CR 2002/34 (traduction)

CR 2002/34 (translation)

Lundi 10 juin 2002 à 15 heures

Monday 10 June 2002 at 3 p.m.

The PRESIDENT: Please be seated. The sitting is open and I immediately give the floor on behalf of the Republic of Indonesia to Maître Loretta Malintoppi.

Mrs. MALINTOPPI:

Introduction

1. Mr. President, Members of the Court, I am aware that — at this stage of the proceedings — some attempt at a summing-up is needed. I shall therefore confine myself to replying to the arguments made by our opponents in the first round of oral discussions in regard to the significance of the cartography in the present case, and in doing so I shall refrain from pointless repetitions.

2. The Court will surely recall that, in his statement last week, Professor Crawford referred to a play by Shakespeare, "Twelfth Night", so as to classify the cartography into three different categories.

3. The quotation as rephrased by Professor Crawford to adapt it to the relevant maps in the present case is as follows: "Some maps are born great, some achieve greatness and some have greatness thrust upon them" (CR 2002/32, p. 22, para. 3). What is curious, though, in Professor Crawford's stylistic exercise is that the passage in Shakespeare's play refers to people who are climbing the social ladder and therefore gaining in importance and status. Yet my colleague on the opposite side turns the situation on its head, ascribing decreasing importance, and ultimately none at all, to the items of cartographic evidence.

4. With the greatest respect to Professor Crawford, I find his categories — clever though they are — more appropriate to their theatrical home than to legal reasoning. The result of confining the cartography within such an artificial framework is that some maps, and in particular those which support the Indonesian position, are banished from Professor Crawford's Shakespearean world while others are promoted to the rank of maps "born great". An admirable exercise, Mr. President, but let me assure you straightaway: I need not draw a parallel with Carlo Goldoni's *"Arlequin serviteur de deux maîtres"* (Harlequin the Servant of Two Masters) to show you that the case file contains a large number of maps which from the legal standpoint it is impossible to disregard.

5. At a more modest level, Members of the Court, I prefer to address the fundamental aspects of the Indonesian position in regard to the maps from a purely legal point of view.

First, in the present case, the cartography constitutes an element of the practice followed by the Parties in the application of the 1891 Convention. As a consequence, the contextual maps and those which immediately followed the Convention furnish evidence of the existence of a consensus between the parties as to the meaning and scope of the Convention.

Second, a very great majority of the maps subsequent to 1891 show a line crossing the island of Sebatik and continuing eastwards along the parallel of latitude of 4° 10' N, a line which is easily recognizable as the one resulting from Article IV of the Convention. That instrument is the sole explanation for the presence of this line. Malaysia, for its part, has certainly not offered any other explanation.

Thirdly, the maps subsequent to Malaysia's independence, drawn up between 1964 and 1974, consistently show a line extending beyond the east coast of Sebatik, whether it be long or short; they contradict Malaysia's present position and are therefore opposable to it as admissions against interest. Not until 1979, ten years, that is, after the "crystallization" of the dispute, did the Malaysian maps alter and Malaysia attempt by this belated change to improve its position in law.

Fourth, there is a final group of maps showing a line stopping at the east coast of Sebatik which prove nothing for the purposes of the present case. At the very most these maps are neutral in terms of sovereignty since they do not attribute the disputed islands to either of the Parties to the dispute.

1. The maps as elements of the practice of the parties to the 1891 Convention

6. As regards my first point, it will suffice to observe that the maps and sketches exchanged in the negotiations on the Convention testify to a remarkable coincidence between the positions taken by its negotiators and Indonesia's present position as regards the scope of the boundary settlement resulting from the 1891 Convention (cf. Indonesian judges' folders, first round, Nos. 24, 25, 26 and 27 and the statement of Professor Pellet, CR 2002/29, pp. 50-56, paras. 42-60).

7. This substantial cartographic material clearly implies the notion of a territorial division, and even more clearly it marks the presence of a line — repeated thenceforth until 1974 in a whole

series of official maps from various sources — continuing out to sea from the eastern coast of the island of Sebatik along the parallel of latitude of 4° 10' N.

8. This identity between the parties' views as to the boundary line of 1891 is strengthened and confirmed by the map attached to the Dutch "Explanatory Memorandum" (Indonesian judges' folders, first round, No. 8) which therefore represents the interpretation placed on the Convention at the time by the Dutch authorities and communicated to their British interlocutors, who did not challenge it in any manner whatsoever. The line which appears on this map, and on the maps exchanged during the negotiations, is manifest proof of the fact that the parties accepted Indonesia's interpretation of the course of the line contemplated by Article IV of the 1891 Convention.

9. This conclusion is also corroborated by the maps emanating from the BNBC at the time of its administration of North Borneo, particularly those published after 1894, that is to say, three years after the conclusion of the Convention; these show the line resulting from the Convention as extending out to sea to the east of the islands which form the object of the present dispute (Indonesian judges' folders, first round, Nos. 30 and 32, Reply of Indonesia, Vol. 2, Ann. 26).

10. Incidentally, the 1903 and 1904 Stanford maps (Indonesian judges' folders, first round, No. 30, Reply of Indonesia, Vol. 2, Ann. 26) were moreover published after the conclusion of the Treaties of 1898 and 1900 whereby Spain ceded its possessions in the Sulu Archipelago to the United States. They therefore furnish a graphic illustration of the fact that these islands were not at that time regarded as forming part of the possessions of the United States, at least by the BNBC and therefore by Great Britain. These maps alone contradict the Malaysian interpretation of the 1900 Treaty.

11. What do our opponents say in regard to the maps used during the negotiations on the Convention? Nothing whatsoever. In their view, these maps are not even worth a mention, not even in passing. As regards the "Explanatory Memorandum" map, it falls into Professor Crawford's residual category, No. 3, the depository of all those maps which in his view are valueless, in particular those which show "lines in the sea" to the east of Sebatik. Quite clearly these maps are unwelcome to Malaysia because they support Indonesia's reasoning.

Sir Arthur Watts has replied to our opponents' arguments in this respect and so I need not address them further.

12. In Professor Crawford's statement, the Stanford maps are also rapidly disposed of. Stanfords, after all, were only "a commercial company" (CR 2002/32, p. 37, para. 56) and the maps which they published for the BNBC only show internal administrative boundaries (CR 2002/32, *ibid.*).

13. As regards the first of those criticisms, Professor Soons explained earlier in some detail, in the first round of oral pleadings (CR 2002/28, pp. 30-33, paras. 2-10) what Stanfords' undisputed status was as official cartographer to the BNBC. I shall therefore say no more about this. The documentary evidence to which Professor Soons referred amply supports the Indonesian position.

14. With regard to our opponents' contentions as to the lines appearing on these maps — even if we admit, *quod non*, that the Stanford maps showed nothing more than the administrative district boundaries of North Borneo — it is self-evident that they had taken account of the international boundaries. For the boundaries of the BNBC's provinces shown on these maps do, as you can see, extend out to sea, and thus respect the line of the 1891 Convention, signed only a few years earlier. The islands of Sipadan and Ligitan thus remain outside the jurisdiction of the BNBC, whereas other islands, situated more than 9 nautical miles from the coast, but to the north of the latitude of 4º 10' N — such as Si Amil, Dinawan and Mabul — are shown on it as being under British sovereignty.

