

COMMENTARY

Passing of Sovereignty:

The Malaysia/Singapore Territorial Dispute before the ICJ

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1. INTRODUCTION

The 2008 *Malaysia/Singapore* case before the International Court of Justice relates to the dispute concerning territorial sovereignty over three maritime features in the Straits of Singapore, namely Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge.¹ Pedra Branca/Pulau Batu Puteh (hereafter Pedra Branca) is a granite island, measuring 137 m long, with an average width of 60 m.² It is situated at the eastern entrance of the Straits of Singapore – one of the busiest maritime passages in the world. 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 Indonesian island of Bintan. Middle Rocks consists of two clusters of small rocks that are permanently above water, and is located 0.6 nautical miles to the south of Pedra Branca. South Ledge is a low-tide elevation and lies at 2.2 nautical miles to the south-south-west of Pedra Branca.³

On 21 December 1979, Malaysia published a map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia.” The map depicted the island of Pedra Branca as lying within Malaysia’s territorial waters. By a diplomatic note dated 14 February 1980, Singapore rejected Malaysia’s claim to Pedra

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¹ The text of the judgment is available at www.haguejusticeportal.net/eCache/DEF/9/227.html. The analysis of this contribution relies on the electronic version of the judgment. The page numbers quoted in this paper are the numbers of the electronic text.

² The names Pedra Branca and Batu Puteh mean ‘white rock’ in Portuguese and Malay, respectively. *Ibid.*, p. 11, para. 17. Under Article 3 of the Special Agreement, the order of the use of the names Pedra Branca/Pulau Batu Puteh or vice versa shall not affect the question of sovereignty to be determined by the ICJ. Because of the limited space, this contribution will use the term “Pedra Branca.”

³ The *Malaysia/Singapore* judgment, p. 11, paras. 16-18. Under Article 13 (1) of the 1982 UN Convention on the Law of the Sea, a low-tide elevation is defined as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.”

Branca and requested that the 1979 map be corrected. Malaysia and Singapore attempted in vain to settle the dispute through a series of bilateral negotiations from 1993-1994. 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 negotiations, the Parties signed a Special Agreement on 6 February 2003 (entered into force on 9 May 2003) and submitted the dispute to the International Court of Justice (hereafter the ICJ or the Court) on 24 July 2003.⁴ Thus, under Article 2 of the Special Agreement, the Court was requested to determine whether sovereignty over Pedra Branca, Middle Rocks and South Ledge belongs to Malaysia or Singapore.⁵

As the Court included upon the Bench no judge of the nationality of either of the Parties, Malaysia chose Mr. Christopher John Robert Dugard and Singapore Mr. Sreenivasa Rao Pemmaraju as judges *ad hoc*. Since Judge Higgins recused herself from participating in the present case pursuant to Article 17 (2) of the Statute of the ICJ, the Vice-President, Judge Al-Khasawneh exercised the functions of the presidency for the purposes of the case.⁶ Against that background, this contribution seeks to succinctly overview the *Malaysia/Singapore* case.⁷

2. CRITICAL DATE

In the context of a territorial dispute, the critical date upon which the dispute crystallized is of particular importance.⁸ As stated in the 2002 *Indonesia/Malaysia* judgment,⁹ the Court cannot take into consideration acts having taken place after the critical date. With regard to the dispute as to sovereignty over Pedra Branca, the Court considered 14 February 1980, the time of Singapore's protest in response to Malaysia's publication of the 1979 map, as the critical date. Furthermore, the Court concluded that the dispute as to sovereignty over Middle Rocks and South Ledge crystallized on 6 February 1993.¹⁰

⁴ *Ibid.*, p. 16, paras. 30-31; p. 5, para. 1.

⁵ *Ibid.*, p. 6, para. 2.

⁶ *Ibid.*, p. 8, paras. 7-8.

⁷ Thus, examination of each and every issue of this case is beyond the scope of this contribution.

