INTERNATIONAL COURT OF JUSTICE

**APPLICATION FOR REVISION OF THE JUDGMENT DELIVERED BY THE INTERNATIONAL COURT OF JUSTICE ON 23 MAY 2008 IN THE CASE CONCERNING *SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAYSIA/SINGAPORE)***
**(MALAYSIA *v.* SINGAPORE)**

# WRITTEN OBSERVATIONS OF THE REPUBLIC OF SINGAPORE

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## WRITTEN OBSERVATIONS OF THE REPUBLIC OF SINGAPORE

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# WRITTEN OBSERVATIONS OF THE REPUBLIC OF SINGAPORE

## CHAPTER I

## INTRODUCTION

1.1 On 2 February 2017, Malaysia filed an Application for revision ("the Application") of the Judgment delivered by the Court on 23 May 2008 in the Case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* ("the Judgment")[1]. The Application is accompanied by three Annexes.

1.2 In accordance with the Registrar's letter dated 14 February 2017, these Written Observations address the question of the admissibility of the Application under Article 61 of the Statute of the Court ("the Statute") and Article 99, paragraph 2, of the Rules of Court ("the Rules"). As the Court has made clear, the Statute and the Rules foresee a "two-stage procedure" for a request for revision, with the first stage "limited to the question of admissibility of that request"[2].

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[1] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12. In accordance with the terminology applied in the jurisprudence of this Court in previous revision cases, the Case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* is referred to hereafter as "the original case".

[2] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 197, paras. 8 and 10; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina

1.3 At this stage, therefore, the question is whether Malaysia has satisfied the conditions laid down in Article 61 of the Statute for the admissibility of the Application. Those conditions are the following[3]:

(*a*) the application should be based upon the "discovery" of a "fact";

(*b*) the fact, the discovery of which is relied on, must be "of such a nature as to be a decisive factor";

(*c*) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;

(*d*) ignorance of this fact must not be "due to negligence"; and

(*e*) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

In these Written Observations, Singapore will show that except for the ten-year time limit, the Application fails to meet the conditions set out in Article 61, and is thus inadmissible.

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*v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 11, para. 15.

3 *See Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, pp. 11-12, para. 16; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, pp. 398-399, para. 19.

## A. Malaysia's Failure to Satisfy Its Burden of Proof

### 1. THE CONDITIONS FOR THE ADMISSIBILITY OF A REQUEST FOR REVISION

1.4 Malaysia bears the burden of demonstrating that all of the conditions for the admissibility of a request for revision laid down in Article 61 of the Statute have been met. This is made clear in Article 99, paragraph 1, of the Rules, which provides that:

> "A request for the revision of a judgment shall be made by an application containing the particulars *necessary to show* that the conditions specified in Article 61 of the Statute are fulfilled." [Emphasis added]

The requirement for an applicant seeking revision to show that the conditions for admissibility have been met was affirmed in the Chamber's Judgment on El Salvador's request to revise the Judgment in the *Land, Island and Maritime Frontier Dispute*, where the Chamber observed that, at the admissibility stage, the decision is "limited to the question whether El Salvador's request satisfies the conditions contemplated by the Statute."[4]

1.5 The Court has also emphasised that "[i]f any one of [the conditions in Article 61] is not met, the application must be dismissed."[5] Reinforcing this point, the Court has also observed that: "[s]trictly speaking, once it is

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[4] *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 398, para. 19.

[5] *Ibid.*, p. 399, para. 20, citing also *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 12, para. 17.

established that the request for revision fails to meet one of the conditions for admissibility, the Court is not required to go further and investigate whether the other conditions are fulfilled."[6]

1.6 These conditions are demanding ones to which Malaysia is held to a high standard of proof. Pursuant to the first sentence of Article 60 of the Statute: "The judgment is final and without appeal". Requests for the revision of a Judgment are thus exceptional proceedings because they go to the finality of what the Court has decided with binding force, and potentially impact the stability of legal relations, including, in this case, the stability of territorial sovereignty.

1.7 In this respect, it is significant that none of the three previous requests for revision submitted to the Court under Article 61 have been found to be admissible[7]. This attests to the high standard of proof which an Applicant seeking revision has to satisfy.

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6 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 29.

7 *Ibid.*, p. 229, para. 69; *see also Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 411, para. 60; and *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 32, para. 75.

## 2. MALAYSIA HAS FAILED TO MEET THE CONDITIONS FOR ADMISSIBILITY

1.8 As will be shown in these Written Observations, the Application does not come close to meeting the conditions imposed by Article 61. Malaysia's non-compliance with the conditions of admissibility will be discussed in Chapters IV to VI. However, certain key points deserve mention here.

1.9 As to whether (*i*) the "newly discovered documents"[8] on which Malaysia relies were unknown to Malaysia when the Judgment was given; (*ii*) such ignorance was not due to negligence; and (*iii*) the Application was made within six months of their discovery:

(*a*) Malaysia has made only bare assertions that the documents in support of the Application were "not available to Malaysia before the Judgment"[9] and were "confidential official documents which were inaccessible to the public until their release by the UK National Archives"[10], and that it undertook research in the UK National Archives during the period from 4 August 2016 to 30 January 2017, thus complying with the six-month requirement[11].

(*b*) Singapore has found evidence showing that nearly *two years* before the Application was filed, Malaysia knew of the existence of the documents, in particular those in Annexes 1 and 2 of the

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8 Application, para. 22.

9 *Ibid.*, para. 47.

10 *Ibid*., para. 47.

11 *Ibid.*, paras. 23 and 51.

Application. As such, the Application was not made within six months of the acquisition of such knowledge.

(*c*) Moreover, the content of the documents in Annexes 2 and 3 of the Application shows that these documents and any fact they are said to evince must have been known to Malaysia well before the time of the Judgment.

(*d*) In the case of all three Annexes to the Application, even if they were unknown to Malaysia at the time of the Judgment, Malaysia's ignorance was due to negligence. In particular, Annex 3 was part of a document promulgated in March 1965 and distributed to Malaysian authorities. Moreover, the documentary annexes to the pleadings in the original case contain an extract of that same document. In any event, the UK National Archives file containing Annex 3 was accessible to the public since April 2005.

1.10 Malaysia also has to satisfy the requirement that the new documents adduced by Malaysia are evidence of a fact "of such a nature as to be a decisive factor" affecting the Court's reasoning underlying its decision that sovereignty over Pedra Branca belongs to Singapore. In assessing whether Malaysia has done so, it is necessary to distinguish between the factors that the Court considered material for its decision on sovereignty, and those that it did not. As Chapter VI shows, the documents on which Malaysia now seeks to rely fall into the latter category. Thus, those documents are, and would have been, irrelevant to the Court's decision.

1.11 The Court's holding in the *dispositif* of the Judgment—"that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to the Republic of Singapore"[12]—was based on a number of factors occurring within a

[12] Judgment, p. 101, para. 300(1).

certain time frame, which, when taken together, reflected a "convergent evolution of the positions of the Parties regarding title over Pedra Branca/Pulau Batu Puteh"[13], leading the Court to conclude that "by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore."[14] These factors comprised the following key elements:

(*a*) Johor's understanding that it did not have sovereignty over Pedra Branca, as evinced by Johor's unequivocal statement, in official correspondence with Singapore in 1953, that it did not claim ownership of Pedra Branca;

(*b*) various activities that Singapore undertook on Pedra Branca *à titre de souverain* between 1953 and 1980, coupled with Malaysia's acceptance of, or failure to react to or protest against, these activities;

(*c*) Malaysia's own publications and official maps, which showed Pedra Branca as part of Singapore—conduct that constituted recognition by Malaysia of Singapore's sovereignty over Pedra Branca; and

(*d*) the absence of any Malaysian *effectivités* on Pedra Branca for over a century after 1850.

1.12 None of the documents on which Malaysia relies in the Application affects the reasoning of the Court underlying its decision that sovereignty over Pedra Branca belongs to Singapore. Moreover, none of those documents refers to the question of sovereignty or bears the meaning that Malaysia ascribes to them. Similar documents had been submitted in the

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13 Judgment, p. 96, para. 276.

14 *Ibid.*, p. 96, para. 276.

original case, to which the Court attached no significance for the purpose of determining sovereignty over Pedra Branca.

### B. The Conduct of the Parties Following the Judgment

1.13 Having set out an overview of Singapore's case as to why Malaysia has failed to discharge its burden of proving that the conditions of admissibility under Article 61 have been satisfied, it is apposite to recall the context in which Malaysia brings the Application.

1.14 On 23 May 2008, the Court delivered the Judgment, in which the Court found that:

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

(*b*) sovereignty over Middle Rocks belongs to Malaysia;

(*c*) sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.

1.15 The Judgment resolved a long-standing dispute between Malaysia and Singapore concerning sovereignty over Pedra Branca. This was a dispute that had lasted some thirty years. Significantly, the Parties included a specific provision in Article 6 of their Special Agreement submitting the dispute to the Court, as follows: "The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them."[15]

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15 Judgment, p. 19, para. 2.

1.16 In a Ministry of Foreign Affairs press statement following the Judgment, Singapore noted that the Judgment was

> "not totally in Singapore's favour, as the Court [had] awarded Middle Rocks to Malaysia. The Court also decided that South Ledge belongs to the country in whose territorial waters it is located. We had argued that these features are part of Pedra Branca but as the Court has found otherwise, Singapore accepts the Court's decision."[16]

In remarks carried in the media, the Malaysian Minister for Foreign Affairs at the time, H.E. Datuk Seri Utama Dr. Rais Yatim, described the Judgment as a "win-win situation". He stated:

> "It is a victory for Singapore and it is a winning episode for Malaysia for having obtained the Middle Rocks. We are also pleased that the judgment which states that the territorial waters within which South Ledge is situated, will be, to be in favour of the state that has the territorial waters. We will work this out with the technical committee and as George [George Yeo, Singapore's Minister for Foreign Affairs] has stated, the technical committee is already in swing and in operation, virtually to be in session within 2 weeks from today."[17]

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16 Singapore Ministry of Foreign Affairs, MFA Press Statement: International Court of Justice awards sovereignty of Pedra Branca to Singapore, 23 May 2008, available at: https://www.mfa.gov.sg/content/mfa/media_centre/special_events/pedrabranca/press_room/mfa_pr/2008/200805/press_200805_11.html (last accessed: 20 May 2017).

17 Singapore Ministry of Foreign Affairs, Transcript of Door-stop Interview with Minister for Foreign Affairs George Yeo and Malaysian Foreign Minister, Datuk Seri Utama Dr. Rais Yatim on 25 May 2008, Sedona Hotel, Yangon, available at: https://www.mfa.gov.sg/content/mfa/media_centre/special_events/pedrabranca/press_room/sp_tr/2008/200805/press_200805_1.html (last accessed: 20 May 2017).

1.17 Between August 2008 and November 2013, Malaysia and Singapore met six times under the auspices of the technical committee mentioned by the Malaysian Minister for Foreign Affairs. On almost every occasion, Malaysia and Singapore issued a joint press statement reiterating their commitment to "honour and abide by the ICJ's judgment and fully implement its decision"[18]. In May 2011, Malaysia and Singapore completed a joint hydrographic survey of the area in and around Pedra Branca and Middle Rocks.

1.18 Thus, until it filed the Application, Malaysia had spent the majority of the nine-year period following the Judgment working with Singapore to implement the Judgment. During this period, both Malaysia and Singapore conducted themselves on the basis that sovereignty over Pedra Branca belongs to Singapore. The hydrographic survey referred to in the previous paragraph was done in preparation for the work of a sub-committee to discuss maritime boundary delimitation, and was obviously premised on the fact that Singapore had sovereignty over Pedra Branca (otherwise, there would be nothing to delimit). In these circumstances, the timing of the Application, not to mention its content, is surprising, and gives every impression of having been submitted owing to internal factors within Malaysia that are unconnected with the merits of the case.

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[18] *See*, *e.g.*, Singapore Ministry of Foreign Affairs, Joint Press Statement on the 5th Malaysia-Singapore Joint Technical Committee (MSJTC) Meeting on the Implementation of the ICJ Judgment on Pedra Branca, Middle Rocks and South Ledge, 29-30 November 2010 by H.E. Dato' Sri Anifah Aman, Minister of Foreign Affairs, Malaysia and H.E. George Yeo, Minister for Foreign Affairs, Republic of Singapore, Singapore, 2 December 2010, available at: https://www.mfa.gov.sg/content/mfa/media_centre/press_room/if/2010/201012/infocus_20101202_02.html (last accessed: 20 May 2017).

## C. Structure of These Written Observations

1.19 Singapore's Written Observations are divided into six Chapters including this introductory chapter. The remaining Chapters are organised as follows:

(*a*) Chapter II will review the central aspects of the Court's reasoning in the Judgment that led the Court to hold that sovereignty over Pedra Branca belongs to Singapore. This background is important to place Malaysia's contentions in the proper context.

(*b*) Chapter III will show that none of the documents introduced by Malaysia in the Application pertains to sovereignty over Pedra Branca, and that none bears the meaning Malaysia ascribes to the documents when given their true meaning in their context.

(*c*) Chapter IV will then discuss the conditions for admissibility under Article 61 of the Statute.

(*d*) Chapter V will show the procedural shortcomings of the Application, and that, on the basis of any of these shortcomings, the Application is inadmissible.

(*e*) Chapter VI will show that Malaysia has also failed to satisfy the requirement that any "new fact" adduced is "of such a nature as to be a decisive factor", and that the Application is therefore inadmissible.

1.20 A Summary of Singapore's Reasoning and Singapore's Submission are set out at the end of these Written Observations.

1.21 Concerning terminology and the names of the Parties during the period relevant to these proceedings, the Court may find it useful to refer to the following paragraphs reproduced from the Memorial of Singapore submitted in the original case. These set out basic points not disputed by Malaysia:

> "1.5 Malaysia is a federal State made up of 13 constituent states. She was formed in 1963 through the merger of the Federation of Malaya with the State of Singapore (then a British colony) and the British territories of Sabah and Sarawak in Borneo. Among the 13 constituent states of Malaysia, the one that is relevant to this dispute is the State of Johor. It is the state which is geographically closest to Singapore.
>
> 1.6 In the context of this dispute, Malaysia is the successor State to the State of Johor in relation to her claim of sovereignty over Pedra Branca.
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> …
>
> 1.10 In the context of this dispute, Singapore is the successor in title to the United Kingdom. [Footnote 4 in original: Throughout this Memorial, the terms 'United Kingdom', 'Great Britain' and 'Britain' will be used interchangeably as is appropriate to the context.]"[19]

1.22 Malaya became independent on 31 August 1957. Malaysia was formed on 16 September 1963. Singapore became independent on 9 August 1965. In these Written Observations, Singapore will refer to Malaysia using the name that applied on the relevant date. Thus, in references to matters taking place before 16 September 1963, the name used is "Malaya".

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[19] Memorial of Singapore, paras. 1.5-1.6 and 1.10. *See also* CR 2007/20, 6 November 2007, pp. 19-20, paras. 16-17 (Koh).

## CHAPTER II

## THE BASIS OF THE COURT'S JUDGMENT ON SOVEREIGNTY OVER PEDRA BRANCA

2.1 As the Court has observed in previous revision cases, in considering the contentions of the Applicant, it is necessary to recapitulate at the outset the relevant part of the reasoning of the Judgment[20]. To use the Court's words from its Judgment on the request for revision in the *Genocide* case: "the Court will recount the background to the case with a view to providing the context for the contentions of the FRY."[21] It is therefore necessary to review the basis upon which the Court decided in the Judgment that sovereignty over Pedra Branca belongs to Singapore. This will show the elements the Court considered relevant for its finding on sovereignty, as well as the elements that the Court did not consider to be pertinent. All of the new documents or the "facts" contained therein introduced by Malaysia fall into the latter category.

2.2 Malaysia contends that, in the light of its recent discoveries, "it is impossible to identify the development of the 'shared understanding' on which the Court based its judgment", particularly given what Malaysia

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20 *See Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 400, para. 23.

21 *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 14, para. 24.

asserts was the "controlling character" that was attributed to the 1953 correspondence and the evaluation of the practice subsequent thereto[22].

