INTERNATIONAL COURT OF JUSTICE

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

ADDITIONAL WRITTEN OBSERVATIONS AND DOCUMENTATION OF MALAYSIA

11 December 2017

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I. INTRODUCTION

A. Preliminary Observations

1. These additional written observations and documentation ("Observations") are submitted pursuant to the letter of the Registrar dated 9 October 2017 transmitting the decision of the Court to permit such submissions. These Observations address the Written Observations of the Republic of Singapore dated 24 May 2017 ("Singapore's Observations").

2. There is agreement between the Parties that the present proceedings are concerned with the admissibility of Malaysia's 2 February 2017 Application for Revision of the Judgment of 23 May 2008 in the Case Concerning *Sovereignty Over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* ("Revision Application") and not with the substantive issues that would fall to be addressed in a merits rehearing in the event that the Court concludes, as Malaysia contends, that the Revision Application is admissible.

3. The admissibility character of these proceedings bears emphasis for three reasons. First, while it is necessary for a revision application to be placed in the context of the judgment of the Court the revision of which is sought, there is a proper divide between contextualising the revision application and engaging in *sotto voce* submissions on the merits that would fall to be addressed in proceedings that would follow a finding of admissibility. Second, while admissibility is a threshold matter, in respect of which the burden properly rests

on the Applicant, it must be seen for what it is, namely, a gateway test to filter out applications to reopen cases other than on grounds that go to the essence of the Court's original judgment and in respect of which it is appropriate, in the administration of international justice, for the Court to look again at the substance of its original decision. Third, the differentiation between admissibility proceedings and a substantive rehearing on the merits makes it plain that the criteria for assessing admissibility are not to be construed as a test of whether the application would succeed on the merits but rather whether the application has the potential to succeed on the merits. For example, the "decisive factor" criterion in Article 61 of the Court's Statute, properly construed, is a test of whether the new fact advanced has the potential to lead to a different outcome on the controlling aspect of the original judgment, not whether they would have led to a different outcome. A "would succeed" or "would have led" test would require a merits examination. It is thus not appropriate for an admissibility proceedings. An admissibility threshold cannot be construed in such a way as to establish an insurmountable procedural hurdle to frustrate applications that properly warrant reconsideration on the merits.

4. Singapore objects to the admissibility of the Revision Application on every conceivable ground: Malaysia knew of the facts that it now adduces as new at the time of the 2008 Judgment or, if it did not, it should have known and was negligent, or, if it was not negligent, it knew of the facts nearly two years before the Revision Application was filed; the claimed facts are not facts, within the meaning of this term in Article 61 of the Court's Statute, or, if they are facts, they are not new facts, or, if they are new facts, they are not of such a nature as to be

a decisive factor, going to the 2008 Judgment. Singapore seeks to diminish Malaysia's application to that of a cavalier appeal to the Court, driven by "internal factors within Malaysia that are unconnected with the merits of the case."[1]

5. The 2008 Judgment of the Court, the revision of which is sought by Malaysia, warrants review by reference to the new fact now established by Malaysia's new documents, which goes to the heart of the reasoning in the 2008 Judgment. In the realm of cases concerning territorial sovereignty, the 2008 Judgment has unusual features. It is to all intents and purposes a case of acquisitive prescription or historical consolidation by the implication of a shared understanding, a tacit agreement, in which the Malaysian component of the shared understanding is inferred by the Court and Singapore's component of the shared understanding is construed from limited and and shifting practice. It is also to be noted that, as the dissenting opinions to the 2008 Judgment make clear, the appreciations on which the Court's Judgment turned in 2008 were never addressed by the Parties in argument.[2] The 2008 Judgment rested on a *proprio motu* analysis that had not had the benefit of submissions by the Parties.

6. As was set out in the Revision Application, and is addressed further below in response to Singapore's Observations, the 2008 Judgment turned on two interlocking and inextricable appreciations. The <u>first</u> was the appreciation that the Court gave to the 1953 correspondence between the Colonial Secretary of Singapore and the Acting Secretary of State of Singapore ("the 1953

[1] Singapore's Observations, para. 1.18.
[2] Joint Dissenting Opinion of Judges Simma and Abraham, ICJ Reports 2008, pp. 120–1, paras 12 and 14; Dissenting Opinion of Judge ad hoc Dugard, ICJ Reports 2008, p. 152, para. 45.

Correspondence"), which the Court described as "of central importance for determining the developing understanding of the two Parties about the sovereignty over Pedra Branca/Pulau Batu Puteh".[3] The second was the appreciation of the shared understanding of the Parties in the period following 1953, a shared understanding that the Court had necessarily to imply from a limited basis of available practice.

7. Based, as it was, on the evidence then before the Court, the 2008 Judgment was finely balanced in its reasoning. It does no disservice to the Court to say that the Judgment might have gone either way. It turned on limited practice and nuanced appreciations.

8. The new documents on which Malaysia's Revision Application rests go directly to these interlocking appreciations on which the 2008 Judgment turned. They go to the construction given, weight and authority attributed, to the 1953 Correspondence. They go to the implied shared understanding, or tacit agreement, on which the Judgment subsequently rested. The simple reason for this is that **the new documents show that Singapore did not as a matter of fact have the understanding that was attributed to it by the Court in the 2008 Judgment.** A shared understanding requires two components. The Malaysian component, implied by the Court, was always doubtful, given Malaysia's assertion of sovereignty over Pedra Branca/Pulau Batu Puteh and its contestation of Singapore's claim. The new documents now go to Singapore's component of the implied shared understanding and raise sufficient doubt about

[3] Judgment, p. 75, para. 203.

the veracity of the appreciation at the heart of the 2008 Judgment to warrant a re-hearing on the merits.

9. Amongst its other admissibility objections, Singapore contends that the new facts now advanced, even if they are new and even if they are facts, and even if they meet the due diligence and temporal requirements of Article 61 of the Court's Statute, are not in the nature of a decisive factor that would lead to a different result. At the most, Singapore suggests, by way of reference to the Court's jurisprudence, these new facts might have led to some addition to the discussion in the 2008 Judgment, but not to a different outcome.

10. As noted above, however, the decisive factor test is an admissibility requirement. It does not impose, at the admissibility phase, a merits evaluation. It is a test of whether the new facts go to the controlling appreciation on which the Judgment in question rested and have the potential, following a merits rehearing, to lead to a different outcome. It is not a test of whether the outcome would definitively have been different. Such an approach would turn these admissibility proceedings into the merits phase, but without the benefit of a fully pleaded case on the substance.

11. In a case in which the appreciation of the Court was unavoidably finely balanced, resting on variable evidence and implied understandings, what is or may be a decisive factor need have no greater weight than a feather capable of tipping the scale in a different direction. Malaysia does not come to the Court in this Revision Application wielding a sledge hammer. It seeks to put to the Court new evidence, that, in Malaysia's contention, would have altered the Court's appreciation of the

balance of understanding between the Parties in the decade following the 1953 Correspondence. The Court's 2008 Judgment turned on the 1953 Correspondence as of central importance for the shared understanding that the Court went on to imply. Before 1953, sovereignty over Pedra Branca/Pulau Batu Puteh rested with Johor. After 1953, the Court perceived, on the evidence before it, a shared understanding in favour of acquisitive prescription or historical consolidation by Singapore. The documents that Malaysia now brings to the Court, the new evidence, raise fundamental questions that go to the heart of the Court's appreciation. They are more than just a feather tipping the balance on the scale.

B. The Structure of These Observations and Brief Framing Remarks

12. These Observations are divided into five parts. Following this Introduction (Part I), Part II addresses the **new fact – decisive factor criteria** of the admissibility requirements of Article 61 of the Court's Statute, namely, that an application for revision may be made only when it is "based upon the discovery of some fact of such a nature as to be a decisive factor". Thereafter, Part III addresses the **due diligence and temporal criteria** of Article 61, namely, the requirements that any new fact must have been unknown to the Court and to the Party claiming revision, that such ignorance was not due to negligence, and that the application is made at the latest within 6 months of the discovery of the new fact and no later than 10 years from the date of the judgment the revision of which is sought. A summary of the reasoning set out in these Observations is given in Part IV. These Observations conclude with Malaysia's formal submissions in Part V.

13. A number of brief framing remarks are warranted on what follows in the remainder of these Observations. The detail is, as appropriate, developed more fully in the remainder of these Observations.

14. On the **new fact – decisive factor criteria** of admissibility addressed in Part II below, three issues warrant comment at this introductory point. First, Malaysia does not claim that new documents are, without more, new facts. A newly discovered document could, self-evidently, simply repeat what is said elsewhere. This would not meet the admissibility requirement of Article 61 of the Court's Statute. Something more is required. That something more is that the document must shed new light on the point on which the judgment in question turned. That new light might be generated by the provenance of the document, by its addressee, or by its content. What is material is that the evidence in respect of which the document is advanced must be new, in the sense of not having been before the Court in the original proceedings.

15. As is addressed more fully below, the new documents advanced by Malaysia in support of its Revision Application all meet the new fact test. As a formal matter, none of the three documents were before the Court in the original proceedings. More importantly, each of the three documents goes to an issue which the Parties did not address in argument to the Court but on which the 2008 Judgment ultimately rested, namely, the implied shared understanding, or tacit agreement, of the Parties about the change in the sovereign status of Pedra Branca/Pulau Batu Puteh from the period before 1953 to the period after 1953. Also of importance is that the new documents shed materially new light on the apparent

Singaporean component of the shared understanding implied in the 2008 Judgment, challenging the appreciation that it was Singapore's understanding that sovereignty over Pedra Branca/Pulau Batu Puteh had shifted to Singapore, by operation of acquisitive prescription or historical consolidation, in and after 1953.

16. It is also material that the new documents, while unknown to Malaysia in the period leading up to the 2008 Judgment, and unknown to the Court, would manifestly have been known to Singapore. Singapore thus comes now before the Court to press the Court to deny a request to re-open the case that is based on documents of which Singapore would have been aware but of which Malaysia and the Court were ignorant.

17. Second, Singapore suggests that it is not clear whether Malaysia is asserting that the new facts, for purposes of Article 61, are the new documents or the light that they shed on the shared understanding on which the 2008 Judgment turned. The answer is simple. It is both the documents themselves that are new and the evidence that they embody, in the form of their content, that is new. It is also material that the issue to which the evidence embodied in the documents goes, namely, the shared understanding (or lack thereof) of the Parties, was not addressed in argument before Court. It is material as the Court would, if the Revision Application is found to be admissible, for the first time, be addressed, by reference to the new facts, on the implied shared understanding, or tacit agreement, on which the 2008 Judgment was based.

18. Third, the construction that ought properly to attach to the "decisive factor" criterion has already been addressed above and is addressed more fully below. The contentions advanced in paragraphs 40 and 41 of the Revision Application nonetheless warrant further emphasis. The new evidence demonstrates that Singapore knew that the 1953 Correspondence did not effect a transfer of sovereignty of Pedra Branca/Pulau Batu Puteh from Malaysia to Singapore. The new documents demonstrate that there was no shared understanding, post-1953, that sovereignty rested with Singapore. On the contrary, the new documents demonstrate that any shared understanding between the Parties that there might have been in the period after 1953 was a shared understanding that sovereignty rested with Malaysia. By any assessment, the new fact, established by the new evidence, meets the decisive factor admissibility criterion.

19. On the **due diligence and temporal criteria** of Article 61 addressed in Part III below, three issues warrant comment at this introductory point. First, on the issue of due diligence, Singapore covers all the bases. It contends that Malaysia knew of the facts that it now adduces as new at the time of the 2008 Judgment or, if it did not, it should have known and was negligent, or, if it was not negligent, it knew of the facts nearly two years before the Revision Application was filed. There is nothing whatever sustainable in Singapore's assertions. As is addressed more fully below, as the volume of documentary evidence attached to the pleadings in the original proceedings plainly attests, Malaysia undertook every conceivable step and made every conceivable effort to locate relevant documents and material evidence for the original proceedings. The plain fact is that the documents now advanced to the Court were not available to, or, if they

were available, they were not readily discoverable by, Malaysia in the period leading to the 2008 Judgment.

