

Making Peace over a Disputed Territory in Southeast Asia: Lessons from the Batu Puteh / Pedra Branca Case

Kamarulzaman Askandar

Professor of Peace and Conflict Studies, Faculty of Humanities, Arts and Heritage,
Universiti Malaysia Sabah, Malaysia

Carlervin Sukim

Lecturer, International Relations Program, Faculty of Humanities, Arts and Heritage,
Universiti Malaysia Sabah, Malaysia

Abstract

The dispute between Malaysia and Singapore over Batu Puteh or Pedra Branca was settled in 2008 by the International Court of Justice (ICJ). The decision was to give Singapore ownership over Pedra Branca, while Malaysia was given control of Middle Rocks, a small rock formation to the south of Pedra Branca. The ICJ ruling also decided that a third piece of contentious area, the Southern Ledge should be jointly managed by the two countries. This paper focuses on two aspects of the case: the decision to send the case to the ICJ, instead of utilizing regional mechanisms for dispute settlement; and the post-decision reactions of both countries. Sending the case to the ICJ shows confidence in one's ability to win, while at the same time showing a lack of confidence in regional mechanisms for dispute settlement available to the parties regionally. Some of the lessons learnt from this process include the need to be fully prepared for the legal process; not relying solely on historical evidences; making sure that one is in effective control of the territories in dispute; and that regional mechanisms do have limitations due to perceived (un)trustworthiness of third parties, and the need to improve them further.

Keywords

Batu Puteh, Pedra Branca, Malaysia, Singapore, dispute settlement, territorial dispute, regional mechanism, ICJ

INTRODUCTION

There is an old Malay saying that translates simply as “the house is finished but you can still hear the sound of work being done on it.” While this saying has a somewhat negative connotation to it, it also presents a realistic view of the difficulty of building a structure that lasts. The same can be said about peacemaking efforts as well—that work continues after the signing of an agreement or after a decision has been made about the contentious issues. In many cases, this phase is one of the most important parts of the process as it determines whether the process has been properly done and is thus durable, and the peace sustainable. It also gives us an idea on how the parties will approach future issues and contests that they might have.

Over the last 15 years, Malaysia went through this process as an interested party in two cases. In 2002, an International Court of Justice (ICJ) decision over the Islands of Sipadan and Ligitan which were contested by Malaysia and Indonesia went Malaysia's way. However, the Court did not make a decision on maritime boundaries between Malaysia and Indonesia in the areas around the two islands, resulting in arguments saying that the dispute has not been completely settled. Observers noted that the reason for this was that the ICJ was not requested to resolve that particular issue by the parties (Strachan 2009).

In 2003, Malaysia, and this time Singapore, jointly submitted a request to the ICJ to decide on the sovereignty of three pieces of contested land/areas between the two countries—Pedra Branca/Batu Puteh Island, Middle Rocks and South Ledge. Analysts said that the case was submitted to the ICJ even if the then Prime Minister of Malaysia was not totally convinced that they should do so (Asri et.al. 2009). In May 2008, the ICJ decision was split between the two countries. Singapore was awarded Pedra Branca, while Malaysia was given ownership of Middle Rock. South Ledge which is only visible during low tide was split between both countries according to their territorial waters. This ‘win-win’ decision, however, is not without controversies as the two countries have yet to decide on how the territorial waters around Pedra Branca and Middle Rocks will be delimited. A joint technical committee involving both countries will be set up to look at this as well as the issue of South Ledge (Strachan 2009).

In this sense, it can be argued that even if a decision has been made in both of these cases, they remain as still contentious issues between the parties. The aftermath raises questions about the usefulness of the arbitration process for the parties, and alternative venues and bodies of peacemaking—especially regional ones that should and could have been utilized, and lessons that can be learnt from this process. This paper will try to look at the reasons behind the use of the

ICJ as a mediating body for countries like Malaysia and Singapore, and what lessons can be learnt along the way. It will start by discussing the peacemaking process before going on to investigate the background of the case and the decision made by the Court. The paper will then look at the responses on both side and will conclude with some lessons learnt from this case.

THE PEACEMAKING PROCESS AND THE VIABILITY OF AN “EXTERNAL” PROCESS AS OPPOSED TO A REGIONAL ONE

The peacemaking process is technically the same regardless of the level and types of conflict being addressed. The actors involved will evaluate whether it is something that needs to be and should be resolved and whether settling the conflict can bring them more benefits than allowing the status quo to remain. The next step is usually to determine whether both sides are interested in settling the case. Feelers are sent and efforts are made to determine the viability of the process. This is part of the confidence building step done before direct negotiations between the sides are conducted. Some conflicts are lucky enough to be settled in this bilateral mode, but many need guidance and facilitation by a third party in order to move on. This third party intervention presents a lifeline for many difficult cases and comes in many forms. This part will look at this third party intervention exercise of the peacemaking process, highlighting the issue of an “external” process as opposed to a “regional” one and the implications that it might have on the result on this case.