15. The evidence provided by the maps I have just mentioned in regard to the intentions of the signatories of the 1891 Convention concerning the settlement which ensued from it is corroborated by the very large number of maps which show a line crossing the island of Sebatik and extending several miles out to sea from its east coast.

2. The recurrence of the 1891 Convention line in the cartography subsequent to that date confirms the Indonesian position

16. I now come to my second point. The peculiar characteristic of this case, as we have seen, is that a very large number of official maps, and particularly the maps published by the Directorate of National Mapping of Malaysia or by its predecessor, Great Britain, show a line

going beyond the island of Sebatik and continuing along the parallel of latitude of 4º 10' N eastwards.

17. At the beginning of his statement regarding Malaysia's alleged title to the disputed islands, Professor Crawford categorically asserted: "history shows that no one before 1969 ever considered them [the islands] to be part of the Netherlands or of Indonesia". (CR 2002/31, p. 41, para. 2.) Allow me to express a dissenting opinion: in truth, the pre-1969 British, Malaysian and even American maps, as we saw this morning, say something quite different, and I refer in particular to the maps exchanged during the negotiations, the map attached to the Dutch "Explanatory Memorandum", the map from the American atlas of 1897 which Mr. Bundy showed us this morning, the Stanford maps and, in chronological order, from 1944 to 1968, the maps in the folders prepared by Indonesia for the first round under Nos. 54, 57, 58, 59, 60, 62, 63 and 70.

18. A small digression, Mr. President, if I may. Last Friday Professor Crawford hastened to include in his third category of maps — those which, on his Shakespearian analogy, have no hope of achieving greatness — certain maps produced in the course of my first statement, on the pretext that they show only a short stretch of line extending beyond the east coast of the island of Sebatik.

19. Contrary to Professor Crawford's assertion (CR 2002/32, p. 37, para. 57), Indonesia has never sought to extend the lines which appear on these maps. We have no need to do that: I have no difficulty in acknowledging that on some maps the length of the line is limited.

20. However, even if the length of the line varies, the fact remains that these maps show a line which passes across the island of Sebatik and continues out to sea eastwards. This line does not stop at the east coast of Sebatik, which would have been consistent with the interpretation which Malaysia places on the Convention. All these maps — and even those which show no more than a tiny stretch of line extending to the east of Sebatik — clearly contradict the position taken by Malaysia in this case.

21. This is because, if the line goes beyond the island of Sebatik eastwards along the parallel of latitude 4° 10' N, regardless of its length it fully bears out the terms of Article IV of the Convention: "The boundary shall be continued eastward along that parallel, across the island of Sebatik." It is surely not a pure coincidence, Mr. President, that these graphic illustrations express the terms of Article IV of the 1891 Convention with such precision.

22. Furthermore, Professor Crawford acknowledges that he has no explanation for this line, whether it be short or long, apart from the customary reference to the length of the territorial sea. Yet this explanation does not hold water, firstly because it takes no account of the maps whose legends indicate the line to be a "international boundary" and, secondly, because even my distinguished opponent admits that the length of the line varies, and cannot therefore represent the territorial sea.

23. Our opponents tell us that the cartographers must have had a reason to extend the line out to sea beyond Sebatik. We fully agree on this point. And the raison d'être of this line extending seawards is self-evident, the only credible reason being that the cartographers' work was motivated by the need to reproduce the line established by the 1891 Convention.

3. The maps which represent admissions against interest by Malaysia

24. I now come to my third point, namely the importance of the maps which represent admissions against interest by Malaysia. I must point out in this respect how remarkable it is that, in his statement last Friday, devoted entirely to the cartographical material, Professor Crawford was careful to avoid mentioning the production of maps of Malaysia which are opposable to it because they contradict the position taken by the latter in this dispute. In addition to that huge output, there are the maps produced for Malaysia by its predecessor State, Great Britain, from 1964 onwards.

25. Not a word on these maps from Professor Crawford. Sometimes, Mr. President, silence speaks louder than words. We must therefore pay heed to this curious silence on the part of Malaysia since it betrays its embarrassment on the subject of the maps in question.

26. There is — it must be admitted — a short passage in Professor Crawford's long statement which refers to a Malaysian map of 1966 (CR 2002/32, p. 37, para. 55). However, this passage surely fails to do justice to such an important topic as the enormous official map output of Malaysia which contradicts the latter's present position.

27. Some of the British and Malaysian maps were placed by Professor Crawford, as if by chance, in his third category and downgraded to the rank of maps of no importance or consequence. The purge conducted by my friend on the opposite side does not even spare the map published by the Malaysian Ministry of Mines illustrating the 1968 oil concessions. This map is "generic", we

are told, and "is obviously not intended to reflect the territorial position of particular islands which are not depicted" (CR 2002/32, p. 34, para. 40).

28. But Professor Crawford forgets that this map sets out, as the legend indicates, to show international boundaries, without — let it be said in passing — any "disclaimer".

29. Mr. President, Members of the Court, the corpus of official Malaysian maps carries too great a weight of legal consequences to be done away with like that, hastily eliminated along with all sorts of other maps considered irrelevant. It is all too easy for Malaysia thus to ignore our arguments in this respect. Perhaps our colleagues on the other side will revert to this point the day after tomorrow. In the meantime, may I simply comment that all these maps — in so far as they contradict the position taken by Malaysia in these proceedings — constitute evidence against Malaysia.

4. The maps which are neutral in regard to sovereignty

30. I now come to my fourth and last point. Our opponents accuse us — if you will allow this somewhat trivial expression, Mr. President — of wanting to have our cake and eat it. Professor Crawford asserts that, on the one hand, I ignored the maps on which the line stopped at the island of Sebatik "because they were boundary lines, which naturally stopped at the coast" (CR 2002/32, p. 37, para. 58) and, on the other, that I stressed the importance of those maps which were "evidence of an allocation line proceeding to the east, and supported Indonesia's case" (CR 2002/32, p. 37, para. 58).

31. As regards the maps on which the line stops at Sebatik, as I said at the beginning of my statement, they prove absolutely nothing either way. They furnish no evidence regarding the sovereignty of either of the Parties over the disputed islands. There is therefore a remarkable qualitative difference in the probative force of these maps by comparison with those which show the projection of a line out to sea. The first group is neutral in regard to sovereignty and consequently has no probative force in that respect, whereas the second gives clear indications as to the sovereignty over the disputed islands and shows that the way in which the 1891 Convention was interpreted in practice corresponded to the Indonesian position.

32. What is more, the reason why I placed emphasis on the latter group of maps is that I am convinced that an indisputable frontier line is discernible from this abundant cartographic material, to paraphrase the terms employed by the Chamber of the Court in the *Frontier Dispute* Judgment (*I.C.J. Reports 1986*, p. 584, para. 58).

