

Analysis and Reflections on Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge

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Abstract

The judgment of the International Court of Justice over the dispute between Malaysia and Singapore concerning Pedra Branca offers quite different insights into general aspects of the rules governing the acquisition of territorial sovereignty in international law. The Court concluded in the case that at a typical time Johor understood that it did not have sovereignty over Pedra Branca and that the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island, and the conduct of Singapore and its predecessors *à titre de souverain* afterwards, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors reflects the pass of sovereignty. In this case, instead of weighing which is the stronger title, the Court emphasized the importance of consent in the field of territorial change and for the notions of abandonment and acquiescence as the legal foundations of this transfer of sovereignty. Based on the analysis on this case, some countries which face similar territorial disputes could acquire inspiration.

Keywords: case concerning sovereignty over Pedra Branca, passing of legal title, consent to transfer sovereignty

1. Introduction

1.1 Subject and Historical Background of the Dispute

Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge is a case between Malaysia and Singapore before the International Court of Justice (hereinafter ICJ). It is a dispute on the sovereignty over three maritime features located in the Straits of Singapore which open into the South China Sea.

The first and most important maritime feature under dispute in the case is Pedra Branca, which is also named as Pulau Batu Puteh in Malay. The process for the court to adjudge which party has sovereignty over this rock is quite detailed and long-lasting, mainly because of the value to be given to various information related to the Horsburgh lighthouse built on the rock. Middle Rocks and South Ledge are the two maritime features closest to Pedra Branca. Middle Rocks are two clusters of small rocks, which are permanently above water, standing from 0.6 to 1.2 m high. Meanwhile, South Ledge is a rock formation only visible at low-tide.

The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511. By the mid-1600s the Netherlands had wrested control over various regions in the area from Portugal. In 1795, France occupied the Netherlands which prompted the British to establish rule over several Dutch possessions in the Malay archipelago. But under the terms of the Anglo-Dutch Treaty of 1814 (also known as the Convention of London) the United Kingdom agreed to return the former Dutch possessions in the Malay archipelago to the Netherlands.

On 17 March 1824, a treaty between the United Kingdom and the Netherlands (entitled “Treaty between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies” and

hereinafter referred to as “the 1824 Anglo-Dutch Treaty”) was signed, which has the practical effect of broadly establishing the spheres of influence of the two colonial Powers in the East Indies. In consequence, one part of the Sultanate of Johor fell within a British sphere of influence while the other fell within a Dutch sphere of influence. At the same year, a Treaty of Friendship and Alliance was signed between the East India Company and the Sultan of Johor and Temenggong of Johor, providing for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore.

Between March 1850 and October 1851, a lighthouse was constructed on Pedra Branca.

The Federation of Malaya gained independence from Britain in 1957, with Johor as a constituent state of the Federation. In 1958 Singapore became a self-governing colony. In 1963 the Federation of Malaysia was established, formed by the merger of the Federation of Malaya with the former British colonies of Singapore, Sabah and Sarawak. In 1965 Singapore left the Federation and became a sovereign and independent State.

1.2 Final Judgment

Considering the sovereignty over Pedra Branca, the court concluded that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca in 1844, this island was under the sovereignty of the Sultan of Johor. The Court does not draw any conclusions about sovereignty based on the construction and commissioning of the lighthouse. Based on an examination of the parties’ conduct after the completion of the lighthouse construction in 1852, the court considers that the 1953 correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca, but it was not a formal or express disclaimer of title to the island, did not amount to a binding unilateral undertaking, and, with no distinct acts by Singapore in reliance on the statement, did not meet the requirements of estoppel. Instead, the Court concluded that “as of 1953 Johor understood that it did not have sovereignty over Pedra Branca and that in light of Johor’s reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.” However, after 1953, 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 reflects the pass of sovereignty. The Court endorsed Malaysia’s argument concerning the status of Pedra Branca as originally belonging to the Sultanate of Johor, but considered that at an unspecified moment in time Malaysia had abandoned its sovereignty and that the United Kingdom/Singapore had acquired it.

As for sovereignty over Middle Rocks, the Court found that the Sultan of Johor held original title and that the conduct related to Pedra Branca did not apply to Middle Rocks. Origin title therefore remained with the Sultan of Johor and with Malaysia as its successor. The Court left sovereignty over South Ledge, a low-tide elevation located within the area of potentially overlapping territorial seas generated by Middle Rocks and Pedra Branca, to be determined by the parties’ delimitation of this as yet undelimited maritime area.

