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# Sovereignty over Pedra Branca/ Pulau Batu Puteh: The Judgment of the ICJ and A Critical Analysis of Its Legal Implications

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# Sovereignty over Pedra Branca/ Pulau Batu Puteh: The Judgment of the ICJ and A Critical Analysis of Its Legal Implications

**Prof. Dr. Abdul Ghafur Hamid [alias] Khin Maung Sein***

The International Court of Justice in the case concerning *Sovereignty over Pedra Branca/ Pulau Batu Puteh* adjudged Pedra Branca/ Pulau Batu Puteh to Singapore, Middle Rocks to Malaysia, and South Ledge to the State in the territorial waters of which it is located. The judgment has far-reaching implications for both Malaysia and Singapore as it creates overlapping territorial waters, leaving sovereign rights of the two States unresolved, in an area which is strategically extremely important. The present paper first of all gives a brief commentary on the judgment and thrashes out issues that may arise in its implementation. The paper touches upon the issue of whether an exclusive economic zone can be claimed from Pedra Branca and suggests that the best solution is to concentrate on the territorial sea delimitation rather than claiming wider maritime zones. On other maritime features, since Middle Rocks, which is under the Malaysian sovereignty, lie in-between Pedra Branca and South Ledge and blocks any expansion of territorial waters from Pedra Branca, the paper argues that South Ledge squarely falls within the territorial waters of Malaysia and Malaysia can expand its territorial sea limits from South Ledge, which is a low-tide elevation. Although the delimitation of the territorial sea is the major and the most challenging issue for Malaysia and Singapore, there are also other outstanding issues such as the rights of fishermen, naval patrols, security matters, prevention of marine pollution, and traffic separation scheme for ships. To tackle all these issues will definitely require close cooperation and mutual understanding between the two neighbours.

## I. Introduction

It was a suspenseful time for both Malaysian and Singaporean delegations to the Hague when the International Court of Justice delivered its judgment on Friday, 23 May 2008. The judgment was not a winner-take-all but a split one, adjudging Pedra Branca/ Pulau Batu Puteh to Singapore, Middle Rocks to Malaysia, and South Ledge to the State in the territorial waters of which it is located.[1]

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[1] Abdul Ghafur hamid @ Khin Maung Sein, "After the Hague It Is Time to Move On" *New Straits Times*, Sunday (May 25, 2008).

Pedra Branca/ Pulau Batu Puteh is a small granite rocky island, 137-metre by 60-metre (roughly half the size of a football field), which is located 7.7 nautical miles to the South of Johor and approximately 24 nautical miles to the east of Singapore. The dispute arose on 14 February 1980, when Singapore protested against the 1979 map published by Malaysia placing the island in the Malaysian territory. Singapore claimed the Middle Rocks and South Ledge, two other marine features near the island, in February 1993. After exhausting a few years of bilateral consultations, the two countries submitted their dispute to the International Court of Justice on 24 July 2003.[2]

The present paper has two main tasks: commenting on the judgment of the ICJ and thrashing out issues and problems that may arise in its implementation. Once the judgment was pronounced, both parties to the dispute indicated to graciously accept and implement it. This is in accord with their undertaking when they submitted the case to the Court. Nevertheless, it is the duty of academia to make a commentary on both factual and legal conclusions of the Court. The paper first of all evaluates the interpretation of the facts of the case. According to the Court, the letter of 1953 by the Acting State Secretary of Johor was of central importance. The paper casts doubts on the Court's wisdom to take this single fact as the decisive factor in passing sovereignty over Pedra Branca to Singapore despite a number of questions as to the clear status of the letter unanswered.

The paper next goes deeper into the investigation of the legal principles featured prominently in the judgment. The Court, however, did not explicitly refer to any established law of territorial acquisition. It is only from the language of the judgment that one can infer that *tacit agreement***,** as evidenced by the conduct of the parties, was the basis of the Court's judgment. Implied or tacit agreements must be approached with great caution. In such a case, both intention and terms of the agreement are inferred from the conduct of the Parties. The intention of the Parties must be manifestly clear; their conduct that constitutes the agreement must leave no room for doubt. However, in the present case, the 1953 correspondence was riddled with uncertainties and ambiguities. The conduct of the Parties in the period 1953 to 1980 was very much equivocal, making it very difficult to establish tacit agreement.

The judgment has far-reaching implications on both Malaysia and Singapore as it deals with a sensitive dispute between the two close neighbours and is a split one, adjudging Singapore with Pedra Branca, while giving Malaysia the near-by Middle Rocks, creating overlapping territorial sea. The paper is an attempt to answer the interesting legal issues such as: whether Singapore can claim exclusive economic zone from Pedra Branca; how South Ledge is legally significant and how to decide its status; how to delimit the territorial sea between Malaysia and Singapore in the area in question; and whether a unilateral action of either party is possible pending proper delimitation.

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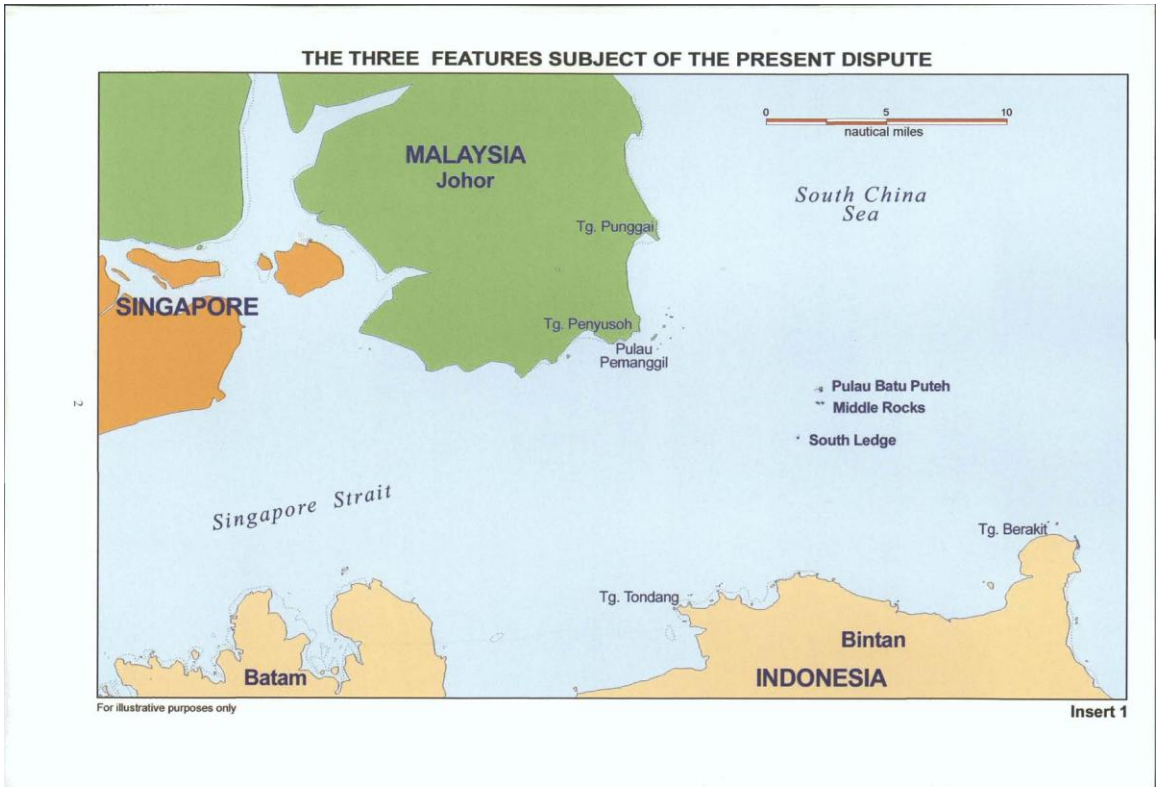
[2] Malaysia and Singapore brought the dispute to the International Court of Justice by means of a Special Agreement. By joint letter dated 24 July 2003, filed in the Registry of the Court on the same day, the Ministers for Foreign Affairs of Malaysia and the Republic of Singapore (hereinafter "Singapore") notified to the Registrar a Special Agreement between the two States, signed at Putrajaya on 6 February 2003 and having entered into force on 9 May 2003.


THE THREE FEATURES SUBJECT OF THE PRESENT DISPUTE
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5
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nautical miles
MALAYSIA
Johor
South China Sea
Tg. Punggai
SINGAPORE
Tg. Penyusoh
Pulau Pemanggil
Pulau Batu Puteh
Middle Rocks
South Ledge
Singapore Strait
Tg. Berakit
Tg. Tondang
Bintan
Batam
INDONESIA
For illustrative purposes only
Insert 1

# II. The facts of the case

Pedra Branca/ Pulau Batu Puteh (PBP)[3] is a granite island, measuring 137 metre long, with an average width of 60 metre and covering an area of about 8,560 sq metre at low tide. It is situated at the eastern entrance of the Straits of Singapore, at the point where the latter open up into the South China Sea. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian state of Johor and 7.6 nautical miles to the north of the Indonesia island of Bintan. The names Batu Puteh and Pedra Branca mean "white rock" in Malay and Portuguese respectively. On the island stands Horsburgh lighthouse, which was erected in the middle of the nineteenth century.[4]

Middle Rocks and South Ledge are the two maritime features closest to PBP. Middle Rocks is located 0.6 nautical miles to the south and consists of two clusters of small rocks about 250 m apart that are permanently above water and stand 0.6 to 1.2 m high. South Ledge, at 2.2 nautical miles to the south-south-west of PBP, is a rock formation only visible at low tide.[5]

## 1. Brief historical background

The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511. By the mid-1600s the Netherlands had wrested control over various regions in the area from Portugal. N 1789, the British established rule over several Dutch possessions in the Malay archipelago, but in 1814 returned the former Dutch possessions in the Malay archipelago to the Netherlands. On 17 March 1824, a treaty was signed between the two colonial powers. As a consequence of this treaty, one part of the Sultanate of Johor fell within the British sphere of influence while the other fell within the Dutch sphere of influence.[6]

On 2 August 1824 a treaty of Friendship and Alliance (known as "the Crawford Treaty") was signed between the British East India Company and the Sultan of Johor and the Temenggong (a Malay high-ranking official) of Johor, providing for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore. Between March 1850 and October 1851 a lighthouse was constructed on PBP.