⁸ Sir Gerald Fitzmaurice defined the critical date as "the date after which the actions of the parties can no longer affect the issue." Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1 (Cambridge, Cambridge University Press 1995) p. 261. According to Thirlway, the critical date purports to enable a judge to exclude from consideration acts which are likely to have been performed in order to consolidate a State's own view as to its rights in an area where it is known that these are disputed. H Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part Seven," (1996) 66 *British Yearbook of International Law*, p. 33. See also MG Kohen, *Possession contestée et souveraineté territoriale* (Paris, PUF, 1997) pp. 169-183; LFE Goldie, "The Critical Date," (1963) 12 *ICLQ*, pp. 1251-1284.

⁹ ICJ Reports 2002, p. 682, para. 135.

¹⁰ The *Malaysia/Singapore* judgment, pp. 16-17, paras. 32-36.

3. SOVEREIGNTY OVER PEDRA BRANCA

Sovereignty over Pedra Branca is the central issue of the present case. While Singapore argued that the legal status of Pedra Branca was that of *terra nullius*,¹¹ Malaysia maintained that it had an original title to Pedra Branca of long standing.¹² Thus, an arising question was whether Malaysia has established its claim over the island. In this respect, a principal issue relates to the question whether the Sultanate of Johor – a predecessor of Malaysia – had sovereignty over Pedra Branca.

On this issue, the ICJ examined three letters, all from 1824, written by the British Resident in Singapore as well as an article from the Singapore Free Press dated 25 May 1843. In light of these documents, the Court considered that:

[F]rom 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.¹³

The Court also noted the fact that throughout the entire history of the old Sultanate of Johor, there is no evidence that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore.¹⁴ Hence, the Court concluded that the Sultanate of Johor had original title to Pedra Branca.¹⁵ In addition, the Court found that the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut – “the people of the sea” who were engaged in various activities in the waters in the Straits of Singapore – confirms the ancient original title of the Sultanate of Johor to islands in the Straits of Singapore, including Pedra Branca.¹⁶

By the 1824 Anglo-Dutch Treaty, the old Sultanate of Johor was divided into the Sultanate of Johor with Sultan Hussein as its sovereign and the Sultanate of Riau-Lingga with Sultan Abdul Rahaman as its sovereign.¹⁷ In relation to this, a question was raised as to whether the original title was affected by the developments in the period 1824 to 1840.¹⁸ This question includes two different issues: (i) whether the sovereign entity of the Sultanate of Johor continued to exist as the same legal entity after the division; and (ii) whether the territorial domain of the “new Sultanate of Johor” included Pedra Branca.¹⁹

¹¹ Reply of Singapore, pp. 36-37; CR2007/28 (Pellet), pp. 37-51, paras. 1-29.

¹² Memorial of Malaysia, Vol. I, pp. 3-6, paras. 5-12; Reply of Malaysia, pp. 25-52, paras. 54-109; CR2007/24 (Crawford), pp. 57-66, paras. 1-22; CR 2007/25 (Crawford), pp. 12-24, paras. 1-34.

¹³ The *Malaysia/Singapore* judgment, p. 23, para. 59.

¹⁴ *Ibid.*, pp. 23-24, paras. 62-68.

¹⁵ *Ibid.*, p. 25, para. 69.

¹⁶ *Ibid.*, pp. 25-26, paras. 70-75.

¹⁷ *Ibid.*, p. 31, para. 98.

¹⁸ *Ibid.*, p. 28, para. 80.

¹⁹ *Ibid.*, para. 85.

Concerning the first issue, the Court concluded from the documentary evidence submitted by Malaysia that the Sultanate of Johor continued to exist as the same sovereign entity throughout the period 1512 to 1824.²⁰ In relation to the second issue, Singapore argued that the 1824 Treaty left the entire Straits open for access; and that since Pedra Branca had become *terra nullius* as a result of the disappearance of the “old Sultanate of Johor” by the division of the Kingdom, there was a legal vacuum with regard to sovereignty over Pedra Branca, leaving room for the “lawful possession” of the island by the British during the period of 1847-1851.²¹ Ultimately, the ICJ did not admit the argument of Singapore. According to the Court, Article 12 of the 1824 Anglo-Dutch Treaty would suggest that all the islands and islets, including Pedra Branca, within the Straits fell on the British side of the dividing line of the spheres of influence. Consequently, the legal status of Pedra Branca remained as it had been, i.e. part of the territorial domain of what continued to be called the “Sultanate of Johor” after the division of the old Sultanate.²² In conclusion, the Court held that:

Malaysia has established to the satisfaction of the Court that [...] when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty over the Sultan of Johor.²³

The next issue is whether Malaysia has retained sovereignty over Pedra Branca following 1844 or whether the sovereignty has since passed to Singapore.²⁴ In fact, Singapore contended that it acquired sovereignty over Pedra Branca in 1844 on the basis of the construction and operation of Horsburgh lighthouse on the island as well as various other actions.²⁵ In response to this question, the ICJ particularly examined the conduct of the Parties relating to Pedra Branca in some detail.

