

## Current Legal Developments

### International Court of Justice

---

#### ***Pedra Branca* Judgment and Beyond: Issues and Challenges in its Implementation by Malaysia and Singapore**

#### **Introduction**

On 23 May 2008, the International Court of Justice (the Court) announced its decision on a territorial dispute between Singapore and Malaysia concerning the three marine features of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, which lie in the Straits of Singapore. The Court awarded Pedra Branca (PB) to Singapore, Middle Rocks to Malaysia, and South Ledge to the state in whose territorial waters it was located.

The Court's ruling on the three maritime features is of crucial importance to Singapore and Malaysia, because having resolved the question of which State has sovereignty over PB and Middle Rocks, the Court has paved the way for the resolution of the delimitation of the maritime boundaries between the two States. However, this matter, and South Ledge's legal status, still need to be further worked out by the "Joint Technical Committee" the two States have subsequently set up for the purpose. Moreover, the Court's judgment and subsequent decisions by the Joint Technical Committee affect the exercise of sovereign rights in those waters, such as the conduct of naval patrols, navigational aids, protection of the marine environment and the exploitation of natural resources. Another vital complexity is how Indonesia's maritime rights generated by its islands in the Straits of Singapore will be negotiated with Singapore and Malaysia.

## The Judgment of the Court

Situated at the eastern entrance of the Straits of Singapore, PB is a small granite island lying approximately 24 nautical miles (nm) to the east of Singapore and 7.7 nm to the south of the Malaysian state of Johor.<sup>1</sup> Middle Rocks is located 0.6 nm to the south of PB and consists of two clusters of small rocks that are permanently above water. South Ledge, at 2.2 nm to the south-southwest of PB, is a rock formation only visible at low tide (See Fig. 1).<sup>2</sup>

In its Judgment of 23 May 2008, the Court split its analysis of the legal status of PB into two periods: pre- and post-1844.<sup>3</sup> After examining the historical facts, the Court ruled that the Sultanate of Johor (predecessor to Malaysia) had original title to PB.<sup>4</sup> However, the Court considered that the 1953 response by the Acting State Secretary of Johor to a letter sent by the Singapore Colonial Secretary, stating that the Johor Government does not

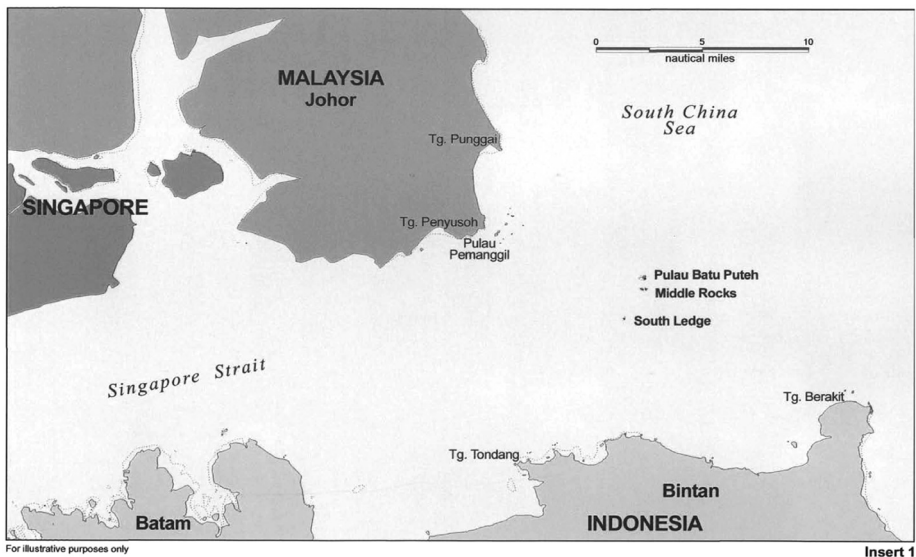


Fig. 1. The sketch map; the three features subject of the present dispute.

