

DISSENTING OPINION OF JUDGE *AD HOC* DUGARD

Malaysia has original title to Pedra Branca/Pulau Batu Puteh — Construction of Horsburgh lighthouse did not alter situation — 1953 correspondence of uncertain meaning and authorization — Failure of Singapore to publicize 1953 correspondence confirms its inconsequential nature — Court wrong to attach significance to 1953 correspondence — Conduct of Parties between 1953 and 1980 equivocal — No inferences on sovereignty to be drawn from this period — Singapore's conduct consistent with that of lighthouse operator — Court errs in interpretation of facts of this period — Legal basis for Court's decision unclear — Court correctly rejects prescription and estoppel — Court's decision that conduct of Parties displayed tacit agreement or understanding on passing of sovereignty unconvincing in law and on facts — Insufficient evidence to support finding that Malaysia acquiesced in Singapore's claim to sovereignty — Requirements for acquisition of territory set out in Eritrean/Yemen Arbitration Award — Such requirements not satisfied in present case — Title to Pedra Branca/Pulau Batu Puteh remains with Malaysia — Middle Rocks and South Ledge fall within sovereignty of Malaysia — Unfortunate that counsel not invited to address Court on legal basis for Court's decision.

1. The Court's Judgment provides an equitable solution to the dispute before it. Pedra Branca/Pulau Batu Puteh is awarded to Singapore; Middle Rocks is awarded to Malaysia; and South Ledge, a low-tide elevation, will be allocated to the State in the territorial waters of which it is located. Although the dispute was not, at least in theory, about territorial sea and continental shelf, both Parties will share these areas and their resources. If this Court was sitting as a court of equity, or if it had been authorized by the Parties to decide the case *ex aequo et bono* in terms of Article 38, paragraph 2, of the Statute of the Court, I might have been able to agree with the Court's Judgment. The Court is not, however, sitting as a court of equity. The Special Agreement entered into between Malaysia and the Republic of Singapore on 6 February 2003 makes it clear, in Article 5, that the dispute is to be resolved in accordance with international law. As I find it impossible to agree with the Court's reasoning on the law, and its interpretation of the facts upon which this legal reasoning is based in respect of the question of sovereignty over Pedra Branca/Pulau Batu Puteh, I must dissent on this issue.

2. The majority judgment of a court the size of that of the International Court of Justice inevitably must take account of different judicial views and will reflect the lowest common denominator of the majority.

Even allowing for this, I find it difficult to fully comprehend the basis for the Court's Judgment. The Judgment is premised on the finding that the conduct of both Parties has resulted in the passing of sovereignty over Pedra Branca/Pulau Batu Puteh from Malaysia (previously Johor) to Singapore. While considerations of acquiescence, abandonment of title and tacit agreement or understanding feature prominently in the Court's reasoning, no attempt is made to justify or explain the passing of sovereignty in terms of accepted principles governing the acquisition of territorial title. At the same time the interpretation of the facts of the case gives rise for concern. The facts of the dispute are complex, contradictory and complicated. In reaching its final decision the Court has been compelled to choose between competing facts and to attach more weight to some facts than to others. This is the nature of fact finding in the judicial process. In my view, however, the Court has allowed itself, in making its choice of facts and the weight to be attached thereto, particularly in respect of the period 1953 to 1980, to be unduly influenced by its interpretation of the controversial correspondence of 1953 between Singapore and Johor. It has been very kind to Singapore in its assessment of the facts of this period and less kind to Malaysia. My disagreement with the Court on both facts and law are examined in this opinion.

THE FACTS BEFORE 1852

3. I have little disagreement with the Court in respect of events that occurred before 1852. I agree with findings and reasoning of the Court that Johor (and hence Malaysia) had sovereignty over Pedra Branca/Pulau Batu Puteh before 1824 and that nothing occurred between that date and 1844 to affect this conclusion. The Court is correct in deciding that in all probability W. G. Butterworth, Governor of the Straits Settlement, wrote to the Sultan and Temenggong of Johor in November 1844 proposing the construction of the Horsburgh lighthouse in general terms, that is not only for it to be built on Peak Rock but also in other possible locations. However, I disagree with the Court that the Governor "appears" not to have identified Pedra Branca/Pulau Batu Puteh as a possible alternative location (Judgment, para. 134). The correspondence preceding Governor Butterworth's letters indicates that Pedra Branca/Pulau Batu Puteh was always an alternative location and one identified as a possible site for the construction of the lighthouse before Peak Rock was suggested. Thus it is a highly reasonable inference that Pedra Branca/Pulau Batu Puteh was expressly mentioned as an alternative site in Governor Butterworth's letters. This disagreement is not crucial to the outcome of the case as the Court seems to have accepted that sovereignty over the island remained with Johor when the lighthouse was constructed. In any event, it "does not draw any conclusions about sover-

eignty based on the construction and commissioning of the lighthouse” (Judgment, para. 162).

4. The Court makes no finding on the question whether Johor ceded any island (including Pedra Branca/Pulau Batu Puteh) under its sovereignty, that might be chosen for the construction of the lighthouse, to the United Kingdom (and hence Singapore) or whether it granted only permission to build, maintain and operate a lighthouse on the island selected. The reason for this is that the Court was left “in real doubt” about what Governor Butterworth had proposed to the Sultan and Temenggong of Johor in 1844 (*ibid.*, para. 133). The Court was, however, satisfied that Johor’s sovereignty over Pedra Branca/Pulau Batu Puteh before 1844 had already been established.

