JOINT DISSENTING OPINION OF JUDGES SIMMA AND ABRAHAM

[Translation]

Disagreement with the part of the Judgment concerning sovereignty over Pedra Branca/Pulau Batu Puteh — Agreement with the position of the Court in favour of the sovereignty of Johor in 1844 — Unconvincing nature of the Judgment's demonstration regarding the subsequent transfer of sovereignty to Singapore — Twofold legal basis for the solution adopted by the Court: tacit agreement and acquiescence — Failure to choose between the two — Regrettable lack of reference to acquisitive prescription — Importance of the acquiescence or consent of the original sovereign to the transfer of sovereignty whatever the area considered — In the present case, conditions required for transfer of sovereignty not fulfilled in the absence of express consent — In particular, lack of conduct by the United Kingdom and Singapore clearly and publicly manifesting sovereign intent towards the island — Consequently, impossibility of deducing from the silence of Johor, and subsequently Malaysia, acquiescence to the relinquishment of its original sovereignty.

I

1. The dispute settled by the present Judgment principally concerns sovereignty over the island of Pedra Branca/Pulau Batu Puteh, at issue between Malaysia and Singapore, and, less directly, sovereignty, in contention between the same two States, over two maritime features of minor importance near the aforementioned island, Middle Rocks and South Ledge.

In the first point of the operative clause, the Judgment finds that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore, in the second point that sovereignty over Middle Rocks belongs to Malaysia and in the third that South Ledge falls under the sovereignty of the State in the territorial waters of which it is located.

2. We voted in favour of the last two points, but against the first.

We disagree with the reasoning which led the Court to find in favour of Singapore's claim to Pedra Branca/Pulau Batu Puteh, to which most of the Judgment is devoted, and quite legitimately so.

Since our disagreement concerns questions of law and of fact which we believe are of some importance, we feel we must explain our reasons.

II

3. The reasoning relied on by the Court bases in the part of the Judgment concerning Pedra Branca/Pulau Batu Puteh can be broken down into two sections. The first relates to the period prior to the construction of Horsburgh lighthouse on the island by the British, on which preparatory work began in 1844. Consideration of the facts relating to that period prompts the Court to conclude (Judgment, para. 117) that in 1844 the island was under the sovereignty of the Sultanate of Johor, of which Malaysia is now the undisputed successor State.

The Court then moves on to a second phase of its reasoning, from paragraph 118 until its final conclusion in paragraph 277, considering the conduct of the two Parties (and their predecessors, Johor for Malaysia and Britain for Singapore) from the beginning of the construction of the lighthouse until the present. That long and meticulous analysis, which, however, as we will indicate shortly, is not without weaknesses, leads the Court to the conclusion that, today, "sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore" (*ibid*., para. 277). According to the Judgment, from 1844 onwards a process took place which resulted, at a date which it is impossible to ascertain precisely, in sovereignty over the island passing from the Sultanate of Johor (or its successor Malaysia) to Singapore (or its predecessor the United Kingdom). The Court describes this process as evidence of a "convergent evolution of the positions" of the Parties over time regarding sovereignty over the island (*ibid*., para. 276). That "convergent evolution" might lead one to deduce either that a "tacit agreement" on the transfer of sovereignty had been reached between the Parties or that Johor had acquiesced to that transfer by conduct having given rise to inalienable rights for Singapore. Between the legal foundations of "tacit agreement" and of "acquiescence", which are defined respectively in paragraphs 120 and 121 of the Judgment, the Court refrains from making a choice, merely noting *in fine* that the conduct of the Parties as a whole over the period considered — more than a century and a half in all — changed the holder of sovereignty. While it is true that neither the will of the "new sovereign" to acquire sovereignty nor the consent of the "former" sovereign to relinquish it were ever formally expressed at any time, according to the Court both can be deduced from a consideration of the relevant facts.

4. We have no objection to the first part of the Court's demonstration, that concerning the period before 1844. Overall, it seems convincing.

