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INTERNATIONAL LEGAL RULES FOR DECIDING SOVEREIGNTY DISPUTES

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International legal rules for deciding sovereignty disputes

The international legal rules for deciding sovereignty disputes are well established, and are set out in this paper.[1]

a. The rules for acquisition of territory were concisely summarized by the tribunal in the first (1998) *Eritrea/Yemen* Arbitration Award:

> "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. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any."[2]

In the 1931 award in the dispute between Mexico and France over the sovereignty of *Clipperton Island*, located in the Pacific Ocean 1280 km (about 690 nautical miles) southwest of Acapulco, Mexico, the King of Italy as sole arbitrator had previously stated the rules this way:

> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

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[1] See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, "The Creation and Transfer of Territorial Sovereignty," chapter 7 (7th ed. Oxford 2008).

[2] Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (*Territorial Sovereignty and Scope of the Dispute*, (1998) 22 *RIAA*, p. 268, para. 239). Judge Dugard, in his dissenting opinion in the *Pedra Branca/Pulau Batu Puteh* case, stated:

> 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. (pages 150-151, para. 42).

> There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.[3]

In the separate opinion of Judge Carneiro in the case of the *Minquiers* and *Ecrehos* islands (France/United Kingdom), ICJ 1953, the judge laid out the rules for determining sovereignty in greater detail:

> 2. *Criterion for the decision*. -- In this Opinion I have confined myself to the following rules which were laid down by the Permanent Court of International Justice in the case concerning the Legal Status of Eastern Greenland:[4]
>
> (a) the elements necessary to establish a valid title to sovereignty are "the intention and will to exercise such sovereignty and the manifestation of State activity" (pp. 46 and 63);
>
> (b) in many cases international jurisprudence "has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries". (p. 46);
>
> (c) it is the criterion of the Court in each individual case which decides whether sovereign rights have been displayed and exercised "to an extent sufficient to constitute a valid title to sovereignty" (pp. 63-64).[5]

In this case, Judge Carneiro then applied these rules to the interpretation of treaties and other ancient documents by considering the following factors: the historical moment that the documents were concluded and their specificity regarding the islands in question; the attitudes of the parties regarding the features in question; geographical data; the natural unity of the islands; proximity of the mainland and relevant historical facts; acts of occupation; visits of fishermen; maps (which in this case were not taken into consideration); and diplomatic protests of the parties.

In cases where resolution of a dispute depends on legally significant facts that occurred, or a treaty concluded, centuries ago, the doctrine of *inter-temporal law* has become well-established: "in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at that time, and not as they exist today."[6]

Later cases have elaborated on the meaning and scope of these rules.

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[3] 26 American Journal of International Law 390, at 393-394 (1932), http://www.jstor.org/stable/pdfplus/2189369.pdf.
[4] http://www.icj-cij.org/pcij/serie_AB/AB_48/01_Groenland_ordonnance_19320802.pdf.
[5] *The Miniquiers and Ecrhos case*, individual opinion of Judge Carniero, ICJ Rep. 1953, p. 85, http://www.icj-cij.org/docket/files/17/2029.pdf.
[6] Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice," 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 5 (1953). This principle was earlier applied in the *Island of Palmas* case, note 8 below.

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a. One of the initial decision points is identifying what is known as the "*critical date or dates*". The ICJ, in its *Pedra Branca/Pulau Batu Puteh* judgment, stated:

> 32. The Court recalls that, in the context of a dispute related to sovereignty over land such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date, "which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, pp. 697-698, para. 117).
>
> As the Court explained in the *Indonesia/Malaysia* case, "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135).

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b. On the issue of the *burden of proof*, the ICJ in its *Pedra Branca/Pulau Batu Puteh* judgment stated:

> 45. It 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 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 75, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101).

