

INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 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*)

(MALAYSIA v. SINGAPORE)

COUR INTERNATIONALE DE JUSTICE

REQUÊTE

INTRODUCTIVE D'INSTANCE

enregistrée au Greffe de la Cour
le 2 février 2017

DEMANDE EN REVISION
DE L'ARRÊT DU 23 MAI 2008
EN L'AFFAIRE RELATIVE À LA *SOUVERAINETÉ
SUR PEDRA BRANCA/PULAU BATU PUTEH,
MIDDLE ROCKS ET SOUTH LEDGE*
(*MALAISIE/SINGAPOUR*)

(MALAISIE c. SINGAPOUR)

I. LETTER FROM THE CO-AGENT OF THE GOVERNMENT
OF MALAYSIA TO THE REGISTRAR
OF THE INTERNATIONAL COURT OF JUSTICE

2 February 2017.

I, in my capacity as Co-Agent for Malaysia and also as the Ambassador of Malaysia to The Hague, do hereby submit on behalf of Malaysia an application for revision of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* for the consideration of the International Court of Justice pursuant to Article 61 of the Statute of the Court.

The Application is filed in accordance and within the time-limit set out in Article 61 of the Statute. In accordance with the respective Rules and practice of the Court, I forward herewith two (2) signed original copies of the review application, 30 additional copies, the Appointment letter dated 31 January 2017 and electronic USB in PDF format, for the Court's consideration and necessary action.

(Signed) Ahmad Nazri YUSOF.

II. LETTER FROM THE MINISTER FOR FOREIGN AFFAIRS
OF MALAYSIA TO THE REGISTRAR OF THE
INTERNATIONAL COURT OF JUSTICE

31 January 2017.

On behalf of the Government of Malaysia, I have the honour to inform you that H.E. Ramlan Ibrahim, Secretary-General of the Ministry of Foreign Affairs, Malaysia, and H.E. Ahmad Nazri Yusof, Ambassador Extraordinary and Plenipotentiary of Malaysia to the Kingdom of the Netherlands, have been appointed as Agent and Co-Agent respectively for Malaysia for the purpose of an application for revision of the Judgment delivered on 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

(Signed) Anifah AMAN.

III. APPLICATION INSTITUTING PROCEEDINGS

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I. SUMMARY OF THE APPLICATION