<sup>1</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, paras. 16–18 [hereinafter *Pedra Branca Judgment*]

<sup>2</sup> See Fig. 1, the sketch map.

<sup>3</sup> Abdul Ghafur Hamid, “After the Hague It Is Time to Move On”, *New Straits Times* Sunday (25 May 2008).

<sup>4</sup> *Pedra Branca Judgment*, *op. cit.*, *supra* note 1 at para. 69.

claim ownership of PB,<sup>5</sup> was of central importance for determining the *developing understanding of the two Parties* about sovereignty over PB.”<sup>6</sup>

Then the Court reviewed the conduct of the parties after 1953. The Court was able to find several instances of conduct by Singapore taken *à titre de souverain* that supported Singapore’s case. The Court also found Malaysian conduct in a few instances to constitute recognition of Singapore’s sovereignty over PB. The Court further noted that Malaysia had taken no action on the island for at least a century and that Malaysia never protested any of Singapore’s various acts that could well have indicated its exercise of sovereignty.<sup>7</sup> In light of the above, the Court declared that Singapore held sovereignty over PB.<sup>8</sup>

As for Middle Rocks, the Court held that they had the “same legal status as [PB] as far as the ancient original title . . . was concerned”<sup>9</sup> but that as the circumstances which effected the passing of title of PB to Singapore did not apply here, thus Middle Rocks were to remain under Malaysian sovereignty.<sup>10</sup>

With respect to South Ledge, the Court held that as it was a low-tide elevation with its own peculiar complexities, it cannot be assumed to constitute ‘territory’ in the same sense as an island.<sup>11</sup> Moreover, the Court recalled that it had not been called upon by Malaysia and Singapore to delimit the territorial waters of the area in question. Hence, the Court concluded that South Ledge belonged to the State “in the territorial waters of which it is located”.<sup>12</sup>

## Implementation of the Judgment

The immediate post-judgment reactions of Singapore and Malaysia were mixed. While it did not win all three features it claimed before the Court, Singapore was quietly satisfied at having had its sovereignty over PB confirmed, as this was the main issue in dispute. The then Malaysian Foreign Minister, Datuk Seri Rais Yatim, hailed the judgment as “win-win” for both sides. Nonetheless, Malaysia registered more disappointment with the

---

<sup>5</sup> *Ibid.*, at para. 196; Memorial of Malaysia, Vol. 3, Ann. 69; Memorial of Singapore, Vol. 6, Ann. 96.

<sup>6</sup> *Pedra Branca* Judgment, *op. cit.*, *supra* note 1 at para. 203 [emphasis added].

<sup>7</sup> *Ibid.*, at paras. 274–75.

<sup>8</sup> *Ibid.*, at para. 277.

<sup>9</sup> *Ibid.*, at para. 290.

<sup>10</sup> *Ibid.*, at para. 278.

<sup>11</sup> *Ibid.*, at para. 295–6, referring to the 2001 judgment on the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.

<sup>12</sup> *Ibid.*, at para 299.

judgment. Thus, the former Malaysian Prime Minister, Abdullah Badawi, admitted sadness upon hearing the news and acknowledged that it would naturally be a hard blow to Johoreans, as they had considered the three maritime features to be part of the historical Sultanate of Johor. The Sultan of Johor, Sultan Iskandar Ismail, has even declared to the Johor State Assembly that he will do his utmost to restore Batu Puteh (PB) to his sovereignty.<sup>13</sup>

*Revision of the Judgment: Is it Possible?*

Malaysia had argued before the Court that the United Kingdom built and operated the Horsburg Lighthouse on PB only after obtaining the necessary permission from the Sultan and Temenggong of Johor in 1844. This was done via correspondence between the British Governor Butterworth and the Sultan and Temenggong. However, Malaysia was unable to provide evidence in support of this contention.<sup>14</sup> Suggestions have been made that Malaysia should continue searching for the letter of request from Governor Butterworth, and, if found, use this as the basis for an application to revise the judgment.<sup>15</sup>