In this context, an important element is the construction and commissioning of Horsburgh lighthouse on Pedra Branca by the United Kingdom between 1850-1851. Malaysia argued that the conduct of the United Kingdom and Singapore related only to the construction and commissioning of the lighthouse and later operating it with the consent conferred by the Sultan of Johor and the Temenggong in November 1844; and that they were not actions intended to acquire sovereignty over Pedra Branca.²⁶ By contrast, Singapore contended that the United Kingdom acquired title to the island in the period of 1847-1851 by taking lawful possession of the island in connection with building the lighthouse on it.²⁷ In this regard,

²⁰ *Ibid.*, para. 86.

²¹ *Ibid.*, p. 30, para. 94; Counter-Memorial of Singapore, pp. 30-31, paras. 3.22-3.24.

²² The *Malaysia/Singapore* judgment, p. 32, para. 100.

²³ *Ibid.*, p. 36, para. 117. However, Judge *ad hoc* Sreenivasa Rao was not supportive of the Court’s view. Separate Opinion of Judge *ad hoc* Sreenivasa Rao, para. 27.

²⁴ The *Malaysia/Singapore* judgment, p. 36, paras. 118-119.

²⁵ *Ibid.*, p. 36, para. 118; Memorial of Singapore, pp. 29-137, paras. 5.1-6.122.

²⁶ Memorial of Malaysia, Vol. I, pp. 53-81, paras. 104-177; Counter-Memorial of Malaysia, pp. 33-37, paras. 63-72; CR 2007/25 (Mr. Kohen) pp. 62-63, paras. 85-91.

²⁷ Memorial of Singapore, pp. 86-87, paras. 5.112-5.114; CR2007/21 (Mr. Brownlie), pp. 34-69, paras. 1-154. See also the *Malaysia/Singapore* judgment, p. 46, para. 150.

the ICJ did not draw any conclusions about sovereignty on the basis of the construction and commissioning of the lighthouse, while the Court 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 1950.²⁸

Thus, the central question is whether the conduct of the Parties after the construction of the lighthouse on Pedra Branca provides a basis for the passing of sovereignty over the island from Johor to the United Kingdom, Singapore's predecessor. In this respect, the 1953 correspondence is of central importance. On 12 June 1953, the Colonial Secretary of Singapore sent a letter to the British Adviser to the Sultan of Johor, writing that:

It is [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 ceded²⁹ by the Government of the State of Johore or in any other way disposed of.

In a letter dated 21 September 1953, the Acting State Secretary of Johor replied as follows:

I have the honour to refer to your letter ...dated 12th June 1953, 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*.³⁰

The opinions of the Parties were sharply divided with respect to the significance and interpretation of this correspondence. In particular, two issues must be highlighted.

The first issue is whether the Acting State Secretary had the legal capacity to write the 1953 letter. In this regard, the Court did not uphold the Malaysian argument that the Acting State Secretary did not have the authority and capacity to write the 1953 letter.³¹

The second issue concerns the interpretation of the word "ownership" in the reply of Johor. While in law "ownership" is distinct from "sovereignty," the ICJ took the view that in international litigation, "ownership" over territory has sometimes been used as equivalent to "sovereignty".³² According to the Court, in light of the context of the request by Singapore, it is evident that the letter addresses the issue of sovereignty over the island. Accordingly, the Court held that: "Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh."³³

²⁸ *Ibid.*, p. 49, para. 162.

²⁹ *Ibid.*, p. 56, para. 192.

³⁰ Emphasis added. *Ibid.*, para. 196.

³¹ *Ibid.*, p. 61, paras. 217-220.

³² *Ibid.*, pp. 61-62, para. 222. However, this interpretation was criticized by Judge *ad hoc* Dugard. Dissenting Opinion of Judge *ad hoc* Dugard, para. 10.

