

PEDRA BRANCA

The Road to the World Court



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YAKUMAR and TOMMY KOH

with a Foreword by Minister Mentor Lee Kuan Yew

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Painting by J.T. Thomson, showing Pedra Branca just after the completion of Horsburgh Lighthouse (1851).



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TUN DR. MAHATHIR MOHAMAD

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FOREWORD

The Prime Minister must try to establish good, stable and equitable relations with the government of Malaysia. I worked with four successive Malaysian Prime Ministers: Tunku Abdul Rahman, Tun Abdul Razak, Tun Hussein Onn and Tun Dr Mahathir Mohamad.

With our long and close links of family, history, geography and an unfortunate two year experience as part of Malaysia from 1963 to 1965, I knew that relations with Malaysia would have its ups and downs. What is important is how both sides can manage and amicably resolve issues that must crop up from time to time because of our widespread interactions, without souring up our long term overall bilateral relationship. The way the Pedra Branca claim by Malaysia was resolved makes a good case study. It is a story worth telling.

In 1979, Malaysia published a new map on its territorial waters and continental shelf boundaries. In it, Malaysia claimed, for the first time, that Pedra Branca was Malaysian territory. We were surprised because the island had been in British and subsequently Singapore's possession since 1847. There was no protest from Malaysia or any other country for 132 years. We formally protested the 1979 map in February 1980.

But, I saw no need for this claim to trouble our bilateral relationship. I went out of my way to persuade Malaysian PM Hussein Onn, under whose watch this claim was made, to settle this issue in an open and straightforward manner. I found Hussein fair-minded when we discussed the Pedra Branca issue during

his visit to Singapore in May 1980. He said both sides should search for documents to prove ownership of Pedra Branca.

Hussein was pre-occupied with domestic matters and the issue was put on a back burner. Dr Mahathir took over in 1981. Mahathir was an activist and drove Malaysia's foreign and domestic policy. We had a good meeting during his first official visit to Singapore in December 1981. This was a turning point in bilateral relations. During that meeting, we agreed that both sides should exchange documents to establish the legitimacy of our respective claims on Pedra Branca. I then left it to Jayakumar, the Attorney-General's Chambers and the Ministry of Foreign Affairs to work with the Malaysians to resolve this issue.

I had seen the key documents and been briefed on the arguments supporting our case. It was clear that we had a very strong legal case. I instructed our then Attorney-General, Tan Boon Teik, to go to Kuala Lumpur and show our documentary evidence to his counterpart, the Malaysian Attorney-General. It was, as Jayakumar and Tommy Koh describe it, an unprecedented unilateral move. I was prepared to take that step to get the Malaysians to know that we had a powerful legal case.

But I also understood that it was difficult for any leader to give up sovereignty claims unilaterally. I therefore proposed to Dr Mahathir in 1989 that if the matter was not settled after an exchange of documents, we should refer the dispute to the International Court of Justice (ICJ).

The two sides then spent many years seeking an amicable solution to the dispute through bilateral discussions. However, these discussions proved futile.

In 1994, Malaysia accepted Singapore's proposal to refer the matter to third-party adjudication, and we settled for the ICJ. This was Singapore's first case in the ICJ. Malaysia had prior experience at the ICJ with the Sipadan and Ligitan case. The judgment of the Court, awarding sovereignty over Pedra Branca to Singapore and sovereignty over Middle Rocks to Malaysia is a partial vindication of Singapore's position. Naturally we were disappointed because we believed, as did our foreign couns

that any Court would decide that sovereignty over all three features Pedra Branca, Middle Rocks and South Ledge went together.

Nonetheless, the Government accepted the Court's judgment without any qualification. Whichever way the judgment went, it is better for bilateral relations that a conclusive judgment has been made. This allows us to put aside this issue and move on to other areas of cooperation.

Singapore must remain committed to upholding the rule of law in the relations between States. If a dispute cannot be resolved by negotiations, it is better to refer it to a third party dispute settlement mechanism, than to allow it to fester and sour bilateral relations. This was my approach and subsequent Singapore Prime Ministers have continued to subscribe to it.

When Jayakumar and Tommy Koh considered writing up the case, I encouraged them. The Pedra Branca story deserves to be recorded up in a book intelligible to lay readers. Their book recounts the many valuable lessons and insights we have gained from the lengthy negotiations and the final resolution at the ICJ.

