

# MALAYSIA'S APPLICATION FOR REVISION OF THE PEDRA BRANCA JUDGMENT: CASE NOTE ON THE QUESTION OF ADMISSIBILITY

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*In 2008, the International Court of Justice held in Malaysia v Singapore that Pedra Branca, originally under the domain of the Sultanate of Johor, had passed over to Singapore by acquisitive prescription. In February 2017, Malaysia made an application to revise that ruling on the basis that recently found declassified documents advanced new facts refuting the central findings of the 2008 Judgment. This article examines the admissibility of Malaysia's application. In doing so, the paper examines whether the evidence provided fulfils the elements of article 61 of the Statute of the International Court of Justice. It contends that Malaysia's application is not admissible within the meaning of article 61 and previous International Court of Justice Jurisprudence. Although the evidence disproves the central findings of the 2008 Judgment, advances 'new facts', satisfies the stipulated time limits and was not omitted in the original proceedings due to negligence, it does not alter the outcome of the 2008 Judgment, and thus does not satisfy the 'decisive factors' criterion. As such, Malaysia's application for revision of the 2008 Judgment is ill-founded and should therefore be inadmissible.*

## I INTRODUCTION

The concept of 'losing face' is far more sensitive in the collectivist and hierarchical societies of the East as compared to the more individualistic and egalitarian societies of the West.<sup>1</sup> Malaysia's application to review the 2008 Judgment should therefore not come as a surprise. Pedra Branca, originally within the domain of the Johor Sultanate (predecessor of the state of Johor within the Federation of Malaya and Malaysia), was awarded to Singapore in 2008 by the International Court of Justice (**Court**) in the *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (2008 Judgment)*.<sup>2</sup> With Malaysia's general elections looming, heightened national sentiment has put instances of lost national pride in the spotlight. Reclaiming Pedra Branca is not just a matter of reclaiming lost pride; it is one that attempts to fulfil a politically charged agenda. The state of Johor has long been a safe seat for the ruling *Barisan Nasional* party which commands an absolute majority in

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Catharine Munro, 'The Cultural Conundrum of losing face', *Sydney Morning Herald* (online), 19 November 2009 <<http://www.smh.com.au/federal-politics/contributors/the-cultural-conundrum-of-losing-face-20091118-imtr.html>>.

<sup>2</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12.

both houses of the Federal Parliament. While it is in the interests of the current Malaysian government to fight against the 'apparent mis-appropriation' of its territory, it has a greater vested interest in retaining the support of the Johor state electorate.<sup>3</sup>

On 2 February 2017, Malaysia made an application under article 61 of the *Statute of the International Court of Justice (ICJ Statute)* requesting the Court to revise the 2008 Judgment. The application was made on the basis that three new pieces of evidence discovered by Malaysia would have been a decisive factor, if they had been known to the Court when the judgment was delivered.<sup>4</sup> This article seeks to determine whether Malaysia's request for revision of the 2008 Judgment is admissible, whether there are any merits in the case, and whether these new discoveries would alter the Judgment at all.

## II 2008 JUDGMENT

Pedra Branca is a small island located in the eastern entrance of the Singapore Strait between the Malaysian state of Johor (approximately 7.7 nautical miles to the north)<sup>5</sup> and the Indonesian island of Bintan (approximately 7.6 nautical miles to the south),<sup>6</sup> and twenty-four nautical miles east of the Singapore Mainland. Pedra Branca was owned and ruled over by the Sultan of Johor ever since its establishment in 1511. The Court held that the Sultanate held the title to Pedra Branca until at least 1844.<sup>7</sup> In 1844, preparations for the construction of the Horsburgh lighthouse began, and a lighthouse was constructed on the island by the British during the period 1850–51. The lighthouse has been in operation ever since.<sup>8</sup> Although the British controlled the lighthouse and had several dealings on the island post-1844, the Court held that no single act taken by the British was found to be dispositive of sovereignty.<sup>9</sup> Malaysia's ownership and sovereignty over the island would therefore have continued from 1844. Nevertheless, as it was, disagreement between Singapore and Malaysia in the latter half of the 20<sup>th</sup> century over which country was sovereign led to a dispute.

In 1953, the acting Secretary of State of Johor, in a reply to the Colonial Secretary of Singapore, stated that 'the Johor Government does not claim ownership of Pedra

<sup>3</sup> Justin Ong, 'Malaysia throwing 'the kitchen sink' with second pedra branca challenge, says experts', *Channel NewsAsia* (online), 24 July 2017 <<http://www.channelnewsasia.com/news/singapore/malaysia-throwing-the-kitchen-sink-with-second-pedra-branca-9059270?cid=FBcna>>.

<sup>4</sup> *Statute of the International Court of Justice* art 61(1).

<sup>5</sup> Malaysia, 'Malaysia reopens Pedra Branca island row with Singapore after a decade', *South China Morning Post* (online), 4 February 2017 <<http://www.scmp.com/news/asia/southeast-asia/article/2068096/malaysia-reopens-pedra-branca-island-row-singapore-after>>.

<sup>6</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12, [16].

<sup>7</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12, [20], [117].