To cut the long history short, the Federation of Malaya gained independence from Britain in 1957, with Johor as a constituent state of the Federation. In 1958 Singapore became a self-governing colony. In 1963 the Federation of Malaysia was established, formed by the merger of the Federation of Malaya with the former British colonies of

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[3] *Pedra Branca/ Pulau Batu Puteh* will hereinafter be referred to as 'PBP'.

[4] *Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore)* Judgment of 23 May 2008, paras, 16-18 [hereinafter *Pedra Branca Judgment*]

[5] See appendix 1 for the sketch map.

[6] *Pedra Branca Judgment*, above note 4, para. 20.

Singapore, Sabah and Sarawak. In 1965 Singapore left the Federation and became a sovereign and independent State.[7]

## 2. The origin of the dispute and the critical date

On 21 December 1979, Malaysia published a map entitled "Territorial Waters and Continental Boundaries of Malaysia". The map depicted PBP as lying within Malaysia's territorial waters. By a diplomatic note dated 14 February 1980 Singapore rejected Malaysia's claim to PBP and requested that the 1979 map be corrected. This led to an exchange of correspondence and subsequently to a series of intergovernmental talks in 1993-1994, which did not bring a resolution of the matter. During the first round of talks in February 1993 the question of the appurtenance of Middle Rocks and South Ledge was also raised. In view of the lack of progress in the bilateral negotiations, the Parties agreed to submit the dispute for resolution by the International Court of Justice.[8]

It is a basic principle of international law that in the context of a dispute related to sovereignty over territory, the date upon which the dispute crystallized is of significance. This is known as the "critical date." The International Court of Justice opined that it was on 14 February 1980, the time of Singapore's protest in response to Malaysia's publication of the 1979 map, that the dispute as to sovereignty over PBP crystallized. As far as sovereignty over Middle Rocks and South Ledge is concerned, the Court found that the dispute crystallized on 6 February 1993, when Singapore referred to these maritime features in the context of its claim to PBP during bilateral discussions between the parties.[9]

## 3. Arguments of the parties

Malaysia argued that PBP "could not at any relevant time be considered *terra nullius*,"[10] that "Malaysia has an original title to PBP of long standing,"[11] 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"[12].

Singapore argued that the status of PBP as of 1847 was that of *terra nullius* or that, alternatively, "the legal status of the island was indeterminate,"[13] 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

[7] Ibid., paras 27-29.
[8] Ibid., paras. 30-34.
[9] Ibid. paras. 35-36.
[10] Ibid., para. 38, quoting Malaysian memorial.
[11] Ibid., para. 37, quoting Malaysian memorial.
[12] Ibid.
[13] Ibid., para. 41.

Crown,"[14] and that "the title acquired in 1847-1851 has been maintained by the British Crown and its lawful successor, the Republic of Singapore"[15].

## III. The Judgment of the Court

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Malaysia chose Mr. Christopher John Robert Dugard and Singapore Mr. Sreenivasa Rao Pemmaraju. Prior to her election as President of the Court, Judge Higgins recused herself from participating in the present case. It therefore fell upon the Vice-President, Judge Al-Khasawneh, to exercise the functions of the presidency for the purposes of the case. The Court delivered its judgment on Friday, 23 May 2008.[16]

The Court split its analysis of the legal status of PBP 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.

### 1. Legal status of PBP before 1844

The Court first examined whether Malaysia, which means its predecessor the Sultanate of Johor, held original title to PBP and retained it up to the 1840s.

The Court noted that "from at least the seventeenth century until early in the nineteenth, it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits. Specifically, this domain included the area where Pedra branca/ Pulau Batu Puteh is located."[17] The Court concluded that "this possession of the islands by the Sultanate was never challenged by any other Power in the region and can in all the circumstances be seen as satisfying the condition of 'continuous and peaceful display of territorial sovereignty (peaceful in relation to other States)'."[18] The Court thus "concludes that the Sultanate of Johor had original title to Pedra branca/ Pulau Batu Puteh."[19] The Court also found that "the nature and the degree of the Sultan of Johor's authority exercised over the Orang Laut who inhabited the islands in the Straits of Singapore, and who made this maritime area their

[14] Ibid., para. 39, quoting Singaporean memorial.
[15] Ibid.
[16] Ibid., paras. 1-2.
[17] Ibid., para 59.
[18] Ibid., para. 68. The Court in this regard cited the *Island of Palmas* case (Netherlands/USA) Award of 4 April 1928, RIAA, Vol. II (1949), 840.
[19] Ibid. para. 69.

habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/ Pulau Batu Puteh."[20]

This situation continued until 1824,[21] at which point the sultanate split into two parts divided, roughly, by the Singapore Strait. PBP was not mentioned in both the 1824 Anglo-Dutch Treaty and the 1824 Crawfurd Treaty and the Court acknowledged that the dividing line between the two new sultanates "remained somewhat unclear."[22] However, reading the events together, the Court concluded that "Malaysia has established to its satisfaction that as of the time when the British started their preparations for the construction of the light house on Pedra Branca/ Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor."[23]

## 2. Legal status of PBP after 1844

The Court observed that in order to determine "whether Malaysia has retained sovereignty over Pedra branca/ Pulau Batu Puteh following 1844 or whether sovereignty has since passed to Singapore," it needed to assess the relevant facts consisting mainly of the *conduct of the parties* during that period.[24]

**The conduct of the Parties, 1844-1852**

In its analysis of the post-1844 situation, the Court reviewed the process of selecting the site for the Horsburgh lighthouse and the construction and commissioning of the lighthouse. 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. PBP 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.

In respect of the issue of whether Johor ceded sovereignty over the particular piece of territory which the United Kingdom would select for the construction and operation of the lighthouse for the stated purpose or granted permission only to that construction and operation, the Court found that the correspondence was not conclusive.[25] The Court stated:

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[20] Ibid. para. 75.

[21] Ibid. para. 80, where it was stated that "The Court, having found that in 1824 the Sultan of Johor had title to Pedra Branca/Pulau Batu Puteh, will now turn to the question whether this title was affected by the developments in the period 1824 to 1840."

[22] Ibid., para. 115.

[23] Ibid., para. 117.

[24] Ibid., para. 119.

[25] Ibid., para. 133.

> The Sultan is "exceedingly pleased at the intention expressed [by Governor Butterworth]" because a lighthouse will allow for greater confidence; and the Temenggong had "no possible objection to" the erecting of a lighthouse; "wishing to be guided in all matters by the Government, so much so, that the company are at full liberty to put up a Light House…". That wording may be read… as limited to a permission to build and operate. The Sultan simply express pleasure and, so far as temenggong is concerned, the East India company is at "full liberty' to put up a lighthouse.[26]

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.[27] The Court was referred to the proposal of establishing a lighthouse on Pulau Aur and also the Convention for the Cape Spartel lighthouse concluded in 1865 between Morocco and a number of maritime Powers which regulates in some detail the rights and obligations of the parties. Against that background of extensive legal regulation in agreements between the sovereign of the territory where the lighthouse was to operate and European States, the Court observed the lack, in the case of PBP, of any written agreement between the Johor and the British authorities regulating in some detail the relationship between them and their related rights and obligations. The Johor authorities did not provide for instance for the maintenance of their sovereignty and their rights to repossess the land in the event that conditions relating to the operation of the lighthouse were not satisfied.[28] The Court, therefore, 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.[29]

The Court further observed that:

> There is nothing at all in the record before it to suggest that the authorities in Singapore considered it necessary or even desirable to inform the Johor authorities of the decision about the sitting of the lighthouse or to seek any consent in respect of it. That conduct may be interpreted in one of two ways: it may indicate, as Malaysia contends, that what it sees as Johor's 1844 consent to the building and operation of a lighthouse on one of its islands simply applied to Pedra Branca/ Pulau Batu Puteh as it would have to any of its islands. Or it may indicate, as Singapore contends, that the Johor

[26] Ibid., para. 135.

[27] Ibid., para. 141. 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).

[28] Ibid., para. 144.

[29] Ibid., para. 145.

> authorities had no rights in respect of this project and that such was the perception in 1847 of the responsible British authorities. On the basis of the case file, the Court is not in a position to reach a conclusion on that issue.[30]

The British ultimately chose to build the lighthouse on PBP 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.[31] Johor played no role in the construction. Malaysia contended that Johor, having permitted the building of the lighthouse, had no reason to have any involvement in its construction and commissioning. The Court however noted that "the only time the Johor authorities were present throughout that process was the two-day visit of the Temenggong and his followers in early June 1850."[32] 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"[33] but drew no conclusions about sovereignty from those events alone.

**The conduct of the Parties, 1852-1952**

Events occurring between 1852 and 1952 were largely viewed by the Court as having no significance or being little significance. This brings one to 1953 which was seen by the Court as the turning point in respect of sovereignty over PBP.

