SEPARATE OPINION OF JUDGE *AD HOC* SREENIVASA RAO

Sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore — Sovereignty over Middle Rocks also belongs to Singapore and not to Malaysia — Johor never had had original title and did not do so as of 1847 — Malaysia did not discharge the required burden of proof and could not produce certain and conclusive evidence that Johor ever had possession of Pedra Branca/Pulau Batu Puteh to sustain its claim that Johor had original title based on immemorial possession — General historical references and the private activities of the Orang Laut are not sufficient to establish the claim of original title — Effective display of State authority or conduct à titre de souverain *involving continuous and uncontested possession of the rock is essential — Both Johor and Britain, initially, did not show any interest and hence any intention to acquire title — Status of Pedra Branca/Pulau Batu Puteh was indeterminate in 1847 — Pedra Branca/Pulau Batu Puteh was not* terra nullius *as Johor could be deemed to have discovered it and had an inchoate title — Johor's title needed perfection particularly in the face of growing manifestation on the part of Britain to acquire sovereignty — Peaceful, long, continuous possession and exercise of State functions by Britain and Singapore going beyond the needs of management of the lighthouse for over 100 years — Lack of protest and even acceptance by Johor of the authority of Singapore over the rock and the waters around it — Johor's categorical reply to Singapore in 1953 stating it had no claim to ownership of Pedra Branca/Pulau Batu Puteh provides certain and conclusive evidence that Singapore had sovereignty over Pedra Branca/Pulau Batu Puteh by 1953 and maintained it ever since — Middle Rocks and South Ledge, which is a low-tide elevation, also belong to Singapore as both fall within the customary three-mile territorial sea limit of Pedra Branca/Pulau Batu Puteh.*

1. I agree with the decision of the Court that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore. I do not, however, agree with the decision of the Court that sovereignty over Middle Rocks belongs to Malaysia. The Court left the question of sovereignty over South Ledge pending and leaves it to be determined as part of the delimitation of the territorial sea boundaries among the States concerned. I have no difficulty with this conclusion except that I hold the view that, if Middle Rocks is also held to be under the sovereignty of Singapore, South Ledge would also belong to Singapore. Accordingly, I voted in favour of operative clauses (1) and (3) and voted against operative clause (2).

2. Even though my conclusion is the same as that of the Court in holding that Singapore has sovereignty over Pedra Branca/Pulau Batu Puteh, the reasons that guide me are different from those of the Court. I differ particularly with the view of the Court that Malaysia satisfied it to hold that Johor had original title over Pedra Branca/Pulau Batu Puteh as of 1847. This view is central and crucial to the later treatment of the material and conclusions of the Court that that title eventually, by virtue of acts *à titre de souverain* performed by Singapore and the conduct of Johor/Malaysia during the period 1852 to 1952, got transferred or passed on to Singapore but only with respect to Pedra Branca/Pulau Batu Puteh and not in respect of Middle Rocks.

Burden of proof and the standard that proof be certain and convincing

3. The Court stressed that it is the duty of each of the Parties to prove the claims it asserted (Judgment, para. 45). Accordingly, it stressed that it is for Malaysia to produce evidence to prove that the Sultanate of Johor held original title to Pedra Branca/Pulau Batu Puteh and retained it up to the 1840s (Judgment, para. 46). Even though it did not further elaborate on the standard of proof, 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). I find that Malaysia failed to discharge the burden of proof incumbent upon it to prove with certainty and convincingly that Johor had original title over Pedra Branca/Pulau Batu Puteh on the basis of immemorial possession.

4. The only proof Malaysia could offer to the Court which it notes relates to the fact that '"[t]he Sultanate [of Johor] covered all the islands within this large area, including all those in the Singapore Straits, such as Pulau Batu Puteh and the islands to the north and south of the Straits, taking in Singapore Island and the adjacent islands'" (Judgment, para. 47). In addition, it was submitted by Malaysia that '"Pulau Batu Puteh, sitting at the eastern entrance of the Singapore Straits, lies in the middle of the old Sultanate of Johor'" (Judgment, para. 47). Malaysia also argued, and the Court accepted, that the Sultanate of Johor was a recognized sovereign entity since 1512 "with a certain territorial domain under its sovereignty" (Judgment, para. 52); and as a clear indication of this position, the Court also noted the incident involving the seizure of two Chinese junks by the boats of the Dutch East India Company and the displeasure expressed by the King of Johor to the Governor of Malacca (Judgment, paras. 54-55). The Court also took note of three documents of 1824 (Judgment, para. 56) and one article in the Singapore Free Press dated 25 May 1843 (Judgment, para. 57) which portrayed in all too general terms the maritime and geographical features of the Malay Kingdom. These documents are the basis of the Court's observation that

> "from at least the seventeenth century until early in the nineteenth 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" (Judgment, para. 59).