2. Analysis on the Dispute and Judgment

2.1 The Acquisition of Territory and the Passing of Legal Title

Five modes of acquisition of territory have been traditionally identified under international law, mostly derived by analogy from Roman Law rules relating to the acquisition of land by private parties. These five modes are cession, effective occupation, accretion, conquest or subjugation and prescription. However, in practice the issue of territorial sovereignty is complex and cannot usually be ascribed to any single mode of acquisition. Moreover, international tribunals have not always referred to these classic modes of acquisition within fixed compartments. Besides, at present, the notion of “title” is preferred. It refers generally to the acts or facts that constitute the legal foundation for the establishment of a right over territory. The notion of title is often employed to refer either to the source of a right or to the proof of it.

In the present case, the Court did not explicitly refer to any established law of territorial acquisition. It is only from the language of the judgment that one can infer that tacit agreement to transfer legal title, as evidenced by the conduct of the parties, was the basis of the Court’s judgment.

In light of the need to preserve the stability and certainty of State sovereignty, the process of passing a legal title over territory from a State possessing the original title to another State will invite careful consideration. Considering this issue, the relationship between legal title and *effectivités* must be noted.

Huber’s theory was that, apart from the traditional modes of acquiring territory, “the continuous and peaceful display of territorial sovereignty...is as good as a title”. Essential constituents of this concept were: State activity *à titre du souverain*; continuity over some undefined period of time, and, to the extent appropriate to the territory, over the disputed area; some element of acquiescence by other States.

The ICJ, in the 1986 Frontier Dispute judgment between Burkina Faso/Republic of Mali, made clear that: “Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*,

the only role of *effectivités* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivités* does not coexist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice.”

Although the Chamber of the Court was dealing in that case with *uti possidetis*, its statement concerning the relationship between *effectivités* and title is authoritative on the framework to apply in order to examine the relationship between *effectivités* and a legal title in general. The Court has applied this framework in other cases in which *uti possidetis* was or was not at issue. A careful analysis of the ICJ’s territorial dispute jurisprudence indicates that the Court applies a three-tier, hierarchical decision rule that looks first to treaty law, then to *uti possidetis*, and finally to the actual (peaceful and continuous) exercise of “sovereign activities” or “*effectivités*”. Out of the twelve territorial disputes before the Pedra Branca Case decided by the ICJ, the Court directly invoked, and decided on the basis of the peaceful and continuous exercise of sovereign activities (*effectivités*) in three disputes, and partially applied this principle in one dispute. Not only the ICJ, but other international tribunals have recognized *effectivités* as the crucial element of acquiring territorial sovereignty in long line of leading cases including Island of Palmas arbitration, Clipperton Island arbitration, Legal Status of Eastern Greenland, and Eritrea/Yemen.

It was argued that the Pedra Branca case is the only territorial case settled by the Court after the Burkina Faso/Mali judgment in which the Court did not explicitly refer to the traditional relationship between titles and *effectivités*. However, it should be noted that the Court in the present case chooses another approach to establish its judgment which is quite different from some previous cases.

2.2 Consent to Transfer Sovereignty

In its review of the applicable law, the Court offered two modes by which a state could acquire derivative title when the original sovereign shows consent to transfer territory. First, title might pass by tacit agreement arising from, and reflected in, the conduct of the parties. Second, title “might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre du souverain* of the other State...”, with such failure may well amount to acquiescence, amounting to behavior “which the other party may interpret as consent.” The difference between these two modes is subtle and seems to hinge on whether there is actual agreement which is consent from the ceding party or only implicit agreement, with apparent consent coming in the passive form of silence and inaction.

Resorted to the existed international law, it is suggested that rights which have been acquired in clear conformity with existing law have no need of the doctrine of acquiescence to confirm their validity. However, the line which divides conduct which international law permits from that which it prohibits is in many cases not susceptible of precise delimitation. A course of action which in one period may have been expressly prohibited may, by dint of its continued repetition coupled with the consent of other States, be acceptable under rules obtaining in a later period. It is not surprising that, in a system of law which is not fully developed, the extent to which a novel practice may be regarded as being in conformity with existing law should be unpredictable. In the absence of a satisfactory compulsory procedure for authoritative judicial ascertainment of the legality of such practices may depend upon the measure in which they enjoy the express approval of other States, or, in the course of time, their acquiescence.

Jennings holds that, express recognition does not present many problems because if a State were to recognize that another State holds title to the territory in question, combined with the exercise of acts *à titre de souverain*, that will be determinative. Whereas recognition, even though it be tacit, is the adoption of a positive acknowledgment on the part of a State, acquiescence may arise from a mere omission to protest against a situation where a right to protest existed and its exercise was called for. Both recognition and acquiescence, however, are manifestations of a legally operative consent on the part of a State. In a real situation, recognition and also indeed acquiescence are almost always *prima facie* relevant considerations, and factors to be taken into consideration by any international tribunal faced with a dispute over territorial sovereignty of this kind.