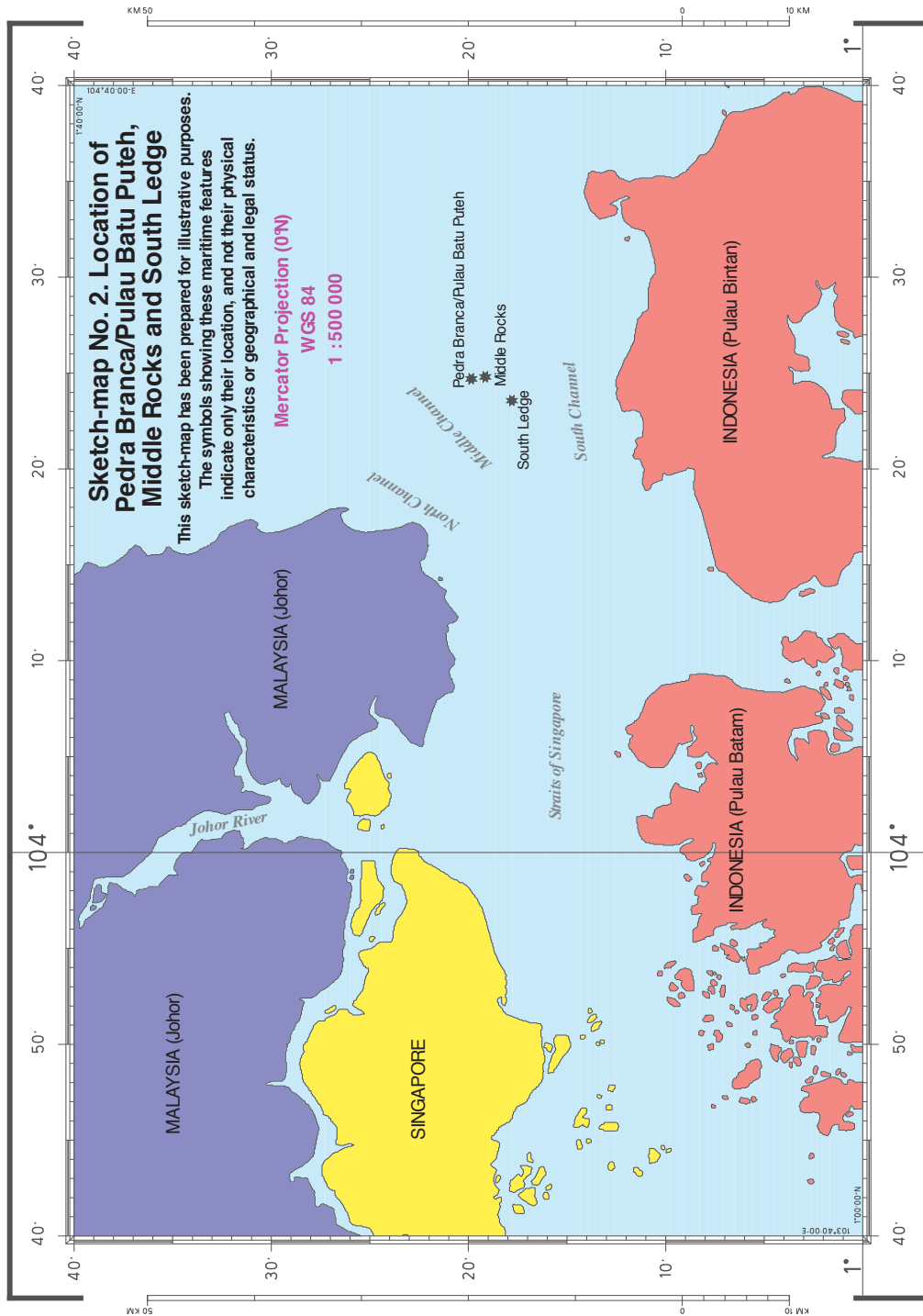
1. In its Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, the Court awarded sovereignty over the island of Pedra Branca/Pulau Batu Puteh to Singapore. This ruling was explained on the basis that a “shared understanding” had gradually developed between the Parties that sovereignty over Pedra Branca/Pulau Batu Puteh had passed from Johor, Malaysia’s antecedent and the holder of original title to the island, to Singapore. The Court considered that the emergence of this “shared understanding” was demonstrated by an exchange of correspondence between the representatives of the Parties’ predecessors (Johor and the United Kingdom) in 1953 and by the conduct of the Parties relating to the island in the following years. The Court ruled that Johor’s sovereignty over the island passed to Singapore at some point between 1953, when the correspondence took place, and 1980, when the dispute crystallized.

2. Malaysia has recently discovered three significant documents that indicate that, in the critical years following the 1953 correspondence, during a period that witnessed Malaysian independence and the transition of Singapore from a self-governing colonial territory to incorporation as part of Malaysia and then independence as the Republic of Singapore, Singapore officials at the highest levels did not consider that Singapore had acquired sovereignty over Pedra Branca/Pulau Batu Puteh from Johor. These documents were recently discovered in a batch of archival records stored in the United Kingdom National Archives. Two of these documents only became accessible to the public in the years since the Court gave its Judgment in 2008; the third document’s date of release is unknown. The documents are internal correspondence of the Singapore colonial authorities in 1958, during the period of Singapore’s colonial self-government, concerning Singapore’s territorial waters, an incident report filed by a British naval officer which acknowledges that the waters around Pedra Branca/Pulau Batu Puteh are Johor’s, and an annotated map of naval operations which indicate that Singapore’s territorial boundary does not encompass Pedra Branca/Pulau Batu Puteh.

3. The newly discovered materials show that Singapore’s perception that Pedra Branca/Pulau Batu Puteh did not fall within Singapore’s territory persisted through the critical period of the first half of the 1960s during which Singapore underwent various constitutional changes, and lasted until at least February 1966, by which time Singapore had ceased to be part of Malaysia and became an independent State in its own right. In the light of these recent discoveries that Singapore did not consider that it had acquired sovereignty over Pedra Branca/Pulau Batu Puteh following the 1953 correspondence, it is impossible to identify the development of the “shared understanding” on which the Court based its Judgment. While the Court’s 2008 Judgment considered post-1953 practice, the weight that the Court accorded to the 1953 correspondence cast this correspondence as the prism through which the subsequent developments were seen. The recently discovered 1958 documentation goes directly to the reliability of this vantage point, calling into question not only the controlling character that was attributed to the 1953 correspondence but also the evaluation of the practice subsequent thereto.