³³ The *Malaysia/Singapore* judgment, p. 62, para. 223; p. 63, para. 230. See also Separate Opinion of Judge *ad hoc* Sreenivasa Rao, para. 35.

Further to this, the Court examined the various conduct of the Parties after 1953.³⁴ The Court ruled that the following actions of Singapore can be seen as conduct *à titre de souverain*:

- (i) investigation by Singapore of shipwrecks in the waters around Pedra Branca/Pulau Batu Puteh,
- (ii) Singapore's exercise of exclusive control over visits to the island,
- (iii) the installation by Singapore of military communications equipment on the island in 1977, and
- (iv) proposed reclamation by Singapore to extend the island.

In addition, the Court considered that the following actions of the Parties gave some weight to Singapore's case or signified the failure of Malaysia's argument. These actions include:

- (i) the display of the British and Singapore ensigns on Pedra Branca/Pulau Batu Puteh,
- (ii) the delimitation of Malaysia's territorial sea in 1969,
- (iii) the inclusion of Horsburgh lighthouse as a "Singapore" Station in the 1959 Malaysian report and the 1966 joint report and its omission from the 1967 Malaysian report, and
- (iv) official maps.

On the basis of the above considerations, the Court was obliged to respond to the question of whether sovereignty over Pedra Branca passed to the United Kingdom or Singapore. In this respect, the Court recalled the position of the Acting Secretary of State of Johor in 1953 that Johor did not claim ownership of Pedra Branca. According to the Court, "[t]hat statement has major significance."³⁵ The Court also stressed that the conduct of the United Kingdom and Singapore includes acts *à titre de souverain*; and that Malaysia and its predecessors did not respond in any way to that conduct. In addition to this, the Johor authorities and their successors took no action at all in respect to the island from June 1850 for the whole of the following century or more.³⁶ Overall, the Court considered that the relevant facts reflect "a convergent evolution" of the positions of the Parties concerning title to Pedra Branca. Hence, the Court concluded, by twelve votes to four that by 1980 sovereignty over Pedra Branca had passed to Singapore.³⁷

³⁴ The *Malaysia/Singapore* judgment, pp. 64-74, paras. 231-272.

³⁵ *Ibid.*, p. 75, para. 275.

³⁶ *Ibid.*, paras. 274-275.

³⁷ *Ibid.*, paras. 276-277. Dissenters are: Judges Parra-Aranguren, Simma, Abraham and Judge *ad hoc* Dugard.

4. SOVEREIGNTY OVER MIDDLE ROCKS AND SOUTH LEDGE

Concerning the legal status of Middle Rocks and South Ledge, basically Singapore argued that sovereignty over these marine features comes with sovereignty over Pedra Branca. According to Singapore, whoever owns the island owns Middle Rocks and South Ledge because they are dependencies of the island of Pedra Branca.³⁸ On the other hand, Malaysia claimed that Middle Rocks and South Ledge have always been considered as features falling within Johor/Malaysian jurisdiction. Malaysia also argued that Singapore not only failed to protest against Malaysia's manifestations of sovereignty, but did not advance any claims of its own to Middle Rocks and South Ledge either.³⁹

The ICJ held that as far as the ancient original title held by the Sultan of Johor was concerned, Middle Rocks should be understood to have had the same legal status as Pedra Branca. In relation to this, the Court clearly confirmed that the particular circumstances concerning Pedra Branca which have come to affect the passing of title to the island to Singapore do not apply to other maritime features, namely, Middle Rocks and South Ledge. Hence, the Court concluded, by fifteen votes to one that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.⁴⁰

On the other hand, the legal status of South Ledge must be distinguished from that of Middle Rocks, because South Ledge is a low-tide elevation. In this regard, the Court recalled the 2001 *Qatar/Bahrain* case which stated that:

It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.⁴¹

The Court also noted that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca and Middle Rocks. Thus, the Court found, by fifteen votes to one, that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.⁴² In so ruling, it may be said that like the *Qatar/Bahrain* judgment, the Court, in the *Malaysia/Singapore* case, did not assimilate low-tide elevations to land territory or islands.⁴³

³⁸ Memorial of Singapore, p. 180, para. 9.7.