THE PERIOD 1852 TO 1952

5. There is an ambivalence on the part of the Court in its treatment of the period 1852 to 1952. In large measure this is because of the failure of the Court to reach any conclusion on the question whether Pedra Branca/Pulau Batu Puteh had been ceded to the United Kingdom in 1844 or whether it had merely been given permission to construct, maintain and operate the lighthouse on the island (see above, paragraph 4). The Court considers the conduct of the Parties during this period and carefully scrutinizes events occurring during this period that might have some bearing on the sovereignty over the island, but reaches no conclusion on the question of sovereignty over the island.

6. The Court examines British legislation dealing with the straits lights system, which allowed Singapore to administer lighthouses which had no territorial connection with Singapore, and rightly finds that it did not demonstrate British sovereignty over the islands on which lighthouses were constructed. However, it then finds, in respect of the post 1952-period, that a claim that Pedra Branca/Pulau Batu Puteh belonged to Singapore, included in the drafting history of a 1958 amendment to the 1957 Light Dues Ordinance (Singapore), gives “support to Singapore’s contentions” (Judgment, para. 174). In my view such a claim in the drafting history of a statute does not warrant even so weak a conclusion. Another fact of doubtful significance viewed as having “some significance” by the Court is the fact that in 1952 Johor considered assuming responsibility for the funding of the Pulau Pisang Lighthouse, which clearly falls within Malaysia’s sovereignty, but not for Pedra Branca/Pulau Batu Puteh. On the other hand, the Court does not attach significance to the failure of the 1927 Straits Settlement and Johor Territorial Waters Agreement, which dealt with the retrocession of certain islands ceded by Johor to Singapore in 1824, to include Pedra Branca/Pulau Batu Puteh within Singapore’s territory. It is true, as the Court finds, that Pedra Branca/Pulau Batu Puteh did not fall within the scope of the

Agreement, but one would at the very least have expected Singapore to have insisted on some mention that the island belonged to Singapore — had it at this time indeed claimed sovereignty over the island.

7. Events occurring between 1852 and 1952 are largely viewed by the Court as having no significance or being of little significance. This brings one to 1953 which is seen by the Court as the turning point in respect of sovereignty over Pedra Branca/Pulau Batu Puteh.

THE 1953 CORRESPONDENCE

8. The year 1953 was, in the language of the Court (Judgment, para. 203), of “central importance” to an understanding of the dispute, for in that year the Acting State Secretary of Johor wrote to Singapore informing it that Johor (Malaysia) did not claim “ownership” of Pedra Branca/Pulau Batu Puteh. This admission is correctly seen by the Court as highly significant but whether it, together with preceding or subsequent events, provides evidence that sovereignty over the island was now with Singapore is another matter. In my view there are too many questions, too many doubts, surrounding the 1953 exchange of correspondence between Singapore and Johor and its aftermath to justify the conclusion that Johor’s letter *in effect*, if not in form, resulted in the transfer of sovereignty over Pedra Branca/Pulau Batu Puteh from Johor to Singapore.

9. First, the Singapore Colonial Secretary did not ask where sovereignty over Pedra Branca/Pulau Batu Puteh lay, but whether the island had been leased, granted or ceded to Singapore. Had Singapore’s letter expressly asked which State had sovereignty over or territorial title to the island, and had Johor stated that it did not claim sovereignty or territorial title, it would have been possible to conclude that Johor (Malaysia) had abandoned any claim to sovereign title over the island. But Singapore’s letter confused the language of private law and public law and instead asked whether the island had been leased, subjected to a grant or ceded to Singapore. Not surprisingly, therefore, the reply made use of the language of private law — ownership — not that of public law — sovereignty. And it cannot be denied that there is a difference between ownership and sovereignty.

10. The Court’s comment on “ownership” and “sovereignty” is not convincing. It acknowledges that “in law” ownership is distinct from sovereignty but asserts that the enquiry by Singapore was directed at Singapore’s sovereignty over Pedra Branca/Pulau Batu Puteh. It then adds that “[i]n international litigation ‘ownership’ over territory has sometimes been used as equivalent to ‘sovereignty’” (*ibid.*, para. 222). In support of this proposition it cites *Territorial Sovereignty and Scope of the Dispute*,

Eritreal/Yemen ((1998) 22 *RIAA*, pp. 209, 219, para. 19 and pp. 317-318, para. 474). This calls for two responses. First, as shown above (see paragraph 9 above), the letter of request itself confused property law and international law by asking whether there was “any document showing a lease or grant of the rock or whether it had been ceded by the Government of the State of Johore or in any other way disposed of” (Judgment, para. 192). Secondly, the *Eritreal/Yemen* Arbitration Award does not equate “ownership” with “sovereignty”. The passages cited, use the word “ownership” loosely to mean “sovereignty” but, when it comes to the *dispositif*, the Tribunal is careful to use the word sovereignty in respect of the islands (*Eritreal/Yemen, op. cit.*, pp. 330-331, para. 527). In the present case it is not clear — and this is the reason for uncertainty — whether the Acting State Secretary used the word “ownership” loosely to mean sovereignty or whether he deliberately used the property law term of ownership to indicate that as far as Johor was concerned Singapore owned the land on which the lighthouse was built.

11. Secondly, there is the question why the Acting State Secretary of Johor consulted the Commissioner for Lands and Mines and Chief Surveyor, who would have been able to advise mainly on private law issues, rather than his political and foreign affairs advisers. Was this because he failed to see the matter as one affecting sovereignty over Pedra Branca/Pulau Batu Puteh? Is this why he used the word ownership? And what did he mean by ownership in the context of the historical circumstances relating to the island? Full ownership? Residual ownership? Possession? Or sovereignty?