33. At tab 12 in the judges' folders which we have prepared for this second round, we have included a list of all the maps — from those prepared during the negotiations for the 1891 Convention to a map of 1978 — which show a prolongation of the line to the east of the island of Sebatik along the parallel of latitude of 4º 10' N. This list is proof that the Indonesian interpretation of the Convention is based on the soundest of cartographic evidence.

34. With your permission, Mr. President, I should like to show one or two examples of this cartography on the screen. In order not to tax your patience with a tedious list of references, I would ask you to be good enough to find the pertinent references to these maps in our written documents:

— the map attached to the Dutch "Explanatory Memorandum" of 1891 (tab 8, Indonesian judges' folders, first round);

— the 1894 Stanford map (tab 32, Indonesian judges' folders, first round);

— a map from an American atlas of 1897 annexed by the United States to their memorial in the *Island of Palmas* arbitration (tab 11, judges' folders, this round);

— the 1903 Stanford map (tab 30, Indonesian judges' folders, first round);

— the 1904 Stanford map (Reply of Indonesia, Vol. 2, Ann. 26);

— a map of Borneo from an Indonesian atlas of 1953 (Counter-Memorial of Indonesia, Ann. 37);

— a map of Tawau, produced by Great Britain for its successor State, Malaysia, this time in 1965 (tab 58, Indonesian judges' folders, first round);

— the political map of Malaysia, of Malaysian origin, dated 1966 (tab 59, Indonesian judges' folders, first round);

— the Malaysian map representing Malaysia published in 1966 (tab 62, Indonesian judges' folders, first round);

— the same map as published in 1967, again by Malaysia (tab 63, Indonesian judges' folders, first round);

— a Malaysian map of Semporna published in 1967 (tab 13, judges' folders, this round). This map is significant despite containing a disclaimer and mistakenly representing the island of Ligitan as lying to the north of latitude 4º 10', whereas it is situated, as Malaysia itself recognizes, to the south of that line;

— the official Malaysian map of the 1968 oil concessions showing the international boundary (tab 60, Indonesian judges' folders, first round);

— another map of Malaysia, published by the Malaysian Directorate of National Mapping in 1972 (tab 64, Indonesian judges' folders, first round);

— the map of Malaysian origin regarding the 1970 Sabah population census, published in 1974 (tab 65, Indonesian judges' folders, first round);

— the Operational Navigation Chart of British origin published in 1978 (tab 71, Indonesian judges' folders, first round).

35. On all these maps, without exception, the line continues beyond the island of Sebatik and extends for several nautical miles to the east of the latter along the parallel of latitude of 4º 10'. This cartographic material, covering almost a century, beginning with the conclusion of the 1891 Convention, is consistent: it displays "lines in the sea", to use the term employed ironically by Professor Crawford. There is no other justification for these lines — nor does Malaysia suggest any — than the need to illustrate what had been agreed in 1891.

36. Do you really think, Members of the Court, as my friend James Crawford does, that these maps should be thrown in the wastepaper basket? These "lines in the sea" deserve something far better than the treatment he would wish to inflict on them. Their probative force is indisputable: they reproduce, recurrently, the line resulting from the Anglo-Dutch Convention of 1891, thus corroborating the legal position of Indonesia that it has sovereignty over the islands of Sipadan and Ligitan.

37. This concludes my statement. I thank you warmly, Mr. President, Members of the Court, and I would now ask you to be good enough to give the floor to Professor Alain Pellet.

The PRESIDENT: Thank you, Maître Malintoppi. I now give the floor to Professor Alain Pellet.

Mr. PELLET: Thank you.

THE CONDUCT OF THE PARTIES

1. Mr. President, Members of the Court, last Thursday, with sound common sense, Professor Crawford stated one or two obvious truths which I have no difficulty in laying claim to myself : "When it comes to [territorial] title, some facts are better than no facts, and many facts are better than a few facts." (CR 2002/30, p. 47, para. 4.) How can we apply this profound idea to our present case, Mr. President? Quite simply: neither Party can pride itself on many *effectivités* in the full sense of the word; Indonesia, however, can point to some (II), whereas Malaysia can point to *no act* — I repeat, *no act* — of effective manifestation of sovereign authority over either island (I). On the other hand, the striking identity in the reciprocal conduct of the Parties provides abundant confirmation of the Indonesian interpretation of Article IV of the 1891 Convention (III). Let us begin with:

I. The Malaysian non-*effectivités*

2. Sir Elihu Lauterpacht offers us a definition of *effectivités* which, at first sight, is as good as any other: "*Effectivités* consists of conduct attributable to a State which evidences its authority in, or in relation to, the disputed territory." (CR 2002/32, p. 14, para. 7.) Looked at a little more closely, however, this definition is questionable for "lumping together", if I may say so, the evidence of a State's authority *over* a territory and its conduct *in relation to* a territory, something which undoubtedly is infinitely more vague. Furthermore, an essential element is lacking here: "the intention and will to act as sovereign", which constitutes the very essence of *effectivités* (cf. Judgment of 5 April 1933, *Legal Status of Eastern Greenland, P.C.I.J. Series A/B, No. 53*, p. 46; see also the Judgments of 17 November 1953, *Minquiers and Ecrehos, I.C.J. Reports 1953*, p. 71; 11 September 1992, *Land, Island and Maritime Frontier Dispute, I.C.J. Reports 1992*, p. 566, para. 347; and 13 December 1999, *Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1105, para. 98; the Advisory Opinion of 16 October 1975, *Western Sahara, I.C.J. Reports 1975*, p. 43, para. 92; and the Arbitral Award of 9 October 1998 in the *Eritrea/Yemen* case, pp. 84-85, para. 315 of the Award).

3. Bearing this in mind, let us for a few moments follow my distinguished opponent as he analyses the list of the so-called Malaysian *effectivités*, included by us in the judges' folders for 4 June, which he was kind enough to thank me for — for your convenience, Members of the Court, and that of our opponents, we have reproduced it again in today's folders at tab 14.

4. First of all, Sir Elihu finds the list "somewhat" inflated (CR 2002/32, p. 15, para. 13). That is certainly the case — but not my fault; the list does no more than enumerate very faithfully all the documents, with the exception of the maps, invoked in the written pleadings of Malaysia in support of the *effectivités* it invokes (cf. Memorial of Malaysia, Chap. 6, pp. 60-71; Counter-Memorial of Malaysia, Chap. 4, pp. 71-96; Reply of Malaysia, Chap. 5, pp. 33-36). Besides, being less adept at understatement than my very British friend, I would not say that the list — which thus reflects Malaysia's views only — is "somewhat" inflated; it is enormously inflated!

5. I must, however, do Sir Elihu justice; he helped me — parsimoniously, it is true — to curb the process of inflation. In contradiction to Malaysia's written pleadings, on his own initiative he eliminates documents 1 to 13 (CR 2002/32, p. 15, para. 14). Right, they disappear (it is not I, Mr. President, who have the magician's talents Jean-Pierre Cot credits me with, but Mr. Rizzuti; he sits behind his mysterious machine and has greatly assisted the entire Indonesian team on all the map issues and with the screening). There, however, Sir Eli's spirit of co-operation ends. As to the remainder, either he says nothing — I shall therefore do the same and these documents (items 16, 17, 25, 39 and 42) disappear too — or he endeavours to establish their relevance. Wrongly. Nevertheless a few words must be said about the remaining 38 documents.