**The 1953 correspondence**

The ambiguity of the correspondence of 1844 submerged over the next century but reappeared in the correspondence of 1953. On 12 June 1953, that is, more than one hundred years after the completion of the Horsburgh lighthouse, Mr. J.D. Higham, on behalf of the Singapore Colonial Secretary, sent the Sultan of Johor's British Advisor a letter - for clarification on the status of PBP - as follows:

> 1. I am directed to ask for information about the rock some 40 miles from Singapore known as Pedra Branca on which the Horsburgh Lighthouse stands. The matter is relevant to the determination of the boundaries of the Colony's territorial waters. It appears this rock is outside the limits ceded by Sultan Hussain and the Dato Tumunggong to the East India Company with the island of Singapore in the Treaty of 1824… It was, however, mentioned in a dispatch from the Governor of Singapore on 28th November 1844… The lighthouse was built in 1850 by the Colony Government who have maintained it ever since. This by international usage no doubt confers some rights and obligations on the Colony.

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[30] Ibid., para. 148.
[31] Ibid., para. 161.
[32] Ibid., para. 162.
[33] Ibid., para. 162.

2. In the case of Pulau Pisang which is also outside the Treaty limits of the Colony it has been possible to trace an indenture in the Johor Registry of Deeds dated 6th October, 1900. This show that a part of Pulau Pisang was granted to the Crown for the purpose of building a lighthouse. Certain conditions were attached and it is clear that there was no abrogation of the sovereignty of Johor. 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.
4. A copy of this letter is being sent to the Chief Secretary, Kuala Lumpur.[34]

The Acting State Secretary of Johor replied on 21 September 1953:

> I have the honour to refer to your letter… addressed to the British Adviser, Johor, on the question of the status of Pedra Branca Rock some 40 miles from Singapore and to inform you that the Johor Government does not claim ownership of Pedra Branca.[35]

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 PBP."[36] The Court dismissed the Malaysian contention that the Acting State Secretary "was definitely not authorized" and did not have "the legal capacity to write the 1953 letter, or to renounce, disclaim, or confirm title of any part of the territories of Johor."[37] The Court expressed the view that:

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 and that the word "ownership" referred, not to private property interests with respect to the lighthouse, but to sovereignty over the entire island of PBP.[38] However, while the acting State secretary's statement had "major significance,"[39] 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.[40] 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."[41]

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[34] Ibid. para. 192; Memorial of Malaysia, Vol. 3, Ann. 67; Memorial of Singapore, Vol. 6, Ann. 93.
[35] Ibid., para. 196; Memorial of Malaysia, Vol. 3, Ann. 69; Memorial of Singapore, Vol. 6. Ann. 96.
[36] Ibid., para. 203 [emphasis added.]
[37] Ibid., para. 220.
[38] Ibid., paras. 220, 223.
[39] Ibid., para. 275.
[40] Ibid., paras. 226-29.
[41] Ibid., para. 230 [emphasis added.]

**The conduct of the Parties after 1953**

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 *a 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.[42] Nonetheless, the Court was able to find several instances of Singapore conduct that supported Singapore's case:

(1) Singapore's investigations of shipwrecks: The Court took into consideration Singapore's contention that it and its predecessors had exercised sovereign authority over the island by investigating shipwrecks within its territorial waters. The last marine casualty occurring before 1980 and investigated by Singapore was the running aground of a Panamanian vessel off the island in 1979. The Court considered that this enquiry in particular assisted Singapore's contention that it had been acting *a` titre de souverain*. The Court accordingly concluded that this conduct gives significant support to the Singapore case. It also recalled that it was only in June 2003 that Malaysia protested against this category of Singapore conduct.[43]

(2) Singapore's control over visits to the island: In respect of the argument of Singapore's exercise of exclusive control over visits to the island and the use of the island, the Court found that the conduct of Singapore with respect to permissions granted or not granted to Malaysian officials in the context of a survey of the waters surrounding the island in 1978 was to be seen as *a` titre de souverain* and did give significant support to Singapore's claim to sovereignty over the island.[44]

(3) The display of Singapore ensign on Pedra Branca: The Court considered that the flying of an ensign was not in the usual case a manifestation of sovereignty. It stated that some weight may nevertheless be given to the fact that Malaysia, having been alerted to the issue of the flying of ensigns by the Pulau Pisang incident, did not protest against flying the Singapore ensign at Horsburg Lighthouse.[45]

(4) Singapore's installation of military communications equipment on the island: A military rebroadcast station was installed on PBP on 30 May 1977 to overcome communication difficulties. Singapore said that the installation was carried out openly, involving the transportation of equipment by military helicopters which have also been involved in the maintenance of the station. Malaysia stated that the installation was undertaken secretly and that it became aware of it only on receipt of Singapore's

[42] See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), 2002 ICJ Rep. 625 (Dec. 17).
[43] Ibid., paras. 231-34.
[44] Ibid. paras. 235-39.
[45] Ibid., paras. 244-46.

Memorial.[46] The Court concluded that "The Court is not able to assess the strength of the assertions made on the two sides about Malaysia's knowledge of the installation. What is significant for the Court is that Singapore's action is an act *à titre de souverain*."[47]

(5) Proposed land reclamation by Singapore to extend the island: In respect of the plans to reclaim areas around the island, the Court observed that while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was pubic and attracted replies and further the proposed action did go beyond the maintenance and operation of the lighthouse. The Court considered this conduct as supporting Singapore's case.[48]

The Court noted, in contrast, that Malaysia had taken no action on the island for at least a century after the Temmengong's visit in 1850 and that Malaysia never protested any of Singapore's various acts that could well have indicated its exercise of sovereignty.[49] Moreover, the Court noted two instances of affirmative Malaysian conduct indicating that Singapore was sovereign over PBP: 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;[50] and second, designating the island with the label "Singapore" or "Singapura" on six official maps published by the Malaysian Surveyor General and Director of National Mapping between 1962 and 1975.[51]

**Conclusion**

In the light of the principles and rules of international law and of the assessment of the relevant facts, particularly the conduct of the Parties, the Court made the following conclusion as to sovereignty over PBP:

> The conduct of the United Kingdom and Singapore was, in many respects, conduct as operator of Horsburgh lighthouse, but that was not the case in all respects. Without being exhaustive, the Court recalls their investigations of marine accidents, their control over visits, Singapore's installation of naval communication equipment and its reclamation plans, all of which include acts *a` titre de souvrain*, the bulk of them after 1953. Malaysia and its predecessors did not respond in any way to that conduct, or the other conduct with that character identified earlier in this judgment, of all of which (but for the installation of the naval communication equipment) it had notice.

[46] Ibid., para. 247.
[47] Ibid., para. 248.
[48] Ibid., paras. 249-50.
[49] Ibid., paras. 274-75.
[50] Ibid., paras. 265-66.
[51] Ibid., para. 272.

> Further, the Johor authorities and their successors took no action at all on Pedra Branca/ Pulau Batu Puteh from June 1850 for the whole of the following century or more. And, when official visits (in the 1970s for instance) were made, they were subject to express Singapore permission. Malaysia's official maps of the 1960s and 1970s also indicate an appreciation by it that Singapore had sovereignty. Those maps, like the conduct of both parties which the Court has briefly recalled, are fully consistent with the final matter the Court recalls. It is the clearly stated position of the Acting secretary of State of Johor in 1953 that Johor did not claim ownership of Pedra Branca/ Pulau Batu Puteh. That statement has major significance.
>
> The Court is of the opinion that the relevant facts, including the conduct of the Parties …reflect *a convergent evolution of the positions of the Parties regarding title to Pedra Branca* / Pulau Batu Puteh. The Court concluded, especially by reference to the conduct of Singapore and its predecessors *a` 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.[52]
>
> For the foregoing reasons, the Court concludes that Pedra Branca /Pulau Batu Puteh belongs to Singapore.[53]

## 3. Sovereignty over Middle Rocks and South Ledge

Since Middle Rocks should be understood to have had the same legal status as PBP as far as the ancient original title held by the Sultan of Johor was concerned, and since the particular circumstances which have come to effect the passing of title to PBP to Singapore do not apply to this maritime feature, the Court held that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.[54]

With regard to South Ledge, however, there are special problems to be considered, because South ledge, as distinct from Middle Rocks, presents a special geographical feature as a low-tide elevation.[55] In view of its previous jurisprudence,[56] the Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by PBP, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia.[57] The Court concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it was located.[58]

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[52] Ibid., para. 276.
[53] Ibid., paras. 274- 277[emphasis added.]
[54] Ibid., para. 290.
[55] See Article 13 of the United Nations Convention on the Law of the Sea, 1982
[56] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* Judgment, ICJ Reports 2001, 101, para. 204.
[57] *Pedra Branca Judgment*, above note 4, para. 297.
[58] Ibid., para. 299.

# IV. A Brief Critique of the Judgment

The judgment was not unanimous but a majority one. Four judges dissented[59] from the majority ruling of the main operative paragraph of the Judgment. They disagreed with the majority ruling on the evaluation of the facts as well as the law.

The very first comment that can be made is the significance of the Court's decision that PBP was not *terra nullius*, that the Sultanate of Johor had original title to it and that the island was under the sovereignty of Johor when the British started preparations to construct a light house in 1844. Events occurring between 1852 and 1952 were largely viewed by the Court as having no significance or being little significance and thus the 1953 correspondence was seen by the Court as the turning point in respect of sovereignty over the Island. It can, therefore, correctly be inferred from the Judgment that Singapore had no sovereignty over PBP before 1953. It means that PBP was originally under the Malaysian sovereignty and that only because of the 1953 correspondence and of the conduct of the parties during a short period between 1953 and 1980,[60] the sovereignty has passed from Malaysia to Singapore. After a thorough analysis of the Judgment, the following reservations can be made in respect of the judgment of the Court.

## 1. Criticism on the Court's evaluation of the facts

The court's evaluation of the facts that occurred until 1952 is impressive and agreeable to most commentators. Nevertheless, the Court's treatment of the 1953 correspondence and of the conduct of the parties in its aftermath is somewhat questionable.