Although the judgment of the Court is final and without appeal,<sup>16</sup> there is a revision procedure under Article 61 of the Statute of the Court. The main conditions contemplated by this Article include the discovery of a fact which is a 'decisive factor', and application for revision to be made within 10 years from the date of the judgment.<sup>17</sup> It is unlikely that the above evidence would meet the requirements of Article 61.<sup>18</sup> In its judgment, the Court concluded that Johor was sovereign over PB in the period before the construction of the lighthouse, and it did not consider it necessary to rule on Malaysia's argument that the 1844 correspondence acknowledged Johor's sovereignty over the island. The Court also noted, looking at the contents of the reply letters, that Governor Butterworth's letters to the Sultan and Temenggong of Johor would appear to be in the most general terms, in all likelihood without specifically

<sup>13</sup> Siti Nurbaiah Nadzmi, "Sultan To Reclaim Pedra Branca 'Whatever It Takes'," *New Straits Times* (20 June 2008).

<sup>14</sup> 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) at 17.

<sup>15</sup> *Ibid.*

<sup>16</sup> Article 60, Statute of the International Court of Justice, *Acts and Documents concerning the Organization of the Court*, United Nations, New York, Sales No 917 (2007).

<sup>17</sup> *Application for Revision of the Judgment of 11 July 1966 in the Case Concerning Application of the Genocide Convention* (Bosnia v. Yugoslavia) [2003] ICJ Rep. 77, para. 16.

<sup>18</sup> See Mohammad, *op. cit.*, *supra* note 14 at 17.

identifying PB.<sup>19</sup> This indicates that the Court did not consider Governor Butterworth's letters as crucial to the resolution of the dispute.

### *Fortifying Sovereignty over Middle Rocks*

In order to show its sovereignty over Middle Rocks, Malaysia has announced plans to develop the two rocks by merging them. However, no specifics were given on how and when this will be done. Malaysian former Foreign Minister Rais Yatim told the Malaysian media, “[t]here are a lot of benefits in joining the rocks but I can't tell you specifically what. Definitely when you join two points, it will become something bigger.”<sup>20</sup> For the time being, the Malaysian national flag—Jalur Gemilang—has been raised on Middle Rocks.<sup>21</sup>

### *Singapore's EEZ Claim*

Soon after pronouncement of the judgment, the Malaysian Foreign Ministry requested the domestic media to refer to PB as “Batu Puteh” instead of the usual Malaysian name of “Pulau Batu Puteh”.<sup>22</sup> By omitting the word “Pulau” (the Malay word for “island”), Malaysia is clearly taking the position that PB is not an island, but merely a rock, thus it cannot generate an exclusive economic zone (EEZ). For its part, Singapore has always referred to PB as an island.

On 21 July 2008, in response to questions from Singapore Members of Parliament about PB, the Singaporean Minister of State for Foreign Affairs stated that “Singapore is claiming a territorial sea and an Exclusive Economic Zone around Pedra Branca.”<sup>23</sup> Due to an intense media frenzy, the Singapore

---

<sup>19</sup> *Pedra Branca* Judgment, *op. cit.*, *supra* note 4 at para. 134.

<sup>20</sup> “From Rocks to Island”, *The Utusan Malaysia* (3 June 2008), quoting Rais as saying that the bigger rock (or island) has the potential to have a weather station and marine observatory centre.

<sup>21</sup> Anis Ibrahim, “Jalur Gemilang on Middle Rocks”, *New Sunday Times* (15 June 2008), stating that “Malaysia asserted its authority over Middle Rocks yesterday, raising a flag on the highest point of the outcrop. National Security Council Secretary Datuk Muhammad Hatta Ab Aziz led a team of government officers to the area. Raising the flag, he said, was the first step Malaysia is taking to show its presence on Middle Rocks, or Batuan Tengah. ‘We may consider building some structures here, although we will need to look into the type of structures.’”