2.3 This contention is unsustainable. For present purposes, a review of the relevant parts of the Judgment shows very clearly that the Court's ruling on Singapore's sovereignty over Pedra Branca was based on *four* key elements, each of which was, in and of itself, significant, and none of which is even remotely affected by the new documents introduced by Malaysia. These elements, which will be discussed in turn below, are:

(*a*) the 1953 correspondence, including in particular the response of the Acting State Secretary of Johor on 21 September 1953 to a query from the Colonial Secretary of Singapore, stating that "the Johore Government does not claim ownership of Pedra Branca", which the Court found reflected Johor's understanding that it did not have sovereignty over Pedra Branca;

(*b*) various activities that Singapore undertook on Pedra Branca *à titre de souverain* between 1953 and 1980 (14 February 1980 being the critical date[23]), and Malaysia's acceptance of, or lack of reaction to or protest against, Singapore's activities until after the critical date. It should be noted that the vast majority of these activities took place after 1966, which is the latest date that appears on the documents on which Malaysia relies in the Application;

(*c*) Malaysia's own publications and maps, which acknowledged Pedra Branca as part of Singapore, and most of which post-dated 1966; and

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22 Application, para. 3.

23 *See* Judgment, p. 28, para. 34.

(*d*) the lack of any competing Malaysian *effectivités* on or relating to Pedra Branca for over a century after 1850.

### A. The Relevance of the 1953 Correspondence

2.4 On 12 June 1953, the Colonial Secretary of Singapore wrote to the British Adviser to the Sultan of Johor asking for information regarding Pedra Branca, on which the Horsburgh lighthouse stood, for the purpose of ascertaining Singapore's territorial waters. After referring to various background documents, the Colonial Secretary stated: "It is how [now] desired to clarify the status of Pedra Branca", and asked "whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of."[24] Later that month, the Secretary to the British Adviser to the Sultan of Johor advised the Colonial Secretary that the letter had been passed to the State Secretary of Johor[25].

2.5 On 21 September 1953, the Acting State Secretary of Johor replied to the Colonial Secretary's letter of 12 June. In that letter, the Acting State Secretary informed the latter "that the Johore Government does not claim ownership of Pedra Branca."[26]

2.6 As the Court noted, no further correspondence followed, and Singapore took no public action although Singapore officials did consider the matter

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24 Judgment, p. 73, para. 192.

25 *Ibid.*, pp. 73-74, para. 195.

26 *Ibid.*, p. 74, para. 196.

internally[27]. At paragraph 203 of the Judgment, the Court then stated the following:

> "The Court considers that this correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh."

2.7 In the original case, Malaysia argued that the Acting State Secretary of Johor did not have the authority and capacity to write the reply letter of 21 September 1953[28]. However, the Court did not uphold this contention[29]. As to the content of the letter, the Court observed that, while in law "ownership" was distinct from "sovereignty"; it also observed that in international litigation, "ownership" over territory had sometimes been used as equivalent to "sovereignty"[30]. The Court thus drew attention to the fact that the enquiry was directed at Singapore's sovereignty over Pedra Branca, and that "Johor does not put that matter in doubt in any way at all."[31] In the Court's view:

> "the Johor reply is clear in its meaning: Johor does not claim ownership over Pedra Branca/Pulau Batu Puteh. That response relates to the island as a whole and not simply to the lighthouse."[32]

The Court then concluded:

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27 Judgment, p. 74, para. 196.

28 *Ibid.*, p. 77, para. 211.

29 *Ibid.*, p. 79, para. 220.

30 *Ibid.*, p. 80, para. 222.

31 *Ibid.*, p. 80, para. 222.

32 *Ibid*., p. 80, para. 223.

> "Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island." [33]

## B. Singapore's Activities *à titre de souverain* on Pedra Branca

2.8 The Court then addressed the arguments of the Parties relating to their respective conduct after 1953. That conduct comprised a number of different events that were significant for the Court's holding that sovereignty over Pedra Branca belongs to Singapore. In this section, Singapore will recall the Court's findings about various Singaporean activities on the island that were undertaken *à titre de souverain*, for the most part after 1966, as well as Malaysia's acceptance of, or failure to react to or protest against, those activities.

### 1. Investigation by Singapore of Shipwrecks in the Waters Around Pedra Branca

2.9 The first event under this category pre-dated 1953, and concerned a collision in 1920 between British and Dutch vessels within two miles of Pedra Branca. While the Court noted that the report of the investigation did not identify the jurisdictional basis on which it was undertaken, it nonetheless stated that "[o]f some significance for the Court is that the enquiry was undertaken by Singapore and not Johor."[34]

2.10 The next incident involved the grounding of a British vessel on a reef adjacent to Pedra Branca in 1963. On this, the Court again noted that "it

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[33] Judgment, p. 80, para. 223.

[34] *Ibid.*, p. 83, para. 233.

was the authorities in Singapore, rather than those in Johor, that undertook the investigation."[35]

2.11 The last marine casualty occurring before the 1980 critical date[36] concerned the running aground of a Panamanian vessel off Pedra Branca in 1979. Singapore investigated the incident under its Merchant Shipping Act. The investigation resulted in a ruling that debarred the vessel's Master and Second Officer from working on any Singapore vessel[37]. On this incident, the Court was more categorical. It stated:

> "The Court considers that this enquiry in particular assists Singapore's contention that it was acting *à titre de souverain*. This conduct, supported to some extent by that of 1920 and 1963, provides a proper basis for the Court also to have regard to the enquiries into the grounding of five vessels (three of foreign registry) between 1985 and 1993, all within 1,000 m of the island."[38]

2.12 Accordingly, the Court concluded that:

> "this conduct gives *significant support* to the Singapore case. It also recalls that it was only in June 2003, after the Special Agreement submitting the dispute to the Court had come into force, that Malaysia protested against this category of Singapore conduct."[39] [Emphasis added]

2.13 Also significant in this connection was the Court's conclusion regarding the Light Dues Ordinance 1957 (Singapore) concerning the upkeep of lighthouses and its amendment in 1958. As the Court noted in the

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35 Judgment, p. 83, para. 233.

36 *Ibid.*, p. 28, para. 34.

37 *See* Memorial of Singapore, para. 6.79; Reply of Singapore, para. 4.163.

38 Judgment, p. 83, para. 233.

39 *Ibid.*, p. 83, para. 234.

Judgment, not only did the statement of purpose for the 1958 amendment refer to Pulau Pisang (an island to the north west of Singapore in the Strait of Malacca which was indisputably under Malayan sovereignty) as not lying within Singapore's territorial waters, the drafting history of the amendment made an express statement that Pedra Branca is Singapore's[40]. The Court observed that such a combination of factors "does give support to Singapore's contentions"[41] regarding its exercise of sovereign authority over Pedra Branca.

### 2. SINGAPORE'S CONTROL OF VISITS TO PEDRA BRANCA

2.14 Another of Singapore's arguments supporting its claim to sovereignty over Pedra Branca concerned its control over visits to the island both by Singaporeans and other nationals (including Malaysian officials), and its use of the island. Singapore drew attention to the fact that at no point did Malaysia protest against Singapore's requiring its officials to obtain permits to visit Pedra Branca from Singapore[42].

2.15 While the Court noted that many of the visits by Singaporean personnel "related to the maintenance and operation of the lighthouse and are not significant in the present case"[43], it found that two visits by Malaysian officials to Pedra Branca in 1974 and 1978 were particularly significant for sovereignty purposes[44]. Both of these events took place well after the

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40 *See* Judgment, p. 68, para. 174.

41 *Ibid.*, p. 68, para. 174.

42 *Ibid.*, p. 83, para. 235.

43 *Ibid.*, p. 84, para. 236.

44 *Ibid.*, p. 84, para. 236.

dates of the three "new documents" on which Malaysia relies in the Application.

2.16 The 1974 event involved a tidal survey team from Indonesia, Japan, Malaysia and Singapore who wished to visit Pedra Branca over a seven to eight week period. As the Judgment recalls, an officer from the Port of Singapore Authority wrote to the Commanding Officer of the Royal Malaysian Navy asking for a list of the Malaysian members who would be staying at the lighthouse, and seeking their particulars, such as names, passport numbers and nationalities, "[i]n order to facilitate the necessary approval from the various government ministries concerned"[45]. The Malaysian Commanding Officer complied with this request.

2.17 The 1978 visit entailed a request from the Malaysian High Commission in Singapore for clearance for a Malaysian Government vessel "to enter Singapore territorial waters" and inspect tide gauges, including at the Horsburgh lighthouse station on Pedra Branca, over the course of about three weeks. Singapore's Ministry of Foreign Affairs acceded to the request, which evidenced its exercise of authority over Pedra Branca. In contrast, shortly before this request was made, two people who claimed to be from the Malaysian Survey Department had landed at Pedra Branca to carry out triangulation observations without authorisation. They were informed by the light keeper that they could not remain on the island without prior permission from the Port of Singapore Authority. The two Malaysian officials left, and Malaysia made no protest[46].

2.18 Given the materiality of these events to the question of sovereignty, the Court's view of their legal significance merits recalling:

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45 Judgment, p. 84, para. 237.

46 *Ibid.*, p. 84, para. 238.

> "In the Court's opinion, this Singaporean conduct is to be seen as conduct *à titre de souverain*. The permission granted or not granted by Singapore to Malaysian officials was not simply about the maintenance and operation of the lighthouse and in particular its protection. Singapore's decisions in these cases related to the survey by Malaysian officials of the waters surrounding the island. The conduct of Singapore in giving permission for these visits does give *significant support* to Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh."[47] [Emphasis added]

## 3. DISPLAY OF THE BRITISH AND SINGAPORE ENSIGNS ON PEDRA BRANCA

2.19 As noted above[48], Malaysia has sovereignty over the island of Pulau Pisang. Singapore manned and operated a lighthouse on Pulau Pisang pursuant to an earlier agreement between the Sultan of Johor and the Singapore Government. Until 1968, Singapore flew its marine ensign at the lighthouses on both Pulau Pisang and Pedra Branca. In 1968, following demonstrations in Malaysia over the flying of the Singapore ensign on Pulau Pisang, Malaysia requested Singapore to "bring down the Singapore flag from Malaysian soil at Pulau Pisang"[49]. In contrast, it made no such request in respect of the ensign flying at Pedra Branca[50].

2.20 In the Judgment, the Court agreed with Malaysia that the flying of an ensign is "not in the usual case a manifestation of sovereignty and that the

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47 Judgment, p. 85, para. 239.

48 *See* para. 2.13 above.

49 Judgment, p. 87, para. 244.

50 *Ibid.*, p. 87, para. 244.

difference in size of the two islands must be taken into account."[51] Nonetheless, it still considered that

> "some weight may nevertheless be given to the fact that Malaysia, having been alerted to the issue of the flying of ensigns by the Pulau Pisang incident, did not make a parallel request in respect of the ensign flying at Horsburgh lighthouse."[52]

## 4. INSTALLATION BY SINGAPORE OF MILITARY COMMUNICATIONS EQUIPMENT ON PEDRA BRANCA IN 1977

2.21 The Judgment notes that "[i]n July 1976, the Singapore Navy explained to the Port of Singapore Authority its need, shared by the Singapore Air Force, for a military rebroadcast station on Pedra Branca/Pulau Batu Puteh to overcome communications difficulties."[53] The Navy thus requested the co-operation of the Authority "in order that communications needs for both security and defence could be met"[54]—a request to which the Authority responded positively. The relay station was then installed in May 1977[55].

2.22 Although the Court was unable to assess whether Malaysia knew, or should have known, about the installation by Singapore of this equipment

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51 Judgment, p. 87, para. 246.

52 *Ibid.*, p. 87, para. 246.

53 *Ibid.*, p. 87, para. 247.

54 *Ibid.*, p. 87, para. 247.

55 *Ibid.*, p. 87, para. 247.

at the time[56], regarding Singapore's establishment of military communications equipment on the island, the Court found that:

> "What is *significant* for the Court is that Singapore's action is an act *à titre de souverain. The conduct is inconsistent with Singapore recognizing any limit on its freedom of action*."[57] [Emphasis added]

## 5. PROPOSED RECLAMATION BY SINGAPORE TO EXTEND PEDRA BRANCA

2.23 As the Judgment recalls, in 1978, the Port of Singapore Authority, on the direction of the Government of Singapore, "studied the possibilities, which had also been considered in 1972, 1973 and 1974, of reclaiming areas around Pedra Branca/Pulau Batu Puteh."[58] The Authority published tenders for a reclamation project in a newspaper advertisement, and three companies tendered for the project.

2.24 Despite the fact that the project ultimately was not implemented[59], the Court still considered Singapore's conduct to be material. It observed that:

> "while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was public and attracted replies. Further, as the Malaysian Agent recognizes, the proposed action, as advertised, did go beyond the maintenance and operation of the lighthouse. It is conduct which supports Singapore's case."[60]

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56 Judgment, p. 88, para. 248.

57 *Ibid.*, p. 88, para. 248.

58 *Ibid.*, p. 88, para. 249.

59 *Ibid.*, p. 88, para. 249.

60 *Ibid.*, pp. 88-89, para. 250.

2.25 In addition to the *effectivités* undertaken by Singapore discussed above[61], this was yet further conduct of Singapore relating to the administration of Pedra Branca that was undertaken *à titre de souverain*.

## C. Malaysian Publications and Maps Supporting Singapore's Sovereignty Over Pedra Branca

2.26 Apart from these activities undertaken by Singapore on or in relation to Pedra Branca in a sovereign capacity, the Court also addressed a variety of publications and maps that the Parties adduced in support of their respective positions.

2.27 For its part, Malaysia relied on a number of Annual Reports of the Rural Board of Singapore, along with a publication entitled *Singapore Facts and Pictures* and a book by J. A. L. Pavitt, Singapore's Director of Marine for many years, for the proposition that they did not include Pedra Branca as part of Singapore's territory[62]. However, the Court dismissed the relevance of these publications. It stated:

> "Given the purpose of the publications and their non-authoritative and essentially descriptive character, even if official, *the Court does not consider that they can be given any weight*."[63] [Emphasis added]

2.28 In contrast, certain Malaysian publications and maps which showed Pedra Branca as part of Singapore were viewed by the Court as material and as

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61 *See* paras. 2.9-2.22 above.

62 *See* Judgment, p. 92, para. 261; p. 93, para. 263.

63 *Ibid.*, p. 92, para. 262. In the Judgment, p. 93, para. 263, the Court stated that "[t]he same is also true" with respect to a passage from the book by J. A. L. Pavitt on which Malaysia relied.

supporting Singapore's case. The Court focused on several such examples discussed below.

### 1. MALAYSIAN METEOROLOGICAL INFORMATION

2.29 Over the years, meteorological information had been collected from a weather station on Pedra Branca. This was reported in official government publications.

2.30 In 1959, before Singapore's independence, Malaya listed the Horsburgh lighthouse as one of the "Singapore" Stations for the collection of such information, and Malaysia and Singapore did the same in a joint publication in 1966, the year after Singapore's independence[64]. However, in 1967, after the latest date that appears on Malaysia's "newly discovered documents" (i.e., 1966), the two countries began to report meteorological information separately. Malaysia's 1967 report listed a number of weather stations in Johor, but did not include the station on Pedra Branca. This omission was considered to be relevant by the Court:

> "The Court does consider as *significant in Singapore's favour* the inclusion of Horsburgh lighthouse as a 'Singapore' Station in the 1959 and 1966 reports and its omission from the 1967 Malaysian report."[65] [Emphasis added]

### 2. OFFICIAL MAPS

2.31 Both Parties produced a large number of maps in the original case. While they both agreed that none of the maps established title, they did contend

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64 *See* Judgment, p. 93, para. 265.

65 *Ibid.*, pp. 93-94, para. 266.

that some of the maps issued by the Parties or their predecessors "have a role as indicating their views about sovereignty or as confirming their claims."[66]

2.32 In the Judgment, the Court noted that "Singapore places considerable weight on six maps published by the Malayan and Malaysian Surveyor General and Director of National Mapping in 1962 (two maps), 1965, 1970, 1974 and 1975."[67] For the convenience of the Court, Singapore is reproducing the 1974 map as **Insert 1** on the facing page[68].

66 Judgment, p. 94, para. 267.

67 *Ibid.*, p. 94, para. 269.

68 The map at Insert 1 was included as Map 30 in Singapore's Map Atlas filed with the Counter-Memorial of Singapore in the original case.

