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Turkish Naval War Collage, Turkey

**A CASE STUDY OVER THE CONCEPT OF “EFFECTIVITÉS” TO
DECIDE SOVEREIGNTY OVER DISPUTED ISLANDS:
MALAYSIA/SINGAPOR**

Abstract:

The International Court of Justice (ICJ) announced its verdict on a territorial dispute between Singapore and Malaysia on 23 May 2008, involving the three marine features of Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge. Consequently, Pedra Branca/Pulau Batu Puteh awarded to Singapore and Middle Rocks to Malaysia. The Court found that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.

In this Case, the ICJ decided by following a specific method; first, it described the geographical context, and next gave an overview of the complex historical background, then examined the positions of the Parties, legal status of the islands and applicable law, finally took the conduct of the Parties into consideration for the purpose of assessing and validating effectivités. Effectivités of the Parties seem to be decisive and have a direct effect on the verdict in this Case. This study shows that some categories of effectivités are legally significant and demonstrate à titre de souverain, but some are not. Additionally, it points out that not to protest the opponent’s activities with respect to the maritime features in dispute is seen as “implied recognition” by the Court.

Keywords:

Effectivités, Disputed Island, Sovereignty, International Court of Justice, Malaysia/Singapore Case, Pedra Branca/Pulau Batu Puteh

JEL Classification: K33

1 Introduction

Malaysia and Singapore litigated to the International Court of Justice (ICJ, hereinafter the Court) on 24 July 2003,¹ and requested the Court to determine whether sovereignty over Pedra Branca/Pulau Batu Puteh² (hereinafter Pedra Branca³), Middle Rocks and South Ledge belongs to Malaysia or Singapore.

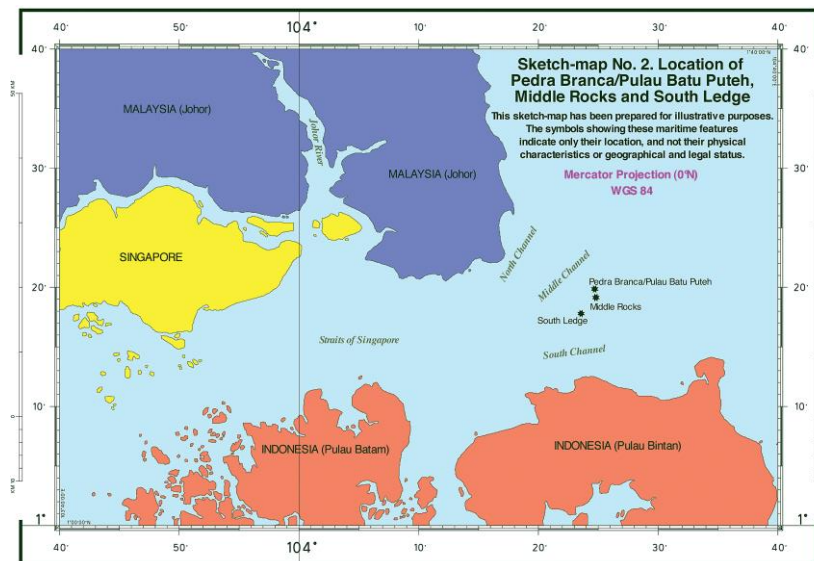
The Court announced the judgment on 23 May 2008. It decided that Singapore has the sovereignty over Pedra Branca, Malaysia has the sovereignty over Middle Rocks, and sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.⁴

In this paper, I'm going to start with a short summary of the Malaysia/Singapore Case in which I will describe the geography, history of the dispute, positions of the Parties, legal status of the island, and applicable law. Then, we'll examine the concept of effectivités and effectivités on Malaysia/Singapore Case. Finally, we are going to sum up the effectivités, positions of Parties, the Court's comments and legal consequences in the Malaysia/Singapore Case in a table.

2 Summary of the Malaysia/Singapore Case

2.1 Geography

Map 1: Location of Pedra Branca, Middle Rocks, and South Ledge



Source: *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore)*, Judgment of 23 May 2008, p.24.

¹ Special Agreement: For submission to the International Court of Justice of the dispute between Malaysia and Singapore Concerning the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, 24 July 2003. Available from: ICJ, <http://www.icj-cij.org/docket/files/130/1785.pdf>. [Accessed:30th November 2012]

² The name which Singapore uses Pedra Branca means "white rock" in Portuguese, and the name which Malaysia uses Pulau Batu Puteh means "white rock island" in Malay.

