DISSENTING OPINION OF JUDGE FRANCK

The 1891 Convention determined the allocation of territorial sovereignty between the Parties — Pulau Ligitan and Pulau Sipadan clearly located south of 4° 10′ allocational line therein established — Presumption that 4° 10′ line intended to settle all areas of potential conflict between the Parties — Need to interpret boundary and allocation agreements broadly — Role of ad hoc *judge — Three principal issues in case — Agreement with Court's Judgment rejecting Malaysian "chain of title" argument — Difficulty in assessing comparative weight of Parties' pleaded* effectivités — Effectivités *were minimal and not performed, in all but a few instances,* à titre de souverain — Effectivités *do not prevail against conventional title established under 1891 Convention — New* effectivités *created after 1969, the critical date, are inadmissible as evidence of title — 1891 Convention's text does not establish the applicability of Article IV (the 4° 10′ line) to Pulau Ligitan and Pulau Sipadan — Article IV does not have one clearly expressed "ordinary meaning" within the terms of Article 31 of the Vienna Convention on the Law of Treaties — "Across Sibbitik" equally can be construed to mean "over and beyond" or "over but no further" — Vienna Convention in Article 31 refers Court to the "object and purpose" of a treaty as way to clarify ambiguous text — Parties' "object and purpose" was closure, to achieve certainty and finality — Collateral evidence of this object and purpose in Dutch map attached to Explanatory Memorandum and comments of Netherlands Minister van Dedem — British "object and purpose" to include territories south of 4° 10′ latitude also deducible from British Foreign Office Minute as well as lack of reaction to transmission of Dutch map by British Minister in The Hague, Sir Horace Rumbold — Commonsense confirms Parties could not have intended to exclude tiny islets from 1891 boundary settlement — Further confirmed by Parties granting oil exploration concessions in 1960s east of Sebatik that stop 30″ on either side of the 4° 10′ line — Court should confirm precedents making rebuttable presumption that a line to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety conduces to establishment of a precise, complete and definitive frontier.*

1. Introduction

1. The 1891 Convention between Britain and the Netherlands should have been determinative of this case. It established a line beginning at Broershoek on Borneo's east coast and continuing in an eastward direc-

tion along the 4° 10′ latitude. Pulau Ligitan and Pulau Sipadan clearly lie south of this line, on the Indonesian side.

2. Beyond that, little else is clear. This case presents the Court with a record full of ambiguities. That is no one's fault: it is the fate of history in obscure places. Pulau Ligitan and Pulau Sipadan, at least until recently, were not the stuff of which history is made.

3. To overcome that difficulty within the case's factual record, however, the Court need not have had recourse to conjectures about fragments of *effectivités* when it could, instead, have resorted to well-established presumptions of law that are applicable to the interpretation of the text and context of the 1891 Convention. More precisely, when, as frequently occurred, the evidence presented was unclear or indecisive, the Court could have applied rules of evidence to clarify not only the issues central to this case but also to elucidate — for these and for future litigants — the applicable principles by which the law shines a light on that which is unclear to the naked eye.

4. A presumption of law draws on the common experience to make a reasonable inference from what is known to what is unknowable. Such inferences are crystallized in well-known principles or legal maxims, such as *res ipsa loquitur*. Any rebuttable presumption can be contradicted by evidence demonstrating its opposite, or by application of a stronger evidentiary presumption such as the principle of absolute liability. In a sense, then, a rebuttable presumption shifts the onus of proof to the party seeking to disprove the deduction derived from it.

5. How is this relevant to the dispute over two tiny islands off Borneo? I believe that when two powerful States, with a history of both conflict and co-operation, negotiate a convention settling a long boundary in a distant theatre of their colonial interaction, then this Court should presume that the boundary was meant to cover all the area's potential points of conflict.

