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SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW

RESEARCH REPORT

TOPIC: TERRITORIAL DISPUTE OF PEDRA BRANCA/ PULAU BATU PUTEH
BETWEEN MALAYSIA AND SINGAPORE

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1.0 INTRODUCTION

It was anxiety for Malaysia and Singapore when the ICJ delivered its ruling on Friday, 23 May 2008. The decision made by the Court given benefit to both State parties in dispute, in the final judgment of Pedra Branca to Singapore, the part of the island's surrounding area to Malaysia, and tiny stones of the south ledge to the State with legal rights of its territorial waters according to the international law. However, there some contentious issue arises concerning legal issue such as in claiming exclusive economic zone (EEZ) of Pedra Branca by Singapore since they have sovereignty over the island after the Court's ruling; measuring territorial waters between Malaysia and Singapore with referring to UNCLOS 1982; and how to decide south ledge status since its being raised additional claims to this case. This report covers the background of the issue, the laws involved, solutions to the problem, and comments and critique to the solution. The report also highlights the justification of the study is also included in this finding. Theoretical framework, challenges, and potential of international law and dispute settlement mechanism are also contained herein.

2.0 BACKGROUND OF ISSUE

The ICJ ruling that Pedra Branca has shifted sovereignty from Malaysia to Singapore, now taking possession based on legal arguments presented before the Court. Malaysia responded with the discomfort that they believed Pedra Branca was a part of their territory since ancient times. It hurt particularly as Singapore has been a sign of Singapore's ignorance concerning its relations with Malaysia and its insensitivity to Malaysian sentiments in Malaysians' eyes since the issue surfaced in 1980.

Then, looking at the background of the issue, we can start by studying these two State parties' historical background in dispute. The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511.¹ The Netherlands had invaded various countries in Southeast Asia under the Portuguese administration by the mid-1600s. In 1789 in the Malay Archipelago, UK declared some Netherlands possession, but in 1814 the former Dutch possessions returned part of the Netherlands' Malay Archipelago. After that, these two colonial powers agreed to sign a treaty on 17 March 1824; a treaty called the Anglo-Dutch Treaty.

As a result of this agreement, part of Johor came under British rule while the other part fell under Dutch possession.² To shorten Malaya's history, the Federation gained independence from England in 1957 after a series of diplomatic negotiations led by Tunku Abdul Rahman, the First Prime Minister of Malaysia, with Johor as an integral State of the Federation. A year after that, Singapore then proclaimed a self-governing colony. Then, a big moment for Malaysia in history when on 16 September 1963, The Federation of Malaysia was established in 1963 to unite unity with the former British colonies Sabah, Sarawak, and Singapore. Later, a confrontation and political movement between Malaysia and Singapore

¹ INTERNATIONAL COURT OF JUSTICE. <https://www.icj-cij.org/public/files/case-related/130/14506.pdf>

² *Pedra Branca Judgment*, above note 4, para. 20.

resulted in 1965. Singapore left the Federation and became an independent sovereign State, governing its own rule and government.³

The dispute's origin can be seen in 1979, Malaysia had published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia," which to show that Pedra Branca as forming part of Malaysian territory. The cartographers purposely intended this to assert Malaysia's sovereignty over Pedra Branca, which stands that it has always belonged since ancient times to the Sultanate of Johor. But, Singapore not agreed and protested this act by Malaysia regarding the claim of the island. To understand this dispute further, as refer to the legal basis of the rule of international law subjected to dispute-related with territorial sovereignty, the date upon the beginning is significant to establish territorial dispute over territory. This is known as the critical date. In this case, marking on 14 February 1980, when Singapore's protest published a map by Malaysia, it began a protracted dispute spanning almost three decades.

Following the date, many efforts were made through lengthy bilateral negotiations to settle the dispute but have failed. Then, in 1994, both States agreed to submit their question of a dispute concerning territorial sovereignty of Pedra Branca through a judicial settlement, the International Court of Justice (ICJ). After that, the Court looking at legal arguments by both states. The ICJ has made its ruling regarding this issue and further add sovereignty over two additional claims situated in Pedra Branca.

³ Ibid.

3.0 LAWS INVOLVED IN ISSUE

Treaties or agreements or conventions between States, or treaties between States and international bodies, are considered the other main sources of law. International law is different in terms of application compared to domestic law. International law covered the legal provision as the whole community while domestic law only prescribed to its local condition in State territory. We can see that treaties are the primary source of international law and treaties only binding upon States who become parties to them. All countries in the world freely decide to become or not a party to a treaty which also there is no strict guideline to ratify a treaty.