³ Because the Court awarded Pedra Branca/Pulau Batu Puteh to Singapore, Pedra Branca is preferred as the name.

⁴ *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore)*, Judgment of 23 May 2008, para.300. Available from: ICJ, <http://www.icj-cij.org/docket/files/130/14492.pdf>. [Accessed:30th November 2012]

Pedra Branca is a rocky island, covering approximately an area of a football field. It is located at the eastern entrance of the Straits of Singapore. It's approximately 7.7 nautical miles away from Malaysia, and 24 nautical miles from Singapore. There is a lighthouse on Pedra Branca, which was constructed in 1851 and named "Horsburgh". Middle Rocks consists of two separated small rocks which are permanently above water, and located 0.6 nautical miles south of Pedra Branca. South Ledge is a low tide elevation⁵ located at 2.2 nautical miles southwest of Pedra Branca.

2.2 History of the Dispute

Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia" on 21 December 1979. The map showed Pedra Branca within Malaysia's territorial waters.⁶ Singapore rejected the map by a diplomatic Note on 14 February 1980 and requested that the map be corrected.⁷ Afterward, the Parties held a series of bilateral negotiations in 1993-1994, which didn't end up with a solution. The question of the sovereignty of Middle Rocks and South Ledge was also raised during the first discussion in February 1993. No progress could be achieved from negotiations, thus the Parties accepted to bring the dispute before the Court.⁸

The Court decided that the dispute crystallized for Pedra Branca on 14 February 1980 when Singapore protested Malaysia's 1979 map.⁹ For Middle Rocks and South Ledge, it was decided that the dispute crystallized on 6 February 1993 when the question of the sovereignty of them was raised.¹⁰

2.3 Positions of the Parties

Malaysia argues that originally it has the sovereignty of Pedra Branca. Malaysia's sovereignty over it never passed to another State. Singapore's presence on the island is with Malaysia's permission and solely with the intention to construct and maintain the lighthouse.¹¹ Additionally, the island has never been considered as *terra nullius* and, therefore, can't be achieved through occupation.¹²

Singapore claims that Pedra Branca is selected for building the lighthouse with the authorization of the British Crown and this demonstrates sovereignty. Moreover, title to the island is obtained by the British Crown in conformity with the law and since has been well kept by the British Crown and its lawful successor Singapore.¹³

⁵ 1982 United Nations Convention on the Law of the Sea (UNCLOS), A/CONF. 62/122(1982), 21 International Legal Material 1261. Available from: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. [Accessed:30th November 2012] Article 13(1): "A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide."

⁶ Memorial of Singapore, 25 Mart 2004, Volume 1, para. 2.9, Map 8. Available from: ICJ <<http://www.icj-cij.org/docket/files/130/14133.pdf>. [Accessed:30th November 2012]

⁷ Para. 30, supra note 5.

⁸ Ibid, para.31.

⁹ Ibid, para.34.

¹⁰ Ibid, para.36.

¹¹ Ibid, para.37.

¹² Ibid, para.38.

¹³ Ibid, para.39.

2.4 Legal Status of the Island

The Court analyzed approximately five hundred years of history, including not only Malaysia and Singapore but also Sultanate of Johor and Britain as predecessors.

The Sultanate of Johor based sovereignty on the Southeast Asia since its establishment in 1512. This area of sovereignty comprises the islands of the area where Pedra Branca is located. Pedra Branca has always been known as a danger to navigation, so, it is not *terra incognita*. Examining the relation between the Sultanate of Johor and the Orang Laut,¹⁴ the Court decided that the Sultanate of Johor had the original title of those islands, including Pedra Branca.¹⁵

The Sultanate of Johor's sovereignty over the area continued between 1512 and 1824. With the Anglo-Dutch Treaty, the region was divided into two parts; Dutch and British sphere of influences in 1824. Additionally, the Sultan and the Temenggong¹⁶ of Johor and the East India Company signed the Crawford Treaty, which provides a full concession of Singapore to the East India Company, together with all the islands at a distance of 10 miles of Singapore.