From ancient times it is impossible to date with accuracy, the Sultanate of Johor, which originally stretched both north and south of the Straits of Singapore, had held sovereignty over Pedra Branca/Pulau Batu Puteh, an island located at the entry to the Straits. After the partition of the Sultanate into two sovereign entities in 1824 to 1825, that "original title" to

the island passed to the entity with its mainland territory north of the Straits, which also kept the name "Sultanate of Johor". It is to this State that Malaysia is successor.

5. By thus declaring that "in 1844, th[e] island was under the sovereignty of the Sultan of Johor" (Judgment, para. 117), the Court accepts Malaysia's principal argument, albeit temporarily, and rebuts the main argument developed by Singapore. Malaysia based the greater part of its argument on the original title to the island held by the Sultanate of Johor from "time immemorial", a title which was said to have been transferred through succession to present-day Malaysia, while Singapore, which roundly disputed that argument, asserted that on the eve of the construction of the Horsburgh lighthouse, in 1850, the island was *terra nullius*, or, at least, that its legal status was indeterminate.

Had it accepted Singapore's argument (either the principal one or that in the alternative), the Court would inevitably (and logically) have had to proclaim Singapore's sovereignty over the island today. Had the island been *terra nullius* in 1850 or its status then been impossible to determine, no convincing argument could have tipped the scales in Malaysia's favour on the basis of either premise: either the United Kingdom acquired sovereignty by legally taking possession of a *terra nullius* in 1850, or, failing that, the mass of *effectivités* from 1850 to 1980 (the critical date) would necessarily have led to a settlement in favour of Singapore.

6. However, as we have seen, the Court did not accept either Singapore's principal or alternative argument, having decided that in 1844, on the eve of the construction work on the lighthouse, the island belonged to Johor. The Court also acknowledged that present-day Malaysia is the successor of the Sultanate of Johor in 1844, which moreover Singapore did not dispute.

The Court nevertheless reached the final conclusion that the island is now under the sovereignty of Singapore, by virtue of a gradual process of transfer of sovereignty it felt able to deduce from the conduct of the Parties since 1850.

It is on this point precisely that we part company with the Judgment and for the following reasons.

III

7. We have no major criticism of the legal principles laid down by the Court, on the basis of which it then goes on to consider the relevant facts. However, we are not at all convinced by the way the present Judgment applies those principles to the facts of the case and, consequently, by the ensuing conclusions it draws in the present case.

In summary, our position is the following: the conditions and criteria which the Judgment lays down and to which it subordinates the transfer

of sovereignty from one State to another in the absence of an express agreement between the former and the new sovereign seem to us legally correct overall. But we firmly believe that those conditions were far from fulfilled in the present case, contrary to what is asserted in the Judgment, which for this reason we fear may constitute a dangerous precedent.

8. It is from paragraph 120 to paragraph 125 that the Judgment sets out the relevant legal principles on the transfer of sovereignty.

There can be no doubt that such a transfer may occur through an express agreement between the initial holder of sovereignty and another State.

What is harder to decide, however, is whether there can be a transfer of sovereignty in the absence of an express agreement.

In principle, the answer to the above question is in the affirmative; it is what the Judgment declares and we have no objection on that score. However, the conditions of such a transfer need to be rigorously defined, a presumption in favour of maintaining the sovereignty in the hands of the initial holder must be clearly asserted and that presumption should not be lightly regarded as having been overturned.

9. In this respect, the presentation made by the Judgment of the applicable legal principles is not faultless, even though it does essentially reflect our concerns.

10. The two legal foundations on which the Judgment relies, without opting for either or even indicating whether and how they might be combined, are "tacit agreement" and "acquiescence" (see paragraph 3 *supra*). As sovereignty can be transferred by an express agreement, it must also be so by tacit agreement (if the conditions for it are met), since international law is not formalistic as regards agreements and since what can be done by an express agreement may also, in principle, be done by a tacit agreement; that is what, in substance, is explained in paragraph 120. Also, the conduct of a State which possesses sovereignty over a territory but which refrains from responding to the acts of another State which is acting in the territory concerned *à titre de souverain* may amount to acquiescence by the former to the transfer of sovereignty to the latter, creating inalienable rights for the latter State: that is what, in substance, is stated in paragraph 121.