6. I maintain, Mr. President, that items 14 and 15 (cf. Sir Elihu Lauterpacht, CR 2002/32, pp. 15-16, para. 14) are irrelevant for our present purposes: Mr. Bundy demonstrated this morning that in no way did those documents show that the United States regarded Ligitan and Sipadan as either American or British, any more than they gainsaid Dutch sovereignty over the islands; in any case, though, it cannot be seriously argued that the voyage of the *Quiros* lends colour to the *effectivités* of the United States or of Great Britain.

7. All the other documents — all of them without exception — fall into one or other of the following four categories, and in some cases into two or three at once:

— either they have no relationship with the islands, which they do not mention;

— or they constitute mere paper claims which were never implemented on the ground;

— or they are the acts of private individuals and, at the very best, establish the *personal* authority of the BNBC over the Bajau of Dinawan but in no way its *territorial* authority over the islands;

— or lastly they do in fact testify to an episodic presence on Ligitan and Sipadan but with the agreement of Indonesia.

(a) ***An episodic presence agreed to by Indonesia***

8. One single element falls into this last category: the light towers.

9. Sir Elihu sets some store by these. While accepting that "the construction of a lighthouse does not prove a wish to act *à titre de souverain*" (CR 2002/32, p. 19, para. 26; for the Indonesian position see CR 2002/29, pp. 30-32, paras. 37-41), he takes the view that a construction of that kind must be seen as part of a pattern, no doubt an allusion to the upkeep and maintenance of the towers in question — let me say in passing that they cannot really be considered as lighthouses worthy of the name. I have the same attachment to Brittany as Jean-Pierre Cot has to Savoy and I can assure you, Mr. President, that this meccano-kit construction — useful of course for local Malaysian shipping — does not really resemble our Breton lighthouses.

10. That being so, the least to be said is that, after they were built, these light towers were scarcely ever the object of attention on the part of Malaysia once it had become independent. In 1967 a patrol led by Sergeant-Major (Navy) Ilyas landed at Sipadan as part of a policing operation and found the following — I quote the actual words of the sailor's affidavit: "We only saw a lighthouse with faded paint, due to lack of maintenance." (Item 54 — Memorial of Indonesia, Vol. 5, Ann. D.) And the video which we saw last Thursday shows that Malaysia had gone to considerable trouble to make the light towers presentable for the purpose of the present proceedings: workmen were repainting a rusty metal structure which was certainly in great need of a good coat of paint.

11. But that is not the real point, which is that Indonesia formally gave its agreement to the upkeep of the two light towers: an Indonesian Note Verbale of 7 May 1988 — the first of a long series of Notes protesting against the establishment of tourist facilities on Sipadan — shows that

the 1969 status quo agreement had provided that the two Parties should abstain from any activity on the island "except for maintaining a lighthouse at the easternmost part of Sipadan" (Memorial of Indonesia, Vol. 4, Ann. 142, p. 245).

12. According to Sir Elihu, the relevance of this *effectivité* cannot be dismissed because of this *ex post facto* assertion regarding an agreement as to their maintenance 26 years after the emergence of the dispute ("by an *ex post facto* grant of . . . 'agreement' to their maintenance some 26 years later", CR 2002/32, p. 19, para. 26). The fact is, though, that Malaysia, which took pains to challenge the various Indonesian assertions, as the war of Notes Verbales at the end of the 1980s and the beginning of the following decade shows, did not react in the slightest to this reminder; it would not have failed to do so had it thought it out of order; moreover, it is difficult to see why Indonesia would have lied on this point; in the context as it then was, it was in its interests to protest against any Malaysian presence on the island, even if, legally, the maintenance of the light towers was of no particular significance.

(b) ***The documents establishing the personal authority of the BNBC and then of Great Britain over the Bajau of Dinawan***

13. This is the great warhorse of Sir Elihu — but I think he wages a lost battle, albeit with great bravado.

14. According to him, items 18 and 19 "show clearly that in 1910 the British North Borneo Company authorities . . . considered that the resolution of disputes over the collection of turtle eggs . . . was a matter for their concern" (CR 2002/32, p. 16, para. 15). The same, he says, is equally true of items 21 and 22 *(ibid.)*. Yet once again this proves absolutely nothing as regards territorial sovereignty over the island of Sipadan.

15. Sir Elihu asserts that these documents, and other later documents which he does not cite, "demonstrate the applicability and application of British legislation to Sipadan" *(ibid.*, p. 17, para. 16) and the exercise of British legislation over the persons involved. But as the Permanent Court stated forcefully in the *Lotus* case:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive

> rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States." (Judgment of 7 September 1927, *P.C.I.J., Series A, No. 10*, p. 19.)

16. It was only natural that the BNBC should seek to regulate the old custom of the Bajau of Dinawan of collecting turtle eggs on Sipadan. It was only natural that the British administrators should seek to end the wrangling which took place on the subject among those concerned. These were certainly "classic governmental activities" (CR 2002/32, p. 17, para. 19, Sir Elihu Lauterpacht); however, it is difficult to see what conclusions can be drawn from this as regards the territorial ownership of Sipadan, on which, may I say, the Bajau of Dinawan were not the only people to collect turtle eggs, an article apparently coveted by many others (cf. CR 2002/29, p. 26, para. 29 (2)).

17. What is more, this activity is inherently a private one which does not fall within the definition of *effectivités* given by Sir Elihu since it is not "attributable to a State" (CR 2002/32, p. 14, para. 7; v. *supra*, para. 2). I also note that Malaysia's counsel have been careful not to comment on the comparison I made on Tuesday in this respect with the intermittent (but far less episodic) presence of the Masubia on Kasikili/Sedudu Island (CR 2002/29, p. 27, para. 29 (2) and 29 (3)); I nevertheless maintain that the comparison needs to be made: the members of the Bajau tribe who were collecting turtle eggs on Sipadan were obviously not occupying the island *"à titre de souverain"*, that is to say, they were not exercising "functions of State authority" on behalf of the British or Malaysian authorities (cf. Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1105, para. 98; see also Judgment of 22 December 1986, *Frontier Dispute, I.C.J. Reports 1986*, p. 617, para. 117, and the Arbitral Award of 9 October 1998 in the *Eritrea/Yemen* case (pp. 84-85, para. 315, of the Award)).

(c) ***The British paper claims (or map claims)***

18. The same reasoning applies to the British regulations (and *a fortiori* mere statistics) by which my opponent sets great store (cf. CR 2002/32, p. 17, para. 20, p. 18, para. 22 and pp. 18-19, para. 24) and which are mainly represented by items 24, 26 and 28 and by item 27, which does no more than anticipate the succeeding document.