<sup>8</sup> Coalther Lathrop, 'Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge' [2008] 102(4) *The American Journal of International Law* 828.

<sup>9</sup> *Ibid.*

Branca.<sup>10</sup> Ownership here referred not to property interests in the land on which the lighthouse stood, but to sovereignty over the whole island of Pedra Branca.<sup>11</sup> However, the Court held that this was not a formal or express disclaimer of title to the island, and did not amount to a binding unilateral undertaking.<sup>12</sup> With no distinct acts by Singapore in reliance on the statement by the other party, the requirements constituting an estoppel were not met. Singapore's conduct was not sufficient to vest sovereignty over Pedra Branca. Nonetheless, the court observed that 'as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh and that in light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.'<sup>13</sup>

The Court subsequently found that the title to Pedra Branca had passed from Malaysia to Singapore sometime between 1953 and 1980 by prescription.<sup>14</sup> Acquisitive prescription, under international law, is the legal recognition given to a state to exercise sovereignty over land or sea territory once certain conditions are met. These conditions include the exercise of authority over the territory à *titre de souverain* for a sufficient period of time in a continuous, uninterrupted, and peaceful manner, and the acquiescence of all other interested and affected states to the exercise of this authority.<sup>15</sup>

The Court was able to find several instances of Singapore's conduct that demonstrated conduct à *titre de souverain*. They included Singapore's investigation of shipwrecks in the waters around Pedra Branca/Pulau Batu Puteh,<sup>16</sup> its requirement that Malaysian

<sup>10</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [196].

<sup>11</sup> *Ibid*, [220] – [223].

<sup>12</sup> Lathrop, above n 8, 832.

<sup>13</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [230].

<sup>14</sup> 14 February 1980 is the critical date, as the dispute over Pedra Branca crystallized in February 1980, when Malaysia published a map showing the disputed island as lying within Malaysia's territorial sea, leading to diplomatic protests by Singapore. The date upon which the dispute crystallized is of significance in distinguishing between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date, 'which are in general meaningless for that purpose, having been carried out by a state which, already having claims to assert in a legal dispute, could have taken those action strictly with the aim of buttressing those claims'; Lathrop, above n 8; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment)* [2007] (1) ICJ Rep 661, 697-8 [117].

<sup>15</sup> D N H Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Yearbook of International Law* 332, 353-4.

<sup>16</sup> These investigations include the 1920 Collision between a British and Dutch vessel within 2 miles of Pedra Branca, grounding of a British vessel in an adjacent reef in 1963 and the running aground of a Panamanian vessel off Pedra Branca in 1979. The Court notes that in all cases, it was the marine authorities in Singapore that responded to the incidents, even when Singapore was part of the Federation of Malaya in the period 16 September 1963 to 7 August 1965; *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [233], [276].

officials seek and obtain permission for visits to the island,<sup>17</sup> the display of the British and Singaporean ensigns on the island, Singapore's installation of military communications equipment on the island,<sup>18</sup> and its proposed land reclamation project on the island.<sup>19</sup> The Court noted that Malaysia never took any action in respect of island and had never protested any of Singapore's actions that could well have indicated its exercise of sovereignty.<sup>20</sup> Malaysia's lack of response to these actions had amounted to acquiescence and therefore an estoppel, which had extinguished Malaysia's claim of sovereignty over Pedra Branca.<sup>21</sup>

The Court held that the conduct (or lack thereof) of both parties from 1953 to 1980 reflected "a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh" to the effect that Singapore was the sovereign ruler of Pedra Branca.<sup>22</sup> This was the central finding of the 2008 Judgment.

In Malaysia's application, it claims that the recently discovered documents cut against this central finding. First, in 1958 telegrams addressed to and from the Governor of Singapore concerning Singapore's territorial waters,<sup>23</sup> the Governor of the Colony of Singapore appreciated that Singapore did not have sovereignty over Pedra Branca.<sup>24</sup> Secondly, a 1958 memorandum concerning the *Labuan Haji* maritime incident,<sup>25</sup> and 1962 annotated map of Singapore's naval operations,<sup>26</sup> indicated that the British Colonial Administration did not consider Pedra Branca to be part of Singapore.<sup>27</sup> On the basis of these documents, individually and together, Malaysia contends that the British Colonial and Singaporean administration, at the highest levels, knew that the 1953 cor-

<sup>17</sup> The Court refers to two instances in 1974 and 1978. This was considered by the Court to be intention to claim the islands *a titre de souverain* - showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the islands; *Ibid*, [236]; *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Eritrea v Yemen)(Award)* (Permanent Court of Arbitration, 9 October 1998) [241].

<sup>18</sup> This occurred in the period 1976 – 1977. The Court concluded that Singapore's action in installing military equipment on the island is an act *a titre de souverain*; *Ibid*, [247], [248].

<sup>19</sup> The court noted that land reclamation was considered in 1972, 1973, 1974 and 1978 by the Singapore government.

<sup>20</sup> Lathrop, above n 8, 832-3.