### A. Too much significance given to the 1953 correspondence which was riddled with uncertainties

The Court, in its Judgment, gave too much significance to the 1953 correspondence to the extent that it was taken as a decisive factor in determining the passing of sovereignty from Johor (Malaysia) to Singapore. In fact, there were uncertainties and doubts surrounding the 1953 correspondence.

*The uncertainty inherent in the letters themselves*

The Singapore Colonial Secretary asked whether the island had been leased, subjected to a grant or ceded to Singapore. The wording of this letter is an unequivocal evidence of

[59] *Judges* Parra-Aranguren, Bruno Simma, Abraham; *Judge ad hoc* Dugard.

[60] There is only one significant remark made by the Court in respect of the period between 1844 and 1852: "The Court does not draw any conclusions about sovereignty based on the construction and commissioning of the lighthouse. Rather it sees those events as bearing on the issue of the evolving views of the authorities in Johor and in Singapore about sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia contends that Johor, having permitted the building of the lighthouse, had no reason to have any involvement in its construction and commissioning. The Court however notes that the only time the Johor authorities were present throughout that process was the two-day visit of the Temenggong and his followers in early June 1850." See, *Pedra Branca* Judgment, above note 4, para. 162.

Singapore's recognition at that time of the original title of the Sultan of Johor over PBP and Singapore just wanted to confirm the mode of the authority given by the Sultan of Johor for the construction of the light house on the island: whether it was a lease, a grant, or a cession. Nevertheless, the reply by the Acting State Secretary of Johor to this query of Singapore was quite amazing and did not in fact answer it at all. Here are some interesting questions: Why did Singapore not do any follow-ups to clarify the situation if they thought the answer was confusing? Or if they thought the answer was clear enough to disclaim Johor's sovereignty over PBP, why, as Judge ad hoc Dugard put it in his dissenting opinion, "did they not publicize the fact that Johor (Malaysia) had conceded that sovereignty over PBP vested in Singapore? Why did Singapore not fly its national flag over the island, place it on its own maps, and publish it in its promotional brochures?"[61] There can only be one answer to all these questions – that Singapore itself, even after the reply from the Acting State Secretary of Johor, was not very clear about the status of PBP and did not clearly know how to proceed with it.

The Court failed to seriously consider the uncertain and ambiguous nature of the 1953 correspondence and instead regarded it as central to the passing of sovereignty from Johor to Singapore. It is, therefore, submitted that the conclusion of the Court 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"[62] is unconvincing.

*The uncertainty relating to the capacity of the Acting State Secretary*

The worrying question is whether the Acting State Secretary of Johor had the authority to make official pronouncements on matters of sovereignty. Malaysia raised constitutional objections in this regard during the final session of the oral submissions.[63] It is humbly submitted that both the Malaysian arguments and the Court's reply to these missed the point.

Malaysia first argued that in accordance with the Johor Agreement 1948, His Majesty "shall have complete control of the defence and all the external affairs of the State of Johor"[64] and the Sultan of Johor "undertakes that, without the knowledge and consent of His Majesty's Government, he will not make any treaty, enter into any agreement, deal in or correspond on political matters with …any foreign State."[65]

The Court considered that the Johor Agreement was not relevant since the correspondence was initialized by a representative of Her Britannic Majesty's Government which at the time was not to be seen as a foreign State.[66] It is true that the British Government at that time could not be regarded as a 'foreign State. The real question, nevertheless, was not whether Johor could enter into an agreement or a deal

[61] Dissenting Opinion of Judge ad hoc Dugard, para. 17.
[62] Ibid., para. 230 [emphasis added.]
[63] See the Oral Submission made by the Attorney General of Malaysia to the International Court of Justice on 22 November 2007, CR 2007/30,
[64] The Johor Agreement of 21 January 1948, Clause 3(1).
[65] Ibid., Clause 3(2).
[66] *Pedra Branca* Judgment, above note 4, para. 218.

with a foreign State but whether the Acting State Secretary of Johor was a person having the authority to represent or bind Johor to make official pronouncements on matters of sovereignty over part of the territory of the State of Johor.

There is a big question mark here as to why the Acting Secretary of State made such an unnecessary reply in the first place. He, as a civil servant, after checking out the records, should have simply replied that he could not find any such record of a lease, a grant or a cession of territory. That is adequate. As Singapore never asked about who owned Pedra Branca, it is beyond all reason why the Acting Secretary of State replied that 'Johor Government does not claim ownership of Pedra Branca." This reply raises a number of questions: Was it necessary for him to reply like this? Did the Sultan know about this at that time? Was it the real intention of the Sultan to abandon the island? Did the Sultan of Johor officially authorize the Acting State Secretary to disclaim PBP or was it the latter's own decision after going through state records?

In any case, Johor at that time was a Sultanate - the Sultan was the Ruler. Even after colonization by the British, the sovereign power of the Malay Ruler over his territory was recognized by the British although His Majesty Government controlled the Defence and Foreign affairs. The sovereign authority of the Malay Rulers was explicitly recognized by the Privy Council in the case of *Sultan of Johor v Tunku Abubakar*.[67] As a consequence, only the Sultan himself or the one who was officially directed or authorized by the Sultan to act on his behalf may act in matters that involved sovereign authority of the state.[68] The Acting State Secretary, therefore, in the absence of express direction or authorization by the Sultan, had no authority to make an official announcement in matters of sovereignty.

Secondly, Malaysia invoked the Federation of Malaya Agreement 1948 and argued that the executive authority of the Federation had to be exercised by the High Commissioner and that Johor or its State Secretary had no such power. However, the Court rejected the argument and stated that the action of responding to a request for information is not an "exercise" of "executive authority."[69] Again it is submitted that by looking only at the initial letter, the Court considered that it was merely a request for information. However, if one seriously looks at the reply letter, it was not just giving the requested information but rather going beyond that and trespassing on the question of territorial sovereignty, which was the prerogative of the Sultan of Johor. If it was not the exercise of "executive authority" what else would it be?

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[67] *Sultan of Johor v Tunku Abubakar*, [1952] AC 318. See also Clause 155 of the Federation of Malaya Agreement 1948 and Clause 15 of the Johor Agreement 1948.

[68] The idea is well established in international law and can be seen in Article 7 of the Vienna Convention on the Law of Treaties (implicitly acknowledging that no body can give consent that binds his country without producing 'Full Powers', except the Big Three: the Head of State, the Head of Government and the Minister for Foreign Affairs), and the *Legal Status of Eastern Greenland* case, 1953 PCIJ Series A/B, No. 53 (where the World Court laid down conditions for the pronouncement of the Minister for Foreign Affairs to bind his country).

[69] Ibid., para. 219.

In fact, Malaysia should have raised these constitutional objections in its earlier stages of written memorials and replies to carry more weight to it rather than left it to the closing oral submissions. In this respect, the Court stated that "the failure of Malaysia to invoke this argument, both throughout the whole period of bilateral negotiations with Singapore and in the present proceedings until late in the oral phase, lend support to the presumption of regularity invoked by Singapore."[70] It is submitted, however, that since it is an issue of vital importance to the outcome of the case, much more attention should be given to it by the Court.

**B. The Court's evaluation of the conduct of the parties between 1953 and 1980 questionable**

After evaluating the conduct of the Parties between 1953 and 1980, the Court concluded that the conduct of the United Kingdom or Singapore of investigation of marine accidents, control over visits, installation of naval communication equipment and reclamation plans were acts *à titre de souverain* and that Malaysia and its predecessors did not respond in any way to that conduct, of all of which (but for the installation of the naval communication equipment) it had notice.[71]

Judge *ad hoc* Dugard was of the opinion that the Court's evaluation of the conduct of the parties between 1953 and 1980 were influenced by its finding that Johor (Malaysia) had acknowledged the sovereignty of Singapore over PBP in the 1953 letter. In his Dissenting Opinion, he further stated that "The actions of Singapore thereafter are positively interpreted to support its claim to sovereignty while its failures to act, its omissions, are excused. Conversely, no positive legal significance is attached to Malaysia's actions, while its failures to act are seen as further evidence of its acquiescence in Singapore's claim. This is evidenced by an examination of the Court's Judgment."[72]

One can say that Judge ad hoc Dugard may have gone a bit far to view the evaluation of the conduct of the parties between 1953 and 1980 as entirely unsatisfactory. It is, however, submitted that the evaluation of at least two of the conduct of the Parties is questionable. First, the installation of the naval communication equipments by Singapore could not be taken into consideration and counted against Malaysia due to the fact that Malaysia was unaware of this fact and therefore unable to react. Secondly, in respect of Singapore's proposal to extend the island by reclamation, the Court observed that while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was public and attracted replies. The reasoning here is not strong enough and a mere tender advertisement in one country may not establish a presumption of knowledge of a foreign country. Besides, there must be reasons behind the abortion of the reclamation plan and the chief among them could be to avoid angry reaction from Malaysia. Therefore, the aborted reclamation plan should not be used against Malaysia to

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[70] Ibid., para. 219.
[71] See *Pedra Branca* Judgment, above note 4, para. 274.
[72] See Dissenting Opinion of Judge ad hoc Dugard, para. 20.

show that there was a display of sovereign authority by Singapore on PBP and Malaysia failed to object to it.

## 2. Criticism on the Court's application of the law

First of all, we need to examine the jurisprudence of the International Court of Justice in determining territorial disputes.