4. Article 61 of the Statute of the Court provides that a party may, within ten years of the delivery of a Judgment by the Court, apply for revision of that Judgment upon discovery of some fact that was unknown both to the Court and the party seeking revision at the time Judgment was given, provided that

SKETCH MAP OF PEDRA BRANCA/PULAU BATU PUTEH, REPRODUCED FROM THE 2008 JUDGMENT



the newly discovered fact would be a decisive factor in the Court's consideration of the case. Malaysia submits that the new documents recently identified require revision of the 2008 Judgment.

5. By this Application, the Government of Malaysia seeks revision of that part of the Judgment of 23 May 2008 concerning sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia requests the Court to determine that this Application satisfies the requirements set out in Article 61 of the Statute of the Court and is therefore admissible. Malaysia further requests the Court to make appropriate arrangements for the substantive revision proceedings.

6. Malaysia emphasizes that it does not make this Revision Application lightly. Revision proceedings are exceptional. It is only after careful consideration that the Government of Malaysia has decided to submit this Application.

7. This Application is not an appeal against the 2008 Judgment. On the contrary, it draws to the Court's attention what has only recently become known to Malaysia, namely, that even after the 1953 correspondence, and at a point at which Singapore had become a self-governing colonial territory, Singapore, at the highest levels of its Government, did not have the view that it had sovereignty over Pedra Branca/Pulau Batu Puteh. Singapore subsequently carried this appreciation into its federation as part of Malaysia in 1963 and, it necessarily follows, that that appreciation remained controlling on Singapore's independence in 1965. It is Malaysia's contention, informed by a close reading of the Judgment of 2008 and its accompanying opinions, that the Court would have been bound to reach a different conclusion on the question of sovereignty over Pedra Branca/Pulau Batu Puteh had it been aware of this new evidence.

II. THE JUDGMENT OF 23 MAY 2008 AS IT CONCERNS SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH

8. In the 2008 Judgment, the Court found that Malaysia, through its predecessor, the Sultanate of Johor, held original title to the islands in the straits of Singapore, including Pedra Branca/Pulau Batu Puteh, from at least the seventeenth century. Although the Sultan of Johor gave his permission to the British to construct and operate a lighthouse, the Horsburgh Lighthouse, on Pedra Branca/Pulau Batu Puteh in 1844, the Court held that Johor had not ceded sovereignty to the British by this arrangement but instead retained its original title to the island until at least 1952¹.

9. In turning to consider whether Johor's sovereignty had been transferred to Singapore or its predecessors, the Court explained that

“[a]ny passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty . . . The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions.”²

10. The Court explained that such a tacit agreement might arise in circumstances where a State fails to respond to concrete manifestations of the display of territorial sovereignty over the disputed area by the other State.

¹ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, pp. 29-72, paras. 37-191.

² *Ibid.*, p. 50, para. 120.

“Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence ‘is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent’. That is to say, silence may also speak, but only if the conduct of the other State calls for a response.”³

11. Moreover, the Court emphasized the significance of the stability of territorial sovereignty when determining whether sovereignty had been transferred from one party to another on the basis of their conduct.

“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 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.”⁴

12. In deciding whether such a transfer of title had occurred, the Court attached central importance to correspondence which passed between the Colonial Secretary of Singapore and the Acting Secretary of the State of Johor in 1953. In particular, the Court considered it significant that the Acting Secretary of Johor stated, in response to the Colonial Secretary’s request for clarification of the status of Pedra Branca/Pulau Batu Puteh, that the Johor Government did not claim ownership of the island⁵. The Court considered that:

“this correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh”⁶.

13. Although the Court acknowledged that “ownership” and “sovereignty” are different concepts in law, it concluded that:

“Johor’s reply showed that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor’s reply, the authorities in Singapore had no reason to doubt that the United Kingdom [Singapore’s predecessor in title] had sovereignty over the island.”⁷

14. The Court noted, though attached limited significance to the fact, that after this correspondence the Colonial Secretary of Singapore indicated to the Attorney-General that the colonial authorities could claim the island, and another internal memorandum was sent to inform the Master Attendant, Marine. But, as the Court also stated, the Singapore authorities took no action in respect of Pedra Branca/Pulau Batu Puteh at this time.