<sup>21</sup> The absence of reaction may well amount to acquiescence. Silence may also speak, but only if the conduct of the other party calls for a response. This shows was tacit agreement that arose from acquiescence to the transfer of title; *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [120]; Johnson, above n 15, 353-4.

<sup>22</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [276].

<sup>23</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) annex 1.

<sup>24</sup> *Malaysia v. Singapore – 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [39]-[40].

<sup>25</sup> *Ibid*, annex 2.

<sup>26</sup> *Ibid*, annex 3.

<sup>27</sup> *Ibid*.

respondence did not effect a transfer of sovereignty. This, contrary to the convergence of views in the 2008 Judgment, demonstrates that there was no ‘shared understanding’ that Pedra Branca belonged to Singapore. Malaysia submits that this new fact could potentially have altered the decision of the Court had it been known to the Court before the 2008 Judgment. This therefore forms the basis of the current revision application.

### III WHAT IS A REVISION?

A request for revision is made by way of an application, in accordance with article 61 of the *ICJ Statute*. In revision proceedings, the Court places the newly discovered fact alongside the facts of the case earlier assessed and determines whether the new fact materially modifies the significance of facts earlier assessed or conclusions drawn such that the prior judgment would have been materially different. Article 60 expressly prohibits using reviews and interpretations as opportunities to appeal on legal grounds. The revision provision under article 61 does not challenge the principle of *res judicata*,<sup>28</sup> but provides for an appeal on factual grounds.<sup>29</sup> A revision is a reassessment of a previous Court judgment, in light of new evidence advancing facts which existed at the time of judgment, but were unknown to the Court and the party claiming the revision (**Claimant**). An application for revision consists of two tests – admissibility and merits. The Court noted in *El Salvador v Honduras* that the revision process is a ‘two-staged procedure’,<sup>30</sup> where the first stage is limited to the question of admissibility and does not consider the merits of the evidence. Thus, the Court will start its analysis on the question of admissibility.

### IV REQUIREMENTS FOR ADMISSIBILITY UNDER ARTICLE 61

The requirements for admissibility are contained in article 61 of the *ICJ Statute*.<sup>31</sup> These requirements are that:

- a) the application is based on the discovery of a ‘new fact’;<sup>32</sup>
- b) the newly discovered fact is of ‘such a nature to be a decisive factor’;<sup>33</sup>
- c) the newly discovered fact was ‘unknown’ to both the Court and the Claimant at the time the judgment was given;<sup>34</sup>

<sup>28</sup> This therefore does not contradict article 60.

<sup>29</sup> A revision under article 61 does not challenge legal basis for a decision, but disputes the facts of the case.

<sup>30</sup> *El Salvador v Honduras – 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)*[2003] ICJ Rep 392, 398 [18].

<sup>31</sup> *Ibid*, [16] – [18].

<sup>32</sup> *Statute of the International Court of Justice* art 61(2).

<sup>33</sup> *Ibid* art 61(1).

<sup>34</sup> *Ibid*.

- d) ignorance of the newly discovered fact is not 'due to negligence' on the part of the Claimant;<sup>35</sup>
- e) the application is made within ten years from the date of judgment;<sup>36</sup> and
- f) the application is made at the latest within six months after the discovery of the new fact.<sup>37</sup>

The Court interprets the requirements of the test cumulatively, and will reject the request for revision unless all the conditions are satisfied.<sup>38</sup> Should a request satisfy all of the requirements, the Court will declare the request admissible and subsequently allow the Claimant to commence substantive revision proceedings.<sup>39</sup>

## V ANALYSIS OF ADMISSIBILITY

In analysing whether or not the 'new facts' advanced by Malaysia in its application for revision are admissible, certain general principles of international law must be followed and applied.

### A *Were the discoveries 'new facts'?*

The construction of what constitutes 'new' and 'fact' is unclear at international law. Malaysia submits that there has been some disagreement as to whether the newly discovered documents are to be regarded as facts within the meaning of article 61. Malaysia contends that 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*<sup>40</sup> means that the Court, through Judge Paolillo's dissenting opinion, accepted a broad interpretation of 'fact' for the purposes of the article,<sup>41</sup> implying that 'newly discovered documents' constitute 'new facts' within the meaning of article 61.<sup>42</sup>

Malaysia also submits that, as a result of research undertaken by Malaysia at the

<sup>35</sup> Ibid.

<sup>36</sup> Ibid art 61(5).

<sup>37</sup> Ibid art 61(4).

<sup>38</sup> Martin Dixon, Robert McCoquodale and Sarah Williams, *Cases and Materials on International Law* (Oxford University Press, 6<sup>th</sup> ed, 2016) 676.

<sup>39</sup> *Statute of the International Court of Justice* art 61(2).

<sup>40</sup> *El Salvador v Honduras – 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) [2003] ICJ Rep 392.

<sup>41</sup> Ibid, 423 [33] – [34] (Judge Paolillo).

<sup>42</sup> In the Judgment of *Bosnian Genocide Case (Application for Revision)*[2003] ICJ Rep 7, the court took no opinion on what constituted 'new facts' within meaning of article 61, but the judges who produced dissenting opinions took it as self evident that newly produced evidence, including documentary evidence, could constitute new facts within meaning of article 61; *Bosnian Genocide Case (Application for Revision)*[2003] ICJ Rep 7, 34 [2] (Judge Koroma); Ibid, 54-5 [6], [9] (Judge Dimitrijevic).