Third party involvement in the peacemaking process in the region is not the standard norm, especially up to the pre-mid 1990s period. Southeast Asian countries are well known for their hesitancy in allowing others to come in and mediate their problems, and if they do so, it probably means that they are at the end of their ropes having tried to address the issues themselves unsuccessfully. Since the mid-1990s there have been cases of international involvement in intra-state conflict issues in the region, i.e. the OIC (led by Indonesia) in the GPH-MNLF peace process; Malaysia in the GPH-MILF process (involving also a number of other countries and international organizations); the HDC and then the CMI (and subsequently the EU and others) in the Aceh conflict; the UN in East Timor; and Malaysia in Patani/Southern Thailand. For inter-state conflicts, there have been even lesser cases of third party involvement, mostly because there have not been many serious or high profile inter-state cases. Or more likely that the parties are unwilling to seriously look at settling the issues for a variety of reasons including the need to avoid confrontations, to contain them and to prevent them from

disrupting peaceful relations between the countries (Amer 2000; Bercovitch et al. 2002). Or even that the parties are not sure about the possible outcome and have chosen instead to simply avoid addressing the issues altogether. Strachan observed that, “Regional mediation is also preferable to international involvement but is not always viable due to fears that regional actors may have vested interests in certain cases. Moreover, ASEAN’s current stance on intervention in regional disputes renders a greater regional role in the resolution of territorial disputes unlikely in the impending future” (Strachan 2009, 5).

We will go first into a discussion of what third party involvement in the form of mediation in a peacemaking process means, especially in an inter-state setting.

Mediation is generally known as the continuation of negotiations by other means. Chris Mitchell defines mediation as any “intermediary activity... undertaken by a third party with the primary intention of achieving some compromise settlement of the issues at stake between the parties, or at least ending disruptive behaviour” (Mitchell 1981, 287).

Spencer and Yang (2003) in Bercovitch (2003) see mediation as the “assistance of a third party not involved in the dispute, who may be of a unique status that gives him or her certain authority with the disputants; or perhaps an outsider who may be regarded by them as a suitably go-between.”

Bercovitch further defines mediation “...as a process of conflict management, related to but distinct from the parties’ own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider (whether an individual, an organization, a group, or a state) to change their perceptions and behavior, and to do so without resorting to physical force or invoking the authority of the law” (Bercovitch 2003, 130). He went on to elaborate that the motives for mediation include the following:

“...mediation is particularly appropriate when (a) a conflict is long, drawn out, or complex; (b) the parties’ own conflict management efforts have reached an impasse; (c) neither party is prepared to countenance further costs or loss of life; and (d) both parties are prepared to cooperate, tacitly or openly, to break their stalemate” (Bercovitch 2003, 133).

While mediation looks at the bigger picture of third party involvement in peacemaking, there are also other legal and formal forms of mediation such as adjudication and arbitration. “International adjudication is a method of international dispute settlement that involves the referral of the dispute to an impartial third-party tribunal—normally either an arbitral tribunal or an international

court—for binding decision, usually on the basis of international law” (Bilder 2003, 155).

The fundamental principle of this practice is consent, as a state need not submit its disputes unless it wishes to do so; and an international arbitrator or court has no jurisdiction to decide on the dispute unless all the states involved have given their consent. This is only one of many ways of dealing with disputes at the international level. The UN Charter in Article 33 lists a number of acceptable methods of peaceful settlement including:

“...negotiation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and resort to UN or other international organization dispute-settlement procedures. In essence, a full list of methods reflect a spectrum of techniques that range from so-called diplomatic means, such as negotiation, consultations, good offices, mediation and conciliation, which give control of the outcome primarily to the parties themselves, to so-called legal means, such as arbitration or judicial settlement, which give control of the outcome primarily to a third party (or parties)” (Bilder 2003, 156).

States will usually weigh carefully the possible advantages and disadvantages of using the available methods before deciding on the most appropriate one for them.

There are essentially two methods of international adjudication: arbitration and judicial settlement by an international court. Differences lie in the “permanence of the tribunal to which the dispute is referred, the scope of its jurisdiction or authority, and the extent to which the parties to the dispute can control the selection of the third parties—arbitrators or judges—who will rule on their dispute and the tribunal’s jurisdiction and procedures” (Bilder 2003, 159).