Lee Kuan Yew
Minister Mentor, Singapore



PREFACE

For both of us, working on the Pedra Branca case over many years as part of the Singapore team was a labour of love. We had a great interest in public international law. We also felt strongly that Pedra Branca rightfully belonged to Singapore and that Malaysia's belated claim in 1979 had no basis. In the early seventies, we had worked together closely representing Singapore at the Third United Nations Conference on the Law of the Sea (UNCLOS III), which was another labour of love.

UNCLOS III spanned a period of almost ten years (1973–1982) before the new landmark Convention was finally adopted. After UNCLOS III, we collaborated on a writing project and co-authored a comprehensive essay on “The Negotiating Process of the Third United Nations Conference on the Law of the Sea 1982”, published by the Center for Oceans Law and Policy, University of Virginia, as part of the Center's project *Third United Nations Convention on the Law of the Sea 1982, A Commentary*.

We conceived the idea of this book on Pedra Branca over a weekend break during the public hearings at The Hague, Netherlands, in November 2007. We had just completed our first round of oral arguments at the International Court of Justice (ICJ) and Malaysia was scheduled to begin its first round of arguments the Tuesday following that weekend.

Over a cup of coffee in our “operations room” at the Crowne Plaza Promenade Hotel, we took stock of the progress of the case. As we reminisced over the many phases of the dispute which, at long last, was drawing to a close, we began

to discuss the usefulness of a book where we could record our own impressions of the management of the dispute. Whatever the final decision of the ICJ, this case would certainly be very significant in Singapore's legal history as it was the first time that Singapore had submitted a dispute to the ICJ and we were two of the four Singapore lawyers who had the honour to make presentations to the Court.

Having been members of the team for a long period, we had seen interesting developments as the political, diplomatic and legal phases of the dispute evolved over time. There was an interesting story to tell and we agreed that it would be a good idea for us to collaborate on this writing project just as we had done for our publication on UNCLOS III.

This book is, therefore, the story of the Pedra Branca dispute, of how Britain (and later Singapore as Britain's successor) acquired sovereignty over Pedra Branca and maintained and operated Horsburgh Lighthouse since 1851. It is a story of how the dispute arose after Malaysia made its claim over Pedra Branca in 1979 and how we managed the dispute over a period spanning almost three decades before its final resolution through judgment of the ICJ on 23 May 2008.

We have not attempted a detailed analysis of the legal pleadings and arguments of both countries. Singapore's written pleadings comprised 14 volumes totalling 2,723 pages. Nor have we undertaken an in-depth analysis of the ICJ's final judgment. If we were to attempt to do either, we would be perceived as being biased and partisan. We have decided to leave that task to international law scholars and legal commentators.

We wrote this book to give readers a glimpse of the enormous behind-the-scenes preparations for the case, both before and during the hearings at the ICJ. We hope it will give readers some interesting insights into the way we managed the dispute and the various policy decisions that were made. For example, in the negotiations on the Special Agreement to submit the case to the ICJ, when Malaysia first insisted that Middle Rocks and South Ledge belonged to them, should we agree to their proposal to omit these features from the Agreement? If we had accept

Malaysia's position, the sovereignty of Middle Rocks and South Ledge would have remained unresolved. Singapore, however, preferred to ask the Court to consider who had sovereignty over the three maritime features. Should we agree to Malaysia's proposal to provide that the ICJ should also decide the rights of the party which was not awarded sovereignty? This would run the risk of the Court deciding to grant sovereignty to Malaysia and to grant only lighthouse operator rights to Singapore.

When Attorney-General Chan Sek Keong was appointed as the Chief Justice, should he continue to represent Singapore as part of the team appearing at The Hague? When one of our international Counsel cautioned that there was a risk that Malaysia would object to our nominating Tommy Koh to be our judge *ad hoc*, should we proceed with our plan and be prepared for the Court to rule against us on preliminary objections even before the actual merits of the case have been heard?

Working on the Pedra Branca case with other colleagues was immensely satisfying and at the same time challenging in many ways. The question put to the ICJ seemed deceptively straightforward: "*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*". However, as the written pleadings and oral arguments showed, the issues involved in the arguments on who had sovereignty turned not only on legal principles but also on assessing the significance of various historical events in the region as well as the interpretation of treaties, colonial records, maps etc.

