

MALAYSIA V. SINGAPORE

A Case Summary for the
Maritime Dispute Resolution Project



U.S.-ASIA LAW INSTITUTE
NEW YORK UNIVERSITY SCHOOL OF LAW

Maritime Dispute Resolution Project

Sovereignty Over Pedra Branca/Pulau Batu
Puteh, Middle Rocks and South Ledge
(*Malaysia v. Singapore*)

Case Summary by Yann-Huei Song*



A research project of the
U.S.-Asia Law Institute

* SONG Yann-Huei, Research Fellow, Institute of European and American Studies, Academia Sinica (Taiwan)

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Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

Citation:

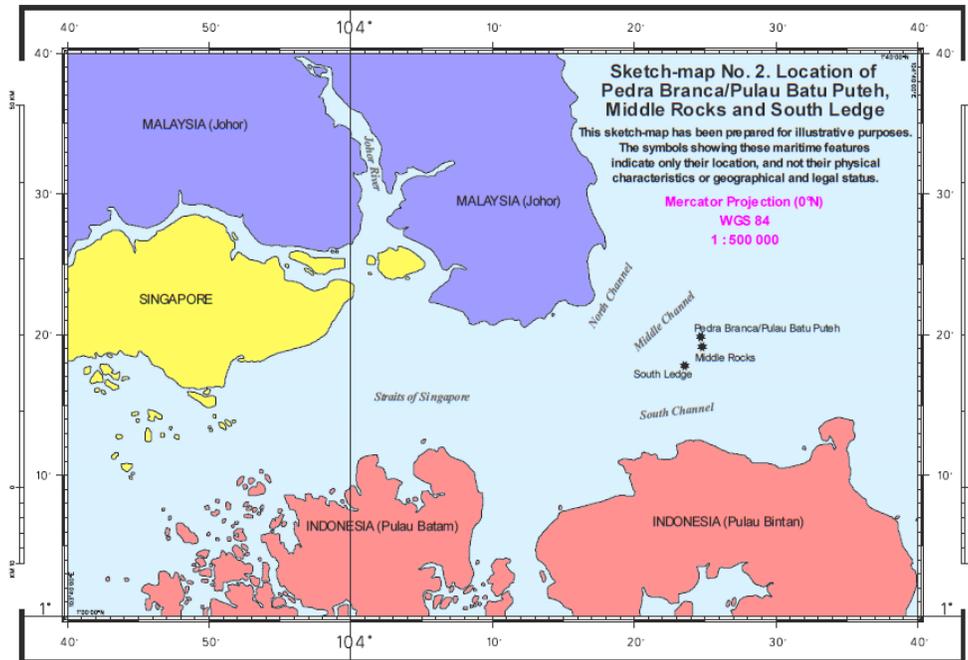
Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, Malaysia v Singapore, Judgment, Merits, ICJ GL No 130, ICGJ 9 (ICJ 2008), 23rd May 2008, International Court of Justice [ICJ]

Section I – Background and Summary of the Case

This case concerns a dispute between Malaysia and Singapore over territorial sovereignty to maritime features in the Straits of Singapore. The main focus of the dispute, Pedra Branca/Pulau Batu Puteh¹ is a granite island 137 meters (“m”) long and an average of 60 m wide, roughly 24 nautical miles (“nm”) east of Singapore and 7.5 nm from Malaysia (the state of Johor) and Indonesia. The two other features are minor. Middle Rocks is a cluster of rocks to the south that is no higher than 1.6 m at low tide, and South Ledge is a rock formation to the southwest that is submerged at high tide. The features are considered important because of their strategic location, nearby fishery resources, and their significance in the delimitation of maritime boundaries.

The competing claims arise from the complex colonial history of the area. In 1826, Britain established an outpost on land “donated” by the Sultanate of Johor, an independent kingdom under British influence that controlled much of the region in this period. The ceded territory included Singapore and lesser islands within 10 miles, but did not extend to the maritime features that are the subject of this dispute. In the 1847 the British government selected the uninhabited island of Pedra Branca/Pulau Batu Puteh, beyond 10 miles from Singapore, as the site for a lighthouse. It was completed in 1851 and has been operated by either the United Kingdom or Singapore until today.