**Insert 1**

**1974 Malaysian "Admission Against Interest" Map**
**(Map 30 of Singapore Counter-Memorial Map Atlas in the original case)**

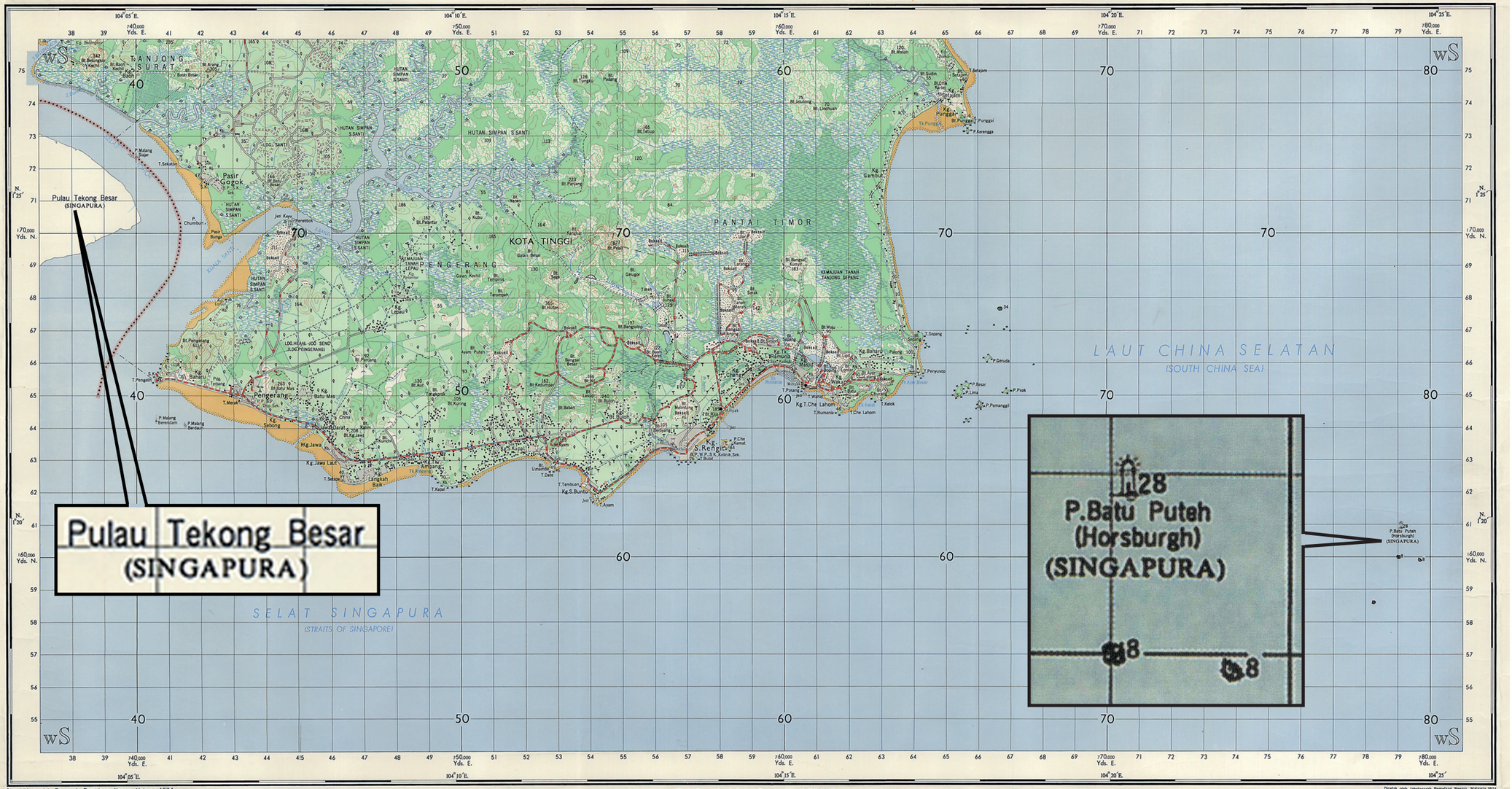
SEMENANJUNG MALAYSIA 1:63,360
PENINSULAR MALAYSIA

# PENGERANG

GRID BBST (ELA)
RSO GRID (YARDS)

Siri L7010
Series
Cetakan 3-PPNM
Edition

**SYIT** *(SHEET)* **135**





Di-terbitkan oleh Pengarah Pemetaan Negara, Malaysia 1974
*Published by the Director of National Mapping, Malaysia 1974*

Dicetak oleh Jabatanarah Pemetaan Negara, Malaysia 1974
*Printed by the Directorate of National Mapping, Malaysia 1974*




Skil Satu Inci Satu Batu atau 1:63,360
*Scale One Inch to a Mile or 1:63,360*

JARAK KONTOR 50 KAKI
*CONTOUR INTERVAL 50 FEET*

UKURTINGGI DARIPADA ARAS PURATA LAUT DENGAN UKURAN KAKI
*HEIGHTS IN FEET ABOVE MEAN SEA LEVEL*

PETA PANDU MENUNJUKKAN SEMPADAN NEGERI, BAHAGIAN ATAU KERESIDENAN.
*INDEX TO SHEETS & STATE, DIVISION OR RESIDENCY BOUNDARIES.*

PETA INI BUKANLAH BUKTI YANG SAHIH UNTUK PERENDAHAN SEMPADAN.
*THIS MAP IS NOT AN AUTHORITY ON BOUNDARIES*

PERHAL MAKLUMAT
Maklumat dalam peta ini betul bagi tahun 1969.
*RELIABILITY NOTE*
*Map information correct as at 1969*

JALAN KERETAPI *(RAILWAYS)*
JALANRAYA *(ROADS)*
RUPAMUKA BUATAN DAN PELBAGAI BENAAN *CULTURAL FEATURES & MISCELLANEOUS CONSTRUCTIONS*
BANGUNAN *(BUILDINGS)*
RUPAMUKA SUNGAI DAN AIR *(WATER & RIVER FEATURES)*
JAMBATAN *(BRIDGES)*
SEMPADAN *(BOUNDARIES)*
RUPAMUKA BUKIT DAN TITIK KAWAL *(RELIEF FEATURES & CONTROL POINTS)*
TUMBUH-TUMBUHAN DAN PAYA *(VEGETATIONS AND SWAMPS)*

U.Grid Grid N. | U.Benar True N. | U.Magnet Mag.N.
0° 42'
or
17½ mils.
Pada Pusat Syt
Sudutstwa Magnet 1976
Perlukarun Tahunan Tidak Nampak
*At Sheet Centre*
*Magnetic Declination 1976*
*Annual Change Negligible*

UNJURAN
Peta ini telah dibuatkan di atas Unjuran Bentukbenar Serong Ditepati, Malaya.
*PROJECTION*
*This map is compiled on the Meayan Rectified Skew Orthomorphic Projection.*
GRID
Grid Bentukbenar Serong Ditepati (Ela)
*GRID*
*Rectified Skew Orthomorphic Grid (Yards)*

500,000 ELA (Huruf Kecil) dan 100,000 ELA (Huruf Besar) TANDA-TANDA SEGIEMPAT
*500,000 YARDS (Small Letter) and 100,000 YARDS (Large Letter) SQUARE IDENTIFICATIONS*

CARA MEMBERI RUJUKAN PETA DI ATAS SYIT INI SEHAMPIR 100 ELA
*TO GIVE A STANDARD REFERENCE ON THIS SHEET TO NEAREST 100 YARDS*

TITIK CONTOH *(SAMPLE POINT)* Bt. Pelah △

1. Lihat dahulu garisan grid PUGAK di sebelah KIRI titik tersebut, dan baca di jalur atas atau bawah angka yang BESAR yang tertulis bagi garisan grid dur. Taksirkan berapa par sepuluh daripada garisan grid ke titik: 54
*1. Locate first VERTICAL grid line to the LEFT of point and read LARGE figures labelling the line either in the top or bottom margin, or on the line itself: Estimate tenths from grid line to point:* 7

2. Lihat dahulu garisan grid UFUK DI BAWAH titik tersebut dan baca di jalur kiri atau kanan angka yang BESAR yang tertulis bagi garisan grid itu. Taksirkan berapa par sepuluh daripada garisan grid ke titik: 69
*2. Locate first HORIZONTAL grid line BELOW point and read LARGE figures labelling the line either in the left or right margin, or on the line itself: Estimate tenths from grid line to point:* 7

TINGGALKAN angka-angka Kecil pada tempat nombor grid; angka-angka ini di gunakan apabila mencari kedudukan yang penuh. Daripada sesuatu nombor grid gunakan angka-angka BESAR SAHAJA. Contoh: 547 697
*IGNORE the SMALLER figures of any grid number; they are for finding the full Co-ordinates. Use ONLY the LARGER figures of the grid number: example:* 547 697

CONTOH RUJUKAN PETA *(SAMPLE REFERENCE)*

Jika merujuk daripada lebih 100,000 ela, atau pun syit itu mengandungi grid bertindih, angka-itu hendak lah didahului dengan tanda segempat 100,000 ela seperti: S 547697
*If reporting beyond 100,000 yards or if sheet bears an overlapping grid, prefix with 100,000 Yard Square Identification as:*

Jika merujuk daripada lebih 500,000 ela dahului dengan tanda segempat 500,000 ela seperti WS 547697
*If reporting beyond 500,000 yards prefix with 500,000 Yard Square Identification as:*

**Insert 1** - 1974 Malaysian "Admission Against Interest" Map (Map 30 of Singapore's Counter-Memorial Map Atlas in the original case)

2.33 As can be seen from the representative sample, in all six maps, Pedra Branca (indicated as "P. Batu Puteh (Horsburgh)") is annotated with the word "(SINGAPURA)" or "(SINGAPORE)". As the Court highlighted in the Judgment:

> "Exactly the same designation '(SINGAPORE)' or '(SINGAPURA)' appears on the maps under the name of another island which unquestionably is under Singapore's sovereignty. Further, in a map in the same series relating to Pulau Pisang, the site of the other Singapore administered lighthouse, no similar annotation appears, that omission indicating that its inclusion has nothing to do with ownership or management of the lighthouse."[69]

2.34 While Malaysia contested the relevance of these maps on various grounds (that the annotations might be assessed differently, maps did not create title, maps could never amount to admissions except when incorporated in treaties or used in inter-state negotiations, and the maps contained a disclaimer)[70], the Court did not accept these arguments. The Court's reasoning was as follows:

> "On Malaysia's first contention it does appear to the Court that the annotations are *clear and support Singapore's position*. On the second point, the Court sees strength in Singapore's more limited argument that the maps give a good indication of Malaysia's official position rather than being creative of title. On the third there is authority for the proposition that admissions may appear in other circumstances (e.g. *Frontier Dispute (Benin/Niger), I.C.J. Report 2005*, p. 119, para. 44). The disclaimer, the subject of the fourth Malaysian contention, says that the map must not be considered an authority on the delimitation of

69 Judgment, p. 94, para. 269.

70 *Ibid.*, p. 94, para. 270.

> international or other boundaries. (The 1974 formula is a little different.)"[71] [Emphasis added]

On this last point, the Court cited the Boundary Commission's decision in the *Eritrea/Ethiopia* case, where the Commission said:

> "The map still stands as a statement of a geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest."[72]

2.35 In contrast, Malaysia sought to rely on maps published by Singapore which, like the sketch map in Annex 3 to the Application, did not depict Pedra Branca or show it as part of Singapore. However, in concluding its assessment of the maps, the Court stated:

> "The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore."[73]

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71 Judgment, p. 95, para. 271.

72 *Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, United Nations, *Reports of International Arbitral Awards*, vol. XXV, p. 116, para. 3.28.

73 Judgment, p. 95, para. 272.

## D. The Lack of Any Malaysian *Effectivités* on Pedra Branca

2.36 In contrast to Singapore, Malaysia was unable to point to any actions it took with respect to Pedra Branca that was conduct *à titre de souverain*. Indeed, Malaysia never set foot on the island in any sovereign capacity or did any other act in relation to Pedra Branca in a similar capacity.

2.37 Instead, in the original case, Malaysia advanced a number of factors that it claimed indirectly evidenced its sovereignty over the island. These included arguments based on a Malaysian petroleum agreement of 1968, internal Malaysian legislation from 1969 extending its territorial sea from 3 to 12 nautical miles, and the 1969 Continental Shelf Agreement and 1970 Territorial Sea Agreement between Malaysia and Indonesia. None of these were considered by the Court to be relevant to the question of sovereignty.

2.38 With respect to Malaysia's 1968 petroleum agreement, the Court was succinct in dismissing its relevance:

> "Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight can be given to the concession."[74]

2.39 Malaysia's argument based on its 1969 territorial sea legislation fared no better. The Court's opinion was that "the very generality of the 1969 legislation means that Malaysia's argument based on it must fail. It does not identify the areas to which it is to apply except in the most general sense: it says only that it applies 'throughout Malaysia'."[75]

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74 Judgment, p. 89, para. 253.

75 *Ibid.*, p. 90, para. 256.

2.40 As for Malaysia's reliance on its 1969 Continental Shelf and 1970 Territorial Sea Agreements with Indonesia, the Court attached no weight to either of these agreements. The 1969 Agreement stopped 6.4 nautical miles short of Pedra Branca, while the 1970 Agreement also avoided the area around the island. As the Court stated:

> "Given that fact [that Singapore had not yet extended its territorial waters to 12 nautical miles] and the fact that the line stops 6.4 nautical miles to the east of Pedra Branca/Pulau Batu Puteh and begins again beyond the western end of the Straits of Singapore, the Court does not consider that the 1970 Territorial Sea Agreement can have any significance in this case."[76]

2.41 The Court also did not find significance in the 1973 Indonesia-Singapore Territorial Sea Agreement. The Court did not consider

> "that the 1973 Agreement can be given any weight in respect of sovereignty over Pedra Branca/Pulau Batu Puteh. Like the Malaysia-Indonesia Agreements in 1969 and 1970, the issue is not covered in the 1973 Indonesia-Singapore Territorial Sea Agreement."[77]

### E. The Court's Conclusions on Sovereignty

2.42 Having examined the conduct of the Parties in detail, the Court set out its conclusions on the question of sovereignty at paragraphs 273-277 of the Judgment.

2.43 The Court started by saying that the question to which it must respond "is whether in the light of the principles and rules of international law it stated earlier and of the assessment it has undertaken of the relevant facts,

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[76] Judgment, pp. 90-91, para. 258.

[77] *Ibid.*, p. 91, para. 259.

particularly the conduct of the Parties, sovereignty over Pedra Branca/Pulau Batu Puteh passed to the United Kingdom or Singapore."[78]

2.44 The Court then recalled the conduct of Singapore that had been carried out on Pedra Branca *à titre de souverain* and had not been protested by Malaysia. Although the Court noted that, in many respects, the conduct of the United Kingdom and Singapore was conduct as the operator of the Horsburgh lighthouse, it went on to say:

> "[B]ut that was not the case in all respects. Without being exhaustive, the Court recalls their investigation of marine accidents, their control over visits, Singapore's installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de souverain*, the bulk of them after 1953. Malaysia and its predecessors did not respond in any way to that conduct, or the other conduct with that character identified earlier in this Judgment, of all of which (but for the installation of the naval communications equipment) it had notice."[79]

2.45 The Court remarked on the contrasting conduct of Johor and Malaysia. In this respect, the Court recalled that "the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more."[80] It continued:

> "And, when official visits (in the 1970s for instance) were made, they were subject to express Singapore permission."[81]

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78 Judgment, p. 95, para. 273.

79 *Ibid.*, pp. 95-96, para. 274.

80 *Ibid.*, p. 96, para. 275.

81 *Ibid.*, p. 96, para. 275.

With respect to the maps, the Court then stated:

> "Malaysia's official maps of the 1960s and 1970s also indicate an appreciation by it that Singapore had sovereignty. Those maps, like the conduct of both Parties which the Court has briefly recalled, are fully consistent with the final matter the Court recalls."[82]

This "final matter" was the 1953 correspondence. On this point, the Court recalled as follows:

> "It is the clearly stated position of the Acting Secretary of the State of Johor in 1953 that Johor did not claim ownership of Pedra Branca/Pulau Batu Puteh. That statement has major significance."[83]

2.46 It was this constellation of factors that led to the Court's conclusion on sovereignty over Pedra Branca, which it summed up at paragraphs 276 and 277 of the Judgment. Those two paragraphs deserve to be quoted in their entirety:

> "276. The Court is of the opinion that the relevant facts, including the conduct of the Parties, previously reviewed and summarized in the two preceding paragraphs, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.

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82 Judgment, p. 96, para. 275.

83 *Ibid.*, p. 96, para. 275.

> 277. For the foregoing reasons, the Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore."[84]

2.47 As will be shown in Chapter VI, none of these factors are affected by any "new fact" which Malaysia purports to rely on in the Application.

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[84] Judgment, p. 96, paras. 276-277.

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## CHAPTER III

## MALAYSIA'S "NEWLY DISCOVERED DOCUMENTS" IN CONTEXT

3.1 Malaysia's request for revision of the Judgment rests on a small selection of documents that Malaysia has included in three annexes to the Application. In this Chapter, Singapore will place these documents in their proper context. Further, Singapore will demonstrate that Malaysia's claim of an "implicit underlying fact" regarding sovereignty over Pedra Branca, said to be evidenced by these documents, is unsupportable. None of these documents concerns sovereignty *per se*, much less sovereignty over Pedra Branca. As Chapters V and VI will show, it therefore also follows that none of the documents evidences any "new fact", let alone any fact "of such a nature as to be a decisive factor" within the meaning of Article 61.