12. That the Acting State Secretary saw his role as limited to internal, private law affairs is confirmed by the written response of Singapore to the question put by Judge Keith on 23 November 2007. Singapore refers to the fact that during the period in question “Johor officials continued to correspond routinely with their counterparts in Singapore on matters under their charge” (Written response of Singapore to the question put by Judge Keith dated 30 November 2007). Examples of such contact and correspondence given by Singapore concerned the supply of water, cooperative policing and relations between Singapore and the Johor Harbour Master and Johor Controller of Supplies. None of these matters concerned political, external affairs of the kind reserved for Great Britain under the Federation of Malaya Agreement of 1948.

13. Thirdly, why did the Government of Singapore not ask for clarification as to the meaning of “ownership”? Surely it must have been uncertain as to exactly what this meant? Did it fail to publicize the letter of

Johor because this might have prompted an unfavourable clarification or explanation from Johor? The Court's assertion that Johor's reply "is clear in its meaning" (Judgment, para. 223) fails to address questions of the kind raised in paragraphs 9 to 13 of the Judgment.

14. Fourthly, there is the vexed question whether the Acting State Secretary of Johor had the authority to pronounce on matters of sovereignty (as opposed to ownership)? The Parties strongly disagreed on the subject. Malaysia maintains that two agreements of 1948, between the British Crown and the Sultan of Johor and the Federation of Malaya respectively, withheld power in respect of external affairs from the State of Johor in favour of Great Britain. Singapore, on the other hand, argues that the 1953 correspondence did not relate to external affairs and that the principle of *omnia praesumuntur rite esse acta* applied to the 1953 letter. The Court's brief conclusion that the 1948 Agreements were not relevant, because the correspondence was initiated by a representative of the British Crown which was not a foreign State, and because a response to a request for information could not be described as the exercise of executive authority in respect of external affairs, do not in my view satisfactorily answer the constitutional objections raised by Malaysia to the authority of the Acting State Secretary to pronounce on sovereignty over Pedra Branca/Pulau Batu Puteh. This is a matter that required much more attention. Malaysia was itself largely to blame for this as it failed to raise this issue in its written submissions and left it to the closing statements of its oral submissions. Nevertheless, it is an issue of vital importance to the outcome of the case and one which warranted more consideration than it received.

15. Related to the question of the authority of the Acting State Secretary of Johor to pronounce on matters of external affairs is the question of the nature of agreement, if it was an agreement at all, between Singapore and Johor arising from the 1953 correspondence. Was it a treaty governed by international law? Although the Sultan of Johor may have been an independent sovereign, Johor was not a fully independent State but a protectorate (and consequently not a Member of the United Nations). This probably explains why no attempt was made to register the "agreement" under Article 102 of the United Nations Charter. But what was the status of agreements between two British dependencies? Were they agreements *inter se* (like the agreements between the former Dominions within the British Commonwealth)? If they were, it is not "easy", in the words of Lord McNair, "to give a simple answer" to the question whether such agreements were "governed by international law or by some domestic system of law" (Lord McNair, *The Law of Treaties*,

1961, p. 115). And if the 1953 correspondence was not governed by international law does this affect the consequences to be attached to it?

16. Another question, also related to the authority of the Acting State Secretary, is whether he had the authority to dispose of territory that ultimately fell under the British Crown? If he had the authority to dispose of Pedra Branca/Pulau Batu Puteh by a note that was relegated by its recipient to its archives, would he have had the authority to settle a boundary dispute or to dispose of a large section of the Johor mainland? Or would this have constituted an “external affair” to be determined by the British Crown?

17. Fifthly, why did Singapore not publicize the fact that Johor/Malaysia had conceded that “ownership” (sovereignty) over Pedra Branca/Pulau Batu Puteh vested in Singapore? If the 1953 letter was as significant as Singapore claims, it remains a mystery as to why this matter was not given publicity beyond the bureaucracy of Singapore. Why did Singapore not fly its national flag over the island, place it on its own maps, publish it in its promotional brochures? Register it under Article 102 of the United Nations Charter? If the purpose of the letter of enquiry was to determine the boundaries of Singapore’s territorial waters why did Singapore not publicly proclaim its maritime boundaries after 1953? The answer provided by the Court that this could have led to claims for territorial waters by neighbouring States that might interfere with the rights of Singapore fishermen is both speculative and unconvincing.

18. At the beginning of its Judgment the Court asserts that “[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact” (Judgment, para. 45). Later it adds that:

“any passing of sovereignty over territory on the basis of the conduct of the Parties . . . must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.” (*ibid.*, para. 122.)

The question whether Singapore discharged the burden of proof cannot arise in respect of the consequences of the 1953 correspondence as Singapore attached very different consequences to the correspondence to those attached to the correspondence by the Court. Whereas the Court views the correspondence as a “tacit” agreement (*ibid.*, para. 120) or the culmination of a “developing understanding” (*ibid.*, paras. 203, 223,

230, 276) that Johor did not claim sovereignty over the island, or had acquiesced in Singapore's sovereignty over the island, Singapore denied that it was part of its argument that Johor had renounced or abandoned title over Pedra Branca/Pulau Batu Puteh for "the simple reason" that it had no title to renounce or abandon (written response of Singapore to the question put by Judge Keith dated 30 November 2007). As the Court has drawn different conclusions from the 1953 correspondence from those advanced by Singapore, the Court must be satisfied that Johor's conduct "manifested clearly and without any doubt" that it had in effect abandoned sovereignty over the island. Whether the 1953 correspondence provides such evidence is highly doubtful in the light of the very real uncertainties relating to the meaning, nature and consequences of this correspondence.