Generally, the source of international law is inter-related and stands as a complement to each other. To support, a treaty is binding on all Member States who have joined and became parties because the principle comes together as a rule of customary international law. The legal maxim is *pacta sunt servanda*, which requires all States to honour their treaties. For instance, according to the Vienna Convention on the Law of Treaties 1969, generally at the international community, this treaty was signed only by less than half the States the world are parties to it. Still, all courts are honoured this Convention and apply it as main provisions to codify customary international law, thus treating them as binding on all States whether they belong as parties to the Convention.

In this case, a treaty or Convention applicable for both states is the United Nations of the Convention on the Law of the Sea (UNCLOS) 1982. Generally, this Convention sets out an international legal framework governing the nationality, the territorial sovereignty of territorial water, delimitation line with adjacent states, etc. Pedra Branca is an island near Malaysia and Singapore; thus, the UNCLOS is applicable in determining who has legal rights over the islands. To support, the provision regarding the term "island" is mentioned in UNCLOS 1982. This Convention is best seen as the basis of international law regarding the

oceans, which should be expanded and strengthened by utilizing more relevant international agreements and developing custom States⁴. The best answer to Pedra Branca's status lies in Article 121 (1) of UNCLOS 1982, which defines an island as a "naturally formed area of land, surrounded by water, which is above water at high tide."⁵ According to its definition of "island," subjected to UNCLOS 1982, a piece of land surround by water during water at high tide. Besides, as refer to Article 3 of UNCLOS 1982, which states that "each States has right to set the width of its shore territory, measured from the baselines defined under this Convention, to a maximum of 12 nautical miles".⁶

We look first at Malaysia claimed on this case, where Malaysia stated in the written pleadings that they have the original title of ownership of the island.⁷ Malaysia stressed that the island is still part of the Sultanate of Johor in legal possession. There was nothing that caused Pedra Branca to be displaced. Singapore's presence on the island was solely intended to construct and maintain a lighthouse with the owner's permission. However, based on that authorization, Singapore still cannot annex the island's sovereignty. This can be shown in international law that was simply building and operating the lighthouse does not constitute the island's authority. Furthermore, the dispute has no relevance and insignificant with the status of *terra nullius* of the island. To use the Court's words in the Qatar v. Bahrain 2001 case concerning "tiny islands," the activities of Johor with respect to Pulau Batu Puteh are sufficient to support Malaysia's claim to sovereignty.⁸

Moreover, Singapore claimed that Pedra Branca as the lighthouse's construction was under the British Crown's authorization. Singapore argued that the island's original owner was the British Crown, evidence of building a lighthouse and other structures over 160 years

⁴ P. Hoagland and M.E. Schumacher, 'Law Of The Sea - An Overview | ScienceDirect Topics' (*Scencedirect.com*, 2001)

⁵ Article 121(1), United Nations of the Convention on the Law of the Sea (UNCLOS)

⁶ Article 3, United Nations of the Convention on the Law of the Sea (UNCLOS)

⁷ S. Jayakumar and Tommy Koh, *Pedra Branca: The Road to the World Court* (Singapore: NUS Press, 2009), 67. ⁸ See *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports 2001, para. 197.

ago. Thus, taking into account the history and legal perspective, then the right of a successor from the British empire should be given to the Republic of Singapore. Singapore also stated that Pedra Branca's status was *terra nullius*. *Terra nullius* can be defined as no man's island. Then, the Court observed that Singapore's statement clearly shows that in 1847 the legal status of Pedra Branca was *terra nullius*. Since then, Singapore continuously fights and act as sovereign nature over the island and its surroundings. During that time, Malaysia did not lodge any protest, and there was evidence that in 1953, the State Government of Johor, in response to a Singapore correspondence, stated that they did not claim possession of authority over the island. Since then, Pedra Branca was thought to be under Singapore's possession until the dispute began with claiming the island from Malaysia when Malaysia published its map in 1979.

Besides, regarding the Middle Rocks and South Ledge located near Pedra Branca, Singapore claimed sovereignty over these two parts was to the country with sovereignty over Pedra Branca.⁹ Lastly, Singapore claimed that it took ownership of the island as a sovereign site by choosing Pedra Branca for constructing the Horsburgh Lighthouse between 1847 and 1851 with the principle of *a titre de souverain*. This principle explained that whoever possessed legal possession over the island according to legal regulations covered under acquisition of territory at that time; thus, it has the legal right to the island's title. To sum up, the United Kingdom (UK) and its legitimate successor, the Republic of Singapore, have the right to keep this title to ownership of the island, Pedra Branca.