The Court decided that *Pedra Branca was under the sovereignty of the Sultan of Johor when the British started their preparations for the construction of the lighthouse in 1844.*¹⁷ And the Court stated that related facts must be estimated by reference to the governing principles and rules of international law to decide whether Malaysia has kept in possession over Pedra Branca after 1844 or whether sovereignty has since passed to Singapore.¹⁸

2.5 Applicable Law

Sovereignty might be passed by means of an agreement which might be either in the form of a treaty or be tacit and result from the conduct of the Parties. International law does not enforce a rigid form but emphasizes on the purposes of the Parties. Sovereignty over an island might under particular conditions pass because of the lack of objection of a sovereign State to the activities of the other State which demonstrates sovereignty. The absence of a response may add up to implicit acceptance. Which means, "*Silence may also speak, but only if the conduct of the other State calls for a response.*"¹⁹

¹⁴ The term Orang Laut literally means the people of the sea. They live and travel in their boats on the sea nomadically and engage in fishing and piracy in the Straits of Singapore.

¹⁵ Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Summary of the Judgment of 23 May 2008, p.5. Available from: ICJ <http://www.icj.org/docket/files/130/14506.pdf>. [Accessed:30th November 2012]

¹⁶ A Malay high-ranking official.

¹⁷ P.6, supra note 17.

¹⁸ Ibid, p.7.

¹⁹ Ibid, p.7.

3 The Concept of Effectivités

Effectivités, *state acts manifesting a display of authority on a given territory*²⁰, are used as an argument when claiming sovereignty. Presence or absence of effectivités might be of conclusive significance for the objective estimation of legal situations. Effectivités isn't the only criteria to understand legal situation, and usually it's not a justification *per se*. It's only legally relevant to the extent that the legal situation allows it. Effectivités alone doesn't create rights as a result of a mere factual event.²¹

There must be two elements of a claim to sovereignty based on a continued display of authority when there isn't a specific act or title like a treaty of concession. These elements are *the intention and will to act as sovereign*, and *some actual exercise or display of such authority*.²² If the actions are made by a sovereignty will, directly related to that island, and carried out clearly the Court evaluates them as legally significant. Moreover, if one Party doesn't object to the activities of another Party, it's considered as implied acceptance of the sovereignty.

The Court's decisions must be read in that way that the Parties display few actual exercise of sovereignty in many cases. This is especially true for unsettled or sparsely populated islands.²³ Small islands which aren't inhabited or haven't economic life of their own, mainly, don't become a subject of a dispute till the Parties have a quarrel about the delimitation of maritime borders.²⁴ Thus, concerning such very small islands effectivités will usually be rare.²⁵ The Court makes a comparison of the effectivités of the Parties and determining which side is more dominant to give a decision on sovereignty.

In the following section, effectivités of the Parties in Malaysia/Singapore case will be examined which was argued to be evidence for the sovereignty.

4 Effectivités on the Malaysia/Singapore Case

4.1 The Construction of Horsburgh Lighthouse

The East India Company initiated construction of a lighthouse for the memory of James Horsburgh. Pedra Branca was considered as the favored location beside many other possibilities.²⁶ Governor of the Straits Settlements sent a letter to the Sultan and

²⁰ ICJ, Territorial Dispute and Maritime Delimitation (Nicaragua v. Colombia), Summary of the Judgment of 19 November 2012, p.2.

²¹ DOEHRING, K., Effectiveness, in: BERNHARDT, R. (ed.), Encyclopedia of Public International Law, Instalment 7 (1984), p.7.

²² Permanent Court of Justice, Legal Status of Eastern Greenland (Denmark/Norway), Series A/B, No.53, p.45.

²³ P.46, supra note 17.

²⁴ In Indonesia/Malaysia Case, Ligitan and Sipadan which are too small and uninhabited islands, did not subject to a dispute until both sides of the conflict gave concession of oil research to Japanese oil companies. See also: Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002. Available from: ICJ <http://www.icj-cij.org/docket/files/102/7698.pdf>. [Accessed:30th November 2012]

²⁵ Ibid, para.134.

²⁶ Para.126, supra note 5.