20. Second, going to both the due diligence and temporal criteria of Article 61, Singapore contends that Malaysia must be deemed to have been aware of the new documents well before the 6 months' limitation period for the filing of the Revision Application as the facts disclosed by the new documents were disclosed in blog posts by Professor Shaharil, a retired academic who had been a consultant on Malaysia's original legal team before the Court for the purposes of the 2008 case.

21. There is no basis to this suggestion. Professor Shaharil's position, and the content of his blog posts, are addressed fully below. The short response to Singapore's claim, however, is that Professor Shaharil had not published, or seemingly even identified, the documents which Malaysia now advances and on which it now relies. Malaysia cannot, on any reasonable appreciation, be prejudiced and penalised in its Revision Application in consequence of an unsubstantiated claim by someone once associated with the Malaysian Government that new material casts doubt upon the 2008 Judgment. The present Revision Application was not filed in a cavalier manner, without due and proper regard to the Court's Statute and the criteria for such applications. The Revision Application rests on and is rooted in newly discovered documents, adducing new evidence, that go to the controlling appreciation on which the 2008 Judgment rested.

22. Third, while there are documents in the record of the original proceedings that appear, on superficial examination, to cover the same ground as the three

documents now advanced to the Court, the new documents are materially different in relevant and important aspects of their content by comparison to anything put before the Court in the original proceedings. These material differences are addressed fully in the discussion that follows in Part II below.

23. Against the background of these introductory remarks, Malaysia now turns to address more fully the issues raised by Singapore's Observations.

II. THE NEW FACT – DECISIVE FACTOR CRITERIA OF ADMISSIBILITY

24. As the Court explained in *Genocide Convention Revision Application*, and repeated in the *El Salvador v Honduras Revision Application*, there are two substantive conditions which an Application for Revision must satisfy in order to be admissible. The first requirement is the "discovery' of a "fact', and the second is that this fact is "of such a nature as to be a decisive factor'.[4]

25. In this section, Malaysia will show that its Application satisfies both of these substantive conditions.

[4] *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*), ICJ Reports 2003, pp. 11–12, para. 16; 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, ICJ Reports 2003, p. 398–9, para. 19.

A. Newly Discovered Fact Within the Meaning of Article 61

26. Under Article 61, an Application for Revision must be based upon the discovery of some fact. As the Court has explained, this fact must have existed already at the time when Judgment was given, even though it was only discovered subsequently by the Applicant.[5]

27. Singapore contends that "there is no 'new fact' of the nature alleged by Malaysia for the purposes of Article 61",[6] and that "none of the documents evidences any 'new fact'".[7] Elsewhere, Singapore asserts:

> [W]hether 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." 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.[8]

28. Malaysia observes that a newly discovered fact for the purposes of Article 61 includes the discovery of the *non-existence* of a fact. As Judge ad hoc Dimitrijevic observed in his Dissenting Opinion in the *Genocide Convention Revision Application*, "[t]he non-existence of a fact, as well as its existence, is also a factual

[5] *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, ICJ Reports 2003, p. 30, para. 67.
[6] Singapore's Observations, para. 4.8.
[7] Singapore's Observations, para. 3.1.
[8] Singapore's Observations, para. 4.8.

question."[9] Several commentators have also noted that the requirement for the discovery of some fact can be satisfied if a fact which was relied upon when the Judgment was delivered is found to have not existed.[10]

29. Accordingly, each of the documents newly discovered by Malaysia confirms a discrete moment in the continuation of a certain empirical state of affairs, namely the non-existence of any tacit agreement between the parties concerning the transfer of Johor's sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore. As will be demonstrated more fully in the following section II.B, it is a question of fact whether an agreement forms between two parties, and the Court's factual finding that a tacit agreement had formed between the parties through an informal process of convergent evolution was the key element of the 2008 Judgment. The newly discovered documents establish that such an agreement never came into existence, as they provide evidence of incidents and acts which show with clarity that no shared understanding existed between the parties.

30. Malaysia also notes that, contrary to Singapore's assertion, it has been accepted generally and for a long time in practice that in the revision context the term "fact" is to be understood broadly to include a wide range of documents. Thus,

[9] *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*), ICJ Reports 2003, p. 55, para. 11.

[10] Oellers-Frahm, 'Revision of Judgments of International Courts and Tribunals', *Max Planck Encyclopedia of Public International Law*, 2013, para. 12; A Zimmermann and R Geiß, 'Procedure, Article 61', in Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press, 2012), p. 1516, para. 48.

in the Statute of the Permanent Court of International Justice, on which this Court's Statute was modelled, the reference to "fact" in Article 61 was generally understood to include evidence, documents, maps and other potentially probative materials.[11] In the *Heim and Chamant* arbitration, the Tribunal accepted that "fact" "embraces all means of proof relating to questions of law",[12] and other international courts and tribunals have adopted a similar approach.[13] Most importantly for present purposes, the practice of this Court also aligns with this approach. In the *El Salvador v. Honduras Revision Application,* the Court proceeded to examine whether the scientific, historical and technical evidence, as well as a map and expedition report, submitted by El Salvador in support of its Application for Revision satisfied the condition of decisiveness. By so doing the Chamber appears to have accepted the possibility that these evidentiary materials can be characterised as facts within the meaning of Article 61.[14] In that case Judge ad hoc Paolillo observed that the Court's consideration of the decisiveness of the new facts was "tantamount to an implicit acknowledgement of its status as 'new facts'. The Chamber thus confirms that the production of such documents may substantiate an application for revision provided that they

[11] A Zimmermann and R Geiß, 'Procedure, Article 61', in A Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press, 2012), p. 1512, para. 39.
[12] *Heim and Chamant v. The German State*, 7 August and 22 September 1922, 1 ILR 379 at p. 380.
[13] For example, in the International Criminal Tribunal for Rwanda: *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration)*, Case No. ICTR-97–19-AR72, A.Ch., 31 March 2000; in the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadić, Appeal Judgement on Allegations of Contempt against Prior Counsel Milan Vujin*, Case No. IT-94–1-A-AR77, A.Ch., 27 February 2001; in the European Court of Human Rights, *McGinley and Egan v United Kingdom (Apps 21825/93, 23414/94)(Revision Request)*, 28 January 2000, ECHR 2000-I.
[14] *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, ICJ Reports 2003, pp. 406–7, para. 40, pp. 409–10, paras 49–55.

meet the criteria laid down by Article 61 of the Statute."[15] Judge ad hoc Paolillo dedicated considerable attention in his Dissenting Opinion to the specific question whether documentary evidence may serve as new facts, and his conclusion was unequivocal: "there can be no doubt whatsoever that the ordinary meaning of the term 'facts' includes documents."[16]

31. Nevertheless, Singapore has attempted to sail against the current of this widespread practice by invoking a quote from the PCIJ's *Monastery of Saint-Naoum* Advisory Opinion.[17] Setting aside the fact that this Advisory Opinion was not brought under the provisions governing the PCIJ's revision jurisdiction in Article 61 of the PCIJ Statute, the PCIJ drew a distinction between "fresh" or "new facts" and "facts already in existence" of which the decision-maker was unaware at the time of decision, and the quote invoked by Singapore relates only to the former category. As for facts already in existence which were unknown at the time of the decision—a category which corresponds to the interpretation of Article 61 provided by the Court in the *Genocide Convention Revision Application*, as noted above—the PCIJ appears to accept that fresh documents could

[15] Ibid., Dissenting Opinion of Judge ad hoc Paolillo, p. 421, para. 29.
[16] Ibid., Dissenting Opinion of Judge ad hoc Paolillo, p. 422, para. 32. Kaikobad is similarly conclusive when he remarks that 'this rule [that evidence can be admitted as a new fact under Article 61] has a good legal pedigree': *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press, 2007), p. 277.
[17] *Question of the Monastery of Saint-Naoum* (Albanian Frontier), Advisory Opinion, 1924, PCIJ Series B, No. 9, p. 22.

constitute previously unknown facts if the information they convey might prove the existence of such facts.[18]

32. In any case, the documents which Malaysia has newly discovered do not simply repeat information that has been found elsewhere. They shed new light on the factual record on which the 2008 Judgment was based by providing fresh information about the Singaporean component of the shared understanding implied in the Judgment. This new information establishes that, as a matter of fact, no shared understanding, or tacit agreement, existed between the Parties.

B. The Decisive Nature of the Newly Discovered Fact

33. According to paragraph 1 of Article 61, an Application for Revision is only admissible when it is based upon "the discovery of some fact of such a nature as to be a decisive factor". In *Tunisia v Libya Revision and Interpretation*, the Court concluded that the correct co-ordinates of the petroleum concession granted by the Libyan authorities was not "a fact of such nature as to be a decisive factor", since those details "would not have changed the decision of the Court" as to the relevant sector of the delimitation.[19]

34. This test requires the Court to assess the newly discovered fact against the factual record produced during the original proceedings and to determine whether the

[18] Id. See A Zimmermann and R Geiß, 'Procedure, Article 61', in Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), p. 1516, para. 48. para. 62.

[19] *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, ICJ Reports 1985, pp. 213–4, para. 39.

Court "might have reached different conclusions… had it also had before it the [newly discovered fact]".[20] Thus, it falls to the Applicant to ensure that it accurately identifies the grounds on which the Court arrived at its conclusions in the Judgment in order to show how those grounds would be changed by the newly discovered facts. In *Tunisia v Libya Revision and Interpretation*, the Court considered that Tunisia had presented "an oversimplification of its reasoning" in the Judgment,[21] such that the Court's reasoning was "wholly unaffected" by Tunisia's arguments based on the newly discovered fact.[22] So too in the *El Salvador v Honduras Revision Application*, the Chamber considered that El Salvador had incorrectly summarised the basis of its Judgment, so all of El Salvador's arguments concerning avulsion were irrelevant in view of the fact that the Chamber's determined the course of the boundary on the basis of El Salvador's conduct during the relevant period. Avulsion simply did not matter in that judgment, with the result that findings to that effect like those urged by El Salvador on the basis of its new facts "would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds." In that sense, the new facts asserted by El Salvador could not be decisive factors in respect of the Judgment.[23] As for the second alleged new fact in *El Salvador v Honduras Revision Application*, based on the discovery of a new copy of an historical map and an expedition report, the ICJ concluded that these documents

[20] *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)*, ICJ Reports 2003, p. 410, para. 51.
[21] Ibid., p. 210, para. 35.
[22] Ibid., p. 213, para. 38.
[23] Ibid., pp. 406–7, para. 40.

differed only in minor details from the map which the Court had considered at the time when the Judgment was given. Accordingly, the Court determined that these alleged new facts lacked decisive character.[24]

35. It must be recalled, however, that Article 61, paragraph 2 envisages that two separate procedural stages must be completed before the Court can finally decide whether and how the Judgment requires revision. Article 61, paragraph 2 provides:

> The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

36. The Court highlighted the two-stage structure of revision proceedings in the *Genocide Convention Revision Application* when it stated:

> Article 61 provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute, Article 99 of the Rules makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible. Thus the Statute and the Rules of Court foresee a "two-stage procedure". The first stage of the procedure for a request for revision of the Court's judgment should be "limited to the question of the admissibility of that request".[25]

37. Consequently, the first stage of the process is not concerned with the ultimate question as to whether the Judgment should be revised. Rather, the Court's task

[24] Ibid., pp. 409–10, paras 51–5.
[25] *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*), ICJ Reports 2003, p. 11, para. 15.

is more limited. In these admissibility proceedings, the Court is required merely to determine whether a fact exists and whether it is of such a nature as to be *capable* of affecting or altering the Judgment of the Court. If an Applicant is adjudged to be successful in this first admissibility stage, the Court does no more than record the existence of the new fact of requisite character and "lays the case open to revision". It is only after the second stage of the process—the proceedings on the merits—that the Court will decide ultimately whether the alleged facts truly do possess a decisive character and whether the original Judgment should be revised.

38. In this light, the applicable test in the admissibility proceedings for the decisiveness of a newly discovered fact is, to use Geiß's formulation, "whether it is of such a nature as to be capable of altering the prior Judgment, but not whether it does in substance do so."[26] The Court's practice bears out this approach. By asking whether it "might have reached different conclusions" or "would not have changed [its] decision', the Court has sought to determine whether the newly discovered fact has the *potential* to alter its original findings.