United Kingdom National Archives, each of the documents were released after the 2008 Judgment and only revealed to Malaysia in the period of 4 August 2016 to 30 January 2017.<sup>43</sup> These documents should be characterised as ‘new facts’ within the plain meaning of article 61(1). The Oxford Dictionary defines ‘new’ as ‘... discovered recently or now for the first time; or not existing before.’<sup>44</sup> As such, these documents that shed new light on the position taken by the Singaporean authorities from different departments of Singapore’s administration should be classified as ‘new facts’. Additionally, these newly discovered documents may be construed as evidence of a new and implicit underlying fact that, contrary to the judgment, Singapore did not consider the 1953 correspondence to be effective in transferring sovereignty over Pedra Branca to Singapore.<sup>45</sup> They may also be construed as identifying for the first time that Singapore’s administration did not consider Pedra Branca to be part of Singaporean territory – a view that did not exist at time of the judgment.<sup>46</sup>

Malaysia’s reasons for satisfying this condition are affirmed by the Hague conferences, in that the construction of what constitutes ‘new’ and ‘fact’ is unclear at international law.<sup>47</sup>

### B *Was the omission due to negligence?*

Malaysia asserts that the discovery of documents after the 2008 Judgment could not be due to negligence. In questioning whether the late discovery of new facts and the failure to produce evidence of the newly alleged facts during the original proceedings was due to negligence on the part of the State requesting the revision, the Court appears to employ an objective test based on the reasonableness of the conduct of the Applicant State.<sup>48</sup>

In *Tunisia v Libya (Application for Revision and Interpretation)*,<sup>49</sup> the Court held that there was no reason why Tunisia could not itself have sought the information concerning the facts that were newly alleged in the revision application by employing lawful and proper means.<sup>50</sup> In determining whether Tunisia had been negligent in failing to obtain certain information concerning concessions granted by Libya, the Court asked

<sup>43</sup> *El Salvador v Honduras – 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*) [2003] ICJ Rep 392, 423 [23].

<sup>44</sup> *Oxford English Dictionary* (Oxford University Press, 2017) <<https://en.oxforddictionaries.com/definition/new>>.

<sup>45</sup> *Ibid*, [22].

<sup>46</sup> *Ibid*, [23].

<sup>47</sup> ‘on Parle de “fait nouveau”: mais rien n’est plus difficile a definir.’; Andreas Zimmermann et al, *The Statute of the International Court of Justice : a Commentary* (Oxford University Press, 2nd ed, 2012) 1514.

<sup>48</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [46].

<sup>49</sup> *Tunisia v Libya (Application for Revision and Interpretation)* [1985] ICJ Rep 192.

<sup>50</sup> *Ibid*, [23].



‘whether the circumstances were such that *means* were available to Tunisia to ascertain the details of the concessions from other sources.’<sup>51</sup> The Court held that because Tunisia had been informed that the maps had already been published, registered, publicly communicated, and distributed through the Libyan Official Gazette,<sup>52</sup> the newly alleged fact could have been discovered through the application of normal diligence. The Court went on to add that a party cannot argue that it was unaware of a fact which was brought to its attention in the pleadings of its opponent, or in a document annexed.<sup>53</sup> The Court therefore held that Tunisia was ignorant of the facts due to its own negligence.<sup>54</sup> Similarly, in the *Fisheries Case*, the Court held that it was *not reasonable* to assert that the United Kingdom did not know about the Norwegian Decree of 1869, given that the Decree was public and formed part of the ‘common knowledge’ in this particular industry,<sup>55</sup> of which there is no doubt that the United Kingdom was an interested party.

The question here is whether the recently discovered documents were ‘common knowledge,’ and whether Malaysia had the means of finding out about the existence of such facts at the date of judgment. Malaysia posits that the newly discovered documents which establish the ‘fact’ presented in its application for revision were not readily available to Malaysia before the judgment was given. They were confidential internal communications of the British Colonial Administration which were inaccessible to the public,<sup>56</sup> and therefore did not form part of the public’s ‘common knowledge’. Malaysia did not have such means to find out about the documents. They further posit that the negligence standard should take into account the parties’ own understanding of the situation concerning sovereignty over Pedra Branca, something which was not pleaded during the original proceedings.<sup>57</sup> They argue further that it would be unfair to expect litigants to be characterised as negligent for not discovering information relevant to a point that was not anticipated in the proceedings.<sup>58</sup>

The discovery of new documents after the conclusion of the proceedings before the Court should therefore not be attributable to any negligence on the part of the Government of Malaysia, and should not present an obstacle to the admissibility of the application for revision.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, 206 [26].

<sup>53</sup> *Ibid.*, 203 [19].

<sup>54</sup> *Ibid.*, 206-7 [28].

<sup>55</sup> *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 139.