Yet, the material the Court examined and found to be of interest is too general to be able to offer a clear or convincing case for it to conclude that Johor had original and ancient title over "all the islands and islets within the Straits of Singapore, which lay in the middle of this Kingdom, and did thus include the island of Pedra Branca/Pulau Batu Puteh" (Judgment, para. 68). Specific reference to Pedra Branca/Pulau Batu Puteh could however be found only in the article in the *Singapore Free Press* but in the context of describing the menace of piracy and referring to pirates who "'go [there] for shelter and concealment'" (Judgment, para. 57).

5. In the absence of any clear and convincing exercise of Johor's sovereignty over these islands and islets, including more specifically Pedra Branca/Pulau Batu Puteh, the Court's observation of the lack of challenge to Johor's sovereignty over these maritime features in the Straits of Singapore (Judgment, para. 68) appears to ring hollow and could not in all the circumstances be seen as satisfying the conditions of "continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) . . .", a test laid down by the *Island of Palmas* case *(Island of Palmas Case (Netherlands/United States of America)*, Award of the Arbitral Tribunal, 4 April 1928, *RIAA*, Vol. II (1949), p. 839), which is treated as a customary principle of international law. Similarly, the Tribunal in the *Eritrea/Yemen* case noted that:

> "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." (Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (*Territorial Sovereignty and Scope of Dispute*, Decision of 9 October 1998, *RIAA*, Vol. XXII (2001), p. 268, para. 239.)

6. That general references, such as those noted by the Court, cannot form the basis for a legally valid claim to territory is evident from the jurisprudence of the Court. Malaysia argued in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* that it acquired original title over Pulau Ligitan and Pulau Sipadan through consecutive transfers of title, but could not present any document to show that such transfer of title specifically related to the islands in dispute. The Court rejected its contentions and noted that "the islands in dispute are not mentioned by name in any of the international legal instruments presented by Malaysia to prove the alleged consecutive transfers of title" (*Judgment, I.C.J. Reports 2002*, p. 674, para. 108). The Court thus concluded that: "These documents, therefore, provide no answer to the question whether Ligitan and Sipadan, which are located at a considerable distance from the main island of Sulu, were part of the Sultanate's dependencies." (*Ibid.*, p. 675, para. 109.)

7. Similarly, in the *Minquiers and Ecrehos* case, the Court, after examining various treaties concerning the Channel Islands, observed that it

> "would therefore not be justified in drawing from them any conclusion as to whether the Ecrehos and the Minquiers at the time when these Treaties were signed were held either by the English or by the French King. This question depends on facts which cannot be deduced from the text of these Treaties." (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 54.)

8. With respect to the article in the *Singapore Free Press*, it is evident that it cannot provide any basis for the title of Johor which is otherwise not proven or established. With respect to the probative value of newspaper reports, the Court in the *Nicaragua* case treated the press reports not as evidence capable of proving facts, but as material which could nevertheless contribute, in some circumstances, to corroborate the existence of a fact, that is, as illustrative material additional to other sources of evidence (*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 40-41, paras. 62-63). Press reports however could be relied upon as evidence if they are the source of official government statements, as it happened in the case of *Certain Phosphate Lands in Nauru (Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J Reports 1992*, p. 254, para. 33). This is confirmed by the Court itself when it considered the probative value of the *Singapore Free Press* report "to lie in the fact that it corroborates other evidence that Johor had sovereignty over the area in questions" (Judgment, para. 58). It is to this hard evidence, independent of the press report, that we must look to be satisfied of the claim of Johor's original title.

9. Malaysia also failed to sustain the claim of original title on the basis of immemorial possession inasmuch as it could not show at any time continuous and uncontested possession over Pedra Branca/Pulau Batu Puteh, which is a basic requirement to sustain such a claim. The *Meerauge* Arbitral Award, to which Malaysia referred, defined immemorial possession to mean possession "which has lasted for such a long time that it is impossible to provide evidence of a different situation and of which anybody recalls having heard talk" (Judgment, para. 48). This quotation of the Court, which is taken from the submission of Malaysia is, however, incomplete.

An equally important requirement is to be found in the subsequent sentence of the *Meerauge* Award:

> "Dieser Besitz muss ferner ununterbrochen und unangefochten sein, und es ist selbstverständlich, dass der so qualifizierte Besitz bis in die Jetztzeit, das heisst bis zu der Zeit, in welcher die Differenz in der zum Abschluss eines Schiedsvertrages führenden Konstellation aufgetreten ist, fortgedauert haben müsste." (*Meerauge Arbitral Award (Austria/Hungary*), 13 September 1902, *Nouveau recueil general de traités*, 3rd Series, Vol. III, p. 80 — internal citation omitted.
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> ["Moreover, this possession has to be uninterrupted and unchallenged, and it is self-evident that such possession must have subsisted up to the present, that is to say up to the point in time at which the dispute concerning the state of affairs that has led to the conclusion of a *compromis* has arisen." *[Translation by the Registry.]*]

Effective display of State authority as the basis for title to territory

10. Where original title to a given territory is sought to be established, what is crucial are not indirect inferences or presumptions deduced from "history" or "Middle Ages" but evidence directly relating to effective display of State authority. Referring to claims of original title based on immemorial possession, in the *Minquiers and Ecrehos* case, the Court observed that "[w]hat is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of Ecrehos and Minquiers groups" (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 57). Similarly, in its Advisory Opinion in the *Western Sahara* case, in response to Morocco's claims to ties of sovereignty on the ground of an alleged immemorial possession of the territory, the Court noted that "what must be of decisive importance . . . is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 43, para. 93).