B.1 Analysis of the Court's 2008 Judgment

39. In order to determine whether a fact is "decisive" according to Article 61 of the Statute, it is, as Singapore has noted in its Written Observations, "necessary to

[26] R Geiß, 'Revision Proceedings before the International Court of Justice' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 167, p. 184.

review the basis upon which the Court decided in the Judgment that sovereignty" over Pedra Branca/Pulau Batu Puteh "belongs to Singapore".[27]

40. But first a brief comment on Singapore's Written Observations on this matter is necessary. Singapore takes the view that the Court's decision 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".[28] This clearly proposes that the Court had four independent legal reasons for holding that Singapore had title to Pedra Branca/Pulau Batu Puteh. This, as the following section amply demonstrates, is simply not the case. On the contrary, the whole tenor of the Court's approach was that, faced with Malaysia's original title to the island, a combination of sovereign activities coalesced so as to demonstrate a "convergent evolution" in the views of the Parties as to the transfer of title. It is this evolving progression that for the Court was the key to the decision and for Malaysia the key to the current request for revision.

41. Singapore's comment manifests not only a misunderstanding of the Court's decision, but also a confusion as to Malaysia's current arguments, as the following section will seek to demonstrate.

42. In reaching its decision, the Court commenced with an analysis of the legal situation as it existed prior to the construction of the Horsburgh Lighthouse in the 1840s.

[27] Singapore's Observations, para. 2.1.
[28] Singapore's Observations, para. 2.3.

43. The Court noted that Malaysia argued that Pedra Branca/Pulau Batu Puteh had always been part of the Sultanate of Johor since the kingdom had come into existence. Indeed, the Court underlined that the Sultanate of Johor had established itself in 1512 as a sovereign state with a certain territorial domain under its sovereignty.[29] The Court concluded that:

> [F]rom at least the seventeenth century until early in the nineteenth it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits. Specifically, this domain included the area where Pedra Branca/Pulau Batu Puteh is located.[30]

44. The Court analysed the legal conditions necessary for title in such situations, taking into account the principles concerning the relevance of the paucity of rival legal claims and the geographical circumstances of the island (citing the *Eastern Greenland*[31] and *Island of Palmas*[32] cases). The clear conclusion reached was that "the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh".[33] This was so as of 1824.

45. In so doing, the Court firmly rejected the primary contention argued by Singapore which was that Pedra Branca/Pulau Batu Puteh had been *terra nullius* prior to 1847 and thus susceptible of the lawful taking of possession by the UK in

[29] Judgment, pp. 31–3, paras 46–8 and 52.
[30] Judgment, p. 35, para. 59.
[31] Judgment, pp. 35–6, paras 63–4 (*Legal Status of Eastern Greenland, Judgment,* 1933, *PCIJ Series A/B, No. 53,* pp. 39 and 46).
[32] *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA,* Vol. II (1949), pp. 839, 840 and 855.
[33] Judgment, p. 37, para. 69.

1847-1851.[34] Singapore had concluded that there was no evidence that the island belonged to the Johor Sultanate "at any point in its history and certainly not at the beginning of the nineteenth century".[35] The Court found very firmly that Malaysia (the successor to the Sultanate of Johor) had original title to the island. This title was confirmed by the nature and degree of the authority of the Sultan of Johor exercised over the Orang Laut who inhabited the islands in the Straits of Singapore.[36]

46. The Court reaffirmed this original title in examining the situation between 1824 and 1840. It is not necessary for present purposes to examine the relevant instruments (the 1824 Anglo-Dutch Treaty; the Crawfurd Treaty of 1824 between the Sultan and Temenggong of Johor and the East India Company; and the 1825 "letter of donation"). It suffices to underline the conclusion of the Court that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, "this island was under the sovereignty of the Sultan of Johor".[37]

47. Faced with an analysis focusing clearly on the recognition of Johor/Malaysia's "original title" to Pedra Branca/Pulau Batu Puteh as of 1844, the Court proceeded to examine whether subsequent conduct could modify this. Leaving aside for one moment the question of legal methodology and continuing with the Court's findings, the Court was unable to draw any conclusions as to sovereignty based

[34] Judgment, p. 32, para. 49.
[35] Judgment, p. 32, para. 50.
[36] Judgment, p. 39, para. 75 and p. 40, para. 79.
[37] Judgment, p. 49, para. 117.

on the construction and commissioning of the lighthouse.[38] Further, the Court did not find that a variety of enactments (in 1852, 1854 and 1912) demonstrated British sovereignty,[39] while the various constitutional changes that took place in the area (in 1927, 1946, 1957, 1959, 1963 and 1965) in the Court's view "do not help resolve the question of sovereignty".[40] Again, no assistance as to the sovereignty question could be obtained from a consideration of the joint regulation of fisheries in the 1860s.[41] One may conclude at this point by saying that the Court apparently found no applicable legal activity up to 1953 that constituted or could constitute a clear and effective modification of Malaysia's original title.

48. We turn now to the relevant legal methodology.

49. There are various legal consequences that may be drawn from the Court's analysis up to the 1953 correspondence. The Court found that Johor and thus its successor Malaysia had original title to Pedra Branca/Pulau Batu Puteh in the 1840s and that nothing had happened during the period of some one hundred years to displace that title, still less to transfer it to another sovereign. International law has historically put in place a number of presumptions and principles with regard to the situation where there is an established legal title to territory. First, as Judge Ranjeva underlined in his Declaration in the 2008

[38] Judgment, p. 65, para. 162.
[39] Judgment, p. 67, para. 172.
[40] Judgment, p. 71, para. 186.
[41] Judgment, p. 72, para. 191.The general point is underlined in the Joint Dissenting Opinion of Judges Simma and Abraham, who noted that in none of the 1852-1952 practice did the Court "discern a clear manifestation of a British claim to sovereignty", ICJ Reports 2008, p. 123, para. 22.

judgment, "the transfer of territorial sovereignty cannot be presumed in international law". Consent was required. [42]

50. Secondly, as O'Connell has noted, there is a presumption against loss of sovereignty or to put it another way, a presumption against abandonment. [43] Further, it was stated that: "there can be no loss of territory without the intention of abandonment coupled with withdrawal in fact. Mere hiatus in administration and settlement does not … affect the persistence of sovereignty".[44] Oppenheim has written that dereliction (or abandonment) was accomplished "through the owner-state completely abandoning territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it … Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory".[45]

51. Judges Simma and Abraham in their Joint Dissenting Opinion expressed the matter as follows:

> [A] presumption in favour of maintaining the sovereignty in the hands of the initial holder must be clearly asserted and that presumption should not be lightly regarded as having been overturned.[46]

52. As a presumption, this may be rebutted by evidence to the contrary, of course, but the burden of proof rests upon the party claiming that sovereignty has been relinquished. The parties do not come to this as to a blank page. There is no

[42] Ibid., p. 104, para. 3.
[43] D P O'Connell, *International Law,* (Stevens, 1965), Vol. I, p. 512.
[44] Ibid., p. 511.
[45] Jennings and Watts (eds), *Oppenheim's International Law* (9th edn, Longmans, 1992), p. 717.
[46] ICJ Reports 2008, p. 119, para. 8.

juridical equality as between the title holder and the claimant to title. It is for the latter to prove clearly that title has shifted.

53. Thirdly, there is the principle that the legal boundary has precedence over practice to the contrary or to put it another way, legal title has priority over *effectivités*. This is now well-established. International law proclaims the doctrine that "where the territory which is the subject of the dispute is effectively administered by a state other than the one possessing the legal title, preference should be given to the title-holder".[47] The *effectivités* of the state claiming transfer of title are not as such relevant, while the conduct of the title-holder is relevant only in the context of alleged acquiescence to a change in sovereignty.[48] The Tribunal in the *Croatia/Slovenia* arbitration emphasised that the "legal boundary is not necessarily the same as what might be called the 'practical boundary'", for instance where a particular location was treated for certain purposes (for example allocation of postal codes or connection to public utilities such as gas, water or sewage) as part of another state. The obligation here was to determine the legal boundary.[49] This had priority.

54. The reason for such principles and presumptions is clear. As the Court emphasised robustly in an essential statement of principle:

> Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over

[47] *Frontier Dispute (Burkina Faso/Mali),* ICJ Reports 1986, p. 587, para. 63.
[48] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* ICJ Reports 2002, p. 353, para. 68.
[49] Final Award, 29 June 2017, p.109, paras 337–8.

> territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties is in effect the abandonment of sovereignty over part of its territory.[50]

55. Having established the essential legal framework as it appears from the Court's judgment and general international law reflected in the caselaw of the Court, consideration will now be given as to how the Court approached the question of the possible transfer of Malaysia's legal title over Pedra Branca/Pulau Batu Puteh after 1952.

56. Although the two Parties accepted that the notion of acquisitive prescription had no role to play in the case[51] and that the Court itself did not refer explicitly to this concept[52] nor to that of historical consolidation, it is noticeable that in effect the Court drew upon their key elements in analysing the case.[53]

57. The Court noted that sovereignty could pass by way of agreement between the Parties, but such agreement could also be "tacit and arise from the conduct of the Parties … International law … places its emphasis on the parties' intentions".[54] The intention of the Parties may appear from their conduct "particularly conduct

[50] Judgment, p. 51, para. 122.
[51] CR 2007/26, para. 1 (Malaysia) and CR 2007/27, p. 29, para. 69.
[52] See Declaration of Judge Ranjeva, p. 103, para. 2; Joint Dissenting Opinion of Judges Simma and Abraham, p. 119, para. 11 and following; Dissenting Opinion of Judge Dugard, p. 145, para. 31 and Separate Opinion of Judge Sreenivaso Rao, p. 171, para. 38.
[53] See Joint Dissenting Opinion, p. 122, para. 17 and following.
[54] Ibid., p. 50, para. 120.

occurring over a long period".[55] As the Court noted in its 2007 judgment in *Nicaragua v Honduras,* "[e]vidence of a tacit legal agreement must be compelling".[56] This standard was cited with approval by the Special Chamber of the International Tribunal for the Law of the Sea in the *Ghana/Côte d'Ivoire* case.[57]

58. Further, under certain circumstances, sovereignty could pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State. The absence of reaction, noted the Court, could well amount to acquiescence.[58]

59. In this context, the judgment of the Court in *Cameroon v Nigeria* is pertinent. Here, the Court was faced with a situation of extensive settlement of territory near Lake Chad subject to Cameroonian sovereignty by treaty and claimed by Nigeria partly on the basis of its activities. The Court noted that some of these activities were acts *à titre de souverain.* However, as there was a pre-existing title held by Cameroon in the area in question, "the pertinent legal test [was] whether there was thus evidenced acquiescence by Cameroon in the passing of title from itself to Nigeria".[59] The Court concluded that there was not.[60]

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[55] Ibid., p. 61, para. 149.
[56] *Territorial and Maritime Dispute between Nicaragua v Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ Reports 2007, p. 735, para. 253.
[57] Decision of 23 September 2017, para. 212.
[58] Judgment, p. 50, para. 121.
[59] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* ICJ Reports 2002, p. 353, para. 67.
[60] Ibid., p. 355, para. 70.

60. The Court also drew attention to the temporal element and held that:

> the facts and circumstances put forward by Nigeria with respect to the Lake Chad villages concern a period of some 20 years, which is in any event far too short, even according to the theory relied on by it [of historical consolidation].[61]

61. The "tacit agreement … arising from the conduct of the Parties" matrix relied upon by the Court was deemed to be manifested in this case by what may be termed a process by which the parties seemed to reach an understanding. The Court put it in the following way:

> The Court is of the opinion that the relevant facts, including the conduct of the Parties … 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.[62]

62. There are two particular point to be noted here. First, the temporal factor relates to the period between 1953 and 1980 (28 years). There is here a clear analogy with the *Cameroon v Nigeria* case (where a period of 20 years was deemed to be far too short). Secondly, the intention of the parties deducible from their conduct is referenced in the light of "convergent evolution". Other relevant phrases used by the Court were "evolving views"[63] and "developing understanding"[64] with regard

[61] Ibid., p. 352, para. 65.
[62] Judgment, p. 96, para. 276.
[63] Judgment, p. 65, para. 162.
[64] Judgment, p. 75, para. 203.

to sovereignty over the island. Thus, the Court saw the conduct of the Parties over the relevant time frame in terms of an emerging pattern of coalescing understanding as to the sovereignty issue.