19. The Court understandably has difficulty in finding a clear legal basis for its finding that the 1953 correspondence substantially contributed to the transfer of sovereignty from Johor to Singapore. It rightly holds that the correspondence was not constitutive and did not create title, that the letter from the Acting State Secretary did not constitute a binding unilateral undertaking and that no estoppel arose. However, the Judgment does not indicate clearly what conclusions are to be drawn from the 1953 correspondence. In the sections of the Judgment associated with the 1953 correspondence, the Court states that the "correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh" (Judgment, para. 203); "that Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh"; and that "[i]n light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island" (*ibid.*, para. 223; see also para. 230). It also talks of an "evolving understanding shared by the Parties" (*ibid.*, para. 224). Earlier in the Judgment the Court comments, probably with reference to the 1953 correspondence, that the passing of sovereignty may result from a "tacit" agreement arising from the conduct of the Parties (*ibid.*, para. 120) and from the failure of a State which has sovereignty to respond to the conduct of the other State *à titre de souverain*, in which case the "absence of reaction may well amount to acquiescence" (*ibid.*, para. 121). Acquiescence, in this context, says the Court, is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent" (*ibid.*; citing the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, *I.C.J. Reports 1984*, p. 305, para. 130). Later, in its concluding section of the Judgment, with reference in part to the 1953 correspondence — described as being of "major significance" in the Court's assessment of the situation (Judgment, para. 275) — the Court declares that the relevant facts, including the conduct of the Parties "reflect a convergent evolution of the positions of the Parties

regarding title to Pedra Branca/Pulau Batu Puteh” resulting in the passing of sovereignty over the island to Singapore (Judgment, para. 276). From this it appears that notions of tacit agreement, developing or evolving understanding (a synonym for tacit agreement?) and acquiescence, evidenced by the conduct of the Parties, provide the legal basis for the Court’s Judgment. Clearly, Johor’s letter of 1953 features prominently in the Court’s assessment. Whether tacit agreement based on: the conduct of parties, a “developing understanding” that sovereignty had passed, or acquiescence, in the context of the facts of the case, as for it providing a sound legal basis for the passing of sovereignty will be examined later.

THE PERIOD 1953 TO 1980

20. The Court’s approach to the legal consequences to be attached to the events of the period 1953 to 1980 are premised on and influenced by its finding that Johor (Malaysia) had acknowledged the sovereignty of Singapore over Pedra Branca/Pulau Batu Puteh in the 1953 letter from the Acting State Secretary of Johor. The actions of Singapore thereafter are positively interpreted to support its claim to sovereignty while its failures to act — its omissions — are excused. Conversely, no positive legal significance is attached to Malaysia’s actions, while its failures to act are seen as further evidence of its acquiescence in Singapore’s claim. This is evidenced by an examination of the Court’s Judgment.

21. The Court finds that Singapore’s investigation of shipwrecks in the vicinity of Pedra Branca/Pulau Batu Puteh has favourable legal consequences for Singapore despite the fact that Singapore as lighthouse operator was obliged to do so. It holds that Singapore’s exercise of control over official visits (including by Malaysia) to the island weighed in Singapore’s favour, and declines to view Malaysia’s acquiescence in this practice as polite deference to the authority of its lessee. Singapore’s installation of military equipment on the island is counted in its favour despite Malaysia’s uncontested assertion that it was unaware of this fact and therefore unable to react. So too is Singapore’s proposal to extend the island by reclamation, which again was done without Malaysia’s knowledge. On the other hand, no adverse inference is drawn from the failure of Singapore to protest, express concern or even publicly take notice of a number of open actions by Malaysia in the vicinity of Pedra Branca/Pulau Batu Puteh which had potentially serious implications for it — the 1968 Petroleum Agreement between Malaysia and the Continental Oil Company of Malaysia, the 1969 Malaysian Territorial Seas legislation extending Malaysia’s territorial waters, and the Agreements of

1969/1970 between Malaysia and Indonesia delimiting their continental shelf and territorial waters. Surprisingly, the Court fails to attach any significance to the failure of the 1973 Territorial Sea Agreement between Singapore and Indonesia to include any mention of Pedra Branca/Pulau Batu Puteh. Generously, the Court likewise draws no adverse inference from the failure of Singapore's official publications to include the island as Singaporean territory, and dismisses as insignificant an assertion made in 1966 by J. A. L. Pavitt, for many years Director of Marine in Singapore, that Pedra Branca/Pulau Batu Puteh did not belong to Singapore (J. A. L. Pavitt, *The First Pharos of the Eastern Seas: Horsburgh Lighthouse*). On the other hand, the Court considers as "significant" the fact that Malaysia listed Horsburgh lighthouse as a "Singapore Station" in two meteorological reports. Malaysia's explanation that this simply meant that this was a Singapore rainfall station is discounted. Finally the Court notes, in passing, and without comment, that Singapore did not include Pedra Branca/Pulau Batu Puteh as part of Singapore in any map it published between 1847 and 1995.

22. The Court is ambivalent in its treatment of Singapore's flying of the ensign over Pedra Branca/Pulau Batu Puteh rather than its national flag. It acknowledges that the flying of an ensign "is not in the usual case a manifestation of sovereignty" (Judgment, para. 246), but draws an inference adverse to Malaysia from its failure to protest about the flying of the ensign over the uninhabited island of Pedra Branca/Pulau Batu Puteh when it had protested over the flying of the ensign over the larger and inhabited island of Pulau Pisang. In my view, the Court should instead have drawn an inference adverse to Singapore for its failure to fly its national flag over Pedra Branca/Pulau Batu Puteh. This failure speaks volumes as it indicates clearly that Singapore did not at any time believe (or at least had no confidence in such a belief) that it enjoyed sovereignty over the island and that for this reason it was unprepared to engage in a public display of alleged sovereignty that would inevitably have followed from the flying of the national flag.