19. Once again, there was nothing whatsoever to prevent the BNBC or the British administration from extending "the application of [its] laws and the jurisdiction of [its] courts to persons, property and acts outside [its] territory", to quote the *Lotus* formulation. All our countries do so. France does not allow its citizens to bring back samples in their luggage of rare or protected species captured in the Amazonian forest or in a reserve in Sierra Leone or on the high Malagasy plateau — and doubtless turtle eggs from Sipadan either (when its citizens are not kidnapped there); this does not mean that those parts of Brazil, Sierra Leone or Madagascar — or even Sipadan — are French or claimed by the French Republic.

20. In speaking about the 1917 Turtle Ordinance, Sir Elihu seems to admit that the circumstances were unfavourable to making protests immediately; but he then asks: "why they [they are the Netherlands administration] did not become aware of it in 1918, 1919, 1920 and each subsequent year of its existence and *application*" (CR 2002/32, p. 17, para. 20; emphasis added). Apart from my strong doubts that reading the Company's publications (particularly retrospectively) was the favourite occupation of the Dutch colonial administrators (who were far from numerous), they had no reason to protest against an "application" which, visibly, had never existed, except in the imagination of our opponents. It is a striking fact that Malaysia has been unable to point to any episode testifying to the effective application *on* Sipadan or Ligitan of the Turtle Ordinance or the 1933 megapode Notification. At no time did a police officer, a forest or natural resources inspector or an ordinary British administrator set foot there — for we can rely on Malaysia: had that been the case, there would be news of it! Let me add that the actual text of the Ordinance gives the lie to Malaysia's interpretation of it: it places Sipadan in Schedule C, under which it is a "native reserve" for which no licence can be granted; the British thus recognized the traditional, ethnic and family nature of the collection of turtle eggs on the island and, far from asserting their sovereign rights there, manifested their intention *not* to exercise them "in relation to" Sipadan, to use Sir Elihu's phrase.

21. Besides, even if these documents were to bear witness to a territorial claim by Great Britain *(quod non)*, they would be no more than paper claims, not followed up by the slightest sign of implementation on the ground. They too can therefore disappear.

22. In the same spirit, Sir Elihu accuses me of not having mentioned, in the list of *effectivités* claimed by Malaysia, the sketch-map No. 18 in the Indonesian atlas which claims to show the boundary of the Lahad Datu Police District. Let us take a look at it; it is at tab 16 in the judges' folders.

23. Admittedly, the district boundary takes in Sipadan and Ligitan. But:

— it must be said that the circuitous line which is supposed to mark the district boundary is surprising, since it is a maritime boundary and points to the amateurishness of the author of the sketch-map;

— the same is true of the location of Ligitan, clearly to the north of the parallel of 4° 10', whereas in fact it is, slightly but clearly, to the south of it, as Sir Arthur Watts showed this morning;

— the boundary ascribed to the District by Mr. Ross, the author of this sketch-map, contrasts with that of Semporna District on the sketch-map of the latter which dates from 1935, the relevant extract from which is on the screen and at tab 17 in the judges' folders;

— and the same line appears on the map of Sabah now on the screen, drawn up in 1964 by the Sabah Department of Lands and Surveys and reprinted in 1972 by the Malaysian Directorate of National Mapping; it is tab 18 in the folders.

I do not think, Mr. President, that very much can be concluded from the map claim on which Sir Elihu relied last week.

(d) ***The documents which do not mention either Ligitan or Sipadan***

24. To revert to our list of *effectivités* invoked again by Malaysia, there now remain two documents, two only, mentioned by Sir Elihu (CR 2002/32, p. 16, para. 15, p. 20, para. 29) but they have this in common, that they make no mention whatsoever of either of our two islands. They are items 20 and 40 in the list. Despite my great wish to please my distinguished friend, I find it difficult to see how they can remain as part of the evidence of Malaysian *effectivités*: not only are these too paper claims, but what is more they claim absolutely nothing (for a comparable example, concerning a game reserve, see the Judgment of 13 December 1999, *Kasikili/Sedudu Island, I.C.J. Reports 1999*, pp. 1095-1096, paras. 76 and 78). Here we are then, Members of the Court, in front of a blank screen: *there was no Malaysian* effectivité *before 1969, there was no British* effectivité

during the colonial period, any more than Malaysia was able to point to the slightest effective presence of Sulu on either island before 1891. No *effectivité*, therefore, which can come to the aid of a title (imaginary in any case); no *effectivité* upon which any title whatsoever can be founded; *a fortiori* no *effectivité* capable of displacing the Indonesian title. This contrasts with the arguments upon which Indonesia can rely and, assuredly, Mr. President, as Professor Crawford said (see, *supra*, para. 1):

II. "Some *effectivités* are better than no *effectivités*"

25. This will be the second part of my argument.

26. Sir Elihu has cautioned you, Members of the Court: "the fact that the question of the nature and effect of the conduct of the Parties is thus being divided between counsel should not be allowed to suggest that there is any real comparability between the *effectivités* of the two sides" (CR 2002/32, p. 12, para. 1).

The fact remains that this separation of the issue on the Malaysian side has the unfortunate consequence precisely of obscuring this comparative element. My colleague Alfred Soons dealt this morning in detail with the Dutch *effectivités* before Indonesia's independence; we nevertheless feel it might be helpful to place these *effectivités* alongside the *effectivités* — or non-*effectivités* — invoked by Malaysia. But let us turn first to the *effectivités* of Indonesia (or of its predecessor, the Netherlands). They are few in number, but well and truly genuine.

27. "The *Lynx*, the *Lynx* and yet again the *Lynx*!" (cf. CR 2002/32, p. 21, para. 32, Sir Elihu Lauterpacht), Mr. President, is always better than "*nothing*, *nothing* and yet again *nothing*!" If there were only the *Lynx*, that would already be something — and more than what Malaysia can point to. Although the officers and crew of the *Lynx* did not perhaps stay as long on Sipadan as the underwater diving enthusiasts who now go there in their thousands, they did at least set foot on its soil and fly over it, as well as Ligitan, in the course of a policing operation. Malaysia, for its part, has been unable to mention the presence on the island of any British or Malaysian official before 1969, any more than it has been able to find the slightest trace of a British or Malaysian vessel cruising in the immediate vicinity of the two islands, once again, until Malaysia began sending flotillas there at the end of the 1980s.

28. Furthermore, whatever Malaysia tries to have us believe, there is not only the *Lynx*, far from it. No doubt our list of *effectivités* is shorter than what Malaysia wishes you to accept as its own list — less artificially inflated —, but at least it contains genuine manifestations of the will to act on the disputed islands (or in their immediate vicinities) in a sovereign capacity. These *effectivités* are enumerated at tab 15 in the judges' folders.

29. There is the *Lynx*, definitely.

But before that, we know at least

— that in 1903 the *Macasser* carried out hydrographic surveys at Ligitan and Sipadan;

— that in 1910 the *Koetei* had twice been sailing quite close to Sipadan;

— and that those two patrols followed the one conducted in 1876 by the *Admiraal van Kinsbergen* in the immediate vicinity of Sipadan (and at Mabul — but that island became a British possession under the 1891 Convention).