63. The evidence for this was critical. The Court regarded the terms of the 1953 correspondence as of "central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh".[65] It is not necessary for present purposes to analyse this exchange of letters. What is important to note is that the Court held that the correspondence was not of itself determinative[66] nor did it amount to an estoppel[67] nor did it amount to a unilateral binding undertaking. [68] However, it did constitute one (albeit important) element in a progression of elements that the Court believed led to the transfer of sovereignty.

64. The Court examined 13 kinds of post-1953 sovereign activity which it regarded as relevant to this progression. Of these nine categories of activity were regarded as of no weight concerning the sovereignty issue. These included the conduct of naval patrols and exercises by both Parties around the island,[69] the display of the British and Singapore ensigns on the island,[70] the installation by Singapore of

[65] Judgment, p. 75, para. 203.
[66] The Court did "not consider the Johor reply as having a constitutive character in the sense that it had a conclusive legal effect on Johor", Judgment, p. 81, para. 227.
[67] Judgment, pp. 81–2, para. 228.
[68] Judgment, p. 82, para. 229.
[69] "The Court does not see this activity as significant on one side or the other", Judgment, p. 85, para. 241.
[70] "The Court accepts the argument of Malaysia that the flying of an ensign is not in the usual case a manifestation of sovereignty", Judgment, p. 87, para. 246. However, the Court did note that

military communications equipment on the island,[71] a Malaysian Petroleum Agreement of 1968,[72] the delimitation of Malaysia's territorial sea in 1969,[73] the Indonesia–Malaysia Continental Shelf Agreement 1969 and Territorial Sea Agreement 1970,[74] the Indonesia–Singapore Territorial Sea Agreement 1973,[75] inter-state cooperation in the Straits of Singapore,[76] and a range of official publications.[77]

65. Those four activities that the Court found of relevance were the following. First, the investigation by Singapore of shipwrecks around the coasts of the island, which it was felt gave "significant support" to Singapore's case.[78] Secondly, the regulation of visits by Singapore to the island, which again was seen as constituting "significant support" to its claims.[79] Thirdly, the publicity given to a proposed land reclamation scheme by Singapore on the island "supported" Singapore's case, even though the scheme was not carried out.[80] Finally, the Court felt that 6 (out of nearly 100 maps) published between 1962 and 1975 "tend

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Malaysia did express concern over the flying of the flag by Singapore in 1978, Judgment, p. 87, para. 246.

[71] The Court noted that although this was undertaken *à titre de souverain,* it was not clear whether Malaysia actually knew about this activity, Judgment, p. 88, para. 248.

[72] Judgment, p. 89, paras 251–3.

[73] Judgment, pp. 89–90, paras 254–6.

[74] Judgment, pp. 90–91, paras 257–8.

[75] Judgment, p. 91, para. 259.

[76] The Court held that this was "not conduct concerned with territorial rights", Judgment, pp. 91–2, para. 260.

[77] The Court noted that "[g]iven 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", Judgment, pp. 92–4, paras 261–6.

[78] Judgment, pp. 82–3, paras 231–4.

[79] Judgment, pp. 83–5, paras 235–9.

[80] Judgment, pp. 88–9, paras 247–8.

to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore".[81]

66. This was categorised in the Joint Dissenting Opinion as "a very meagre harvest".[82]

67. Nonetheless, what is important, is that the Court clearly weighed those activities that it thought of relevance in the balance in reaching its conclusion that "convergent evolution" had been demonstrated so that Malaysia's original title, accepted as persisting at least until 1952–3, was transferred to Singapore at some point before 1980. In view of the character, number and significance of these activities as analysed by the Court, it must have been a fine call.

68. It is in this context that the additional elements brought to the Court by Malaysia may be seen as "decisive" in tipping that balance the other way and thus reaffirming Malaysia's original title to the island.

B.2 The Decisive Character of the Newly Discovered Documents Taken in Context with Additional Documentation

69. Singapore claims that "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",[83] and also that the documents newly discovered by Malaysia, by virtue of their alleged similarity to

[81] Judgment, pp. 94–5, paras 267–72.
[82] Judgment, p. 124, para. 26.
[83] Singapore's Observations, para. 6.13.

documents which the Court "dismissed as irrelevant" in the original case "are not, and cannot be considered to be, of such a nature as to be a decisive factor."[84]

70. As explained in the previous section, a central element of the 2008 Judgment was the finding of fact made by the Court that a tacit agreement was formed between the parties by their conduct to the effect that Johor's sovereignty over Pedra Branca/Pulau Batu Puteh was transferred to Singapore. The documents discovered by Malaysia establish the occurrence of a series of incidents which all demonstrate that no such agreement came into existence. Since the Court's determination that sovereignty over Pedra Branca/Pulau Batu Puteh passed by way of this tacit agreement was an essential finding of the 2008 Judgment, Malaysia's newly discovered documents showing that this agreement never came about are capable of altering the Judgment. In this way, the newly discovered facts which support Malaysia's Application are of such nature as to be a decisive factor.

71. As for Singapore's claim that Malaysia's newly discovered documents are similar to documents submitted during the original proceedings, each new document will be considered in turn.

(a.) Annex 1 – 1958 internal correspondence concerning delimitation of territorial waters

72. Annex 1 to the Application comprises internal correspondence between the Governor of Singapore and the Secretary of State for the Colonies in 1958

[84] Singapore's Observations, para. 6.14.

concerning the implications for Singapore of the possible enlargement of States' entitlement to territorial waters under international law. Singapore attempts to query the decisiveness of these newly discovered documents in three ways.

73. First, Singapore says that this internal correspondence is "very similar" to an internal Singapore letter from July 1953 which the Court considered in the original proceedings. Moreover, Singapore claims that the 1953 letter concerned the "same issues" as the 1958 correspondence, since both address "'new methods of defining territorial waters' following the Court's 1951 Judgment in the *Fisheries* case".[85] Singapore contends that "Malaysia is now seeking to re-argue a point already canvassed and dismissed in the original case".[86]

74. By way of response it is worth noting at the outset that the Court said no more about this 1953 letter in the Judgment than that it was "not at all surprising" that "the authorities in Singapore—or in London for that is where the final decision-making power lay—took no action at that time".[87] This letter from the Mr Colton on behalf of the Colonial Secretary in London had been received by the Deputy Commissioner for Colonial Affairs in Singapore in July 1953, two months before Singapore received, in response to its request for information about "the rock", the notorious letter dated 21 September 1953 in which the Acting Secretary of State of Johor wrote that the Johor Government did not claim ownership of Pedra Branca. It is this letter of September 1953, of course, which was considered by the

[85] Singapore's Observations, para. 6.16.
[86] Id.
[87] Judgment, p. 81, para. 225.

Court to be "of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh".[88]

75. The Court noted that the Singapore authorities took no further action at all after receiving either of these documents, irrespective of the fact that they relate to a matter of great significance, the extent of Singapore's sovereign space. Although the Court considered that this inaction on Singapore's part was "not at all surprising",[89] Singapore misrepresents this aspect of the Judgment when it claims in its Written Observations that the Court "dismissed [this point] in the original case".

76. Moreover, Singapore's claim that the newly discovered 1958 correspondence is "very similar" to the 1953 Colton letter does not withstand scrutiny. The Colton letter was, as noted above, sent before the Singaporean authorities had received the September 1953 letter from Johor's Acting State Secretary about Pedra Branca/Pulau Batu Puteh, so in its assessment of the implications for Singapore's interests and entitlements the Colton letter could not have included consideration of the possibility that Singapore possessed sovereignty over Pedra Branca/Pulau Batu Puteh. In contrast, the 1958 internal correspondence must be viewed in the light of the 1953 correspondence concerning sovereignty over Pedra Branca/Pulau Batu Puteh, especially when the Court considered that exchange to have carried such great importance in the resolution of the dispute over Pedra

[88] Judgment, p. 75, para. 203.
[89] Judgment, p. 81, para. 81.

Branca/Pulau Batu Puteh, and when the Court attached such strong probative value to this exchange when arriving at its factual determination that a tacit agreement developed between the parties by their conduct. That the Singapore authorities, five years after the 1953 correspondence with Johor, apparently did not take Pedra Branca/Pulau Batu Puteh into the reckoning when examining an issue which was apparently so important for a "densely populated maritime Colony dependent on sea-borne trade", to use the description of the Colton letter, is unusual, to say the least. As the Court reminds us in the Judgment, a State's failure to act in circumstances when it is reasonable to expect a reaction provides a basis for ascertaining or interpreting the intent of that State.[90] Faced with a clear challenge from the State conduct of its neighbours, whose expanding claims to maritime spaces threaten the lifeblood of Singapore's society and economy—its access to an uninterrupted shipping channel—it is remarkable that Singapore's authorities make no mention at all of Pedra Branca/Pulau Batu Puteh and the maritime rights which are generated by sovereignty over that island.

77. The 1958 correspondence differs from the 1953 Colton letter in two other respects: it comes after the Federation of Malaya had achieved independence, and its content is focused not on the consequences of changes in the international rules concerning territorial waters for fishing grounds, which are scattered around various parts of Singapore's waters, but on the consequences for the maintenance of an uninterrupted channel for shipping running all the way through the Strait

[90] Judgment, p. 51, para. 121.

of Singapore. Pedra Branca/Pulau Batu Puteh's position at the eastern end of that Strait would seem to be considerably more relevant to the 1958 correspondence than the 1953 letter.

78. Second, Singapore claims that Annex 1 lacks the character of decisiveness because the Court had already considered evidence concerning a routing system for maritime traffic to be irrelevant.[91] Malaysia notes that the construction and maintenance of navigational systems has typically been considered a separate matter to questions of sovereign entitlement,[92] and the 1958 correspondence is animated by concerns for the extent and configuration of Singapore's maritime spaces rather than the placement and upkeep of navigational aids.

79. Third, Singapore contends that Annex 1 offers no more than a simply geographical description and is therefore irrelevant.[93] While it is true that the Court decided that a short passage in a monograph written by a former Director of the Singapore Light Dues Board could not be given any weight "given the purpose of the publication and [its] non-authoritative and essentially descriptive character",[94] Annex 1 deserves an altogether different categorisation, given that it is a document distributed among high-ranking Singapore authorities about an essential attribute of Singaporean sovereignty, the extent of its territorial waters.

80. As the preceding analysis demonstrates, Annex 1 provides invaluable "assistance in determining the understanding at that time by the authorities in Singapore of

[91] Singapore's Observations, para. 6.17.
[92] *Minquiers and Ecrehos case (France/United Kingdom),* ICJ Reports 1953, pp. 70–1.
[93] Singapore's Observations, para. 6.18.
[94] Judgment, pp. 92–3, paras 262–4.

sovereignty over Pedra Branca/Pulau Batu Puteh".[95] Accordingly, it weighs heavily against the notion that a convergence in the understanding of the parties concerning Pedra Branca/Pulau Batu Puteh had formed, or even begun to form, in 1958. Annex 1 tips the balance of the factual record on which the Court determined that there was a tacit agreement between the parties, and therefore it constitutes a newly discovered fact of such a nature as to be a decisive factor.