23. Malaysia's actions are viewed less positively. The fact that the Malaysian and Singaporean navies together patrolled the seas in the vicinity of Pedra Branca/Pulau Batu Puteh is treated as insignificant. No weight is given to a 1968 letter of the Chief of the Malaysian Navy declaring that the territorial waters of Pedra Branca/Pulau Batu Puteh were part of Malaysia's territorial sea on the ground that this letter was not made public. (This might have been an acceptable argument had the

Court not been more generous in its attachment of significance to Singapore's secret installation of military equipment and proposed land reclamation: see para. 21 above.) No legal consequences are attached to the Government of Malaysia's 1968 Petroleum Agreement with the Continental Oil Company of Malaysia authorizing the company to explore for oil in the vicinity of Pedra Branca/Pulau Batu Puteh. Here the Court might well have taken judicial notice of the sensitivity displayed by States in respect of exploration for oil and that this Agreement must have received the attention of Singapore — resulting in an expectation of some response. No weight is given to Malaysia's 1969 legislation on its territorial sea on the ground that it does not expressly mention Pedra Branca/Pulau Batu Puteh. Again, one would surely have expected a State with an unpublicized claim to territory in the region to at least have reminded Malaysia of its interest. Malaysia's agreements with Indonesia over their continental shelf and territorial seas are treated in a similar vein, and no adverse inference is drawn from Singapore's silence, despite its obvious interest in respect of territorial claims in the region.

24. The Court's handling of the maps depicting Pedra Branca/Pulau Batu Puteh is highly unsatisfactory. The Court attaches considerable significance to six Malaysian maps that appear to describe Pedra Branca/Pulau Batu Puteh as Singaporean territory, without seriously considering Malaysia's highly plausible explanation that "Singapore" in context referred to the Horsburgh lighthouse only and not to the island. (At this stage the Court might also have considered the question whether Singapore's decision to fly the ensign rather than its national flag gave any support to Malaysia's explanation.) On the other hand, the Court dismisses those maps which clearly support Malaysia's position. First, it doubts the significance of three maps published in 1926 and 1932 by the Surveyor-General of the Federated Malay States and Straits Settlements, which indicate clearly (despite the Court's statement that they "may" indicate) that the island is within Johor. Secondly, it even fails to consider other maps produced by Johor and the United Kingdom, which place Pedra Branca/Pulau Batu Puteh within Malaysian territory.

OVERALL FACTUAL ASSESSMENT

25. This case involves a dispute between two friendly nations, both for many years subject to British authority or influence, whose friendship and close constitutional relationship is in part the reason for the present dispute. This friendship has allowed the issue of sovereignty over Pedra Branca/Pulau Batu Puteh to go virtually unnoticed for 130 years. In

approaching the dispute it is essential to have regard to these historical and political circumstances.

26. Before 1980 no serious attention was paid to the status of Pedra Branca/Pulau Batu Puteh. Malaysia thought the island belonged to it. Singapore too, at some time after the construction of the Horsburgh lighthouse, thought it belonged to it. But, wisely, both Parties allowed the overriding interest of safety of navigation in the Singapore Straits to prevail over territorial claims. The 1953 correspondence did not disturb the relationship between the Parties. Having been informed by Johor that it did not claim "ownership" (whatever this may mean) over Pedra Branca/Pulau Batu Puteh, Singapore did nothing to advertise this information to third States. It did not take any actions based on this information itself. Instead both Parties relegated this information to their archives. Maybe they did this to avoid maritime disputes in the region in the wake of the "new" Law of the Sea declared in the *Fisheries case (United Kingdom v. Norway)* (*Judgment, I.C.J. Reports 1951*, p. 116). Maybe Singapore did not wish to disturb its good relationship with Johor by a request for clarification of the 1953 letter by the Acting State Secretary. Whatever the reason for this conduct, or lack of conduct, nothing was done and the Parties continued as they had behaved before 1953.

27. Singapore continued to behave as a lighthouse operator unaccountable to Malaysia. It was careful not to flaunt its sovereignty, if it believed that it was sovereign. It did nothing to advertise that it considered itself to be sovereign. It flew the ensign over the island rather than its national flag. It accepted Malaysian naval patrols in the vicinity of the island. Military communication equipment was quietly installed on the island. Land reclamation plans were not proceeded with. Official publications made no attempt to include the island in Singaporean territory. Singapore published no map claiming the island as its own. It refrained from reminding Malaysia that it had an interest in the continental shelf or territorial sea of the island when Malaysia entered into a petroleum agreement (1968), adopted legislation on its territorial sea (1969) and entered into an agreement with Indonesia in respect of continental shelf and territorial sea. It raised no objections to maps that included Pedra Branca/Pulau Batu Puteh in Malaysian territory. And, finally, it refrained from claiming the island in its 1973 Territorial Sea Agreement with Indonesia.

28. Malaysia likewise continued to behave as a lessor without any expectation of accountability from its lessee. It failed to protest Singapore's activities on the island, even when they went beyond those of a lighthouse operator. It accepted that it was required to obtain permission from its lessee for visits to the island. It raised no objections to the Singapore navy patrolling the vicinity of the island. It failed to object to Sing-

apore's flying of the ensign, despite the fact that it objected to such conduct in the case of Pulau Pisang. It acknowledged that Singapore controlled the island in its six notorious maps. On the other hand, in a rare display of sovereignty, it did not consult Singapore when it entered into a petroleum agreement for the continental shelf, enacted legislation for its territorial sea and entered into an agreement with Indonesia for the delimitation of its continental shelf and territorial sea.