¹ Singapore refers to the island by the Portuguese name of Pedra Branca, which came to be used by Western cartographers, while Malaysia refers to the island by the Malay name of Pulau Batu Puteh. Both mean “white island.”



Source: ICJ Judgment.

After World War II, Malaysia and Singapore both gained independence, respectively inheriting the claims of Johor and the United Kingdom. In late 1979, Malaysia published a map showing the island and other disputed features within its territorial waters. Shortly after, Singapore rejected the claim in a formal diplomatic communication, crystalizing the dispute on February 14, 1980.

Section II – Summary of the Key Procedural Steps

In the decade following, tensions between Malaysia and Singapore escalated. Malaysian police sent boats to assert sovereignty over the disputed feature and surrounding waters, and the Singaporean navy sought to deny access in defense of its own claim. To prevent further escalation, the countries sought to resolve the issue through

diplomatic channels. In the early 1990s, Malaysia and Singapore exchanged documents regarding their claims, and two rounds of bilateral consultations were held in 1993 and 1994. In view of the lack of progress, in September 1994, Prime Minister Goh Chok Tong of Singapore and Prime Minister Mahathir Mohamad of Malaysia agreed to submit the dispute for resolution by the International Court of Justice (ICJ).

As the two countries are not signatory to the Statutes of the ICJ, a Special Agreement was required to bring the case to the Court. It took four years (1995 – 1998) for Malaysia and Singapore to reach agreement on the text of the Special Agreement. The delay was due to the following difficulties: (1) whether to list “Pedra Branca” or “Pulau Batu Puteh” first when describing the subject matter of the litigation; (2) whether the issue to be referred to the ICJ should also cover Middle Rocks and South Ledge; and (3) whether to accept Malaysia’s proposal to include a provision in the Agreement to the effect that if one side was adjudged to have sovereignty over Pedra Branca, the ICJ should also be asked to determine the rights or interests of the other party. On February 6, 2003, Malaysia and Singapore signed the Special Agreement, in which they agreed in advance “to accept the Judgment of the Court . . . as final and binding upon them.” The Agreement entered into force on May 6, 2003.

Since no judge on the Court was a national of Malaysia or Singapore, in accordance with Article 31 of the Statute of the ICJ, each party had the right to select a judge ad hoc to sit in the case. Malaysia chose Mr. Christopher John Robert Dugard and Singapore selected Mr. Sreenivasa Rao Pemmaraju. The president of the Court, Judge Rosalyn C. Higgins, recused herself from participating in the case and therefore the vice-president of the Court, Judge Awn Al-Khasawneh, exercised the functions of the presidency for the purposes of the case. The parties presented

written pleadings to the Court in 2004 and 2005, and public hearings were held in November 2007.

Section III – Summary of Key Substantive Issues

The dispute between Malaysia and Singapore focused on a set of questions concerned the lighthouse and the island. First, did Johor hold historic title to Pedra Branca/Pulau Batu Puteh, or was the island *terra nullius* before the 1840s? Second, did the 1844-1851 construction of the lighthouse and its subsequent operation in the colonial period constitute acts *à titre de souverain*, and did Johor abandon its title at any point? Third, did acts from either state asserting sovereignty *à titre de souverain* in the modern period result in Malaysia or Singapore acquiring title?

Additionally, the court considered ownership over Middle Rocks and South Ledge, but the factual record was less robust and stakes lower. As such, this inquiry occupied less of the attention of the court.

A. Was Pedra Branca/Pulau Batu Puteh *Terra Nullius*?

Was the island *terra nullius* before the construction of the lighthouse?

Malaysia argued that the maritime feature in question had always been part of the Sultanate of Johor since the kingdom came into existence. The party argued that the island was not ceded to the United Kingdom, but leased for the sole purpose of building and operating a lighthouse. Therefore, the island was not *terra nullius*.

