

*International Court of Justice*—original title—acquisition of derivative title to territory—conduct of the parties—acquiescence—tacit agreement—acquisitive prescription

SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (Malaysia/Singapore). *At* <<http://www.icj-cij.org>>.

International Court of Justice, May 23, 2008.

In their letter of July 24, 2003 to the registrar of the International Court of Justice, Malaysia and Singapore requested a decision that would determine sovereignty over several small features in the eastern entrance of the Singapore Strait: Pedra Branca/Pulau Batu Puteh,<sup>1</sup> Middle Rocks, and South Ledge.<sup>2</sup> In assessing the history of this region, the Court concluded in its judgment of May 23, 2008,<sup>3</sup> that as of 1844, Pedra Branca/Pulau Batu Puteh “was under the sovereignty of the Sultan of Johor” (para. 117), the predecessor to Malaysia, but that “by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore” (para. 276). Taking this history and other factors into account, the Court found “that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to the Republic of Singapore” (twelve votes to four), “that sovereignty over Middle Rocks belongs to Malaysia” (fifteen votes to one), and “that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located” (fifteen votes to one) (para. 300).

Pedra Branca/Pulau Batu Puteh is a small island covering approximately 8,500 square meters at low tide.<sup>4</sup> It is located in the eastern entrance of the Singapore Strait between the Malaysian state of Johor (approximately eight nautical miles to the north) and the Indonesian island of Bintan (approximately eight nautical miles to the south) (see figure 1). Singapore is located approximately twenty-four nautical miles to the west of the disputed island. The Horsburgh lighthouse was constructed on the island during the period 1850–51. The lighthouse facility, which occupies most of the island’s surface at high tide, has been in operation since its first lighting in October 1851. Middle Rocks consists of two clusters of small rocks approximately 0.6 nautical miles south of Pedra Branca/Pulau Batu Puteh. These clusters are above water at high tide and are therefore to be distinguished from the last feature—South Ledge—which is a low-tide elevation (above water at low tide but submerged at high tide) located approximately two nautical miles south-southwest of Pedra Branca/Pulau Batu Puteh (para. 18). The dispute over Pedra Branca/Pulau Batu Puteh crystallized in February 1980, when Singapore protested the publication by Malaysia of a map showing the disputed island lying within Malaysia’s territorial sea.<sup>5</sup>

<sup>1</sup> This awkward toponym combines Singapore’s name for the disputed island—Pedra Branca, or “White Rock” in Portuguese—with Malaysia’s name for the same feature—Pulau Batu Puteh, or “White Rock Island” in Malay.

<sup>2</sup> The only question before the Court was sovereignty over these named features. The Court was not asked to delimit maritime boundaries.

<sup>3</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)* (Int’l Ct. Justice May 23, 2008). The basic documents, decisions, pleadings, transcripts, press releases, and other materials for this case and others are available on the Court’s Web site, <<http://www.icj-cij.org>>.

<sup>4</sup> The Court was not asked to decide the rock-versus-island status of Pedra Branca/Pulau Batu Puteh. Under the provisions of Article 121(3) of the Law of the Sea Convention, if it were considered a rock “which cannot sustain human habitation or economic life of [its] own” it would generate only a territorial sea, but not an exclusive economic zone or continental shelf. The use of the word “island” in this report (and apparently, also in the judgment) is for convenience only.

<sup>5</sup> The Court determined that February 14, 1980, the date of Singapore’s protest note, was the critical date with respect to Pedra Branca/Pulau Batu Puteh. The dispute over the other features did not crystallize until February 1993, when Singapore first claimed the features in discussions with Malaysia (paras. 34–36).