³ *I.C.J. Reports 2008*, pp. 50-51, para. 121, quoting the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports 1984*, p. 305, para. 130.

⁴ *Ibid.*, p. 51, para. 122.

⁵ *Ibid.*, p. 74, para. 196.

⁶ *Ibid.*, p. 75, para. 203.

⁷ *Ibid.*, p. 80, para. 223.

15. Having interpreted the 1953 correspondence, the Court proceeded to examine the subsequent conduct of the Parties. This evidence concerned the investigation of marine accidents, visits to the island, naval patrols, the display of symbols, installation of military equipment, plans for reclamation works, petroleum prospecting agreements, official publications, official maps and agreements to delimit the territorial sea and continental shelf⁸. Based on this evidence, the Court decided that the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the lack of response from Malaysia and its predecessors, “reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh”. The Court concluded that “by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore”⁹.

III. ADMISSIBILITY OF THE APPLICATION FOR REVISION OF THE 2008 JUDGMENT

16. Article 61 of the Statute of the Court provides:

“1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.”

17. Accordingly, for an application for revision to be admissible, the following requirements must be fulfilled¹⁰:

- (a) the application must be based on the “discovery” of a “fact”, described in Article 61 (2) as a “new fact”;
- (b) the newly discovered fact must be “of such a nature as to be a decisive factor”;
- (c) the newly discovered fact must have been “unknown” to both the Court and the party claiming revision at the time when the judgment was given; and
- (d) ignorance of the newly discovered fact must not be “due to negligence”.

18. Pursuant to Article 61 (4) and (5), an application for revision must be made at latest “within six months of the discovery of the new fact” (Article 61 (4)) and within ten years of the date of the Judgment (Article 61 (5)).

19. Malaysia acknowledges that all of these requirements must be satisfied for an application for revision to be admissible¹¹. Malaysia considers that each of these conditions has been satisfied in respect of the part of the Judgment of 23 May 2008 that concerns sovereignty over Pedra Branca/Pulau Batu Puteh.

20. In accordance with both Article 99 of the Rules of the Court and the Court’s clarifications in previous applications for revision, this Application is

⁸ *I.C.J. Reports 2008*, pp. 82-95, paras. 231-272.

⁹ *Ibid.*, p. 96, para. 276.

¹⁰ *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), *Judgment, I.C.J. Reports 2003*, p. 12, para. 17, repeated in *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, *Judgment, I.C.J. Reports 2003*, pp. 398-399, para. 19.

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

limited to the question of the admissibility of this Request, and so it addresses each of the criteria described above. However, it will be necessary to address certain substantive aspects of the 2008 Judgment given that this is required by some of the admissibility requirements stipulated in Article 61.

A. Newly Discovered Facts

21. The meaning of the term “fact” in Article 61 of the Statute has not been fully elaborated in the Court’s jurisprudence on Article 61, and there has been some disagreement as to whether newly discovered documents are to be regarded as facts within the meaning of Article 61. It appears from the Court’s readiness to assess documents produced by El Salvador against the admissibility criteria of Article 61 in the *Application for Revision of the Land, Island and Maritime Frontier Dispute* that the Court accepted a broad interpretation of “fact” for the purposes of the Article.

22. Each of the documents described below can be characterized as a new fact and satisfies the admissibility criterion of Article 61. Additionally, these newly discovered documents may be taken as evidence of an implicit underlying fact, namely, that Singapore did not consider that the 1953 correspondence effected a transfer of sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore.

23. During the period 4 August 2016-30 January 2017, research was undertaken by Malaysia at the United Kingdom National Archives in London. This research identified for the first time documents which demonstrated that Singapore officials at the highest levels did not consider Pedra Branca/Pulau Batu Puteh to fall within Singapore’s sovereign territory in the years following the 1953 exchange of correspondence. These documents were released to the public by the Government of the United Kingdom only after the Court delivered its Judgment in 2008.