The ICJ was established in 1945 by the UN Charter as the principal judicial organ of the UN and is governed by a special treaty called ‘the Statute of the Court.’ It is annexed to the UN Charter, where all members of the UN are parties to. It acts as a world court and has a dual jurisdiction, deciding disputes that are brought to it by states and giving advisory opinions on legal questions at the request of organizations like the UN. The 15 judges of the ICJ are elected by the UN General Assembly and the Security Council for a period of nine years. The court’s most important job is to deliver legally binding judgments in so-called contentious cases involving disputes between states. Only states can bring contentious cases before the court and not intergovernmental organizations, nongovernmental organizations, or individuals.

The alternative to the Court would be regional mechanisms for dispute settlement. However, "...regional arrangements differ in terms of how they respond to conflicts and disputes among members. At one level, they differ over whether member-versus-member disputes make it onto the formal or informal agenda of the regional arrangement" (Haacke & Williams 2009, 9).

The list of potential instruments of conflict management is considerable and regional arrangements will naturally seek to draw on different techniques as appropriate to the specific conflict in question. The list of instruments includes the use of force and coercion, the imposition of economic sanctions, as well as diplomacy and other confidence-building measures (Crocker et al. 2007).

Arguably the most common conflict-management technique used by regional arrangements is peacemaking through mediation, although they differ over the extent to which this is best carried out bilaterally by individual members or collectively by representatives of the arrangement (Haacke & Williams 2009).

In Southeast Asia, the Association of Southeast Asian Nations (ASEAN) has been an important stabilizer among its member states. ASEAN is generally considered the most successful regional organisation in the developing world, but it has faced questions over its relevance as a security actor in a rapidly changing environment (Emmerson 2008).

As a principle it should not be necessary for Southeast Asian nations to turn to an external international legal body to resolve regional disputes. There is widespread feeling that the Association of Southeast Asian Nations (ASEAN) should be playing a greater role in settling intra-regional disputes. However, ASEAN member states continue to support a policy of non-interference and this has hampered efforts to make it a reliable body for dispute settlement.

As a grouping, ASEAN has generally avoided dealing with bilateral disputes or territorial conflict between members. Instead, there has been a distinct preference for the parties concerned to enter bilateral negotiations to address the issue at stake or to allow for the involvement of third parties from within or even outside the region (Caballero-Anthony 2005). The 1976 Treaty of Amity and Cooperation (TAC), provides a code of conduct governing intramural relations that retains validity to this day. This include the following:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion and coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of difference or disputes by peaceful means

5. Renunciation of the threat or use of force; and
6. Effective co-operation among themselves (TAC 1976)

Scholars have commented that a “distinctive characteristic of the ASEAN conflict management approach is its ability to combine these principles with the more tacit and passive approach of avoiding conflict, dampening it, or postponing dealing with it for an indefinite period. It is in this regards that ASEAN differs from other regional organisations” (Kamarulzaman, Bercovitch & Oishi 2002). This spirit of the “ASEAN Way” has gone a long way towards managing conflict in the region and attempts have been made to elevate this to a higher level where it can contribute to settlement of actual disputes and conflicts in the region (Thambipillai 2001; Kamarulzaman 2001). The TAC also allows for the constitution of an ASEAN High Council to take cognizance of disputes or situations likely to disturb regional peace and harmony when negotiations of parties concerned fail. However, the High Council has never been convened to address any disputes between ASEAN members. Even the introduction of rules of procedure for the High Council in 2001 has not provided a new impetus for its invocation. Instead, members have repeatedly reaffirmed, for instance, their commitment to desist from using or threatening to use force. Notably, when ASEAN countries have felt sufficiently comfortable, they have submitted territorial disputes to the ICJ. Relevant cases include the one covered by this paper—Pedra Branca/Pulau Batu Puteh (Singapore and Malaysia), as well as Pulau Ligitan and Pulau Sipadan (Malaysia and Indonesia).

Agreement by members on the establishment of the ASEAN Security Community (ASC, now ASEAN Political-Security Community, APSC) has also not translated into new initiatives as regards strengthening ASEAN’s conflict management capacity. The 2003 Bali Concord II vaguely states that the High Council shall be an “important component in the ASEAN Security Community since it reflects ASEAN’s commitment to resolve all differences, disputes and conflicts peacefully” (ASEAN 2003). The ASEAN Charter, ratified by all member states in 2008, reinforces traditional principles of dispute settlement wherein member states “endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation” (ASEAN 2008, Chapt. 8). An entire chapter deals with issues pertaining to the settlement of disputes. Article 22 of the Charter states that a dispute settlement mechanism will be established and maintained and Article 23 states that parties to a dispute may request “the Chairman or Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.” Unresolved disputes are in future ultimately to be referred to the ASEAN Summit, but it remains to be seen to what