<sup>56</sup> Malaysia, ‘Malaysia refers to declassified British files in seeking revision of ICJ ruling on Pedra Branca’, *The Straits Times* (online), 4 February 2017 <<http://www.straitstimes.com/singapore/malaysia-refers-to-declassified-british-files-in-seeking-revision-of-icj-ruling-on-pedra>>.

<sup>57</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [48].

<sup>58</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [48].



C *Were the 'new facts' unknown to the Court and Claimant at the time of judgment?*

In *Yugoslavia v Bosnia and Herzegovina (Application for Revision)*,<sup>59</sup> the Court held that the newly discovered facts must have existed at the time the judgment was given, but must be unknown to both the Court and the party seeking revision.<sup>60</sup> As established above, the newly discovered documents were late-1950s and early-1960s confidential internal communications of the British Colonial Administration and Far East Command. Noting that the original judgment was made on 23 May 2008, these newly discovered 'facts' clearly existed as of 23 May 2008.

On the question of whether these newly discovered facts were unknown to the Court and Claimant at the time of judgment, Malaysia submit that the newly discovered documents were not readily available to Malaysia before the judgment was given. They were inaccessible to the public until their declassification by the UK National Archives in 2013,<sup>61</sup> and were not pleaded before the Court in the original proceedings.<sup>62</sup> This, when construed in the context of article 61(1), demonstrates that the application meets the condition that the newly discovered facts were 'unknown to the Court and also to the party claiming revision.'

D *Does the request meet time limits under arts 61(4) and 61(5)?*

Articles 61(4) and 61(5) of the *ICJ Statute* impose time limitations on requests for revision of judgment. They impose the following conditions in that:

4. The application for revision must be made at latest within six months of the discovery of the new fact.
5. No application for revision may be made after the lapse of ten years from the date of the judgment.<sup>63</sup>

Malaysia argues that their revision application satisfy both requirements. Malaysia contends that since the application was made within six months of the discovery of these documents, it satisfies the requirement of article 61(4). In their affidavit, Malaysia

<sup>59</sup> *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)* [2003] ICJ Rep 7.

<sup>60</sup> *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)* [2003] ICJ Rep 7, 34 [2] (Judge Koroma).

<sup>61</sup> Malaysia, above n 56.

<sup>62</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [48].

<sup>63</sup> *Statute of the International Court of Justice* art 61(4), (5).

attests that all the documents were obtained on or after 4 August 2016.<sup>64</sup> Noting that the application was made on 2 February 2017, this sits reasonably well within the limitation period of six calendar months from discovery of documents.<sup>65</sup> The exact date of discovery of each document severally is uncertain. Even if the date of discovery of these documents is taken to be the earliest of that time period, the application sits two days before the expiration of the time limit of six calendar months. This is completely acceptable. In *El Salvador v Honduras (Application for Revision)*, El Salvador submitted its application one day before the expiry of the ten-year limit. Honduras maintained that by proceeding in this fashion, the applicant showed procedural bad faith.<sup>66</sup> Nevertheless, the Court held that this condition, amongst others, was satisfied.<sup>67</sup>

Malaysia contends that its application also meets the time limit specified in article 61(5), as it was submitted before the lapse of ten years from the judgment date of 23 May 2008.<sup>68</sup> This is rightly so.

### E *Would the 'new facts' have been 'decisive' had they been known before the 2008 Judgment?*

The question of whether a newly discovered 'fact' is a decisive factor is not easily answered. Jurisprudence of the Court suggests that it is unclear which new 'facts' can be considered 'decisive'. In *Tunisia v Libya (Application for Revision and Interpretation)*,<sup>69</sup> the Court held that a 'fact' does not have to change or alter the judgment for it to be 'decisive'.<sup>70</sup> A similar interpretation of 'decisive factor' was observed in *El Salvador v Honduras* where it was held that one of the alleged new facts was admissible, although it did not overturn the conclusions arrived at by the Court.<sup>71</sup>

<sup>64</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [51].

<sup>65</sup> *Ibid.*

<sup>66</sup> *El Salvador v Honduras – 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)* [2003] ICJ Rep 392, 404 [35].

<sup>67</sup> *Ibid.*, [41] (Judge Paolillo).

<sup>68</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [52].

<sup>69</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [37].

<sup>70</sup> "[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 also 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."; *Tunisia v Libya (Application for Revision and Interpretation)* [1985] ICJ Rep 192, 213-4 [39].

<sup>71</sup> *El Salvador v Honduras – 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)* [2003] ICJ Rep 392.