Exercise of sovereign rights to be consistent with the nature of the territory

11. The Court however, in the case of thinly populated or unsettled countries or territories, is "satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other States could not make out a superior claim" (*Legal Status of Eastern Greenland, P.C.I.J, Series A/B, No. 53*, p. 46). For example, the Court in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* accepted an unmanned light beacon constructed by Bahrain as sufficient to determine that Bahrain exercised sovereignty over a small insular feature, Qit'at Jaradah. The Court observed:

> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (*Judgment, I.C.J. Reports 2001*, pp. 99-100, para. 197.)

12. In the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the Court, finding very little by way of exercise of sovereign authority by Indonesia, observed that while the activities relied upon by Malaysia were "modest in number"

they were also "diverse in character and include legislative, administrative and quasi-judicial acts". It further noted that "[t]hey cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands" (*Judgment, I.C.J. Reports 2002*, p. 685, para. 148). Specifically, the Court found that a regulation governing the collection of turtle eggs, and a designation of the island by Malaysia as a protected space, was sufficient to rule that Malaysia had sovereignty over the island (*ibid.*, p. 684, para. 143). Similarly, in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* Honduran *effectivités* on Bobel Cay were also modest and consisted of little more than the installation of an antenna and triangulation markers (Judgment of 8 October 2007, paras. 205, 207). Nevertheless, the Court, relying upon pronouncements made in *Legal Status of Eastern Greenland (Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46) and *Minquiers and Ecrehos (France/United Kingdom) (Judgment, I.C.J. Reports 1953*, p. 71) came to the conclusion that the "*effectivités* invoked by Honduras evidenced 'an intention and will to act as sovereign' and constitute a modest but real display of authority over the four islands" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* Judgment of 8 October 2007, para. 208).

Nature of ties between the Sultanate of Johor and the Orang Laut

13. The Court also refers to the evidence supplied by Malaysia from the nineteenth century to suggest that the title of the Sultanate of Johor "is confirmed by the ties of loyalty that existed between the Sultanate and the Orang Laut . . ." (Judgment, para. 70). On the basis of reports of British officials it notes in paragraphs 68 to 70, the Court finds "that the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut who inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh" (Judgment, para. 75). Yet, the evidence the Court relies on for its conclusion is weak and without foundation to establish the ties of a kind that would go to show ties of loyalty and allegiance to the Sultan of Johor and they certainly do not amount to ties of sovereignty.

14. The letter of J. T. Thomson (Judgment, para. 71) was of November 1850, when the construction of the lighthouse was already underway. John Crawfurd's account (Judgment, para. 72) was recorded in his journal of 1828. The selected passages from E. Presgrave belonged to his Report of 1828 (Judgment, para. 73). These letters and reports could hardly be considered to be of ancient vintage and hence could not be treated as evidence of Johor's ancient and original title, if we are looking for proof of such title in the period prior to 1840. Besides, they made no reference to any display of Johor's sovereign authority over the rock in question. Further, if the full report of Presgrave is of any guidance it would establish that the Sultan of Johor was no more than the "nominal" head of the Orang Laut; that they consider piracy as their principal mode of life and that they are "ready to obey any leader" (Memorial of Malaysia, Vol. 3, Ann. 27, para. 6); and that anyone, not only the Sultan of Johor, can "hire the services of the Rayat or professional Pirates" (*ibid.*, para. 13). As the Court found in its Advisory Opinion on Western Sahara when examining ties of political allegiance to a ruler:

> "Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 44, para. 95.)

15. Further, even if it is granted that the Orang Laut might have used the uninhabited island from time to time, Johor's title to Pedra Branca/Pulau Batu Puteh is not established as Malaysia is

unable to show that the Sultan of Johor claimed territorial title to Pedra Branca/Pulau Batu Puteh or considered them part of his possessions. The observation of the Court in *Sovereignty over Pulau Ligitan and Pulau Sipadan* is directly to the point:

> "Malaysia relies on the ties of allegiance which allegedly existed between the Sultan of Sulu and the Bajau Laut who inhabited the islands off the coast of North Borneo and who from time to time may have made use of the two uninhabited islands. The Court is of the opinion that such ties may well have existed but that they are in themselves not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to these two small islands or considered them part of his possessions. Nor is there any evidence that the Sultan actually exercised authority over Ligitan and Sipadan." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 675, para. 110.)