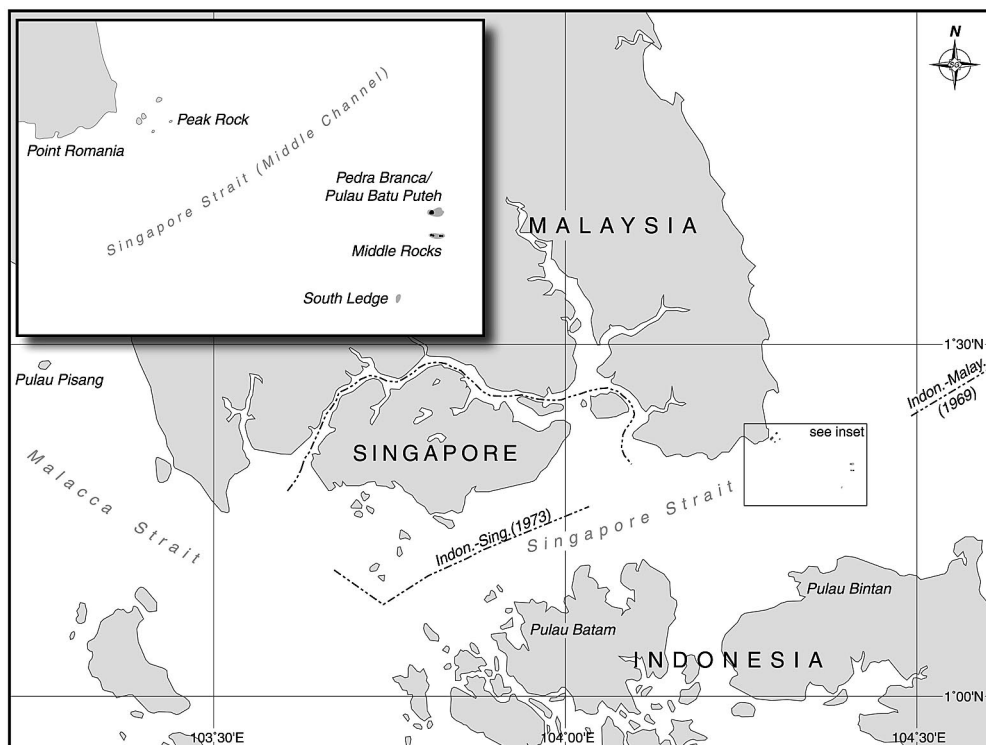


FIGURE 1. Map of Singapore Strait.

Singapore argued that the status of Pedra Branca/Pulau Batu Puteh as of 1847 was that of *terra nullius* or that, alternatively, “the legal status of the island was indeterminate” (para. 41); that the events of 1847 to 1851, including the planning and construction of the Horsburgh lighthouse, “constituted a taking of lawful possession of Pedra Branca by agents of the British Crown” (para. 39, quoting Singapore memorial); and that “the title acquired in 1847–1851 has been maintained by the British Crown and its lawful successor, the Republic of Singapore” (para. 39, quoting Singapore memorial).

Malaysia argued that Pedra Branca/Pulau Batu Puteh “could not at any relevant time be considered *terra nullius*” (para. 38, quoting Malaysia memorial); that “Malaysia has an original title to Pulau Batu Puteh” (para. 37, quoting Malaysia memorial); and that “Singapore’s presence on the island for the sole purpose of constructing and maintaining a lighthouse there—with the permission of the territorial sovereign—is insufficient to vest sovereignty in it” (para. 37, quoting Malaysia memorial).

The Court split its analysis of the legal status of Pedra Branca/Pulau Batu Puteh into two periods: pre- and post-1844, or before and after an important exchange of correspondence between the British government in Singapore and the Sultan and Temenggong of Johor about the siting of the Horsburgh lighthouse.<sup>6</sup>

The Johor sultanate, established in the early 1500s, straddled the Singapore Strait and included what is now Singapore, in addition to territory on the peninsula to the north (now

<sup>6</sup> The Court notes that a temenggong was a “high-ranking official in traditional Malay states” (para. 21 n.1).

Malaysia's states of Johor and Pahang) and the islands to the south (now Indonesia's Riau Archipelago). The Court reviewed the history of the Sultanate through the early 1800s, considered the geographic extent of the Sultanate, took into account that the disputed island was a known navigational hazard and therefore not *terra incognita*, and concluded that "the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh" (para. 69). This situation continued until 1824 (para. 80), at which point the Sultanate split into two parts divided, roughly, by the Singapore Strait.

In 1812, Johor's Sultan Mahmud III had died, leaving his sons Hussein and Abdul Rahman to vie for succession to the sultanate. Three events occurred in 1824 and 1825 that marked the culmination of this fraternal battle for power and resulted in the partitioning of the sultanate. First, in March 1824, the United Kingdom and the Netherlands signed the 1824 Anglo-Dutch Treaty, which had the practical effect of splitting the Johor sultanate into an area north of the strait, which was within the British sphere of influence, was ruled by Hussein, and maintained the name Johor, and an area south of the strait, which was within the Dutch sphere of influence, ruled by Abdul Rahman, and known as Riau-Lingga. Second, in August 1824, the East India Company and Sultan Hussein of the new Johor sultanate signed a treaty of friendship and alliance—the Crawford Treaty—in which the Sultan ceded Singapore and all islands within ten miles of Singapore to the East India Company.<sup>7</sup> Finally, in June 1825, Sultan Abdul Rahman sent a letter across the strait to his brother, Sultan Hussein, in which he "donated" certain territory to his brother, including Johor and Pahang on the mainland. Pedra Branca/Pulau Batu Puteh was not mentioned in the 1824 treaties or the 1825 letter, and the Court acknowledged that the dividing line between the two new Sultanates "remained somewhat unclear" (para. 115). However, reading the three events together, the Court concluded that "as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the [new] Sultan of Johor" (para. 117).