However, in the very same case,<sup>72</sup> the Court held that, despite the merits of each new fact, the Chamber would still have reached the same decision.<sup>73</sup> Indeed, the new facts would only serve to confirm the conclusion made in the case earlier assessed. Although the documents were new facts, they were not decisive factors.<sup>74</sup> Accordingly, it seems that the Court will only admit ‘new facts’ if it is satisfied that there is a very high chance of the new facts materially changing the outcome of the case, or if the merits of the case show that it will most likely alter the judgment. Clearly, the *necessary condition* for a ‘fact’ to be ‘decisive’ is that it must be ‘new’, but the *sufficient condition* for a ‘fact’ to be ‘decisive’ is that it must be capable of materially altering the outcome of the case.<sup>75</sup>

Although the Court has held that the ‘first stage’ in every application for revision should be limited to the question of article 61 admissibility,<sup>76</sup> it seems that the Court will sometimes find it necessary to consider some of the merits (that rightfully belong to the second stage of proceedings) in the first stage within the context of the ‘decisive factor’ requirement. This means that some of the merits concerning individual pieces of evidence will need to be examined in order to determine the evidences’ admissibility.<sup>77</sup>

Article 61(1) of the ICJ Statute requires that this analysis of merits be done by taking into account the requirements in (A), (B) and (C) together with the new fact, and placing them alongside the facts of the case earlier assessed. In order to determine whether a newly discovered fact is capable of being characterised as a decisive factor, it is necessary to recall the legal principles on which the Court relied when ruling on the sovereignty of Pedra Branca,<sup>78</sup> as the same legal principles are applied to the ‘new facts’.<sup>79</sup> With these conditions in mind, the evidence may be assessed as follows.

### *1 1958 telegrams between the Secretary of State for the Colonies and the Governor of Singapore*

In these telegrams, the Governor of Singapore expressed that, should the International Law Commission on Law of the Seas extend the limits of the territorial sea to six nautical miles, channels of access of approach to Singapore would be inhibited, and special provisions for an international high seas corridor would have to be made to

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> A necessary condition for some state of affairs is a condition that must be satisfied in order to obtain that state of affairs. A sufficient condition for some state of affairs is a condition that, if satisfied, *guarantees* that that state of affairs is obtained; University of Wisconsin-Madison Department of Philosophy, *Necessary vs. Sufficient Conditions*, <<http://philosophy.wisc.edu/hausman/341/Skill/nec-suf.htm>>.

<sup>76</sup> *El Salvador v Honduras – 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*) [2003] ICJ Rep 392, 398 [18].

<sup>77</sup> Robin Geib, ‘Revision Proceedings before the International Court of Justice’ (2003) 63 ZaöRV 167, 183.

<sup>78</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [39].; see section D above.

<sup>79</sup> Legal principles relevant to the original judgment are presented in Section II.

ensure ships could pass through to Singapore without let. Malaysia contends that Singapore appreciated that Pedra Branca did not fall within Singapore's territorial waters.<sup>80</sup> If the Governor had understood that Pedra Branca was under Singaporean sovereignty, there would be no need to advocate for an international high seas corridor to ensure that ships would have access to mainland Singapore from the eastern end of the Straits of Malacca, as they could simply assert Singapore's right to the waters surrounding Pedra Branca. The newly discovered document attests that, contrary to the 2008 Judgment, the 1953 correspondence concerning Pedra Branca had 'no relevant impact' on Singapore's understanding of its entitlement to maritime rights in the area around the island of Pedra Branca.<sup>81</sup> Malaysia also claims that in light of the foregoing, the 1958 document indicates that Malaysia and Singapore had a 'shared understanding' that sovereignty over Pedra Branca rested with Malaysia, not Singapore.<sup>82</sup>

Malaysia is correct in considering that if the territorial sea limit was extended to 6 nautical miles, the Straits of Singapore would be closed to Singapore as the channel of international high seas that existed before the territorial sea extension would disappear. The Singapore Strait east of Singapore is about 9 nautical miles at its narrowest point between Johor and the Indonesian island of Batam. In the 2008 Judgment, the Court had not been able to determine the status of Pedra Branca as at 1953. The absence of events or conduct engaged in by both parties in the period between 1953 and 1958 would mean that the status quo remained until 1958.<sup>83</sup> As such, the status of Pedra Branca at 1958 would still be unclear.

Does this document advance a new fact about the situation? Well, this document could demonstrate that, as of 1958, the UK (and Singapore) understood that they did not possess the title to Pedra Branca. This cuts against the purported mutual understanding between both nations that the UK (and Singapore) had in 1958 implicitly held the title to Pedra Branca. This substantiates Malaysia's claims that the 1953 correspondence had no impact on Singapore's understanding of its relationship with Pedra Branca. In the absence of competing claims over Pedra Branca, sovereignty over the Island would rest with the original holder of the title – the Sultan of Johor. These correspondences disprove the Court's central finding that the 1953 correspondences effected the transfer of sovereignty of Pedra Branca from Malaysia to the UK (and Singapore). Therefore,

<sup>80</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [26].

<sup>81</sup> In the 1953 correspondences, the acting state secretary of Johor responded that "the Johore Government does not claim ownership of Pedra Branca", and this was held by the Court to be of 'major significance'. The Court concluded that "as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/ Pulau Batu Puteh and that in light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island".

<sup>82</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [26].

<sup>83</sup> The 2008 Judgment does not mention any acts taken by either party in the period 1953 to 1958.

on the basis that these correspondences constitute ‘new documents’ of unquestionable authenticity which advance a new fact or new take on the issue, these evidences are admissible

But would this event have changed the 2008 Judgment? Malaysia claims that because Singapore knew that it was not the sovereign power over Pedra Branca, the title to Pedra Branca would have remained with Malaysia in 1958, and into the future. This claim, however, is unconvincing. No one as of 1958 could reasonably foresee the future, nor could they guarantee that the title would definitely remain with the Sultan of Johor forever. It is plausible that, with the effluxion of time, actions taken by Singapore in the operation of their lighthouse on the Island would have seen sovereignty pass over to Singapore.