⁹ International Court of Justice, "Memorial of Malaysia." International Court of Justice.

4.0 SOLUTIONS TO ISSUE

The solution took place by a judicial settlement through the International Court of Justice. Before ICJ ruling this case, there was a bilateral negotiation made between Malaysia and Singapore. To resolve the dispute of territorial sovereignty of Pedra Branca, both states went through a long term of negotiation, but this mechanism cannot be resolved bilaterally. Singapore recommended that Malaysia refer to their conflict over territory to the ICJ in 1989 for final adjudication. Later, in 1994 Malaysia finally agreed to Singapore's idea of submitting their dispute to ICJ. The critical factor closing the prospect of achieving bilateral relations included two additional assertions by Singapore, Middle Rocks, and South Ledge. This was the essential factor that closed the chance of attaining bilateral ties.

Then, the Foreign Ministers on behalf of both States were agreed to sign the Special Agreement on 6 February 2003. Malaysia and Singapore consented to refer their prior dispute to the Court through this Agreement. To support, according to Article 2 of the Special Agreement stated that the Court is requested to determine whether sovereignty over the island, called Pedra Branca, and the additional claims placed in the area of the island belongs to Malaysia or the Republic of Singapore.¹⁰

As consider that both Malaysia and Singapore agreed on mutual consent to submit their question of Pedra Branca to ICJ. It is crucial to refer to and analyse the Court's final ruling and its legal basis decision regarding this matter. The Court's final judgment was Singapore has sovereignty over Pedra Branca. The two additional claims resulted in Malaysia have legal rights over Middle Rocks. The tiny part at the island area, called South Ledge, has possession to the State who possessed its territorial water after following UNCLOS 1982 in drawing the line of territorial waters.

¹⁰ Special Agreement for Submission to the ICJ of the Dispute between Malaysia and Singapore Concerning Sovereignty over Pedra Branca/ Pulau batu Puteh, Middle Rocks, and South Ledge.

In addition, the legal basis ground of decision by ICJ, after considered both of legal arguments by the States, had concluded that while the Sultanate of Johor was originally had possession over Pedra Branca following in the history of legal title of the island, but the sovereignty had shifted to Singapore by 1980 by when the dispute crystallized. This is because there is evidence proved by Singapore that they were maintaining the island and performed its duty while Malaysia at that time did not protest or rejected the actions taken by Singapore. Thus, the island's territorial sovereignty finally goes to Singapore, and Malaysia only has possession over the island's area, the Middle Rocks.

Next, Malaysia and Singapore took a further step by forming a committee to resolve the maritime boundaries' delimitation concerning territorial waters and Pedra Branca's area. The committee called as "Malaysia-Singapore Joint Technical Committee on the Implementation of the ICJ Judgment on Pedra Branca, Middle Rocks, and South Ledge (MSJTC)" as a next step to perform the ICJ's ruling.

The post-judgment by the ICJ had shown the development of the dispute from time to time. Malaysia demanded on 2 February 2017 that the judgment of 2008 of the ICJ be review. To support, according to Article 61 Statute of the ICJ only provides for an application to review a decision if it based on the finding of some evidence that was a nature to be a deciding factor and that the Court and the party seeking for revision, when the ruling was issued, were ignoring the fact that this ignorance was not due to negligence. Besides, the appeal must be made within ten years from the Court decision date and at least six months after the new fact has been discovered.

Then, Malaysia also sent a request for interpretation for the ICJ's ruling 2008 on 20 June 2017. Following Article 60 of the ICJ statute stated that the Court should clarify to the parties involved if the judgment constructs dispute or any meaning in the scope. The request from Malaysia to seek clarification was supplemental and separate from its application for

review. This method is way more to seek to clarify a judgment compared to the revision application, which aims to alter decisions based on perceived new evidence.

Later, Singapore notified the ICJ of the request of discontinuation made by Malaysia on 29 May 2018. ICJ then declared with both parties' consents; the Court had announced to Malaysia and Singapore that the case had been withdrawn from the Court's list.

5.0 COMMENTS AND CRITIQUE

The settlement disputes between Malaysia and Singapore based on international law can be categorized as a perfect model, especially the peaceful settlement of disputes in the Southeast Asia region. Generally, as laid down under Article 33 of the UN Charter stated that any conflict likely to threaten international peace or security should first be resolved by negotiation, mediation, arbitration, or other peaceful means. However, a judicial settlement through ICJ was the best choice for Malaysia and Singapore, looking at circumstances prevailing at that time. To support, as an independent international body for the settlement of this case, a position played by the ICJ may be considered a peaceful instrument, in line with the UN Charter under Article 2(3), which stated that "all Members shall resolve by peaceful means their international dispute so that international peace and stability are not jeopardized."