It is true that between 1921 and Indonesia's independence in 1949 we have an archive problem, which Professor Soons has explained. And given the circumstances, the authorities of the new State, independent Indonesia, could not be expected to have given attention as a matter of priority to those two out-of-the-way and uninhabited islands in an archipelago containing some 17,000 islands.

30. Nevertheless, from the beginning of the 1960s onwards, before the critical date, Indonesia can point to a sizeable number of policing patrols. I enumerated them last Tuesday (CR 2002/29, pp. 56-57, para. 21). To take just one example now, item 6 in the list shows that, following complaints by fishermen from the unquestionably Indonesian island of Nanoekhan against illegal fishing by — by Malaysians from Semporna, the Indonesian Navy landed *on* Sipadan (this was when the Indonesian naval personnel found that the light tower was rusty).

31. Malaysia has not taken the trouble to discuss these *effectivités*. Even so, such "periodical . . . visits" are undoubtedly very sound evidence of *effectivités* (cf. Judgment of 17 November 1953, *Minquiers and Ecrehos, I.C.J. Reports 1953*, p. 66). It has been said that activities "relating to the regular exercise of functions of territorial control" can "constitute relevant evidence of the manifestation of State authority" (Marcelo Kohen, *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 216). Moreover, Malaysia has no hesitation in

relying on comparable *effectivités* (cf. Memorial of Malaysia, pp. 61-64, paras. 6.5 and 6.6, and Reply of Malaysia, p. 69, para. 5.9); unfortunately for our opponents, they are never anything more than episodes which take place on islands or in the surrounding waters — islands and waters undoubtedly under Malaysian sovereignty and having no connection with either Ligitan or Sipadan.

32. In this respect Malaysia is guilty of a double conjuring trick:

— in the first place, for want of any mention of Ligitan in virtually all the documents invoked by Malaysia in support of its (non-)*effectivités*, Sir Elihu embarks on rash assertions: "if Sipadan was British, so was Ligitan" (CR 2002/32, p. 17, para. 17); why, Sir Eli ? "If Sipadan was British and not Dutch, it follows that Ligitan was British and not Dutch." *(Ibid.)* Again, why? These are two separate islands quite unlike each other geophysically, and *effectivités* on one of them cannot automatically rub off onto the legal and territorial status of the other (even though I must admit that the *effectivités* which Indonesia can rely on are more firmly established on Sipadan than on Ligitan);

— in the second place — and this is supposed to explain what has just been said —, Sipadan and Ligitan, Malaysia says, form part of the same groups of islands, the same social and economic unity *(ibid.)*. Sir Arthur Watts demonstrated this morning that such is not the case and I see no point in pursuing this any further.

33. Malaysia cannot, in our case, avail itself of the policing operations conducted against the Bajau of Omadal (items 6 and 10 in the list), Dinawan (items 9, 11 and 39), Si Amil (items 11 and 39) or *a fortiori* Sibutu (item 39). These *effectivités* — for they really are *effectivités* — concern these four islands in the so-called "Ligitan Group" alone; none of them relates to Ligitan or Sipadan itself, and I suspect that our opponents have concocted something called the "Ligitan Group" solely in order to bring them into the picture. Although I have the greatest liking for Harry Potter's impish magic (it seems that the Wizard of Oz is now a bygone), it does not work in this Great Hall of Justice — and here we are back at our blank page.

34. Some *effectivités* are better than none at all. Some *effectivités* are what Indonesia presents — eight as shown in the list at tab 15 in your folders and now on the screen (since the list of ships, item 2 in that document, is non-specific). The list is relatively short, but it has the merit of existing, in contrast to the blank page which is what the illusory list of *effectivités* claimed by

Malaysia comes down to (cf. tab 14, judges' folders). What is more, even had Indonesia been unable to show evidence of any *effectivité*, its title would nonetheless have been established on the basis of the 1891 treaty; the *effectivités* it can adduce confirm that conventional title (that is, the one inherited from Boeloengan).

35. In the *Clipperton Island* case, the King of Italy found that, despite the relative scarcity of the *effectivités* France could rely on, she had never lost the title belonging to her "since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected" (*AJIL*, Vol. 26, p. 394); the jurisprudence is consistent in this respect (cf. Judgment of 5 April 1933, *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, p. 47; Judgment of 11 September 1992, *Land, Island and Maritime Frontier Dispute*, *I.C.J. Reports 1992*, pp. 563-564, paras. 342-343; see also Charles De Visscher, *Les effectivités en droit international public*, Pédone, Paris, 1967, p. 115). Here, though, not only has Indonesia not abandoned its title in any way whatsoever, but it has also exercised it, as witness the *effectivités* which I have described. And there is this too: the identity of conduct between the Parties before, and even after, the critical date establishes their agreement as to the parallel of latitude of 4° 10' N being the limit of their respective jurisdictions. This brings me to the third and last part of my argument.

III. The identity of conduct between the Parties

36. The least that can be said, Mr. President, is that on this point (as indeed on quite a number of others) Malaysia's counsel do not face up to things. Just as they refrained from discussing the Indonesian policing patrols, so they maintain a careful silence about the navigational aids on either side of the parallel of 4° 10' N *(b)* and barely mention the question of the drawing of baselines *(a)* and the issue, crucial though it is, of the oil concessions *(c)*.

(a) *The drawing of baselines*

37. The drawing of baselines by the two Parties does in fact point to an agreement of a somewhat "negative" kind: it is instructive only because both Parties did not take Ligitan and Sipadan into account. Wishing as I do to abide fully by the recommendations you made to us last Friday (CR 2002/32, pp. 41-42), Mr. President, I shall not repeat what I said last week and merely

commend it respectfully to the Court's attention except in so far as Professor Crawford saw fit to comment on it (see CR 2002/29, pp. 53-56, paras. 11-18).

38. And he made very little comment on it: one of his few remarks, in displaying a different segment of Indonesia's baselines (on the screen and at tab 19 in the judges' folders), was to assert: "You can see there is no indication of restraint here . . . In short, we may presume that the reason Indonesia did not draw its baseline over to Ligitan was not restraint, but that it did not claim the two islands in 1960." (CR 2002/32, p. 28, para. 20.) Professor Crawford's blend of things is unconvincing: the segment in question is that of the Mapia islands, a small archipelago off Irian Jaya which has had up to 300 permanent inhabitants. What is more, above all this excursus did not carry the risk of encroaching on the claims of any other State.

39. The situation would have been very different had Indonesia taken Ligitan and Sipadan into account in drawing its archipelagic baselines. Not only, as you can see from the sketch-map now on the screen (tab 20 in the judges' folders), would its archipelagic waters have covered an additional area of over 4,200 km^2 — something doubtless not to the liking of the United Kingdom and subsequently of Malaysia, the archipelagic sea lanes right of passage being subject to restrictions which could have hampered Malaysia's heavy coastal shipping traffic in the area; also, Indonesia would have been entitled to claim, beyond its territorial waters, a territorial sea and a continental shelf, and that would inevitably have led to a whole tangle of delimitation issues.