**A. Territorial dispute jurisprudence of the International Court of Justice**

The following are the twelve territorial disputes (apart from the case concerning *Sovereignty over Pedra Branca/ Pulau Batu Puteh*) decided by the International Court of Justice and the main principles of law applied by the Court:

(1) In *The Minquiers and Ecrehos*,[73] as there was no treaty-based title, the Court decided on the basis of the actual exercise of 'sovereign activities' or '*effectivites*' over the territory.
(2) In *Sovereignty over Certain Frontier Land (Belgium /Netherlands)*,[74] the Court relied on the Boundary Convention to decide in favour of Belgium.
(3) In the case of *Temple of Preah Vihear*,[75] the Court decided that the 1904 French-Siamese boundary treaty substantiated the Cambodian claim over the Temple and rejected Thailand's claims based on *effectivites* because Thailand's administrative acts were conducted by local authorities, were very few, and did not suffice to annul the clear impression of acceptance of the frontier line at Preah Vihear.
(4) In *Frontier Dispute (Burkina Faso/Mali)*,[76] although the parties made claims based on treaty law and *effectivites*, due to inconsistencies and gaps in record, the Court applied *equity infra legem* and divided the disputed territory in half.
(5) In *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras)*,[77] the Court grounded its decision in *uti possidetis*, when possible, and relied otherwise on postcolonial *effectivites*.
(6) In *Territorial Dispute (Libya and Chad)*,[78] the Court entirely relied on the 1955 Treaty between the two parties and held that since the treaty was clear on the boundary question, it was unnecessary for the Court to consider *uti possidetis*.
(7) In *Kasikili/Seduku Island (Botswana v Namibia)*,[79] apart from the 1890 treaty between the two countries, Namibia relied on the doctrine of 'prescription.' While making no determination of its own, the Court noted that the two parties agreed that acquisitive prescription was recognized in international law and further agreed on the four criteria to be satisfied for the establishment of such a title. The Court finally decided the dispute in accordance with the 1890 treaty.

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[73] *The Minquiers and Ecrehos*, 1953 ICJ Report 47.
[74] *Sovereignty over Certain Frontier Land (Belgium /Netherlands)*, 1959 ICJ Rep. 209.
[75] *Temple of Preah Vihear (Cambodia v Thail.)*, 1962 ICJ Rep. 6.
[76] *Frontier Dispute (Burkina Faso/Mali)*, 1986 ICJ Rep. 554.
[77] *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras*: Nicar. intervening), 1992 ICJ Rep. 351.
[78] *Territorial Dispute (Libya/Chad)*, 1994 ICJ rep. 6.
[79] *Kasikili/Seduku Island (Botswana v Namibia)*, 1999 ICJ Rep. 1045.

(8) In *Maritime Delimitation and Territorial Question (Qatar v Bahrain)*,[80] the Court accepted the sovereign authority of Sheikh of Qatar over the disputed territory and the recognition of it by the Powers such as the British and the Ottoman.
(9) In *Land and Maritime Boundary (Cameroon v Nigeria)*,[81] the Court awarded title on the basis of an international agreement and reaffirmed its holding in *Frontier Dispute* that *effectivites* are subsidiary to and unable to supersede a conventional title.
(10) In *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia)*,[82] the Court decided on the basis of peaceful and continuous exercise of 'sovereign activities' or '*effectivites*'.
(11) In *Frontier Dispute (Benin/ Niger)*,[83] the Court applied the principle of *uti possidetis juris* to determine the boundary between Benin and Niger. The legal value of postcolonial *effectivites* was also considered.
(12) In *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*,[84] although the Court reaffirmed that *uti possidetis juris* principle was applicable to the question of territorial delimitation between Nicaragua and Honduras, it concluded that the principle could not assist in the present dispute as there were no colonial *effectivités* in relation to the four disputed islands. The Court then examined the evidence submitted on post-colonial *effectivités* and found that the *effectivités* invoked by Honduras evidenced an "intention and will to act as sovereign" and constitute a modest but real "exercise of sovereign authority" over the islands.

A careful analysis of the International Court of Justice's territorial dispute jurisprudence indicates that the Court applies a three-tier, hierarchical decision rule that looks first to treaty law, then to *uti possidetis*, and finally to the actual (peaceful and continuous) exercise of 'sovereign activities' or '*effectivite`s*'.[85] The existence of a prior boundary treaty or other documentation reflecting interstate agreement as to boundaries is generally dispositive for the Court. In the absence of treaty law, the next most dispositive basis for a judgment is *uti possidetis*, if applicable. In cases that do not concern postcolonial borders and that lack manifest international agreement as to borders, the Court is most likely to base its decision on '*effectivit`es*'.

In other words, if there is no binding treaty and if *uti possidetis* is not applicable, the Court will invariably look at which party peacefully and continuously exercises 'sovereign activities' (*effectivites*) over the territory. Out of the twelve territorial disputes, the Court directly invoked, and decided on the basis of, the peaceful and continuous exercise of sovereign activities (*effectivites*) in three disputes, and partially applied this principle in one dispute. Furthermore, it was reaffirmed again and again, as a core legal principle in determining territorial disputes, in successive judgments of the Court. Not only the International Court of Justice, but other international tribunals have recognized

[80] *Maritime Delimitation and Territorial Question (Qatar v Bahrain)*, 2001 ICJ Rep. 40.
[81] *Land and Maritime Boundary (Cameroon v Nigeria)*, 2002 ICJ Rep. 303.
[82] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia)*, 2002 ICJ Rep. 625.
[83] *Frontier Dispute (Benin/ Niger)*, 2005 ICJ Rep. 90.
[84] *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, (ICJ Judgment Oct. 8, 2007).
[85] See Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice", [2004] 53 *Juke L.J.* 1779, at 1803-04.

'*effectivites*' as the crucial element of acquiring territorial sovereignty in long line of leading cases including *Island of Palmas* arbitration,[86] *Clipperton Island* arbitration,[87] *Legal Status of Eastern Greenland*,[88] and *Eritrea/Yemen*.[89]

Max Huber, in his seminal decision in the *Island of Palmas* case, ruled that "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title."[90] In the *Legal Status of Eastern Greenland*, the PCIJ laid down the two elements of acquiring sovereignty over a territory as "the intention and will to act as sovereign and peaceful and continuous display of State authority."[91] The Tribunal in *Eritrea/ Yemen* Arbitration confirmed that "the modern international law of acquisition of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis."[92] In the recent case of *Territorial and Maritime Dispute Between Nicaragua and Honduras*, the International Court of Justice reaffirmed that "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority"[93]

The required degree or extent of the exercise of sovereign activities (*effectivites)* will vary according to the nature of the territory. It is customary in the literature to identify the two traditional modes of acquisition of territory: 'occupation' and 'prescription.' Occupation is a mode of acquiring territory, which is a *terra nullius*, by means of an intention or will to act as sovereign and peaceful and continuous display of State authority. Prescription or 'acquisitive prescription' is a mode of establishing title to territory which is not *terra nullius*. The criteria to be satisfied for the establishment of such a title are: the possession must (1) be exercised *a titre de souverain*; (2) be peaceful and uninterrupted; (3) be public; and (4) endure for a certain length of time.[94]

**B. Not explicitly referring to any established mode of territorial acquisition**

In the dispute on *Sovereignty over Pedra Branca/Pulau Batu Puteh,* there was lack of conventional title and *uti possidetis* principle was also not applicable. In such a situation, according to the long established jurisprudence of the Court, the principle of law which the Court should have applied was the peaceful and continuous exercise of sovereign activities (*effectivities*). As the Court had decided in the earlier part of the judgment that

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[86] *Palmas Island* arbitration (1928) 2 RIAA 829.

[87] *Clipperton Island* arbitration, (1932) 26 AJIL 390.

[88] *Legal Status of Eastern Greenland*, (1933) PCIJ Series A/B, No. 53.

[89] *Eritrea/Yemen*, *Phase one, Territorial Sovereignty and Scope of the Dispute*, (PCA Oct. 9, 1998), 22 RIAA 209; 114, ILR 1.

[90] *Island of Palmas* case (1928) 2 RIAA, 829, at 839.

[91] *Legal Status of Eastern Greenland*, 1933, P.C.I.J., Series A/B, No. 53, pp. 45-46.

[92] *Eritrea/ Yemen*, above note 88, para. 239.

[93] *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, (ICJ Judgment Oct. 8, 2007), para. 172.

[94] *Kasikili/Seduku Island (Botswana v Namibia)*, 1999 ICJ Rep. 1045, para. 94.

PBP was not a *terra nullius* and was under the sovereignty of the Sultan of Johor (Malaysia), the appropriate traditional mode of acquiring territory would be 'acquisitive prescription.' Singapore never invoked prescription in its arguments and it did so correctly because it would fail to satisfy the four criteria stated earlier and would definitely lose the case. What is surprising is that the Court also did not rely on the idea of acquisitive prescription nor even referred to the established principle of the peaceful and continuous exercise of sovereign activities (*effectivites)* in its assessment of the applicable law for the period after 1844.[95]

According to the judgment, by 1980, sovereignty had passed to Singapore. On the basis of what principle or rule of international law did title pass from Johor (Malaysia) to Singapore? The Court did not provide a clear answer. In its review of the applicable law, the Court highlighted 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.[96] Second, title "might pass as a result of the *failure* of the State which has sovereignty to respond to conduct *a titre de souverain* of the other State,"[97] with such failure amounting to behavior "which the other party may interpret as consent."[98] The Court further stated that the absence of reaction may well amount to *acquiescence*.