Temenggong of Johor about the place. In its reply,²⁷ the Sultan and Temenggong of Johor consented²⁸ to the construction without a clear description of the place.²⁹

Regarding the letter and the reply, the Court didn't find it conclusive whether Johor ceded its sovereignty over any place that was chosen for a lighthouse or Johor permitted only building and operating a lighthouse. There wasn't any agreement between the Parties about the lighthouse and the island on which it was to be installed. The Court wasn't in a position to decide the issue about the content of any agreement reached in November 1844.³⁰

As a result of surveys began in December 1849, on May 1850 the foundation stone was laid.³¹ Johor authorities weren't presented at the ceremony, and they weren't even invited. It can be understood that Singapore did not deem it necessary to inform Johor.³²

Malaysia claimed that the lighthouse was built on an island over which Johor was sovereign, all the actions of the British and Singaporean authorities are just related to the operation of the lighthouse.³³ Contrarily, Singapore argued that its activities relating specifically related to Pedra Branca as a whole and not only related to the lighthouse. Activities such as legislation about the costs of the lighthouse, vesting control of it under various governmental bodies, and regulating the activities of persons residing, visiting and working on Pedra Branca means that Singapore has continuously exercised state and sovereign authority over Pedra Branca.³⁴

The Court paid attention to a fact: "*A lighthouse may be built on the territory of one State and administered by another State with the consent of the first State as a matter of law.*"³⁵ But, considering the data achieved, the Court didn't make a decision about sovereignty on the basis of construction and operation of the lighthouse.³⁶ Then, the Court measured the effectivities of Singapore and Malaysia after the construction of the lighthouse to clarify whether the sovereignty over the island was passed or not.³⁷

4.2 Legislation About Lighthouses

Singapore argued that the activities like legislations about the costs of the lighthouse, vesting control of it under various governmental bodies, and controlling the activities of

²⁷ The Governor's letters have not been found. Thus it's unknown whether the Governor asked permission specifying the name of the island or solely informed the Johor. There can be a judicial review of the case within the ten-year window, if the letter be found. See also: HSIEN-LI, T., Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Singapore Year Book of International Law and Contributors, 2010, p.260-262.

²⁸ In the letter, Sultan and Temenggong of Johor stated that he had no objection to a construction of a lighthouse, actually he was pleased that such an undertaking is in contemplation. He wished to be guided in all matters. The company was free to construct a lighthouse at any spot deemed suitable.

²⁹ Para. 128, supra note 5.

³⁰ Ibid, para. 145.

³¹ Ibid, para. 151, 152.

³² Ibid, para. 155.

³³ Ibid, para. 167.

³⁴ Ibid, para. 168.

³⁵ Ibid, para. 166.

³⁶ Ibid, para. 162.

³⁷ Ibid, para. 163.

persons residing, visiting and working on Pedra Branca demonstrated state and sovereign authority of Singapore and its predecessors.³⁸

The Court decided that the legislations weren't exhibiting British or Singaporean sovereignty over the island. First, they also applied to the lighthouses which are unquestionably under Johor sovereignty. Second, they even applied to lighthouses on the high seas. The legislations weren't specifically about sovereignty, in contrast, they were just regulations of lighthouses.³⁹

4.3 Constitutional Developments and Official Descriptions

Malaysia argued that the 1927 Straits Settlement and Johor Territorial Waters Agreement assisted the Malaysian claim, but the Court didn't agree since it's limited to the areas within 10 miles of the main island of Singapore, so Pedra Branca hadn't included.⁴⁰

4.4 Regulation of Fisheries

Malaysia argued that after the installation of the lighthouse, Johor continued to rule fishing nearby Pedra Branca, granted licenses and exercised criminal jurisdiction and that that exercise of authority exhibited Johor's sovereignty.⁴¹ While the area was limited to 10 miles of the island of Singapore and did not refer to jurisdiction over the waters of Pedra Branca, the Court decided that the Malaysia's conduct isn't relevant.⁴²

4.5 The 1953 Correspondence and Declarations of Johor

The Colonial Secretary of Singapore sent a letter to the British Adviser to the Sultan of Johor on 12 June 1953. With the letter, he requested information about Pedra Branca. Basically, he wanted to learn if there was a document presenting any donation of the island or if it had been ceded by Johor, to determine the territorial waters of the Colony.⁴³ Acting State Secretary of Johor answered that "*the Johor Government did not claim ownership of Pedra Branca*".⁴⁴

The Court attached particular importance to this correspondence and its interpretation.⁴⁵ The letter was about the whole of the island and not only about the lighthouse. The purpose of the letter was to determinate of the territorial waters of the Colony that was about sovereignty over the island.⁴⁶ Singapore assumed that Pedra Branca had been granted voluntarily by the Sultan and the Temenggong to the East India Company, as the letter shown.⁴⁷

³⁸ Ibid, para. 168.

³⁹ Ibid, para. 172.

⁴⁰ Ibid, para. 188.

⁴¹ Ibid, para. 190.