Effective occupation requires acts *à titre de souverain*

16. In order for effective occupation to result in title over territory, such occupation must be by a State, and not by private individuals. The Court made this very clear in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*. Namibia claimed that it had acquired title through prescription on the basis of the use and peaceful occupation of Kasikili Island by the Masubia. Namibia argued that for the most part the colonial Power exercised effective control over the islands "through the modality of 'indirect rule', using the chiefs and political institutions of the Masubia to carry out the directives of the ruling power, under the control and supervision of officials of that power" (*Kasikili/Sedudu Island (Botswana/Namibia), Judgment I.C.J. Reports 1999 (II)*, p. 1104, para. 94). Further, it was submitted that "[a]lthough indirect rule was manifested in a variety of ways, its essence was that the acts of administration of the colonial authorities and those of the traditional authorities were acts of a single entity: the colonial government" (*ibid.*, p. 1104, para. 94). The Court did not find that the use of the island by the Masubia amounted to acts *à titre de souverain*, as

> "it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi . . .
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> In the Court's view, Namibia has not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island." (*Ibid.*, pp. 1105-1106, paras. 98-99.)

17. Similarly, the *Eritrea/Yemen* Arbitral Tribunal found that historic title could not be awarded to Yemen on the basis of activities carried out by nomadic fishermen. In addition it did not find permanent habitation, even if such activities were admittedly seasonal and regular, on the island in question:

> "The second conclusion appears to be that the manner of living on the Islands is equally indiscriminate: some fishermen stay on their boats; others sleep on the beach; some construct small shelters; other use larger shelters; some consider their structures

> 'settlements'. The one thing that is clear is [sic] from the record is that there is no significant and permanent dwelling structure, or in fact any significant and permanent structure of any other kind, that has been built and that has been used to live in.
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> The third conclusion is that it is not clear from the evidence, in spite of occasional references to 'families' staying on the Islands, whether any family life is in fact present on the Islands. Inasmuch as the use of the islands is necessarily seasonal, this would seem to be *a priori* inconsistent with family life in the sense of family units migrating to a location where normal community activities continue, as for example with nomadic herdsmen.
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> The final conclusion must be that life on the Islands, such as it is, is limited to the seasonal and temporary shelter for fishermen. The evidence shows that many of them, of both Eritrean and Yemen nationality appear to stay on the islands during the fishing season and in order to dry and salt their catch, but that residence although seasonal and regular, is also temporary and impermanent." (*RIAA*, Vol. XXII (2001), p. 290, paras. 354-356.)

In the case of Pedra Branca/Pulau Batu Puteh, not even a seasonal and temporary habitation was established. As noted above, the Orang Laut, being pirates, frequented Pedra Branca/Pulau Batu Puteh only for seeking "shelter and concealment", and their activities are lawless, and besides being incapable of reflecting display of Johor's State authority, are in reality against that authority (*Singapore Free Press Report*, 25 May 1843; Judgment, para. 57).

Fishing activities of Orang Laut and the claim concerning Johor's original title

18. To support the claim of original title, it was also suggested that the Orang Laut regularly were engaged in fishing activities around Pedra Branca/Pulau Batu Puteh. First, a distinction must be kept in view in the case of nomads who may live for short periods on an island and fish in its surrounding waters, and "sea nomads" who fish in certain areas of sea from time to time which happen to surround an island on which they do not establish even a temporary or seasonal habitation. The case of fishing activities of the Orang Laut around Pedra Branca/Pulau Batu Puteh clearly fell within the latter category. Moreover, the claim that fishing in the area of Pedra Branca/Pulau Batu Puteh constituted an activity specific to Pedra Branca/Pulau Batu Puteh is not sustainable if fishing occurred on the high seas, as Pedra Branca/Pulau Batu Puteh and its surrounding waters are situated at a distance greater than the 3-mile limit of the territorial sea of the Sultanate of Johor. Second, the evidence pleaded cannot in any way be treated as acts *à titre de souverain* as there is no evidence that the acts were conducted under the authority and control of the State of Johor or were in any way regulated by the Sultan. Here the test applied by the Court in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan* is equally applicable. Rejecting the submission of Indonesia that "the waters around Ligitan and Sipadan have traditionally been used by Indonesian fishermen", the Court observed, "that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 683, para. 140). Inasmuch as they are private acts, they do not offer any basis for the claim that Johor had original title.

Contiguity as a basis of title to islands

19. In addition, Malaysia argued that Johor should be deemed to have title over Pedra Branca/Pulau Batu Puteh on the principal ground that it lay well within the geographical confines of its territories and islands belonging to Johor. This is a claim that is reminiscent of claims to title on the basis of contiguity. However, geographical "contiguity" in and of itself is not a sufficient

ground to establish title to territory. In the *Island of Palmas* case, for example, Judge Huber, rejecting claims to territory based on contiguity stated:

> "Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results." (*RIAA*, Vol. II (1949), pp. 854-855.)