In the spirit of good neighbourliness and being an excellent example among the ASEAN Member States, Malaysia stands to apply the strategy of non-confrontation and the friendly way of behaving. Malaysia may have used military action to control Pedra Branca and his surrounding areas, but the Malaysian leadership concluded that it would harm both countries and damage diplomatic ties that will affect maintaining a prosperous region. Indeed, the State Parties to the Treaty of Amity and Cooperation are Malaysia and Singapore, which involved the peaceful resolution of all disputes. The main point to tackle was not the question of being afraid to go to war with Singapore. It was a calculated option that took into account the need to find a peaceful resolution rather than recourse to use force in Malaysia's broader interests and the region.

With reference to the judgment reached on 23 May 2008, Pedra Branca was given jurisdiction over Singapore, and the surrounding areas of the island, named Middle Rocks, awarded to Malaysia while territorial waters between the two countries separated the South Ledge. Malaysia and Singapore agreed to the ICJ ruling, and it was described as a "win-win"

situation. However, there are remaining problems in this ruling. The territorial waters around Pedra Branca, according to the UNCLOS 1982, have yet to be determined in Malaysia and Singapore. Thus, in this case, we can see that the ICJ has only resolved half the dispute, only answering the question of Pedra Branca's territorial sovereignty. In general, this is the right step in the correct direction for both states, but years of negotiations will be followed to settle the conflicts in full.

In my opinion, the ICJ mechanism in resolving this case is not fully effective in solving this situation since both states must negotiate bilaterally in calculating the territorial boundary waters around Pedra Branca. The ICJ determined the question of territorial jurisdiction of Pedra Branca to carry out its functions because, in either instance, it was not necessary to establish maritime boundaries. In addition, following the decision of ICJ, a time-consuming procedure to start fresh negotiations will make bilateral negotiations more successful than referring the cases to ICJ as an alternative means of resolving the dispute.

To support, in 2003, the International Tribunal for the Law of the Sea (ITLOS) acting as arbitration concerning a territorial dispute between Malaysia and Singapore, but the arbitration process not entirely successful in resolving the conflict. This case deals with Singapore's schemes for reclamation of land, which claimed to have violated Malaysia's territorial waters. Later, through the signing of the Settlement Agreement on 26 April 2005, several rounds of talks were held until this dispute was eventually resolved.¹¹

Furthermore, the Court has been widely criticized by nations and scholars alike.¹² These criticisms include claiming that the Court is biased and that certain countries chose not to recognize the Court's competence. For instance, to settle regional conflicts, Southeast Asians do not refer their case to the international legal body. As we know, an international organization has its area, and the Association of Southeast Asian Nations (ASEAN)

¹¹Anna Louise Strachan, *Resolving Southeast Asian Territorial Disputes: A Role for the ICJ*, 2009.

¹² *Ibid.*

represents a perfect example. This is because ASEAN should play a more significant role in resolving intra-regional conflicts. Both Member States ratified the ASEAN Charter in 2008. The ultimate objective of this Charter is to foster regional peace and stability and to resolve disputes peacefully through dialogue and consultation.

In support of the ASEAN Charter, according to Article 22(1), "member states shall endeavour, by dialogue, consultation, and negotiation, to a peaceful manners settle their disputes." Besides, according to Article 23(2) of the ASEAN Charter mentioned that "parties to the dispute may apply the Chairman of ASEAN or the Chairman or Secretary-General of ASEAN, serve as an ex-officio capacity, to provide good offices, conciliation, or mediation." Thus, considering the future territorial dispute concerning the ASEAN member states, they may submit the application or request for dispute settlement mechanism at ASEAN rather than running through a judicial settlement, International Court of Justice (ICJ).

6.0 CONCLUSION

To conclude, Malaysia has made considerable progress in resolving its sea-territorial dispute taking into account peacefully through diplomacy, bilateral negotiations, and other peaceful approaches in the territorial sovereignty of Pedra Branca between Malaysia and Singapore. In Malaysia, the spirit of goodwill and ties between Singapore, as both are ASEAN members, must prioritize conflicts rather than resort to military powers. International Court of Justice (ICJ) has delivered a good judgment in a very impartial and benefits to both parties in dispute. Besides, in the absence of other peaceful platform tools, the ICJ is the right mechanism to resolve territorial disputes through the legal ruling based on international law. Besides, Malaysia believed that any escalation of violence in maritime disputes between its regional countries would harm human lives, economic development, and the claimant states' diplomatic relations and threaten the region's entire peace and stability.

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