(i) 1958 correspondence concerning Singaporean territorial waters

24. The first newly discovered document was a confidential telegram sent in 1958 from the Governor of Singapore to the British Secretary of State for the Colonies in response to a request for comments on a proposal to extend Singapore’s territorial waters from 3 miles to 6 miles. (This proposal was intended to prevent the emergence of a general international entitlement to 12 mile limits.) The Governor of Singapore indicated that it was important to Singapore that the existing 3 mile limit be retained as access to the channels of approach to Singapore would be inhibited if an entitlement to 6 mile limits became generally accepted in international law. For this reason, he proposed that, in the event that 6 miles became the generally accepted limit, “special provision should be made for an international high seas corridor 1 mile wide through the straits between Singapore and Malayan territory on the north and Indonesian territory on the south”¹². He described the course of this corridor of international waters passing only 1 mile from Pedra Branca/Pulau Batu Puteh (where Horsburgh Lighthouse is situated):

“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

¹² Annex 1.

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.”

25. This document, which was not released by the Government of the United Kingdom until 2013, but Malaysia surmises, would have been known to Singapore at the time of the proceedings before the Court, as the document originates from Singapore, shows that, in 1958, the Governor of Singapore did not consider the island of Pedra Branca/Pulau Batu Puteh to be part of Singaporean territory. If he had understood, or otherwise been advised, that Pedra Branca/Pulau Batu Puteh was under Singaporean sovereignty, there would not have been a need for him to advocate the provision of an international passage so near to the island, since Singapore would have been able to claim rights over the territorial waters surrounding Pedra Branca/Pulau Batu Puteh. It is clear, therefore, that the Governor of Singapore appreciated that the 1953 correspondence with Johor was not dispositive and did not effect the transfer of sovereignty over Pedra Branca/Pulau Batu Puteh, as it could reasonably be expected that he would otherwise have asserted Singapore's rights over the waters surrounding Pedra Branca/Pulau Batu Puteh in order to ensure free access to Singapore's port, given the central importance of that facility to the Singaporean economy.

26. It is interesting to compare this exchange with the examination that the colonial authorities undertook five years earlier, in 1953, and which the Court referred to in the Judgment¹³. This comparison is particularly interesting in view of the fact that in 1957, that is, after the first exchange but before the latter, Malaya had gained independence. This newly discovered document attests that the 1953 correspondence concerning Pedra Branca/Pulau Batu Puteh had no relevant impact on Singapore's understanding of its entitlement to maritime rights in the area around the island of Pedra Branca/Pulau Batu Puteh. It follows from the 1958 document that the Governor of Singapore, the most senior official in the Singapore administration, had no appreciation of any territorial waters claimed by Singapore around the island of Pedra Branca/Pulau Batu Puteh. On the contrary, the 1958 document indicates that Malaysia and Singapore had a shared understanding at that point that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Malaysia, not with Singapore.

(ii) *Memorandum concerning the Labuan Haji maritime incident in 1958*

27. The second document was discovered in a British archival file for 1958. It is a message of 25 February 1958 addressed to “GS” (presumed to be the Governor of Singapore) from a Mr. Wickens, and relates an incident concerning a Malaysian vessel, the *Labuan Haji*, being followed by an Indonesian gunboat in waters “near Horsburgh Light” (which is situated on Pedra Branca/Pulau Batu Puteh). Mr. Wickens' message explains that the Royal Navy could not assist because the vessel was “still inside Johore territorial waters”.

“MKPM vessel *Labuan Haji* left Singapore this morning for Petani. At 12:56 p.m. message received that she was being followed by Indonesian gunboat near Horsburgh Light and she turned back to Singapore. The RMN [Royal Malayan Navy] patrol launch left Telok Ayer to go to the rescue. Further frantic messages received that the Indonesian gunboat was trying

¹³ *I.C.J. Reports 2008*, pp. 80-81, para. 125.

to block the *Labuan Haji*. Royal Navy were not in a position to act as ship still inside Johore territorial waters.”¹⁴

28. Press reports attached to the archival record report that a Royal Malayan Navy launch responded to the appeal for help and attended the scene.

29. Attached to the same message is a later file note which reports an explanation from Mr. Wickens that Royal Navy ships had been instructed that they “could not intervene in Johore territorial waters unless specifically requested to do so by the Federation Government (referring to the Government of the Federation of Malaya)”¹⁵.