In opposition, Singapore contended that before 1847 Pedra Branca/Pulau Batu Puteh had been *terra nullius* susceptible of the lawful taking of possession by the United Kingdom. Singapore

emphasized that Malaysia submitted very little evidence showing that the Sultanate of Johor had effective control in the region, and specifically over the maritime feature of Pedra Branca/Pulau Batu Puteh. Singapore therefore argued that “there is no evidence that Pedra Branca belonged to the Johor Sultanate at any point in its history and certainly not at the beginning of the nineteenth century.”

Based on evidence submitted, the Court concluded that from at least the seventeenth century until early in the nineteenth century, it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits. Specifically, this domain included the area where Pedra Branca/Pulau Batu Puteh is located.

The Court then considered whether this historic domain accorded Johor title recognized in law. The Court cited the conclusion made by the Permanent Court of International Justice (“PCIJ”) in the *Case Concerning the Legal Status of Eastern Greenland* on the significance of the absence of rival claims to the sovereignty over the disputed island. The Court found that the possession of Pedra Branca/Pulau Batu Puteh by the Sultanate of Johor had never been challenged by any other power in the region and therefore satisfied the condition of “continuous and peaceful display of territorial sovereignty.” By citing the pronouncement made by Judge Max Huber in the *Island of Palmas Case* (Netherlands/United States of America), the Court noted that State authority should not necessarily be displayed “in fact at every moment on every point of a territory.” Accordingly, the Court concluded that the Sultanate of Johor had original title to

Pedra Branca/Pulau Batu Puteh, and therefore that the island was not *terra nullius*.²

The Court concluded that Malaysia had established to the satisfaction of the Court that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor.

B. What Was the Legal Status of Pedra Branca/Pulau Batu Puteh after the 1840s?

The Court then turned to the question of whether Malaysia retained sovereignty over Pedra Branca/Pulau Batu Puteh after 1844, when the British started their preparations for the construction of the lighthouse on the disputed feature.

Malaysia contended that because the lighthouse was built on an island over which Johor was sovereign, all the actions of the British authorities and, following them, the Singaporean authorities, are simply actions pursued in the normal course of the operation of the lighthouse. Singapore, by contrast, argued that some of the actions are not matters simply of the operation of the lighthouse but are, in whole or part, acts *à titre de souverain*. Singapore referred to legislation enacted by itself and its predecessors in title, which regulated the defraying of costs of establishing and operating the lighthouse, vesting control of it under various governmental

² The court also considered at length the significance of the Anglo Dutch Treaty of 1824, which ultimately supported recognition of Johor's historic title. Not addressed at length here for reasons of space, this treaty recognized possessions of Johor in the area, in the context of delimiting Dutch and English spheres of influence in the Far East.

bodies, and regulating the activities of persons residing, visiting and working on Pedra Branca/Pulau Batu Puteh.

To resolve which position would prevail, the Court noted that “[s]overeignty over territory might under certain circumstances pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or to concrete manifestations of the display of territorial sovereignty by the other State.” Citing the ICJ in the *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the Court indicated that the lack of response by the State concerned may amount to “acquiescence,” which “is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...” However, in such circumstances, they noted that acts of sovereignty “must be manifested clearly and without any doubt by that conduct and the relevant facts.”

The court reviewed the factual record closely, examining the selection process of the site of the lighthouse in the period 1836 to 1844, the construction and commissioning of the lighthouse in 1850-1851, the conduct of the Parties between 1852 and 1952, and the 1953 correspondence between the Colonial Secretary of Singapore and the British Adviser to the State of Johor, and the conduct of the Parties after 1953.

Broadly, the court found that some of the historic actions of Britain were insufficient to demonstrate intent to exert exclusive sovereign control over the island. Some actions suggested sovereignty, but not unambiguously. Thus the factual record before 1953 did not resolve the question of title and territorial sovereignty.