extent this will happen. The ASEAN Political-Security Community Blueprint issued in 2009 formulates an action plan to develop measures in the areas of conflict prevention, confidence-building measures, conflict resolution, the pacific settlement of disputes, as well as post-conflict peace building (ASEAN 2009). It declares that “more efforts are needed in strengthening the existing modes of pacific settlement of disputes to avoid or settle future disputes.” This is undoubtedly a step in the right direction but nothing concrete has been settled, suggesting that a change in ASEAN’s stance on the issue of intervention remains a long way off (Strachan 2009, 4).

It is no surprise then that Malaysia and Singapore decided that the best way to resolve the issue of Batu Puteh/Pedra Branca after bilateral negotiations failed is by judicial settlement at the ICJ. Malaysia was anxious about sending the case to the ICJ but as remarked by a former high ranking diplomat, “There are, of course, risks to be run in bringing the matter before the ICJ. But the question is was there any other practical alternative?” (Deva 2008) It can be concluded then that despite all the innovations made to implement a regional dispute settlement and peacemaking mechanism within ASEAN, the members still find it highly impractical to send their disputes there when bilateral negotiations break down. At the same time, the parties are confident with the external Court and with their own cases. Malaysia, for example, was confident that they had a good case. The same senior diplomat said that, “...refusing to let our case be heard at the World Court is to suggest Malaysia is not confident in its claims” (Deva 2008). This, in the end resulted in the case of Batu Puteh/Pedra Branca being sent to the ICJ for deliberation. The background of the case and the decision made by the Court is the subject of the next part of this paper.

BACKGROUND OF THE CASE

The background of the case goes back to 21 December 1979 when Malaysia published a map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia” (the 1979 map). In that map, Pulau Batu Puteh/Pedra Branca is depicted as lying within the territorial waters of Malaysia. Singapore responded through a diplomatic note dated 14 February 1980 which stated that “[t]he Government of the Republic of Singapore is gravely concerned at what is set out in the said map. This map purports to claim the island of Pedra Branca as belonging to Malaysia. The Government of the Republic of Singapore rejects this claim...” (Memorial of Singapore 2004, 24). This particular note led to an exchange of correspondence and subsequently to a series of bilateral talks—the first round which started in

February 1993 in Kuala Lumpur. On this particular occasion, Singapore revealed that it is not only claiming sovereignty over Pulau Batu Puteh/Pedra Branca but also over Middle Rocks and South Ledge. These two are other maritime features lying in the vicinity south of Pulau Batu Puteh/Pedra Branca.

The second round of talks took place in 1994 in Singapore which also did not bring any resolution of the matter. According to Kadir Mohamad, "...[t]he inclusion by Singapore of two additional claims erased any possibility of arriving at a bilaterally negotiated solution" and that "...the possibility of regaining such control by peaceful negotiations had become non-existent in view of Singapore's uncompromising attitude" (Kadir 2015). In this regard, both parties considered that the best option is to seek a third-party judicial settlement by way of adjudication at the International Court of Justice (ICJ).

The decision to take the dispute to the ICJ for adjudication was agreed on between Prime Ministers Mahathir Mohamad and Goh Chok Tong in 1994. However, Malaysia and Singapore are not signatory states to the Statutes of the ICJ. In this regard, a Special Agreement between the two parties was required to bring the case to the Court. Bilateral negotiations then was conducted to agree and to sign the Special Agreement. Between 1997 and 2002, both parties mutually agreed to hold the negotiations to enable Malaysia to focus on a separate case in the same Court. It was the case concerning the sovereignty over the islands of Sipadan and Ligitan between Malaysia and Indonesia. In that case, the Court on 7 December 2002 ruled that the sovereignty over Pulau Sipadan and Pulau Ligitan belongs to Malaysia. After that, the negotiation between Malaysia and Singapore was resumed and eventually concluded with the signing of the Special Agreement by the Foreign Ministers of Malaysia and Singapore on 6 February 2003. In Article 2 of the Special Agreement, the parties requested the Court "to determine whether sovereignty over: (a) Pedra Branca/Pulau Batu Puteh; (b) Middle Rocks; (c) South Ledge, belongs to Malaysia or the Republic of Singapore." The parties presented to the Court their written pleadings in three stages i.e. the Memorial, Counter-Memorial and Reply over a period of two years in 2004 and 2005. The Public Hearings were held from 6 to 23 November 2007.