6. Instead, the Court has relied on a narrow parsing of *effectivités* that are (by its own admission) enveloped in ambiguity. I dissent, not because I think that reasonable judges could not have concluded as this Court has done, but, rather, because a visionary judiciary should have used the opportunity here presented to clarify the adjectival law of evidence — the presumptions — applicable to the interpretation of treaties intended to resolve territorial and jurisdictional conflict. The applicable presumption is straightforward: where a treaty specifies a boundary line or principle of territorial allocation, it should be interpreted as broadly as necessary to resolve any conflict of jurisdiction in the absence of clear evidence of a contrary intent. As I will seek to demonstrate in part 8 below, such a presumption accords both with common intuition and with judicial practice.

7. In terms of the present case, the line established by the 1891 Anglo-Dutch Convention at the eastern end of the agreement's subject-matter (the 4° 10′ line) should have been presumed to apply broadly to the entire area of the Parties' interface east of Sebatik, subject only to prevailing evidence to the contrary. The onus of proof, in other words, should have been held to rest with those seeking to rebut a presumption of completeness or closure. A treaty such as this one, resolving a vast area of potential conflict, is special. It seeks to transform a zone of conflict into a zone of peace. Its purpose requires not just deference but generosity. It is not to be construed by the gimlet eye as if it were a contract for the sale of barley.

8. Of course, this is a case about very small islands. But, that the subject-matter of the case is small does not mean that it does not afford the Court an auspicious occasion to clarify important law. The legal issues in this case are ones that have arisen in other, weightier, contexts and they will arise again in contexts more freighted than these. The Court's decision, alas, does not elucidate the applicable normative standards. Quite aside from which party wins a case, it is the international legal system which loses when the Court fails broadly to address the legal issues and, instead, focuses on deciding small questions of fact on ambiguous evidence, eliciting little that can be of value to the *corpus juris*.

2. The Role of the *Ad Hoc* Judge

9. Before adverting further to these matters, it seems in keeping with this preference for developing the *corpus juris* that I express myself regarding the appropriate role of the *ad hoc* judge. The subject has but rarely been canvassed by those occupying this unusual position. An exception is the separate opinion of Judge *ad hoc* Lauterpacht in the provisional measures phase of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993* (*I.C.J. Reports 1993*, pp. 408-409, paras. 4-6); see also Judge *ad hoc* Palmer, in his dissenting opinion in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995* (*I.C.J. Reports 1995*, pp. 420-421, para. 118). I subscribe entirely to Judge *ad hoc* Lauterpacht's useful analysis, the gist of which is that *ad hoc* judges, in accordance with their solemn declaration under Article 20 of the Statute, are bound to exercise their function impartially and conscientiously, while also discharging:

> "the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 409, para. 6).

As Judge *ad hoc* Nicolas Valticos has pointed out, the *ad hoc* judge is not simply a representative of the appointing State. Notably, one — Judge *ad hoc* Suzanne Bastid — has even disagreed on the merits with the position of the appointing States. (See Nicolas Valticos "L'évolution de la notion de juge *ad hoc*", *Revue hellénique de droit international (RHDI)*, Vol. 50, 1997, pp. 11-12; and Hubert Thierry, "Au sujet du juge *ad hoc*", *Liber Amicorum "In Memoriam" of Judge José María Ruda*, 2000, p. 285.)

10. The nub of the matter is this: the *ad hoc* judge must always ensure that the appointing State's arguments are fully addressed by the Court, whether or not they convince the majority of the judges. Between March 1948 (*Corfu Channel (United Kingdom* v. *Albania)*) and July 2002 (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*) there have been *ad hoc* judges in 45 cases and 53 phases of cases before this Court. Of these, 29 have written dissenting opinions, corresponding quite closely to the number of *ad hoc* judges appointed by losing parties. That, however, does not argue against the integrity of the institution of *ad hoc* judges. Rather, it demonstrates that, when a State is the losing party, the *ad hoc* judge it appointed has an even greater obligation to ensure that the Court's judgment accurately and fully reflects the careful consideration given by the Court to the losing State's representations. The drafting of the dissent attests to the richness of the Court's collegial deliberative process.