What were the factors which contributed to our success in convincing the ICJ to award sovereignty over Pedra Branca to Singapore? There were many and here we will mention the more important factors. Firstly, we were fortunate in assembling a first rate inter-agency team. The absence of turf battles and our ability to subordinate our institutional interests to the national interest is one of Singapore's comparative advantages. It was truly a Singapore Inc or Whole of Government effort. Secondly, from an early stage, we enlisted an excellent team of able international Counsel. Thirdly, close rapport and coordination

between the international Counsel and members of the Singapore team proved critical. The international Counsel themselves acknowledged that the quality of their work depended hugely on the input of the Singapore team.

We would add another important factor: we enjoyed the full backing, trust and support from the Prime Minister and his Cabinet. All three Singapore prime ministers, Lee Kuan Yew (1959–1990), Goh Chok Tong (1990–2004) and Lee Hsien Loong (2004–current) followed the case very closely and each of them was *au fait* with the issues. Although they took deep personal interest, they showed full confidence in the team and left it to us and our Counsel to decide the best way to present our case to the ICJ.

The Pedra Branca case was an important development in our bilateral relations with Malaysia. It finally brought closure to this long-standing dispute between the two countries. Beyond bilateral relations, this case served as a good example to the rest of the region on the merits of amicable settlement of disputes through third party adjudication. That approach continues to be an important feature in Singapore’s foreign policy in managing disputes with other countries. As Prime Minister Lee Hsien Loong said in his remarks to the media after the ICJ Judgment was made: “This is a good way for us to resolve disagreements or problems while maintaining good relations with each other.”

We wish to say a word about the importance of developing international law expertise in Singapore. We are two aging members of the legal fraternity who have dabbled in public international law. We wish to express our conviction that we need to identify early and develop a bigger pool of younger Singaporean lawyers with international law experience and expertise. We need to pay attention to this because of the increasing importance of international law in our foreign relations and the growing demands for international law advice. For example, there is an increasing number of international conferences and forums where our delegations require sound advice on international law. New challenging areas are all emerging, such as climate change. Regardless of whether v

have disputes which may find their way to the ICJ or other tribunals, we need to develop a sufficiently large pool of people who are able to respond to such new challenges and operate as credible players in the international arena.

Acknowledgments and Appreciation

We are very grateful to Minister Mentor Lee Kuan Yew for honouring us with his Foreword. We are deeply indebted to Chief Justice Chan Sek Keong who read the manuscript and made many valuable suggestions. We wish to thank our MFA colleagues, Foreign Minister George Yeo, Permanent Secretary Peter Ho, Second Permanent Secretary Bilahari Kausikan, High Commissioner in Kuala Lumpur T Jasudasen and Ambassador in Brussels Anil Kumar Nayar for going through the manuscript and giving many useful comments. Lydia Lim from Singapore Press Holdings, who followed the case closely as a journalist, also gave us good suggestions on earlier drafts.

We are grateful to Sivakant Tiwari, Pang Khang Chau, Foo Chi Hsia, Chang Li Lin, Wu Ye-Min and Stephen Quick for their help and invaluable assistance in the preparation of this book. Stephen and Ye-Min did an outstanding job in checking of facts and tracing documents spanning over 30 years. We also thank Ministry of Information, Communications and the Arts (MICA), Ministry of Defence (MINDEF), Ministry of Foreign Affairs (MFA), Maritime and Port Authority of Singapore (MPA), National Archives of Singapore (NAS) and Tan Ken Hwee for the use of their photographs. We are grateful to the Dean of the MFA Diplomatic Academy, Ho Cheok Sun, for the Academy's support and helping in the book launch. We also appreciate the meticulous editorial work and excellent arrangements of Paul Kratoska from NUS Press.

Finally, we would like to dedicate this book to all the members of the Singapore team, each of whom has made a significant contribution to the success of our collective endeavour.

S Jayakumar and Tommy Koh





This book is about the territorial dispute between Malaysia and Singapore over Pedra Branca, a small but strategically located island near the entrance to the Straits of Malacca. It describes how the two countries managed the dispute over three decades until final resolution by the International Court of Justice in May 2008. The two authors, who were personally involved in the case, recount the many twists and turns in the dispute as well as behind the scenes political and diplomatic manoeuvres. At a time when Asia still has numerous unresolved territorial disputes, the book would be of great interest to practitioners, scholars and students and to readers interested in international relations, international law, negotiations and the peaceful settlement of disputes.



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