### A. The 1958 Correspondence

3.2 Annex 1 to the Application consists of two telegrams. The first telegram, dated 18 January 1958, is signed by the Secretary of State for the Colonies and addressed to the Governor of Singapore. The second telegram, dated 7 February 1958, is the response of the Governor of Singapore to the Secretary of State for the Colonies.

3.3 This correspondence concerned the breadth of the territorial sea and the proposal by some States to extend the territorial sea to 6 nautical miles. This proposal caused concern to Singapore because of the narrowness of the Strait of Singapore. As the Governor noted in his 7 February 1958 telegram, the western and eastern approaches to Singapore were through

channels that were "only 8½ miles wide at their narrowest parts."[85] The effect of extending the territorial sea to 6 nautical miles would have been to "close the high seas channels of approach to Singapore"[86], giving rise to "special difficulties"[87] for Singapore. Singapore would, in effect, be "territorial sea-locked" by neighbouring States.

3.4 To deal with those "special difficulties", the Governor suggested providing for an "international high seas corridor" through the Strait of Singapore. According to the Governor, the "international high seas corridor" would "follow the normal shipping channel"[88]. The effect of this "corridor" would have been to prevent the channels of approaches on the eastern and western sides of Singapore from being "close[d]"[89] by the extended territorial seas of Malaya and Indonesia. The "normal shipping channel" at that time was "approximately"[90] described by the Governor by reference to various navigational aids and is depicted on a chart prepared for illustrative purposes at **Insert 2** on the facing page.

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85 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 1(a) (Application, Annex 1).

86 *Ibid*., para. 1(a).

87 Confidential telegram from Secretary of State for the Colonies to Governor [of] Singapore dated 18 January 1958, para. 1 (Application, Annex 1).

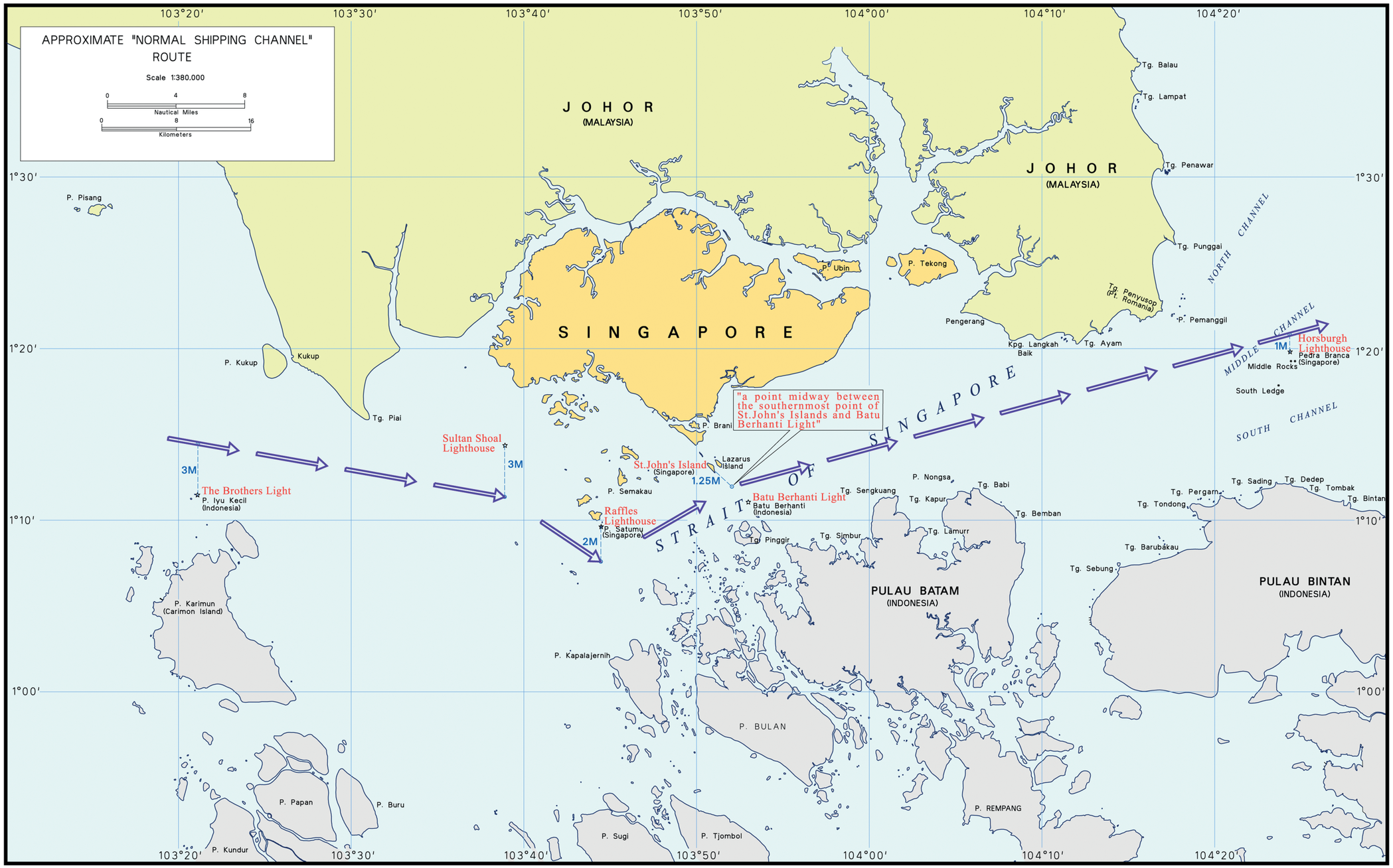
88 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 2 (Application, Annex 1).

89 *Ibid.*, para. 1(a).

90 *Ibid*., para. 2.

**Insert 2**

**Map *annotated* to illustrate the approximate route of the "normal shipping channel" described by the Governor in Annex 1 to the Application**




For illustrative purposes only

**Insert 2** - Map *annotated* to illustrate the approximate route of the "normal shipping channel" described by the Governor in Annex 1 to the Application

3.5 Malaysia argues that the 1958 correspondence showed that the Singapore authorities did not consider Pedra Branca as part of Singapore territory at that time[91]. If they did, according to Malaysia, Singapore "would have been able to claim rights over the territorial waters surrounding Pedra Branca/Pulau Batu Puteh"[92], thus obviating the need for the Governor to "advocate the provision of an international passage so near the island"[93]. This argument defies logic. The mere fact that the Governor described the course of the "normal shipping channel" as passing a point "near" a particular feature does not lead to the conclusion that he did not understand, or was not advised, that that feature belonged to Singapore.

3.6 First, what the Governor described by reference to the navigational features was not an exact and detailed proposal of the envisaged international high seas corridor. All that the Governor stated was that the corridor would "follow" what was the normal shipping channel, which in turn was "approximately" described by reference to those navigational features.

3.7 Second, in his description, the Governor referred to several features that indisputably belong to Singapore. Apart from "a point 1 mile north of Horsburgh Light", the Governor also referred to points "3 miles south of Sultan Shoal Light" and "2 miles south of Raffles Light"[94]. Malaysia has never disputed that Sultan Shoal lighthouse and Raffles lighthouse are located in Singapore territorial waters, or that they sit on geographical

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91 *See* Application, para. 25.

92 *Ibid.*, para. 25.

93 *Ibid.*, para. 25.

94 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 2 (Application, Annex 1).

features of Singapore[95]. Further, the Governor referred to "a point midway between the southernmost point of St. John's Islands and Batu Berhanti Light", which would have been approximately 1.25 nautical miles from St. John's Island[96]. Malaysia has also never disputed that Singapore has sovereignty over St. John's Island[97].

3.8 Apart from features belonging to Singapore, the Governor's description of the "normal shipping channel" also included "Brothers Light" and "Batu Berhanti Light", which were and are located on geographical features belonging to Indonesia.

3.9 Thus, the Governor's references to various navigational aids along the "normal shipping channel" were not based on any territorial entitlement to the features on which those navigational aids were located.

3.10 Malaysia makes several more leaps in logic by asserting that the 1958 correspondence indicates that: (*i*) "the Governor of Singapore appreciated that the 1953 correspondence with Johor was not dispositive and did not effect the transfer of sovereignty over Pedra Branca/Pulau Batu Puteh"[98]; and (*ii*) "Malaysia and Singapore had a shared understanding at that point

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95 *See* Judgment, p. 93, para. 263.

96 This distance is reckoned according to Malaysia's own pleadings in the original case, where Malaysia stated that the distance between St. John's Island and Batu Berhanti is 2.5 nautical miles. *See* Memorial of Malaysia, para. 29 ("Near the middle of the Straits, between Saint John Island and Batu Berhenti, the channel is only 2.5 nm wide. In short, the area is a confined one, and in normal conditions all the islands are visible from the nearest coastlines.")

97 *See* Memorial of Malaysia, para. 211, where Malaysia cited the 1972 edition of *Singapore Facts and Pictures*, and reproduced a list of "islands forming part of Singapore". The list that Malaysia reproduced included "St. John's Island" (with its Malay name, "Pulau Sekijang Bendera").

98 Application, para. 25.

that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Malaysia, not with Singapore."[99] Neither of these assertions is accurate.

3.11 First, as Singapore has shown above, the 1958 correspondence had nothing to do with sovereignty. Instead, the Governor was simply proposing a navigational corridor following the existing "normal shipping channel"[100]. This was to overcome the "special difficulties" arising from the "clos[ing] [of] the high seas channels of approach to Singapore."[101] Thus, the 1958 correspondence had nothing to do with, and gives absolutely no indication of, any appreciation on the Governor's part that the 1953 correspondence "did not effect the transfer of sovereignty over Pedra Branca"[102].

3.12 Second, the 1958 correspondence indicates no "shared understanding"[103] between Singapore and Malaysia as to sovereignty over Pedra Branca. For the reasons set out in the previous paragraph, the 1958 correspondence does not evince Singapore's understanding of its lack of sovereignty over the territorial waters surrounding Pedra Branca. Nor does it indicate any understanding of sovereignty on the part of Malaya since it did not involve any Malayan authorities. Indeed, Malaysia did not at any time after 1953 resile from the position it expressed in the official correspondence of that year, referred to in Chapter II, that "the Johore

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99 Application, para. 26.

100 Confidential telegram from Governor [of] Singapore to Secretary of State for the Colonies dated 7 February 1958, para. 2 (Application, Annex 1).

101 *Ibid.*, para. 1(a).

102 Application, para. 25.

103 *Ibid.*, para. 26.

Government does not claim ownership of Pedra Branca."[104] That position is entirely unaffected by the 1958 correspondence.

3.13 In short, Malaysia has misconstrued the true meaning of the 1958 correspondence at Annex 1 to the Application, viewed in its proper context. Contrary to Malaysia's assertion, the 1958 correspondence does not, and cannot, "attest" anything at all about "Singapore's understanding of its entitlement to maritime rights"[105] around Pedra Branca. It follows that the 1958 correspondence cannot be construed to reflect any understanding, much less "shared understanding"[106] as to any matter relating to sovereignty over Pedra Branca, and therefore evidences no "fact" of such a nature, let alone a "fact" of such a nature as to be a decisive factor.

## B. The Documents Relating to the 1958 *Labuan Haji* Incident

3.14 Annex 2 to the Application concerns a navigational incident that occurred on 25 February 1958 involving the vessel *Labuan Haji* which was sailing from Singapore to Thailand. The documents which Malaysia claims it "discovered in a British archival file for 1958"[107] consist of a message from one Mr Wickens dated 25 February 1958[108], which is accompanied by handwritten internal minutes dated 26 February 1958[109], and two

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104 *See* para. 2.5 above.

105 Application, para. 26.

106 *Ibid.*, para. 26.

107 *Ibid.*, para. 27.

108 Note from "ER" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw) dated 25 February 1958 (Application, Annex 2).

109 Handwritten internal minute signed by "H Shaw" to "Y.E." (i.e., "Your Excellency", Governor of Singapore, W. A. C. Goode) and handwritten internal

newspaper cuttings of reports of the incident from well-known and publicly available newspapers, the *Straits Times*[110] and *Singapore Standard*[111].

3.15 With respect to Mr Wickens's message, this stated:

> "KPM vessel Labuan Haji left Singapore this morning for Petani. At 12.56 p.m. message received that she was being followed by Indonesian gunboat near Horsburgh Light and she turned back to Singapore. The RMN patrol launch left Telok Ayer to go to the rescue. Further frantic messages received that the Indonesian gunboat was trying to block the Labuan Haji. Royal Navy were not in a position to act as ship still inside Johore territorial waters. Finally, 2.15 p.m. RAF Sunderland went up and at 2.50 p.m. Labuan Haji signalled that gunboat had sheered off and she (Labuan Haji) was turning north again and proceeding inside Federation territorial waters."[112]

3.16 On the basis of this imprecise description of where the vessel was at the relevant time, Malaysia alleges that:

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minute signed "W A C Goode" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw), both dated 26 February 1958 (Application, Annex 2).

110 Cutting from the *Straits Times* (Application, Annex 2).

111 Cutting from *Singapore Standard* (Application, Annex 2).

112 Note from "ER" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw) dated 25 February 1958 (Application, Annex 2).

> "the military authorities responsible for Singapore's defence at the time did not view the waters around Pedra Branca/Pulau Batu Puteh as belonging to Singapore. Indeed, these authorities considered these waters to belong to Johor, and had apparently issued instructions to their ships to refrain from entering those waters without specific invitation."[113]

3.17 Malaysia has distorted Mr Wickens's message. The message states that the incident had occurred "near Horsburgh Light", not, as Malaysia asserts, in "the waters around Pedra Branca/Pulau Batu Puteh"[114]. Nothing meaningful can be drawn from the expression "near Horsburgh Light". It is clear from the context that the crew of the *Labuan Haji* mentioned "Horsburgh Light" as a navigational aid and a natural reference point for navigators in the area—nothing more.

3.18 Moreover, given the geographical setting of the area, with several features belonging to different States situated so close together, the generality of the term "near" permits no conclusion as to the location of the incident. Pedra Branca is 0.6 nautical miles from Middle Rocks, and 6.8 nautical miles from Pulau Pemanggil, the next nearest Malaysian island[115]. In the original case, Malaysia even described Pedra Branca as "a place 'near Point Romania'", based on Pedra Branca's location "only 7.7 nm from Point Romania"[116]. Point Romania is the nearest location on the Malaysian mainland at Johor. According to Malaysia's own description, therefore, a navigational incident in the territorial waters of the Malaysian mainland at Johor can still be described as having taken place "near" Pedra Branca. It is therefore not surprising that *both* a Royal Malayan

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113 Application, para. 30.

114 *Ibid.*, para. 30.

115 *See* Memorial of Malaysia, paras. 32 and 34.

116 *Ibid.*, para. 125. *See also* CR 2007/24, 13 November 2007, p. 14, para. 15 (Kadir).

Navy patrol launch and a Royal Air Force Sunderland aircraft were dispatched in response to the *Labuan Haji*'s distress message.

3.19 As for the newspaper cuttings, they are equally imprecise. The cutting from *Singapore Standard* states:

> "On receipt of the message a Royal Malayan Navy motor launch wa[s] alerted and in addition, a Sunderland aircraft from the Royal Air Force Station in Seletar was dispatched for investigation.
>
> When the Sunderland arrived in the area, *north of Horsburgh Lighthouse*, the Indonesian gunboat was seen moving off towards Indonesia, while the Labuan Haji steamed north-west within the Federation territorial waters."[117] [Emphasis added]

The only indication as to the actual location of the incident is that the area was "north of Horsburgh Lighthouse". According to the same cutting, the vessel "steamed north-west within the Federation territorial waters."[118]

3.20 The cutting from the *Straits Times* is just as vague on the location of the incident. It simply reports that according to the *Labuan Haji*'s own message, it was "harass[ed]" by the Indonesian gunboat "off Horsburgh lighthouse, 35 miles north east of Singapore."[119] As the Court noted in the Judgment, Pedra Branca "lies approximately 24 nautical miles [27.6 statute miles] to the east of Singapore"[120]. Therefore, it is unlikely that the incident occurred anywhere close to, much less within, the

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117 *See* cutting from *Singapore Standard* (Application, Annex 2).

118 *See* cutting from *Singapore Standard* (Application, Annex 2).

119 *See* cutting from the *Straits Times* (Application, Annex 2).