30. This piece of evidence also demonstrates that the military authorities responsible for Singapore’s defence at the time did not view the waters around Pedra Branca/Pulau Batu Puteh as belonging to Singapore. Indeed, these authorities considered these waters to belong to Johor, and had apparently issued instructions to their ships to refrain from entering those waters without specific invitation. Once again, Malaysia assumes that the document, and the evidence that it affords of an appreciation of sovereignty, will have been known to Singapore at the time as it was addressed to the Governor of Singapore. Once again, if there is any shared understanding of sovereignty that emerges from this document it is that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Malaysia, in the name of Johor.

31. That the British naval authorities viewed the waters adjacent to Pedra Branca/Pulau Batu Puteh as belonging to Johor is especially noteworthy in view of the fact, mentioned by the Court in the 2008 Judgment, that the Colonial Secretary of Singapore had informed the Master Attendant, Marine in 1953 of his view that Pedra Branca/Pulau Batu Puteh to lie in Johor waters indicates that no such a claim to the island was ever made.

(iii) Annotated map of naval operations

32. The third document was discovered in a file prepared by the British Commander of the Far East Fleet under the title “Naval Operations in the Malacca and Singapore Straits 1964-1966”. This file contains a confidential publication distributed by the Commander titled “Orders for Ships Patrolling in Defence of Western Malaysian Seaboard”.

33. This confidential compilation of orders includes an order for “Restricted and Prohibited Areas — Singapore Territorial Waters”, which indicates the areas in which night curfew arrangements were to be enforced, and designates three areas where night fishing was permitted. A map illustrating the various designated curfew and fishing areas is attached to the order. Dated 25 March 1962, the map also includes a clear line delimiting the Singaporean territorial waters. It shows the limits of Singaporean territorial waters at a point south of Pulau Tekon Besar in the Johor Strait; they do not extend to the vicinity of Pedra Branca/Pulau Batu Puteh.

34. Although the map is originally dated 25 March 1962, there are handwritten annotations on the sheet dated February 1966. One annotation explains that “the

¹⁴ Annex 2, p. 43.

¹⁵ *Ibid.*, p. 44.

night curfew arrangements are reviewed each month by Singapore authorities and re-imposed as necessary". It goes on to remark that there are no changes from the arrangements described on the map as of February 1966.

35. The discovery of this map with its particular handwritten annotations provides a valuable new basis for assessing the Singaporean authorities' understanding of their territorial entitlements, since the notes describe the operation and outcome of a regular process in which the Singapore authorities reviewed and reaffirmed the strict regulation of their maritime spaces every month. Despite the regularity and frequency of this review, the authorities never extended its coverage to include Pedra Branca/Pulau Batu Puteh.

36. It is not known precisely when this map was released to the public, and the UK National Archives was unable to supply a specific date when enquiries were made.

B. New Fact "of such a Nature as to Be a Decisive Factor"

37. For an application for revision to be admissible, the newly discovered fact must be "of such a nature as to be a decisive factor". The test of decisiveness has proved to be significant in some of the Court's previous judgments concerning applications for revision, and the Court has clarified that a newly discovered fact will be a decisive factor if the Court might have changed its decision in some way as a result. In the *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*), the Court stated:

"[W]hat is required for the admissibility of an application for revision is not that the new fact relied on might, had it been known, have made it possible for the Court to be more specific in its decision; it must have been a 'fact of such a nature as to be a decisive factor'. So far from constituting such a fact, the details [of the alleged new fact] . . . would not have changed the decision of the Court."¹⁶

38. A similar interpretation appears to have been applied in the *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*) when the Chamber determined that one of the alleged new facts "does not overturn the conclusions arrived at by the Chamber"¹⁷.

39. In order to determine whether a newly discovered fact is capable of being characterized as a decisive factor, it is necessary to recall the considerations of legal principle on which the Court relied when ruling on the sovereignty of Pedra Branca/Pulau Batu Puteh. According to the Court, sovereignty might pass if the conduct of the parties reveals the emergence of an informal or tacit agreement between the two States in question, including situations where an existing sovereign's failure to respond to acts *à titre de souverain* by the other State indicates that

¹⁶ *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*), *I.C.J. Reports 1985*, pp. 213-214, para. 39.

