

## SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

*Operative clause of the Judgment — Interpretation of the 1953 correspondence — Examination of the conduct of the Parties after 1953 — Sovereignty over South Ledge — Final considerations.*

## I

1. In paragraph 300 of the Judgment, the majority of the Court finds that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to the Republic of Singapore (subpara. 1); that sovereignty over Middle Rocks belongs to Malaysia (subpara. 2); and that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located (subpara. 3). Juridical reasons can always be found to support any conclusion.

## II

2. I disagree with the finding in paragraph 300 (1) of the Judgment because it is based mainly on the interpretation of the 1953 correspondence made in section 5.4.5, which I cannot accept for the reasons explained hereafter.

3. On 12 June 1953, Mr. J. D. Higham, on behalf of the Singapore Colonial Secretary, sent the British Adviser at Johor a letter, which is quoted in paragraph 192 of the Judgment 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 (extract at ‘A’). It was however mentioned in a despatch from the Governor of Singapore on 28th November 1844 (extract at ‘B’). 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.

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

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

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

4. A copy of this letter is being sent to the Chief Secretary, Kuala Lumpur.” (Memorial of Malaysia, Vol. 3, Ann. 67; Memorial of Singapore, Vol. 6, Ann. 93.)

4. The Acting State Secretary of Johor replied on 21 September 1953. The answer is quoted in paragraph 196 of the Judgment:

“I have the honour to refer to your letter . . . dated 12th June 1953, addressed to the British Adviser, Johore, on the question of the status of Pedra Branca Rock some 40 miles from Singapore and to inform you that the Johore Government does not claim ownership of Pedra Branca.” (Memorial of Malaysia, Vol. 3, Ann. 69; Memorial of Singapore, Vol. 6, Ann. 96.)

5. Singapore had an unexpected opportunity to explain its argument based on the 1953 correspondence when answering the question put by Judge Keith at the end of the public sitting on 23 November 2007, after both Parties had filed their final submissions.

6. The question was the following:

“What response, if any, does Singapore wish to make in reply to the submission made yesterday by the Attorney-General of Malaysia, expressly by reference to provisions of the Johor Agreement of 1948 and the Federation of Malaya Agreement of 1948, that the Acting State Secretary of Johor, to quote part of the submission, ‘was definitely not authorised’ 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?’” (CR 2007/31, pp. 59-60.)

7. In its response Singapore stated, *inter alia*:

“Singapore has never argued that Johor renounced title to Pedra Branca for the simple reason that Johor had no title to Pedra Branca to renounce or abandon. As for confirmation of title, it is not Singapore’s argument that the Johor State Secretary confirmed Singapore’s title to territory. Singapore’s argument is simply that, by declaring that Johor did not claim Pedra Branca, the Johor State Secretary’s letter had the effect of confirming Singapore’s title to

Pedra Branca and of confirming that Johor had no title, historic or otherwise, to the island.” (Written response of Singapore to the question put by Judge Keith dated 30 November 2007.)

8. In respect of the term “disclaimer of title”, Singapore recalled the explanation given in its Memorial:

“8.16. It should be emphasised that it is not Singapore’s case that Johor *abandoned* or *relinquished* title to Pedra Branca in 1953. Abandonment or relinquishment of title is possible only if there is a pre-existing title. What Johor did by her 1953 letter was not to renounce title (since she did not have title) or a ‘claim’ to ownership, but rather to *pronounce* explicitly that Johor *did not have* a claim to ownership of Pedra Branca. It must also be emphasised that, in the context of Singapore’s possession of the island and in the absence of any claim or interest by third States, Johor’s disclaimer can only be regarded as unequivocal recognition of Singapore’s title.” (*Ibid.*)

9. Malaysia commented on Singapore’s answer by noting that Singapore did not argue that the 1953 letter amounted to a “renunciation” or “abandonment” of title by Johor, or that the letter “confirmed Singapore’s title to territory”. Malaysia then added:

“There is an evident confusion and self-contradiction in the Singapore Response since, in the sentence immediately following the denial that the letter ‘confirmed Singapore’s title to territory’ the Response goes on to say that ‘the letter *had the effect of* confirming Singapore’s title to Pedra Branca’ (emphasis added). It is unclear what Singapore is saying: is it that the 1953 letter *does not confirm* or *does confirm* Singapore’s claim to Pulau Batu Puteh? If it does *not* confirm Singapore’s title it is difficult to see how that the letter assists its case. If, on the other hand, the letter is said to confirm Singapore’s claim, it is difficult to see how the words that Johor ‘does not claim ownership of Pedra Branca’ can be converted into a positive acknowledgement that Singapore has sovereignty over the island.” (Malaysia’s comments on Singapore’s written response to the question put by Judge Keith to Singapore dated 7 December 2007.)

10. In this connection Malaysia had already stated:

“The Court should bear in mind that prior to the Singapore letter of 12 June 1953 there were only two possibilities regarding Singapore’s sovereignty over Pulau Batu Puteh. Either Singapore had sovereignty, acquired over a century earlier, or it did not have sov-

ereignty. If Singapore had sovereignty, then the Malaysian reply of 21 September 1953 has no relevance to the question of title. The letter could not confer on Singapore a sovereignty that it already possessed.

If, on the other hand, Singapore did not possess sovereignty over Pulau Batu Puteh in June 1953, then Singapore is effectively treating the Malaysian September 1953 letter as its root of title. This would imply that nothing that Britain or Singapore had done in the preceding century had been effective to reflect or establish title and that it is only the Malaysian reply of September 1953 that effectively created Singapore's title." (CR 2007/26, pp. 51-52, paras. 55-56.)

11. In my opinion, Singapore's argument is not very clear. On the one hand, it maintained: that it "has never argued that Johor renounced title to Pedra Branca for the simple reason that Johor had no title to Pedra Branca to renounce or abandon"; that its argument was not that "Johor *abandoned* or *relinquished* title to Pedra Branca in 1953", because "[a]bandonment or relinquishment of title is possible only if there is a pre-existing title"; and that "it is not Singapore's argument that the Johor State confirmed Singapore's title to territory". On the other hand, Singapore explained that its argument was simply that, by declaring that Johor did not claim Pedra Branca/Pulau Batu Puteh, the Johor State Secretary's letter had the effect of confirming Singapore's title to Pedra Branca/Pulau Batu Puteh and of confirming that Johor had no title, historic or otherwise, to the island.

12. In this respect, it is to be recalled that, as the Court concludes earlier in the Judgment, Singapore did not have title to Pedra Branca/Pulau Batu Puteh prior to 1953. Therefore, contrary to Singapore's contention, it is, in my opinion, not possible for the 1953 letter from the Johor Acting State Secretary to have had the effect of confirming Singapore's title to Pedra Branca/Pulau Batu Puteh.

13. Nor, for the same reason, can the other possibility mentioned by Singapore be accepted, i.e., that the 1953 Johor Acting State Secretary's letter confirmed that Johor had no title, historic or otherwise, to the island. As found in previous sections of the Judgment, Johor did have title to Pedra Branca/Pulau Batu Puteh, and therefore it was not possible for the 1953 letter from the Acting State Secretary to confirm that Johor had no title to Pedra Branca/Pulau Batu Puteh.

14. The argument that the 1953 letter should be understood as Johor's renunciation, abandonment or relinquishment of its title to Pedra Branca/Pulau Batu Puteh was not the argument made by Singapore and, accordingly, in my opinion it should not have been analysed, as it has been in many paragraphs of the Judgment, and relied upon as the main basis to conclude on Singapore's sovereign title to Pedra Branca/Pulau Batu Puteh.

15. The 1953 letters are examined in great detail in the Judgment; and paragraph 196 states: “No further correspondence followed and the Singapore authorities took no public action.”