³⁹ Memorial of Malaysia, pp. 129-134, paras. 286-300; the *Malaysia/Singapore* judgment, pp. 76-77, paras. 279-287.

⁴⁰ *Ibid.*, pp. 77-78, paras. 289-290. Judge *ad hoc* Sreenivasa Rao voted against this part of the judgment.

⁴¹ ICJ Reports 2001, p. 102, para. 206.

⁴² The *Malaysia/Singapore* judgment, pp. 78-80, paras. 291-299. Judge Parra-Aranguren voted against the judgment.

⁴³ Concerning the territoriality of low-tide elevations, see Y Tanaka, "Low-Tide Elevations in International Law of the Sea: Selected Issues," (2006) 20 *Ocean Yearbook*, pp. 198-207.

5. SOME REMARKS ON THE *MALAYSIA/SINGAPORE* JUDGMENT

As territory is one of the fundamental elements of States, the determination of the spatial ambit of territorial sovereignty is of vital importance in international law. Thus, clarification of rules applicable to the acquisition of territory is of central importance in the international legal system.⁴⁴ There appears to be little doubt that the ICJ has an important role to play in the development of the international law on acquisition of territory. In fact, it can be observed that the Court is developing the law in a way that differs from the traditional modes of acquisition.⁴⁵

A remarkable feature of the *Malaysia/Singapore* judgment relates to the passing of legal title from Malaysia, i.e. the original title holder, to Singapore by the conduct of the Parties. Relating to this, it must be recalled that a distinction was made between the creation of a new right and the existence of the right in the *Island of Palmas* case.⁴⁶ The ICJ, in the present case, appeared to give more weight to the existence of the right. According to the Court's approach, much weight would be given to "the continuous and peaceful display of territorial sovereignty."⁴⁷ It appears that the *Malaysia/Singapore* judgment provides an interesting precedent pertaining to the *loss* of territory in international law.

In light of the need to preserve the stability and certainty of State sovereignty, the process of passing of a legal title over territory from a State possessing the original title to another State will invite careful consideration. Considering this issue, the relationship between legal title and *effectivités* must be noted.⁴⁸ In this regard, the ICJ, in the 1986 *Frontier Dispute* judgment between Burkina Faso/Republic of Mali, made clear that:

⁴⁴ P Reuter, *Droit international public* (Paris, PUF, 1993) pp. 25-26.

⁴⁵ In the textbooks of international law in English, normally five modes of the acquisition of territory are described: (i) occupation of *terra nullius*, (ii) cession, (iii) conquest, (iv) accretion and (v) prescription. See for instance, J.L Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn (Oxford, Clarendon Press, 1963) p. 163; P Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn (London and New York, Routledge, 1997) pp. 147-154; I Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Oxford University Press 2003) pp. 126-127; M Shaw, *International Law*, 5th edn (Cambridge, Cambridge University Press, 2003) p. 417. In practice, however, the traditional modes of acquisition of territory were not applied by international courts and tribunals. Shaw, *ibid.*, p. 417; Brownlie, *supra* note 45, p. 127; M Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford, Clarendon Press, 1986) p. 17.

⁴⁶ The *Island of Palmas* award, p. 845. Available at: <http://www.haguejusticeportal.net/eCache/DEF/6/142.html>.

⁴⁷ *Ibid.*, p. 839.

⁴⁸ On this issue, see in particular, MG Kohen, "La relation titre/effectivités dans le contentieux territorial à la lumière de la jurisprudence récente," (2004) 108 *RGDIP*, pp. 562-595. Concerning the concept of legal title, see G Distefano, "La notion de titre juridique et les différends territoriaux dans l'ordre international," (1995) 99 *RGDIP*, pp. 335-366; by the same writer, *L'ordre international entre légalité et effectivité: le titre juridique dans le contentieux territorial* (Paris, PUF, 2002); by the same author, "The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law," (2006) 19 *Leiden Journal of International Law*, pp. 1041-1075; H Post, "International Law Between Dominion and Imperium: Some Reflections on the Foundations of the International Law of Territorial Acquisition," TD Gill and WP Heere (eds.),

Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which 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. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivité* can then play an essential role in showing how the title is interpreted in practice.⁴⁹

This formula was echoed by the 1994 *Libya/Chad*,⁵⁰ the 2002 *Indonesia/Malaysia*,⁵¹ and the 2002 *Cameroon/Nigeria* judgments.⁵² In the *Malaysia/Singapore* dispute, Singapore's *effectivités* do not correspond to the law, because Malaysia established its original title over Pedra Branca. Hence, according to the formula of the Court, preference must be given to Malaysia.