In his separate opinion in this case, Judge ad hoc Rao explained the standard of proof needed to meet this burden of proof (p. 154, para. 3):

> it is quite clear from the well-established jurisprudence of the Court that it is incumbent upon Malaysia to prove with certainty that the claim it makes is sound in law and to establish conclusively the facts on which the claim of Johor's original title is based. That this is the standard of proof that is required is clear from the pronouncement of the Court in the *Nicaragua* case. Referring to Article 53 of its Statute and clarifying the standard of proof that is required to "satisfy itself", the Court noted that it
>
> > "must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 24, para. 29).

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c. With regard to the *absence of competing sovereignty claims* to the territory in question prior to a time certain, the ICJ in its *Pedra Branca/Pulau Batu Puteh* judgment stated:

> 63. It is appropriate to recall the pronouncement made by the Permanent Court of International Justice in the case concerning the *Legal Status of Eastern Greenland*, on the significance of the absence of rival claims. In that case it was the Danish contention that "Denmark possessed full and entire sovereignty over the whole of Greenland and that Norway had recognized that sovereignty", whereas the Norwegian contention was that all the parts of Greenland "which had not been occupied in such a manner as to bring them effectively under the administration of the Danish Government" were "*terrae nullius*, and that if they ceased to be *terrae nullius* they must pass under Norwegian sovereignty." (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 39).[7]

With regard to the extent to which there are *competing claims to sovereignty*, the Court explained:

> 64. Against this background the Court stated:
>
> > "Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty." (*Ibid*., p. 46.)
>
> 65. On this basis, the Court came to the following conclusion:
>
> > "bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed . . . in 1721 to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area" (*ibid.*, pp. 50-51).
>
> 66. If this conclusion was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also apply to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.
>
> 67. The Court further recalls that, as expounded in the *Eastern Greenland* case (see paragraph 64 above), international law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case.
>
> Moreover, as pointed out in the *Island of Palmas* case, State authority should not necessarily be displayed "in fact at every moment on every point of a territory" (*Island of Palmas*

[7] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment, 2008 ICJ Rep. 12, at 35-36, http://www.icj-cij.org/docket/files/130/14492.pdf.

Case (Netherlands/United States of America), Award of 4 April 1928, *RIAA*, Vol. II (1949), p. 840). It was further stated in the Award that:

> "[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space . . . The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances." (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II (1949), p. 855.)

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d. With regard to the *effectiveness of exercise of sovereignty*, the Award of the Arbitral Tribunal in the first stage of proceedings, *Territorial Sovereignty and Scope of the Dispute*, in the case of *Eritrea versus Yemen*, 9 October 1998, stated:

> 239. The factual evidence of "*effectivités*" presented to the Tribunal by both parties is voluminous in quantity but is sparse in useful content. This is doubtless owing to the inhospitability (sic) of the Islands themselves and the relative meagreness of their human history. 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. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.

The tribunal then turned to an analysis of the evidence, applying the following principles:

> 241. Evidence of intention to claim the Islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands. . . .

After considering the evidence regarding *Public Claims to Sovereignty over the Islands* and *Legislative Acts Seeking to Regulate Activity on the Islands*, the Tribunal concluded:

> 257. In conclusion, the evidence on behalf of both Parties shows legislative and constitutional acts without any specific reference to the Islands by name. It should be borne in mind that during most of these years both Ethiopia and Yemen were distracted by civil war or strife, and serious internal instability. Yemen did not resile from the broad and loose claims made before World War II – which might or might not have embraced the islands in dispute – but did not pursue or articulate them until 1973.

With regard to *Licensing of Activities in the Waters Off the Islands*, the tribunal concluded:

> 263. In conclusion, the Tribunal is of the view that the activities of the Parties in relation to the regulation of fishing allows no clear legal conclusion to be drawn. The record of these activities under Ethiopian administration is, as will be seen below, open to conjecture. Since Eritrean independence, the record is less than clear. Since 1987, Yemen appears to have been engaged in some regulation of fishing, primarily directed toward larger vessels. The balance of this evidence does not appear to tilt in one direction or another.