The Court does neither explicitly explain the differences between tacit agreement and acquiescence, nor makes it clear which mode it chooses to apply in the present case, but the language throughout the judgment includes “evolving views”, “developing understanding”, “evolving understanding shared by the Parties”, “Johor understood...Singapore had no reason to doubt”, and “convergent evolution of the positions of the Parties” describes a protracted meeting of the minds. Judge *ad hoc* Dugard considers that “developing or evolving understanding” may be a synonym for tacit agreement, and it appears that notions of tacit agreement, developing or evolving understanding and acquiescence, evidenced by the conduct of the Parties, provide the legal basis for the Court’s Judgment. Anyhow, the Court may not distinguish the notion of tacit agreement and acquiescence,

but the wording in the Judgment reflects that the Court tries to find a “consent” between the parties, which is based on one hand the parties’ intentions, and on the other hand on the parties conducts. However, the vacuum and ambiguity the Court leaves here would inevitably raise questions.

The Judgment actually recognizes that both parties consent to transfer the sovereignty, through silence or inaction and in the way of tacit agreement or acquiescence. As it is put forward in the Judgment, any passing of sovereignty over territory based on the conduct of the Parties must be manifested clearly and without any doubt by that conduct and the relevant facts. The Court has to infer both intentions and contents of the consent from the conduct of the parties on a concrete basis, making sure that the intention of parties must be manifestly clear; their conduct that constitutes the agreement must leave no room for doubt. However, such deduction is inevitably difficult to establish. As a matter of fact, few treatises deal with tacit agreements, and there is very little State practice on tacit agreements, and therefore courts have treated such agreements with great caution. This may be another reason why the Judgment of Pedra Branca case attracts many dissents on this topic.

3. Reflections on the Judgment

A remarkable feature of the present judgment relates to the passing of legal title from Malaysia, which is the original title holder, to Singapore by the consent and conduct of the Parties. It is also worth noting that the Court examine the case from the aspect of consent, which may avoid some legal questions that could generate defective titles or rights.

The ICJ has an important role to play in the development of the international law on acquisition of territory. The Pedra Branca case is an appropriate manifestation of such a role played by the ICJ, even though it is accompanied by debate and query. But just like what is put forward by Tanaka, as with all types of law, the antithesis between stability and change is a fundamental issue underlying international law of acquisition of territory. This will produce a difficult question how it is possible to reconcile the requirement of stability of sovereignty and change of circumstances with the passage of time. The Pedra Branca judgment will provide an important example for discussion in this matter.

While studying the case, it seems that some countries will inevitably be brought into the position of Malaysia in this case. Malaysia, as a country with the original title of power of Pedra Branca, how it handed the title over is of great warning significance to many countries. Based on the evidence adopted by the court decision, one can be alert to other countries’ invasion of territory and preset the response in advance from the following aspects.

First of all, countries must pay attention to official materials. In the Pedra Branca case, Singapore and Malaysia submitted a large number of map evidences. Among them, six maps published by the Malayan and Malaysian Surveyor General and Director of National Mapping in 1962, 1965, 1970, 1974 and 1975 were adopted by the ICJ, holding that these maps confirmed that Malaysia regards Pedra Branca as the territory of Singapore, because the words “Singapore” are marked under Pedra Branca on these maps. The court held that although these maps did not have the effect of creating the title, they were important evidence to prove the official position of Malaysia. On the one hand, countries need to be cautious about all official materials that may cause similar misunderstandings, and must not repeat the mistakes of Malaysia; On the other hand, countries should also further explore the existing official materials to avoid the lack of evidence to support the claim and position.

Secondly, pay attention to the publicity of State activity *à titre du souverain*. In the Pedra Branca case, both Singapore and Malaysia submitted internal military documents indicating that the sovereignty of Pedra Branca belongs to their own side. The ICJ believed that Malaysia’s charts and Singapore’s guidelines were unilateral acts and were unknown to the other party, and the relevant documents were confidential and were not disclosed before. In dealing with foreign affairs, the state may not disclose some important materials based on the requirements of interests and confidentiality. However, it can be prompted by Pedra Branca case that countries should consider whether confidentiality will have a negative impact on the settlement of future territorial disputes when involving disputed islands and reefs. In addition, when non confidential actions are taken on disputed islands and adjacent waters, efforts should be made to publicize the actions, so as to reach the objective standard that the opposite country can recognize.

Finally, countries should express firmly that it has the original title of disputed islands and reefs. In the Pedra Branca case, the letter in 1953 and the tacit agreement which Malaysia made it possible for Singapore to possess the title through *effectivités*. The attitude of the country which has the original title is crucial. As long as there is a flaw, it may lead to a different outcome. For some countries which own the original title, it is important to firmly and clearly resist the invasion of island and reef sovereignty conducted by relevant countries, and continue to issue official positions and attitudes, thus effectively safeguard the territorial integrity and protect maritime rights and interests.

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