned parties adhered. Within the British sphere, Johor included all the islands off its coasts, to considerable distances; certainly not limited to 3 nautical miles. That is the lesson of the Ord Award, just as it is of the Kuria Muria Islands I showed you yesterday. But above all it is the lesson of the Crawfurd Treaty. In denying to the Johor authorities the capacity to deal with islands in the Straits, including uninhabited islands more than 3 miles offshore, Singapore denies both British practice and its own heritage.

12. In its reply, Singapore responded to this key argument in two ways.

13. First, it stressed the need for the explicit mention of the islands claimed[116]. But they *are* explicitly mentioned and shown as belonging to Johor, for example, in the 1842 official Dutch map

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[114] *I.C.J. Reports 1896*, pp. 586-587, para. 63.

[115] *I.C.J. Reports 2002*, pp. 683-684, para. 142.

[116] CR 2007/20, p. 47, para. 7 (Pellet); CR 2007/21, pp. 10-11, paras. 36-37 (Pellet); CR 2007/28, pp. 40-42, paras. 9-12 (Pellet); CR 2007/28, p. 64, para. 13 (Bundy).

and in the 1843 *Singapore Free Press* article. The British acknowledged this when they sought permission to build the lighthouse, as Marcelo Kohen has shown. But Mr. President, Members of the Court, how often do you have to mention a clump of rocks before you cease to risk losing them to the nearest foreign naval officer with a flag? There is no presumption of *terra nullius*; there is no presumption of loss of territory — in fact, the presumption is the other way. Once it is clear from the documents and the circumstances that particular features *are* included in a State — including an indigenous State — then other more general descriptions can be resorted to to reinforce that position. The consistent refrain of "all the islands" in the statements I took you to the other day[117] remains relevant if, in terms or by clear implication, such statements cover the region where the clump of rocks is located. There has to be a sufficient identification of particular features as included in the State — and let us assume, for the sake of argument, that some specific mention even of small geographical features is required, though it seems to me that assumption should *not* be made. But even making it, here there is such mention, in official documents and reliable statements of the period. And once we have it, concordant general descriptions of the extent of the State can also be taken into account. They do not cease to be evidence because they fail to mention by name any one particular clump of rocks, given that they unquestionably include them and given that the prior and subsequent history of dealing with offshore features of the Malay Peninsula — the Crawfurd Treaty, the Ord Award — itself supports this conclusion. Counsel for Singapore profess to be good at addition; in fact, their real speciality is subtraction, minimization, the reduction of evidence, its reduction to absurdity.

14. Singapore's second response is to resort to the argument of indeterminacy. For example, the Agent, Mr. Koh said: "should the Court find that the title to Pedra Branca [was] indeterminate at that time [i.e., 1847-1851], Singapore has clearly shown that it has sovereignty"[118]. But it is necessary to distinguish between genuine indeterminacy, where some necessary proposition cannot be established at all, and an argument which uses indeterminacy to undermine conclusions reasonably reached on the evidence before the Court. The Court is not scared of inferences. The former is acceptable and consistent with what the Chamber said in *Burkina Faso*/*Mali* and what

[117]CR 2007/25, pp. 18-22, paras. 23-29.

[118]CR 2007/29, p. 59, para. 10 (Koh).

you did in *Nicaragua* v. *Honduras*. In *Nicaragua* v. *Honduras* there was genuine indeterminacy because neither party could show what the *uti possidetis* principle entailed offshore for the small islets. Contrast this with a situation where there is a body of material before the Court, which on the balance of probabilities, leads to a particular conclusion. The dossier is not silent: the position might be arguable — anything is arguable with my colleagues opposite — but the balance sufficiently clearly points one way rather than another. It is improper at that stage for a party, having lost the argument on the substance, then to invoke indeterminacy and have a second bite at the cherry — or if it was Mr. Bundy, it would be a second bite of the apple! After all, Singapore's case itself depends on inference, as Mr. Brownlie admitted[119]. The determination of sovereignty over very small features is not equivalent to a finding of guilt in a criminal case and there is no room for a standard of proof beyond a reasonable doubt. Able counsel can cast doubt on virtually *every* proposition. An approach treating indeterminacy as a joker in the forensic pack would be a powerful solvent of territorial sovereignty.

15. Moreover, as you have observed, when it comes to the comparison of *effectivités*, rather little may do, and there may be — there usually are — *effectivités* on both sides. It would be incongruous if the especially rigorous standard applied to issues of primary title — the first stage of the *Burkina Faso/Mali* test — but then a much looser and more indeterminate standard applied at the second stage of comparison of *effectivités*. The same standard — reasonable demonstration on the balance of the available evidence — should apply at both stages.