With regard to the arrest of fishing vessels, the tribunal concluded:

> 264. Although there is evidence before the Tribunal that a substantial number of arrests of fishing vessels for violation of the respective fishing regulations and orders have occurred, the period of time comprised in that evidence is brief. It is difficult therefore to characterize those actions as the "continuous and peaceful display of state authority."

The tribunal considered other evidence of effectiveness, under the following headings:

Other Licensing Activity; Granting of Permission to Cruise Around or to Land on the Islands; Publication of Notices to Mariners or Pilotage Instructions Relating to the Waters of the Islands; Search and Rescue Operations; The Maintenance of Naval and Coast Guard Patrols in the Waters Around the Islands; Environmental Protection; Fishing Activities by Private Persons; Other Jurisdictional Acts Concerning Incidents at Sea; landing parties on the Islands; the establishment of military posts on the Islands; the construction and maintenance of facilities on the Islands; the licensing of activities on the land of the Islands; the exercise of criminal or civil jurisdiction in respect of happenings on the Islands; the construction or maintenance of lighthouses; the granting of oil concessions; and limited life and settlement on the Islands; overflight; maps; and petroleum agreements and activities.

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e. With regard to *acquiescence,* the ICJ in the *Pedra Branca/Pulau Batu Puteh* case set out the rule:

> 121. Under certain circumstances, sovereignty over territory might 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, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *RIAA*, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence
>
> > "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent . . ." (*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).
>
> That is to say, silence may also speak, but only if the conduct of the other State calls for a response.
>
> 122. Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, 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.

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f. With regard to the concept of *historical title*, the Award of the Arbitral Tribunal in the first stage of proceedings, *Territorial Sovereignty and Scope of the Dispute*, in the case of *Eritrea versus Yemen*, October 9, 1998, the panel stated:

> 123. There can be no doubt that the concept of historic title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters.

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g. With regard to acquisition of sovereignty by *military occupation*, in the case of the Ottoman Empire pre-1918 of the Red Sea islands, the Award of the Arbitral Tribunal in the first stage of proceedings, *Territorial Sovereignty and Scope of the Dispute*, in the case of *Eritrea versus Yemen*, October 9, 1998, stated that "title had been secured by military occupation, which was lawful by reference to the international law of the day." (para. 147)

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h. Concerning the *evidentiary value of maps*, the ICJ in its judgment in the case of Kasikili/Sedudu Island, wrote:

> 84. The Court will begin by recalling what the Chamber dealing with the *Frontier Dispute (Burkina Faso / Republic of Mali)* case had to say on the evidentiary value of maps:
>
> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or constitute the real facts." (I.C.J. *Reports 1986*, p. 582, para. 54.)

In its judgment in *Pedra Branca/Pulau Batu Puteh*, the ICJ made the following observation regarding official maps:

> 267. The Parties referred the Court to nearly 100 maps. They agreed that none of the maps establish title in the way, for instance, that a map attached to a boundary delimitation agreement may. They do contend however that some of the maps issued by the two Parties or their predecessors have a role as indicating their views about sovereignty or as confirming their claims.

The Court concluded:

> 272. The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.

Examples of prior compulsory territorial dispute settlement where sovereignty of island is in dispute

a. The following cases were decided pursuant to a special agreement between the parties:

- *Island of Palmas case* (Netherlands-USA), award 1928[8]
- *Case of Clipperton Island* (Mexico-France), award 1931[9]
- *The Minquires and Ecrehos Case* (France/United Kingdom) judgment 1953[10]
- *Eritrea v. Yemen* arbitration, awards 1998 & 1999[11]
- *Botswana v. Namibia* (Case Concerning Kasikili/Sedudu Island), judgment 1999[12]
- *Sovereignty over Pulau Ligitan & Pulau Sipadan* (Indonesia-Malaysia), judgment 2002[13]
- *Malaysia v. Singapore* (Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge), judgment 2008.[14]

b. The following cases were decided pursuant to the parties' pre-existing consent to the jurisdiction of the tribunal:

- *Romania v. Ukraine* (Case Concerning Maritime Delimitation in the Black Sea), judgment 2009[15]
- *Nicaragua v. Colombia* (Territorial and Maritime Dispute), judgment on preliminary objections 2007[16]
- *Nicaragua v. Honduras* (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea), judgment 2007[17]
- *Legal Status of Eastern Greenland*, judgment 1933.[18]

Some of these cases are summarized next.