(b.) Annex 2 – documents concerning Labuan Haji incident in Johor's territorial waters

81. Singapore objects to the characterisation of Annex 2 as a fact of decisive nature on the basis that the documents contain "imprecise and vague references" to the location of the incident. Singapore contends that "[i]n the original case… the Court gave no significance to similarly imprecise and vague documents, and therefore no significance should be given to Annex 2."[96]

82. Singapore attempts to make much of the fact that Mr Wickens's message to the Governor of Singapore recounting the Labuan Haji incident employs the word "near", so as to invoke what it claims to be the Court's rejection of certain evidence produced during the original proceedings because it too used the word "near".[97] In fact, the Court did not rule on the evidence cited by Singapore, since it had already decided that Johor was sovereign over Pedra Branca/Pulau Batu Puteh in 1844. If anything, the Court's comment about the generality of the 1844 correspondence cited by Singapore relates to the fact that the correspondence

[95] Judgment, p. 72, para. 191.
[96] Singapore's Observations, para. 6.19.
[97] Singapore's Observations, para. 6.20.

did not even "specifically identif[y] Pedra Branca/Pulau Batu Puteh".[98] Singapore makes similarly weak claims in respect of a different letter from the British Governor to the Temenggong of Johor.[99]

83. The situation is altogether different with the documents in Annex 2. Above all, Malaysia has discovered in the same British archival file a number of separate documents which all refer to the same incident, each corroborating the others to provide a reliable indication of the location of the of the incident and the conduct of the Royal Malaysian Navy in responding to it. Mr Wickens's message is an internal report which states that the Dutch merchant vessel being followed by an Indonesian gunboat "near Horsburgh Light" could not be assisted by the Royal Navy because the "ship [was] still inside Johore territorial waters".[100] Attached to that message is a file note which explains that the Royal Navy "could not intervene in Johore territorial waters unless specifically requested to do so by the Federation Government".

84. The press report in the *Straits Times* reported that the "Indonesian gunboat was harassing [the Labuan Haji] off Horsburgh lighthouse, 35 miles north east of Singapore." (It is notable that the Court stated in the Judgment that Horsburgh is 33 miles distant from Singapore.)[101] The second press cutting, from the *Singapore Standard* provides further detail when it notes that the Indonesian

[98] Judgment, p. 55, para. 134.
[99] Singapore's Observations, para. 6.21.
[100] Annex 2, Application for Revision, para. 27.
[101] Judgment, p. 93, para. 264. (But at p. 22, para. 16 of the Judgment, the Court says that Pedra Branca/Pulau Batu Puteh "lies approximately 24 nautical miles to the east of Singapore".)

gunboat and the Labuan Haji were seen in the area north of Horsburgh Lighthouse.

85. Pursuant to the permission granted by the Court to submit additional documentation, Malaysia attaches three further newspaper articles which provide further corroboration of the location of the Labuan Haji incident (**Annexure A**). Of particular interest is the cutting from the *Straits Times* on 27 February 1958, as it not only reiterates that the incident took place "*off Horsburgh lighthouse*, 35 miles north-east of Singapore", it also reports that the Prime Minister of Malaya, Tengku Abdul Rahman, "call[ed] for a full report on the incident in Johore territorial waters yesterday", in confirmation of the fact that the Malayan authorities considered that Johor's territorial waters encompassed the waters to the north of Pedra Branca/Pulau Batu Buteh.

86. Far from being "too vague", the various documents comprising Annex 2, when taken together, offer a clear and reliable indication that the Labuan Haji was being pursued in the waters just north of Pedra Branca/Pulau Batu Puteh. The most significant element of the Annex is the revelation that the Singapore authorities considered that this area could not be accessed by the Royal Navy without the permission of the Federation of Malaya, since that area was part of Johor's territorial waters.

(c.) Annex 3 – sketch map of restricted maritime areas

87. Singapore also asserts that Annex 3 lacks the character of decisiveness necessary to satisfy the conditions of admissibility. Annex 3 comprises a sketch map dated

25 March 1962 depicting the "Restricted and Prohibited Areas – Singapore Territorial Waters" established by the Singaporean authorities which, according to the handwritten annotations featured on the newly discovered copy of this document, were re-imposed regularly by Singapore authorities until at least February 1966.

88. In its Observations, Singapore contends that "[t]he purpose of the sketch map is disclosed by reviewing that part of the 1964–1966 file containing the sketch map that Singapore has not produced".[102] Malaysia observes that a clearer and more complete understanding of the context in which the sketch map was produced and of the significance of Singapore's conduct can be obtained by producing the complete set of orders of which the sketch map forms part. Thus, in accordance with the permission granted by the Court to submit additional documentation concerning the admissibility of its Application for Revision, Malaysia attaches the entire archival file in which the sketch map was newly discovered. This file, number DEFE 69/539 titled "Naval Operations in the Malacca and Singapore Straits, 1964–66", includes the full "Set of Orders for Ships Patrolling in Defence of Western Malaysian Seaboard (Second Edition) (MALPOS II)" **(Annexure B)**. The sketch map is Appendix One to Annex B (Patrol Areas and Navigation) of MALPOS II. The details concerning the discovery of DEFE 69/539 are provided in section III.C.1 below.

[102] Singapore's Observations, para. 3.29.

89. In its attempt to query the decisive character of the Annex 3 map, Singapore relies upon a passage from the Judgment concerning the omission of Pedra Branca/Pulau Batu Puteh from the scope of a curfew order made in Singapore in 1948. In that passage, the Court endorsed Singapore's view that "there was no reason in terms of its purpose for extending the ban to such a distant island".[103] According to Singapore "[e]xactly the same reasoning applies to the sketch map in Annex 3 to the Application."[104] Singapore contends that:

> [T]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 the coverage of the sketch map to Pedra Branca.[105]

90. In order to respond to this contention, Malaysia avails itself of the opportunity it has been given by the Court by letter dated 9 October 2017 to present further documentation in support of its Application.

91. Annexed to these Additional Observations is a copy of file WO 268/802 (**Annexure C**), which is a confidential document from the UK War Office titled "Indonesian Offensive Against West Malaysia (Excluding Piracies and Undetected Infiltrations)". The document was released by the UK National Archives for public access on 16 September 2008, after the Judgment was delivered, and it was discovered by Malaysian researchers on 30 May 2017, after Malaysia had already submitted its Application for Revision on 2 February 2017.

[103] Judgment, p. 72, para. 189.
[104] Singapore's Observations, para. 6.25.
[105] Singapore's Observations, para. 6.25, citing Judgment, p. 95, para. 272.

92. The document tabulates the details of the incidents involving British forces and Indonesian infiltrators in the period 17 August 1964–31 December 1965, when *Konfrontasi*, the Indonesian campaign of confrontation intended to intimidate and destabilise the newly formed Federation of Malaya, was underway. The document records such details as the location of the incident, the number of persons involved, whether any enemy persons were killed or captured, and any casualties suffered by the allied forces.

93. On page 8 of document WO 268/802, item 34 records an incident which took place on 25 March 1965 involving an attempted landing by three boats. Two of these boats were intercepted by Royal Navy vessels as part of Operation Oak Tree III. The document shows that one of the Indonesian infiltrators was "captured at HORSBORO Lighthouse attempting escape". The document indicates the specific zone or area in which each incident took place, and this sea interception is marked under "EAST JOHORE–TG PUNGGAI area".[106]

94. As this document shows, the UK authorities had subdivided the operational theatre of West Malaysia into a series of areas, such as "SINGAPORE–RAFFLES LIGHT" or SELANGOR–KUALA LUMPUR", to note two of the more common areas. Item 34 indicates that the UK authorities considered Horsburgh lighthouse to be situated in East Johor until at least the end of 1965.

[106] "TG PUNGGAI" refers to Tanjung Punggai, which is a cape on the south-eastern coast of Johor, roughly nine nautical miles north-west of Pedra Branca/Pulau Batu Puteh. It is the easternmost point of the Malay Peninsula.

95. While this additional document is valuable in itself for providing yet another new illustration that the "understanding at that time by the authorities in Singapore" that it had not acquired sovereignty over Pedra Branca/Pulau Batu Puteh from Johor, it has further relevance in illuminating why the omission of Pedra Branca/Pulau Batu Puteh from the Annex 3 sketch map is significant.

96. Singapore attempts to explain the absence of any reference to Pedra Branca/Pulau Batu Puteh in the Annex 3 map depicting the "Restricted and Prohibited Areas in Singapore Territorial Waters" by stating that "there was no reason" for extending the orders and restrictions to Pedra Branca/Pulau Batu Puteh, and so "there was "no reason in terms of its purpose" for extending the coverage of the sketch map to Pedra Branca."[107] According to Singapore:

> [R]ead 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.[108]

97. Considering the information provided in the additional documentation—the War Office list of incidents and the Ministry of Defence file on naval operations—it quickly becomes clear that Singapore's claim that there was neither need nor reason for Singapore to include Pedra Branca in these security arrangements or on the sketch map cannot be sustained. In particular, Singapore understates the scale of the danger caused by *Konfrontasi* when it suggests in its

[107] Singapore's Observations, para. 6.25.
[108] Singapore's Observations, para. 3.34.

Written Observations that *Konfrontasi* was a threat "arising from the south of the main island of Singapore".[109]

98. The documents comprising Annex 2 themselves call this claim into question, as the Labuan Haji incident reported by those documents is a clear indication that the danger posed by Indonesian infiltration forces stretched to Pedra Branca/Pulau Batu Puteh and its surrounding waters. Furthermore, the War Office document WO 268/802 presented as additional documentation lists no fewer than 124 hostile interactions with Indonesian antagonists over 16 months in an area encompassing the Malacca and Singapore Straits and the south-eastern coast of Johor. Finally, the introductory document in archival file DEFE 69/539 provides a useful overview of the extent of the security threat posed by armed Indonesian craft throughout the region. It states that "the main areas of threat were: South Malacca Strait, Singapore, SE Johore".[110]

99. As these documents indicate, the threat to security posed by the Indonesian agitators during the *Konfrontasi* campaign spread throughout the region, and certainly encompassed the area of Pedra Branca/Pulau Batu Puteh, as the Labuan Haji incident itself attests. In these circumstances, it seems that there was a palpable need for Singapore to include Pedra Branca/Pulau Batu Puteh in its security arrangements and curfew orders, and so too there was every reason for Singapore to depict Pedra Branca/Pulau Batu Puteh in the Annex 3 sketch map.

[109] Id.
[110] "Naval Operations in the Malacca and Singapore Straits 1964–1966", first document in DEFE 69/539, p. 7.

100. Finally, Singapore attempts to claim that the Court "dismissed [the] arguments" that Singapore's failure to depict Pedra Branca/Pulau Batu Puteh as part of Singapore demonstrated that it did not understand that Pedra Branca/Pulau Batu Puteh formed part of its territorial entitlements.[111] However, a close reading of the passage cited by Singapore shows that the Court did not go as far as Singapore claims. Rather than "dismissing" the argument that Singapore's repeated failure to include Pedra Branca/Pulau Batu Puteh in maps of its sovereign territory indicates its view about sovereignty, the Court simply attached less probative value to the specific maps published by Singapore than it did to the maps published by Malaya and Malaysia.[112]

101. This second contention can be readily discounted, as it does not withstand a close reading of the passage from the Judgment relied upon by Singapore. Rather than "dismissing" the claim that Singapore's repeated failure to include Pedra Branca/Pulau Batu Puteh in cartographic representations of its sovereign territory, the Court simply attached less probative value to the specific maps published by Singapore than other maps published by Malaya and Malaysia. This does not foreclose the possibility that the discovery of the annotated map may tip the balance of the factual record on which the Court based its determination that a tacit agreement emerged.

[111] Singapore's Observations, para. 6.26.
[112] Judgment, pp. 94–5, paras 267–72.

(d.) Annexure D – the 1937 map validated by the War Damage Commission Stamp

102. Further confirmation that the authorities of Malaya and Singapore both understood that Pedra Branca/Pulau Batu Puteh was situated in Johor's territorial waters is offered by a newly discovered map which Malaysia also submits as additional documentation and attaches as **Annexure D**.

103. This newly discovered map is titled "Johore, 1937" and it has been franked with an official stamp of the War Damage Commission. The Government of Malaysia was first made aware of the existence of this map as stamped by the War Damage Commission on 9 November 2017, and it received a copy of the stamped map from a private individual, Dr R Satkunarajah, on 5 December 2017, after Malaysia submitted its Revision Application. Dr Satkunarajah has informed the Government of Malaysia that he purchased the stamped map on 3 September 2017 from a UK seller/collector, Mr Martin Fuller, who had held the map privately. The Government of Malaysia states that it was unaware of and had no means whatsoever of knowing of the existence of this map as stamped by the War Damage Commission, prior to being informed of the same by Dr Satkunarajah.

