

V.3 The International Court of Justice and Territorial Disputes: Pedra Branca, Middle Rocks and South Ledge

Edouard Fromageau

1. *Background*

The dispute between Malaysia and Singapore over Pedra Branca, Middle Rocks and South Ledge – three maritime features located at the eastern entrance of the Straits of Singapore – began in December 1979 when Malaysia published a map depicting Pedra Branca as lying within its territorial waters. A few months later, Singapore sent a diplomatic note rejecting Malaysia's claim to Pedra Branca and requesting a correction of the map. Attempts to settle the dispute by bilateral negotiations were made from 1993 to 1994. The question of sovereignty over Middle Rocks and South Ledge was raised during these negotiations. Faced with a lack of progress, both parties decided to submit the dispute to the International Court of Justice on 24 July 2003. According to the Special Agreement signed by the parties, the Court was requested to determine whether sovereignty over these features belongs to Malaysia or Singapore.

Pedra Branca, also named Pulau Batu Puteh by Malaysia, is a granite outcrop located 25 nautical miles east of Singapore, 7.7 nautical miles south of Johor, Malaysia, and 7.6 nautical miles north of the Indonesian island of Bintan. During the low water spring tide, it measures 137 meters long with an average width of 60 meters. Between March 1850 and October 1851 a lighthouse was constructed on Pedra Branca. The "Horsburgh lighthouse" occupies most of its surface at high tide and has been in operation since its first lighting in October 1851. Pedra Branca was the main feature concerned in the dispute. Middle Rocks consists of two clusters of small rocks separated by 250 meters at 0.6 nautical miles south of Pedra Branca and South Ledge, located at 2.2 nautical miles south-south-west of Pedra Branca, is visible only at low tide.

2. *Materials and Links*

- International Court of Justice, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008,

p. 12

- (<http://www.icj-cij.org/docket/files/130/14492.pdf>);
- Declaration of Judge Ranjeva
(<http://www.icj-cij.org/docket/files/130/14494.pdf>);
- Separate opinion of Judge Parra-Aranguren
(<http://www.icj-cij.org/docket/files/130/14496.pdf>);
- Joint dissenting opinion of Judges Simma and Abraham
(<http://www.icj-cij.org/docket/files/130/14498.pdf>);
- Declaration of Judge Bennouna
(<http://www.icj-cij.org/docket/files/130/14500.pdf>);
- Dissenting opinion of Judge *ad hoc* Dugard
(<http://www.icj-cij.org/docket/files/130/14502.pdf>);
- Separate opinion of Judge *ad hoc* Sreenivasa Rao
(<http://www.icj-cij.org/docket/files/130/14504.pdf>).

3. *Analysis*

According to Singapore's memorial, the status of Pedra Branca as of 1847 was that of *terra nullius*. The planning and the construction of the Horsburgh lighthouse thus constituted a taking of lawful possession *à titre de souverain* of Pedra Branca by agents of the British Crown. Singapore argued that it acquired the title over Pedra Branca in 1847-1851 and that this title has been "maintained by the British Crown and its lawful successor, the Republic of Singapore"(paragraph 39 of the Judgment).

On the contrary, Malaysia argued that it had "original title" to Pedra Branca, which then "could not at any relevant time be considered *terra nullius*". The presence of Singapore on it for the construction and the maintenance of the lighthouse was "insufficient to vest sovereignty in it" (paragraphs 37 and 38).

The Court examined first whether the Sultanate of Johor, predecessor of Malaysia, held original title to Pedra Branca and effectively retained it up to the 1840s (paragraph 46). According to the Court, Pedra Branca "had always been known as a navigational hazard in the Straits of Singapore, an important channel for international navigation in east-west trade connecting the Indian Ocean with the South China Sea", and that it is consequently "impossible that the island could have remained unknown or undiscovered by the local community (...). Pedra Branca evidently was not *terra incognita*" (paragraph 61). Furthermore, the Court noted that "as far as the territorial domain of the Sultanate of Johor was concerned, it did cover in principle all the islands and islets within the Straits of Singapore, which lay in the middle of this Kingdom, and thus included the island

of Pedra Branca/Pulau Batu Puteh” (paragraph 68). The Court took into consideration the fact that the island territories belonging to the Sultanate of Johor had never been challenged throughout its entire history. This led the Court to conclude that the condition of “continuous and peaceful display of territorial sovereignty”, as set forth in the *Island of Palmas* case, was satisfied. The Court thus agreed with Malaysia’s position and adjudged that the Sultan of Johor had effectively held original title on Pedra Branca (paragraph 117). At the time when the British started their preparations for the construction of the lighthouse in 1844, Pedra Branca was thus under the sovereignty of the Sultan of Johor.

The Court had moreover to consider Singapore’s argument, that even if Malaysia could show original title to Pedra Branca, sovereignty still belong to Singapore as it had “exercised continuous sovereignty over the island while Malaysia has done nothing” (paragraph 123). This argument is based on the construction starting from 1844, and operation since then, of the lighthouse by the United Kingdom and then Singapore. To determine whether Malaysia retained sovereignty over Pedra Branca following the construction of the lighthouse or, on the contrary, whether sovereignty passed to Singapore, the Court took in consideration various relevant facts that occurred since 1844.