As Judges Simma and Abraham pointedly observed, it is arguable that an original title of a State cannot be passed to another State, unless there is consent of the holder of the legal title to the cession of that title to another State.⁵³ In relation to this, the ICJ, in the present case, explicitly stated that:

[A]ny passing of sovereignty over territory on the basis of the conduction of the Parties [...] must be manifested clearly and without any doubt by that conduct and the relevant fact.⁵⁴

Thus, an essential question is whether there was a clear manifestation of the Parties in order to pass sovereignty over Pedra Branca from Malaysia to Singapore.

In this regard, the Court's interpretation of the 1953 correspondence written by the Acting State Secretary of Johor will have particular importance for years to come. As explained earlier, the Court gave "major significance" to the correspondence. Nonetheless, it would appear that the Court's interpretation leaves some room for discussion. For example, given that, as the Court held, Johor did have title to Pedra Branca, it would appear difficult to consider from Acting State Secretary of Johor's correspondence that as of 1953 Johor understood that it did not have sovereignty over the island.⁵⁵ Does the 1953 correspondence amount to a "renunciation" or "abandonment" of sovereignty by Johor? The

Reflections on Principles and Practice of International Law, (The Hague *et al*, Kluwer, 2000) pp. 147-173.

⁴⁹ ICJ Reports 1986, pp. 586-587, para. 63.

⁵⁰ ICJ Reports 1994, p. 38, paras. 75-76.

⁵¹ ICJ Reports 2002, p. 678, paras. 125-126.

⁵² ICJ Reports 2002, p. 353, para. 68. On the other hand, the Eritrea-Ethiopia Boundary Commission took a different view. Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, (2002) 41 *ILM*, pp. 1057-1134. Concerning a critical analysis on this decision, see Kohen, *supra* note 48, pp. 565-572.

⁵³ Joint Dissenting Opinion of Judges Simma and Abraham, para. 13. See also the *Cameroon/Nigeria* case (Merits), ICJ Reports 2002, pp. 353-354, paras. 68-70.

⁵⁴ The *Malaysia/Singapore* judgment, p. 37, para. 122.

⁵⁵ Separate Opinion of Judge Parra-Aranguren, para. 13. In this regard, Judges Simma and

answer would be no. Indeed, Singapore has never argued that Johor abandoned or relinquished its title to Pedra Branca in 1953.⁵⁶ Considering that the Sultan of Johor was not a fully independent State but a protectorate, it may also be debatable that the Acting State Secretary of Johor had the authority to pronounce on matters of sovereignty.⁵⁷ The ICJ itself made clear that Johor was merely asked for information, and Johor's denial of ownership "cannot be interpreted as a binding undertaking."⁵⁸ In light of the uncertainty over the 1953 correspondence, opinions may be divided with respect to the legal effect of this document.

Further to this, the concept of an "evolving understanding shared by the Parties" or a "convergent evolution of the position of the Parties" will require further consideration. Basically the Court appeared to examine a series of events as the formation of the "evolving views" or "evolving understanding shared by the Parties" about sovereignty over Pedra Branca.⁵⁹ Although the Court did not define the precise meaning of this concept, it may be argued that this concept is essentially equivalent to tacit agreement between the parties arising from their conduct.⁶⁰ According to the *dictum* of the Court, arguably the evolving understanding must be "manifested clearly and without any doubt" through the conduct of the Parties. Yet there appears to be scope to reconsider the question whether the evolving understanding of the Parties was clearly formulated with respect to the title over Pedra Branca in the period from 1953 to 1980.⁶¹

Finally, some mention should be made of acquisitive prescription in the *Malaysia/Singapore* case. In this case, Singapore carefully avoided the reference to the notion of prescription,⁶² and this point was confirmed by Malaysia.⁶³ Consequently, the ICJ did not examine the role of prescription in the *Malaysia/Singapore* dispute. However, some members of the Court addressed this issue in their Dissenting Opinions. In this regard, Judge *ad hoc* Dugard took the view that

Abraham regarded Johor's reply as an error. Joint Dissenting Opinion of Judges Simma and Abraham, para. 24.