For its part, Malaysia "believed that it had a sound case and had at least 50 percent probability of regaining control over Batu Puteh, Middle Rocks and South Ledge via the international legal process" (Kadir 2015). Not only that, Malaysia was also "confident that it could prove that Johor had original title to Batu Puteh, Middle Rocks and South Ledge" and that "nothing had happened later to cause Johor or Malaysia to lose that title" (Kadir 2015, 113). Malaysia also argued that Singapore's presence on Batu Puteh/Pedra Branca for the sole purpose of constructing and maintaining the lighthouse there (with the permission of the

territorial sovereign) is not sufficient to vest sovereignty in it. Malaysia further says that Pulau Batu Puteh/Pedra Branca was not a *terra nullius* (literal translation means ‘nobody’s land’) at any relevant time and was therefore, not susceptible to acquisition through occupation. For Malaysia, the three maritime features in question are distinct with each other and “do not constitute one identifiable group of islands in historical or geomorphological terms, and that they have always been considered as features falling within Johor/Malaysian jurisdiction.”

On the other hand, Singapore claims that “the selection of Pedra Branca as the site for building the lighthouse with the authorization of the British Crown constituted a classic taking of possession *a titre de souverain* (with the title of sovereign). Singapore argued that the title to the island was acquired by the British Crown in accordance with the legal principles of that time and has since “been maintained by the British Crown and its lawful successor, the Republic of Singapore” (Memorial of Singapore 2004, 79). Singapore’s position is that sovereignty over Middle Rocks and South Ledge goes together with sovereignty over Pulau Batu Puteh/Pedra Branca. In this sense, according to Singapore, whoever owns Pulau Batu Puteh/Pedra Branca owns Middle Rocks and South Ledge. In Singapore’s view, Middle Rocks and South Ledge are dependencies of Pulau Batu Puteh/Pedra Branca and that these three are a single group of maritime feature.

THE ICJ DECISION

The ICJ delivered its decision for the case during a special sitting of the Court on 23 May 2008. The Court ruled, by twelve votes to four, that sovereignty over Pulau Batu Puteh/Pedra Branca belongs to Singapore. By fifteen votes to one, the Court ruled that the sovereignty over Middle Rocks belongs to Malaysia. On South Ledge, the Court ruled by fifteen votes to one that sovereignty over this maritime feature belongs to the State in the territorial waters of which it is located. It is worth discussing the process by which the Court reached its decision.

In determining whether the sovereignty over Pulau Batu Puteh/Pedra Branca, Middle Rocks and South Ledge belongs to Malaysia or Singapore, the Court first described the geographical context of the dispute. The Court then gave an overview of the complex historical background of the dispute between Malaysia and Singapore beginning from the establishment of the Sultanate of Johor until the separation of Singapore from the Federation of Malaysia in 1965. The Court examined the question regarding the original title of the Pulau Batu Puteh/Pedra Branca before 1840. In this regard, the Court concluded that “as of the time when the British started their preparations for the construction of the lighthouse

on Pedra Branca/Pulau Batu Puteh in 1844, (the) island was under the sovereignty of the Sultan of Johor” (Summary of the Judgement 2008, 7).

The Court then examined the legal status of Pulau Batu Puteh/Pedra Branca after the 1840s to determine whether Malaysia has retained sovereignty over Pulau Batu Puteh/Pedra Branca or whether sovereignty has passed to Singapore. In doing so, the Court observed that “it needs to assess the relevant facts” consisting mainly of the conduct of Malaysia and Singapore from after the 1840s until the crystallization of the dispute in 1980. An important fact of the case was a letter written in 1953 by the acting Secretary of the State of Johor to the British Adviser of colonial government in Singapore that admitted that Johor does not claim ownership of the island. This important episode, based on the documents submitted to the Court was analysed and reported by Lathrop (2008) as follows:

“Apparently the British adviser passed this letter to the state secretary of Johor. Three months later, in September 1953, the acting state secretary of Johor responded that “the Johore Government does not claim ownership of Pedra Branca” (para. 196). In its review of this brief and indirect exchange, the Court concluded that the acting state secretary had the authority and capacity to write the response quoted above and that the word “ownership” referred, not to private property interests with respect to the lighthouse, but to sovereignty over the entire island of Pedra Branca/Pulau Batu Puteh (paras. 220, 223).

Instead, the Court concluded that “as of 1953 Johor *understood* that it did not have sovereignty over Pedra Branca/ Pulau Batu Puteh and that in light of Johor’s reply, the authorities in Singapore *had no reason to doubt* that the United Kingdom had sovereignty over the island” (para. 230, emphasis added).