Part II. The issues for the Court

16. Mr. President, Members of the Court, this brings me to my second and, happily, even briefer section of this presentation. There are in our view seven issues which the Court should consider in this case. They can be seen on the screen and at tab 183 in your folder. Let me take you through the table.

17. For the reasons that I have explained, drawing on *Libya/Chad*, the very first question is whether either Party has a treaty title opposable to the other. The Parties agree that the answer is no. But two comments are in order:

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[119]CR 2007/21, p. 35, para. 5.

— First, Singapore *expressly* does not rely upon a treaty title arising from the Johor consents of 1844, which were not a cession, or from the letter of 1953, which was not a cession and is not a root of title.

— Second, even in cases where there is no treaty title, the Court is sensitive as to the implications that treaties, concluded by the competent authorities, may raise for any claim of original title. In applying the *Western Sahara* test, you looked to external relations as well as internal relations. Here the implications of the Treaties of 1824 support — powerfully support — Johor's original title. But of course they do not create it.

18. As to the second question, the *terra nullius* question, in none of the five cases I have discussed was it argued or held that the territory in question was *terra nullius*. *A fortiori,* a claim to lawful occupation has never been held to prevail over original title.

19. As to the third question, we have explained at length why, if PBP was not *terra nullius* in 1824 or 1847, it must have belonged to Johor. This is not a case which is indeterminate in the sense I have analysed above, in the proper sense of that term. Of course, Singapore *says* it is indeterminate, but that is because their image is of Malaysia as a mere claimant to a title already lawfully vested in them.

20. As to the fourth question — did PBP fall within the British zone under the 1824 Anglo-Dutch Treaty? — Singapore's suggestion that PBP is in the Dutch zone is fanciful and inconsistent with other aspects of the argument. It shows the extent to which they have been driven by the recognition of the difficulty of their position.

21. As to the fifth and seventh questions — whether consent was given to the principal *effectivités* in the case, that crucial question, and the issue of "confirmation of title" — these have been authoritatively dealt with by my colleague Marcelo Kohen.

22. As to the sixth question, whether there was a public claim to sovereignty prior to the critical date, we have shown beyond peradventure the absence of any public claim to PBP by Great Britain in the period before 1962 and by Singapore in the period between its separation from Malaysia and the critical date. What can Singapore do in response? Produce letters from subordinate officials in their Reply, which have never been published before. That being so there was never any adverse possession to start with.

23. Mr. President, Members of the Court, I suggest with respect that to ask these questions in this order is both logically and legally appropriate. Singapore jumbles them up: for example Mr. Brownlie's "lawful taking of possession" is a hybrid of questions 2 and 6. You cannot have occupation, in the legal sense, of features which were not *terra nullius* — but you can have control of *terra nullius* without any intention to acquire sovereignty. Mr. Brownlie's approach to the case fails on both grounds.

24. Counsel for Singapore this week tried to scare you by saying that a decision in favour of Malaysia would be unprecedented. So would a decision in favour of Singapore. No State claiming "by right or usance" — to borrow Lord Clarendon's formula which I cited yesterday and which is in tab 167 — no State claiming "by right or usance" has ever been held to have lost its rights merely by consenting to the use of its territory by another State. There is no case of a State claiming what it says was *terra nullius* being held to have acquired sovereignty if the territory was not in truth *terra nullius*. In other respects, too, Singapore's case is unprecedented.

25. Mr. President, Members of the Court, judges who are warned against setting precedents have normally responded in a robust manner — "that is our function", they have said. I suggest, with respect, that that is the appropriate response.

26. Mr. President, Members of the Court, may I thank the Court for its careful attention and, Mr. President, ask you to call on the Agent to close Malaysia's case and present its formal submissions.

The VICE-PRESIDENT, Acting President: Thank you, Professor Crawford, for your speech. I now call on His Excellency Tan Sri Abdul Kadir Mohamad, Agent of Malaysia, to make the closing statement on behalf of Malaysia.

Mr. KADIR:

CLOSING STATEMENT BY THE AGENT OF MALAYSIA

1. Mr. President, distinguished Members of the Court, the delegation of Malaysia values greatly the opportunity it had in these three weeks to explain to you Malaysia's stand that sovereignty over Pulau Batu Puteh; Middle Rocks; South Ledge, belongs to Malaysia. In these closing remarks, I will not attempt yet again to summarize the extensive arguments already made

by Malaysia's counsel. But I do need to respond to a few of the points made this week by Professor Jayakumar.