104. The newly discovered map shows a dotted boundary line between Singapore and Johor (thus clearly distinguishing between the two entities), and very clearly includes Pedra Branca/Pulau Batu Puteh as part of Johor. Although this map was produced in 1937 (and reissued in 1946), its significance for the Revision Application comes from the fact that it was used by the War Damage

Commission, as shown by the official stamp on the map and the bindings. The War Damage Commission was a body established by War Damage Ordinances and came into being on 1 January 1950. It consisted of 12 members, all of whom were appointed jointly by the High Commissioner of the Federation of Malaya and the Governor of the Colony of Singapore. It operated during the 1950s. Among the members of the Commission were the Honourable Financial Secretaries of both Malaya and Singapore.[113] As such, Singapore had clear official notice that this map included Pedra Branca/Pulau Batu Puteh as part of Johor and it made no protest.

105. In this way, the use by the War Damage Commission, with its official constitution and operation, of this map showing Pedra Branca/Pulau Batu Puteh as indisputably part of Johor provides further evidence that no shared understanding was emerging between the parties. There was no appreciation on the part of the Singapore authorities that Pedra Branca/Pulau Batu Puteh was part of Singapore. Although other copies of this map exist, this particular copy is distinctive and important for the purposes of the Revision Application because it has been imprinted with the stamp of the War Damage Commission, an official Malay-Singapore body, established at the highest level.

[113] See War Damage Commission Report, 1952, p. 33, Annexure D. It is to be noted that none of the reports of this Commission explicitly refer to the map, thus Malaysia had no notice of its existence until informed on 9 November 2017 of its discovery in a private collection.

III. THE DUE DILIGENCE AND TEMPORAL CRITERIA OF ADMISSIBILITY

A. Newly Discovered Fact Unknown When Judgment Given

106. Singapore contends that Malaysia's application is inadmissible because Malaysia knew during the proceedings that Singapore did not claim that the 1953 correspondence had effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh.[114] Alternatively, Singapore claims that Malaysia was aware that Singaporean authorities knew that Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory in the years after the 1953 correspondence "because this was precisely what Malaysia claimed in its pleadings in the original case. There, Malaysia alleged that Singapore's conduct and representation showed that Singapore's conduct and representation showed that Singapore did not have sovereignty over Pedra Branca."[115]

107. These observations are misplaced, since they misconstrue the facts which Malaysia has newly discovered and in respect of which Malaysia has applied for Revision of the Judgment. As section II explained in detail, the documents newly discovered by Malaysia establish the existence of a continuing factual situation, of which neither the Court nor Malaysia knew when the Judgment was given: specifically, that no agreement, express or tacit, existed between the parties as to

[114] Singapore's Observations, para. 5.3.
[115] Singapore's Observations, para. 5.5.

the transfer of Johor's sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore.

108. These particular documents attesting to the non-existence of an agreement between the parties were not laid before the Court during the original proceedings, nor were they part of or referred to in the pleadings of either Malaysia or Singapore in those proceedings. Singapore has been unable to point in its Written Observations to any reference to these newly discovered documents during the original proceedings, and has merely noted that counsel for Malaysia acknowledged, during the oral pleadings in the original case, that Singapore did not claim that the 1953 correspondence amounted to title to territory.[116] The most that Singapore has claimed is that Malaysia argued in its written pleadings that Singapore did not have sovereignty over Pedra Branca/Pulau Batu Puteh[117]. This is a feeble basis for asserting that Malaysia knew during the earlier proceedings that there was evidence available which proved that no agreement for the transfer of sovereignty from Johor to Singapore ever formed between the parties.

109. The fact that no agreement ever arose between the parties was obviously unknown to the Court itself, seeing that a crucial element of the Court's Judgment was the specific finding of fact that an agreement had come into existence as a result of an informal convergent evolution in the parties' understanding of sovereignty over Pedra Branca/Pulau Batu Puteh. Since the

[116] Singapore's Observations, para. 5.3.
[117] Singapore's Observations, para 5.5.

Court did not know of the existence or content of the newly discovered documents it could not come to the conclusion that there was no convergent evolution in the parties' understanding. This finding of fact and its centrality to the Court's Judgment is discussed more fully in section III.

110. Contrary to Singapore's vague allegations, these documents evidencing this vital fact were only discovered by Malaysia after August 2016, following a review of archival files in the United Kingdom. The following section, III.B, describes in detail the circumstances surrounding the discovery of these documents.

B. Ignorance Not Due to Negligence

111. Singapore alleges that Malaysia's application is inadmissible on the grounds that it fails to satisfy the condition that the late discovery of the fact is not due to negligence on the part of the Applicant. Singapore claims that "Malaysia failed to exercise reasonable diligence with respect to the research and discovery of all the 'new documents' on which it now seeks to rely" on the basis that the newly discovered documents were, "by reason of their character and substance", obtainable by Malaysia during the original proceedings "with minimal effort".[118]

112. Malaysia notes that the test of negligence in discovery is, as Kaikobad explains, objective, based on what reasonably can be expected of a State's conduct in the circumstances of the case.[119]

[118] Singapore's Observations, paras 5.16 and 5.21.
[119] K H Kaikobad, *Interpretation and Revision of International Boundary Decisions* (Cambridge University Press, 2007), p. 296.

113. This formulation reflects the practice of the Court in *Tunisia v Libya Revision and Interpretation*. In that case, when considering whether Tunisia's ignorance of the precise boundary of a petroleum concession granted by Libya was due to negligence on Tunisia's part, the Court noted that:

> [It] must however consider whether the circumstances were such that means were available to Tunisia to ascertain the details of the co-ordinates of the concession from other sources and indeed whether it was in Tunisia's own interests to do so. If such be the case, it does not appear to the Court that it is open to Tunisia to rely on those co-ordinates as a fact which was "unknown" to it for the purposes of Article 61, paragraph 1, of the Statute.[120]

114. In the following paragraphs, Malaysia will demonstrate that it is not unreasonable in the circumstances of the original case that Malaysia, despite its extensive and systematic efforts, did not locate or obtain the documents which support the newly discovered facts on which this Application is based.

B.1 Malaysia Had No Knowledge of or Reasons to Believe the Existence of the New Documents before the 2008 Judgment Was Given

115. Singapore contends that Malaysia has "presented no evidence to show that it had made any attempt to obtain the documents before the judgment was given". [121] Singapore further contends that "the new documents could have been researched and discovered before the judgment was given".[122] These contentions are wholly disingenuous and mischievous.

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[120] *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*), ICJ Reports 1985, p. 205, para. 23.
[121] Singapore's Observations, para. 5.9.
[122] Singapore's Observations, Part B(2), Chapter V.

116. Singapore's contention presupposes that Malaysia was aware of the existence of the documents and therefore Malaysia should have attempted to request such documents from the UK Government before judgment was given. This prompts the question as to how Malaysia was supposed to make a request for documents of whose existence it was unaware. Malaysia contends that it had no knowledge of or reason to believe the existence of these documents before the judgment was given, and therefore that there was no basis during the original case to make any approach to the UK Government to request such documents of which it was unaware. In contrast, these documents were available to Singapore before the 2008 Judgment was given, and could have been produced by Singapore in good faith during the original proceedings.

117. While Singapore claims that these facts were obtainable by Malaysia in the original case "by reason of their character and substance", this is clearly baseless.[123] Malaysia will demonstrate below that the newly discovered facts as produced as Annexes 1 and 3 to the Application for Revision share no substantial similarity with Singapore's suggested documents, let alone share similarity "by reason of their character and substance"

B.2 Comparison Between the July 1953 Letter Produced by Malaysia in the Original Case and the 7 February 1958 Telegram Submitted as Annex 1 to Malaysia's Application

[123] Singapore's Observations, para. 5.1.

118. Singapore contends that the 7 February 1958 telegram comprising Annex 1 to Malaysia's Application does not evidence a new fact because it is similar to a 1953 letter that Malaysia produced in the original case.[124]

119. Singapore attempts to characterise these two documents as similar merely because "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". Singapore further states that based on the 1953 letter, "Malaysia clearly knew that there were internal discussions within Singapore concerning the territorial sea issue, but Malaysia has produced no evidence in the Application of any approaches made to the United Kingdom so as to discover Annex 1 to the Application".[125] Mere knowledge of the 1953 letter would by no means whatsoever result in Malaysia having knowledge of the 1958 telegram.

120. Singapore has failed to recognise the fact that these two documents are substantially different from one another. In respect of this, Malaysia wishes to highlight that there are at least two significant differences between the 1958 telegram and the 1953 letter: first, the 1958 document makes specific mention of the Horsburgh Lighthouse, which the 1953 correspondence does not; and second, the subject matter of the two documents differs appreciably.

[124] Letter from A.G.B. Colton, for the Colonial Secretary, Singapore, to the Deputy Commissioner General for Colonial Affairs, Singapore, July 1953 (Annex 68 of Memorial of Malaysia)
[125] Singapore's Observations, para. 5.15.

(a.) No specific mention of the Horsburgh Lighthouse

121. First, there is no specific reference to or mention of the Horsburgh Lighthouse in any part of the 1953 letter. This is entirely different from the 1958 telegram which expressly refers to the Horsburgh Lighthouse in the following terms:

> 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 southernmost point of St John's Islands and Batu Berhanti Light to a point 1 mile north of Horsburgh Light.

122. This reference to the Horsburgh Lighthouse alerted Malaysia to its significance with regard to the question of the sovereignty of Pedra Branca/Pulau Batu Puteh. In fact, Malaysia's arguments in the Application for Revision as regards the 1958 telegram substantially and specifically revolve around the proposal by the Governor of Singapore contained therein, i.e., the special provision for an international high seas corridor passing only 1 mile from the Horsburgh Lighthouse.

123. Neither this proposal nor anything related to it can be found in the 1953 letter, giving Malaysia no reason to be aware of the existence of the 1958 telegram by only having sight of the 1953 letter.

(b.) Different subject matter

124. Second, the subject matter in the 1953 document is completely different from the subject matter in the 1958 telegram. Whilst both sets of correspondence have

some relation to the development of the law of the sea, their specific contents are totally different.

125. In this regard, it is clear that the 1953 letter essentially concerns the effects of the Anglo-Norwegian Fisheries judgment of 1952, whereas the 1958 telegram is an exchange of views among Singapore officials at the highest levels following the work of the International Law Commission. These are two entirely different subjects of discussion. This is also why Malaysia's arguments concerning the 1953 letter in the original case were entirely different from Malaysia's arguments regarding the 1958 telegram in the Malaysia's present Application for Revision.

126. In the original case, Malaysia referred to the 1953 letter to demonstrate the Colonial Secretary of Singapore's understanding that the extent of Singapore's sovereignty over nearby islands was determined by the Anglo-Dutch and Crawfurd treaties of 1824 and the 1927 Agreement.[126] This was following the Anglo-Norwegian Fisheries judgment of 1952. It had nothing to do with the special provision for an international high seas corridor as proposed by the Governor of Singapore in the 1958 telegram which only happened five years after the 1953 letter.

127. If the two sets of correspondence were connected, as Singapore attempts to characterise them, then the Singapore officials in the 1958 telegram would have specifically mentioned or made reference to the 1953 letter. But they did not do so because the two sets of correspondence are unrelated to each other and do

[126] Memorial of Malaysia, para. 238.

not share any substantial similarity "by reason of their character and substance", as alleged by Singapore, or any other reason.

B.3 Comparison between the Annex 3 Sketch Map and the "Set of Orders" which Singapore Alleged Was Made Available to Malaysia Prior to the 2008 Judgment

128. Singapore contends that "Malaysia's negligence is also demonstrated in the case of the sketch map in Annex 3 to the Application".[127] Singapore further contends 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". The Annex referred to by Singapore is Annex 33 to the Reply of Singapore in the original case, and copies of the said set of orders "containing the sketch map" were allegedly distributed to various Malaysian authorities and therefore has been in Malaysia's possession for more than 50 years.[128]

129. Nevertheless, Malaysia's sketch map was not obtained either from Singapore's Annex 33 or from the "set of orders" from which Singapore's Annex 33 was extracted. Indeed, Singapore has failed to produce any evidence to prove that Malaysia's sketch map was obtained from the "set of orders" from which Singapore's Annex 33 was extracted and annexed.