29. It was not until 1980 that the Parties realized that they had a dispute on their hands. But even then they continued to behave amicably towards each other. Both claimed original title to the island and Singapore politely refrained from claiming that it had acquired title by prescription, possibly because it did not wish to suggest that it had for many years been an adverse possessor of the island.

LEGAL ASSESSMENT

30. As I have said in paragraph 2, I find it difficult to fully understand the basis for the Court's Judgment. Notions of conduct, acquiescence, tacit agreement and abandonment of title feature in the Court's explanation for its decision (see Judgment, paras. 120-121, 162, 203, 223-224, 230 and 275). However, the Court fails to explain how sovereignty over Pedra Branca/Pulau Batu Puteh passed from Johor/Malaysia to Singapore in terms of traditional or accepted rules governing the acquisition of territorial title. In particular, it fails to address the question whether there was "an intentional display of power and authority" over Pedra Branca/Pulau Batu Puteh on the part of Singapore "by the exercise of jurisdiction and State functions, on a continuous and peaceful basis" — a formula said to reflect the "modern international law on the acquisition (or attribution) of territory" by the Tribunal in the *Eritreal/Yemen* Arbitration Award (*Territorial Sovereignty and Scope of the Dispute, Eritreal/Yemen* (1998) 22 *RIAA*, pp. 209, 268, para. 239). In order to decide whether the Court's Judgment can be justified in law the wisest course seems to be to examine the decision within the framework of accepted, or at least known, grounds normally advanced for the acquisition of territorial title and then to test the facts of the case against the grounds that appear to have been advanced by the Court.

31. On the face of it, Singapore's claim looks very much like a claim based on prescription. Malaysia has original title but Singapore claims that for 130 years it has possessed the island and performed acts in respect of the island *à titre de souverain*, peacefully and uninterruptedly. But strangely, Singapore chose not to argue this. It repeatedly stated that "the notion of prescription . . . has no role to play in the present case" (CR 2007/22, p. 29, para. 69) and instead maintained that it:

“relies on its conduct after 1851 not for purposes of establishing a legal title to the territory in dispute — that title was already established by 1851 — but rather to demonstrate that that title was maintained and confirmed by a series of concrete activities on the ground which have lasted for over 150 years” (CR 2007/22, p. 28, para. 66).

Malaysia accepted that “the notion of prescription . . . has no role to play in the present case” (CR 2007/26, p. 35, para. 1).

32. It is not known why Singapore chose not to pursue so obvious an argument, even if only in the alternative. And, with the knowledge of hindsight (although the Court must have realized from the outset it would have to deal with some kind of prescription), it is unfortunate that the Court did not ask the Parties to address it on prescription.

33. Prescription is a concept of uncertain content in international law. According to R. Y. Jennings, it is “a portmanteau concept that comprehends both possession of which the origin is unclear or disputed, and an adverse possession which is in origin demonstrably unlawful” (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963) p. 23). In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment, *I.C.J. Reports 1999 (II)*, p. 1103, para. 94 and p. 1105, para. 97), the Court accepted that for a claim based on prescription to succeed it must be shown that possession is *à titre de souverain*, peaceful and uninterrupted, public and endure for a certain length of time (see also, D. H. N. Johnson, “Acquisitive Prescription in International Law”, (1950) *27 British Year Book of International Law*, pp. 344-348). Publicity is an essential requirement for prescription. According to Malcolm Shaw the possession must be public “so that all interested States can be made aware of it” (*International Law*, 5th ed. 2003, p. 427). Judge Max Huber was also keenly aware of this requirement in his decision in the *Island of Palmas Case (Netherlands/United States of America)* (Award of 4 April 1928, *RIAA*, Vol. II (1949), pp. 839, 868), as he repeatedly emphasized the need for a “continuous and peaceful *display* of State authority” (emphasis added) in order to establish title. Given Singapore’s failure to expressly and openly assert its claim to sovereignty over Pedra Branca/Pulau Batu Puteh, and in particular its failure or refusal to publicize Johor’s response to its letter of 1953, it is highly unlikely that it could have succeeded in a claim based on prescription — had it chosen to argue this. In the event, the Court studiously avoided any suggestion that its Judgment was based on prescription.

34. Another ground, that was raised by Singapore and might have been invoked by the Court for its decision, was estoppel — a term:

“used to denote a legal principle which operates so as to preclude a party from denying before a tribunal the truth of a statement of fact

made previously by that party to another whereby that other has acted to his detriment” (I. Sinclair “Estoppel and Acquiescence” in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), p. 105).

After all, estoppel and acquiescence are closely linked and acquiescence features in the Court’s Judgment. However, the Court rightly rejects estoppel as the basis for the acquisition of title on the ground that there was no evidence that Singapore had taken any action in reliance on Johor’s letter of 1953.

35. The Court also, rightly, dismisses any suggestion that the letter of 1953 might be interpreted as a cession of the island from Johor to Singapore by finding that it did not have a “constitutive character in the sense that it had a conclusive legal effect on Johor” (Judgment, para. 227). Singapore’s argument that the 1953 letter might amount to a binding undertaking is likewise dismissed on the ground that Johor’s statement “was not made in response to a claim made by Singapore or in the context of a dispute between them”, but was simply a response to a request for information (*ibid.*, para. 229). Historical consolidation of title was not considered by either Singapore or the Court as a basis for the acquisition of title, probably because of the doubts that have recently been cast on this root of title by the Court in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* (Judgment, *I.C.J. Reports 2002*, p. 352).