The Court noted that the bulk of significant conduct by both parties took place in the period of 1963 to 1980, and it is highly unlikely that this letter would have significant bearing on the 2008 Judgment. Moreover, the Court noted that the inaction or ‘silence’ of Malaysia over actions taken by Singapore in the period of 1953 to 1980 – the crystallisation of the dispute – meant Malaysia acquiesced to Singapore’s actions *à titre de souverain* over Pedra Branca. Further, sovereignty had passed over by acquisitive prescription, effectively estopping Malaysia from counterclaiming sovereignty.

Hence, this piece of evidence, although constituting a ‘new fact’, would not alter the 2008 Judgment, and should not qualify as being a ‘decisive factor’ according to *El Salvador v Honduras*.

*2 Memorandum reporting the Labuan Haji incident 25 February 1958 and accompanying file note*

Malaysia contends that the military authorities responsible for Singapore’s defence at that time did not view the waters surrounding Pedra Branca as part of Singapore’s territorial waters, demonstrating the ‘shared understanding’ that sovereignty of Pedra Branca rested with Malaysia. The document, which Malaysia asserts was addressed to the Governor of Singapore by a Mr Wickens, explained that an Indonesian gunboat was pursuing the *Labuan Haji* in waters near Horsburgh Light (Pedra Branca). He continues to say that the Royal Navy and Royal Air Force were unable to respond to the latter vessel’s distress calls, as the vessel was still in “Johor’s territorial waters”. Newspaper cuttings of *The Singapore Standard* from 1958 tendered by Malaysia are said to affirm the position taken by the Royal Navy. A later handwritten file note by Mr Wickens explains that the Royal Navy had been instructed that they could not intervene in Johor’s territorial waters unless specifically requested to do so by the Federation Government.<sup>84</sup>

The provenance surrounding the document – which was written by a Mr Wickens to a ‘GS’ (presumably the Governor of Singapore) – is unclear. In the absence of fur-

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<sup>84</sup> The Federation Government refers to the Federation of Malaya, the predecessor of modern day Malaysia.

ther conclusive evidence behind the identities of Mr Wickens and 'GS', it cannot be definitively concluded that Mr Wickens' view or explanation represents the view of the Governor of Singapore, or that of the British Crown. The document by Mr Wickens does not prove sovereignty over Pedra Branca, nor does it advance any firm indication that Singapore appreciated that it did not possess Pedra Branca. Its probative value is highly suspect considering that it does not verifiably indicate the source of the information or even the names of its authors.

Moreover, The Singapore Standard was a newspaper that ran from 1950 to 1959, and was reputed to be an 'anti-Merdeka' (anti-independence) paper that saw Malaysia and Singapore as one. It has been reported to have 'always tampered with the truth'.<sup>85</sup> It wound up in dubious circumstances where the owner and senior editors were all detained.<sup>86</sup>

As established in the previous sections, the burden and standard of proof lies with Malaysia in showing that the facts advanced by these documents are of 'unquestionable authenticity'.<sup>87</sup> There are far too many doubts regarding the 'facts' advanced in this document, and the document should therefore be inadmissible on the basis that it does not satisfy the standard of 'unquestionable authenticity'. In light of this, it is unnecessary to consider whether the document constitutes a 'decisive factor'.

### *3 Map of restricted and prohibited areas – Singapore territorial waters, dated 25 March 1962.*

Malaysia contends the map and accompanying annotations provide a valuable new basis for assessing the Singaporean authorities' understanding of their territorial entitlements. They contend that the notes describe a regular process in which the Singaporean authorities reviewed and reaffirmed the strict regulation of their maritime spaces every month. But despite the routine nature of this review, the authorities never regarded Pedra Branca as being under Singapore's sovereignty. Does this piece of evidence prove ownership of title?

In evaluating the evidentiary value of maps, the Court in *Burkina Faso v Mali* stated that maps cannot constitute a territorial title, unless when annexed to an official text of which they form an integral part.<sup>88</sup> Maps are only extrinsic evidence which may be used

<sup>85</sup> Ex-journalist, 'Ex-Journalist leads PAP attack No.2 on the English Press', *The Straits Times* (online), 23 April 1959 <<http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19590423-1.2.14>>; Available on Microfilm reel NL4020 at the National Library of Singapore.

<sup>86</sup> After, 'After 9 years paper closes door', *The Straits Times* (online), 1 August 1959 <<http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19590801-1.2.2>>; Available on Microfilm reel NL4022 at the National Library of Singapore.

<sup>87</sup> It is a general principle of international law that a party which advances a point of fact in support of its claim must establish that fact; *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12, [32], 154 [3] (Judge Rao).