On the question of the 1979 Map:

2. Professor Jayakumar suggested that the 1979 Malaysian Map was a challenge to "the existing legal order"[120]. Later, the Agent for Singapore, Professor Koh, went so far as to call it "infamous"[121]. In fact Malaysia's Map was a step to set out in a specific map, Malaysia's territorial waters and continental shelf boundaries, taking into account agreed boundaries with the neighbouring countries, customary practice of boundary delimitation and applicable principles of international law. The purpose of the telegram of 20 December 1979 from the Ministry of Foreign Affairs addressed to Malaysian diplomatic missions abroad was to advise them that the Map was not a *fait accompli* but a statement of position, accompanied by an express willingness by Malaysia to negotiate any unresolved questions. The fact is that our colonial heritage had left us with unresolved issues with all our seven neighbours — and the developing law of maritime jurisdiction has added more. How else to resolve maritime and boundary issues than to set out a position after due consideration and offer to negotiate unresolved issues? It is a long process but it is an orderly one. By contrast, Singapore never published maps showing what it now claims, and it negotiated agreements with both Malaysia and Indonesia that ignored maritime boundaries it now claims. The Court may decide for itself which of these two processes is preferable.

3. As to the stability of Malaysia's relationship with Indonesia, in particular, the fact is that a decision in favour of Singapore would impose another maritime régime in the area, impacting on existing maritime delimitation and jurisdiction between Malaysia and Indonesia. It would also require a new territorial sea delimitation between Singapore and Indonesia, notwithstanding their earlier Agreement. That brings into focus Singapore's silence on its maritime claims.

4. Mr. President, Members of the Court, I turn now to the operation of the lighthouse and Singapore's plans for the three features. In the first round I said, and I now repeat, that Malaysia has no wish to change the status quo in terms of the operation of the Horsburgh lighthouse.

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[120]CR 2007/28, p. 15, para. 18 (Jayakumar).

[121]CR 2007/29, p. 58, para. 5 (Koh).

Professor Jayakumar alluded to the possibility of "some historic wrong"[122], but there was no such wrong. I wish to underline that Johor's consent for the construction and operation of the lighthouse was sought and was willingly given, and in that respect nothing has changed. The problem is of recent origin. Singapore changed Britain's longstanding policy — as reflected in Pavitt's book[123] and in Singapore's own Light Dues Act of 1969[124]. Singapore wants to redefine its status on Pulau Batu Puteh by claiming sovereignty not only over Pulau Batu Puteh but also Middle Rocks and South Ledge.

5. But, when Professor Jayakumar says that this case is not about the right to operate the lighthouse[125], that raises the question what it *is* about. You have heard about Singapore's reclamation plans — all Singapore says in response is that it is "a law-abiding country and is proud of its record in this respect"[126]. There is no specific denial of reclamation plans whatever — and I would note that Malaysia was not even consulted by Singapore when Singapore commenced its major reclamation works in the Straits of Johor without due regard for the boundaries of Malaysia or the marine environment. And now Professor Pellet, counsel for Singapore, refers to the three features as an "archipelago"[127], another questionable idea never suggested by Singapore before. So the Court will, I hope, understand our concerns — which Singapore has done nothing to address before you, but has in fact aggravated.

6. As to Singapore's military presence, first Singapore admits having introduced military radar communications equipment on PBP. Secondly, the so-called F5 patrol zone of 1975 bore no specific relation to PBP at all. It was only since 1986 that a 24-hour guard has been mounted around PBP. The effect is to make the region around the three features a no-go area. Professor Jayakumar said, "Singapore has never arrested any Malaysian fishermen in Pedra Branca waters"[128]. The issue here is not about whether any Malaysian fisherman has been arrested: it is

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[122]CR 2007/28, p. 15, para. 16 (Jayakumar).

[123]CR 2007/26, p. 68, para. 47 (Crawford).

[124]CR 2007/26, p. 56, para. 5 (Crawford).

[125]CR 2007/28, p. 18, para. 31 (Jayakumar).

[126]CR 2007/28, p. 16, para. 21 (Jayakumar).

[127]CR 2007/23, p. 52, para. 13 (Pellet).

[128]CR 2007/28, p. 17, para. 27 (Jayakumar).

about Johor fishermen being completely prevented from fishing anywhere near PBP, from taking shelter on the island in bad weather and being deprived of their traditional fishing grounds.