However, of “central importance” to the Court’s analysis, is a letter dated September 21, 1953. That year, the British Colonial Secretary

of Singapore wrote to the British Advisor to the Sultan of Johor, asking for information pertinent to Johor claims over the rock. This message was passed to the Acting State Secretary of Johor, who replied in the September 21 letter that “the Johor Government [did] not claim ownership of Pedra Branca.”

During the oral hearings, Malaysia argued that the Acting State Secretary was neither authorized nor had the legal capacity to write the 1953 letter. The court disagreed. The Court found that the Johor’s reply shows that as of 1953, Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

C. The Conduct of the Parties after 1953

Singapore contended that it and its predecessors have exercised sovereign authority over Pedra Branca/Pulau Batu Puteh by implementing a variety of actions, including (1) investigating shipwrecks and reporting on maritime hazards and shipwrecks within the disputed maritime feature’s territorial waters; (2) exercising exclusive control over visits to Pedra Branca/Pulau Batu Puteh and using the feature; (3) conducting naval patrols and exercises in the area around Pedra Branca/Pulau Batu Puteh; (4) displaying the British and Singapore ensigns on the feature; (5) installing military communications equipment on the feature in 1977; (6) proposing the reclamation project to extend the feature; (7) issuing official publications; (8) the development regarding inter-State co-operation in the Straits of Singapore; and (9) publishing official maps. Singapore argued that these actions are conduct *à titre de souverain*.

Malaysia argued that a variety of activities it conducted, including naval patrols and exercised in the waters around Pedra Branca/Pulau Batu Puteh, the oil exploration agreements it signed with a national oil company, the delimitation of Malaysia’s

territorial sea in 1969, the continental shelf agreement it signed with Indonesia in 1969, the Territorial Sea Agreement concluded by Malaysia and Indonesia in 1970, and the 1973 Indonesia-Singapore Territorial Sea Agreement, supported its position that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Malaysia.

After examining the relevant documents and records, the Court concluded that the conduct of Singapore with respect to investigating shipwrecks in the waters around Pedra Branca/Pulau Batu Puteh gives significant support to Singapore in this case, as this conduct assists Singapore's contention that it was acting *à titre de souverain*. The Court also considered Singaporean conduct with regard to exercising exclusive control over visits to Pedra Branca/Pulau Batu Puteh and using the feature as conduct *à titre de souverain*. The flying of the British and Singapore ensigns from Horsburgh lighthouse from the time of its commissioning in 1851 to the present day was seen by the Court as a clear display of sovereignty. The Court was of the view that the installation by Singapore of military communications equipment on Pedra Branca/Pulau Batu Puteh is an act *à titre de souverain*. The Court also concluded that the reclamation project proposed by Singapore to extend Pedra Branca/Pulau Batu Puteh supports Singapore's case. Finally, with regard to the publication of official maps by Singapore, the Court concluded that the maps published by Singapore since 1995 and the six maps by Malaysia in 1962, 1965, 1970, 1974, and 1975 confirmed that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.

The Court observed that patrols by its navies in the waters around Pedra Branca/Pulau Batu Puteh were described by Singapore only in general terms, and therefore cannot be taken in support of its position with regard to sovereignty over the disputed maritime feature. The Court did not give weight to inter-State cooperation in the Straits of Singapore and the Straits of Malacca because they are

not concerned with territorial rights but with the facilitation and safety of navigation through the Straits as a whole. As far as official publications of the government of Singapore are concerned, the Court did not consider that they can be given any weight because of the purpose of the publications and their non-authoritative and essentially descriptive character.