In its analysis of the post-1844 situation, the Court reviewed the process of selecting the site for the Horsburgh lighthouse (paras. 126–48), the construction and commissioning of the lighthouse (paras. 149–63), an exchange of correspondence between the parties in 1853 (paras. 192–30), and the conduct of the parties between 1852 and 1852 (paras. 164–91) and after 1853 (paras. 231–72). No single act was found to be dispositive. In fact, with the exception of certain post-1853 conduct discussed below, the Court found most of the conduct to be irrelevant or otherwise not helpful.<sup>8</sup> Nor did either of the two important exchanges of

<sup>7</sup> The 1927 Straits Settlement and Johor Territorial Waters Agreement—the 1927 Agreement—modified the Crawford Treaty by providing for the retrocession from Singapore to Johor of many of the islands first ceded in the Crawford Treaty. The Court concluded that Pedra Branca/Pulau Batu Puteh was not within the geographic scope of either the Crawford Treaty or the 1927 Agreement (para. 188).

<sup>8</sup> Conduct in this category included: Singapore's conduct related only to the maintenance and operation of the lighthouse, such as "improvement of the lighthouse [and] the exercise of authority over its personnel" (para. 165); the straits lights system and related British and Singapore legislation (paras. 166–80); constitutional developments and official descriptions of Singapore and Malaysia (paras. 181–89); Johor's regulation of fisheries in the 1860s (paras. 190–91); naval patrols around Pedra Branca/Pulau Batu Puteh by Malaysia and Singapore (paras. 240–43); a Malaysian petroleum concession from 1968 (paras. 251–53); Malaysia's territorial sea legislation of 1969 (paras. 254–56); the Indonesia-Malaysia continental shelf and territorial sea agreements of 1969 and 1970, respectively (paras. 257–58); the Indonesia-Singapore territorial sea agreement of 1973 (para. 259); interstate cooperation in the Singapore Strait (para. 260); and Singapore's omission of Pedra Branca/Pulau Batu Puteh from lists in its official publications (paras. 261–62).

correspondence, in 1844 and 1953, constitute an express agreement to cede the island (paras. 135, 227).

The first important exchange of correspondence occurred in 1844 between Governor Butterworth of the Straits Settlements (which included Singapore) and the Sultan of Johor regarding the selection of a site for a lighthouse in the eastern entrance of the Singapore Strait. As early as 1836, private commercial interests had been working with the British government to fund, locate, and build a lighthouse in this hazardous stretch of water. Pedra Branca/Pulau Batu Puteh was among the candidate locations, which also included Peak Rock—a small feature just off Point Romania on the southern tip of Johor. In November 1844, Governor Butterworth corresponded with the Sultan and Temenggong of Johor regarding the siting and construction of a lighthouse near Point Romania.<sup>9</sup> The temenggong responded that “the company are at full liberty to put up a Light House there, or any spot deemed eligible” (para. 128). The key question for the Court was whether this correspondence amounted to a cession by the sultanate of the place chosen for the lighthouse or whether “only a permission to build, maintain and operate a lighthouse was granted” (para. 131). The Court noted the distinction between sovereignty and property rights found in other lighthouse arrangements of the period, including the arrangement between the governor of the Straits Settlements and the Sultan of Johor regarding the lighthouse at Pulau Pisang in the Malacca Strait. The Pulau Pisang arrangement was memorialized in an 1885 agreement and a 1900 indenture, in which the sultan did not cede sovereignty but instead made a land grant for the sole purpose of erecting a lighthouse (para. 141).<sup>10</sup> No such documentation formalized the Pedra Branca/Pulau Batu Puteh arrangement, and the Court was unable to determine whether Johor had, in 1844, ceded sovereignty over the island or merely granted permission to build and operate a lighthouse within its territory (para. 148).