120 Judgment, p. 22, para. 16.

territorial sea of Pedra Branca, which, at the time, extended to 3 nautical miles (3.5 statute miles).

3.21 In summary, the documents in Annex 2 to the Application say nothing about sovereignty over Pedra Branca. They do not indicate the distance between Pedra Branca and the incident involving the *Labuan Haji*, let alone the co-ordinates of where the incident took place. In the absence of any precise indication as to the location of the incident, Mr Wickens's statement that "Royal Navy were not in a position to act as ship still inside Johore territorial waters"[121] cannot be construed to mean, as Malaysia argues, that the "British naval authorities viewed the waters adjacent to Pedra Branca/Pulau Batu Puteh as belonging to Johor"[122].

3.22 For these reasons, the allegedly "newly discovered documents" in Annex 2 to the Application do not support Malaysia's case that Singapore had any understanding, much less a "shared understanding", that sovereignty over Pedra Branca "rested with Malaysia, in the name of Johor"[123], and therefore also evidence no "fact" of such a nature, let alone a fact that could be a decisive factor.

## C. The Sketch Map

3.23 Annex 3 to the Application is a sketch map dated 25 March 1962 with handwritten annotations. The most recent of those handwritten

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121 Note from "ER" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw) dated 25 February 1958 (Application, Annex 2).

122 Application, para. 31.

123 *Ibid.*, para. 30.

annotations is dated "Feb 66"[124]. Malaysia has given this sketch map its own characterisation, "[a]nnotated map of naval operations". For ease of reference, Singapore reproduces this sketch map from the Application below as **Figure 1**.

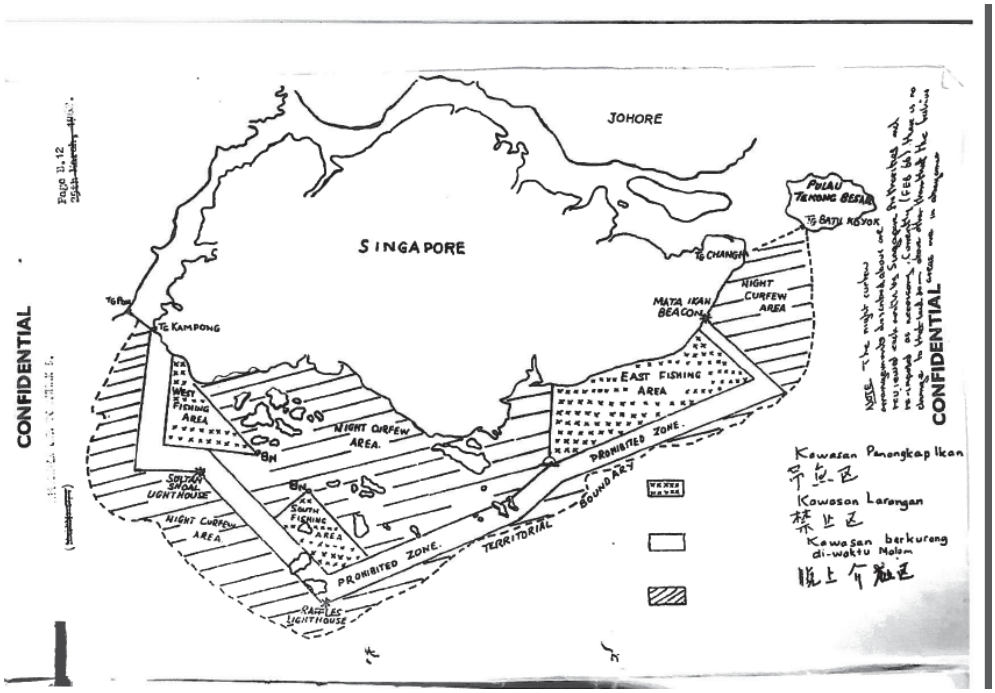



**Figure 1.** Sketch map at Annex 3 to the Application

3.24 According to Malaysia, this sketch map includes "a clear line delimiting the Singaporean territorial waters"[125] and shows "the limits of Singaporean territorial waters at a point south of Pulau Tekon [*sic*] Besar in the Johor Strait; they do not extend to the vicinity of Pedra Branca."[126] This purportedly provides a "valuable new basis for assessing the

124 *Ibid.*, Annex 3.

125 Application, para. 33.

126 *Ibid.*, para. 33.

Singaporean authorities' understanding of their territorial entitlements", which did not include Pedra Branca[127].

3.25 Malaysia has taken this sketch map completely out of context and misrepresented what it shows. This sketch map was not intended to depict the territorial waters or the territorial extent of Singapore, and it does not do so.

3.26 The sketch map depicts the main island of Singapore, some of Singapore's smaller islands, and the southern part of Johor (Malaysia). The waters dividing the main island of Singapore and Johor in the north are known as the Johor Strait. The territorial waters boundary between Singapore and Johor in the Johor Strait has been in existence since 1927[128]. That boundary has never been disputed by Malaysia[129]. At **Insert 3** on the facing page is the sketch map from Annex 3 to the Application with the 1927 territorial waters boundary in the Johor Strait superimposed on it. If Annex 3 was intended to depict the "territorial boundary", it would clearly be inaccurate, especially on the eastern side of the main island of Singapore.

127 *Ibid.*, para. 35.

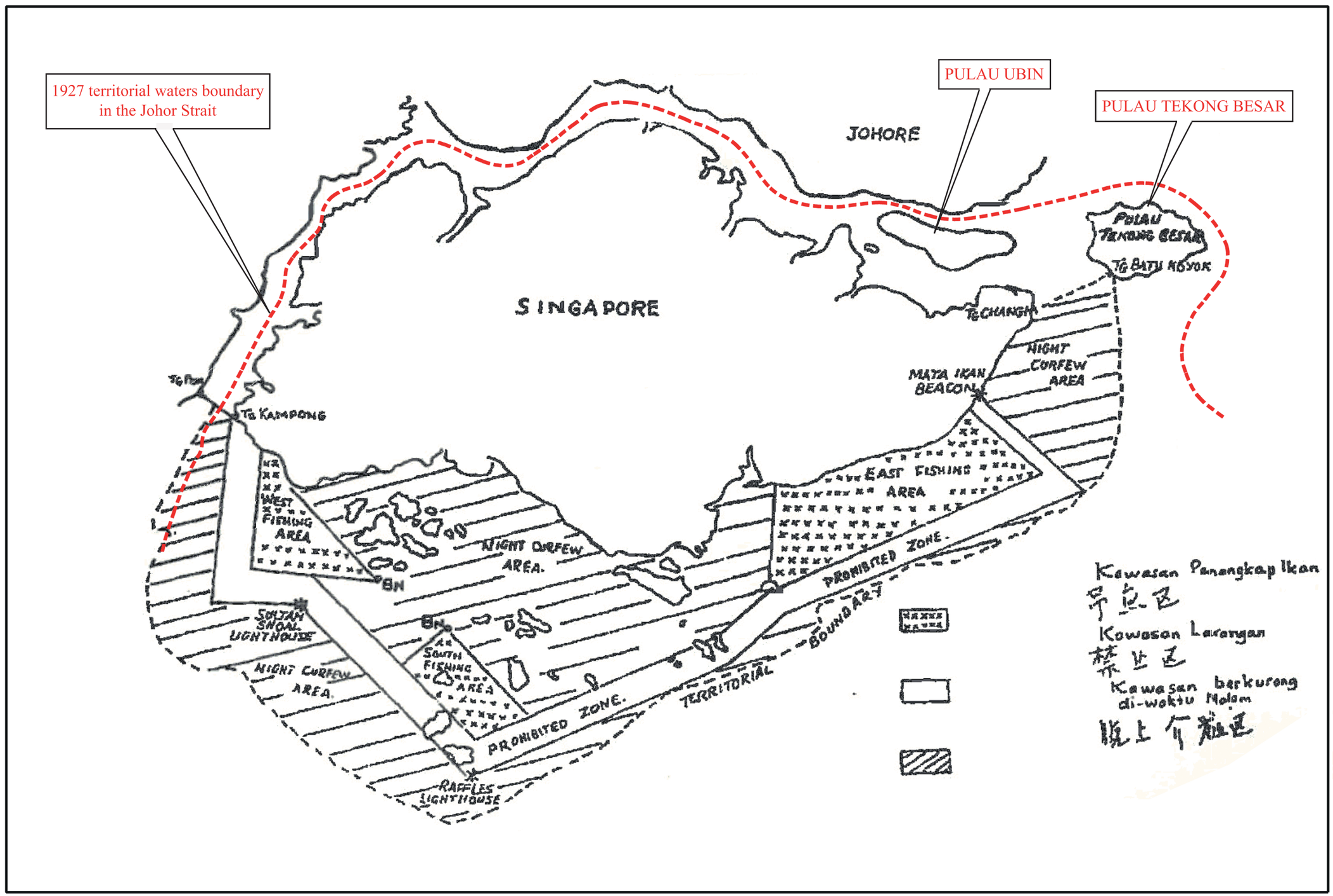
128 *See* Counter-Memorial of Singapore, paras. 6.20-6.25 and 6.97-6.99.

129 *See* Memorial of Malaysia, paras. 11, 99-100, 190-192, 220-221 and Inserts 14 and 17.

**Insert 3**

**Sketch map in Annex 3 to the Application *annotated* (in red) to show the names of Pulau Ubin and Pulau Tekong Besar and the 1927 territorial waters boundary in the Johor Strait**

**Insert 3** - Sketch map in Annex 3 to the Application *annotated* (in red) to show the names of Pulau Ubin and Pulau Tekong Besar and the 1927 territorial waters boundary in the Johor Strait




For illustrative purposes only

3.27 Malaysia's argument appears to be that the Singapore authorities did not understand that Pedra Branca belongs to Singapore because it does not fall within the "territorial boundary" depicted in the sketch map[130]. The fallacy of this argument is apparent from the face of the sketch map. The sketch map shows two islands northeast of the main island of Singapore, in the Johor Strait. One of these islands is Pulau Tekong Besar. It is labelled as such on the sketch map, and this label is enlarged for clarity in **Insert 3**. The island immediately to the west of Pulau Tekong Besar is Pulau Ubin, and Pulau Ubin is labelled in **Insert 3**. Malaysia has never disputed that Pulau Tekong Besar and Pulau Ubin are islands belonging to Singapore[131]. However, on the sketch map, both islands are shown outside the purported "territorial boundary" of Singapore, the eastern end of which implausibly and erroneously ends on land in the middle of Pulau Tekong Besar. Thus, the sketch map was clearly not prepared as an authoritative or official map to depict the territorial boundaries of Singapore.

3.28 Rather, the sketch map was made in conjunction with a set of orders prepared solely for security purposes. Malaysia has mentioned the title of these orders in the Application[132]. However, Malaysia has not mentioned that, when these orders were in force, Singapore faced threats from the south during a period of tension known as the Confrontation (*Konfrontasi*) by Indonesia. As the historian C.M. Turnbull describes:

> "Confrontation with Indonesia damaged trade and brought physical violence. Between September 1963 and May 1965 saboteurs exploded a number of bombs in Singapore, and

130 *See* Application, paras. 33-35.

131 *See* Memorial of Malaysia, paras. 191, 196, 211, 214 and 313.

132 *See* Application, para. 32.

> Indonesian gunboats seized many Singapore fishing craft."[133]

3.29 In this regard, the sketch map was intended to depict only areas south of the main island of Singapore that were affected by restrictions designed to guard against security threats from the south. The purpose of the sketch map is disclosed by reviewing that part of the 1964-1966 file containing the sketch map that Malaysia has not produced. Singapore has attached the relevant extracts of the 1964-1966 file to these Written Observations as **Annex 1**[134].

3.30 At paragraph 32 of the Application, Malaysia refers to the "Orders for Ships Patrolling in Defence of Western Malaysian Seaboard" from which the sketch map was taken. However, Malaysia has failed to produce or refer to Annex B to these orders, paragraph 6 of which reads:

> "SINGAPORE PORT RESTRICTED AREAS
>
> 6. *In the waters South of Singapore Island*. Restricted areas, night curfew areas and night fishing areas are in force. Details are given in Appendix One to this Annex."[135] [Emphasis added]

3.31 Further, Appendix One to Annex B contains the following text, which bears reproducing in full:

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133 Turnbull, C.M.: A History of Singapore, 1819-2005. Singapore: NUS Press, 2009, p 290.

134 Extracts from Orders for Ships Patrolling In Defence of Western Malaysian Seaboard, 2nd ed., promulgated by the Naval Officer-in-Charge, West Malaysia, and the Commander, Far East Fleet of the Royal Navy on 25 March 1965 (MALPOS II), attached to these Written Observations as **Annex 1**.

135 Annex 1, p. A4.

"Restricted and Prohibited Areas – Singapore Territorial Waters.

The Shipping and Fishing Community is advised that new night curfew arrangements for boats under oars, sails and outboard motors will come into force at 1900 hours (7 p.m.) Friday 29.1.65. Three areas where night fishing will be permitting have been designated. Boats must enter the areas before 1900 hours (7 p.m.) and remain in the area until 0530 hours (5.30 a.m.). Night movement of boats under oars, sails and outboard motors in all other parts of the territorial waters of Singapore *between Tg. Changi and Tg. Kampong* continues to be prohibited.

The prohibited day and night areas for all vessels under 100 tons will with effect from 1900 hours (7 p.m.) 29.1.65 be extended *to the East to a point off Tg. Mata Ikan and to the West off Sultan Shoal Lighthouse*. Any vessel under 100 tons wanting to pass through the area by day or night must be in possession of a permit issued by the O.C. Port Authority or in possession of a Port Clearance. Passes are normally only issued for day-light passage through the prohibited areas.

A plan showing: -

(a) the night fishing areas [indicated as  ] and

(b) the night curfew area for boats under oars, sails and outboard motors [indicated as  ], and

(c) the prohibited zones for all vessels under 100 tons during day and night [indicated as  ],

is attached herewith." [Emphasis added]

3.32 The "plan … attached herewith" is the sketch map found at Annex 3 to the Application.

3.33 At paragraph 33 of the Application, Malaysia refers in passing to what can only be Appendix One to Annex B, based on the title of the order to which Malaysia refers. However, Malaysia has omitted the crucial context for the sketch map that is provided by reading the sketch map together with the extracts from Annex B reproduced at paragraphs 3.30 and 3.31 above. As can be seen in the sketch map, the "waters South of Singapore Island" mentioned in paragraph 6 of Annex B are "the territorial waters of Singapore between Tg. Changi and Tg. Kampong", and the areas "to the East to a point off Tg. Mata Ikan and to the West off Sultan Shoal Lighthouse". Tanjung Changi ("Tg. Changi") is the easternmost point of the main island of Singapore marked on the sketch map, while Tanjung Kampong ("Tg. Kampong") is the westernmost point of the main island of Singapore marked on the sketch map. Tanjung Mata Ikan ("Tg. Mata Ikan") is where "Mata Ikan Beacon" is marked on the sketch map, near Tanjung Changi, while Sultan Shoal Lighthouse is marked as such on the sketch map, near Tanjung Kampong. All of the designated curfew areas and fishing areas mentioned in Appendix One and marked on the "plan"—which is the sketch map in Annex 3 to the Application—are south of the main island of Singapore.

3.34 Therefore, read in its context, the sketch map was produced specifically and purely for security threats associated with Confrontation (*Konfrontasi*) by Indonesia, arising from the south of the main island of Singapore. Thus, there was no need to include Pedra Branca on the sketch map. Similarly, there was also no need to include Pedra Branca when the "night curfew arrangements" shown on the sketch map were "reviewed each month by Singapore Authorities and re-imposed as necessary", as was done according to the handwritten annotation dated "Feb 66"[136].

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136 Application, Annex 3.

3.35 In summary, the sketch map provides no basis for "assessing the Singaporean authorities' understanding of their territorial entitlements"[137]. Neither the sketch map nor the handwritten annotation "describe[s] the operation and outcome of a regular process in which the Singapore authorities reviewed and reaffirmed the strict regulation of their maritime spaces every month."[138] The sketch map was not prepared as an authoritative or official map to depict the territorial boundaries of Singapore, but as part of a set of orders concerning security arrangements specifically designed to counter security threats to the south of the main island of Singapore. For all these reasons, the sketch map is irrelevant to the issue of sovereignty over Pedra Branca.

137 Application, para. 35.

138 *Ibid.*, para. 35.

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## CHAPTER IV

## THE CONDITIONS OF ADMISSIBILITY UNDER ARTICLE 61

4.1 The relevant provisions of Article 61 of the Statute are:

> "1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
>
> …
>
> 4. The application for revision must be made at latest within six months of the discovery of the new fact.
>
> 5. No application for revision may be made after the lapse of ten years from the date of the judgment."