<sup>22</sup> Lydia Lim, “Pedra Branca Ruling: Rough Seas or Calm Ahead,” *The Straits Times*, Insight, S10 (31 May 2008).

<sup>23</sup> “Transcript of Senior Minister-of-State Balaji Sadasivan's replies to Parliamentary Questions and a Supplementary Question”, 21 July 2008, *Ministry of Foreign Affairs, Singapore, Press Release*, 21 July 2008; [http://app.mfa.gov.sg/2006/press/view\\_press.asp?post\\_id=4202](http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=4202) .

Ministry of Foreign Affairs (MFA) cleared the air by stating that Singapore was not taking a new position but merely reiterating what it had indicated in the Press Statements by the MFA dated 15 September 1980 and 23 May 2008, namely that Singapore has a territorial sea limit that extends up to a maximum of 12 nm and an EEZ. The Singapore MFA clarified its position by stating that “should the limits of our territorial sea or Exclusive Economic Zone overlap with the claims of neighboring countries, Singapore will negotiate with those countries with a view to arriving at agreed delimitations in accordance with international law.”<sup>24</sup>

Whether or not Singapore can claim an EEZ off PB has become a sensitive issue between Malaysia and Singapore. The answer will depend on whether PB is a full-fledged island or merely a ‘rock’ which cannot sustain human habitation or economic life of its own.<sup>25</sup> The views of jurists on the meaning of “sustain human habitation or economic life of their own” are divided.<sup>26</sup> The present writer’s view, which is designed to promote stability and avoid unending disputes, is that the marine feature must naturally be capable of sustaining human habitation or economic life on its own at the time of the claim and not because of subsequent, artificial additions or support from the mainland. It is common knowledge that PB consists entirely of granite rock. It has no soil or trees, or other natural features that can be used to sustain human habitation. Indeed, the Court pronounced PB to be “a granite island”<sup>27</sup> and described it as a “tiny uninhabited and uninhabitable island”.<sup>28</sup> If one applies the above interpretation of Article 121(3), it seems clear that PB is incapable of sustaining human habitation and economic life “on its own” and is therefore incapable of generating an EEZ.

### *The Legal Significance of South Ledge*

South Ledge is a low-tide elevation located at a distance of 2.2 nm from PB and only 1.6 nm from Middle Rocks. It potentially falls within the three

<sup>24</sup> “MFA Spokesman’s Comments on an Exclusive Economic Zone around Pedra Branca”, *Ministry of Foreign Affairs, Singapore, Press Release*, 25 July 2008; [http://app.mfa.gov.sg/2006/press/view\\_press.asp?post\\_id=4255](http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=4255).

<sup>25</sup> See Article 121(3), United Nations Convention on the Law of the Sea 1982.

<sup>26</sup> See, for example, E.D. Brown, *International Law of the Sea*, vol. I, Introductory Manual (Dartmouth: Aldershot 1994) at 150; J.M. Van Dyke and R.A. Brooks, ‘Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources’ (1983) 12 *ODIL* 265–84; D. Attard, *The Exclusive Economic Zone in International Law* (Oxford: Clarendon Press 1987) 259–60; 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) 21 *Netherlands Yearbook of International Law* 139–81.

<sup>27</sup> *Pedra Branca Judgment*, *op. cit.*, *supra* note 1 at para. 16.

<sup>28</sup> *Ibid.*, at para. 66.

territorial seas, those pertaining to mainland Malaysia, Middle Rocks and PB. South Ledge is located to the south-west of Middle Rocks and thus is 'cut off' from the possible territorial sea of PB by Middle Rocks. As such it seems likely that it falls within the territorial sea of Middle Rocks as the closest maritime feature capable of generating territorial sea. However, it remains open to negotiations between Malaysia and Singapore to finally determine this issue because the Court merely declared it to be subject to the sovereignty of the State within whose territorial waters it is located, without specifying this State.

