Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)

Malaysia's Comments on Singapore's Response to Judge Keith's Question of 23 November 2007

Malaysia makes the following comments:

Introduction

1. Malaysia's reference to the Johor Agreement and the Federation Agreement is not a completely different argument "from that presented by Sir Elihu Lauterpacht" in his first round but a development of it.[1] It does not differ from what Singapore itself had said in the second round: "Addressed [sc., the request in the Higham letter] to the British Adviser, with a copy to the Chief Secretary, Federation of Malaya, it was to the latter that the task of replying fell" (CR 2007/29, 36 (para. 8)).

2. As the Malaysian Attorney-General recalled during his oral presentation on 22 November 2007, Singapore asserted that, in 1953, Johor "was a sovereign State under international law",[2] and that the Acting State Secretary of Johor was "the highest civil servant in charge of the State's administrative matters".[3] Singapore thus sought to imply that both Johor and its State Secretary were renouncing, disclaiming or confirming part of

1 CR 2007/26, 52 (paras. 57, 59).
2 CR 2007/30, 14 (para 7) quoting Professor Koh, CR 2007/29, 58 (para 6).
3 CR 2007/30 14 (para 7) referring to Professor Pellet, CR 2007/29, 46 (para 14).

the territories of Johor. What the Attorney-General said was responsive to these remarks.

Lack of clarity with Singapore's argument

3. At the outset, it must be stressed that the precise character of Singapore's reliance on the 1953 letter is quite unclear. Singapore expressly states that the letter did not amount to a cession of territory:[4] this confirms the statement repeated during oral argument that the 1953 letter was not a "root of title".[5] Nor does Singapore argue that the letter amounted to a "renunciation" or "abandonment" of title by Johor;[6] nor that the letter "confirmed Singapore's title to territory".[7]

4. There is an evident confusion and self-contradiction in the Singapore Response since, in the sentence immediately following the denial that the letter "confirmed Singapore's title to territory" the Response goes on to say that "the letter *had the effect of* confirming Singapore's title to Pedra Branca" (emphasis added).[8] It is unclear what Singapore is saying: is it that the 1953 letter *does not confirm* or *does confirm* Singapore's claim to Pulau Batu Puteh? If it does *not* confirm Singapore's title it is difficult to see how that the letter assists its case. If, on the other hand, the letter is said to confirm Singapore's claim, it is difficult to see how the words that

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4 Response, para. 3, third sentence.
5 E.g., CR 2007/29, 39 (para 16) (Pellet).
6 Response, para. 8, fourth sentence.
7 Ibid., fifth sentence.
8 Response, para. 8, sixth sentence.

Johor "does not claim ownership of Pedra Branca" can be converted into a positive acknowledgement that Singapore has sovereignty over the island.

5. The repeated use by Singapore of the word "disclaimer" to describe the Johor reply cannot give that letter a legal quality which it does not possess. Insistence on the word "disclaimer" necessarily implies acknowledgement that the party "disclaiming" possesses a title to disclaim.

The Higham letter

6. The language used by the Higham letter is not the language of a State that is claiming sovereignty over an area of land territory. The Higham letter does not claim or assert sovereignty over PBP, whether expressly or by implication. Indeed, it makes no hint at all of any claim to British sovereignty over PBP. If, in 1953, Great Britain considered that it had any claim to sovereignty over PBP, this would undoubtedly have been reflected in the letter. But in fact the letter merely asked Johor to inform the writer "whether there is any document showing a lease or grant of the rock".

Constitutional position of Johor

7. Clause 16 and the Second Schedule to the Federation Agreement confirm that the executive authority of the Federation of Malaya extended to certain "defence and external affairs" matters, including "obligations of the Federation in relation to the British Empire and any part thereof". Clause

17 of the Federation Agreement provides that "the executive authority of the Federation shall be exercised by the High Commissioner either directly or through officers subordinate to him". Singapore makes no comment in relation to these provisions in its response. Singapore similarly makes no comment in relation to the Malaysian Attorney-General's observation that Johor was a protected State by virtue of the Johor Agreement. The British Protectorates, Protected States and Protected Persons Order in Council 1949 identified Johor as a British protected State.[9] Singapore fails to address the consequences of Johor's status as a protected State for Singapore's assertion that Johor was capable of dealing with matters of external affairs and territorial sovereignty. It is in this context that the response to the Higham letter must be understood. A declaration by the Acting State Secretary of Johor to the effect that Johor had no claim to sovereignty over PBP (thus implying that Singapore was able to claim sovereignty over PBP) would clearly have constituted a matter of "external affairs", falling beyond the authority and legal capacity of Johor.