4.2 Singapore shares, and can fully endorse, Malaysia's analysis of the requirements of Article 61, in paragraphs 17 to 19 of the Application, in particular the remark that:

> "Malaysia acknowledges that *all of these requirements must be satisfied* for an application for revision to be admissible."[139] [Emphasis added]

4.3 This last remark is in line with the Court's well-established jurisprudence, according to which:

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[139] Application, para. 19. At footnote 11 of the Application, Malaysia also cites *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 399, para. 20.

> "an application for revision is admissible only if *each* of the conditions laid down in Article 61 is satisfied. If *any one of them* is not met, the application must be dismissed."[140] [Emphasis added]

4.4 As recently and aptly observed, the provisions of the Statute and the Rules concerning revision

> "are couched and placed in the Statute in such a way as to emphasize the exceptional nature of [this procedure], as possibly impairing the stability of the jural relations established by the *res judicata*."[141]

4.5 Due to this exceptional nature, the Court has acknowledged that the "conditions for granting an application for revision of a judgment are strictly circumscribed"[142]. Therefore:

> "[i]n the interests of the stability of legal relations, those restrictions must be rigorously applied. … Subject only to

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140 *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 12, para. 17. *See also Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 29; and *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 404, para. 36.

141 Shaw, Malcolm N.: Rosenne's Law and Procedure of the International Court: 1920-2015. 5th edition. Koninklijke Brill NV, 2016. §III.394. *See also ibid.*, §III.397 ("It is also the case that the process of revision needs also to be strictly circumscribed and for the same reason, that is respect for the fundamental importance of the principle of *res judicata*.").

142 *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 90. *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 90, para. 115.

> this possibility of revision [offered by Article 61], the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events."[143]

4.6 At the outset, it is difficult to discern what, precisely, is the "new fact" within the meaning of Article 61 on which Malaysia relies in support of the Application. First, Malaysia claims that each of the documents "can be characterised as a new fact"[144]. Then, Malaysia states:

> "these newly discovered documents may be taken as *evidence of an implicit underlying fact*, namely, that Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore."[145] [Emphasis added]

Yet elsewhere in the Application, Malaysia asserts that:

> "[t]he newly discovered documents individually and together demonstrate that Singapore, at the very highest levels, knew that that 1953 correspondence did not effect a transfer of sovereignty, and that in the years after that exchange Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory."[146]

4.7 With respect to Malaysia's claim that each of the documents "can be characterised as a new fact", it should be highlighted that "fresh

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143 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 92-93, para. 120.

144 Application, para. 22.

145 *Ibid.*, para. 22.

146 *Ibid.*, para. 40. *See also* Application, para. 23.

documents do not in themselves amount to fresh facts."[147] A document may be newly discovered, but the underlying "fact" to which it is said to relate could have been known earlier and thus not be a "*new* fact".

4.8 Moreover, as shown in Chapter III, whether the "newly discovered documents" are considered individually or collectively, they do not stand for Malaysia's proposition that they can "be taken as *evidence of an implicit underlying fact*, namely, that Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore."[148] Nor do they "demonstrate that Singapore, at the very highest levels, knew that that 1953 correspondence did not effect a transfer of sovereignty, and that in the years after that exchange Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory."[149] In short, there is no "new fact" of the nature alleged by Malaysia for the purposes of Article 61. On this basis alone, the Application is not admissible.

4.9 In Chapters V and VI, Singapore will show that except for the ten-year requirement specified in Article 61, paragraph 5, none of the other conditions prescribed in Article 61 is satisfied. Specifically, Singapore will demonstrate the following:

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147 *Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion, 1924, P.C.I.J., Series B, No. 9*, p. 22. *See also Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 411, para. 59, where the Chamber made no finding as to whether the documents submitted by El Salvador, in and of themselves, constituted "new facts". Rather, the Chamber found that these documents did not meet the "decisive factor" requirement under Article 61.

148 Application, para. 22 (Emphasis added).

149 *Ibid.*, para. 40.

(*a*) The "new facts" allegedly referred to in the new documents discovered by Malaysia were not unknown to the Court and to Malaysia when the Judgment was given. This is discussed in Chapter V, Section A.

(*b*) Malaysia has failed to show that its ignorance of the "new facts" in the time before the Judgment was given is not due to its negligence. This is discussed in Chapter V, Section B.

(*c*) Malaysia has not fulfilled the six-month condition of Article 61, paragraph 4, because the so-called "new facts" were known to Malaysia well before 4 August 2016. This is discussed in Chapter V, Section C.

(*d*) Malaysia's "new facts" do not satisfy the "decisive factor" requirement. This is discussed in Chapter VI.

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## CHAPTER V

## THE PROCEDURAL SHORTCOMINGS IN THE APPLICATION

5.1 In this Chapter, Singapore will show that Malaysia's "newly discovered facts", however Malaysia characterises them, were known to the Court and Malaysia as the Parties had made full arguments based on such facts in the original case. Singapore will also show that the "new facts" were obtainable by Malaysia in the original case by reason of their character and substance. Furthermore, most of Malaysia's "new documents" were published online in March 2015 by a member of the Malaysian delegation in the original case, much earlier than six months before the filing of the Application as prescribed under Article 61, paragraph 4. For all these reasons, the Application's procedural shortcomings are sufficient grounds for the Court to dismiss Malaysia's request under Article 61.

### A. Malaysia's "Newly Discovered Facts", However Characterised, Were Not Unknown When the Judgment Was Given

5.2 As the Court made clear in its Judgment on the Application to revise its Judgment on Preliminary Objections in the *Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* case:

> "[U]nder the terms of Article 61, paragraph 1, of the Statute, an application for revision of a judgment may be made only when it is 'based upon the discovery' of some fact which, 'when the judgment was given', was unknown. These are the characteristics which the 'new' fact referred to in paragraph 2 of that Article must possess. Thus both paragraphs refer to a fact existing at the time when the judgment was given and discovered subsequently."[150]

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150 *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime

5.3 As discussed in paragraph 4.6 above, it is not clear what "new fact" Malaysia is relying upon for the Application. If the "fact" on which Malaysia is relying is that "Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore"[151], this "fact" was known to all at the time of the Judgment. This was the position Singapore took in the original case, and this position was fully known to Malaysia, and formally acknowledged by Counsel for Malaysia in the oral proceedings:

> "*Nous prenons acte toutefois que Singapour ne revendique pas cette lettre comme valant un titre ou même comme constituant la racine d'un titre*."[152]

5.4 If, on the other hand, the "newly discovered fact"[153] upon which Malaysia is relying is that "Singapore, at the very highest levels, knew … that in the years after that exchange [i.e., the 1953 correspondence] Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory"[154], this is also not an "unknown" fact within the meaning of Article 61.

5.5 Contrary to what Malaysia claims in various parts of the Application,[155] Malaysia clearly knew about this "newly discovered fact" because this

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of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections, *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 30, para. 67.

151 Application, para. 22.

152 CR 2007/31, 23 November 2007, p. 29, para. 3 (Kohen) ("We note, however, that Singapore is not claiming for this letter the status of a title or even a root of title." *[Translation by the Registry]*)

153 Application, para. 41.

154 *Ibid.*, para. 40.

155 *Ibid.*, paras. 44-45 and 48.

was precisely what Malaysia claimed in its pleadings in the original case. There, Malaysia alleged that Singapore's conduct and representation showed that Singapore did not have sovereignty over Pedra Branca[156]. This claim was carefully considered and dismissed by the Court[157]. Thus, the documents that Malaysia has now produced are but a futile attempt to prove a non-existing "new fact".

5.6 Even if the Court's earlier decision was based on matters not pleaded by the Parties, *quod non*, that alone is not a valid ground to request revision of a Judgment under Article 61. To suggest otherwise, as Malaysia does in the Application[158], would be to confuse the revision procedure under Article 61 with an appeal procedure that might be available in a municipal court but which is not envisaged in the Statute, which expressly states that its Judgments are "final and without appeal".

## B. Malaysia Failed to Exercise Reasonable Diligence to Obtain These "New Facts" Before the Judgment Was Delivered

5.7 Article 61, paragraph 1, of the Statute makes clear that even if Malaysia's "new facts" were unknown to it at the time of the Judgment, Malaysia must still show that "such ignorance was not due to negligence". In *Tunisia* v. *Libya*, the Court referred to this condition as "one of the

156 *See* Memorial of Malaysia, paras. 242 and 245-267; Counter-Memorial of Malaysia, paras. 510-514; and Reply of Malaysia, paras. 304-318, 324-329 and 339-367.

157 Judgment, pp. 36-38, paras. 118-124; pp. 82-96, paras. 231-277.

158 *See* Application, paras. 41, 45 and 48.

essential conditions of admissibility of a request for revision laid down in paragraph 1 of Article 61 of the Statute"[159].

5.8 In the case of the Application, even if Malaysia's documents were evidence of "new facts", *quod non*, Malaysia has not shown that it has made any effort to obtain these documents before the Judgment. Indeed, all of the documents on which Malaysia now seeks to rely were obtainable with reasonable diligence before the Judgment was delivered.

### 1. UK LEGISLATION ON ARCHIVAL RECORDS

5.9 To circumvent this plain conclusion, Malaysia argues:

> "Since the documents described above were housed in the UK National Archives and were only released to the public after the Judgment, their discovery after the conclusion of the proceedings before the Court is not attributable to any negligence on the part of the Government of Malaysia, and so presents no obstacle to the admissibility of the application for revision."[160]

This is a weak attempt by Malaysia to attribute its own negligence to the declassification policy of the UK National Archives. Malaysia has presented no evidence to show that it had made any attempt to obtain the documents before the Judgment was given. In fact, as the following explanation of the relevant UK law shows, if Malaysia had made a request to the United Kingdom ("UK") before the Judgment was given for the documents it now annexes to the Application, Malaysia could have

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159 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 28.

160 Application, para. 49.

obtained them under the applicable UK law in force. The explanation below is derived from information freely available on the website of the UK National Archives[161].

5.10 For many years until January 2005, the applicable law was the Public Records Act (UK)[162]. Under the Public Records Act, "records of, or held in, any department of Her Majesty's Government in the United Kingdom"[163] are "public records" to be selected for permanent preservation and transferred to the Public Record Office (now the UK National Archives)[164]. Under the so-called "30 year rule", public records in the Public Record Office had to be made available for public inspection once they had been in existence for 30 years[165].

5.11 Therefore, up to January 2005, if the Malaysian Government had made a request to the UK Government for access to archival records concerning colonial administration in Malaysia and Singapore, the UK Government would have been obliged under UK law to accede to that request if the relevant records had been in existence for at least 30 years. This means that the UK Government would have been obliged to provide access to

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161 *See* The National Archives, *Legislation and regulations*, available at: http://www.nationalarchives.gov.uk/information-management/legislation/ (last accessed: 20 May 2017).

162 Public Records Act 1958 (UK), as amended by the Public Records Act 1967 (UK), available at: http://www.legislation.gov.uk/ukpga/Eliz2/6-7/51/ (last accessed: 20 May 2017).

163 Public Records Act 1958 (UK), First Schedule, para. 2(1)(a).

164 *See* Public Records Act 1958 (UK), Sec. 3(4).

165 *See* Public Records Act 1967 (UK), Sec. 1, available at: http://www.legislation.gov.uk/ukpga/1967/44/section/1 (last accessed: 20 May 2017), which amended the Public Records Act 1958 (UK), Sec. 5(1). *See also* The National Archives, *History of the Public Records Acts*, available at: www.nationalarchives.gov.uk/information-management/legislation/public-records-act/history-of-pra/ (last accessed: 20 May 2017).

archival records dating from before January 1975. This obligation would have covered Annexes 1 to 3 to the Application, since all of them date from before January 1975.

5.12 In January 2005, the Freedom of Information Act (UK) amended the Public Records Act so that if the Malaysian Government had made its request after that time, the UK Government would have been obliged under the Freedom of Information Act to allow the Malaysian Government access to the relevant archival records on request[166].

5.13 The UK legislation mentioned at paragraphs 5.10 through 5.12 above accords with the general spirit of Article 28, paragraph 3, of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts[167], which provides that:

> "The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of States archives of the predecessor State which pass to the newly independent State pursuant to other provisions of the present article."[168]

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166 In January 2005, the parts of the Public Records Act 1958 (UK) relating to access to public records were amended by the Freedom of Information Act 2000 (UK). The effect of those amendments was to make the rules for accessing the UK Foreign and Commonwealth Office archives even more flexible, subject only to the exceptions set out in the Freedom of Information Act 2000. *See* The National Archives, *The public records system*, available at: http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/public-records-system (last accessed: 19 May 2017).

167 United Nations, *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts (Documents of the Conference)*, document A/CONF.117/14, p. 146.

168 The Convention was adopted at a diplomatic conference convened by the United Nations General Assembly on the basis of a set of draft articles adopted by the United Nations International Law Commission. In respect of evidence "which

## 2. THE "NEW DOCUMENTS" COULD HAVE BEEN RESEARCHED AND DISCOVERED BEFORE THE JUDGMENT WAS GIVEN

5.14 Malaysia has also failed to exercise reasonable diligence with respect to the research and discovery of all the "new documents" on which it now seeks to rely.

5.15 First, in the original case, Malaysia produced a July 1953 document similar to the 7 February 1958 telegram in Annex 1 to the Application[169]. Both the 1953 and the 1958 correspondence concerned issues relating to the potential extension of the limits of the territorial sea beyond 3 nautical miles, arising from contemporaneous developments in the law of the sea[170]. This disposes of the Malaysian argument that "it would be difficult to expect litigants to be characterised as negligent for not discovering information relevant to a point which was not anticipated in the proceedings."[171] From the July 1953 correspondence, Malaysia clearly knew that there were internal discussions within Singapore concerning the territorial sea issue, but Malaysia has produced no evidence in the

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bears upon title to territory of the newly independent State or its boundaries" mentioned in Article 28, paragraph 3 [then draft Article 26, paragraph 3], the Commission noted that "[t]he need for such evidence is especially crucial when the latter State is in dispute or litigation with a third State concerning the title to part of its territory or its boundaries. The Commission considers, therefore, that the predecessor State has a duty to transmit to the newly independent State the 'best evidence' available to it." *See* United Nations, *Yearbook of the International Law Commission, 1981*, vol. II, Part Two, document A/CN.4/SER.A/1981/Add.1 (Part 2), p. 64.

169 Letter and attachments from A.G.B. Colton, for the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore, dated July 1953 (Memorial of Malaysia, Vol. 3, Annex 68).

170 *See also* paras. 3.3-3.4 above.

171 Application, para. 48.

Application of any approaches made to the United Kingdom so as to discover Annex 1 to the Application[172].

5.16 Second, Malaysia's position is no better on the documents relating to the *Labuan Haji* incident. It is highly significant that Annex 2 to the Application includes two contemporary press articles from well-known and publicly available newspapers, the *Straits Times* and *Singapore Standard*, reporting on this incident "off Horsburgh lighthouse". The *Straits Times* was the main English-language newspaper in both Malaya and Singapore in 1958, and in 1959 the archives of the *Straits Times* were relocated from Singapore to Kuala Lumpur in Malaysia. Since then, materials dating before 1959, including the *Straits Times* article in Annex 2 to the Application, have remained in Kuala Lumpur. Had Malaysia exercised reasonable diligence during its preparations for the original case, it is clear that Malaysia could have identified and obtained the article with minimal effort.

5.17 Furthermore, according to Mr Wickens's message and the press cuttings, both British and Malayan military forces responded to the distress message sent by the *Labuan Haji*. The Royal Malayan Navy sent a naval launch and the Royal Air Force dispatched a Sunderland aircraft. Therefore, the incident and its concrete circumstances were known to Malaysia ever since the incident occurred.

5.18 Third, Malaysia's negligence is also demonstrated in the case of the sketch map in Annex 3 to the Application. Malaysia claims that "[i]t is not known precisely when [the sketch] map was released to the public,

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172 *See also* paras. 5.10-5.12 above.

and the UK National Archives was unable to supply a specific date when enquiries were made."[173]

5.19 The UK National Archives has in fact specifically informed Singapore in a letter dated 25 April 2017 (attached to these Written Observations as Annex 2) that the file numbered "DEFE 69/539", in which Malaysia "discovered" the sketch map, was "transferred to The [UK] National Archives on 20th September 2002" and "made available for research on 21st April 2005."[174]

5.20 Indeed, the set of orders containing the sketch map is referred to by Dr. Ian Pfennigwerth in his book on the Royal Australian Navy in Southeast Asia[175]. The book was published in 2008, but it is clear that all the research had been completed and the manuscript finalised for publication by November 2007[176].