40. Moreover, a glance at the extract now on the screen from the 1979 Malaysian map (tab 21, judges' folders) illustrates the danger which any such unilateral conduct involves: the red line represents the limits of the territorial sea and the continental shelf claimed by Malaysia; in view of the extent of the resulting encroachment on Indonesia's rights, comment is superfluous.

41. This should not lead us to overlook the fact that this map was not published until 1979, ten years after the critical date. Seven years earlier, in 1972, Malaysia had published an official map which takes no account of Ligitan and Sipadan, and I show it again (it is at tab 22 in the judges' folders). It demonstrates that three years after the first manifestation of its claims to Ligitan and Sipadan, Malaysia was still not behaving as though the islands belonged to it, and it testifies to the agreement of the Parties that the parallel of 4° 10' N was indeed the limit of their respective possessions.

(b) ***Navigational aids***

42. This is also the case of the electric battery buoys erected — and maintained — by each of the Parties, publicly, on either side of this same line. I quote in full *everything* that Professor Crawford found to say about them:

> "Indonesia is inconsistent in its treatment of navigational lights. The erection after the critical date of lights on reefs far to the west (Alert Patches and Roach Reef) is treated as significant. On the other hand, Malaysia's [Great Britain's] erection of lighthouses on the islands themselves before the critical date is treated as . . . irrelevant." (CR 2002/32, p. 40, para. 62 (5).)

I have spoken about the light towers at some length and shall say no more on the subject. In any case, there is not the slightest inconsistency here; the important point is not the erection and maintenance *per se* of buoys by Indonesia on the one hand and Malaysia on the other, but the *identity* of conduct between the two countries, something which signifies their agreement as to the 1891 Convention line constituting the limit of their respective jurisdictions (see CR 2002/29, pp. 57-59, paras. 25-28).

(c) ***The oil concessions***

43. This characteristic is even more striking where the oil concessions are concerned. Professor Crawford dealt with them briefly last Friday (CR 2002/32, pp. 33-34, paras. 39-43), to say just two things: that there was no oil practice concerning the two islands (para. 41); then that, if there was any oil practice, it was of course Malaysian since, he says, the Teiseki concession (of 1968) crosses Ligitan's territorial sea (para. 42). And he concluded: "Of the two concessions, it is Malaysia's and not Indonesia's which implies a territorial claim to at least one of the islands in dispute." *(Ibid.)*

44. My opponent overlooks a fundamental point: like the navigational aids, the 1960s concessions (the Japex/Permina concession dates from 1966) show that immediately before the critical date the two States considered the parallel of 4° 10' N as the limit of their respective jurisdictions. In 1891 it was obviously no more than a line allocating territory as between the respective colonial possessions of the Dutch and the British — as my colleagues and friends Alfred Soons and Sir Arthur Watts showed this morning. Obviously it was not a maritime

boundary then: at that time there was nothing to delimit unless it was the territorial sea, and the parties were not concerned with that, as is evident from the Dutch hesitations in the 1920s.

45. But during the 1960s (and then the 1990s when the buoys were erected) the issue presented itself in quite different terms: the Parties could claim not only a territorial sea, but also a continental shelf. They considered that the line constituted by the parallel of 4° 10' represented the limit of the maritime areas to which they could lay claim. Hence the concessions. Hence the navigational aids. Hence also the limits spontaneously respected until 1969 in the sphere of action of the naval patrols conducted by the two countries (cf. CR 2002/29, pp. 56-57, paras. 20-24). Hence too, doubtless, the fact that the two islands were not taken into account in the drawing of baselines by each State, otherwise their respective maritime claims would have overlapped considerably. The Teiseki concession is not therefore to be seen as including the supposedly territorial sea of Ligitan, but as testifying to Malaysia's conviction that the parallel of 4° 10' N represented the limit of its jurisdiction. Just as the Japex concession denotes the same belief on the part of Indonesia.

46. The Special Agreement whereby the two Parties referred their dispute to the Court does not ask you, Members of the Court, to undertake a maritime delimitation between the two countries. But that does not mean that you cannot take the concessions into consideration, in the same way as the Arbitral Tribunal which settled the dispute between Eritrea and Yemen took account of the existence of oil concessions in deciding on the attribution of the disputed islands (Award of 9 October 1998, pp. 101-115, paras. 389-439 of the Award), even though it fixed the maritime boundary line between the two States by a separate Award, in which incidentally it referred to the oil practice in more guarded terms (cf. Award of 17 December 1999, p. 25, para. 83).

47. Ligitan and Sipadan are to the south of what the two Parties considered, immediately before the dispute arose, to be the limit of their respective jurisdictions, as is evident from a series of consistent activities by the Parties serving to confirm the *effectivités* of Indonesia, which contrast with the total absence of Malaysian *effectivités*. Ligitan and Sipadan therefore belong to Indonesia.

LEGAL SUMMING-UP

Mr. President, Members of the Court.

1. The Agent of Indonesia will, in a few moments, read the final submissions of Indonesia and make a few short remarks of a more general kind. For my part, I shall limit myself to a brief summing-up of the essence of our legal argument.

2. Although our colleagues and friends on the opposite side have taken a great deal of trouble in attempting to dispel the impression inevitably left by the Malaysian written pleadings, that impression remains at this stage of the oral pleadings: the argument of Malaysia is artificial, contradictory, laborious and complicated. But the case itself is not a complicated one:

— seeing the uncertainty of the limits of the respective possessions of the BNBC and the Netherlands, the latter concluded with Great Britain a treaty fixing those limits in a comprehensive and definitive manner;

— in the area that we are concerned with, the limit was fixed at the parallel of latitude of 4° 10' N;

— Pulau Ligitan is just to the south of that limit; Pulau Sipadan is located 6 km further south;

— both are therefore under the sovereignty of Indonesia, the successor to the Netherlands.

3. It is as simple as that, Mr. President! And this means that there are even fewer problems, in that the Sultan of Sulu was never present south of that parallel and in the very rare cases in which the British ventured there, after 1878, they were prevented from doing so by the Dutch. On the other hand, it is an established fact both that the Sultanate of Boeloengan exercised its authority to the north of Batoe Tinagat, and that the Dutch were well and truly present in the area both on land and in the surrounding waters. And to remove any ambiguity, may I say that Indonesia contends, subsidiarily, that if, against all impossibility, the Court were to set aside the title which it has under the 1891 Convention, it would nonetheless be the successor of Boeloengan and, as such, its sovereignty over the islands would equally well be established.

4. That being so, after 1891 the Convention line fulfilled its function perfectly: it ensured territorial stability on Borneo and in the surrounding islands; it was possible to settle the course of the line with accuracy where it proved uncertain (the result of the 1915 and 1928 agreements) and, at sea, the parties and their successors took the parallel of 4° 10' as the basis for their mutual conduct, as is evident from the really impressive cartography (which Mrs. Malintoppi showed you

just now) and the presence of the Dutch and then the Indonesians on Sipadan and in the waters around the two islands as well as the corresponding absence of the British and subsequently the Malaysians; and as the mutual conduct of the Parties immediately prior to the birth of the dispute, and even later, also testifies.