The Court did not explicitly choose between these modes, but the language throughout the judgment – "evolving views,"[99] "developing understanding,"[100] "evolving understanding shared by the Parties,"[101] "Johor understood . . . [and] Singapore had no reason to doubt,"[102] and "convergent evolution of the positions of the Parties"[103]" - suggests a protracted meeting of the minds.[104] It is only from the language of the judgment that one can infer that *tacit agreement***,** as evidenced by the conduct of the parties, was the basis of the Court's judgment. Implied or tacit agreements must be approached with great caution. In such a case, both intention and terms of the agreement are inferred from the conduct of the Parties. The intention of the Parties must be manifestly clear; their conduct that constitutes the agreement must leave no room for doubt. That is why tacit agreements are difficult to establish. It explains why there is very little State practice on tacit agreements and why courts have treated such agreements with great caution.[105]

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[95] See *Pedra Branca* Judgment, above note 4, paras. 120-122.
[96] Ibid., para. 120.
[97] Ibid., para. 121.
[98] Ibid., quoting *Gulf of Maine* case.
[99] Ibid., para. 162.
[100] Ibid., para. 203.
[101] Ibid., para. 224.
[102] Ibid., para. 230.
[103] Ibid., para. 276.
[104] Judge *ad hoc* Dugard asked whether developing or evolving understandings were not just synonyms for *tacit agreement***.** Diss. Op., Dugard, J. *ad hoc*, para. 19.
[105] See , for example, in the case concerning *Rights of Nationals of the USA in Morocco*, ICJ Reports 1952, 176, at 200-202.

However, in the present case, the 1953 correspondence was riddled with uncertainties and ambiguities. The conduct of the Parties in the period 1953 to 1980 was very much equivocal. How can one establish a tacit agreement on these uncertainties?

### C. The alleged exercise of sovereign authority not sufficient and the period too short to undermine the original title

As stated earlier, Singapore's alleged exercise of sovereign authority over PBP is not sufficient and much questionable. In their joint Dissenting Opinion, Judges Bruno Simmer and Abraham pointed out that:

> Whether one examines them separately or takes an overall view, the acts accomplished by Singapore cannot be considered as constituting an indisputable and public exercise of sovereign authority against which Malaysia should have protested in order to preserve her own sovereignty over the island.[106]

It is important to be highlighted here that Singapore was not claiming sovereignty over an island which was *terra nullius*, but one under the sovereignty of Johor (Malaysia). To displace the original title of Johor (Malaysia), higher level and longer period of display of State authority is required. In case of competing claims, the following is the rule reiterated by the Court in a number of cases:

> Where the act does not correspond to the law, where the territory is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.[107]

Furthermore, Singapore's alleged exercise of sovereign authority was only for 27 years (from 1953 to 1980). Even assuming that the conduct of Singapore during this period were regarded as *a` titre de souvrain*, it concerns, as the Dissenting Judge Parra-Aranguren stated, "a period far too short and for this reason are not sufficient to undermine Johor's historic title to Pedra Branca/ Pulau Batu Puteh."[108] It was unprecedented for the Court to take account a very limited period of *effectivite`s* (between 1953-1980) as decisively supporting Singapore's sovereignty claim.

## V.Revision of the judgment: Is it possible?

Malaysia had argued that the United Kingdom built and operated Horsburg Lighthouse on PBP only after obtaining the necessary permission from the Sultan and Temengggong

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[106] Joint Dissenting Opinion of Judges Simma and Abraham, 9, para 27.

[107] Burkina Faso/ Republic of Mali, 1986 ICJ Rep. 586-87, para. 63; Territorial Dispute (Libya /Chad) 1994 ICJ Rep. 38, paras. 75-76; Land and Maritime Boundary between Cameroon and Nigeria, 2002 ICJ Rep. 303, para. 68.

[108] See Separate Opinion of Judge Parra-Aranguren, 6, para. 25.

of Johor. The Letters of permission from the Sultan and Temenggong of Johor to Governor Butterworth in Singapore, dated 25 November 1844, were presented to the Court as the evidence of consent. Malaysia wanted to find and furnish Butterworth's letter/s of request as additional evidence to corroborate its argument that the consent given by the Sultan and Temenggong did include PBP. Malaysian researchers left no stone unturned to find Butterworth letter/s of request of 1844. Unfortunately, the efforts did not yield that particular piece of evidence.[109]

Certain suggestions have been made that Malaysia should continue searching for the letter/s of request from Governor Butterworth and if found, to be used as critical evidence in support of an application to the International court of Justice to reopen the case and conduct a retrial.[110]

Although the judgment of the International Court of Justice is final and without appeal,[111] there is a revision procedure under Article 61 of the Statute of the Court, which reads as follows:

> 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.
>
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
>
> 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
>
> 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.[112]

In the *Application for the Revision of the Genocide Convention* case, the International Court of Justice formulated the conditions contemplated by Article 61 of its Statute as follows:

(1) The application should be based upon the "discovery of a "fact";

(2) The fact, the discovery of which is relied on, must be "of such a nature as to be a decisive factor".

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[109] Abdul Kadir Mohammad, *Malaysia's Experiences at the International Court of Justice*, Institute of Diplomacy and foreign Relations (IDFR), Ministry of foreign Affairs, Occasional Paper (No. 1, 2008), 17.

[110] Ibid.

[111] Article 60, Statute of the International Court of Justice

[112] Article 61, the Statute of the International Court of Justice

(3) The fact should have been "unknown to the Court and also to the party claiming revision" when the judgment was made;

(4) Ignorance of this fact must not be "due to negligence"; and

(5) The application for revision must be "made at least within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.[113]

In the same case, the Court observed that "the application for revision is admissible only if each of the conditions is satisfied. If any one of them is not met, the application must be dismissed."[114] There have been only three applications[115] for revision of the judgment of the Court throughout its history and due to the strict conditions, none of them was successful.

In the case of sovereignty over Pedra Branca/ Pulau Batu Puteh, as the Court had already concluded earlier in its Judgment that Johor was sovereign over PBP in the period before the planning for and construction of the lighthouse began, it did not consider it necessary to rule on Malaysia's argument that in the 1844 correspondence the Governor Butterworth acknowledged Johor's sovereignty over the island. The Court also noted that, looking at the contents of the reply letters, Butterworth's letters to the Sultan and Temenggong of Johor would be in the most general terms, in all likelihood without specifically identifying PBP.[116] It means that the Court did not consider Butterworth's letters as crucial in the decision of the dispute. As the letters may not satisfy the condition of '*decisive factor*" under Article 61, the value of the 1844 Butterworth letters would be uncertain even if the letter is found and the contents support Malaysia's case.

## VI. The issue of claiming an exclusive economic zone from PBP?

A week after the delivery of the ICJ's judgment, the Foreign Ministry of Malaysia asked the Malaysian media to cease using the Malay word *Pulau* ("Island") for Pedra Branca and to refer to it as "Batu Puteh" or "Pedra Branca."[117] On 21 July 2008, in response to questions from Singapore Members of Parliament about Pedra Branca, the Senior Minister of State for Foreign Affairs Balaji Sadasivan stated that the maritime territory around the island included a territorial sea of up to 12 nautical miles and an exclusive economic zone. This was condemned by the Malaysia's Foreign Minister as "against the spirit of ASEAN and the legal structure" as the claim was "unacceptable and

[113] *Application for Revision of the Judgment of 11 July 1966 in the Case Concerning Application of the Genocide Convention*, 2003 ICJ Rep. 7, para. 16.

[114] Ibid., para. 17.

[115] *Application for Revision of the Judgment of 24 Feb. 1982 in the Case Concerning Continental Shelf ( Tunisia/ Libya)* 1985 ICJ Rep. 192; *Application for Revision of the Judgment of 11 July 1966 in the Case Concerning Application of the Genocide Convention*, 2003 ICJ Rep. 7; *Application for Revision of the Judgment of 11 Sept. 1992 in the Case Concerning Land, Island and Maritime Frontier Dispute(El Salvador v Honduras)*, 2003 ICJ Rep. 392.

[116] *Pedra Branca* case, above note 4, para. 134.

[117] Lydia Lim, "Rough Seas or calm ahead?" *The Straits Times*, (31 May 2008).

unreasonable and contradicts the principles of international law".[118] In response, a Singapore Ministry of Foreign Affairs spokesman said that Singapore statements had made clear that if the limits of Singapore's territorial sea or exclusive economic zone overlapped with the claims of neighbouring countries, Singapore would negotiate with those countries to arrive at agreed delimitations in accordance with international law.[119]

In August 2008, the Malaysian Foeign Minister said Malaysia took the view that Singapore was not entitled to claim an exclusive economic zone around Pedra Branca as it considered that the maritime feature did not meet internationally recognised criteria for an island, that is, land inhabited by humans that had economic activity. Whether Singapore can claim an exclusive economic zone from Pedra Branca or not has become a sensitive issue between the two neighbours. The answer will depend on whether PBP is a full-fledged island or it is merely a 'rock' which cannot sustain human habitation or economic life of its own.

**The development of the law relating to the 'regime of island"**

Around the time of the 1930 Hague Conference, as far as international customary law was concerned, many governments thought that in order for a 'geographic' island to qualify as a "legal island" ( i.e., an island entitled to its own territorial sea), it had to be a piece of territory *capable of occupation and use*. Nevertheless, Sub-Committee II of the Second Commission (Territorial Waters) at the Hague Conference of 1930 for the Codification of International Law included a draft provision referring to 'islands' by stating: "Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark."[120]

Article 10 (1) of the Convention on the Territorial Sea and Contiguous Zone, 1958, provides: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."[121] An "island" did not need to qualify in any other manner in order to have a continental shelf. It did not need to be a certain size, be habitable, or have the capacity to support an economic life of its own.

A "radical shift in the regime of rocks and islands" occurred with the introduction of Article 121 of the United Nations Convention on the Law of the Sea, 1982, which states:

Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in

[118] Carolyn Hong, "Choppy waters around Pedra Branca again: Singapore's remark on setting up Exclusive Economic Zone sparks Malaysian media frenzy", *The Straits Times*, (25 July 2008).

[119] "MFA Spokesman 's Comments on an Exclusive Economic Zone around Pedra Branca", Ministry of Foreign Affairs, 25 July 2008

[120] Ibid.