11. It is probably true, as a general rule, that what States can achieve by an express agreement may also result from a tacit agreement between them. There is also no doubt that the notion of acquiescence plays an important role in international law in various contexts. One may, however, wonder whether the more relevant concept regarding the transfer of territorial sovereignty — rather than tacit agreement or acquiescence — is acquisitive prescription, which in a way encompasses the other two notions and which regrettably the Judgment does not mention.

If prescription is defined as a means of acquiring sovereignty over a territory characterized by

> "continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order" (L. Oppenheim LL.D., *International Law, Vol. I, Peace,* 1905, p. 294, para. 242),

or as "the acquisition of sovereignty through the continuous and peaceful exercise of State authority over a determined territory" (Charles Rousseau, *Droit International Public*, Vol. III, "Les Compétences", p. 183, 1977), then the notion might be used to account for the process by which a State acquires sovereignty over a territory which did not originally belong to it and without the express consent of the original sovereign.

12. It is true that Singapore itself refrained from invoking this notion *expressis verbis*, even though it would have been in its interest.

It is easy to understand why: Singapore's whole line of argument, both principally — the idea of *terra nullius* — and in the alternative — the indeterminate status of the island prior to 1850 — was based on the premise that Johor had no title to sovereignty over the island before the construction of the lighthouse, so that there was no reason to seek out or identify the mechanism by which sovereignty could have been transferred after 1850 from Johor to Singapore.

However, as Singapore could not, in addition, rule out the possibility that the Court might reach the opposite conclusion to its assertion on the legal status of the island in 1844-1850, it had to advance a line of argument (in the further alternative, in short) permitting the Court to decide *in fine* that even if Johor held sovereignty over the island in 1850, Malaysia no longer did so now.

This was why Singapore relied on the "effective and peaceful exercise of State authority" over the island over a long period. These terms, which are similar to the ones used by Max Huber in the Award in the *Island of Palmas* case while remaining sufficiently general, in a way left it for the Court itself to determine the most appropriate legal basis on which, if need be, to base the transfer of sovereignty over the period concerned.

13. On that point, one idea unmistakably emerges from the jurisprudence: when there is an original sovereign, no exercise of State authority, however continuous and effective, can result in a transfer of sovereignty if it is not possible to establish that, in one way or another, the original sovereign has consented to the cession of the territory concerned or acquiesced in its transfer to the State having *de facto* exercised its authority. Without such consent — or acquiescence — original title cannot be ceded, even when confronted by a continuous and effective exercise of authority by a State other than the holder.

That is what the Court recently pointed out in the case concerning the

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. *Nigeria: Equatorial Guinea intervening)* (see, in particular, the Judgment in *I.C.J. Reports 2002*, pp. 346 *et seq.*, paras. 62 *et seq.*). In its Judgment, the Court declined to attach legal effects to the acts of sovereignty performed by Nigeria in the disputed territory, since, as it said in substance, Cameroon held an earlier title to sovereignty and it could not be regarded as having acquiesced to the transfer of that title to Nigeria.

14. Consequently, the only way Singapore could establish its sovereignty over the island, after the finding that Johor held sovereignty in 1850, was by demonstrating that over the subsequent period, Johor, then its successor, Malaysia had, by consistent conduct over a long period, accepted as legitimate the effective exercise of authority on the island by the British and later the Singaporean authorities; in other words, that Singapore had become sovereign through acquisitive prescription. Without actually using the expression, Singapore, in our view, was asking the Court to apply the concept.

15. The cautiousness of counsel for Singapore regarding this expression is probably explained by the fact that both scholarly opinion and international jurisprudence have long had reservations and to some extent continue to do so about prescription as a means of acquiring sovereignty by a new sovereign in place of the original sovereign, and without the latter, *ex hypothesi*, giving its express consent.