20. Moreover, while islands within the limits of the territorial sea of a State, according to international law, belong to the coastal State, islands beyond such limits cannot easily be presumed to belong to that State. The rationale for distinguishing between islands within the territorial waters and those lying beyond can be found in the principle of the freedom of the high seas. This principle has been accepted since Grotius' classic *Mare Liberum*, first published in 1609. It is a time-honoured customary principle of international law and incorporated in Article 2 of the Geneva Convention on the High Seas of 29 April 1958 which states that: "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty". Similarly, Article 87 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) recognizes that "[t]he high seas are open to all States, whether coastal or land-locked". In consequence, Article 89 of UNCLOS states that "[n]o State may validly purport to subject any part of the high seas to its sovereignty".

21. According to Derek W. Bowett, even the proposition that islands lying within the limits of territorial waters of a State belong to that State "can be no more than a presumption, for not infrequently islands under the sovereignty of one State lie within a distance from the shore of another State which is less than the limit of territorial waters" (Derek W. Bowett: *The Legal Regime of Islands in International Law*, 1978, p. 49). However, with respect to islands lying beyond the territorial sea, in contrast, he stresses that

> "sovereignty will depend upon the same criteria as are applied to any land territory and, whether title is claimed to derive from some good root title (as by a treaty of cession) or from occupation of a *res nullius*, the claimant State must demonstrate a continuous and peaceful display of sovereignty over the island territory" (*ibid.*, p. 50).

22. Similarly, another more recent study of the subject by Surya P. Sharma concludes this to be

> "an acceptable statement of law regarding lands lying within the territorial waters of a state. This is also consistent with not only the tendency to regard such islands as part of the mainland, but also the practice of measuring the territorial waters of the coastal state from the seaward side of such islands. However, there is no rational reason for any presumption based on contiguity with respect to islands lying within the limits of the continental shelves or the exclusive economic zones which are essentially resource zones and wherein coastal states are not entitled to claim proprietary rights, unlike in the case of the territorial sea." (Surya P. Sharma, *Territorial Acquisition, Disputes and International Law*, 1997, p. 60.)

With respect to titles to islands lying in the high seas, Sharma notes that they "will be governed by the same norms that are applied to resolve any territorial dispute on land, which means that the claimant state must fulfil the conditions underlying a continuous and peaceful display of sovereignty over the island territory" (*ibid.*, p. 61). It is also well established that it is title to the *terra firma* that generates the right to maritime zones, and not vice versa (R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, 1998, p. 292), where the author notes that "[a]ccording to the principles of international law, it is the acknowledged title to the *terra firma* that generates the right to maritime zones, and not vice versa" (cf. also *Beagle Channel Arbitration, ILM*, Vol. 17 (1978), p. 644, para. 6).

23. Against this background, there is no basis for presuming that uninhabited maritime features in the middle of what undoubtedly constitutes the high seas were under the sovereignty of the ancient Sultanate of Johor-Riau-Lingga or any of its successor States in the region in the absence of territory-specific acts *à titre de souverain*. As Pedra Branca/Pulau Batu Puteh lay clearly outside the limits of the territorial sea of Johor, Malaysia is required to show the exercise of some State authority specific to the rock, how so ever symbolic that exercise might be.

24. Equally, the claim of Malaysia that the Orang Laut regularly conducted traders to the port of Johor cannot by itself lead us to the conclusion that Johor enjoyed sovereignty over Pedra Branca/Pulau Batu Puteh as these activities are not shown to have been conducted with reference to Pedra Branca/Pulau Batu Puteh. Malaysia also suggested that there was evidence that the Temenggong of Johor took action to deal with piracy and that such action earned him appreciation from the British authorities. In this connection there is a report concerning a ceremony in which Governor Butterworth awarded the Temenggong a sword in appreciation of his efforts at suppressing piracy (Memorial of Malaysia, Vol. 3, Ann. 52; *Straits Times*, 5 Sept. 1846). Malaysia claimed that "[t]he Temenggong's activities against piracy constitute a manifestation of Johor's exercise of sovereignty in the region under consideration" (Memorial of Malaysia, p. 68). It is worth noting, as has been pointed out by one commentator, that "[f]or the purposes of international law, piracy can take place only within clearly prescribed locations, those being the high seas or a place outside the jurisdiction of any State" (Scott Davidson, "Dangerous Waters: Combating Maritime Piracy in Asia", *Asian Yearbook of International Law*, Vol. 9 (2000), p. 14). Accordingly, there is no merit in the argument advanced by Malaysia. Besides, Johor's display of power over the Orang Laut appeared to have as its objective the suppression of their piratical activities, the suppression of piracy being the right of every State for which it enjoys universal jurisdiction. In other words, these were not activities a State regulates in pursuance of the exercise of its function as a State on the basis of exclusive authority and control over its loyal and obedient subjects.