The Court did not give weight to Malaysia's act regarding naval patrols and exercises as it rejected Singapore's argument on the same ground. Given the territorial limits and qualifications in the entire concession area and the lack of publicity of the co-ordinates, the Court did not give weight to the 1968 Malaysian petroleum agreement. No weight was given to Malaysia's legislative act in 1969 to extend its territorial waters from 3 to 12 nm, either, due to the very generality of the 1969 territorial sea legislation. The Malaysian legislation does not identify the areas to which it is to apply except in the most general sense. It says only that it applies "throughout Malaysia." The Court was of the opinion that the 1969 Indonesia-Malaysia Continental Shelf Agreement and the 1970 Territorial Sea Agreement cannot have any significance in this case because of absence of participation of Singapore in maritime boundary delimitation in the Straits of Singapore area. Finally, the Court did not give any weight to the 1973 Indonesia-Singapore Territorial Sea Agreement in respect of sovereignty over Pedra Branca/Pulau Batu Puteh, because, like the Malaysia-Indonesia Agreements in 1969 and 1970, the Agreement does not cover the sovereignty issue.

D. The Court's Conclusion on the Issue Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh

Especially by reference to the conduct of Singapore and its predecessors *a titre de souverain* from 1953 to 1980, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors

during the same period of time, the Court concluded that by 1980 (when the dispute crystallized) sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore. The Court thus concluded that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore.

E. The Court's Consideration and Conclusion on the Issue Concerning Sovereignty over Middle Rocks

The Court observed that the particular circumstances which led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore clearly do not apply to Middle Rocks. Accordingly, the Court found that original title to Middle Rocks should remain with Malaysia as the successor to the Sultanate of Johor.

F. The Court's Consideration and Conclusion on the Issue Concerning Sovereignty over South Ledge

As for South Ledge, the Court noted that this low tide elevation falls within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and Middle Rocks. Because it has not been mandated by the Parties to draw the line of delimitation with respect to their territorial waters in the area, the Court concluded that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located

Section IV – Implementation of the Tribunal's Decision

After the release of the ICJ's judgment, both Singapore and Malaysia agreed to abide by the Court's ruling and established a Malaysia-Singapore Joint Technical Committee ("MSJTC") to implement the Court's judgment. The MSJTC was tasked with addressing the delimitation of the maritime boundaries between the

territorial waters of both countries. The Committee had met seven times since 2008, but reached an impasse in November 2013 because the two countries were “unable to agree over the meaning of the 2008 Judgment as it concerns South Ledge and the waters surrounding Pedra Branca/Pulau Batu Puteh.”

In February 2017, Malaysia filed an application for revision of the ICJ’s 2008 Judgment in accordance with Article 61 of the Statutes of the ICJ. Malaysia argued that “there exists a new fact of such a nature as to be a decisive factor within the meaning of Article 61. . . .” In response, Singapore filed its Written Observations on the admissibility of Malaysia’s revision application with the Court in May 2017. In June 2017, Malaysia filed an application for interpretation of the ICJ’s 2008 Judgment in accordance with Article 60 of the ICJ’s Statute. Malaysia indicated in its Application that “[t]he parties have been unable to agree on the meaning and/or scope of the following two points of the 2008 Judgment: (1) the Court’s finding that “sovereignty over Pedra Branda/Pulau Batu Puteh belongs to Singapore”; and (2) the Court’s finding that “sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.”

Less than two months after filing the application for interpretation of the Judgment, Malaysia inaugurated the Abu Bakar Maritime Base on Middle Rocks, which consists of a jetty, helipad and lighthouse plus quarters for a detachment of personnel from the Malaysian Maritime Enforcement Agency. In the same month, the Liberian-registered tanker *Alnic MC* and the US Naval vessel USS *John S. McCain* collided in the westbound lane of the Singapore Straits, resulting in ten fatalities on the American warship. Both Malaysia and Singapore claimed that the collision occurred in their territorial waters and conducted separate and independent search and rescue operations.