36. This leaves tacit agreement, some sort of acquiescence in Singapore’s title or abandonment of title as the basis for the Court’s Judgment. Abandonment of title is mentioned by the Court as a possible effect of the conduct of the Parties (Judgment, para. 122), but is not raised as a separate basis for the acquisition of title. This is a wise course as the “actual examples of it are scarce” (G. Marston, “The British Acquisition of the Nicobar Islands, 1869: A Possible Example of Abandonment of Territorial Sovereignty”, (1998) 69 *British Year Book of International Law*, p. 262) and the intention to abandon title must be manifest. Johor’s letter of 1953 would not seem to satisfy this test.

37. The Court employs different terminology to describe what it perceives to be a “tacit agreement” between Johor/Malaysia and Singapore on the passing of sovereignty over Pedra Branca/Pulau Batu Puteh. Early in the Judgment, probably with reference to the 1953 correspondence, the Court warns that the passing of sovereignty may result from “tacit” agreement arising from the conduct of the Parties (Judgment, para. 120). Later it talks about “evolving views” (*ibid.*, para. 162) and an “evolving understanding shared by the Parties” (*ibid.*, para. 224). In its concluding remarks on sovereignty over Pedra Branca/Pulau Batu Puteh, the

Court declares, in part with reference to the 1953 correspondence, that the relevant facts and conduct of the Parties “reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh” resulting in the passing of sovereignty over the island (*Judgment*, para. 276). The “evolving understanding” between the Parties and the “convergent evolution” of their positions resulting from their conduct can be read as meaning nothing else but tacit agreement between the Parties arising from their conduct.

38. Implied or tacit agreements must be approached with great caution. An *informal* agreement is a very different agreement from an *implied* agreement. In the former case the intention of parties to enter into an agreement and the terms of the agreement are clear. However, they agree to dispense with the formalities sometimes required for a treaty or agreement (see *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31). In the latter case both intention and terms of the agreement are inferred from the conduct of parties. This does not mean that there should be any relaxation in respect of the fundamental requirement for treaties or agreements, that is, that there should be a concurrence of wills or a meeting of minds on the part of both parties. This is because a tacit agreement remains an agreement, although not covered by the limited definition of a treaty contained in Article 2 (*a*) of the Vienna Convention on the Law of Treaties. Whereas evidence of a treaty governed by the Vienna Convention on the Law of Treaties is provided by its written form, a tacit agreement must be proved by the conduct of parties, and here evidence will be less clear. Consequently, the intention of parties must be manifestly clear; their conduct that constitutes the agreement must leave no room for doubt. Inevitably tacit agreements are difficult to establish. This probably explains why, despite mention of such agreements in Article 3 (*b*) of the Vienna Convention on the Law of Treaties (whose Commentary makes specific mention of “tacit agreement”), few treatises deal with tacit agreements. It also explains why there is very little State practice on tacit agreements and why courts have treated such agreements with great caution. For instance, in the case concerning *Rights of Nationals of the United States of America in Morocco (Judgment, I.C.J. Reports 1952*, p. 176), the Court rejected an argument that “prolonged conduct”, in the form of “usage and sufferance”, on the part of the Parties could constitute a binding agreement (*ibid.*, pp. 200-202, read with the joint dissenting opinion, pp. 219-220).

39. The existence of a tacit agreement must therefore be firmly established. This is acknowledged by the Court when it says that “any passing of sovereignty over territory on the basis of the conduct of the Parties . . . must be manifested clearly and without any doubt by that conduct and the relevant facts” (*Judgment*, para. 122). This accords with the basic rule that restrictions on States are not to be presumed (case concerning

the S.S. "Lotus", "*Lotus*", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18). Judged by these principles, I find it difficult to accept that the 1953 correspondence, riddled as it is with uncertainties and ambiguities (see above paragraphs 8-19), or the equivocal conduct of the Parties in the period 1953 to 1980 (see above paragraphs 20-28), can be held to constitute a tacit agreement or understanding.

40. Sovereignty over territory may pass, says the Court, as a result of "the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State" (Judgment, para. 121). In such a case, continues the Court, "[t]he absence of reaction may well amount to acquiescence" (*ibid.*), which, in the words of the Court in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*Judgment, I.C.J. Reports 1984*, p. 305, para. 130) "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent". The Court does not again expressly mention acquiescence in respect of the passing of sovereignty over Pedra Branca/Pulau Batu Puteh, but prefers to rely on the evolution of an understanding between the Parties, amounting to tacit agreement, as a basis for its decision. Despite this, it seems that acquiescence features as an element of the Court's decision.

41. In most situations acquiescence is linked to estoppel or prescription, but in this case it is connected instead to tacit agreement, in much the same way that was done by the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (*Judgment, I.C.J. Reports 1992*, p. 577, para. 364). Like tacit agreement, acquiescence must be strictly interpreted. According to I. C. MacGibbon:

"The purpose of insisting on circumspection in inferring the consent of a State from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them." (I. C. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 *British Year Book of International Law*, p. 169.)