Having found most of the pre-1953 conduct irrelevant, the Court completed its analysis with a review of the conduct of the parties after 1953, focusing on both Singapore’s conduct taken *a` titre de souverain* and not solely as operator of the lighthouse, and Malaysia’s conduct (or lack thereof) indicating that it did not claim sovereignty over the island and instead acknowledged Singapore’s sovereignty there” (Lathrop 2008, 5).

This was a very important point raised by the Court and from there it was obvious that Singapore now had the upper hand in the case. The Court’s decision on Pulau Batu Puteh/Pedra Branca case then read as follows:

“The court is of the opinion that the relevant facts, including the conduct of the Parties, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors a *titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.

For the forgoing reasons, the Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore” (Summary of the Judgement 2008).

On the legal status of Middle Rocks, the Court’s decision read as follows:

“The Court first observes that the issue of the legal status of Middle Rocks is to be assessed in the context of its reasoning on the principal issue in the case. It recalls that it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the case. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct of the Parties reviewed in the previous part of the Judgement has any application to the case of Middle Rocks.

The Court therefore finds that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor” (Summary of the Judgement 2008).

With regard to the South Ledge, the Court noted “that there are special problems to be considered, inasmuch as South Ledge presents a special geographical feature as a low-tide elevation” and concluded that sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located (Summary of the Judgement 2008).

PICKING UP THE PIECES FOR MALAYSIA (WHILE THE OTHER SIDE IS CEMENTING THE WALL IN THE POST-SETTLEMENT PERIOD)

The decision of the ICJ immediately created ripples in both Malaysia and Singapore. It was reported in the Singaporean media that the leaders of both countries accepted the decision, albeit with some reservations (Zuraidah 2008). The same Singapore Straits Times reported that the decision was accepted in Johor, the Malaysian state closest to Singapore, and that "...Foreign Minister Rais Yatim and PM Abdullah Badawi have also spoken, repeatedly, in the same vein" (Zuraidah 2008). However, the view was somewhat less favourable from the Malaysian side. Many in the Malaysian diplomatic circle disagreed. One senior diplomat said that, "...all told, the ICJ judgment went beyond a winner/loser scenario, or even, a winner-take-all verdict. It was a mid-way judgment of sorts" (Deva 2008). The feeling is that the ICJ only resolved half the issue and that it will take considerable time and effort by the two parties to settle unfinished issues left by the court.

The decision also came with cautionary statements about things to come. For example, in Johor the politician that said that he accepted the decision also said that "...Malaysia should consider taking over from Singapore the management of the lighthouse on Pulau Pisang, an island owned by Malaysia. Why? The Pedra Branca issue 'has taught us a lesson on territorial claims'" (Zuraidah 2008). This clearly shows that although the decision was generally accepted by both, it was by no means a victory to either and that both parties are looking at ways to either avoid a repeat of the unsatisfactory decision (to their side) or cement the decision for their future advantage. For Malaysia, it's a matter of picking up the pieces. It involves finding holes in the decision before moving on. A respected law scholar at a local Malaysian university highlighted that: "The judgment was not unanimous but a majority one. Four judges dissented from the majority ruling of the main operative paragraph of the judgment. They disagreed with the majority ruling on the evaluation of the facts as well as the law" (Hamid 2011). This, however, was of little use because the most important thing is the court follows the majority ruling, regardless of what the minority says.

Those in diplomatic circles commented that Malaysia could have done better with their case. A former Malaysian ambassador to the EU, Belgium, Luxembourg, and Cambodia even lamented that Singapore had actually got Pedra Branca on the "flimsiest of evidence." He went on to say that Singapore had built up a case out of nothing, but then again, it had nothing to lose. Malaysia on the other hand,

“...failed to assert our claim through any manifestation of effective control. That would have meant our moving ahead in areas such as navigation aids, marine conservation, tide and current surveys, hydrography, etc. which we did not. That is what sovereignty is all about—developing the means to effectively control what is rightfully ours—and establishing the reality that others who use our territory do so on our terms. In other word, sovereignty claims undefended will gradually and eventually disappear. That is what happened to our ownership or original title to Pedra Branca...” (Deva 2008).

Soon after the judgement the Malaysian government instructed the media to cease using the Malay word *Pulau* or Island for Pedra Branca. This is connected with the claims made in the Singaporean Parliament on 21 July 2008 by “Senior Minister of State for Foreign Affairs, Balaji Sadasivan that the maritime territory around the island included a territorial sea of up to 12 nautical miles and an exclusive economic zone” (Hamid 2011).

This was criticized by Malaysia as going against the ASEAN way and that the claim was unreasonable and not acceptable. A further response by the Singaporeans however indicated that “...if the limits of Singapore’s territorial sea or exclusive economic zone overlapped with the claims of neighbouring countries, Singapore would negotiate with those countries to arrive at agreed delimitations in accordance with international law” (Hamid 2011).