8. There is an inherent inconsistency in paragraphs 10 and following of the Singapore Response. Singapore argues that the requirement in the Johor Agreement that Johor will not enter into any engagement or consult on political matters with any foreign State could not apply to correspondence with Britain or Singapore. The Attorney-General did not argue, as

[9] In 1953 Johor was a protected State by virtue of the Johor Agreement. The British Protectorates, Protected States and Protected Persons Order in Council 1949, Schedule 2, identified Johor under the list of "Malay States" as a British protected State and designated as its authority "the High Commissioner for the Federation of Malaya": *Statutory Instruments, 1949* (London: HMSO, 1950), vol. I, 522, 526.

suggested by Singapore,[10] that Britain was a "foreign State" for the purpose of Clause 3(2) of the Johor Agreement.[11] The fact that the same State was the protector State of the Federation of Malaya (which included Johor) and the colonial ruler of Singapore does not mean, however, that any colonial authority of any colonial entity being part of the British Empire had the capacity to enter into discussions having binding results with any entity being part of the Federation of Malaya. Moreover, it was the evident intention of the Johor Agreement that Johor should not be able, *inter alia*, to dispose of any part of its territory without the knowledge and consent of the British Crown. This was a significant fetter on the sovereignty of Johor. As explained by the Attorney-General, by virtue of the Second Schedule[12] this fetter would operate as regards a renunciation of title even in favour of the British Empire.[13] A disclaimer of territorial sovereignty by a protected State in favour of the protecting State is not something to be dealt with in the manner Singapore attributes to the 1953 letters.

9. Paragraph 11 of the Response seeks to dispose of the reservation to the Federation, in the Federation Agreement, of competence over "External Affairs" by asserting that the concept of "External Affairs" did not apply to what, in this case, Singapore asserts is "a disclaimer" of title to territory. No authority is cited or examples given to support the very broad contention that "the term 'External Affairs' appearing in constitutions of the Commonwealth is imprecise in meaning and has been differently

10 Response, para. 9-10.
11 CR 2007/30, 15 (para 10-12).
12 Tab 163, Vol. 5 of Malaysia's Judges' Folder.
13 CR 2007/30, 16 (para 16).

interpreted in different jurisdictions and at different periods of time". Moreover, it runs counter to the obvious point that correspondence with another government relating to title to territory falls within the concept of "external affairs". Nor is the Singapore argument in any way supported by invoking the provision of the Federation Agreement relating to interpretation. The fact that there had not been an interpretation of "External Affairs" by the Interpretation Tribunal provided for in that Agreement does not mean that that expression cannot be given its ordinary and natural meaning.

Practice of the parties

10. At paragraph 12 of its response, Singapore asserts that "during the period when the Federation Agreement was in force, Johor officials continued to correspond routinely with their counterparts in Singapore on matters under their charge". This is true. Indeed, the 1953 correspondence provides an example, since it commented upon issues of private property rights that fell within the Acting State Secretary's authority and legal capacity. However, Singapore has provided no evidence that, during the period concerned, Johor officials corresponded with counterparts in Singapore on matters relating to "external affairs" or territorial sovereignty. Certainly, none of Singapore's three examples at paragraph 12 support this proposition. The first example relates to the continuation of a commercial contract for the supply of water from Johor to Singapore dating back to 1927. The second example concerns correspondence relating to defence matters between the Chief Police Officer of Johor and his counterpart in

Singapore. Consistent with the reservation in the Federation Agreement as regards defence matters, the Chief Police Officer of Johor was an officer of the Federation, not Johor. The third example concerns communications by the Johor Harbour Master and the Johor Control of Supplies. Again, these officers were officers of the Federation stationed in Johor. They were not officers of Johor.