<sup>88</sup> *Frontier Dispute (Burkina Faso v Republic of Mali) (Judgment)* [1986] ICJ Rep 554, 582 [54].

in conjunction with other evidence of a circumstantial kind to establish the real facts.<sup>89</sup>

As such, the ‘facts’ advanced by Malaysia claiming that Singapore did not consider Pedra Branca to be part of their territory is not conclusive of whether Singapore had title to Pedra Branca. The map was used in operations of Singapore’s maritime activity and not in an official capacity. Moreover, the map does not depict Pedra Branca, and Singapore’s views on the legal status of the Island cannot be conclusively inferred. However, the Court in the *Pedra Branca/Pulau Batu Puteh* dispute noted that:

The Parties referred the Court to nearly 100 maps. They agreed that none of the maps establish title in the way that a map attached to a boundary delimitation agreement may. They do contend however that some of the maps issued by the two Parties or their predecessors have a role as indicating their views [or opinions] about sovereignty or as confirming their claims.<sup>90</sup>

The question, then, is whether this map, when placed alongside the other facts of the case, would alter the 2008 Judgment. The Court in *Pedra Branca/Pulau Batu Puteh* found:

The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.<sup>91</sup>

This map, while it does indicate that Singapore may have appreciated a different view of Pedra Branca, confirms that ‘Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory.’<sup>92</sup> This closely resembles the case of *El Salvador v Honduras* where the Court then concluded that despite having seen the merits of each new fact, the Chamber would have still reached the same decision, and the new facts would only serve to confirm the conclusion made in the case earlier assessed. Therefore, although this map may have advanced a new fact, it is not a ‘decisive factor’ according to *El Salvador v Honduras*, and should thus be inadmissible.

<sup>89</sup> Ibid.

<sup>90</sup> *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)*[2008] ICJ Rep 12, [267].

<sup>91</sup> Ibid, [272].

<sup>92</sup> The map does not depict Pedra Branca at all; *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) annex 3.



## VI CONCLUSION

In light of the evidence presented by Malaysia in its application for revision and previous decisions of the Court, it appears that only the evidence presented in the 1958 correspondence between the Governor of Singapore and the Secretary of State for the Colonies advance facts which are admissible. The evidence advances facts pertaining to the period of 1958 to 1962 which suggest that Singapore was not sovereign over Pedra Branca in that time. However, this is not determinative of the status of that title after those times. Given that the bulk of the significant conduct and interaction between both parties held by the Court to be determinative of acquisition took place in the late 1970s, the Court is still likely to find that the title to Pedra Branca passed over to Singapore. As such, it is unlikely that these new documents (and evidence) presented in Malaysia's application will alter the 2008 Judgment and subsequently qualify as 'decisive factors' within the meaning of article 61 and *El Salvador v Honduras*.<sup>93</sup> Ultimately, the documents submitted as evidence in Malaysia's application should not be admissible. Malaysia's application for revision should be dismissed.

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<sup>93</sup> Evidence should only be admissible if it satisfies the *sufficient condition* that it is capable of materially altering the Judgment; *El Salvador v Honduras – 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*) [2003] ICJ Rep 392.

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... The Oxford Dictionary defines 'new' as '... discovered recently or now for the first time; or not existing before.'<sup>43</sup> As such, these documents that shed new light on the position taken by the Singaporean authorities from different departments of Singapore's administration should be classified as 'new facts'. Additionally, these newly discovered documents may be construed as evidence of a new and implicit underlying fact that, contrary to the judgment, Singapore did not consider the 1953 correspondence to be effective in transferring sovereignty over Pedra Branca to Singapore.<sup>44</sup> They may also be construed as identifying for the first time that Singapore's administration did not consider Pedra Branca to be part of Singaporean territory – a view that did not exist at time of the judgment.<sup>45</sup> Malaysia's reasons for satisfying this condition are affirmed by the Hague conferences, in that the construction of what constitutes 'new' and 'fact' is unclear at international law.<sup>46</sup>

Malaysia's reasons for satisfying this condition are affirmed by the Hague conferences, in that the construction of what constitutes 'new' and 'fact' is unclear at international law.<sup>47</sup> According to Zimmermann et al, delegates of The Hague conferences noted the difficulty in establishing what constitutes a fact. Nevertheless, examples of what could constitute a 'new fact' within the meaning of the revised provision were concluded by the Hague conferences to include 'new document(s) of unquestionable authenticity'.<sup>i</sup> This has proved to be a typical ground on which revision is sought.

### B Was the omission due to negligence?

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<sup>43</sup> *Oxford English Dictionary* (Oxford University Press, 2017)  
<<https://en.oxforddictionaries.com/definition/>>.

<sup>44</sup> Above n 43, [22].

<sup>45</sup> *Ibid.*, [23].

<sup>46</sup> 'on Parle de "fait nouveau": mais rien n'est plus difficile a defner.'; Andreas Zimmermann et al, *The Statute of the International Court of Justice : a Commentary* (oxford university Press, 2nd ed, 2012) 1514.

<sup>47</sup> *Malaysia v. Singapore – Request 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 v. Singapore)* (International Court of Justice, General List No 167, 2 February 2017) [46].

<sup>i</sup> 'ne nouvelle carte ou un nouveau document d'une authenticité incontestable'; Above n 46, 1512.