This issue of whether Singapore can claim an exclusive economic zone from Pedra Branca or not has become a sensitive issue between the two countries in the aftermath of the decision. Malaysia took the view that Singapore was not entitled to claim an exclusive economic zone around Pedra Branca as it considered that the maritime feature did not meet internationally recognised criteria for an island, that is, land inhabited by humans that had economic activity. The answer will depend on whether Pedra Branca “...is a full-fledged island or if it is merely a ‘rock’ which cannot sustain human habitation or economic life of its own” (Hamid 2011, 12). The same scholar made the following observation:

“The most crucial question between Malaysia and Singapore nevertheless is delimitation of maritime boundary (in particular the territorial sea limit). Singapore cannot claim EEZ from PBP not merely because PBP is a granite rock incapable of human habitation or economic life of its own but all the more because PBP is within the territorial sea 12 nautical miles of the Mainland Malaysia and even up to 5 nautical miles to the east of PBP is still within the radius of the Malaysian territorial sea limit. The two countries, therefore, seriously need to sit down and negotiate to determine the territorial sea limits in accordance with relevant rules of international law” (Hamid

2011, 15-16).

On the Malaysian side too, an immediate reaction was to locate other disputed territories and defend them from being taken over by other countries. It was mentioned earlier that this was made in reference to Pulau Pisang which also has a Singaporean structure on it. In regards to Pedra Branca, the reaction on the ground was immediate. Malaysian fishermen working in the vicinity of the areas were immediately asked to leave by the Singaporean coast guard. This resulted in unhappy comments from the Malaysian side. A senior diplomat commented:

“Malaysia, however, chose not to ‘militarily’ confront Singapore when it blockaded the area, preventing, among others, our fishermen in these waters or seek shelter on the three features. Here again, this was not because we doubted our sovereignty over the features. Rather it was, on our part, an act of self-restraint and wisdom—something done in the letter and spirit of ASEAN. What is even more important now is that Malaysia should from now on be extremely careful about the way we do things with Singapore” (Deva 2008).

Comments were also made in regards to the existing practice in the region and the implications of the action by Singapore:

“While Malaysia took the moral high ground by abiding with the principles of the ASEAN Treaty of Amity and Cooperation (TAC), Singapore ignored them by taking a hostile stance with its naval blockade. Singapore certainly lost some credibility as a result” (Deva 2008).

This points to the necessity of coming back to the spirit of ASEAN regionalism and the usage of local avenues for dispute settlement. Taking unilateral action on either side is not conducive to maintaining good relations:

“Since the three maritime features are too close to each other, unilateral action is out of the question and negotiation and full cooperation is required in whatever measure taken by either party. This is the main reason why a Joint Technical Committee has been established by Malaysia and Singapore, consisting of senior officials of the two countries. The delimitation of the territorial sea is of course the major and the most challenging issue for Malaysia and Singapore. The other outstanding issues, however, include the rights of fishermen, naval patrols, security matters, prevention of marine

pollution, and traffic separation of thousands of vessels entering the Strait of Singapore” (Hamid 2011, 17).

To be fair, the Singaporeans are also quite anxious on how the ICJ decision is going to be received in Malaysia and how it is going to affect the relations between the two countries. Singaporean media reports in the aftermath of the decision warned against insensitivities towards Malaysia, and the implications it might have on ongoing relations:

“More worryingly for Singapore, detractors in Malaysia could whip up feelings against Singapore’s gaining another inch of what they regard as Malaysia territory. They may be less willing to deal with Singapore, for fear that its small neighbor will once again gain the upper hand. The insecurities over bilateral cooperation in the Iskandar Development Region, for example, could grow once again. At a time when bilateral relations have moved on to show a certain maturity, it would be a pity if backsliding occurs” (Zuraidah 2008).

In conclusion, it can be observed that the ICJ decision actually falls short of what either country ideally wanted. It did make the decision on the ownership of the contentious areas, but failed to resolve the question of boundaries between the two parties. While reactions have been swift on both sides to assert their positions, deliberations on unfinished issues have been somewhat slower as the parties realized the necessity of going back to diplomatic solutions and regional mechanisms for continuing their peacemaking efforts. Strachan sums it up nicely as follows:

“The ICJ only resolved half the issue. This is certainly a step in the right direction, but years of negotiation remain to fully resolve the disputes, even after the outcome of the lengthy ICJ hearings. It is however important to note that the ICJ fulfilled its remit in both the aforementioned cases as it was not asked to determine maritime boundaries in either case. The time-consuming process of starting fresh negotiations after the ICJ has presented its ruling does however suggest that alternative means of conflict resolution, preferably in the form of bilateral negotiations, may be more effective in resolving territorial disputes than referring cases to the ICJ” (Strachan 2009, 2).