11. Indeed, it is notable that, between 1947 and 1949, it was the Malayan Union, and subsequently the Federation, not Johor, that negotiated outstanding boundary issues between Johor and Singapore under the Straits Settlements and Johore (Territorial Waters) 1927.[14] Like the question of sovereignty over PBP, these outstanding boundary issues clearly did relate to "external affairs". In principle, issues of sovereignty over the territory of a protected State necessarily have an external aspect.

Restrictive interpretation of unilateral acts

12. Furthermore, as regards paragraphs 14 and 15, the absence of any adverse comment by senior British officials is just as much a "certain" indication of their views that the letter did *not* affect title to the island, as the opposite interpretation that Singapore seeks to put upon their silence.

[14] See Letters relating to the subject on the Johore-Singapore Boundary dated 25 November 1947, 3 December 1947, 31 December 1947, 27 May 1948, 8 December 1949: **Annex** hereto.

13. Finally, as regards paragraphs 16 and following, Malaysia recalls how the Court dealt with the effect of unilateral acts of a State in the *Nuclear Tests* case:[15]

> "44. ...[N]ot all unilateral acts imply obligation: but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound – the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, *a restrictive interpretation is called for.*" (emphasis added)[16]

This is true *a fortiori* when the correspondence concerns the relations between a protected State and an organ of the protecting State.

14. It is appropriate to recall that the 1953 letter cannot have any relevance once the Court has determined that Johor had title to Pulau Batu Puteh in 1847, that the island was not *terra nullius* at that time and that no conduct of Britain in the years 1847-1851 deprived Johor of its title. Everything after 1851 confirms the position, in particular since neither Great Britain nor Singapore ever claimed title to PBP in the period prior to the critical date – a fact not affected *in any way* by the 1953 letter.

15. Even assuming that the letter referred to sovereignty instead of "ownership" (*quod non*), even neglecting (which is not possible) that it was an answer to a request containing an essential error having the capacity of

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15 ICJ Reports 1974, p. 253, 267.

16 See to similar effect the ILC's *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Principle 7 (A/61/10 (2006)).

inducing a wrong answer, even disregarding (which is not possible) the fact that subsequent conduct of the parties was inconsistent with Singapore's current claim as to the effect of the 1953 exchange of letters, the result would still be the same as the Chamber of the Court found in the *Frontier Case (Benin/Niger)* with regard to the letter by M. Reynier, Governor by interim of Niger of 24 August 1954,[17] viz., the correspondence would be without legal incidence.

Respectfully submitted,

Noor Farida Ariffin
Co-Agent of Malaysia

7 December 2007

[17] See *Frontier Dispute (Benin/Niger), Judgment,* ICJ Reports 2005, 122-125 (paras. 57-66).

ANNEX
to Malaysia's Comments on Singapore's Response to Judge Keith's Question of 23 November 2007

Letters relating to the subject on the Johore-Singapore Boundary dated 25 November 1947, 3 December 1947, 31 December 1947, 27 May 1948 and 8 December 1949

No. (2) in M.U.12043/47.

The Secretariat,
Government of the Malayan Union,
Kuala Lumpur,

25th November, 1947.

Sir,

BOUNDARY BETWEEN JOHORE & SINGAPORE

I am directed to request an expression of the views of the Government of Singapore / Resident Commissioner on the amendment to Article I of the Straits Settlements and Johore (Territorial Waters) Agreement 1927 suggested by the Surveyor-General in the attached copy of an extract from his letter No. (5) in S.G.575/47.

I am, Sir,
Your obedient servant,

POW

DEPUTY CHIEF SECRETARY.

The Hon'ble the Colonial Secretary, Singapore
Secretary to Resident Commissioner, Johore.

POW/AAW

Extract from copy of a letter from Surveyor-General - No.(34) in M.U.11324/47 - No.5 in S.G.575/47

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X X X

3. It is desired however, to refer to the Straits Settlements and Johore (Territorical Waters) Agreement dated 19th Oct 1927 - Notification No. 1580 in S.S.Gazette No.56 of 17th August, 1928. Article I of this Agreement describes the boundary between Johore and Singapore as the centre of the deep water channel in Johore Strait.