16. It is surprising that “[n]o further correspondence followed”, because Johor had not given the information requested by Singapore. Johor did not inform Singapore of the existence or non-existence of any “document showing a lease or grant of the rock”, nor did Johor answer the question whether it had “ceded” “or in any other way disposed of” Pedra Branca/Pulau Batu Puteh. It is basic practice in international relations whenever a question remains unanswered to repeat the request in writing and to insist that the information be provided. This would have been particularly true here, because the aim of the 1953 correspondence was to “clarify” the status of Pedra Branca/Pulau Batu Puteh. However, Singapore chose not to proceed in this way and has not explained to the Court why it abstained from acting.

17. Moreover, the 1953 letter from Johor answered a completely different question from the one asked by Singapore. It merely stated that “the Johore Government does not claim ownership of Pedra Branca”. It is acknowledged in paragraph 222 of the Judgment that “ownership” is in principle distinct from “sovereignty”, but that “[i]n international litigation ‘ownership’ over territory has sometimes been used as equivalent to ‘sovereignty’”. It is a fact that Johor used the term “ownership”, not “sovereignty”. Therefore, if Singapore understood Johor’s 1953 letter to mean in reality that “the Johore Government does not claim sovereignty over Pedra Branca”, it should at the very least, have requested the necessary explanation from Malaysia. This would have been perhaps the most appropriate way to “clarify the status of Pedra Branca”, which was the main purpose of Singapore’s letter of 12 June 1953.

18. The requests for further information which are referred to in the preceding paragraphs of this separate opinion, and which, in my view, Singapore should have made to Malaysia, cannot be considered out of the ordinary, since both States “enjoyed very close and friendly relations”, as stressed several times in the Judgment.

19. The lack of “public action” by Singapore’s authorities is more difficult to understand than the “lack of further correspondence”.

20. If Singapore did in fact consider that its sovereignty over Pedra Branca/Pulau Batu Puteh had been acknowledged, notwithstanding the ambiguous terms of Johor’s 1953 letter, elementary principles of good faith required Singapore to assert a formal claim of sovereignty over Pedra Branca/Pulau Batu Puteh. It is particularly clear that Singapore should have done so, because, as explained in paragraphs 196 and 224 of the Judgment, the Colonial Secretary wrote to the Acting Master Attend-

ant on 13 October 1953 informing him that, since the Johor Government did not claim ownership of Pedra Branca/Pulau Batu Puteh, “the Attorney General agrees that we can claim it as Singapore territory”; and because on 6 February 1953 the Master Attendant recalled the Chief Surveyor’s opinion that Singapore should claim a 3-mile limit around Horsburgh. However, Singapore failed to do so and, as a result of the inaction of its authorities, the status of Pedra Branca/Pulau Batu Puteh, far from being “clarified”, remained obscure.

21. Additionally, it may be observed that information about Pedra Branca/Pulau Batu Puteh was sought by the Colonial Secretary of Singapore because it was “relevant to the determination of the boundaries of the Colony’s territorial waters”. Paragraph 225 of the Judgment refers to internal Singapore correspondence of July 1953 indicating:

“that the Foreign Office and Colonial Office in London were involved in a wider examination of issues relating to territorial waters, with the then recent Judgment of this Court in the *Fisheries* case (*United Kingdom v. Norway*) (*Judgment, I.C.J. Reports 1951*, p. 116) constituting an important element (that Judgment was rendered on 11 December 1951). The conclusion reached in Singapore by the Colonial Secretary was that because of geographical circumstances, the colony would gain very little from the new methods of defining territorial waters. On the other hand, ‘an application of the new principles by neighbouring countries’ could ‘only result in an undesirable restriction to fishing grounds normally used by Singapore fishermen’. ‘For general reasons also any enclosure of the high seas by foreign States is contrary to the interest of this densely populated maritime Colony dependent on sea-borne trade.’ The internal letter of July 1953 concluded by mentioning an understanding reached on the former methods of defining territorial waters with Indonesia in July 1951, and a concern not to disturb the relationship which then existed between the Colony and Indonesia.” (Memorial of Malaysia, Vol. 3, Ann. 68.)