The Court considered significant among these facts an exchange of correspondence that took place in 1953 between the Colonial Secretary of Singapore and the Acting State Secretary of Johor. The purpose of the letter sent by the Colonial Secretary of Singapore was to ask for clarification on the legal status of Pedra Branca. The response sent three months later by the Acting State Secretary of Johor affirmed explicitly that “the Johor Government does not claim ownership of Pedra Branca” (paragraph 221).

Analyzing the conduct of the parties after 1953, the Court furthermore found several instances of conduct by Singapore that supported its argument. These acts included Singapore’s investigations of shipwrecks around the Pedra Branca waters, with no protest from Malaysia until June 2003 when the Special Agreement submitting the dispute to the Court came into force (paragraph 231), its requirement that Malaysian officials seek and obtain permission for visits to Pedra Branca (paragraph 235), the display of the British and Singapore ensigns on the island (paragraph 244), the installation by Singapore of military communications equipment in 1977 (paragraph 247) and its proposed land reclamation project on Pedra Branca (paragraph 249).

Moreover, the Court took into consideration facts indicative of Malaysia’s belief that Singapore was sovereign over Pedra Branca. Indeed, Malaysia had referred to the lighthouse as a “Singapore” station in the 1959 and 1967 joint meteorological reports, and when the two countries began separate meteorological reports in 1967, Malaysia omitted the lighthouse in their report of

that year (paragraph 265). Between 1962 and 1975, Malaysia furthermore published six maps depicting Pedra Branca as part of Singapore's territory (paragraph 272). The Court also considered of interest the fact that Malaysia only protested against Singapore flying its ensign on Pulau Pisang but not on Pedra Branca (paragraph 244).

For these reasons, the Court concluded that by 1980 sovereignty over Pedra Branca had passed from Malaysia to Singapore (paragraph 276).

With respect to Middle Rocks, the Court ruled that the issue of its legal status was to be assessed in the context of the Court's reasoning on the principal issue in the case. Among the reasons that led the Court to adjudge that sovereignty over Pedra Branca had passed to Singapore, none of them apply to other maritime features in the vicinity of Pedra Branca. For this reason, Middle Rocks should be understood to have had the "same legal status as Pedra Branca/Pulau Batu Puteh as far as the ancient original title (...) was concerned" (paragraph 290). Middle Rocks were thus to remain under Malaysian sovereignty.

This reasoning does however not apply to South Ledge as that, given the lack of definitive custom and treaty law, "a general assumption that low-tide elevations are territory in the same sense as islands" cannot be made (paragraph 296). The Court recalled to the parties that while it had a specific mandate to decide the sovereignty for each of the three maritime features concerned, it had not been called upon to delimit their territorial waters. For this reason, South Ledge belongs to the State "in the territorial waters of which it is located" (paragraph 298).

4. *Issues: Passing of Sovereignty and Loss of Territory*

The interest of this case lies essentially in its clarification of the criteria required in order to transfer sovereignty from a State possessing an original title to another State. This could happen, for example, through an express agreement between the parties (paragraph 120). In the absence of such agreement in the present case, the key question was that of consent of the original sovereign to cede the territory. The Court found two distinct modes of acquisition of derivative title: tacit agreement arising from, and reflected in, the conduct of the parties (paragraph 120) and failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State (paragraph 121).

With respect to the first hypothesis, the Court emphasized that any passing of sovereignty on the basis of the conduct of the parties "must be manifested clearly and without any doubt by that conduct and the relevant facts (...)

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” (paragraph 122).

In the second hypothesis and according to the *Island of Palmas* award, the State which has sovereignty must fail to respond to manifestations of sovereignty by another State. The absence of reaction may well then amount to acquiescence or to a “tacit recognition manifested by unilateral conduct which the other party may interpret as consent” (paragraph 121).

As pointed out by Coalter G. Lathrop, the Court does not explicitly choose between these two modes. However, the language used throughout the judgment – “evolving views” (paragraph 162), “developing understanding” (paragraph 203) or “convergent evolution of the positions of the Parties” (paragraph 276) – could indicate that the Court was searching for a tacit agreement between the parties and thus applied the first mode of acquisition. Furthermore, applying the second mode could result in the transfer of sovereignty from one State to another without the consent of the holder of the legal title, but only where a lack of reaction could be interpreted by the other party as consent. As Judges Simma and Abraham observed in their joint dissenting opinion, this possibility is at least arguable.

Another question is to determine if, and according to the Court’s words, this consent was “manifested clearly and without any doubt by that conduct and the relevant facts”. The “major significance” given by the Court to the above mentioned correspondence of 1953 is important in that context. As Judge *ad hoc* Dugard rightly pointed out in his dissenting opinion, the fact that at this time the Sultan of Johor was not a fully independent State but a protectorate may have weakened the authority of its Acting State Secretary to pronounce on matters of sovereignty.

5. *Further Readings*

- a. T. HSIEN-LI, “Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)”, 12 *Singapore Yearbook of International Law* 257 (2008);
- b. S. JAYAKUMAR, T. KOH, *Pedra Branca: The Road to the World Court*, Singapore (2009);
- c. C.G. LATHROP, “Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge”, 102 *American Journal of International Law* 1 (2008);
- d. Y. TANAKA, “Passing of Sovereignty: the Malaysia/Singapore Territorial Dispute before the ICJ”, The Hague Justice Portal (www.haguejusticeportal.net/eCache/DEF/9/227.html).