[121] Article 10(1), the Convention on the Territorial Sea and the Contiguous Zone 1958.

accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[122]

Article 121(3) represents an entirely new rule whose language is ambiguous and vague. There is no explanation in the convention of the meaning of the three components of Article 121(3): "rock", "cannot sustain human habitation or economic life" and "of their own." Article 121(3) uses the word "or" between "human habitation" and "economic life of their own." A feature, therefore, does not need both human habitation and an economic life of its own. Only one of these qualifications must be met to remove the feature from the restrictions of Article 121(3).[123]

**What is a 'rock'?**

Critical to the identification of an Article 121(3) feature is the meaning of the term "rock." No definition is found either in the Convention or in the *travaux preparatoires*. From geographical or geological point of view, a 'rock' is "a coherent, consolidated and compact mass of mineral matter"[124] or "one of the solid materials of which the earth's crust is mainly composed, being made up of *minerals*".[125] Despite lack of legal emphasis, these definitions may assist at least in distinguishing rocks, which are solid mineral matters, from other types of marine features jutting up from the seabed. We can say that various unconsolidated features, such as masses of wet sand whose shape or location may be significantly altered by water currents, would not qualify and a bare solid granite promontory would certainly meet the definition.[126]

Thus, one might argue that, if it is not to be classified as an Article 121(3) rock, a feature must have tillable soil and sufficient potable water to sustain human habitation. This may be implicit in the use of the word 'rock,' which suggests a largely solid, virtually impermeable mass. Perhaps the phrase "human habitation or economic life of its own" is not an additional qualification but merely a further description of what a 'rock' is understood to be from a legal perspective. For example, one might take the position that, in its natural state, the feature must be uninhabitable in terms of traditional considerations of ability to sustain crops and to supply water for independent human survival. Certainly, this is a reasonable interpretation that would add a level of stability to the provision.[127] Unfortunately, no reference to this view, however, is found in the *travaux preparatoires*.[128]

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[122] Article 121, the United Nations Convention on the Law of the Sea 1982.

[123] Jonathan I. Charney, "Rocks That Cannot Sustain Human habitation", (1999) 93 *AJIL* 863- 877, at 866.

[124] See John B. Whittow, *The Penguin Dictionary of Physical Geography*, (1984) 458-59.

[125] W.G. Moore, The Penguin Dictionary of Geography, 186 (7th. ed., 1988) 186.

[126] See, Charney, above note 123, at 870.

[127] Ibid.

[128] Third United Nations Conference on the Law of the Sea, Official Records, (United Nations, New York) Vol. II, 288.

**Meaning of "cannot sustain human habitation or economic life of their own"**

Brown raises interesting points in his discussion of human habitation or economic life. When discussing the issue of when a rock is uninhabitable, Brown suggests:

> The absence of sweet water might provide such a test; but what if supplies reach the rock from the mainland or a desalination plant is installed? ... Must the rock be able to produce the minimum necessities of life independent of outside supplies before it can be regarded as habitable? Would the presence of a lighthouse keeper, supplied from [outside the rock], provide evidence of habitability?[129]

In the Spratly islands dispute, the six disputing states[130] have attempted to demonstrate that the rocks may have an economic life of their own by, *inter alia*: occupying and fortifying the rocks where possible; creating structures and markers; creating scientific research stations of sorts; allowing tourists and journalists to visit the rocks; and granting concessions to oil companies.[131]

Brown refers to the Resolution of the 1923 Imperial Conference of the British Empire on the question of the limits of territorial waters, which states: "The word 'island' covers all portions of territory permanently above high water in normal circumstances and *capable of use or habitation*."[132] An explanatory memorandum, setting forth the drafters' intent, reads:

> 22. The phrase "capable of use or habitation" has been adopted as a compromise. It is intended that the words "capable of use" should mean capable, *without artificial addition*, of being used throughout all seasons for some definite commercial or defence purpose, and that "capable of habitation" should mean capable, *without artificial addition*, of permanent human habitation.[133]

The addition of the phrase "*without artificial addition*" would have assisted our quest for a proper interpretation of Article 121(3). Some writers have interpreted this requirement to mean that the economy must be self-supporting. Bowett, for example, states that "The phrase 'of their own' means that a State cannot avoid a rock being denied both an EEZ and a shelf by interjecting an artificial economic life, based on resources

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[129] E.D. Brown, *International Law of the Sea*, vol. I, Introductory Manual (Dartmouth: Aldershot, 1994) at 150.

[130] China, Taiwan, Vietnam, Philippines, Malaysia, and Brunei. See Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea", 25 *Ocean Dev. & Int'l L.* 61, at 62-68 (1994) (citing Dato' Haji Mohammad Ali bin Alwi, "Conflicting Claims in the South China Sea", *Asian Def. J.* 10 (June 1992))

[131] Mark J. Valencia, "Spratly Solution Still at Sea", 2 *The Pac. Rev*. 155, 158 (1993).

[132] Brown, above note 129, at 151 (citing Imperial Conference 1923, Report of Inter-Departmental Committee on the Limits of Territorial Waters (Document T.118/118/380 (1924), Public Record Office Ref. F.O. 372/2108 at 5.) [Emphasis added.]

[133] Ibid.

from its other land territory."[134] Van Dyke and Brooks hold the same view and suggest that "to pass the test in Article 121(3) rocks should be able to sustain a stable community using the features' resources *without outside support*."[135] Clagett is of the view that it would be an abuse of the Convention for a State to introduce a population, supplied from outside, for the purpose of defeating the habitation and economic life tests.[136]

In fact, the words "of their own" naturally and ordinarily mean that "no State may artificially create the necessary conditions. Nor may States artificially extend the rocks for the purposes of delimitation."[137] This is because under Article 60, artificial islands may not have a territorial sea or even affect the EEZ delimitation.

On the other hand, there are writers who oppose this view. For Kwiatkowska and Soons, "a lighthouse or other aid to navigation built on an island (rock) gives a rock an economic life of its own in its value to shipping, ocean sports and so forth.[138] This view, however, is somewhat doubtful as economic life naturally and ordinarily means 'of a commercial nature.'

The views of jurists on the meaning of "sustain human habitation or economic life of their own" are divided. In any case, the better view, which can maintain stability and avoid unending disputes, is that the marine feature must be capable of sustaining human habitation or economic life of its own at the time of the claim and not because of artificial additions or support from the main land.

**Decisions of international tribunals and the practice of States**

Elferink and Charney have found that international tribunals have not relied on the interpretation of Article 121(3) in any of their decisions.[139] Until now, there has not yet been any concrete decision of the international tribunals on the issue of whether a maritime feature is merely a 'rock' (within the meaning of article 121(3)) or an island qualified to have an exclusive economic zone of its own.[140]

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[134] D.W. Bowett, *The Legal Regime of Island in International Law* (New York: Oceana Publication, 1979), quoted in V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World*, 2nd. ed. (Leiden: Martinus Nijoff Publishers, 2005), 79.

[135] J.M. Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", (1983) *Ocean Development International Law Journal*, 12, 265-84.

[136] B.M. Clagett, "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea", Part I (1995), *Oil and Gas Law and Taxation Review*, 13, 375-79.

[137] David Attard, *The Exclusive Economic Zone in International Law*, (Oxford: Clarendon Press, 1987) 259-60.

[138] B. Kwiatkowska and A.H.A. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own" (1990) *Netherlands Yearbook of International Law*, XXI, 139-81.

[139] A.G.O. Elferink, "Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Process", (1998) *Boundary and Security Bulletin* 6(2), 58-68; Charney, above note 123, 863-78.

[140] A mere reference to Article 121(3) can be found in the Declaration by Judge Evensen in the *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, 1993 ICJ Rep. 38, at 84-85, without any comment or interpretation.

State practice in this respect is also not reliable and rather controversial. A number of States have claimed EEZs around islands which could be regarded as uninhabitable rocks.[141] At the same time, one can see serious protests or objections made by neighbouring or interested States against such unilateral claims. Spratly Island dispute is a good example. Another precedent is the Rockall dispute. When Britain established the 200-mile exclusive fishery zone in 1976 around the minute islet of Rockall, it was met with protests from several States.[142] When it acceded to the UNCLOS in 1997, Britain gave up its 200-mile claim and confirmed the 12-mile territorial sea.[143]

A more recent confrontation over 'rocks' is the so-called "*Okinotori Shima dispute*" between Japan and China. The two rocks, known as 'Okinotori Shima,'[144] lie in the Western Pacific Ocean,[145] approximately 1,082 miles south of Tokyo. The smaller of the two is roughly the size of a twin bed and pokes only 2.9 inches out of the ocean. The larger, as big as a small bedroom, manages to rise up to 6.3 inches. Japan has declared, unilaterally, that the two rocks were islands: and therefore, are entitled to their own exclusive economic zones. This would allow Japan a vast area of economic control (i.e. 160,000 square miles of ocean) to the exclusion of other nations. China challenges the unilateral declaration of Japan, primarily relying on Article 121(3) of the UNCLOS, although it recognizes Japan's territorial right to the two rocks. These competing claims between Japan and China could lead even to an armed conflict.[146]

**When should Article 121(3) be applied?**

First it is necessary to make an assessment of the location of the insular feature. If the feature lies very close, say within 12 nautical miles to the mainland, there is no need to continue the debate over whether it is a full-fledged island or a rock incapable of human habitation or economic life. Kwiatkowska and Soons agree that Article 121(3) does not take precedence over articles dealing with baselines from which maritime claims are measured.