⁵⁶ Separate Opinion of Judge Parra-Aranguren, paras. 7-8; Dissenting Opinion of Judge *ad hoc* Dugard, para. 18. In practice, an example of abandonment of territorial sovereignty may be furnished by the Nicobar Islands. See G Marston, "The British Acquisition of the Nicobar Islands, 1869: A Possible Example of Abandonment of Territorial Sovereignty," (1998) 69 *British Yearbook of International Law (BYIL)*, pp. 245-265.

⁵⁷ Dissenting Opinion of Judge *ad hoc* Dugard, paras. 14-16. See also Declaration of Judge Ranjeva, paras 5-6.

⁵⁸ The *Malaysia/Singapore* judgment, p. 63, para. 229.

⁵⁹ *Ibid.*, p. 49, para. 162.

⁶⁰ Dissenting Opinion of Judge *ad hoc* Dugard, para. 37. Concerning the concept of acquiescence in some detail, see IC MacGibbon, "The Scope of Acquiescence in International Law," (1954) 31 *BYIL*, pp. 143-186.

⁶¹ *Cf.* Dissenting Opinion of Judge *ad hoc* Dugard, para. 41. In addition to this, Judge Parra-Aranguren argued that the actions of Singapore "concern a period far too short and for this reason are not sufficient to undermine Johor's historical title to Pedra Branca/Pulau Batu Puteh." Separate Opinion of Judge Parra-Aranguren, para. 25.

⁶² CR 2007/22 (Mr. Bundy), p. 29, para. 69.

⁶³ Counter Memorial of Malaysia, p. 4, para. 6; CR 2007/26 (Sir Elihu Lauterpacht), p. 35, para. 1.

Singapore's argument was similar to prescription.⁶⁴ Judges Simma and Abraham echoed this view.⁶⁵ While the validity of acquisitive prescription as a mode of the acquisition of territory has been the subject of extensive discussion,⁶⁶ Judges Simma and Abraham specified four conditions of the application of acquisitive prescription:

- (i) effective exercise of State authority and intention to conduct *à titre de souverain*,
- (ii) peaceful and continuous exercise of State authority,
- (iii) public exercise of authority *à titre de souverain*,
- (iv) enduring for a long length of time.⁶⁷

By applying these criteria, Judges Simma and Abraham concluded that a claim on the basis of prescription would have been unsuccessful.⁶⁸ Judge *ad hoc* Dugard reached the same conclusion.⁶⁹

As with all types of law, the antithesis between stability and change is a fundamental issue underlying international law of acquisition of territory. This will produce a difficult question how it is possible to reconcile the requirement of stability of sovereignty and change of circumstances with the passage of time. The *Malaysia/Singapore* judgment will provide an important example for discussion in this matter.

⁶⁴ Dissenting Opinion of Judge *ad hoc* Dugard, para. 31.

⁶⁵ Joint Dissenting Opinion of Judges Simma and Abraham, para. 14.

⁶⁶ For instance, Johnson confirmed the existence of a doctrine of acquisitive prescription as a rule of international law, while Brownlie questioned the role of the doctrine. DHN Johnson, "Acquisitive Prescription in International Law," (1950) 27 *BYIL*, pp. 332-354; Brownlie, *supra* note 45, pp. 145-150. For a recent study of acquisitive prescription along with bibliography, see R Kolb, "La prescription acquisitive en droit international public," in Université de Neuchâtel (ed.) *Le temps et le droit* (Bâle, 2008) pp. 149-175.

⁶⁷ Joint Dissenting Opinion of Judges Simma and Abraham, para. 17. Johnston also specifies similar conditions. *Supra* note 66, pp. 344-348. See also the *Kasikili/Sedudu Island* case, ICJ Reports 1999, p. 1103, para. 94.

⁶⁸ Joint Dissenting Opinion of Judges Simma and Abraham, para. 19.

⁶⁹ Dissenting Opinion of Judge *ad hoc* Dugard, para. 33.