In October 2017, Singapore filed its Written Observations on the admissibility of Malaysia's interpretation application with the ICJ. In May 2018, Malaysia withdrew its applications to revise and interpret the ICJ's 2008 Judgment. On May 29, 2018, the ICJ made an Order directing the removal of the case from the Court's List. In early June 2018, Malaysian Prime Minister Mahathir Mohamad said that his country plans to form a "small island" by enlarging Middle Rocks. In response, Singapore's Defense Minister Ng Eng Hen stated that Malaysia's development plan is "completely legitimate, as long as it complies with international law." Law of the Sea experts also said that developments on Middle Rock are allowed as long as they do not breach the 1982 United Nations Convention on the Law of the Sea (UNCLOS) or encroach onto Singapore's territorial waters. At present, both Malaysia and Singapore are encouraged to work together to strengthen security cooperation in the eastern Singapore Straits near Pedra Branda/Pulau Batu Puteh and Middle Rocks. It was also reported that the MSJTC has continued negotiations on the issues concerning sovereignty over South Ledge and the delimitation of the maritime boundaries between the territorial waters of Pedra Branda/Pulau Batu Puteh and Middle Rocks.

Section V – Conclusions

Both Malaysia and Singapore are members of the United Nations and parties to the UNCLOS. Under Article 2 of the U.N. Charter, the two countries are obliged to settle their international disputes by peaceful means, which include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" as provided in Article 33 (1) of the U.N. Charter and Article 279 of the UNCLOS.

In the Malaysia/Singapore case, the two Parties began with negotiation and exchange of relevant documents for the purpose of seeking an acceptable way to settle their dispute over Pedra Branda/Pulau Batu Puteh, Middle Rocks and South Ledge. Failing to resolve the matter, they agreed to submit the dispute to the ICJ for settlement. The existence of political will and political commitment to upholding the rule of law made it possible for the dispute to be adjudicated by the ICJ.

However, because the three maritime features are very close to each other and are located at the boundary of territorial waters of Malaysia, Singapore and Indonesia, it is very difficult to manage the jurisdiction and law enforcement issues in the overlapping areas before a maritime boundary delimitation agreement is finally concluded by the three countries. In addition to the delimitation of the territorial sea in the Straits of Singapore area, there are other issues to be dealt with by Malaysia and Singapore, including the rights of fishermen, naval patrols security matters, prevention of marine pollution, and traffic separation of thousands of vessels entering and leaving the Straits of Singapore.

Before the ICJ's May 2008 judgement, there was a concern about whether Pedra Branda/Pulau Batu Puteh and Middle Rocks could claim an exclusive economic zone (EEZ). Soon after the judgment released by the Court, the government of Malaysia instructed the media to cease using the Malay word "Pulau" or island for Pedra Branca. This was related to the claim made in the Singaporean Parliament in July 2008 by Balaji Sadasivan, then Singapore Senior Minister of State for Foreign Affairs, that the maritime territory around Pedra Branca included a territorial sea of up to 12 nm and an EEZ. It would be interesting to confirm the official government position of Malaysia and Singapore on the legal status of Pedra Branda/Pulau Batu Puteh and Middle Rocks with regard to their right to generate an EEZ or continental shelf after the

announcement of the arbitral award by the Tribunal that heard the 2003 Philippines-China arbitration case and announced an award in July 2016. The Tribunal in that case ruled that none of the maritime features can be considered a “full-fledged island” and therefore they are not entitled to generate an EEZ or continental shelf.

The Malaysia/Singapore case demonstrates the importance of the legal principle of *estoppel* as the Court considered interpretation of the 1953 letter of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branda/Pulau Batu Puteh. The Court concluded that the letter shows that “as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Batu Puteh.” In addition to this legal principle, the importance of maps is also recognized by the Court in this case. The Court concluded that the maps published by Malaysia between 1962 and 1975 confirmed that Malaysia considered Pedra Branda/Pulau Batu Puteh to be under the sovereignty of Singapore.

Finally, the central importance of conduct *à titre de souverain* is also demonstrated in this case as the Court considered a full range of actions and activities undertaken by Singapore on Pedra Branda/Pulau Batu Puteh and its surrounding waters to conduct *à titre de souverain* and support Singapore’s sovereignty claim. Singapore’s acts of sovereignty include installment of radar and communications facilities, flying the ensign, visits by high-ranking officials, control of access by foreigners, undertaking scientific research and salvage operations, exercising jurisdiction to investigate shipping incidents, etc.



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