> The clear objective of the rocks-principle is to prevent maritime expansionism by limiting the capacity of rocks to generate extended areas of EEZ and CS… this would seem to allow the assertion that Article 121, paragraph 3, has in principle no bearing on the determination of baselines…. Thus islands in the vicinity of the coast are subjected to the principles and rules enunciated with regard to the baselines… and the question of whether

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[141] R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd. ed., (Manchester University Press, 1999), 164.

[142] Regarding Rockall and the conflicting UK, Danish and Icelandic views, see E.D. Brown, "Rockall and the Limits of National Jurisdiction of the UK", (1978) 2 *Marine Policy*, 181-211.

[143] See further R. R. Churchill, "United Kingdom Accession to the UN Convention to the Law of the Sea", (1998) 13 *IJMCL* 263, at 271-3.

[144] It can be translated into English as "Island of the Sea birds".

[145] Norimitsu Onishi, "Japan and China Dispute a Pacific Islet", N.Y. Times, July 10, 2005, at 4.

[146] L. Diaz, B.H. Dubner and J. Parent, "When is a 'Rock' an 'Island'? – Another Unilateral Declaration Defies 'Norms' of International Law," (2007) 15 Michigan *State Journal of International Law*, 519, at 519-20.

> they are rocks within the meaning of Article 121 paragraph 3 could be regarded as irrelevant.[147]

**Concluding remarks**

Whether Singapore can claim an exclusive economic zone from PBP or not is merely academic. It depends on what type of maritime feature is PBP. An outright rejection of PBP as an island is a sheer misconception. The definition of 'island' under Article 121(1) is simple and clear: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." A 'rock' definitely is also an 'island' if it is surrounded by, and permanently above, sea water. Not all rocks are disqualified by Article 121(3). Only those rocks that cannot sustain human habitation and economic life of their own are disqualified and cannot have EEZ or continental shelf. Therefore, the name or how we call the maritime feature (whether we call it an island or a rock) does not matter. The decisive factor is whether that maritime feature is permanently above sea water and can sustain human habitation or economic life of its own.

It is common knowledge that PBP is entirely made of granite rock (no land, no trees that can naturally sustain human habitation). The International Court of Justice has in fact pronounced PBP "*a granite island*"[148] and described it as a "*tiny uninhabited and uninhabitable island*".[149] If one applies the better view stated earlier, it appears that PBP is incapable of sustaining human habitation and economic life "of its own."

The most crucial question between Malaysia and Singapore is in fact delimitation of maritime boundary (in particular the territorial sea limit). Singapore cannot claim EEZ from PBP not merely because PBP is a granite rock incapable of human habitation or economic life of its own but all the more because PBP is within the territorial sea 12 nautical miles of the Mainland Malaysia and even up to 5 nautical miles to the east of PBP is still within the radius of the Malaysian territorial sea limit. The two countries, therefore, seriously need to sit down and negotiate to determine the territorial sea limits in accordance with relevant rules of international law.

## VII. Delimitation issues

Middle Rocks and South Ledge are maritime features located respectively at 0.6 and 2.2 nautical miles from PBP. Middle Rocks consist of some rocks that are permanently above water whereas South Ledge is a low-tide elevation. In the absence of proof to the effect that the ancient and original title of the Sultan of Johor over Middle Rocks had passed to Singapore like in the case of PBP, the Court adjudged that sovereignty over Middle Rocks remained with Malaysia. Since *South Ledge* is a low tide elevation and not an island, a specific legal principle applies. A low tide elevation is owned by the state in the territorial waters of which it is located. South Ledge now falls within the overlapping territorial waters of the main land Malaysia, PBP and Middle Rocks. The Court was not

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[147] Kwiatkowska and Soons, above note 137, at 147-48.
[148] *Pedra Branca Judgment*, above note 4, para. 16.
[149] Ibid., para. 66.

asked by the parties to delimit their territorial waters and as there are overlapping territorial waters in the area, the Court left open the question of sovereignty over South Ledge, which is to be determined by the parties themselves in future by delimiting their overlapping territorial waters.

There are a number of legal implications that may arise from the Judgment of the International Court of Justice.

## 1. Delimitation of the territorial sea

The legal position of South Ledge will depend entirely on the delimiting the territorial waters between the two countries. It is, therefore, an urgent need for Malaysia and Singapore to negotiate the delimitation of territorial waters, especially in the area around the three maritime features. The next question that needs to be answered is how to delimit the territorial waters between the two countries. Article 15 of the United Nations Convention on the Law of the Sea, 1982 provides that:

> Where the coasts of the two Stats are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.[150]

The answer is simply and clear. First of all, the two countries have to delimit their territorial sea by means of negotiation, trying to reach an agreement. Failing agreement, no State is entitled to claim more than beyond the median line every point of which is equidistant from the nearest point on the base lines of the two countries.

The general rule for the delimitation of the territorial sea, therefore, is '*equidistance principle*', that is, to draw a median line every point of which is equidistant from the nearest point on the base lines of the two countries. The exception, however, is to take into consideration "*special circumstances*," such as the presence of off shore islands, the general configuration of the coast, or claims on the basis of historic title.[151] In the 1974 Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries, for example, a '*modified median line*' was used, to take account of historic factors. In the *Guinea/Guinea-Bissau* case,[152] the tribunal decided that all delimitations had to be measured against the single goal of producing an '*equitable solution*' in the circumstances of each case.

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[150] Article 15, the United Nations Convention on the Law of the Sea, 1982.
[151] See Churchill and Lowe, above note 141, at 183.
[152] *Guinea/Guinea-Bissau Maritime Boundary Arbitration* (1985) 25 ILM 251.

In the Boundary agreements with neighbouring countries, Malaysia normally applies 'equidistance principle.'[153] This is also in line with the Declaration made by Malaysia at the time of its ratification of UNCLOS.[154] Negotiations between Malaysia and Singapore for maritime boundary delimitation should be based on equidistance principle, subject to special circumstances of the two countries, in order to reach an equitable solution for both countries.

## 2. The legal significance of South Ledge

According to the Judgment of the Court, Middle Rocks belongs to Malaysia. South Ledge is a low tide elevation which is located at a distance of 2.2 nautical miles from PBP and only 1.6 nautical miles from the Middle Rocks but the location is in such a way that Middle Rocks are in-between PBP and South Ledge and thus the territorial sea of PBP is totally blocked by the territorial sea of Middle Rocks to have any effect to South Ledge. Furthermore, South Ledge is within the double territorial seas of the mainland Malaysia and Middle Rocks. The inevitable conclusion is that South Ledge squarely lies within the territorial sea of Malaysia and belongs to Malaysia.

Although South Ledge is a low tide elevation, it is legally significant for the following provisions of the UN Convention on the Law of the Sea.

> Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breath of the territorial sea from the mainland or an island, the low water line on that elevation may be used as the baseline for measuring the territorial sea.[155]

A low tide elevation is not an island and thus cannot have the territorial sea of its own. But if it is within the territorial sea of a State, that State can use it as a baseline for measuring its territorial sea and thus increase its territorial sea limit. It is, therefore, very much significant for Malaysia to have South Ledge within its territorial sea because Malaysia can claim12 more nautical miles measuring from South Ledge as a base point.

## 3. The need for close cooperation on the basis of mutual understanding

Is a unilateral measure of either party possible pending proper delimitation? The answer is in the negative. This is the main reason why a Joint Technical Committee has been established, consisting of senior officials of the two countries. Since the three maritime features are too close to each other, unilateral action is out of the question and negotiation and full cooperation is required in whatever measure taken by either party. Of course, the delimitation of the territorial sea is the major and the most challenging issue for Malaysia and Singapore. The other outstanding issues, however, include the rights of fishermen,

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[153] See, for example, Treaty between the Republic of Indonesia and Malaysia on the Delimitation of Boundary Lines of Territorial Waters of the Two Nations in the Straits of Malacca, 1970, Article 1.

[154] See Declaration made by Malaysia at the Time of Its Ratification of the United Nations Convention on the Law of the Sea, 1982, 14 October 1996, para. 7.

[155] Article 13 (1), *ibid.*

naval patrols, security matters, prevention of marine pollution, and traffic separation of thousands of vessels entering the Strait of Singapore.

## VIII. Conclusion

The Judgment of the Court in the case concerning *Sovereignty over Pedra Branca/ Pulau Batu Puteh* is obviously unprecedented and appears to be a bit controversial as the Court did not justify its judgment in terms of accepted principles of international law governing acquisition of title to territory. The Court failed to explain how sovereignty over the island passed from Johor (Malaysia) to Singapore. *Tacit agreement* and some sort of *acquiescence* on the part of Malaysia could be the basis for the Court's Judgment. We have to wait and see how this decision of the Court on the basis of tacit agreement will create a new precedent in future.

The judgment has far-reaching implications for both Malaysia and Singapore as it creates overlapping territorial waters, leaving sovereign rights of the two States unresolved, in an area which is strategically extremely important. The most crucial question between Malaysia and Singapore is in fact delimitation of maritime boundary (in particular the territorial sea limit) rather than whether Singapore can claim an exclusive economic zone from PBP or not. Negotiations between Malaysia and Singapore for maritime boundary delimitation should be based on equidistance principle, subject to special circumstances of the two countries, in order to reach an equitable solution for both countries.

Since Middle Rocks, which is under the Malaysian sovereignty, lie in-between Pedra Branca and South Ledge and blocks any expansion of territorial waters from Pedra Branca, it is clear that South Ledge squarely falls within the territorial waters of Malaysia and Malaysia can expand its territorial sea limits from South Ledge, which is a low-tide elevation. Although the delimitation of the territorial sea is the major and the most challenging issue for Malaysia and Singapore, there are also other outstanding issues such as the rights of fishermen, naval patrols, security matters, prevention of marine pollution, and traffic separation scheme for ships. To tackle all these issues will definitely require close cooperation and mutual understanding between the two neighbours.