11. The function of the dissent, therefore, is multiple. It assures the losing party that its arguments, far from being overlooked, were considered extensively by the entire Court. It facilitates the reasoned and balanced exchange of research and written views among the judges during the deliberative process. And, perhaps, it presents to the law's universal market place of ideas certain principles of law and nuances of analysis which, even if not adopted in the instant case, may be of use in another, as yet unforeseen, context.

12. The *ad hoc* judge, like any other judge authoring a separate opinion, is accorded a sacred freedom. To be preserved, it must be used. As Judge *ad hoc* Bula-Bula has written, the *ad hoc*'s "traditional practice would seem to be characterized by its freedom" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judg-*

ment, I.C.J. Reports 2002, p. 100, para. 2, separate opinion of Judge *ad hoc* Bula-Bula). That freedom, of course, quite simply, is to write as one wills: to be the sole author of an opinion, unencumbered by a majority's need, sometimes, to find common ground through compromise and creative ambiguity.

3. The Principal Issues in Dispute

13. That the Court's Judgment leaves ambiguous the answers to some questions raised in this case is as apparent as that this may have been inevitable given the relative paucity of unambiguous controlling facts.

14. In my reading of the pleadings and the Court's Judgment it emerges that there are three principal points of contention:

(1) whether the 1891 Convention should be read to extend the 4° 10′ "boundary" line to allocate islands east of the east coast of Sebatik;

(2) whether, on the contrary, a "chain of title" exists which establishes sovereignty to Pulau Ligitan and Pulau Sipadan, successively, in the Sultan of Sulu who transferred it to Spain, which transferred it to the United States, which transferred it to Great Britain, which, ultimately, transferred it to Malaysia; and

(3) whether, if the answers to (1) and (2) are both in the negative, the two disputed islands' resultant, unresolved status *(terra nullius)* can be said to have been resolved in favour of either Party by reason of a preponderance of *effectivités* exercised by one or the other.

4. Assessing the Court's Answers

15. The Court answers both questions No. 1 and No. 2 in the negative: the 1891 Convention is held not to be applicable to Pulau Ligitan and Pulau Sipadan, and the Court finds no controlling "chain of title" leading to Malaysian sovereignty over the islands. It therefore relies on a relative weighing of the *effectivités* of the Parties to conclude that those of Britain and Malaysia are superior to those of Indonesia.

16. I will leave to the next section my grounds for disagreeing with the Court's response to question No. 1. I find myself fully in agreement with the Court in its response to question No. 2. For reasons set out precisely in the majority's opinion, I reject Malaysia's "chain of title" theory as unsupported by the events cited as demonstrative of it. It is unnecessary for me to restate the Court's conclusions in this regard, with which I wholly concur.

17. Question No. 3 I find difficult — and ultimately unnecessary — to answer categorically. I do not agree, but neither do I really disagree, with the Court in its weighing up of the *effectivités* adduced by Indonesia and Malaysia to support their respective claims of title. To weigh, on the one hand, occasional administration of turtle egg harvesting and of a bird sanctuary — neither of these, apparently, *in situ* — together with the establishment of a few navigational lights (by Britain/Malaysia) against, on the other hand, naval and air patrolling and piracy-control (by Indonesia) appears to me like trying to weigh precisely a handful of feathers against a handful of grass: it can be done, but not very convincingly. The Court has not set out a coherent table of weights and measures for assessing and comparing the *effectivités* here pleaded, nor could it be expected to do so, given their ephemeral nature. Nevertheless, it is not convincing to give preference to a very few activities by one party while discounting those of the other party without some effort to develop neutral principles by which the relative weight of their respective *effectivités* can be compared.