The British ultimately chose to build the lighthouse on Pedra Branca/Pulau Batu Puteh without further permission from Johor, and the planning and construction went forward under the direction of the Government Surveyor of Singapore. The British government played a large role in the construction of the lighthouse, though it made no proclamation of sovereignty during the process (para. 161). Johor played no role in the construction; the only official presence on the island was a two-day visit by the Temenggong of Johor and his followers in June 1850 (para. 156). The Court saw the events surrounding the construction and commissioning of the Horsburgh lighthouse as “bearing on the issue of the evolving views of the authorities in Johor and in Singapore” but drew no conclusions about sovereignty from those events alone (para. 162).

The ambiguity of the correspondence of 1844 submerged over the next century but reappeared in the correspondence of 1953. In June 1953, the colonial secretary of Singapore wrote to the Sultan of Johor’s British adviser asking—more than one hundred years after the completion of the Horsburgh lighthouse—for clarification on the status of Pedra Branca/Pulau

<sup>9</sup> The parties were not able to produce the governor’s letters, but only the replies from Johor.

<sup>10</sup> The Pulau Pisang comparison appeared elsewhere in the judgment. For example, the Court gave some weight to the fact that Singapore stopped flying its ensign over the lighthouse on Pulau Pisang at Malaysia’s request. No such request was made to lower the Singapore ensign flying above the Horsburgh lighthouse (para. 244). The Court also noted, in its assessment of Malaysia’s official maps that labeled Pedra Branca/Pulau Batu Puteh and the Horsburgh lighthouse “Singapore,” that this label did not appear with respect to Pulau Pisang (para. 269).

Batu Puteh. Comparing the Pulau Pisang arrangement with that of the disputed island, he wrote:

2. In the case of Pulau Pisang . . . it has been possible to trace an indenture in the Johore Registry of Deeds dated 6th October, 1900. This shows that a part of Pulau Pisang was granted to the Crown for the purposes of building a lighthouse. Certain conditions were attached and it is clear that there was no abrogation of the sovereignty of Johore. The status of Pisang is quite clear.

3. It is how [now] desired to clarify the status of Pedra Branca. I would therefore be most grateful to know whether there is any document showing a lease or grant of the rock or whether it has been ceded by the Government of the State of Johore or in any other way disposed of. (Para. 192)

Apparently the British adviser passed this letter to the state secretary of Johor. Three months later, in September 1953, the acting state secretary of Johor responded that “the Johore Government does not claim ownership of Pedra Branca” (para. 196). In its review of this brief and indirect exchange, the Court concluded that the acting state secretary had the authority and capacity to write the response quoted above and that the word “ownership” referred, not to private property interests with respect to the lighthouse, but to sovereignty over the entire island of Pedra Branca/Pulau Batu Puteh (paras. 220, 223). However, while the acting state secretary’s statement had “major significance” (para. 275), the Court concluded that the reply from Johor was not a formal or express disclaimer of title to the island, did not amount to a binding unilateral undertaking, and, with no distinct acts by Singapore in reliance on the statement, did not meet the requirements of estoppel (paras. 226–29). Instead, 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” (para. 230, emphasis added).

Having found most of the pre-1953 conduct irrelevant, the Court completed its analysis with a review of the conduct of the parties after 1953, focusing on both Singapore’s conduct taken *à titre de souverain* and not solely as operator of the lighthouse, and Malaysia’s conduct (or lack thereof) indicating that it did not claim sovereignty over the island and instead acknowledged Singapore’s sovereignty there. As with other disputes over lightly or uninhabited insular territory, there was little relevant conduct to review.<sup>11</sup> Nonetheless, the Court was able to find several instances of Singapore conduct that supported Singapore’s case. They included Singapore’s investigation of shipwrecks in the waters around Pedra Branca/Pulau Batu Puteh (para. 231–34), its requirement that Malaysian officials seek and obtain permission for visits to the island (para. 235–39), the display of the British and Singapore ensigns on the island (paras. 244–46), Singapore’s installation of military communications equipment on the island (paras. 247–48), and its proposed land reclamation project on the island (paras. 249–50). The Court noted, in contrast, that Malaysia had taken no action on the island for at least a century after the temmenggong’s visit in 1850 and that Malaysia never protested any of Singapore’s various acts that could well have indicated its exercise of sovereignty (paras. 274–75).

<sup>11</sup> See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), 2002 ICJ REP. 625 (Dec. 17).