Although South Ledge is a low-tide elevation, it is legally significant under Article 13(1) of the UN Convention on the Law of the Sea.<sup>29</sup> 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 the breadth of its territorial sea. It is, therefore, significant for Malaysia to have South Ledge within its territorial sea and it could have an impact on maritime delimitation. Nevertheless, how much impact it could have would depend on delimitation negotiations whereby the parties would have to agree to give South Ledge half an effect or no effect at all.

#### *The Joint Technical Committee and the Implementation of the Judgment*

Although there were some political reactions in the immediate aftermath of the judgment, both Malaysia and Singapore have reiterated their commitment to honour and abide by the judgment and to fully implement it. The two countries met on 3 June 2008 in Singapore and set up the Malaysia-Singapore Joint Technical Committee (MSJTC) to that effect. The meeting agreed on three points. First, a technical sub-committee on joint survey works will be established to pave the way toward future discussions on maritime issues in the area. Second, both Singapore and Malaysia are to aid distressed vessels in the seas around PB, Middle Rocks and South Ledge. Third, both Singaporean and Malaysian fishermen can continue with their regular fishing practices in these waters.

The second meeting of the MSJTC was held in Putra Jaya, Malaysia, on 20 August 2008. In the third meeting held in Singapore on 5 January 2010, the MSJTC reviewed the work of the Sub-Committee on Joint Survey Works and agreed that the Sub-Committee should continue to hold discussions in the following weeks to finalise technical preparations relating to the Joint Hydrographic Survey. The Meeting also reviewed the work of the Sub-Committee on Maritime & Airspace Management and Fisheries. The fourth meeting of the MSJTC was held on 26–27 July 2010 in Kuala Lumpur to further

---

<sup>29</sup> United Nations Convention on the Law of the Sea (done at Montego Bay), 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* 1261 (1982).

discuss the implementation of the Judgment. The Committee commended the Sub-Committee on Joint Survey Works for completing the drafting of the Memorandum of Understanding (MoU) on the Joint Hydrographic Survey in and around PB and Middle Rocks, which will just have to go through the internal approval processes in both countries. Both sides were pleased with the progress made by the Joint Technical Committee.<sup>30</sup> The MoU was signed by representatives from the two countries at the fifth meeting of the MSJTC on 2 December 2010.

It is uncertain as to when and how Singapore and Malaysia intend to delineate the waters and thus resolve South Ledge's status. A further challenging issue is whether Malaysia and Singapore are willing to include Indonesia in the talks, as the latter also maintains maritime claims in the Straits of Singapore which may overlap with those of Malaysia and Singapore.

## **Conclusions**

The slow beginning to the work of the MSJTC has since gained momentum as a result of the liberal approach by the new Prime Minister of Malaysia, Datuk Seri Najib Tun Razak, and the warmer bilateral ties between the two neighbours. The MoU on the Joint Hydrographic Survey in and around PB and Middle Rocks is the first, but crucial, step towards successful implementation of the judgment by the Court. It has paved the way for the next step of determining the status of South Ledge, and then the final step of delimitation of the maritime boundary between the two countries. Although Malaysia and Singapore prefer bilateral negotiations, Indonesia has expressed its interest in being included in the talks on the ground that its maritime interests in the Strait of Singapore crosscut those of Malaysia and Singapore.

**Abdul Ghafur Hamid**

Professor of Law and Coordinator of International Law and Maritime Affairs  
Research Unit of the International Islamic University Malaysia,  
Kuala Lumpur, Malaysia

---

<sup>30</sup> Joint Press Statement by HE Dato' Seri Anifah Aman, Minister of Foreign Affairs of Malaysia and HE George Yeo, Minister for Foreign Affairs of the Republic of Singapore, 29 July 2010, Ministry of Foreign Affairs Singapore, [http://app.mfa.gov.sg/2006/press/view\\_press.asp?post\\_id=6240](http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=6240).