

LETTER | Pulau Batu Puteh: Malaysia should move on

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LETTER | Malaysia should move on from Pedra Branca/Pulau Batu Puteh as it is now a lost cause.

The judgment in that case is final and binding on the parties to the case and without appeal. At the most, it is said, the judgment may be subject to interpretation or, upon the discovery of a new fact, revision.

Article 61 of the Statute of the Court provides that a party may, within 10 years of the delivery of a judgment by the Court, apply for revision of that judgment upon discovery of some fact that was unknown both to the court and the party seeking revision at the time judgment was given, provided that the newly discovered fact would be a decisive factor in the court's consideration of the case.

In the case concerning the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), a judgment was delivered

on May 23, 2008, in which the court awarded sovereignty over the island of Pedra Branca/Pulau Batu Puteh to Singapore.

Pursuant to Article 61, Malaysia on Feb 2, 2017, filed an application for revision of the judgment.

Colonial-era documents

According to the application, Malaysia “recently discovered three significant documents that indicate that in the critical years following the 1953 correspondence, during a period that witnessed Malaysian independence and the transition of Singapore from a self-governing colonial territory to incorporation as part of Malaysia and then independence as the Republic of Singapore, Singapore officials at the highest levels did not consider that Singapore had acquired sovereignty over Pedra Branca/Pulau Batu Puteh from Johor”.

The documents were only discovered in a batch of archival records stored in the United Kingdom National Archives. Two of the documents only became accessible to the public in the years since the court gave its judgment in 2008; the third document’s date of release was unknown.

The documents allegedly were internal correspondence of the Singapore colonial

authorities in 1958, during the period of Singapore's colonial self-government, concerning Singapore's territorial waters, an incident report filed by a British naval officer which acknowledged that the waters around Pedra Branca/Pulau Batu Puteh were Johor's, and an annotated map of naval operations which indicated that Singapore's territorial boundary did not encompass Pedra Branca/Pulau Batu Puteh.

Malaysia contended that the documents showed that "Singapore's perception that Pedra Branca/Pulau Batu Puteh did not fall within Singapore's territory persisted through the critical period of the first half of the 1960s during which Singapore underwent various constitutional changes, and lasted until at least February 1966, by which time Singapore had ceased to be part of Malaysia and became an independent state in its own right".

Malaysia further contended that the court "would have been bound to reach a different conclusion on the question of sovereignty over Pedra Branca/Pulau Batu Puteh had it been aware of this new evidence".

High burden of proof

However, the "three significant documents" must first be admissible and Malaysia would have the burden of demonstrating that all of the conditions for

the admissibility of a request for revision laid down in Article 61 have been met.

This is made clear in Article 99(1), which states that a request for the revision of a judgment “shall be made by an application containing the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled”.

The court has in a previous judgment (*El Salvador v Honduras*) emphasised that if any one of the conditions in Article 61 is not met, the application must be dismissed. Once it is established that the request for revision fails to meet one of the conditions for admissibility, the court is not required to go further and investigate whether the other conditions are fulfilled.

Malaysia is therefore held to a high standard of proof. One has to be mindful that there were three previous requests for revision submitted to the court under Article 61 and none had been found to be admissible. (*Tunisia v Libyan Arab Jamahiriya*; *El Salvador v Honduras*; *Yugoslavia v Bosnia v Herzegovina*.)

Why the high standard? Revision is an exceptional procedure. It has the possibility of “impairing the stability of the jural relations established by the (principle of) *res judicata*.” In the interest of stability of legal relations, the high standards must be rigorously applied.

It is said that the findings of a judgment must be taken as correct, and “may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events”.

Now, Malaysia and Singapore having filed written observations and comments, and supporting documentation in the court’s registry between Feb 14, 2017 and Feb 12, 2018, the court was notified by Malaysia by a letter dated May 28, 2018, that “the parties had agreed to discontinue the proceedings”.

Consequently, by agreement of both countries, the application for revision instituted on Feb, 2 2017 by Malaysia against Singapore was ordered by the court to be discontinued. The discontinuance order was dated May 29, 2018.

Public hearings of Malaysia's application had already been scheduled to be held from June 11 to June 18, 2018.

So, why the discontinuance of Malaysia’s application?

Move and define the borders

It must again be informed that the discontinuance was notified to the court by Malaysia after all written observations and comments, and supporting

documentation had been filed in the court's registry. These included additional written observations and documentation.

The last of the above was filed by Singapore on Feb 12, 2018. All filings were made within the time limit fixed by the court.

Between Feb 12 and May 28, 2018, both countries were therefore apprised of each other's legal arguments and positions, as well supporting evidence.

Parties to pending proceedings are entitled to compromise or settle their disputes on any terms they desire without the approval of or reference to the court. A compromise can take place when there is a question of doubt over a party's legal position following re-appraisal of the legal authorities. This despite initial "solid evidence, facts and foundations" for the party's legal position.

Consequently, the parties can agree not to proceed. Out-of-court settlement is the term often used. These are agreements between parties which are manifested to the court and have been said to be "a common and essential feature" of the conduct of civil legal proceedings. (See *Tan Geok Lan (P) v La Kuan @ Lian Kuan* [2003] 3 MLJ 758, CA)

In May 2011, Malaysia and Singapore completed a joint hydrographic survey of

the area in and around Pedra Branca and Middle Rocks. Malaysia should therefore work towards finalising maritime boundaries between Malaysia's Middle Rocks and Singapore's Pedra Branca/Pulau Batu Puteh, as urged by legal experts.

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