130. In fact, upon careful examination of Singapore's Annex 33, it is observed that Singapore's Annex 33 contains only a few documents, as follows:

[127] Singapore's Observations, para. 5.18.
[128] Singapore's Observations, para. 5.23.

i. a cover letter entitled "Orders for Ships Patrolling in Defence of West Malaysian Seaboard (Short title: MALPOS II)" together with the distribution list – Page (i) and (ii);

ii. a list of contents – Page (iii) and (iv); and

iii. Annex K: Characteristic of Legal Craft, Crews and documents (pages K.1 to K.7)

131. Singapore contends that Malaysia's sketch map was obtained from the "same set of orders" which were available to Malaysia prior to the 2008 judgment. In this regard, Malaysia relies on a specific sketch map taken from a specific file, not the sketch map contained in any other files as alleged by Singapore.

132. More particularly, the sketch map relied on by Malaysia contains *specific* handwritten annotations that cannot be found in any other files. The said sketch map is part of Appendix One to Annex B (Patrol Areas and Navigation) to the Set of Orders for Ships Patrolling in Defence of Western Malaysian Seaboard (Second Edition) (MALPOS II) found in file DEFE 69/539 obtained from the UK National Archives.

133. Singapore contends that the same set of orders can also be found in the UK National Archives file DEFE 24/98 which Singapore claims "was made available for research as early as January 1998".[129] Singapore clearly reached this view without examining file DEFE 24/98 carefully. Malaysia's sketch map at Annex 3 in its Application for Revision contains handwritten annotations which are not

[129] Singapore's Observations, para. 5.21.

found in the sketch map in DEFE 24/98. This fact sets the two maps apart and the sketch maps are different "by reason of their character and substance". In this regard, Singapore has failed to recognise that Malaysia's reliance on the sketch map that it submitted depends *inter alia* on the handwritten annotations on it.

134. The said handwritten annotations in the sketch map contained in DEFE 69/539 state as follows:

> NOTE. The night curfew arrangements described above are reviewed each month by Singapore Authorities and re-imposed as necessary. Currently (FEB 66) there is no change to that laid down above other than that the [fishing] areas are in abeyance.

135. It is clear from the handwritten annotations that they were inserted in February 1966.

136. In this regard, from a page containing State of Amendments in DEFE 69/539, a total of 17 amendments were made to the set of orders with the latest amendment dated 12 July 1966. More importantly, 2 amendments were made on 9 and 23 February 1966. This is consistent with the handwritten annotations on Malaysia's sketch map which were dated February 1966.

137. Contrary to DEFE 69/539, the page containing State of Amendments found in DEFE 24/98 shows that only a total of five amendments were made to the set of orders in DEFE 24/98. More significantly, the latest amendment was made on 21 January 1966 and therefore it is impossible for the sketch map contained in the file to have any amendments made in February 1966.

138. Based on the above comparison, it is clear that the sketch map from DEFE 24/98 is totally different from the Malaysia's sketch map submitted in her Application for Revision.

139. Singapore further alleges that "the set of orders containing the sketch map is referred to by Dr. Ian Pfennigwerth in his book on the Royal Australian Navy in South East Asia" which "research [on it] had been completed and the manuscript finalised for publication by November 2007", prior to the 2008 Judgment.[130]

140. In respect of this, Malaysia also submits that the sketch map that was produced by Dr. Pfenningwerth is entirely different from Malaysia's sketch map as it bears no annotations.

141. In fact, Singapore acknowledges that "the primary documents reference" sourced by Dr. Pfenningwerth with regard to information relating to the sketch map was *"UKNA DEFE 24/98 – Report on Naval Operations in East and West Malaysia 1964 – 1966"* which is file DEFE 24/98 obtained from the UK National Archives. As established earlier, the sketch map from DEFE 24/98 is totally different from Malaysia's sketch map taken from DEFE 69/539.

142. With regard to Singapore's allegation that the said "set of orders containing the sketch map" were distributed to various Malaysian authorities and therefore have been in Malaysia's possession for more than 50 years,[131] Malaysia comments that

[130] Singapore's Observations, para. 5.20.
[131] Singapore's Observations, para. 5.23.

Singapore has failed to provide any evidence whatsoever to substantiate such an allegation. Malaysia further contends that:

a. the cover letter in Singapore's Annex 33 is a generic letter which can also be found in several other files; and

b. the cover letter was dated 25 March 1965; hence it is impossible that the said letter was attached to a sketch map with annotations dated February 1966, which Malaysia relies on in her Application for Revision.

143. In addition, Malaysia's sketch map with handwritten annotations inserted in February 1966 can only be found in file DEFE 69/539, which is a file owned by Director of Naval Tactical and Weapon Policy (DNTWP), Ministry of Defence, United Kingdom. The file was classified as "SECRET" and the existence of such file was not known to Malaysia before it was discovered on 8 November 2016.

144. Malaysia contends that the handwritten annotations on Malaysia's sketch map have not only distinctive characters that differentiate them from other sketch maps, but they also carry probative value that is highly significant. The fact that the sketch map relied on by Malaysia was reviewed on a monthly basis by the Singapore authorities and that it was reviewed up to February 1966 show the Singaporean authorities' understanding up to 1966 that their territorial entitlements never included Pedra Branca/Pulau Batu Puteh. Thus, Malaysia submits that the alleged existence of a convergent evolution in respect of the title to Pedra Branca/Pulau Batu Puteh is clearly not borne out by the said sketch map.

B.4 UK Legislation on Archival Records

145. The position in respect of UK public records is not as simple as Singapore attempts to suggest. The original position under the Public Records Act 1958 ("Act")**(Annexure E)** was provided in section 5 (1) of the Act as follows:

> Public records in the Public Record Office, other than those to which members of the public had access before their transfer to the Public Record Office, shall not be available for public inspection until they have been in existence for fifty years or such other period, either longer or shorter, as the Lord Chancellor may, with the approval, or at the request, of the Minister or other person, if any, who appears to him to be primarily concerned, for the time being prescribe as respects any particular class of public records.

146. In 1958, when the Act was promulgated, there was no absolute right of access to documents. For example, file FCO 141/14808, from which Annexes 1 and 2 were taken, would only have been disclosable in 2009. Admittedly, the 50-year period was subsequently reduced to 30 years and 20 years but it is clear from section 5(1) of the Act that the 50-year period could have been extended at the request of the "Minister or other person". Singapore's contention that the "documents had to be made available for public inspection once they had been in existence for 30 years" is, with respect, economic with the truth as such a period could have been extended with no right of access being granted to anyone.

147. It is to be further noted that both FCO 141/14808 and DEFE 69/539 were files which were marked as "SECRET" and therefore it is clear that their disclosure was protected by the relevant departments which they originated from.

148. Singapore has referred to the enactment of the Freedom of Information Act ("FOI Act") in 2005 but has not informed the Court that the FOI Act has statutory exemptions contained in Part II which relate *inter alia* to national security, defence and international relations. It is clear that the SECRET files would have fallen into this category and it would have been up to the relevant authorities to de-classify them, as they did, at the appropriate time. The relevant provisions relating to the exemptions are, inter alia, sections 24, 26 and 27 of the FOI Act. **(Annexure F)**.

149. It is therefore clear that Malaysia did not act negligently but rather acted diligently and researched and obtained the necessary documents as best as it could in the circumstances.

150. It must also be noted that the National Archives in the United Kingdom releases documents to the public on an ongoing basis. Documents are released progressively and continue to be released now, even in 2017, as shown by the schedule for the transfer **(Annexure G)**.

151. It is wholly unreasonable to expect Malaysia to monitor, on a daily, weekly or monthly basis the document releases of the National Archives in the United Kingdom.

C. Temporal Limits Observed

152. Article 61 imposes two time limits for the admissibility of an Application for Revision of a Judgment. The first is a relative limit, in the sense that a party must

submit an Application within six months of discovering a relevant fact, whenever that may be. The second condition is absolute, as an Application may not be submitted any later than ten years after the Judgment was given by the Court.

153. Malaysia's Application fulfils both of these temporal conditions.

C.1 The Application Was Filed within Six Months of Discovery

154. In 2016, the Government of Malaysia decided to conduct comprehensive research in relation to the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, bearing in mind the approach of the ten year deadline (2018). The objective of the research was to discover any new fact that may fulfil the requirements set out in Article 61 of the Statute of the ICJ, so as to form a basis for Malaysia to file an application for the revision of the judgment delivered by the ICJ on 23 May 2008.

155. The research commenced on 4 August 2016 and took place in the National Archives of the United Kingdom in London. The National Archives keeps an extensive collection of historical documents relating to both Malaysia and Singapore and has been progressively releasing its Colonial Records and documents on an ongoing basis.

156. The research was carried out according to the following methodology:

a. First, a keyword was entered into the online catalogue of the National Archives which is accessible to registered readers of the National Archives and also the public domain. The main keywords entered into by the

researchers include “Malaya”, “Singapore”, “Johor” and “Johore”. The online catalogue would then show the search results which display all the available records containing the keyword along with descriptions of records and information about how to access them. It is to be noted that a wide range of records were available;

b. Second, the available records were filtered based on their respective dates. In this regard, the researchers divided the available records into two separate groups, i.e., records dated before the year 1950 and records dated after 1950;

c. Third, the researchers scrutinised all the available records based on their descriptions. The researchers then determined records that were most likely to contain any new fact and mark such records accordingly;

d. Fourth, after identifying the relevant records, the researchers proceeded to make a request to the National Archives for the physical records to be produced. These records would then be analysed to identify any new fact which could form a basis for revision of a judgment; and

e. Fifth, in the event where a new fact is found and identified, the researchers would make the necessary check to confirm that the new fact was only made available after the ICJ rendered its Judgment on 28 May 2008.

157. In respect of all three newly discovered documents by Malaysia, Malaysia categorically affirms that these newly discovered documents were all filed within the six month time limit from the date of discovery as prescribed in Article 61 of

the Statute of the ICJ. This is evident from the actual date of discovery of these newly discovered documents which are as follows:

158. Both the Colony of Singapore Confidential Telegram No. 52 from Governor of Singapore to the Secretary of State for the Colonies dated 7 February 1958 regarding territorial waters and the Memorandum reporting the Labuan Haji incident on 25 February 1958 and the accompanying file note were contained within a single file (File Reference No. FCO 141/14808). This file was discovered by the researchers on 4 August 2016. **(Annexure H)**. The record opening date for this file is 27 September 2013 **(Annexure I)**.

159. The file containing the Map of Restricted and Prohibited Areas – Singapore Territorial Waters dated 25 March 1962 (File Reference No: DEFE 69/539) was discovered by the researchers on 8 November 2016 **(Annexure J)**. However, the record opening date of this file could not be identified **(Annexure K)**. The researchers then took the step to confirm the date through the method prescribed by the UK National Archives. This could be confirmed through email correspondence between the researchers and the National Archives dated 19 and 21 January 2017 **(Annexure L)**. Singapore has received a different response from the National Archives and it is astonishing that on the one hand, when Malaysia enquired, the Archives could not confirm the date when the files were made available to the public, while on the other hand they could provide a specific date to Singapore when it enquired on the same point. In this regard Malaysia urges the Court to treat the date given to Singapore with some circumspection as it

clearly is not supported with any contemporaneous documentation to evidence the fact that the file had indeed been released on the earlier date.

160. Based on the above, Malaysia has clearly complied with the Article 61 requirement to submit its Application for Revision within six months of the discovery of the new documents.

(a.) Professor Shaharil

161. In addition, Singapore claims that the documents introduced by Malaysia in support of the Application do not satisfy the six month requirement under Article 61 because "[t]here is substantial overlap" between the material forming the basis of Malaysia's Application and content found on a blog posted on the World Wide Web by one Professor Shaharil.[132] Singapore claims that "Professor Shaharil had knowledge of the Annexes to the Application from early 2015, if not before", and furthermore that any knowledge which Professor Shaharil may have had is attributable to Malaysia on account of Professor Shaharil's participation in the oral proceedings in the original case.

162. According to R Geiß,[133] in the absence of any specific authority with regard to this requirement, the attribution of knowledge to the applicant State in revision proceedings is undertaken by analogy with Article 4 of the International Law Commission's Articles on the Responsibility of States for Internationally

[132] Singapore's Observations, paras 5.30–5.31.
[133] R Geiß, 'Revision Proceedings before the International Court of Justice (2003) 63 *Zeitschrift für ausländisches öffentlices Recht und Völkerrecht*, p. 167 at p. 187.