25. In view of the above, the nature of ties that existed, and the frequency of visits to the rock by the Orang Laut, cannot possibly be regarded as satisfactory or sufficient for establishing the ancient original title of the Sultanate of Johor. Malaysia could not show that the Sultan of Johor had even a notional possession of Pedra Branca/Pulau Batu Puteh to sustain the claim of

original title based on immemorial possession. It is abundantly clear from the above that Malaysia did not discharge the kind of proof that it ought to have discharged in accordance with well-established principles of evidence required by international tribunals and this Court in various cases where claims concerning original title were at issue.

26. In sum, the evidence submitted by Malaysia concerning the activities of the Orang Laut is not impressive, as some of the acts cited, for example indicating their loyalty and allegiance to the Sultan of Johor, were not specific to the assertion of sovereignty of Johor over Pedra Branca/Pulau Batu Puteh. Some of the other activities like fishing do not add weight to Johor's claim as they are private activities. Even though the Orang Laut was stated to have visited Pedra Branca/Pulau Batu Puteh frequently, they were reported to have gone there for "shelter and concealment" and did not establish even a seasonal habitation there.

27. Accordingly, at the time when Britain took possession of Pedra Branca/Pulau Batu Puteh in 1847, for the purpose of construction of the Horsburgh lighthouse, the status of Pedra Branca/Pulau Batu Puteh remained indeterminate. As a matter of fact, as of 1847, neither Johor nor Britain showed any interest over the rock and did not view it as worthy of acquisition of sovereignty; and it was regarded as uninhabitable besides being a tiny, barren and uninhabited rock. In that sense of the term, the legal status of Pedra Branca/Pulau Batu Puteh in 1847 could, following the test laid down by the Court in the *Western Sahara* case (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 79), legitimately be regarded as *res nullius*, as it was not claimed and hence belonged to no one.

28. However, considering the fact that the rock was a well known maritime feature and very much a *terra cognita* lying well within the broad confines of Johor's territorial domain (Judgment, paras. 59 and 61), it is reasonable to assume that Johor discovered Pedra Branca/Pulau Batu Puteh before any other State did. Accordingly, in the absence of any other competing claim (Judgment, para. 62), Johor could be said to hold an inchoate title to Pedra Branca/Pulau Batu Puteh. As such, a better view appears to be that Pedra Branca/Pulau Batu Puteh was not *terra nullius* at the time the British took possession in 1847. The title to Pedra Branca/Pulau Batu Puteh, as noted by the Court in the frontier dispute between Burkina Faso and Mali, in the event would turn upon an evaluation of the *effectivités* of the respective parties. The Court noted: "In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 587, para. 63.) This conclusion leads us to observe that as of 1847 both Johor and Britain were relatively on equal plane for the purpose of establishing their claims to that rock, Johor having to establish sufficient State authority and control to perfect its title and Britain having to exhibit acts *à titre de souverain* in an open, peaceful and continuous manner, unopposed by Johor/Malaysia or any other Power, to establish its title over Pedra Branca/Pulau Batu Puteh on the basis of effective possession and occupation.

Discovery confers only inchoate title to territory

29. It needs no special emphasis to note that an inchoate title requires, in order to be transformed into a proper title, perfection through conduct *à titre de souverain* relative to the nature of the territory involved. That this is an established norm, is evident from the fact that even in the age of discovery, which was a prelude to the period of colonialism, it was recognized as a principle of international law. Rejecting the then claims of Spain and the view of a minority of writers which believed that in the sixteenth century discovery alone was capable of conferring title to territory, one influential work was able to assert, on the basis of an extensive survey of authorities including Spanish sources, that

> "[T]he author trusts that these results will once and for all put an end to the frivolous and uncritical acceptance by law writers of the idea that discovery can give any shadow of right, and that they will move historians to abandon the fantastic picture of Spain seeking to exclude the rest of Europe from the new world by setting up merely a right by discovery to regions which she did not in fact control." (See Julius Goebel, *The Struggle for the Falklands Islands*, 1927, p. xii; see also Phillip C. Jessup, "The Palmas Island Arbitration", *AJIL*, Vol. 22 (1928), p. 739.)

30. This is confirmed by Max Huber, the Arbitrator in the *Island of Palmas* case. Even though he found that the island in dispute was first discovered by Spain, he held that it only acquired an inchoate title which it had not perfected within a reasonable time. In any case, in his view, even if the inchoate title persisted, it could not prevail over "continuous and peaceful display of territorial sovereignty (peaceful in relation to other States)" (*RIAA*, Vol. II (1949), p. 839). The Arbitrator in this celebrated case, accepting the arguments of the Netherlands, also held that

> "a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law." (*Ibid*., p. 845.)

Accordingly, he concluded:

> "For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise." (*Ibid.*, p. 846.)