Moreover, the Court noted two instances of affirmative Malaysian conduct indicating that Singapore was sovereign over Pedra Branca/Pulau Batu Puteh: first, listing the Horsburgh lighthouse as a Singapore weather data collection station in official publications when the parties were reporting jointly, and then omitting it from Malaysia's list when the parties began reporting separately (para. 265–66); and second, designating the island with the label “Singapore” on six official maps published by the Malaysian surveyor general and director of national mapping between 1962 and 1975 (para. 272).

In its penultimate paragraph on sovereignty over the disputed island, the Court wrote:

The Court is of the opinion that the relevant facts . . . reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore. (Para. 276, emphasis added)

As for sovereignty over Middle Rocks, the Court found that the Sultan of Johor held original title and that the conduct related to Pedra Branca/Pulau Batu Puteh did not apply to Middle Rocks. Title therefore remained with the Sultan of Johor and with Malaysia as its successor (para. 290). The Court left sovereignty over South Ledge, a low-tide elevation located within the area of potentially overlapping territorial seas generated by Middle Rocks and Pedra Branca/Pulau Batu Puteh, to be determined by the parties' delimitation of this as yet undelimited maritime area (paras. 297–99).

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Two brief observations are in order. The first concerns the mode of acquisition of derivative title by Singapore. In 1844, the Johor sultanate was sovereign over Pedra Branca/Pulau Batu Puteh. By 1980, sovereignty had passed to Singapore. On the basis of what principle or rule of international law did title pass from one to the other? The Court does not provide a clear answer. Unlike many disputes over marginal territory, especially small islands, that have come before international courts and tribunals, here the disputed territory was not *terra nullius*, and title was not indeterminate. Therefore, the approach used in those cases of balancing competing *effectivités*—as a means of determining which party has a stronger claim to title—was not applicable here.<sup>12</sup> Instead, the Court had to find—in the absence of an express agreement—consent by the original sovereign to cede the territory.<sup>13</sup> In its review of the applicable law, the Court offered two modes by which a state could acquire derivative title under these circumstances. First, title might pass by tacit agreement arising from, and reflected in, the conduct of the parties (para. 120). Second, title “might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State” (para. 121), with such failure amounting to behavior “which the other party may interpret as consent” (*id.*, quoting

<sup>12</sup> Three recent examples include *Eritrea v. Yemen, First Stage, Territorial Sovereignty and Scope of the Dispute*, paras. 449–50 (Perm. Ct. Arb. Oct. 9, 1998), *Sovereignty over Pulau Ligitan and Pulau Sipadan*, paras. 126–49, and *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), paras. 168–208 (Int'l Ct. Justice Oct. 8, 2007).

<sup>13</sup> See Joint Diss. Op., Simma & Abraham, JJ., para. 13.

*Gulf of Maine*).<sup>14</sup> The difference between these two modes is subtle and seems to hinge on whether there is actual agreement—that is, actual, if barely discernible, consent from the ceding party (in the former)—or only implicit agreement, with apparent consent coming in the passive form of silence and inaction, possibly masking a continuing adverse relationship between the parties (in the latter).

The Court does not explicitly choose between these modes, but the language throughout the judgment—“evolving views” (para. 162), “developing understanding” (para. 203), “evolving understanding shared by the Parties” (para. 224), “Johor understood . . . [and] Singapore had no reason to doubt” (para. 230), and “convergent evolution of the positions of the Parties” (para. 276)—describes a protracted meeting of the minds.<sup>15</sup> It is the language of agreement and indicates that tacit agreement, as evidenced by the conduct of the parties, was the basis of the Court’s judgment. If so, this judgment appears to lower the bar for demonstrating tacit agreement in disputes over territory and, by extension, maritime areas—a legal position that has been notoriously difficult to establish.

The second observation concerns the next steps for the parties. Although this case was confined to questions of territorial sovereignty, the territory involved—especially Pedra Branca/Pulau Batu Puteh because of its relatively seaward location—will generate maritime entitlements of some kind. The real prize here will be realized only at the conclusion of the ongoing maritime delimitation negotiation process, which inevitably will result in a Singapore maritime zone at the eastern end of the strait: size and status to be determined.

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<sup>14</sup> Although the Court did not refer to this mode as acquisitive prescription, it is difficult to see the difference between the Court’s “conduct/acquiescence” formulation and garden variety prescription: acquiescence requires publicity, and persistence of conduct seems to be implied. In any event, the three modes (tacit agreement, acquiescence, and prescription) are quite similar. *See id.*, para. 16.

<sup>15</sup> Judge *ad hoc* Dugard asks whether developing or evolving understandings are not just synonyms for tacit agreement. Diss. Op., Dugard, J. *ad hoc*, para. 19.