5. Because the time when the situation began to change was not 1969, when certain Kuala Lumpur technical experts "discovered" that Malaysia, it was said, had a title to Ligitan and Sipadan, but at the end of the 1980s, when Malaysia embarked on organizing the intensive tourist exploitation of Sipadan.

6. In this respect I shall not address further the status quo agreement, Mr. President — except nevertheless to say two things:

— on the one hand it is clear from the affidavit of Professor Mochtar Kusumaatmadja (Memorial of Indonesia, Vol. 5, Ann. A) that it was an "understanding", something separate from the Exchange of Notes of 22 September 1969 with which Malaysia confuses it (cf. CR 2002/30, p. 17, paras. 16-18, Agent);

— on the other, whether a status quo agreement or not, as the Permanent Court forcefully stated,

> "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (1939, *Electricity Company of Sofia and Bulgaria, Preliminary Measures, P.C.I.J., Series A/B, No. 79*, p. 199).

7. In the light of this principle, which has general validity and is a corollary of the obligation on States to settle their disputes by peaceful means, not only should Malaysia have abstained from promoting the tourist invasion of Sipadan, but also, what is particularly perverse, it uses this to argue that Indonesia seeks to induce you "to oust" Malaysia from an island on which it has long been established, as Sir Elihu Lauterpacht twice did last Thursday (CR 2002/30, p. 30, para. 12, and p. 36, para. 23). Malaysia has never been able to point to the slightest activity on the island before 1988, when it sought to create a fait accompli which it seeks to profit from in order to make Indonesia an applicant State. And as you yourself observed at the beginning of these hearings, Mr. President, the fact that we agreed to plead first "does not . . . imply that Indonesia can be regarded as the applicant State or Malaysia as the respondent State and has no effect on any

question concerning the burden of proof" (CR 2002/27, p. 13). Malaysia's counsel seem to have lost sight of that warning.

8. Malaysia is a (peaceful) occupant without title and all that Indonesia asks is to have its rights re-established — to that extent but to that extent only is it an applicant. But it is for the two Parties to prove the title under which they claim. Indonesia has done that; Malaysia has not. Consequently, Members of the Court, it is for you to decide that the two islands are under Indonesian sovereignty, and not be dissuaded by the belated fait accompli of which Malaysia now avails itself.

9. In any case, this does not mean in the slightest that your decision will entail a reconsideration of the rights of the private companies to which Malaysia has entrusted the tourist exploitation of Sipadan: your jurisprudence makes it clear that such is not to be inferred from your Judgments in matters of territorial sovereignty (cf. Judgments of 22 December 1986, *Frontier Dispute, I.C.J. Reports 1986*, p. 617, para. 116, and 11 September 1992, *Land, Island and Maritime Frontier Dispute, I.C.J. Reports 1992*, p. 419, para. 97); and Indonesia is open to foreign investment.

10. Indonesia, Members of the Court, confidently awaits the judgment containing your finding that it has sovereignty over Pulau Ligitan and Pulau Sipadan.

Mr. President, Members of the Court, I thank you warmly for the attention you have been kind enough to give me once again throughout these proceedings; and I would ask you, Mr. President, to be kind enough to give the floor to the Agent of Indonesia for a few brief final remarks.

The PRESIDENT: Thank you, Professor Pellet. I now give the floor to H.E. the Agent of Indonesia.

M. WIRAJUDA : Je vous remercie, Monsieur le président.

1. Monsieur le président, Madame et Messieurs de la Cour, à ce dernier stade des plaidoiries de l'Indonésie, il m'échoit de faire quelques remarques finales et de vous présenter les conclusions de mon pays dans cette affaire.

2. Je voudrais tout d'abord rappeler à la Cour que l'Indonésie, depuis que la Malaisie a revendiqué Pulau Sipadan et Pulau Ligitan en 1969, a toujours considéré qu'aucune des Parties ne devait entreprendre la moindre activité susceptible de compromettre d'une quelconque façon le règlement final de ce différend. Comme la Cour le sait, ce n'est qu'à la fin des années 1980 que la Malaisie a commencé à autoriser des activités touristiques à Sipadan.

3. Jusqu'à cette date, la ligne passant par le parallèle 4º 10' de latitude nord avait constitué pour les deux Parties une garantie de stabilité. Tout au long des années soixante, l'Indonésie comme la Malaisie ont respecté cette ligne dans le cadre de leurs activités d'exploitation pétrolière en mer, sans qu'il y ait la moindre friction; elles en ont aussi toujours tenu compte dans les cartes qu'elles publiaient. De même, l'une et l'autre ont respecté cette ligne lorsqu'elles ont installé par la suite des balises de navigation. Monsieur le président, cette ligne jouait efficacement son rôle, comme elle l'avait toujours fait depuis 1891, c'est-à-dire depuis près de quatre-vingts ans.

4. En 1969, l'émergence de ce différend entre nos deux pays les a empêchés de terminer les négociations qu'ils avaient engagées sur la délimitation de leurs zones maritimes respectives. L'Indonésie espère vivement que ces pourparlers pourront reprendre après que la Cour aura rendu son arrêt dans la présente affaire.

5. Je voudrais également donner à la Cour l'assurance que, si elle décidait que Pulau Sipadan et Pulau Ligitan relèvent de la souveraineté de l'Indonésie, comme le pense cette dernière, le Gouvernement indonésien respectera tous les droits privés qui auraient été acquis conformément à la législation et aux règlements qui sont en vigueur dans son pays.

6. C'est dans cet esprit, qui nous semble nécessaire pour préserver la stabilité et favoriser les relations de bon voisinage dans la région, en particulier entre la Malaisie et l'Indonésie, que je souhaite vous soumettre les conclusions finales de mon gouvernement.

7. Sur la base des considérations de fait et de droit exposées dans les pièces de procédure écrite de l'Indonésie et dans ses plaidoiries, le Gouvernement de la République d'Indonésie prie respectueusement la Cour de dire et juger que :

i) La souveraineté sur Pulau Ligitan appartient à la République d'Indonésie; et

ii) La souveraineté sur Pulau Sipadan appartient à la République d'Indonésie.

8. Enfin, au nom du Gouvernement de la République d'Indonésie, je tiens à vous exprimer ma profonde reconnaissance, Monsieur le président, Madame et Messieurs de la Cour, ainsi qu'à nos distingués collègues malaisiens, pour l'attention et la courtoisie dont vous avez fait preuve lors des plaidoiries de l'Indonésie. J'aimerais également remercier le personnel du Greffe et les interprètes pour leur travail considérable, qui a permis que cette procédure se déroule harmonieusement et efficacement. Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you very much, Minister. This brings to an end the second round of oral pleadings of the Republic of Indonesia. The Court takes note of the final submissions of the Republic of Indonesia. The next sitting will take place on Wednesday 12 June at 10 a.m. for the second round of oral pleadings of Malaysia. The hearing is closed.

The Court rose at 4.30 p.m.

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