Long, continuous and peaceful exercise of State sovereignty by Britain since 1847

31. Since its presence on that rock, during the next 130 years or more, Britain and Singapore performed activities which could properly be regarded as acts *à titre de souverain* which went far beyond the mere management of the lighthouse (Judgment, para. 274). The entire space of the rock was utilized by Britain and Singapore through the construction of the lighthouse and other facilities. Accordingly, the administration of the lighthouse is no different from the administration of the island itself and the same may be characterized as conduct *à titre de souverain*. During this entire period, the activities and exercise of State functions by Britain and Singapore were not opposed by Johor. Moreover, Johor even accepted and complied with them. Malaysia's silence may be taken as acquiescence or recognition of British and later Singapore's sovereignty over the island.

32. Activities of Britain/Singapore which constitute conduct manifesting State authority and which are not indispensable to the management of the lighthouse are many. Some examples may usefully be noted: the installation of military equipment on the island between 1976 and 1977, Singaporean police and security activities on and in the vicinity of Pedra Branca/Pulau Batu Puteh, Singapore's exclusive control of visits to the island including permits given by the Singaporean authorities in 1974 and 1978 to Malaysian officials wishing to visit Pedra Branca/Pulau Batu Puteh, and investigations by Singaporean authorities concerning navigational hazards and shipwrecks in the territorial waters of Pedra Branca/Pulau Batu Puteh (Judgment, para. 275).

33. Similarly, Johor consistently regarded Pulau Pisang as an island under its sovereignty, while it did not display such impression with respect to Pedra Branca/Pulau Batu Puteh. Johor considered making financial contributions for the operation of the lighthouse at Pulau Pisang. In 1952, it even considered taking over the management of the lighthouse from the hands of the Straits Settlement Authority of Britain. It asked for the lowering of the marine ensign which the United Kingdom had hoisted over the lighthouse at Pulau Pisang, as it considered the flying of the ensign was not consistent with its sovereignty. Singapore officials visiting the Pulau Pisang lighthouse were required to carry travel documents, while Singapore officials visiting Pedra Branca/Pulau Batu Puteh carried no such documents. More importantly, Johor concluded a lease agreement to settle the terms and conditions of its grant of Pulau Pisang to Britain to operate the lighthouse there. Similarly specific arrangements were made or contemplated for the construction of lighthouses on Cape Richado and Pulau Aur (not in fact constructed) between the Governor of the Straits Settlement and the Sultan (Judgment, para. 139).

34. Compared to its very careful treatment of the management of the lighthouse on Pulau Pisang, which in every respect sought to preserve and manifest its sovereignty over the same, the manner in which Johor considered the operation of the lighthouse at Pedra Branca/Pulau Batu Puteh signifies recognition of Johor/Malaysia of the sovereignty of Britain/Singapore over Pedra Branca/Pulau Batu Puteh. First, Malaysia could not show that there was ever a document establishing that Johor gave permission to Britain to construct the lighthouse at Pedra Branca/Pulau Batu Puteh. Johor did not attempt to specify conditions for the British operation of the Horsburgh lighthouse. This is rather odd and difficult to understand, particularly because, as the Court noted, elaborate arrangements between the sovereign of the territory where a lighthouse was to be operated and the European States governing the construction of lighthouses were quite common during that period (Judgment, para. 144). Further, Johor did not consider it necessary to object to the flying of the British marine ensign at Pedra Branca/Pulau Batu Puteh. Finally, in the 1950s, Johor authorities did not contemplate taking over the management of the lighthouse on Pedra Branca/Pulau Batu Puteh themselves, even when they considered seriously such a possibility in the case of the lighthouse at Pulau Pisang.

35. In addition, that Johor did not consider itself to be the sovereign of Pedra Branca/Pulau Batu Puteh is confirmed beyond doubt when, in 1953, in response to a specific clarification sought by Singapore, Johor/Federated Malaysia, at the level of their acting Secretary of State, expressly stated that Johor did not claim any ownership over Pedra Branca/Pulau Batu Puteh. Singapore specifically sought the clarification in connection with its proposed move to declare territorial waters around Pedra Branca/Pulau Batu Puteh. It also indicated that, while there was a lease agreement with Johor setting out the conditions under which Singapore was managing the lighthouse at Pulau Pisang, they did not have any record linking the management of Pedra Branca/Pulau Batu Puteh lighthouse and the rock itself to a similar lease or grant from Johor. The clarification sought by Singapore was also noteworthy for its express reiteration of the long, peaceful and open control of Pedra Branca/Pulau Batu Puteh for over 130 years. It also noted as a consequence that it considered itself as having acquired rights under international law over the same. In view of this, it cannot be argued that the authorities of Johor were only referring to ownership and not sovereignty over Pedra Branca/Pulau Batu Puteh. It is clear that the nature of the clarification sought and needed to be given to Singapore pertained to the sovereignty over Pedra Branca/Pulau Batu Puteh. Accordingly, even if they used the term “ownership” in their reply, Johor/Federated Malaysian authorities must be deemed to have understood the same in terms of sovereignty.