22. Paragraph 225 concludes: “the fact that the authorities in Singapore — or in London for that is where the final decision-making power lay — took no action at that time is not at all surprising”. However, even assuming that maritime issues had been under “a wider examination” in London in July 1953, it is not clear why, if the examination of them was ongoing at 12 June 1953, the Colonial Secretary of Singapore decided to demand information about the status of Pedra Branca/Pulau Batu Puteh precisely because it was “relevant to the determination of the boundaries of the Colony’s territorial waters”.

## III

23. My vote against paragraph 300 (1) of the Judgment is also explained because I do not agree with the examination of “[t]he conduct of the Parties after 1953” made in section 5.4.6 of the Judgment. Its paragraph 274 concludes as follows:

“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 investigation of marine accidents, their control over visits, Singapore’s installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de souverain*, 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.”

24. The majority of the Court specifies the actions that, in its opinion, Singapore performed *à titre de souverain*. However, “the bulk of them” took place after 1953, as stated in paragraph 274 of the Judgment. In this respect it is to be recalled that the Court decided on 10 October 2002 that

“the facts and circumstances put forward by Nigeria with respect to the Lake Chad villages concern a period of some 20 years, which is in any event far too short, even according to the theory [of historical consolidation of title] relied on by it” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, p. 352, para. 65).

25. In paragraph 34 of the Judgment, 14 February 1980 is found to be the critical date for the purposes of the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh. Therefore, even assuming that the actions referred to by the majority of the Court in section 5.4.6 of the Judgment were performed by Singapore *à titre de souverain*, they 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. Singapore’s *effectivités* do not correspond to the law, and, as the Court has reiterated more than once:

“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.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p. 587, para. 63; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judg-*

*ment, I.C.J. Reports 1994*, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 353, para. 68).

26. Paragraph 275 of the Judgment states that “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”. Similar statements are also found in a number of other paragraphs of the Judgment and were made repeatedly by Singapore throughout the present proceedings. However, the Johor authorities and their successors were under no international obligation to undertake any action at all, because Johor had historical title to Pedra Branca/Pulau Batu Puteh, as recognized in the Judgment. On the contrary, clarification of the status of the island was a matter of prime importance to Great Britain, because Great Britain had made a substantial investment in the construction and maintenance of Horsburgh lighthouse. However, Great Britain remained silent over the years and the status of Pedra Branca/Pulau Batu Puteh was still unclear in 1953, as evidenced in Mr. J. D. Higham’s letter, on behalf of the Singapore Colonial Secretary. Singapore’s silence continued in the following years. No further correspondence was sent to Malaysia to obtain the necessary clarifications and no public action was undertaken by Singapore authorities.

#### IV

27. Paragraph 297 of the Judgment states that the Court “will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia”; and “that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks”. The Court adds in paragraph 298 that “in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features”, but at the same time observes that it “has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question”. Consequently in paragraph 300 (3) of the Judgment the Court “[f]inds that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located”.

28. As explained in the two preceding sections of this separate opinion, Pedra Branca/Pulau Batu Puteh belongs to Malaysia and I agree that Middle Rocks is under the sovereignty of Malaysia, as found in paragraph 300 (2) of the Judgment. Therefore, I consider South Ledge to be

located within the territorial waters of Malaysia and for this reason to belong to Malaysia.

V

29. On 23 November 2007 the Court informed Malaysia and Singapore that it was retiring for deliberation. Public hearings on the merits in the case brought by Djibouti against France commenced on 21 January 2008 and eight days later the Court retired for deliberation, which is ongoing. Public hearings on the Preliminary Objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*, to be held from 26 to 30 May 2008, require examination in advance of the written arguments and requests made by the Parties. Time constraints to present this separate opinion within the time-limit fixed by the Court did not permit me to make a complete explanation of my disagreement with subparagraphs 1 and 3 of paragraph 300 of the Judgment. Therefore I only advanced some of the main reasons for voting against them.

(Signed) Gonzalo PARRA-ARANGUREN.

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