But mere avoidance of a word designating a legal notion is not enough to make it disappear from the argument. And while we can appreciate the considerations of tactical prudence which prompted Singapore, in its written and oral pleadings, to avoid too clearly designating a legal basis which from its standpoint it might have considered awkward, we regret that the Court itself was not more explicit in stating the legal principles which it has applied.

16. In fact, it is not of great importance that, as basis for the solution it adopts, the Court should use this or that legal category or characterization, as those categories, it must be acknowledged, are often not hermetically separated from one another.

Thus, whether one says that a State can acquire sovereignty over a territory by tacit agreement with the previous sovereign, or by supposed acquiescence, or that the acquisition should be regarded as having taken place through prescription, the essential question is *in what conditions* a tacit agreement having such an effect can be regarded as reached; acquiescence as established or prescription as acquired? In short, what matters above all is ascertaining what effects international law attaches to this or that conduct by the States concerned relating to territorial sovereignty, rather than choosing between one expression or another capable of characterizing the legal process leading from cause to consequence.

17. As for the conditions to which the implementation of acquisitive prescription is subject, we know that there are four. First, the State which relies on it must exercise authority over the territory concerned *à titre de souverain*, which implies, on the one hand, the effective exercise of the attributes of sovereignty *(corpus)*, and, on the other hand, sovereign intent *(animus)*. Second, the exercise of authority must be peaceful and continuous. Third, the exercise of sovereignty must be public, which is to say visible, an essential condition for establishing the acquiescence — through failure to respond — of the State holding the original title. Fourth and last, the exercise of authority must continue in the conditions just described for quite a long period. Although it did not mention prescription, as we have said, the Court would not seem to have intended to apply criteria other than those in the present case.

IV

18. In this case, the first and third of the aforementioned conditions are particularly important. This means that the Court had to answer two questions.

First, did Singapore, or its predecessor Great Britain, openly manifest its intention to act as sovereign on Pedra Branca/Pulau Batu Puteh during the period concerned?

Secondly, should Malaysia — or its predecessor — be regarded as having tacitly acquiesced, or consented, by its failure to respond for a sufficiently long period, to the transfer of sovereignty over the island to Singapore?

If the answer to both questions is yes, as it is in the Judgment, the resulting legal conclusion is that Singapore acquired sovereignty over the island. It is unimportant that the date of that transfer of sovereignty is impossible to pinpoint accurately; it is of secondary importance whether the process concerned is described as having given rise to a tacit agreement, as the outcome of the acquiescence of the original sovereign, or as characterizing an acquisition of territory by prescription.

19. We, however, consider that the Court should have answered the two above questions in the negative, and that there could thus have been neither tacit agreement, acquiescence nor acquisition by prescription.

20. The importance of the assertion made in paragraph 122 of the Judgment cannot, in our opinion, be stressed enough:

> "Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that

sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory."

21. Applying this criterion, we do not think that the "conduct of the Parties" in the present case was manifested "clearly and without any doubt" within the meaning which the Court attributes to it, namely the acquiescence of Johor (or Malaysia) to the claim of sovereignty by Singapore (or Great Britain).

22. Let us first consider the conduct of Great Britain and its successor Singapore.

The Court rightly rejects as irrelevant the acts performed between 1844 and 1851 for building and commissioning the lighthouse. For they contained no manifestation of any intent to act as sovereign regarding the island territory on which the lighthouse was built (see the long passages in paragraphs 126 to 162, after which the Court "does not draw any conclusions about sovereignty based on the construction and commissioning of the lighthouse").

As regards the period from 1852 to 1952, after setting aside everything which related solely to the maintenance and operation of the lighthouse by the British authorities, the Court considers three types of activity allegedly capable of manifesting Great Britain's intention to act as sovereign on the island: British and Singaporean legislation regarding the Horsburgh lighthouse and other lighthouses in the region; constitutional developments relating to Singapore's status; and control over fishing activities in the region in the 1860s. However, in none of those elements does it discern a clear manifestation of a British claim to sovereignty.