CONCLUSIONS: LESSONS TO BE LEARNED

Finally, several conclusions can be made from the lessons learned in this case. They involve lessons from the outcome of the case for future reference of both countries as well as other countries interested in taking up their cause to the international court. There are also lessons from the process as well and the advantages and disadvantages of both the ICJ experience and the regional mechanisms.

The first conclusion that can be made is that a third party process can resolve long-standing and seemingly intractable disputes, but only with political commitment from both sides. In this case, both parties wanted to resolve the issues. They started out negotiating bilaterally but when they got stuck there was consent to have the case presented at the ICJ. There was agreement too to abide by whatever ruling that the Court might come up with. This shows that long term disputes between states can be settled amicably using the third party mechanism especially when the parties are sincere in finding the solution.

However, the use of an external procedure also points out the weakness of regionally set up mechanisms for dispute settlement. Regional arrangements have limitations due to the perceived (un)trustworthiness of regionally based third parties; especially when it involves neighbours who might have issues with the conflicting parties and possibly using the platform in a way that might strengthen its own position vis-à-vis the parties or to its own advantage. As argued in the paper, choosing a judicial process by the ICJ shows confidence in one's ability to win, while at the same time showing a lack of confidence in regional mechanisms for dispute settlement available to the parties regionally.

Another lesson in regards to the process is that the decision in itself does not guarantee the resolution of the problem. In this case the result is seen as a halfway solution and further efforts need to be made to resolve outstanding issues. Any unilateral efforts at implementing the decision by the parties will only create additional issues and problems. Joint effort at implementing the decision is the only viable conduct of post-settlement peacebuilding in cases of territorial disputes. However, because of the sensitivities involved and possible unhappiness with the decision made, this joint effort might take considerable time to get going and parties might even delay their commitments to the effort.

Further lessons in regard to the process include the need to improve the understanding of what a regional dispute settlement can do. This can be done by first taking into account regional sensitivities that might have an effect on the process and finding ways to overcome them. An improved peace support structure built upon the ASEAN spirit and elaborating on the present procedures and mechanisms provided under the various agreements such as the TAC, the ASEAN

Concord, the ASEAN Charter, the APSC and others can help strengthen the regional mechanism. This can also help in supporting the implementation process of disputes settled elsewhere such as this Pedra Branca / Batu Puteh case. Finally, whatever mechanism instituted will be of no use if the affected parties are unwilling to trust and use it. There is no shortage of cases that can be addressed by the regional mechanism and parties should be brave enough to experiment with them. However, they might still think that the stake is too high to experiment with a still unproven method of dispute settlement. Part of the challenge then is to persuade them to overcome this hesitation and to give it a try.

The second set of lessons are in regards to the outcome of this judicial process. One lesson is that the historical claim loses its value if it is not regularly upheld. The Sultan of Johor (now part of Malaysia) has original claim to Pedra Branca, but Malaysia failed to object to various Singaporean exercises of sovereignty over the years. Malaysia even failed to do this after she won the decision in the Sipadan and Ligitan case, which basically came up with a similar judgment in regards to the control, upkeep and maintenance of the disputed territory. Singapore was even prepared to act aggressively to protect her interests in Pedra Branca while Malaysia's unconvincing approach to the issue has not helped her cause at the Court. The process also taught us that parties have to be fully prepared for the legal process and secure all necessary information and supporting documents that can help in the case. But at the end of the day, we found out that the most important criteria that affected the decision is the extent of effective control of the territories in dispute, which Singapore had and Malaysia did not.

The third lesson also shows that decisions will be based on technical arguments and that parties have to be ready to argue technically. For example, the ICJ decision was that low-tide elevations cannot be independently claimed as territory. The Court ruled that South Ledge is submerged at high tide and belongs to whichever state has sovereignty over the seabed, to be determined by a later delimitation of territorial waters.

Finally, we repeat again the conclusion that the case shows that protracted conflict issues between states need not be so. There are ways to address them as long as there is sincerity to settle the issues and commitment to the maintenance of peace despite existing problems between the parties. The challenge is to overcome the initial hesitancy to settle and to choose the proper platform for the resolution of the problem. Once this hurdle has been overcome, the momentum for peaceful settlement should be well underway.

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Appendix: Location of Pedra Branca / Batu Puteh, Middle Rocks, and South Ledge



From: Malay Mail Online, 2008



From: Star Online, 2008