¹⁷ *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*), *I.C.J. Reports 2003*, p. 410, para. 53.

sovereign's consent, in acquiescent form, to the transfer of title¹⁸. In the Judgment, the Court ruled that sovereignty over the island passed because the conduct of the Parties "reflect[ed] a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh"¹⁹. In ascertaining the emergence of this convergence of the Parties' positions, the Court attached "major significance" to the statement of the Acting Secretary of the State of Johor during the 1953 correspondence that Johor did not claim ownership of the island²⁰. The Court also paid close attention 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 respond²¹.

40. The newly discovered documents individually and together demonstrate that Singapore, at the very highest levels, knew that that 1953 correspondence did not effect a transfer of sovereignty, and that in the years after that exchange Pedra Branca/Pulau Batu Puteh did not form part of Singapore's sovereign territory. This fact is of great importance as it cuts deeply against the central thesis of the Court's Judgment that a "shared understanding" began to develop gradually after the exchange of correspondence in 1953. This theory — that that the positions of the two parties gradually converged on a shared understanding that Johor's sovereignty passed over to Singapore — provided the lens through which the Court evaluated the Parties' conduct in the period between 1953 and 1980. As such, the recent discovery that Singapore knew that it had not acquired title to Pedra Branca/Pulau Batu Puteh as a result of the 1953 correspondence is a decisive factor in this case.

41. Not only does this newly discovered fact upset the timeline and disturb the trajectory of the "convergence" of the two Parties' positions on the matter, it also fractures the lens through which the Court viewed all of the subsequent conduct of the Parties. With such deep-reaching effects on the Court's understanding of the issues that informed its Judgment in 2008, this newly discovered fact would, in Malaysia's contention, if considered anew, inevitably lead to a different conclusion on the question of whether Johor's title to the island had passed to Singapore. This is all the more the case as the Court's appreciation that sovereignty passed in consequence of the emergence of an informal agreement between the Parties was not the subject of submission by the Parties or enquiry by the Court in the original proceedings.

42. It is also worth noting the additional significance of the handwritten annotations on the map of restricted areas, since that evidence shows that Singapore's appreciation that it had not acquired sovereignty over Pedra Branca/Pulau Batu Puteh continued through to 1966. This is significant in two respects. First, the annotations inform us that the map of restricted areas was reviewed and reaffirmed every month, and the consistent reaffirmation of a map which excludes Pedra Branca/Pulau Batu Puteh from Singapore's territorial waters shows that there was no evolution or gradual development in the Singaporean officials' understanding of their sovereign space; rather, their position was static and unchanging until

¹⁸ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, pp. 50-51, paras. 120-122, and pp. 95-96, paras. 273-276.

¹⁹ *Ibid.*, p. 96, para. 276.

²⁰ *Ibid.*, para. 275.

²¹ *Ibid.*, para. 276.

1966. Second, the date of the annotation is significant in the light of the constitutional changes which Singapore underwent in the 1960s. Singapore joined the State of Malaysia in 1963 — one year after the map of restricted areas was first drawn — and it ceased to be a member of Malaysia in 1965 — one year before the annotations were added to the map. This means that Singapore did not consider Pedra Branca/Pulau Batu Puteh to fall under Singaporean sovereignty either at the time when it became a part of Malaysia, or at the time when it left that entity and became a State in its own right.

*C. New Fact Unknown to the Court and to the Party Claiming
Revision at the Time of the Judgment*

43. As the Court made clear in its Judgment in the *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*), the newly discovered fact must have existed at the time the Judgment was given but have been unknown to both the Court and the party seeking revision.

44. The fact that the British colonial and the Singaporean authorities at the highest level had acted in conformity with their understanding that Pedra Branca/Pulau Batu Puteh did not fall under Singapore's sovereignty after 1953 was unknown both to the Court and to Malaysia at the time the Judgment was delivered in 2008.

45. This fact was not pleaded by either Party during the original proceedings and was only discovered on review of the archival files of the British colonial administration after they were made available to the public by the UK National Archives after Judgment was rendered in 2008.