⁴² Ibid, para. 191.

⁴³ Ibid, para. 192.

⁴⁴ Ibid, para. 196.

⁴⁵ Ibid, para. 203.

⁴⁶ Ibid, para. 204.

⁴⁷ Ibid, para. 205.

The Court was in the view that the response of Johor obviously meant it didn't assert sovereignty over Pedra Branca. That reply related to the whole of the island and not simply to the lighthouse. Considering a request of Singapore concerning the status of Pedra Branca and the reply of Johor, it's clear that the letter directs to the issue of sovereignty over Pedra Branca.⁴⁸

4.6 Investigations of Shipwrecks

Singapore claimed that it and its predecessors shown sovereignty over Pedra Branca with investigations and reports for the maritime hazards and shipwrecks around it. Malaysia didn't protest this conduct until 2003.⁴⁹ Malaysia stated that the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on the Safety of Life at Sea⁵⁰ enforce duties referring to the investigation and publication of maritime dangers. Singapore's investigations and publications were in conformity with best practice and not a demonstration of sovereignty over the island.⁵¹

The Court decided that this conduct supports Singapore. Also, Malaysia declared opposition against this conduct of Singapore only in June 2003 after dispute brought before the Court.⁵²

4.7 Visits to Pedra Branca

Singapore exercised exclusive control over visits to Pedra Branca. It permitted access to Pedra Branca for both its own and the other State's citizens. Singaporean ministers, members of Parliament, military and police officials visited the island. Also, Singapore obtained permits for Malaysian officials who want to visit the island in order to conduct scientific surveys. Malaysia didn't protest these activities. Malaysia stated that this control was just a regular procedure by a lighthouse keeper over the entrance to the lighthouse and its surroundings.⁵³

The Court concurred with Malaysia that many of the visits by Singaporean personnel related to the maintenance and operation of the lighthouse and weren't meaningful. However, Singapore emphasized visits by Malaysian officials, especially in 1974 and 1978.⁵⁴

4.8 Permission to Visitors for Tidal Surveys and Investigations

A team consisting of four countries, including Singapore and Malaysia was established for tidal surveys in 1974. An officer of the Port of Singapore Authority asked for a list of the Malaysian members who would be staying at the lighthouse from the Commanding Officer of the Royal Malaysian Navy survey vessel, "K.D. Perantau". The Malaysian members of the team actually arrived and provisional permission was given in the

⁴⁸ Ibid, para. 223.

⁴⁹ Ibid, para. 231.

⁵⁰ International Convention for the Safety of Life at Sea (SOLAS), 1974. Available from: <https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf>. [Accessed:30th November 2012]

⁵¹ Para. 232, supra note 5.

⁵² Ibid, para. 234.

⁵³ Ibid, para. 235.

⁵⁴ Ibid, para. 236.

letter. The names and details of Malaysian members were given by Commanding Officer.⁵⁵

Malaysia requested clearance for a Government vessel to enter Singapore territorial waters for a tidal survey in 1978. The Horsburgh lighthouse was among the points identified. Singapore accepted the request. Additionally, two people from Malaysia Survey Department were warned by lighthouse keepers that they couldn't stay unless they got permission from the Port of Singapore Authority, so they left. Malaysia didn't protest these actions.⁵⁶

The Court decided that this Singaporean conduct demonstrates sovereignty. The permission granted by Singapore to Malaysian officials was not just about the maintenance and operation of the lighthouse. Singapore's permissions related to the survey of Malaysian officials gave significant support to Singapore's claim to sovereignty over Pedra Branca.⁵⁷

4.9 Patrols and Exercises of Naval Vessels

The navy ships of Malaysia and Singapore patrolled and held exercises nearby Pedra Branca since they established.⁵⁸ The Court was in the opinion that these activities weren't meaningful neither for one side nor the other. First, it's a geographical necessity for such vessels operating from Singapore harbor to pass near Pedra Branca. Next, most of the patrols were conducted under Malaysia's obligations referring to the defense of Singapore. The Court decided that patrols weren't specifically related to the island, and couldn't in this situation aid Singapore or Malaysia claims.⁵⁹

4.10 Confidential Maps

Chief of the Malaysian navy published an internal confidential document entitled "Letter of Promulgation" on 16 July 1968. There were charts which displayed the outer limits of Malaysian territorial waters. One of these charts showed disputed islands inside territorial waters of Malaysia. Singapore, similarly, published "Operations Instructions" in 1975 in which Singapore Navy showed a patrol area nearby Pedra Branca.⁶⁰ The Court evaluated both Malaysian chart and the Singaporean Instructions as an activity of one Party, which were unknown to the other Party. The documents were confidential and not announced since the case started. For these reasons, they weren't significant.⁶¹

⁵⁵ Ibid, para. 237.