5.21 In the book, Dr. Pfennigwerth mentions certain "Orders for Ships Patrolling in Defence of Western Malaysia Seaboard — known by its short title MALPOS."[177] The primary document reference in the relevant footnote is to "UKNA DEFE 24/98 - Report on Naval Operations in East and West Malaysia, 1964-1966, COMFEF Letter 1763.FEF.143/12 OPS

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173 Application, para. 36.

174 Correspondence concerning the date of release of DEFE 69/539 with The UK National Archives dated 4-25 April 2017, attached to these Written Observations as **Annex 2**.

175 Pfennigwerth, Ian: Tiger Territory: The Untold Story of the Royal Australian Navy in Southeast Asia from 1948 to 1971. Kenthurst, New South Wales: Rosenburg Publishing, 2008.

176 *Ibid.*, p. 9.

177 *Ibid.*, p. 187.

of 23 November 1966."[178] Then, he mentions "[t]he second edition of MALPOS, issued in March 1965", which "was a comprehensive set of instructions on how to prepare for and conduct patrols."[179] This set of orders was accessible to a private individual like Dr. Pfennigwerth and would certainly have been accessible to Malaysia with minimal effort. Further, the UK National Archives informed Singapore that DEFE 24/98 was made available for research from as early as January 1998[180].

5.22 Apart from being freely available since January 1998, as confirmed by the UK National Archives, Malaysia has also omitted to mention that the same set of orders from which the sketch map was obtained was extracted and annexed to the written pleadings in the original case. At paragraph 32 of the Application, Malaysia refers to these orders by title: "Orders for Ships Patrolling in Defence of Western Malaysian Seaboard". An annex bearing extracts from the same title is attached to the Reply of Singapore filed in the original case as Annex 33.

5.23 Annex 33 also shows that copies of the set of orders containing the sketch map were distributed to various Malaysian authorities, including the "Inspector-General RMP" ("RMP" refers to the Royal Malaysian Police), "Mindef K.L. for Navy" ("Mindef K.L." refers to the Ministry of Defence in Kuala Lumpur, Malaysia) and "C.O. NOICWM … for R.M.N. ships"

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178 Pfennigwerth, Ian: Tiger Territory: The Untold Story of the Royal Australian Navy in Southeast Asia from 1948 to 1971. Kenthurst, New South Wales: Rosenburg Publishing, 2008, pp. 307-308, note 79.

179 *Ibid.*, p. 187.

180 *See* Correspondence concerning the date of release of DEFE 69/539 and DEFE 24/98 with The UK National Archives dated 4-25 April 2017, attached to these Written Observations as **Annex 2.** In the letter dated 25 April 2017 at Annex 2, p. A15, the Chief Executive's Office of the UK National Archives noted that "there is one retained item (redacted) [in DEFE 24/98] which is held by the Ministry of Defence". The sketch map is not part of that retained item.

("R.M.N." refers to the Royal Malaysian Navy)[181]. The set of orders containing the sketch map has thus been in Malaysia's possession for more than 50 years.

5.24 Therefore, Malaysia was in a position to obtain the sketch map well before the Judgment was given.

### 3. CONCLUSION

5.25 For all these reasons, there can be no doubt that "one of the essential conditions of admissibility of a request for revision laid down in paragraph 1 of Article 61 of the Statute, namely ignorance of a new fact not due to negligence, is lacking."[182] Malaysia was negligent in failing to obtain in a timely manner all the documents it now presents as "new facts".

## C. Malaysia Failed to File the Application Within Six Months of the Alleged Discovery of the "New Facts"

5.26 Malaysia has also failed to comply with the condition of Article 61, paragraph 4, of the Statute, according to which "[t]he application for revision must be made at latest within six months of the discovery of the new fact."

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181 Reply of Singapore, Vol. 3, Annex 33, p. 244.

182 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 28.

5.27 In paragraph 23 of the Application, Malaysia explains that "[d]uring the period 4 August 2016–30 January 2017, research was undertaken by Malaysia at the United Kingdom National Archives in London."[183] This explanation calls for a number of observations.

5.28 First, the very fact that such research was undertaken shows that Malaysia considered that its research within the scope of the original case was not as complete as it should have been. Second, as far as Annex 1 to the Application is concerned, Malaysia claims that the relevant archives were opened to the general public in 2013[184], but gives no explanation as to why it then waited another three years before commencing a search for new documents. Third, the Application says nothing at all about the lateness of the "discovery" of the documents in Annexes 2 and 3. Fourth, the Application gives no precise date of the so-called "discovery" of any of the "new documents".

5.29 Malaysia, as the Applicant, bears the burden of showing that it has met the conditions for admissibility prescribed in Article 61 of the Statute, including the six-month condition[185]. Singapore, as the Respondent, cannot be expected to rebut evidence not disclosed.

5.30 That said, it is clear that the documents introduced by Malaysia in support of the Application do not fulfil the six-month condition under Article 61, paragraph 4. In a 29 March 2015 blog entry published by Professor Shaharil Talib, entitled "New Facts for Revision Application", Professor Shaharil states:

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183 Application, para. 23.

184 *Ibid.*, para. 25.

185 *See also* para. 1.4 above.

"The final piece of evidence that is decisive in the Application for Revision of Judgment is yet another 2013 released file in the UK Archives. The file makes three important new facts hitherto unknown.

First, it lists all Indonesian patrol vessel intrusions into Singapore Territorial Waters in the Straits of Singapore which were raised with Indonesian authorities by the Government of the Colony of Singapore. The incidents listed covered the period 1955 to 1958. The cases included incidents near Mata Ikan, Raffles Lighthouse and Pulau Senang. There is no mention of Horsburgh Lighthouse and Pedra Branca/Pulau Batu Puteh in the list of intrusions into Singapore Territorial Waters.

Second, this file reveals another crucial piece of evidence where there was mention of an incident around the Territorial Waters of Pedra Branca/Pulau Batu Puteh and in its official correspondence the local authorities of Singapore mentioned that this incident occurred within the territorial waters of Johore which was also reported in the local press. The incident was never recorded in the List of Intrusions into the Territorial Waters of Singapore. This is a decisive fact.

The Third new fact was the observation of Singapore authorities to the suggested Extension of territorial waters to 6 miles in the Straits of Singapore would not be in Singapore's interests for the following reasons:

(a) The approaches to Singapore are through the channels between the Indonesian Islands on the south and the mainland of the Federation of Malaya [The State and Territory of Johore] on the north. These channels are only 8 ½ miles wide at their narrowest parts on both the western and eastern side. The effect of extending territorial waters to 6 miles therefore be to close the high seas channels of approach to Singapore.

(b)2. [*sic*] It is therefore important to Singapore that the present 3 mile limits of territorial waters should be retained. However, if it is necessary in the last resort to agree to a general application of six mile limits, not only must the right of innocent passage through the International Straits so created be reaffirmed, but a special provision should be

> made for an international high seas corridor one mile wide through the straits between Singapore and Malayan territory on the north and Indonesian territory on the south. This corridor should follow the normal shipping channel from west to east which is approximately as follows. From a point 3 miles north of the Brothers light to a point 3 miles south of Sultan Shoal Light to a point 2 miles south of Raffles Light to a point midway between the southern point of St. Johns Islands and Batu Berhenti Light to a point 1 mile north of Horsburgh Light."
>
> It is obvious that had the Colony of Singapore sovereignty over Pedra Branca/Pulau Batu Puteh the issue of closing the entrance into the Straits of Singapore from the High Seas of the South China Sea or the exit from the Straits of Singapore into the South China Sea would never had been raised in 1958."[186]

5.31 There is substantial overlap between the material forming the basis of the Application and the "new facts" described in Professor Shaharil's blog entry. Professor Shaharil had knowledge of the Annexes to the Application from early 2015, if not before.

5.32 Professor Shaharil participated in the oral proceedings in the original case and is listed in the Judgment as a member of the Malaysian delegation. In the delegation list, his designation is "Head of Special Research Unit, Chambers of the Attorney-General of Malaysia"[187]. According to the *curriculum vitae* attached to the blog, Professor Shaharil continues to hold

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186 Shaharil Talib, *New Facts for Revision Application*, dated 29 March 2015, available at http://indefenceofresearch.blogspot.com/2015/03/new-facts-for-revision-application.html (last accessed: 24 April 2017), attached to these Written Observations as **Annex 3**.

187 Judgment, p. 16, preambular paragraph.

this position[188]. Knowledge of Professor Shaharil is therefore knowledge of Malaysia.

5.33 As noted by Professors Zimmermann and Geiss:

> "in order to establish that the fact was unknown to the applicant, the question of whose knowledge is attributable to the applicant State has to be answered.[189] In analogy to Art. 4 of the ILC Articles on State Responsibility, the knowledge of State organs should be considered as knowledge of the State,[190] but in particular the knowledge of those persons who had represented the applicant in the original proceedings.[191]"[192]

Although this observation was made in the context of knowledge for the purposes of Article 61, paragraph 1, it applies equally to Article 61, paragraph 4.

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188 *Curriculum vitae* of Dato' Dr. Shaharil Talib, undated, available via a link on http://indefenceofresearch.blogspot.com to http://www.scribd.com/doc/15984859/CV-Prof-Shaharil (last accessed: 15 April 2017), attached to these Written Observations as **Annex 4**.

189 Note 186 in the original: "With regard to the attribution of knowledge, cf. generally the *Corfu Channel* case, ICJ Reports (1949), pp. 4, 17–22."

190 Note 187 in the original: "ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10; (Bosnian) Genocide case (Application for Revision), CR/2002/40, p. 62 (Varady), where Art. 4 of the ILC Articles was applied in the context of the discovery of the fact in order to establish that the time-limit had been observed and that Mr Kostunica's acts and knowledge were not attributable to the FRY, because at the relevant time, he acted as a private person; cf. also CR/2002/41, p. 28 (van Biesen)."

191 Note 188 in the original: "As to the representation of the parties by agents, counsel and advocates cf. Berman on Art. 42, *passim*."

192 Zimmermann, Andreas, and Geiss, Robin: Article 61 (In: The Statute of the International Court of Justice: A Commentary, ed. by Andreas Zimmermann *et al*. Second ed. Oxford: Oxford University Press, 2012, p. 1522).

5.34 In this connection, it is telling that current access to Professor Shaharil's blog is denied in Malaysia and remains inaccessible in Malaysian territory. Notifications appearing in place of the blog explain that the "website is not available in Malaysia as it violate(s) the National law(s)"[193], and that the relevant "National law(s)" are sections 263(2) and 233 of the Communications and Multimedia Act 1998 (Malaysia)[194]. From section 263(2) of the same Act and from one of the notifications appearing in place of the blog, it is clear that access was denied at the written request of the Malaysian Communications and Multimedia Commission, a Malaysian Government agency. Malaysia is therefore fully aware of this blog. The Court can draw its own conclusions from the coincidence of the denial of access to the blog in Malaysia and the filing of the Application.

5.35 It is therefore quite apparent that Malaysia discovered the "new facts" in or before March 2015. By submitting the Application only on 2 February 2017, Malaysia has failed to comply with the six-month condition prescribed by Article 61, paragraph 4, of the Statute.

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193 Screen capture of notification of unavailability of www.indefenceofresearch.blogspot.my in Malaysia (last accessed: 27 April 2017 in Malaysia), attached to these Written Observations as **Annex 5**.

194 Screen capture of notification of the details of denial of access to www.indefenceofresearch.blogspot.my in Malaysia due to violation of the Communications and Multimedia Act 1998 (Malaysia) (last accessed: 27 April 2017 in Malaysia), attached to these Written Observations as **Annex 6**.

## CHAPTER VI

## MALAYSIA'S FAILURE TO SATISFY THE "DECISIVE FACTOR" REQUIREMENT

6.1 As set out in Chapter IV[195], Malaysia must satisfy all the conditions in Article 61 of the Statute. These include the condition that the alleged "new facts" must be of such a nature as to be a decisive factor. Malaysia has also failed to satisfy this condition. The "new facts" presented by Malaysia are not of such a nature and by no means justify the admissibility of the request for revision under Article 61, paragraph 1.

6.2 In determining whether the "decisive factor" equirement is satisfied, the Court assesses the newly discovered fact in the light of the factors relied on as the basis of the Court's judgment[196]. Whether or not a fact is of a decisive nature depends, as the Chamber in *El Salvador* v. *Honduras* put it, on whether it "overturn[s] the conclusions arrived at" by the Court in the original case[197].

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195 *See* paras. 4.2-4.3 above.

196 *See* para. 2.1 above, and authorities cited therein. *See also* Franco-German Mixed Arbitral Tribunal, *Baron de Neuflize (France)* v. *Diskontogesellschaft et al.* (Germany), 1927, 7 Recueil des décisions des Tribunaux Arbitraux Mixtes 629; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning* the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, pp. 409-410, paras. 50-51; Geiss, Robin: "Revision Proceedings before the International Court of Justice" (In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 63, 2003, p. 182).

197 *Application for Revision of the Judgment of 11 September 1992 in the Case concerning* the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 410, para. 53.

6.3 In Chapter II, Singapore reviewed the decisive factors that led the Court to hold that sovereignty over Pedra Branca belongs to Singapore. As Singapore will demonstrate in this Chapter, the Court's reasoning in the Judgment is "wholly unaffected"[198] by any fact evidenced by Malaysia's "newly discovered documents". On the contrary, Malaysia's "newly discovered documents" are similar to those that the Court dismissed as irrelevant in the original case.

## A. Malaysia's Erroneous Characterisation of the Court's Reasoning in the Original Case

6.4 At the outset, it is necessary for Singapore to respond to Malaysia's mischaracterisation of the Court's reasoning in the Judgment when it alleges that:

> "While the Court's 2008 judgment considered post-1953 practice, *the weight that the Court accorded to the 1953 correspondence cast this correspondence as the prism through which the subsequent developments were seen*. The recently discovered 1958 documentation goes directly to the reliability of this vantage point, calling into question not only the *controlling character* that was attributed to the 1953 correspondence but also the evaluation of the practice subsequent thereto."[199] [Emphasis added]

6.5 This is a mischaracterisation of the Judgment. The 1953 correspondence, while regarded by the Court as having "major significance"[200], did not have the "controlling character" that Malaysia seeks to ascribe to it. As

198 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 213, para. 38.

199 Application, para. 3.

200 Judgment, para. 275.

explained in Chapter II, the Court's ruling on Singapore's sovereignty over Pedra Branca was based on four key elements—including the 1953 correspondence—each of which was, in and of itself, significant[201]. Malaysia relies on this mischaracterisation, which it repeats at paragraphs 40 and 41 of the Application, to support the assertion that its "new fact" is of such a nature as to be a decisive factor.

6.6 In addition, Malaysia contends that the

> "newly discovered fact would … if considered anew, inevitably lead to a different conclusion on the question of whether Johor's title to the island had passed to Singapore. This is all the more the case as the Court's appreciation that sovereignty passed in consequence of the emergence of an informal agreement between the Parties was not the subject of submission by the Parties or enquiry by the Court in the original proceedings." [202]

6.7 There is no factual basis for Malaysia's assertions that "the Court's appreciation that sovereignty passed in consequence of the emergence of an informal agreement between the parties" was "not the subject of submission by the Parties or enquiry by the Court in the original proceedings."[203] This is because the Court simply never made any reference to, much less a finding that there had emerged, such an "informal agreement". Instead, the Court found that:

> "the relevant facts, including the conduct of the Parties, previously reviewed and summarized in the two preceding paragraphs, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the

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201 *See* paras. 2.2 and 2.3 above.

202 Application, para. 41.

203 *Ibid.*, para. 41.

> conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore."[204]

## B. The Court's Reasoning is Unaffected by Malaysia's "New Facts"

6.8 In Chapter II, Singapore has given a detailed explanation of the Judgment, which was based on four key elements[205]. Each key element is wholly unaffected by Malaysia's "new facts".

6.9 First, in relation to the 1953 correspondence, which the Court considered to be of "*central importance* for determining the *developing understanding* of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh"[206], Malaysia's argument in reliance on its "new documents" is that there is some "new fact" regarding the Singapore authorities' purported understanding of Singapore's sovereignty over Pedra Branca. Malaysia has misconstrued the Court's conclusion on the 1953 correspondence, which is that "Johor's reply shows that as of 1953 *Johor understood* that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh."[207] In other words, the Court focused on *Johor's* understanding regarding sovereignty over Pedra Branca rather than that of Singapore. None of the documents on which Malaysia bases the Application alters the significance of the statement by the Acting State Secretary of Johor that *Johor* did not claim ownership, i.e., sovereignty,

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204 Judgment, p. 96, para. 276.