23. It is clear that it is the exchange of correspondence of 1953 which constitutes the principal element militating in favour of Singapore's claims. It is patently a decisive passage in the Court's reasoning. But it is hardly convincing.

In reply to an enquiry by the Colonial Secretary of Singapore intended "to clarify the status of Pedra Branca", the Acting State Secretary of Johor indicated, in a letter of 21 September 1953, that "the Johore Government does not claim ownership of Pedra Branca".

24. Even accepting, as is reasonable, that there was no difference in meaning in the mind of the signatory of that reply between "ownership of" and "sovereignty over", and that the expression "does not claim"

implies belief that there was no title, very few conclusions can be drawn, directly at least, from the 1953 exchange of correspondence.

On the one hand, it is clear that, as regards Singapore, there is nothing here to indicate a claim of sovereignty, since, on the contrary, the enquiry by the Colonial Secretary was aimed at obtaining information to clarify the status of the island.

On the other hand, as regards Johor, if we follow the reasoning of the Court up to paragraph 191 — before it turns to the 1953 correspondence — there can be no doubt that the assertion in the reply by the Secretary of State (Johor does not possess title to sovereignty over Pedra Branca) is quite simply wrong, as the Judgment's whole demonstration leads to the conclusion that in 1953 sovereignty over the island did indeed belong to the Sultan of Johor. Is an error made in a letter such as the one concerned, albeit signed by a senior official, sufficient to deprive a State of its sovereignty over a territory? Certainly not. Nor does the Judgment claim the contrary, since it explains (para. 227) that "the Court does not consider the Johor reply as having a constitutive character". But if the effect of the letter from the Secretary of State was not to cause Johor to lose the sovereignty it held over the island, still less transfer that sovereignty to Singapore or to Great Britain as the colonial Power, what possible relevance could it have to the present case? Perhaps in that the exchange of correspondence must necessarily have alerted the authorities of Johor to the fact that it was possible — or even probable — that Singapore (or Great Britain) might be tempted to claim sovereignty over the island, on the basis of the reply received, so that the acts performed by the colonial authorities of Singapore — then by Singapore after its independence —must have been more readily recognizable by Johor after 1953 as possible manifestations of sovereignty and treated accordingly.

25. By their very nature and purpose, those acts would also have had to lend themselves to such an interpretation, that is, to being understood as manifestations of sovereign intent.

Yet, if we examine the conduct of Singapore (or Great Britain) after 1953 — as the Judgment does from paragraph 231 onwards — we find very few acts of this kind.

26. Under the title "The conduct of the Parties after 1953", the Court meticulously reviews eight types of activity performed by Singapore (under the letters *(a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(i)* and *(j)* — the other activities considered relating to Malaysia).

In a number of cases the Court concludes that the activities concerned were irrelevant, finally concluding that only five constitute possible manifestations of sovereignty. But that is a very meagre harvest.

The first of those activities is the various investigations allegedly carried out by Singapore, especially after 1980, into accidents which occurred in the vicinity of Pedra Branca/Pulau Batu Puteh. However, apart from the fact that this activity was somewhat belated, it is far from "clearly" manifesting a claim to sovereignty over the island. It is more directly linked to Singapore's responsibilities as the operator of the lighthouse and to its duty, under various conventions to which it is a party, to maintain the lighthouse so as to prevent maritime hazards as far as possible.

Secondly, on two occasions, in 1974 and 1978, the Singaporean authorities required Malaysian visitors, on more or less official missions, to request prior permission to enter the "territorial waters" of the island or to visit the lighthouse, and the visitors complied with that requirement. But that acceptance may very easily be explained by the respect due to the owner of the lighthouse (Singapore, indisputably), since the island is very small and its surface is almost entirely occupied by the lighthouse in question. Also, these were minor incidents and it was, moreover, at around that time that Malaysia began to display signs of irritation with Singapore's conduct (see Judgment, para. 238).