Wrongful Acts 2001.[134] According to Article 4, only the knowledge of State organs should be considered as knowledge of the State. Article 4, paragraph 1 provides:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

163. In response to this claim that Professor Shaharil's knowledge is somehow attributable to Malaysia, Malaysia offers the following clarification of Professor Shaharil's past and present roles. Professor Dato' Dr. Shaharil Talib's was Professor and Head of the Department for South East Asia Studies at the University of Malaya. The Attorney General's Chambers of Malaysia (AGC) engaged Professor Shaharil on a contractual basis as the Head of the Special Research Unit from 1 September 2005 to 31 August 2013. Professor Shaharil was subsequently appointed as the AGC's historical advisor from 1September 2009 until 31 August 2013. Professor Shaharil acted as the Adviser to the Malaysian delegation in the *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

164. Professor Shaharil's engagement with the Government ended 31 August 2013. Further, the AGC has not re-employed Professor Shaharil following the end of his employment in 2013. On 19 July 2013, AGC issued Professor Shaharil with a Certificate of Appreciation in conjunction with the expiration of his contract. **(Annexure M)**

[134] Appended to GA Res 56/83, 12 December 2001.

165. Professor Shaharil was not engaged by the AGC or the Government of Malaysia for the purposes of Malaysia's present Revision Application, nor has he been involved in the preparation of this Application in any way whatsoever.

166. In this regard, it is pertinent to note that certain information in the curriculum vitae as attached by Professor Shaharil in his blog is not accurate, especially in respect of information on his "professional positions" which states that he continues to be the Head of the Special Research Unit of the AGC from "2005 to date". This is simply incorrect.

167. Professor Shaharil's blog, "In Defence of Research", contains only his personal views and opinions with regard to the *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* and neither the AGC nor the Government of Malaysia have been involved in any way whatsoever. This is reaffirmed by the disclaimer on his blog which reads as follows:

> The information and analysis contained in this blog site is written by me as an academic and does not reflect the position of any government agency. All data presented in this blog site is within the public domain and does not compromise official policy.

168. Professor Shaharil had published a total of 15 posts in his blog. None of the documents contained in Annexes 1 to 3 of the Application or any information which would have specifically identified the documents contained in the said Annexes were communicated to the Government of Malaysia or to any of its agencies at any stage. Fourteen of the 15 posts constituted merely his personal

analysis of the judgment rendered by the ICJ in 2008 as well as an analysis of evidence filed by both parties and the Court proceedings.

169. Professor Shaharil published on his blog a post dated 24 March 2015 entitled "New Facts for Revision Application" where he referred to the release of three files for the years 1907, 1927 and 1958.

170. It is important to note that none of the Annexes to the Application for Revision are files for the years 1907, 1927 and 1958.

171. The dates of the files which comprise the Annexes are as follows :

Annex 1: 1 January 1957 – 31 December 1959

Annex 2: 1 January 1957 – 31 December 1959

Annex 3: 1 January 1966 – 31 December 1967.

172. Professor Shaharil claimed that the alleged "new facts" were contained in the three files. However, in the write up to his blog he appears to have referred to four files as follows.

173. *File from the year 1907:* Professor Shaharil alleged that the "new fact" is a correspondence from the Governor of Colony of the Straits Settlements at the time, Sir John Anderson, confirming that the Settlement of Singapore had no territories beyond 10 geographical miles from the Main Island in the Straits of Singapore. Nothing from any 1907 file has been used in the Application for Revision.

174. *File from the year 1927:* Professor Shaharil alleged that the "new fact" is the original "Agreement between the Colony of the Straits Settlement and the State and Territory of Johore 1927". He added that the file proved that there was "no territorial waters to demarcate between Pedra Branca/Pulau Batu Puteh in the Straits of Singapore and that of Mainland Johore and this fact was recognised by UK Parliament which ratified the Agreement in 1928".

175. *The third document:* Professor Shaharil alleged that this file was named "Tidelands Oil and U.S. Territorial Waters". He has not given a date for this file but nothing from any file which was named as such has been used in the Application for Revision.

176. *The fourth document:* This document is not identified but Professor Shaharil merely says that the final piece of evidence "is yet another 2013 released file in the UK Archives". He also states that "[t]here is no mention of Horsburgh Lighthouse and Pedra Branca/Pulau Batu Puteh in the list of intrusions into Singapore Territorial Waters".

177. The blog provides no means of identifying precisely which document Professor Shaharil is referring to. There is no basis to suggest that the Government of Malaysia was aware of any new fact so as to be in breach of Article 61, paragraph 4 of the Statute of the ICJ.

178. Further, Singapore raises the issue of the alleged blocking of Professor Shaharil's blog. This is irrelevant. Professor Shaharil's blog is accessible in Singapore and globally. Indeed, Singapore has referred extensively to Professor Shaharil's blog

and therefore they were clearly not prejudiced in any way or denied access to the blog.

C.2 The Application Was Filed Within Ten Years of the Judgment

179. Singapore has accepted in its Observations that Malaysia has complied with the requirement to bring an Application for Revision within ten years of the Judgment, since the submission date of 2 February 2017 is no later than ten years after the Judgment date of 23 May 2008.

180. However, Malaysia cannot let it pass without comment that Singapore has repeatedly insinuated in its Observations that Malaysia has not acted in good faith by lodging its application towards the end of the ten-year period stipulated by Article 61.

181. Malaysia notes that it is entitled under Article 61 to apply for Revision at any moment during the ten years following delivery of the Judgment (provided, of course, that the other conditions for admissibility are satisfied). There is nothing in the Statute of the ICJ nor the Rules of Court to suggest that an Application can only be brought shortly after the Judgment date, or that it must be brought as early as possible. Certainly, the Court did not indicate any objection concerning this admissibility condition when El Salvador submitted its application for Revision on the very last day of the ten-year period stipulated by Article 61.[135]

[135] El Salvador submitted on 10 September 2002 its Application for Revision of the Judgment delivered on 11 September 1992 by a Chamber of the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*. The Chamber decided that El Salvador's Application was inadmissible on the basis that one of the facts it alleged was not a

182. The six-month stipulation included in Article 61 serves to protect against the possibility of a State seeking to delay or postpone an Application for Revision for strategic or other reasons.

183. Malaysia rejects any insinuation that it has delayed its Application for any reason whatsoever.

184. Malaysia has always indicated its acceptance of the Court's Judgment, as Singapore itself has noted, and it has participated in efforts to achieve compliance by the parties with the decision of the Court. Malaysia only makes this Application for Revision because it has come upon documents which call into question the incomplete factual basis upon which the Court gave its Judgment in 2008.

185. Malaysia has not embarked upon this process lightly or without due respect for the principles of stability and finality which international justice demands. At the same time, it is in the interests of justice to ensure that the Judgment of the Court is well founded on an accurate record of the pertinent facts, and those facts are only fully known now that these new documents have been discovered by Malaysia and brought before the Court.

186. For this reason and in this spirit, Malaysia respectfully submits its Application for Revision to the Court.

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decisive factor in the Court's Judgment, while the other fact was not a new fact within the meaning of Article 61: ICJ Reports 2003, pp. 409–11, paras 49–59.

IV. SUMMARY OF REASONING

187. In accordance with Practice Direction II, the following is a short summary of the reasoning set out in these Observations:

a. The documents on which Malaysia's Revision Application rests are both new documents, in the sense of not having been before the Court in the original proceedings, and contain evidence that is new, in that they address an issue that is not addressed in the documents before the Court in the original proceedings.

b. The new documents constitute new facts within the meaning of this term in Article 61 of the Statute of the Court and the jurisprudence of the Court thereunder, the Court having construed Article 61 broadly to include probative materials of whatever form.

c. The evidence that emerges from the new documents goes to the heart of the appreciation on which the 2008 Judgment rested, namely, the effect, weight and consequence of the 1953 correspondence and the implied shared understanding, or tacit agreement, of the Parties perceived by the Court in the period from 1953 and following that sovereignty over Pedra Branca/Palau Batu Puteh had shifted from Malaysia to Singapore.

d. The appreciation of a shared understanding on which the 2008 Judgment rested was not a matter than had been addressed in argument by the Parties in the proceedings culminating in the 2008 Judgment. This is material to the

appreciation that the evidence adduced by reference to the new documents now advanced to the Court is new.

e. The reasoning behind the 2008 Judgment was finely balanced, turning on variable practice and nuanced appreciations of what the Parties understood. Against this background, the assessment of whether the new fact meets the decisive factor criterion in Article 61 of the Statute is an assessment of whether the new fact has the potential to lead to a different outcome on the point on which the 2008 Judgment, not whether it would have led to a different outcome.

f. The distinction between the tests of "having the potential to lead to a different outcome" and "would have led to a different outcome" is highly material as it goes to the differentiation between admissibility proceedings and merits proceedings. The construction given to the admissibility criteria in Article 61 of the Statute cannot properly be such as to effectively establish an insurmountable hurdle to the reopening of cases that, in the interests of the effective administration of international justice, warrant further review.

g. The Revision Application meets all the due diligence and temporal criteria in Article 61 of the Statute. The documents now advanced to the Court were not available to, or, if they were available, were not readily discoverable by, Malaysia in the period leading to the 2008 Judgment.

h. With regard to the claim by Singapore that the new facts now advanced by Malaysia were published by Professor Shaharil more than two years prior to

the Revision Application, Professor Shaharil had not published, or seemingly even identified, the documents which Malaysia now advances and on which it now relies. Malaysia cannot properly be prejudiced and penalised in its Revision Application in consequence of an unsubstantiated claim by someone once associated with the Malaysian Government that new documents cast doubt upon the 2008 Judgment.

i. While there are documents in the record of the original proceedings that appear, on superficial examination, to cover the same ground as the documents on which the Revision Application rests, the new documents are materially different in relevant and important aspects of their content by comparison to anything put before the Court in the original proceedings.

V. SUBMISSIONS

188. For the reasons given above, Malaysia requests the Court to adjudge and declare:

a. That there exists a new fact of such a nature as to be a decisive factor within the meaning of Article 61 of the Statute of the Court;

b. That Malaysia's Revision Application is admissible; and

c. That the Court should, in accordance with Article 99 of the Rules of Court, fix a time to proceed with consideration of the Revision Application on its merits.

I have the honour to submit to the Court the Additional Written Observations and Documentation of Malaysia in the *Application for Revision of the Judgment of 23 May 2008 in the* Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (*Malaysia v. Singapore)* as well as the annexes attached hereto.

The Additional Written Observations and Documentation are submitted pursuant to the letter of the Registrar dated 9 October 2017 transmitting the decision of the Court to permit such submissions. In accordance with the respective Rules and Practice of the Court, I submit a duly signed copy of the Written Observations.

I am pleased to certify that the copies of the annexed documents are true copies of the originals.

Dated the day of 2017

Dato' Ahmad Nazri Yusof

Ambassador of Malaysia to the Kingdom of the Netherlands

Co-Agent of Malaysia

VI. LIST OF ANNEXURES

Annexure A	Additional newspaper clippings concerning the Labuan Haji incident.
Annexure B	File DEFE 69/539: "Naval Operations in the Malacca and Singapore Straits, 1964–66".
Annexure C	File WO 268/802: "Indonesian Offensive Against West Malaysia (Excluding Piracies and Undetected Infiltrations)".
Annexure D	Map of "Johore 1937" and War Damage Commission Report for 1952.
Annexure E	United Kingdom Public Records Act 1958.
Annexure F	United Kingdom Freedom of Information Act 2000.
Annexure G	Printout of the transfer schedule of the UK FCO's retained records to the UK National Archives and a copy of the list of records transferred January to June 2017.
Annexure H	Cover sheet for file FCO 141/14808 showing file retrieval receipt.
Annexure I	UK National Archives record description for file FCO 141/14808.
Annexure J	Cover sheet for file DEFE 69/539 showing file retrieval receipt.
Annexure K	UK National Archives record description for file DEFE 69/539.
Annexure L	Correspondence between Malaysia's researchers and the UK National Archives, dated 19–21 January 2017.
Annexure M	Certificate of Appreciation issued to Professor Shaharil by the Attorney General's Chambers of Malaysia, dated 19 July 2013.