7. With reference to the important letter of request from Governor Butterworth to build a lighthouse on Johor territory: we have now heard, for the first time, that Singapore does not have the Letters of Request from Governor Butterworth. The proposal for a third round of consultations — to which Professor Jayakumar referred on Monday[129] — was plainly not a response to Malaysia's specific enquiry in 1994. Nor does Malaysia have the Butterworth letters, as we have said in our written pleadings. In all likelihood, the letters were received by the Sultan and Temenggong in Singapore, where they were resident at that time. Those residences in Singapore are no longer there. Malaysian researchers have searched all the Johor palaces in Johor and the royal archive without success. So, what our counsel said about the letter last week is the nearest, is the nearest the Court can come to the facts: I refer to the statements of Sir Elihu Lauterpacht[130] and Professor Kohen[131] in this regard.

8. Then there is the issue of the 1953 letter from the Acting State Secretary of Johor. The letter from the Acting State Secretary of Johor was manifestly not an instrument of cession or a "disclaimer" of sovereignty because of its terms, and also because the Acting State Secretary of Johor simply did not have the capacity to effect such a cession or disclaimer. Nor was it taken as such at the time: it was never acted upon by either party. Singapore's own uncertainty about the letter — which is referred to, amongst other things, as a confirmation, a renunciation, a waiver, a disclaimer and an estoppel — shows that Singapore cannot decide on any determinate view as to its status. In fact, the 1953 letter had none.

Finally, I come now to my conclusion and submissions:

9. Mr. President, Members of the Court, as you will have observed, Malaysia has sought to present its case fully and fairly. It has the vital interests in security and co-operation in the region of the Straits which I have mentioned already. But it has an equal interest in maintaining peaceful and friendly relations between nations based on respect for international law. This is especially

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[129]CR 2007/28, p. 14, para. 13 (Jayakumar).

[130]CR 20007/24, p. 42, para. 35 (Lauterpacht).

[131]CR 2007/25, pp. 10-15, paras. 25-34 (Kohen).

important for relations between immediate neighbours such as Malaysia and Singapore. That is why Malaysia has come to this honourable Court to find a peaceful settlement to the dispute over PBP, Middle Rocks and South Ledge.

10. Many allegations have been made against Malaysia by our friends and colleagues opposite. I have referred to certain points made by Professor Jayakumar last Monday which cannot be left unanswered. Should there be any details left unaddressed, Malaysia reserves its position on the points I have not dealt with expressly.

11. Mr. President, Members of the Court, on behalf of the Government of Malaysia, counsel for Malaysia, the Co-Agent and myself as Agent, I wish to thank you for your attention and interest throughout this proceeding, as well as for the efficiency of the Registry. Likewise, we thank the interpreters for a job well done.

12. I will now read Malaysia's submissions:

Malaysia respectfully requests the Court to adjudge and declare that sovereignty over:

(a) Pedra Branca/Pulau Batu Puteh;

(b) Middle Rocks;

(c) South Ledge,

belongs to Malaysia.

Mr. President, Members of the Court, I thank you.

The VICE-PRESIDENT, Acting President: I thank the distinguished Agent for Malaysia. The Court takes note of the final submissions which you have read on behalf of Malaysia, as it took note on Tuesday 20 November of the final submissions of Singapore.

I am informed by Judge Keith that he wishes to pose a question. A question addressed, I believe, to Singapore, and I give him the floor.

Judge KEITH: Thank you, Mr. President. What response, if any, does Singapore wish to make in reply to the submission made yesterday by the Attorney-General of Malaysia, expressly by reference to provisions of the Johor Agreement of 1948 and the Federation of Malaya Agreement of 1948, that the Acting State Secretary of Johor, to quote part of the submission, "was definitely

not authorised" and did not have "the legal capacity to write the 1953 letter, or to renounce, disclaim, or confirm title of any part of the territories of Johor"? Thank you, Mr. President.

The VICE-PRESIDENT, Acting President: Thank you, Judge Keith. The written text of this question will be sent to the Parties as soon as possible. Singapore is requested to provide its written response to the question within one week as from the closure of the present oral proceedings, that is to say, by Friday 30 November 2007 at the latest. Any comments Malaysia may wish to make, in accordance with Article 72 of the Rules of Court, on the response by Singapore must be submitted by Friday 7 December 2007.

This brings us to the end of these three weeks of hearings devoted to the oral argument in the present case. I should like to thank the Agents, counsel and advocates for their statements. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

The Court will now retire for the deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment.

As we have no other business before us today, the sitting is closed. Thank you.

The Court rose at 6.05 p.m.