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[8] http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf; http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf

[9] http://untreaty.un.org/cod/riaa/cases/vol_II/1105-1111.pdf; English translation at 26 Am. J. Int'l L. 390-394 (1932).

[10] http://www.icj-cij.org/docket/files/17/2023.pdf

[11] http://www.pca-cpa.org/upload/files/EY%20Phase%20I.PDF; http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF

[12] http://www.icj-cij.org/docket/files/98/7577.pdf

[13] http://www.icj-cij.org/docket/files/102/7714.pdf

[14] http://www.icj-cij.org/docket/files/130/14492.pdf

[15] http://www.icj-cij.org/docket/files/132/14987.pdf

[16] http://www.icj-cij.org/docket/files/124/14303.pdf

[17] http://www.icj-cij.org/docket/files/120/14075.pdf

[18] http://www.icj-cij.org/pcij/serie_AB/AB_53/01_Groenland_Oriental_Arret.pdf

Summary of sovereignty cases decided pursuant to special agreement

Eritrea - Yemen: Of particular interest is the Eritrea-Yemen two-part arbitration that was heard at an *ad hoc* arbitration tribunal. The first part of the proceedings involved the question of sovereignty over the Hanish Islands in the southern part of the Red Sea. The decision in which numerous of the Hanish Islands were awarded to either Eritrea or Yemen was made on 9 October 1998. Eritrea received ownership over several of the islands, but Yemen gained sovereignty over several, as well.

The second phase of the arbitration focused on the maritime boundary between the two States. The sovereignty award did influence the judges as they determined the course of the boundary.[19] Essentially, the judges developed an equidistant line from the respective mainlands and near-shore islands. And, the judges ignored the islands in the central area of the Red Sea, those islands which had been disputed.[20]

***Indonesia - Malaysia*:** In 1999 Indonesia and Malaysia took their dispute over the sovereignty of Ligitan and Sipadan islands off the coast of East Kalimantan province to the International Court of Justice (ICJ). The ICJ ruled in favor of Malaysia on 17 December 2002. Although neither side convinced the Court that it had clear title to the islands, Malaysia was awarded both islands based, in part, on its continuous administration of the islands. Malaysia did show to the ICJ "manifestations of state authority" over the islands, mainly in the 1930s while under British rule. Indonesia had not protested Malaysia's actions until 1969.

Unlike the Eritrea-Yemen arbitration, this judgment ruled only on the sovereignty of the islands in question, and there was no follow up to delimit the maritime boundary. And, unfortunately for these two States, as of late 2010 Indonesia and Malaysia are disputing the boundary in this area, an area known as the Ambalat.

***Malaysia - Singapore*:** Malaysia and Singapore brought their sovereignty dispute over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge before the ICJ by an agreement signed on 24 July 2003. In a decision given on 23 May 2008 the Court awarded Pedra Branca/Pulau Batu Puteh, a feature in the Strait of Singapore on which Horsburgh Lighthouse sits, to Singapore. Middle Rocks, comprising uninhabitable rocks which are above water at high tide, were awarded to Malaysia. South Ledge, a separate low-tide elevation (submerged at high tide), was said to be under the sovereignty of the State in whose territorial sea it sits.

The disputes over these features came to a head for Pedra Branca/Pulau Batu Puteh when Singapore, in 1980, protested a map produced by Malaysia in 1979 which depicted its

[19] For a detailed analysis of this maritime boundary arbitration see American Society of International Law (ASIL) INTERNATIONAL MARITIME BOUNDARIES (hereinafter referred to as IMB), vol. IV, Report Number 6-14 Eritrea-Yemen, 2002, pp. 2729-2752.
[20] For additional analysis, see IMB, Report 6-14, vol. IV, at 2729.

continental shelf limits. Included inside the claimed limits was this feature that contained Horsburgh Lighthouse. The Middle Rocks and South Ledge dispute were clearly defined in 1993 when Singapore referred to them during bilateral discussions with Malaysia.

