

DECLARATION BY JUDGE RANJEVA

[Translation]

Notion of law prevailing at the time — Relations between Johor and the British Crown — Notion of non-“civilized” “nation” — Hence: lack of valid acquiescence by the Sultan of Johor — Malaysia’s conduct in the post-colonial period — Transfer of title.

1. The present Judgment raises no substantive objection: Malaysia’s immemorial historic title to Pedra Branca/Pulau Batu Puteh has received adequate consideration and the exercise of sovereignty over that island by Singapore on the date of the Court’s Judgment cannot seriously be questioned. On the other hand, the analysis and characterization of the passage of sovereignty from Johor to the British Crown and, subsequently, Singapore, are not convincing. But as this declaration refers to an approach which the Parties did not adopt, the general outlines of this alternative basis need to be set out here.

2. The Judgment could rightly not be founded on an agreement at whose expiry Johor would tacitly have consented to the passage of sovereignty to the British Crown, in the absence of any relevant proof. In the absence of the *probatio probatissima*, failing agreement between the Parties concerned and without any reference to the notion of acquisitive prescription, the Judgment concludes, in paragraph 276, 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”. This conclusion is set out as follows in paragraph 121: “sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State”. The Judgment is based on the award by Max Huber in the *Island of Palmas* case, and on the Judgment of the Chamber in the *Gulf of Maine* case. The failure to respond may perfectly well be tantamount to acquiescence following

“from the fundamental principles of good faith and . . . equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, *I.C.J. Reports 1984*, p. 305, para. 130).

3. Acquiescence is presented as a title, in other words, a substantive basis for the right of territorial sovereignty. In this case, the Judgment ascribes to Johor consent to the progressive transfer of the right to the

British Power. This method of transfer of the title of sovereignty would have benefited from further explanation for the Court's analysis in this case to be convincing. As the transfer of territorial sovereignty cannot be presumed in international law, the Judgment cannot confine itself to transposing traditional conceptual categories under judicial and arbitral jurisprudence. The Judgment reasons on the basis of the formal concepts of sovereignty and conventional liberty. On analysis, it is not certain that this approach is relevant, for in the case law cited, the context is directly international relations: United States of America/Spain in the *Island of Palmas* case; the United States of America and Canada in the *Gulf of Maine* case. Acquiescence in the area of territorial claims might also be instanced in connection with the conduct of the Siamese authorities (*Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23) or with the protest by Honduras (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 577). In all these precedents, the notion of title is used ambiguously, as it refers to the means of the transfer of sovereignty, but not to the actual cause of this legal process. Transfer of sovereignty may only result from two factors: either through an equivalent act, a hypothesis rightly referred to in paragraph 120, or by the emergence of a superior legal title. Where the second hypothesis does not arise, it is hard to see how Johor's title could have been extinguished without its consent; all the more so as the Judgment relies on the presumption of consent in order to conclude that sovereignty was transferred.

4. The Judgment seeks to rehabilitate the history of peoples and nations by constructing its edifice on the axiomatic bases of international law, a praiseworthy intention from the angle of history and the demands of cultural diversity. But this reduction of the reality of the facts to suit the interpretation of the concepts and techniques of international law does not tally with the legal and political order which prevailed when sovereignty was transferred.

5. A glance at the history of the law of international relations reveals that there have been double standards in the application of the applicable norms. In the circumstances of the case, relations between the United Kingdom and the Netherlands are governed by public international law, without consideration of the territorial object of the agreement. The purpose of the Anglo-Dutch Treaty of 1824 was the apportionment of spheres of influence between the two colonial Powers. In the policy of expansion and the practice of colonial apportionment, these agreements heralded the advent of the international colonial order. Relations between the sovereign colonial Powers fell within the domain of international law.

On the other hand, it is difficult to assert that relations between the United Kingdom and the Sultanate of Johor were established on the basis of relations between sovereign, equal subjects of international law. In view of the characteristics of colonial expansion, it is difficult to avoid

recourse to the historical-critical method. To begin with, in the nineteenth century, agreements signed between the European Powers and the indigenous political authorities were not recognized as international treaties. The award in the *Delagoa Bay* case is the acknowledged authority on this issue (*Delagoa Bay (Great Britain/Portugal)*, S.A. MacMahon, 24 July 1875, in A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Vol. III, 1954, p. 633). The text of Article 38 (c) of the Statute of the Permanent Court, and then of the present Court, still contains traces of this philosophy. *A contrario*, it recognizes the possibility of the existence in law of non-civilized nations who would have no access to international law. Also, the sovereignty granted to indigenous authorities did not have the same significance as that in relations between colonial Powers: sovereignty could not be held against the latter. The indigenous authority had but one right and one obligation, to submit to the will of the colonial Power, whereas for the colonial Powers *vis-à-vis* the indigenous authorities, it was not certain that *pacta sunt servanda*. This was the characteristic of classical colonial international law: public international law in relations between European Powers, and unequal domination in relations with the indigenous authorities. Hence the Sultan of Johor could not express the slightest opposition to a decision by the British. The consultation of the Sultan of Johor, of which the Judgment makes so much, was not the expression of a request for legal approval, but an administrative measure situated somewhere between courteously informing him and inviting him to endorse unhesitatingly and unreservedly the proposals of the colonial authority. Conscious as he was of the policy of colonial expansion, the Sultan had no alternative but to pursue a policy of evasion: to contemplate the machinations of the colonial Power as a passive and impotent spectator. Great Britain thus gradually and discreetly substituted the exercise of its territorial colonial authority for the power of running and administering the navigation and maritime safety service on Pedra Branca/Pulau Batu Puteh, accepted by the Sultan of Johor.

Thus it is surreal to speak of the international transfer of title by acquiescence when, according to the rules and practice of the colonial Powers, it was the exercising of colonial territorial title. To follow the reasoning of the Judgment, requiring Malaysia to provide proof of its refusal to accept the act progressively performed by the United Kingdom means asking it to organize a war for the liberation of Pedra Branca/Pulau Batu Puteh! The exercising of the territorial title by the United Kingdom was not legitimate under international law, but is a fact of colonial law, which organized the map of the world and apportioned all its areas.

In the specific circumstances of the case, Johor could not be blamed for its silence, even if it is established that proof of the acceptance of the cession of the island exists.

6. But where relations between Malaysia and Singapore on the Pedra Branca/Pulau Batu Puteh question are concerned, international law rediscovers its titles. Johor's reply to the request for information from the

Colonial Secretary of Singapore may also be considered unimportant in terms of establishing Johor's acquiescence to the transfer of territorial title. Johor's reply is not an answer to the question raised, since Singapore took no decision whatever following Johor's assertion. Yet one certainty remains: the problem of the territorial title over the island which forms the subject of the dispute. Singapore's succession to the United Kingdom's rights also obliged it to take over the practices of its predecessor. In law, and during the colonial period, silence could not be held against Malaysia. But since the accession of the Parties to independence, Malaysia cannot rely on its indifference and silence in the light of conduct that simply and irrebuttably presumes Singapore's sovereignty over Pedra Branca/Pulau Batu Puteh.

7. In conclusion, through succession to the colonial territorial title, Singapore has sovereignty over Pedra Branca/Pulau Batu Puteh.

(Signed) Raymond RANJEVA.