205 *See* paras. 2.42-2.46 above.

206 Judgment, p. 75, para. 203 (Emphasis added).

207 *Ibid.*, p. 80, para. 223 (Emphasis added).

as decided by the Court, of Pedra Branca[208]—a statement that neither Johor nor Malaysia ever resiled from afterwards.

6.10 Second, the Court referred to various activities that Singapore undertook *à titre de souverain* on or related to Pedra Branca mostly after 1953, and Malaysia's acceptance of, or failure to react to or protest against, any of these activities, as a key part of its conclusion that, by 1980, sovereignty over Pedra Branca had passed to Singapore. Significantly, the vast majority of these activities took place after 1966, which is the latest date that appears on the documents on which Malaysia relies in the Application. With respect to these activities, the Court noted in several places in the Judgment that they gave "significant support" to Singapore's claim[209]. Malaysia's "new facts" in no way affect this aspect of the Court's reasoning.

6.11 Third, the Court relied on Malaysia's own publications and official maps, most of which also post-date 1966, to support its ruling on sovereignty. Thus, with respect to Malaysia's failure to include Pedra Branca as a Malaysian meteorological station after Singapore's independence in its official publication, the Court stated that it considered this omission "as significant in Singapore's favour"[210]. Similarly, in connection with a number of official maps that Malaysia published designating Pedra Branca as "Singapore", the Court found that these annotations were "clear and support Singapore's position."[211] The Court concluded that "those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau

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208 Judgment, p. 80, para. 223.

209 *Ibid.*, p. 83, para. 234; p. 85, para. 239. *See also* Judgment, p. 87, para. 246; p. 88, para. 248; and pp. 88-89, para. 250.

210 *Ibid.*, pp. 93-94, para. 266.

211 *Ibid.*, p. 95, para. 271.

Batu Puteh fell under the sovereignty of Singapore."[212] None of the documents annexed by Malaysia to the Application affects this aspect of the Court's reasoning.

6.12 Fourth, the Court noted that Malaysia could not point to a single act it ever took in a sovereign capacity on Pedra Branca[213]. This aspect of the Court's reasoning is also wholly unaffected because none of the documents that Malaysia relies on shows any Malaysian *effectivités* on Pedra Branca.

6.13 In view of the above, none of the so-called "new facts" affects the holding of the Court that sovereignty over Pedra Branca belongs to Singapore or the reasoning of the Court that formed the basis for that holding. Thus, none can be a decisive factor.

## C. Documents Similar to Malaysia's New Documents Were Dismissed as Irrelevant by the Court in the Original Case

6.14 There is another reason why Malaysia's "new facts" are not, and cannot be considered to be, of such a nature as to be a decisive factor. In the original case, the Court considered, but did not accept, arguments raised by the Parties based on documents similar to those now relied on by Malaysia; *a fortiori*, none of the documents now presented by Malaysia can be considered a decisive factor. This is elaborated below.

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212 Judgment, p. 95, para. 272.

213 *Ibid.*, p. 96, para. 275. *See also* paras. 2.36-2.41 above.

## 1. ANNEX 1

6.15 Annex 1 to the Application consists of an exchange of correspondence in 1958 concerning the breadth of the territorial sea. Malaysia relies on Annex 1 to argue that Singapore did not at the time consider Pedra Branca as part of Singapore territory, and did not consider that the 1953 correspondence had any impact on its understanding of its territorial entitlements[214].

6.16 First, the Court did not consider correspondence between British authorities and the colonial administration in respect of the breadth of the territorial sea decisive in respect of sovereignty over Pedra Branca in the original case[215]. As explained in Chapter III[216], the 1958 exchange of correspondence took place in the context of developments in the law of the sea concerning "new methods of defining territorial waters" following the Court's 1951 Judgment in the *Fisheries* case. In the original case, the Court considered internal Singapore correspondence of July 1953 concerning the same issues, which Malaysia had in fact exhibited[217]. The 1958 correspondence that Malaysia now seeks to rely on is very similar to the July 1953 correspondence. Paragraph 225 of the Judgment bears quoting in full to show the parallels with Annex 1 to the Application:

> "Internal Singapore correspondence of July 1953 indicates that the Foreign Office and Colonial Office in London were involved in a wider examination of issues relating to territorial waters, with the then recent Judgment of this

214 *See* Application, para. 25.

215 *See* Judgment, p. 81, para. 225.

216 *See* para. 3.3 above.

217 *See* Letter and attachments from A.G.B. Colton, for the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore, dated July 1953 (Memorial of Malaysia, Vol. 3, Annex 68).

> Court in the *Fisheries* case *(United Kingdom* v. *Norway)* (*Judgment, I.C.J. Reports 1951*, p. 116) constituting an important element (that Judgment was rendered on 11 December 1951). The conclusion reached in Singapore by the Colonial Secretary was that *because of geographical circumstances, the colony would gain very little from the new methods of defining territorial waters*. On the other hand, 'an application of the new principles by neighbouring countries' could 'only result in an undesirable restriction to fishing grounds normally used by Singapore fishermen'. 'For general reasons also *any enclosure of the high seas by foreign States is contrary to the interest of this densely populated maritime Colony dependent on sea-borne trade*.' The internal letter of July 1953 concluded by mentioning an understanding reached on the former methods of defining territorial waters with Indonesia in July 1951, and a concern not to disturb the relationship which then existed between the Colony and Indonesia. *In all the circumstances, the fact that the authorities in Singapore — or in London for that is where the final decision-making power lay — took no action at that time is not at all surprising*."[218] [Emphasis added]

In the light of the quote above, what Malaysia is now seeking is to re-argue a point already canvassed and dismissed in the original case.

6.17 Second, the Court also did not consider as relevant a new ships routeing system through the Straits of Malacca and Singapore, including "at Horsburgh Light Area"[219], which was established in 1977 and performed a similar function to the "international high seas corridor" proposed in Annex 1 to the Application. The Court held that this routeing system was "not concerned with territorial rights but with the facilitation and safety of navigation through the Straits as a whole."[220]

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218 Judgment, pp. 80-81, para. 225.

219 *See* Memorial of Singapore, Annex 134, p. 1060.

220 Judgment, p. 91, para. 260.

6.18 Third, concerning the Governor's references to several navigational aids in the Singapore Strait when describing the "international high seas corridor", the Court rejected a similar argument by Malaysia in the original case. There, Malaysia had attempted to draw inferences about sovereignty over Pedra Branca from the following passage in the 1966 Singapore Light Dues Board publication by J. A. L. Pavitt:

> "The Board, formed by statute in 1957, is responsible for the provision and upkeep of all ship navigational aids in Singapore waters, and for the outlying stations at Pedra Branca (Horsburgh) in the South China Sea and Pulau Pisang in the Malacca Strait. Within Singapore waters, the Board maintains Raffles, Sultan Shoal and Fullerton Lighthouses, 33 light beacons, 29 unlit beacons, 15 light buoys, and 8 unlit buoys."[221]

The Court agreed with Singapore's reading of the same passage that the descriptions were "simply geographical"[222], and therefore irrelevant to the question of sovereignty over Pedra Branca. The same conclusion must apply to the documents in Annex 1 to the Application, which are equally irrelevant to the question of sovereignty over Pedra Branca.

## 2. ANNEX 2

6.19 Annex 2 to the Application consists of documents concerning an incident involving the *Labuan Haji* and an Indonesian gunboat, namely a message from one Mr Wickens[223], accompanied by handwritten internal

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221 Reproduced in the Judgment at p. 93, para. 264. *See also* para. 2.27 above.

222 Judgment, p. 93, para. 264.

223 Note from "ER" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw) dated 25 February 1958 (Application, Annex 2).

minutes[224], and two newspaper cuttings of reports of the incident from the *Straits Times* and *Singapore Standard*. On the basis of imprecise and vague references in these documents that the incident took place "near Horsburgh Light", Malaysia argues that the territorial waters around Pedra Branca were the territorial waters of Johor (and therefore Malaysia). In the original case, however, the Court gave no significance to similarly imprecise and vague documents, and therefore no significance should be given to Annex 2.

6.20 First, similarly to Malaysia's present argument based on the phrase "*near* Horsburgh Light"[225], Malaysia relied on 1844 correspondence between the Governor of Singapore and the Temenggong of Johor on the construction of "a Light House *near* Point Romania"[226] in order to bolster its case before the Court. Specifically, Malaysia argued that the expression "*near* Point Romania" encompassed Pedra Branca. The Court stated:

> "The Court would note in any event that the Malaysian contention about that acknowledgement faces the difficulty that *the correspondence appears to be in the most general terms, in all likelihood without specifically identifying Pedra Branca/Pulau Batu Puteh*."[227] [Emphasis added]

6.21 Second, the Court addressed an 1861 incident involving Singapore fishermen who had been attacked by Johor Malays while returning from

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224 Handwritten internal minute signed "H Shaw" to "Y.E." (i.e., "Your Excellency", Governor of Singapore, W. A. C. Goode) and handwritten internal minute signed "W A C Goode" to "G.S." (i.e., Governor's Secretary, Harold Anthony Shaw), both dated 26 February 1958 (Application, Annex 2).

225 Application, para. 27 (Emphasis added).

226 Judgment, p. 53, para. 128 (Emphasis added).

227 *Ibid.*, p. 55, para. 134.

fishing, according to them, "*near* to the Pedro Branco Light House"[228]. In the original case, Malaysia drew attention to a letter from the British Governor to the Temenggong of Johor describing the incident as having taken place "*in the neighbourhood of* the Pedro Branco Light House"[229] and asking for the attackers to be punished. Malaysia argued that this letter demonstrated that the Governor did not consider Pedra Branca as British[230]. Concerning the Parties' arguments over whether this incident showed that the British colonial authorities had jurisdiction over Pedra Branca and its territorial waters, the Court concluded that

> "the wording of the Singapore reports are *too vague* to provide any assistance in determining the understanding at that time by the authorities in Singapore of sovereignty over Pedra Branca/Pulau Batu Puteh."[231] [Emphasis added]

6.22 Third, in respect of Malaysia's 1969 territorial waters legislation, the Court underlined that "the very generality of the 1969 legislation means that Malaysia's argument based on it must fail. It does not identify the area to which it is to apply except in the most general sense"[232].

6.23 In the same way, the "very generality" of the documents in Annex 2 to the Application also means that Malaysia's argument based on Annex 2 must fail.

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228 Counter-Memorial of Singapore, Vol. 2, Annex 19, p. 194 (Emphasis added).

229 *Ibid.*, Annex 19, p. 194 (Emphasis added).

230 *See* Counter-Memorial of Malaysia, paras. 119-120; Reply of Malaysia, para. 276.

231 Judgment, p. 72, para. 191.

232 *Ibid.*, p. 90, para. 256.

## 3. ANNEX 3

6.24 Annex 3 to the Application consists of a sketch map forming part of a set of naval orders indicating curfews and restrictions. Malaysia relies on this sketch map to argue that its omission of Pedra Branca showed that Singapore did not, at the time, consider Pedra Branca as forming part of Singapore's territorial entitlement[233].

6.25 In the original case, Malaysia similarly relied on the omission of Pedra Branca from the scope of a curfew order made in Singapore in 1948 ("the 1948 Curfew Order") to support its argument that the Singapore authorities had appreciated that Pedra Branca "was not part of the territory of Singapore"[234]. Rejecting Malaysia's argument, the Court decided that:

> "[A]s Singapore points out, there was no reason in terms of its purpose for extending the ban [on persons being in the specified area between 6.30 p.m. and 6.30 a.m. without a police permit] to such a distant island anymore than there was for extending it to the Cocos and Christmas Islands, some great distance away in the Indian Ocean, which at the time were part of the Colony of Singapore."[235]

Exactly the same reasoning applies to the sketch map in Annex 3 to the Application. As explained in Chapter III[236], the sketch map was prepared to depict only areas south of the main island of Singapore that were affected by restrictions designed to guard against security threats from the south. As such, there was "no reason in terms of its purpose" for extending

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233 *See* Application, paras. 33 and 35.

234 Memorial of Malaysia, para. 197.

235 Judgment, p. 72, para. 189.

236 *See* paras. 3.28-3.34 above.

the coverage of the sketch map to Pedra Branca, which is approximately 24 nautical miles east of the main island of Singapore[237].

6.26 Further, as explained in Chapter II[238], in the original case, Malaysia relied on Singapore maps that did not depict Pedra Branca or show it as part of Singapore in support of Malaysia's assertion that Pedra Branca did not form part of Singapore's understanding of its territorial entitlements[239]. However, the Court dismissed these arguments. In concluding its assessment of the maps, the Court stated:

> "The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. *But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975.* The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore."[240] [Emphasis added]

6.27 For all these reasons, Malaysia has failed to satisfy the "decisive factor" requirement prescribed by Article 61 of the Statute.

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237 *See* Judgment, p. 22, para. 16.

238 *See* para. 2.35 above.

239 *See* Judgment, p. 94, para. 268.

240 *Ibid.*, p. 95, para. 272.

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## SUMMARY OF SINGAPORE'S REASONING

1. In accordance with the Court's Practice Direction II, Singapore presents a short summary of the reasoning developed in these Written Observations.

2. Malaysia has to satisfy a high standard of proof that it has met all of the conditions prescribed by Article 61 of the Statute. Save for the requirement that the Application must be brought within ten years of the Judgment, Malaysia has failed to meet these conditions.

3. The Application contains procedural shortcomings, which, in and of themselves, are sufficient grounds for the Court to dismiss the Application:

   (*a*) Malaysia failed to file the Application within six months of discovering the documents annexed to the Application. Nearly two years before the Application was filed, most of those documents were published online by a member of the Malaysian delegation in the original case.

   (*b*) Malaysia has failed to show that it had made any effort to obtain the documents annexed to the Application before the Judgment was given in 2008.

   (*c*) Malaysia either knew or, with reasonable diligence, should have known, of the documents annexed to the Application before the Judgment was given. These documents were all obtainable by Malaysia from the UK National Archives before 2008. Further, they relate to matters that were already known to Malaysia or

pleaded by the Parties in the original case, and were thus discoverable by Malaysia before 2008.

(*d*) The "new facts" Malaysia is relying on—whether characterised as: (*i*) "Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh"; or (*ii*) "Singapore, at the very highest levels, knew … that in the years after that exchange [i.e., the 1953 correspondence] Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory"—were known to Malaysia before the Judgment was given. In the original case, Malaysia made full arguments before the Court on such "facts".

4. In any event, the Application does not satisfy the "decisive factor" requirement under Article 61, paragraph 1 of the Statute.

5. When given their true meaning and read in context, none of Malaysia's "newly discovered documents" refers to sovereignty over Pedra Branca or bears the interpretation that Malaysia gives them:

(*a*) Annex 1 (the 1958 correspondence) merely proposed a navigational corridor that Singapore should seek to establish in the event that States were permitted to extend their territorial sea limits. It was to follow the normal shipping channel, which in turn was approximately described by reference to navigational aids without regard to sovereignty over the underlying features.

(*b*) Annex 2 (the documents on the *Labuan Haji* incident) contained no information about the exact location of the incident. The fact that it took place "near" Horsburgh Lighthouse is of no probative value, especially given the proximity of Malayan and Singapore waters in that area.

(*c*) Annex 3 (the sketch map) was prepared to depict security arrangements in the south of the main island of Singapore during the period of Confrontation by Indonesia. Accordingly, there was no need to depict Pedra Branca on the sketch map.

6. The Court's decision in the original case that Singapore had sovereignty over Pedra Branca was based on four key elements: (*i*) the 1953 correspondence showing Johor's understanding that it did not have sovereignty over Pedra Branca; (*ii*) Singapore's conduct *à titre de souverain*, almost all of which post-dated the documents annexed to the Application, and Malaysia's acceptance of or failure to object to that conduct; (*iii*) Malaysia's publications and maps, most of which also post-dated the documents annexed to the Application, indicating Pedra Branca as belonging to Singapore; and (*iv*) the lack of competing *effectivités* by Malaysia.

7. None of the documents adduced by Malaysia affects any of the four key elements of the Court's reasoning. In contrast, all of them are similar in nature to factors that the Court examined and did not consider relevant to sovereignty in the original case.

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## SUBMISSION

For the reasons set out above, the Republic of Singapore requests the Court to adjudge and declare that Malaysia's request for revision of the Judgment is inadmissible.

Attorney-General Lucien Wong
Agent for the Government of the Republic of Singapore

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## CERTIFICATION

I have the honour to certify that the documents annexed to these Written Observations are true copies and conform to the original documents.

Attorney-General Lucien Wong
Agent for the Government of the Republic of Singapore

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## LIST OF ANNEXES

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