With regards to the question of sovereignty over Pedra Branca/Pulau Batu Puteh the Court reviewed the history of the island dating back to the early 19th century. The area of current day Malaysia was then under the domain of the Sultanate of Johor while Singapore was under British rule. The lighthouse was built by the British in 1852 and maintained by them and subsequently Singapore ever since. A key point in time, from the Court's perspective, was 1953 when the Acting Secretary of State for Johor sent a letter to the Colonial Secretary of Singapore stating that the "Johor Government [did] not claim ownership of the island."[21] The Court felt that was a key expression of the state of affairs. That coupled with the fact that Singapore has operated the lighthouse without any apparent objection from Malaysia, led the Court to rule in Singapore's favor. Thus, conduct of the Parties was paramount in the eyes of the judges.

Singapore argued unsuccessfully that sovereignty over Middle Rocks and South Ledge was tied to sovereignty over Pedra Branca/Pulau Batu Puteh. The Court ruled that Malaysia, and the Sultanate of Johor before it, had title to Middle Rocks. As noted above, left unsettled is which State has sovereignty over South Ledge, a low-tide elevation which is situated in an area overlapped by the territorial sea claims made from Pedra Branca/Pulau Batu Puteh and Middle Rocks. Given that the Court was not asked to determine a maritime boundary of any sort in these proceedings, it ruled that it could not determine under whose sovereignty South Ledge fell. Malaysia and Singapore will have to resolve this lingering issue by bilateral negotiations or they will have to institute another dispute settlement proceeding.

Summary of sovereignty cases decided pursuant to prior agreement to jurisdiction of tribunal

Nicaragua - Colombia: Similar to the Eritrea-Yemen arbitration, Colombia and Nicaragua arbitration has become a two-part case before the International Court of Justice (ICJ). As of the end of 2010 this case is still before the ICJ. Nicaragua instituted proceedings to resolve both the territorial and maritime disputes before the ICJ on 6 December 2001. Colombia questioned the jurisdiction of the Court to rule on the issues claiming that the questions had been settled by the Treaty concerning Territorial Questions at Issue Between Colombia and Nicaragua, signed in Managua 24 March 1928 (the "1928 Treaty"). Colombia has occupied San Andres, Providencia and Santa Catalina. Quita Sueña, Roncador, and Serrana have small, unoccupied features.

On 13 December 2007 the ICJ ruled that Colombia had clear title over the San Andres Archipelago, Providencia, and Santa Catalina islands, stating that this question indeed had been

[21] http://www.icj-cij.org/docket/files/130/14490.pdf.

settled by the 1928 Treaty between the two States.[22] The Court, at this point, left open the sovereignty issue as to which other smaller islands near the San Andres Archipelago may pertain to Colombia. Specifically, title over Quita Sueña, Roncador and Serrana remain at issue, to be determined by the Court in subsequent proceedings. The maritime boundary delimitation between Colombia and Nicaragua also remains to be decided by the ICJ.

Although all memorials on the merits have now been filed by Nicaragua and Colombia, earlier in 2010 Honduras and Costa Rica requested permission to intervene in the proceedings.[23] The applications to intervene will be decided before the case proceeds to oral hearings on the merits.

Effect of names of features on third party settlement of island disputes

In a number of cases where sovereignty over islands was in dispute, the disputed features were called different names by the claimants.

a. *Island of Palmas* arbitration (U.S. v. Netherlands) (decided 1925)

The *Island of Palmas* case is perhaps the first modern case where a sovereignty dispute over an island was decided in a process of compulsory dispute settlement. In this case, the United States claimed sovereignty over the island of Palmas through the Spanish cessation to it of the Philippines in 1898. The Netherlands claimed ownership of this island, known as Miangas, through its Netherlands East Asia Company. In this case, the differing names of the island (Palmas/Miangas) had no direct effect on the outcome of the case.