⁵⁶ Ibid, para. 238.

⁵⁷ Ibid, para. 239.

⁵⁸ Ibid, para. 240.

⁵⁹ Ibid, para. 241.

⁶⁰ Ibid, para. 242.

⁶¹ Ibid, para. 243.

4.11 Public Maps

Malaysia and Singapore referenced almost 100 maps to the Court. Some of these maps had a role as confirming their claims.⁶² Malaysia stated that of all the maps published by the Singapore, only one of them showed Pedra Branca as Singapore's territory which was not published till 1995.⁶³ On the other hand, Singapore paid special attention to six Malaysia maps published between 1962 and 1975. In those maps, there were four lines of information under Pedra Branca:

*“Lighthouse 28,
P. Batu Puteh,
(Horsburgh),
(SINGAPORE) or (SINGAPURA).”*

The information line of “(SINGAPORE)” or “(SINGAPURA)” could be seen under the name of another island that certainly was under the sovereignty of Singapore. However, under Pulau Pisang, which was another Singapore managed lighthouse, there wasn't any similar information. That deletion showing that its inclusion had nothing to do with ownership or management of the lighthouse. Singapore claimed that Malaysia admits its sovereignty over Pedra Branca.⁶⁴

The Court recalled that, until 1995, Singapore didn't publish a map which showed Pedra Branca within its territory. However, this was much less important compared to Malaysia maps which showed Pedra Branca under the sovereignty of Singapore. The Court decided that *those maps tend to confirm that Malaysia considered that Pedra Branca fell under the sovereignty of Singapore.*⁶⁵

4.12 The Display of the Ensigns

British and Singapore ensigns had flown from the Horsburgh lighthouse since its installation. Singapore argued that this was an obvious display of sovereignty. Malaysia rejected Singapore flag on Pulau Pisang, but, on the contrary didn't behave like this for the flag on Pedra Branca.⁶⁶ Malaysia answered that an ensign is associated with maritime matters, it is different from flying of the national flag. Ensigns are marks of nationality, but not of sovereignty. In Pulau Pisang, there was an issue of domestic political sensitivity and the issue was solved between the two Parties. Additionally, Palau Pisang is larger in size than Pedra Branca and has local population.⁶⁷

The Court agrees with Malaysia that *“the flying of an ensign is not in the usual case a manifestation of sovereignty”* and different sizes of the two islands must be taken into consideration. The Court decided that some weight may anyway be given to the fact

⁶² Ibid, para. 267.

⁶³ Ibid, para. 268.

⁶⁴ Ibid, para. 269.

⁶⁵ Ibid, para. 270.

⁶⁶ Ibid, para. 244.

⁶⁷ Ibid, para. 245.

that Malaysia, having been protesting the ensigns on Pulau Pisang, did not make a parallel protest for the ensign on Horsburgh lighthouse.⁶⁸

4.13 The Installation of Military Communications Equipment

A rebroadcast station, which was for military use established on Pedra Branca on 30 May 1977. Singapore claimed that the installation was carried out publicly and military helicopters used for the transportation of equipment. Singapore added that this action was clearly an act of their authority apart from the operation of the lighthouse. Malaysia argued that the construction was held secretly and it only learned the station with Singapore's Memorial.⁶⁹

The Court stated that it couldn't evaluate about Malaysia's knowledge of the construction. But, it decided that the installation of a military broadcast station on the disputed island clearly *à titre de souverain*.⁷⁰

4.14 Reclamation Plans by Singapore

The Government of Singapore planned to reclaim approximately 5,000 sq m of land around Pedra Branca in 1978. A newspaper advertisement was published to go in search for tender companies. Three companies tendered for the reclamation project, but the plan was not taken further. Malaysia punctuated that the reclamation project was not taken further and some of the documentation on which Singapore depends on was not public. Thus, Malaysia didn't deem it necessary to protest.⁷¹

The Court decided that even if the reclamation project was not taken further and some of the documents were secret, the newspaper advertisement was public and three companies replied. Singapore's reclamation plan was beyond the maintenance and operation of the lighthouse and supports Singapore's claim.⁷²

4.15 Petroleum Agreements

Malaysia and Continental Oil Company of Malaysia made an agreement which authorized the Company to research for petroleum in the whole of the area of the continental shelf off the east coast of West Malaysia in 1968.⁷³ Malaysia argued that the Agreement was proof of its sovereignty over the whole concession area.