Thirdly, the ensigns of the British then the Singaporean Navy were continually flown on the lighthouse. But the Court itself acknowledges that the flying of an ensign, unlike a national flag, does not constitute a manifestation of sovereignty. Yet it appears to reproach Malaysia for not having protested, when it did so in 1968 at the display of the Singaporean ensign on another island in the same region, Pulau Pisang. Yet the fact that Malaysia reacted unnecessarily to a similar act performed elsewhere does not change the nature of the one at issue here and cannot confer upon it sovereignty which it does not possess.

Fourthly, in 1977, Singapore installed military communications equipment on the island. The Court notes (*ibid.*, para. 248) that "Singapore's action is an act *à titre de souverain*", which one can accept; but the significance of that statement is singularly diminished by the indication, which is prudent but fully accords with reality, that "[t]he Court is not able to assess the strength of the assertions made on the two sides about Malaysia's knowledge of the installation" (of military equipment). Consequently, it cannot be asserted that this was an activity which was a visible and manifest display of State power.

Lastly, in 1978 the Port of Singapore Authority studied the possibility of extending the island by reclaiming land from the surrounding sea and launched a public tender to this end in the press, without any response from Malaysia. However, the proposal was apparently soon abandoned.

V

27. In all, the few acts capable of being considered as manifestations of sovereignty by Singapore share two characteristics: on the one hand, they are minor and sporadic and, on the other, they occurred on dates very close to 1980, the year in which Malaysia officially claimed sovereignty over Pedra Branca/Pulau Batu Puteh and rejected Singapore's claim.

Both when considered separately and viewed as a whole, the acts performed by Singapore cannot be regarded as constituting the indisputable and public exercise of sovereign authority against which Malaysia should have protested in order to preserve its own sovereignty over the island.

This is thus a long way from the visible, continuous and peaceful exercise of the attributes of sovereignty over a long period which, as a result of the lack of protest by the initial sovereign, might eventually have given rise to legal title for the new sovereign. It is true that silence may speak, as the Judgment says (para. 121). But only in circumstances where words would have been necessary.

28. It may be objected that on an island the size of Pedra Branca/Pulau Batu Puteh — on which, once the lighthouse had been built, there is scarcely any room for any other significant activity — it is rather difficult to find many examples of the exercise of State authority. Should we not, in those circumstances, reduce our requirements and settle for a few manifestations of authority — even a very few — not followed by protests? Would it not be better to apply *mutatis mutandis* the dictum of the Permanent Court of International Justice in the case concerning the *Legal Status of Eastern Greenland (Denmark* v. *Norway)*, according to which we might be satisfied "with very little in the way of the actual exercise of sovereign rights" in the case of "claims to sovereignty over areas in thinly populated or unsettled countries" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46), a dictum which this Court has recently said it found particularly applicable in the case of "very small islands which are uninhabited or not permanently inhabited" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 134)?

29. Our answer is a resolute no. The Court's task in the two cases mentioned was to attribute sovereignty over a given territory on the basis of *effectivités* (if necessary by weighing up competing *effectivités*) in the absence of an original title. Here, the issue is quite different: there is an original sovereign — at least according to the Court's analysis which we endorse — and what has to be determined is whether title was transferred to another sovereign without the first one expressly indicating its consent. In that context, there is nothing to warrant lowering our requirements; for it is not the *effectivités* in themselves which are sought, but the con-

sent (or acquiescence) of the original sovereign which, if it was not actually expressed, must at least be deducible without a shadow of a doubt from its conduct. Such a conclusion, it will be countered, will be very difficult to reach in the case of small portions of territory which are uninhabited or ill-suited to human activity. That may well be true; but the upshot would merely be that the maintenance of the original title to sovereignty, which is presumed, would constitute the legally appropriate solution.

30. That, in the present case, is the conclusion the Court should, in our view, have reached. After enunciating legally well-founded principles, albeit somewhat approximately formulated, in applying them the Court has gradually diverged from them. Its reasoning is more or less as it would have been if, in the absence of original title, it had had to assess the competing *effectivités* of the Parties. In so doing, it has followed a course which could only lead it to a conclusion we hold to be mistaken.

(Signed) Bruno SIMMA.
(Signed) Ronny ABRAHAM.