The names were addressed by the arbitrator in the context of determining whether the two parties were claiming the same island. After deciding that they were, the arbitrator noted that Miangas was the name given to the island by the inhabitants, while Palmas was the name given to the same feature by Spain.

b. Case Concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (decided 13 December 1999)

In this case, the island in question (about 1.5 square miles in area) was known as Kasikili by Namibia, and as Sedudu by Botswana, lies in the Chobe River separating the two countries, Namibia on the north bank and Botswana on the south bank of the river. The court considered two questions, the course of the river boundary around the island and the legal status of the island. The differing names played no role in the Court's decision that the course of the river boundary was the thalweg of the north branch and that therefore the island was under Botswana's sovereignty.

[22] http://www.icj-cij.org/docket/files/124/14325.pdf.
[23] Costa Rica: http://www.icj-cij.org/docket/files/124/15943.pdf (application); http://www.icj-cij.org/docket/files/124/15849.pdf (press release); Honduras: http://www.icj-cij.org/docket/files/124/15958.pdf (application, in French); http://www.icj-cij.org/docket/files/124/15959.pdf (press release).

c. *Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore)* ICJ case (decided 2008)

In its judgment, the ICJ described Pedra Branca/Pulau Batu Puteh as follows:

> 16. Pedra Branca/Pulau Batu Puteh is a granite island, measuring 137 m long, with an average width of 60 m and covering an area of about 8,560 sq. m at low tide. It is situated at the eastern entrance of the Straits of Singapore, at the point where the Straits open up into the South China Sea. Pedra Branca/Pulau Batu Puteh is located at 1°19'□48"N and 104° 24'□27"E. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian State of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan.

Of particular importance on the question of the effect of differing names for the same feature, the Court stated:

> 17. The names Pedra Branca and Batu Puteh mean "white rock" in Portuguese and Malay respectively. . . .[24]
>
> 61. Of significance in the present context is the fact that Pedra Branca/Pulau Batu Puteh had always been known as a navigational hazard in the Straits of Singapore, an important channel for international navigation in east-west trade connecting the Indian Ocean with the South China Sea. It is therefore impossible that the island could have remained unknown or undiscovered by the local community. Pedra Branca/Pulau Batu Puteh evidently was not *terra incognita*. It is thus reasonable to infer that Pedra Branca/Pulau Batu Puteh was viewed as one of the islands lying within the general geographical scope of the Sultanate of Johor.[25]
> . . . .
>
> 66. If this conclusion was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also apply to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.[26]
> . . . .
>
> 69. The Court thus concludes that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh.[27]

Throughout the judgment neither the parties nor the Court suggest that the alternate names for the island (which have the same meaning) provided proof that sovereignty lay with one or the other of the parties.

d. *Clipperton Island (Mexico-France)*, arbitration (decided 1931)

In the *Clipperton Island case*, Mexico argued that Clipperton island was the same known by Spain as Passion Island, Medano or Medanos Island, that the Spanish Navy had been discovered before the French Navy discovered it in 1711. However, the tribunal found that Mexico had failed to prove that "Spain not only had the right, as a state, to incorporate the island

[24] Judgment, p. 22.
[25] Id. at p. 35.
[26] Id. at p. 36.
[27] Id. at p. 37.

in her possessions, but also had effectively exercised the right" and failed to show any manifestation of sovereignty over the island.[28]

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In the other cases discussed in this paper, the names of the islands involved were agreed, and thus played no role in deciding the sovereignty disputes: the *Minquiers and Ecrehos islands* (part of the Channel Islands off the coast of France); *Eritrea v. Yemen* regarding certain Red Sea islands; *Legal Status of Eastern Greenland*; and *Romania v. Ukraine (Maritime Delimitation in the Black Sea)*.

[28] 29 American Journal of International Law 393.