Singapore answered that Pedra Branca wasn't shown on the map. This was indeed not a surprise since islands and their territorial waters were explicitly kept out. Furthermore, the boundaries weren't agreed, the coordinates were not published and no exploration took place in the vicinity of Pedra Branca.⁷⁴ The Court decided that

⁶⁸ Ibid, para. 246.

⁶⁹ Ibid, para. 247.

⁷⁰ Ibid, para. 248.

⁷¹ Ibid, para. 249.

⁷² Ibid, para. 250.

⁷³ Ibid, para. 251.

⁷⁴ Ibid, para. 252.

because of the coordinates were not published and boundaries weren't stated clearly the petroleum agreement didn't support Malaysia's case.⁷⁵

4.16 The delimitation of Malaysia's territorial sea

Malaysia increased its territorial waters from 3 to 12 nautical miles by a legislation in 1969. This increase extended territorial waters of Malaysia beyond Pedra Branca.⁷⁶ Singapore stated that it didn't deem it necessary to protest because the legislation didn't determine the territories, limits, and baselines.⁷⁷ The Court stated that the legislation was very generally prepared so it didn't support Malaysia's claim. The legislation didn't recognize the areas, but it just said that it applies *throughout Malaysia*.⁷⁸

4.17 Territorial Agreements with Third Parties

1969 Continental Shelf Agreement and 1970 Territorial Sea Agreement between Indonesia and Malaysia:

Malaysia and Indonesia consented upon the boundary points with the Continental Shelf Agreement in 1969. The agreed boundary was only 6.4 nautical miles away from Pedra Branca. Singapore didn't protest this maritime delimitation.

Singapore stated that there was no reason to protest because the Agreement was *res inter alios acta* and, more remarkably, the Agreement cautiously refrained from any infringement nearby Pedra Branca. It continued that *Malaysia and Indonesia couldn't delimit their maritime areas without the participation of Singapore which has sovereignty over Pedra Branca and the adjacent features*.⁷⁹

The Court decided that because the agreed boundary line halted 6.4 nautical miles to the east of Pedra Branca and started again beyond the western end of the Straits of Singapore, the Malaysia-Indonesia Agreements were insignificant in this case.⁸⁰

1973 Territorial Sea Agreement between Indonesia and Singapore:

Indonesia and Singapore signed Territorial Sea Agreement, which determines boundaries in the Straits of Singapore. Pedra Branca wasn't referred in this Agreement. Thus, according to the claim of Malaysia, this showed that Singapore didn't consider it had sovereignty over Pedra Branca. Singapore stated that the agreement aimed at a partial delimitation within the Straits of Singapore. To delimitate the whole area, tripartite negotiations had to be held. The Indonesia-Malaysia agreement neither included Pedra Branca.

Like the Malaysia-Indonesia Agreements, the Court decided that the 1973 Territorial Sea Agreement between Indonesia and Singapore didn't have any significance

⁷⁵ Ibid, para. 253.

⁷⁶ Ibid, para. 254.

⁷⁷ Ibid, para. 255.

⁷⁸ Ibid, para. 256.

⁷⁹ Ibid, para. 257.

⁸⁰ Ibid, para. 258.

referring to sovereignty over Pedra Branca. Because the island wasn't included in this Agreement.⁸¹

4.18 Official publications

Official publications of Singapore which give an account of its territory didn't describe Pedra Branca, despite nearly 60 islands were depicted. The lists in 1972 Singapore Facts and Pictures comprised smaller uninhabited islands. Some of these islands had lighthouses. Pedra Branca wasn't included in that publication until 1992. Also, in many other documents, Singapore didn't include it. Singapore argued that 1972 Singapore Facts and Pictures wasn't a *legally comprehensive description of its territory*. The purpose of the publication was to give general information and provide an overview. The publications were for reference instead of being administrative. Additionally, the 1972 list included only small islands nearby the island of Singapore and skipped over not less than eight other islands which belonged to Singapore.⁸²

Considering *the purpose of the publications and their non-authoritative and essentially descriptive character, even if official*, the Court decided that they were insignificant for the sovereignty of the islands.⁸³