36. Johor’s categorical reply only confirmed Singapore’s sovereignty over the rock. Accordingly, having received confirmation of their sovereignty and entitlement to declare territorial waters around Pedra Branca/Pulau Batu Puteh, Singapore did not consider it necessary to

take any further action to confirm the same. It was a different matter that they did not take any action on the matter of declaration of territorial waters around Pedra Branca/Pulau Batu Puteh for reasons of State policy (noted in paragraph 225 of the Judgment).

37. The chain of events as noted above, and the long, open and peaceful display of State authority of Singapore over Pedra Branca/Pulau Batu Puteh for over 100 years in the absence of any challenge or protest or counter-claim of sovereignty by Johor or Malaysia, clearly and unmistakably lead us to the conclusion that *effectivités* of Singapore, being superior and unchallenged, prevail over any inchoate title Johor might have had as of 1847.

38. Singapore was correct when it did not consider it necessary to invoke prescription as the root of its title because its possession of Pedra Branca/Pulau Batu Puteh in 1847 was regarded by it as "lawful". In any case, Britain's possession of Pedra Branca/Pulau Batu Puteh in 1847 was not "adverse", inasmuch as Johor had only an inchoate title which was not perfected. Johor/Malaysia, during this long period of 130 or more years, did not consider it necessary to have that inchoate title perfected. This conduct or lack of action on the part of Johor, particularly in the face of the sustained bid on the part of Britain to exhibit, gradually over a period of time, sovereignty over Pedra Branca/Pulau Batu Puteh, is material and leaves Johor without any basis to maintain the claim of original title. The inaction and omissions of Johor in this case are similar to the case of Spain which "lost her title to the Island of Palmas — if she ever had it — through not sufficiently manifesting her title in the face of growing competition from the Netherlands" (see D. H. N. Johnson, "Consolidation as a Root of Title in International Law", *Cambridge Law Journal*, 1955, p. 225). Again, the conduct of Johor and Malaysia is in direct contrast to the immediate steps France took to assert her title over the Clipperton Island as soon as it was challenged in 1897, although it did not display sovereignty over the island for over 40 years after acquiring it by discovery in 1858 *(ibid.)*.

39. Nevertheless, as Malaysia based its case on the existence of the original title which, in the view of the Court, Johor had, the totality of evidence considered by the Court in this case revolved around, as noted by a commentator referring to the main message of the Court in the *Minquiers and Ecrehos* case, "the importance of effective possession, as opposed to an abstract title." (*ibid.*, p. 221). The Court in that case noted that "any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers . . . must ultimately depend on the evidence which relates directly to the possession of these groups" (*Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 55). Applying this yardstick, Singapore could be said to have consolidated its title through maintenance or manifestation of sovereignty. Through its effective possession and active display of sovereignty, Singapore thus not only acquired the title over Pedra Branca/Pulau Batu Puteh but maintained it without any interruption. This is the conclusion the Court reached, according to which by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed on to Singapore (Judgment, paras. 276 and 277).

40. Given my view that Singapore had sovereignty over Pedra Branca/Pulau Batu Puteh which it acquired during a course of time after it took possession in 1847 and maintained it without any interruption, and that at no stage Johor had any real original title to it, I disagree with the conclusion of the Court that sovereignty over Middle Rocks belongs to Malaysia. The Court's view is entirely based on the finding that Johor had original title to Middle Rocks which it did not lose. If I did not find enough evidence to hold that Johor ever had original title over Pedra Branca/Pulau Batu Puteh, I find no evidence whatsoever to hold that Johor and hence Malaysia had such a title over Middle Rocks, which lies within 200 m from Pedra Branca/Pulau Batu Puteh. The Parties did not adduce any evidence on their conduct relative to Middle Rocks or South Ledge, compared to the evidence they submitted to establish their titles over Pedra Branca/Pulau Batu

Puteh. In comparison to Middle Rocks, South Ledge is a low-tide elevation. It is within 2.4 nautical miles from Pedra Branca/Pulau Batu Puteh. Accordingly, as they lie within the former customary 3-mile limit of the territorial waters of Pedra Branca/Pulau Batu Puteh, and as Singapore has exercised sovereign authority over the waters surrounding Pedra Branca/Pulau Batu Puteh, in my view, it has sovereignty over both Middle Rocks and South Ledge.

41. In spite of the above, I have no objection to the conclusion of the Court that sovereignty over South Ledge need not be decided outright here and now. The same could be settled as part of the delimitation of territorial sea limits among concerned States, possibly Singapore, Malaysia and Indonesia, which appear to have overlapping territorial sea of 12 nautical miles each in the area.

(Signed) Sreenivasa Rao PEMMARAJU.