As shown above (paragraphs 8-18), so much uncertainty surrounds the 1953 correspondence that it is impossible to state that the claim in which Johor/Malaysia is said to have acquiesced, has been sufficiently clearly formulated to find that it had or ought to have had knowledge of the claim now asserted by Singapore. Moreover, it is difficult to maintain that Malaysia has acquiesced in a claim that is founded on a letter that was carefully and deliberately concealed from the public eye by Singapore between 1953 and 1980. Acquiescence surely requires consistency of

conduct on the part of the acquiescing State in respect of the asserted claim. However one interprets the facts between 1953 and 1980 (see paragraphs 20-28 above), it is impossible to argue that they display consistent acquiescent conduct on the part of Malaysia. They are, to put it mildly, equivocal. Some of Malaysia's actions may be interpreted as acquiescence in Singapore's claim — notably the 1953 letter and the six maps that describe the island (or the lighthouse upon it?) as belonging to Singapore. But, as has been shown above, there are explanations for Malaysia's conduct that allow its actions to be interpreted as non-acquiescent acts. Moreover, there are actions that run counter to acquiescence, such as the 1968 Petroleum Agreement, the 1969 Territorial Sea legislation and Malaysia's agreements of 1969 and 1970 with Indonesia over the continental shelf and territorial sea, and the inclusion of Pedra Branca/Pulau Batu Puteh within Malaysian territory in some maps. Had Singapore advertised the letter of 1953 and had Malaysia failed to respond this would have been a basis for a finding of acquiescence. But, of course, Singapore failed to do so. Subject to minor lapses, the acts of Malaysia therefore are consistent with the behaviour of a State that believed it had given permission to a State to operate a lighthouse on its island to continue operating the lighthouse. It is, in these circumstances, impossible to infer acquiescence on the part of Malaysia in Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh.

42. In 1998 the Tribunal in the *Eritreal/Yemen* Arbitration Award stated:

“The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.” (*Territorial Sovereignty and Scope of the Dispute, Eritreal/Yemen*, (1998) 22 *RIAA*, p. 209, para. 239.)

This formulation requires serious attention for two reasons. First, because it gives effect to the jurisprudence of contemporary international law from the time of Max Huber's seminal decision in the *Island of Palmas Case (Netherlands/United States of America)* (Award of 4 April 1928, *RIAA*, Vol. II (1949), pp. 839, 868). Secondly, because it was expounded by a Tribunal comprising two former Presidents of the International Court of Justice (Professor Sir Robert Y. Jennings and Judge Stephen M. Schwebel), the President of the Court (Judge Rosalyn Higgins) and two highly experienced and well regarded international law practitioners (Dr. Ahmed Sadek El-Kosheri and Mr. Keith Highet). In

my view, this is a formulation of the law on the acquisition of territory that is to govern all acquisitions of territorial title based on the effective control of territory over a long period of time, including prescription, estoppel, abandonment of title by the previous sovereign, acquiescence and tacit agreement evidenced by conduct. In other words, for the grounds advanced by the Court in the present case — evolving understanding, tacit agreement or acquiescence evidenced by conduct — to satisfy the requirements of the law, they must be shown to result in a situation in which there is an intentional display of power and authority over Pedra Branca/Pulau Batu Puteh on the part of Singapore, by the exercise of State functions, on a continuous and peaceful basis. For a State to demonstrate an intentional display of power and authority it is not sufficient that it has the intention to act as sovereign. In addition it must display this intention publicly so that both the former, displaced sovereign and third States in the region are aware of the claim. In the light of the uncertainties surrounding the letter of 1953, the failure of Singapore to give publicity to Johor's alleged disclaimer of sovereignty, and the equivocal behaviour of both States in the period 1953 to 1980, it is impossible to seriously argue that Singapore *intentionally* displayed power and authority over the territory by the exercise of jurisdiction and State functions. After all, as the Court accepts, many, perhaps most, of Singapore's actions were fully consistent with the actions of a lighthouse keeper operating in terms of a perpetual lease or grant. Certainly, if Singapore did intend to display power and authority over the island, it did so in a secretive manner without revealing these intentions to the outside world, including Malaysia. The 1953 letter was not published, territorial waters were not claimed around the island, the ensign rather than the national flag was flown, official maps and publications did not claim the island, military equipment was secretly installed and land reclamation plans were not publicized and later withdrawn. To aggravate matters, Singapore expressed no interest whatsoever in Malaysia's plans to exploit the continental shelf and to claim the seas in the vicinity of the island. To repeat, there was no *intentional* display of power and authority over the island for third States and Malaysia to see. Singapore did exercise jurisdiction on a continuous and peaceful basis, but it did so as lighthouse operator and not as a sovereign intentionally displaying power and authority over the island.

43. In my view, for the reasons advanced above, neither the facts nor the law support the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh has passed to Singapore. I therefore find that the original title in respect of the island remains with Malaysia.

44. I am of the opinion that both Middle Rocks and South Ledge fall within the sovereignty of Malaysia. Malaysia's title to Middle Rocks is

based on the original title. South Ledge, a low-tide elevation falling within the territorial sea of Middle Rocks, belongs to Malaysia.

45. The Court is not bound, in reaching its decision, by the submissions of counsel representing parties before the Court. It may invoke reasons of its own *proprio motu* when it considers that there is a sounder basis for decision than that advanced by parties. In the present case the Parties did not directly make submissions or present arguments on the reasons adopted by the Court for the passing of sovereignty — tacit agreement, evolving understanding and acquiescence evidenced by the conduct of the Parties. The main reason for this was that Singapore argued that Pedra Branca/Pulau Batu Puteh was *terra nullius* in 1847, which largely precluded arguments based on control of the island and the conduct of Parties. Nevertheless, as the Court points out in paragraph 124, the Parties did canvas related issues. Despite this, it would have been helpful to the Court if the Parties had made submissions and presented arguments on the legal reasons later approved by the Court. Unfortunately, probably because it is not the practice of the Court to question parties unduly or to interfere in their presentation of argument, no attempt was made to solicit the views of the Parties on the reasons advanced by the Court for its present Judgment. Justice was not necessarily served by the failure of the Court to give some indication to the Parties on the issues that it believed to be of paramount importance.

(Signed) John DUGARD.