5 Judgement of the Court

The Court concluded that *especially with reference to the conduct of Singapore and its predecessors à titre de souverain, taken together with the conduct of Malaysia and its predecessors, including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca had passed to Singapore*.⁸⁴

Unlike Pedra Branca, for Middle Rocks, there weren't any effectivities of Singapore or its predecessors. Thus, the Court concluded that *Middle Rocks had to remain with Malaysia as the successor to the Sultan of Johor that had the original title*,⁸⁵ and in the context of 1982 UNCLOS Article 13,⁸⁶ *sovereignty over South Ledge, as a low-tide elevation, fell within the apparently overlapping territorial waters, belongs to the State in the territorial waters of which it is located*.⁸⁷

6 Conclusion

In Malaysia/Singapore Case, Singapore mainly claimed that the status of Pedra Branca was *terra nullius* or alternatively, the legal status of the island was

⁸¹ Ibid, para. 259.

⁸² Ibid, para. 260.

⁸³ Ibid, para. 261.

⁸⁴ Ibid, para. 276.

⁸⁵ Ibid, para. 290.

⁸⁶ Low-tide elevations: "1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth 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 breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

⁸⁷ Para. 299, supra note 5.

indeterminate as of 1847. From the beginning of the construction of the Horsburgh lighthouse in 1850 to the starting time and critical date of the debate in 1980, the United Kingdom and the successor Singapore acquired sovereignty of the island by the mass of effectivities which are carried out by intention and will to act as sovereign and Malaysia did not object to these actions. Malaysia mainly argued that originally it had the sovereignty of Pedra Branca. Malaysia's sovereignty over it never passed to another State. Singapore's presence on the island is with Malaysia's permission and solely with the intention to construct and maintain the lighthouse. Additionally, the island has never been considered as *terra nullius* and, therefore, can't be achieved through occupation.

In the light of the historical and geographical circumstances, the Court concluded that the island not *terra nullius* and to the date when the lighthouse constructed Sultanate of Johor had the original title to the island. But after the construction, Singapore performed continuous and peaceful display of territorial sovereignty, Malaysia didn't protest this action or exercised some actions which mean the recognition of Singapore's sovereignty on the island.

First, as the 1953 correspondence showed, Johor obviously meant that it didn't assert sovereignty over Pedra Branca. Second, Malaysia rejected Singapore flag on Pulau Pisang, but, on the contrary, didn't behave like this for the flag on Pedra Branca. Third, permissions granted to Malaysian officials in the context of a survey of the waters surrounding the island and clearance to Malaysia Government ships by Singapore. Fourth, a rebroadcast station, which was for military use established on Pedra Branca by Singapore. Fifth, Singapore planned to reclaim areas around the island and held investigations of shipwrecks within the island's territorial waters. Finally, with its six maps, Malaysia showed Pedra Branca under the Singapore's sovereignty.

From the activities of the Parties, unilateral undertakings or bilateral treaties which had no bearings for the third Parties, ones which didn't specifically about the disputed island, ones that were non-authoritative and essentially descriptive and those had executed secretly without the other Party's knowledge weren't accepted as a proof of sovereignty.

The Court compared the activities of the Parties on Pedra Branca for a time period of 130 years, from the construction of the Horsburgh lighthouse to the date of the start of dispute. Ultimately, it emerged that while Singapore has many activities which show sovereignty, in contrast, Malaysia has no such activities, moreover Malaysia didn't protest these actions, even shows some signs that indicate Malaysia accepted Singapore sovereignty on the island. So, it was decided that sovereignty of Pedra Branca passed to Singapore from Malaysia during this period.

The Court stated that Middle Rocks and South Ledge are legally different from Pedra Branca due to their peculiarities. South Ledge, as a low-tide elevation, in accordance with the 1982 UNCLOS, does not comply with the definition of an island and falls within the apparently overlapping territorial waters. Thus, the Court decided that South Ledge belongs to the State in the territorial waters of which it is located. Since the

effectivités of Singapore weren't applied to Middle Rocks, the Court decided that title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.

Effectivités of the Parties seems to be decisive and has a direct effect to the verdict in this case. This Case shows that sovereignty of an island can pass one State to another as a result of lack of protest, even some sort of recognition and finally with effectivités which held with continuous display of sovereignty intention and will, and that are particularly about the island, open to the knowledge of the Parties, in accordance with the international law.

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