4. This deep-water channel is liable to change its position and although such changes automatically alter the physical position of the boundary, they are not of material significance. There is however a land link between Johore and Singapore at the Causeway. As far as can be ascertained, the Johore-Singapore boundary has never been defined at this point although it is generally accepted as being marked by a concrete pillar on the Western parapet equidistant from both shores.

5. I am therefore directed to attach for your consideration, a suggested amendment to Article I of the Agreement which will have the effect of precisely describing the boundary in the vicinity of the Causeway. The effect of this amendment, if accepted, will be to determine the boundary for a distance of 100 yards on both sides of the Causeway from the present boundary pillar and thus prescribe the spheres of responsibility by both administrations for structural maintenance etc. The boundary at this point will be unaffected by changes in the deep-water channel.

6. I am further to state that this proposed amendment is submitted as a matter of technical interest by this Department and it has not been discussed with the Administration of Johore and Singapore or with technical Departments concerned with communications and the Causeway structure.

X X X"

Tel. 92203.

It is requested that the following number be quoted in reply to this letter.

12043/47 M.U. 12043/47

OFFICE OF THE
RESIDENT COMMISSIONER, JOHORE.

No. 2 in RCJ. 1486/47

JOHORE BAHRU, ...3rd December,..... 47.

Deputy Chief Secretary,
Malayan Union,
Kuala Lumpur.

Sir,

Boundary between Johore and Singapore.

I am directed to acknowledge receipt of your letter No. (2) in MU. 12043/47 dated 25/11/47, and to inform you that the Resident Commissioner agrees with the proposed amendment.

I am, Sir,

Your obedient servant,

SECRETARY TO THE
RESIDENT COMMISSIONER, JOHORE.

JSHCB/bm.

FED. U. SECRETARIAT
KUALA LUMPUR
4 DEC 1947

12043/47

Phic Address:—
"SECRETARY, SINGAPORE"

It is requested that the following number be quoted in the reply to this letter.

M.U.12043/47.

Colonial Secretary's Office,

No. 7125/47.

Singapore, 31st December, 1947.

The Deputy Chief Secretary,
Malayan Union,
Kuala Lumpur.

Sir,

I am directed to refer to your letter No.(2) in M.U.12043/47 dated 25th November, 1947, and to state that the point made by the Secretary-General is not considered sufficiently important to justify amending an Imperial Act. The act deals with territorial waters and, if it ever became necessary, the arrangements for dividing the responsibilities for maintaining the causeway could be modified so as to conform with the provisions of the Act. In point of fact, as your correspondence (5) in M.U. 9152/47 shows, these arrangements have in the past been made so as to suit the mutual convenience of the parties concerned. There seems no reason to suppose that future arrangements will not follow the same principle.

I am, Sir,
Your obedient servant,

D.K. Daniels.

Colonial Secretary,
Singapore.

H. E. SZOSZTAKOVITS
Foreign Service
3 JAN 1948

PHB/AHL No. 14 in S.G.575/47.

SURVEY DEPARTMENT,
MALAYA.

TELEPHONE NOS: 4461 - 4462.

27th May, 1948.

The Deputy Chief Secretary,
The Secretariat,
Kuala Lumpur.

State Boundary Johore - Singapore.
(Treaties & Agreements)

Sir,

I have the honour to refer to my (5) in S.G.575/47 dated 15th November 1947 and to make an enquiry as to the position now.

I have the honour to be,
Sir,
Your obedient servant,

(P. H. Bonnet)
Surveyor General,
Malaya.

MU 12043/47

CN/MN No:(18)in S.G. 575/47.

SURVEY DEPARTMENT,
MALAYA.

TELEPHONE NOS: 6481 - 6489.

MOUNTBATTEN ROAD,
KUALA LUMPUR.
P.O. BOX 1035.

8th December, 1949.

The Deputy Chief Secretary,
Federal Secretariat,
Kuala Lumpur.

Johore - Singapore Boundary.

Sir,

I am directed to invite your reference to your file M.U.12043/47 and to enquire whether there have been any developments since your minute of 3.6.48 was written.

I am, Sir,
Your obedient servant,

FED. SECRETARIAT
Kuala Lumpur,
9 DEC 1949

(C. NOBLE)
for Surveyor General,
MALAYA.