D. Ignorance of New Fact not due to Negligence

46. Whether the late discovery of new facts is attributable to negligence on the part of the State requesting revision is a question that the Court has considered in two of the revision applications that it has heard to date. When determining whether a party has been negligent in failing to produce evidence of the newly alleged facts during the original proceedings the Court appears to employ an objective test based on the reasonableness of the conduct of the applicant State. In the *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)*, the Court held that there was no reason why Tunisia could not seek out by itself the information concerning the fact that was newly alleged in the revision application by employing lawful and proper means. In determining whether Tunisia had been negligent in failing to obtain certain information (concerning concessions granted by Libya), the Court asked “whether the circumstances were such that means were available to Tunisia to ascertain the details of the concessions from other sources; and indeed whether it was in Tunisia's own interests to do so”²².

²² *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1985*, p. 205, para. 23.

47. The newly discovered documents which have established the “fact” advanced in the present Application were not available to Malaysia before the Judgment was given. They are confidential official documents which were inaccessible to the public until their release by the UK National Archives.

48. It is also worth noting that the negligence standard in this case should take into account the fact that the issue of the Parties’ own understanding of the situation concerning sovereignty over Pedra Branca/Pulau Batu Puteh was not pleaded during the original proceedings, and it would be difficult to expect litigants to be characterized as negligent for not discovering information relevant to a point which was not anticipated in the proceedings.

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

E. Time-Limits

50. Article 61 imposes two conditions as to the timing of an application for revision: the application must be made within six months of the discovery of the new fact and no later than ten years after the Judgment is delivered.

51. Malaysia’s application complies with both of these requirements. The application complies with Article 61 (4), as it is being made within six months of the discovery of the new fact, since all of the documents that establish this fact and which are referred to in this application were obtained on or after 4 August 2016.

52. This application also complies with the time-limit specified in Article 61(5), as it is being submitted before the lapse of ten years from the Judgment date of 23 May 2008.

IV. CONCLUSION

53. Newly available documents establish the fact that officials at the highest levels in the British colonial and Singaporean administration appreciated that Pedra Branca/Pulau Batu Puteh did not form part of Singapore’s sovereign territory in the years following the correspondence between the British colonial authorities and Johor in 1953. This was not a fact known to Malaysia or to the Court at the time of the 2008 Judgment.

54. This new fact suggests that the 1953 correspondence between the United Kingdom and Johor neither created nor advanced the formation of a shared understanding between the Parties concerning the passing of sovereignty over Pedra Branca/Pulau Batu Puteh from Johor to Singapore. They show that there was no tacit agreement between the Parties regarding the transfer of sovereignty over the island, especially when, as the Court declared,

“any passing of sovereignty over territory on the basis of the conduct of the Parties . . . 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.”²³

²³ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p. 51, para. 122.

V. APPOINTMENT OF A JUDGE *AD HOC*

55. In accordance with Article 31 of the Statute of the Court, Malaysia appoints Professor John Dugard as Judge *ad hoc* for purposes of these proceedings, Professor Dugard having acted as Judge *ad hoc* appointed by Malaysia in the original proceedings leading to the 2008 Judgment.

VI. SUBMISSIONS

56. For the reasons described above, Malaysia respectfully requests the Court to adjudge and declare:

- 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;
- that this Application for revision of the Judgment is admissible; and
- that the Court should, in accordance with Article 99 of the Rules of the Court, fix a time to proceed with consideration of the application for revision.

I have the honour to submit to the Court 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)* as well as the annexes attached hereto.

The Application is filed in accordance and within the time-limit set out in Article 61 of the Statute. In accordance with the respective Rules and Practice of the Court, I submit a duly signed copy of the Application.

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

2 February 2017.

(Signed) Dato' Ahmad Nazri YUSOF,
Ambassador of Malaysia
to the Kingdom of the Netherlands,
Co-Agent of Malaysia.

LIST OF ANNEXES*

- Annex 1.* Colony of Singapore Confidential Telegram No. 52 from the Governor of Singapore to the Secretary of State for the Colonies dated 7 February 1958 regarding Territorial Waters.
- Annex 2.* Memorandum reporting *Labuan Haji* incident, 25 February 1958 and accompanying file note.
- Annex 3.* Map of Restricted and Prohibited Areas — Singapore Territorial Waters, dated 25 March 1962.

* Annexes not reproduced in print version, but available in electronic version on the Court's website (<http://www.icj-cij.org>, under "cases").

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