18. The problem of their comparative weight is augmented by the brevity of the period from which evidence of *effectivités* may properly be pleaded. There is no evidence before this Court that, prior to 1930, Britain believed itself to have title to either Ligitan or Sipadan. Whatever slender acts of administration might have been undertaken prior to that date by the British North Borneo Company were not claimed to have been made *à titre de souverain*. As Judge Huber said in the *Island of Palmas* case, the demonstration of *effectivités* must consist "in the actual display of State activities, such as belongs only to the territorial sovereign" (*Island of Palmas (Netherlands/United States of America), Award of 4 April 1928, Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 839). To qualify, they must be activities undertaken not as a good neighbour or a gratuitous intermeddler, but as an exercise of sovereign responsibility for the territory in question. The harvesting activities of fishermen were found not to constitute occupation *à titre de souverain* by this Court in the *Kasikili/Sedudu Island (Botswana/Namibia)* case (*Judgment, I.C.J. Reports 1999 (II)*, p. 1095, para. 75) and the same principle is applicable to turtle egg collectors. Similarly, the construction by Malaysia of lighthouses on Ligitan and Sipadan may or may not be evidence of occupation *à titre de souverain* when seen by itself, without reference to the 1891 Convention. Even so, the Arbitral Award of 9 October 1998 between Eritrea and Yemen stated: "The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty." (*Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October

1998, p. 91, para. 328; see also to same effect *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, pp. 70-71.)

19. This is especially so when, as in this case, the territory is the subject of a competing claim of sovereignty based on conventional title, against which mere *effectivités* have been held to be of little evidentiary value (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 472, para. 181; *ibid.*, p. 516, para. 266). As this Court has pointed out, "where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 587, para. 63). Moreover "acts . . . largely of a routine and administrative character performed by local officials . . ." were held insufficient in the *Sovereignty over Certain Frontier Land (Belgium/Netherlands)* case "to displace Belgian sovereignty established by. . . Convention" (*Judgment, I.C.J. Reports 1959*, p. 229). *Effectivités* are rubber spears when wielded against the shield of conventional title. In the present case, it is title under the 1891 Convention that Indonesia claims. Thus the minor *effectivités* presented by Britain and Malaysia depend for whatever persuasive power they may have on a determination that the 1891 Convention failed to resolve the question of title to Ligitan and Sipadan: a proposition I reject (see below).

20. By 1969, moreover, the window of opportunity for *effectivités* had closed. The Parties, in their status quo agreement (described by the Agent for Indonesia in CR 2002/27, pp. 16-17, paras. 13-18), in effect had determined the critical date by which new acts and facts could not be adduced to support the claim of either Party. Evidence of new *effectivités*, such as the establishment of a deep-sea diving resort, are inadmissible in evidence of Malaysian title.

21. If I were disposed to weigh the handful of Malaysian true *effectivités* against that of Indonesia, I could conceivably join the majority opinion on that count. But were I to agree with the Court — *arguendo* — that a few turtle eggs and signal lights do, indeed, have greater *gravitas* than the voyage of HNLMS *Lynx*, that would still not get me across to the other shore. In my opinion, these are token acts of no legal value. For *effectivités* to be weighed at all, they must not only be performed *à titre de souverain* but also upon *terra nullius* or, at least, upon territory whose title has not been dispositively determined. Both Malaysia and Indonesia have argued that at all relevant times, neither Ligitan nor Sipadan were *terra nullius*, and I agree with them. The one solid legal instrument before

this Court is the Convention of 20 June 1891 between Great Britain and the Netherlands. It is to that sturdy instrument I now turn. Against it, properly construed, an *effectivités*-based claim cannot stand.

5. The 1891 Convention

22. If the 1891 Convention between Britain and the Netherlands were applicable to Pulau Ligitan and Pulau Sipadan, that would be decisive in this case. Is it? It's Article IV establishes a line beginning at the east coast of Borneo at 4° 10′ latitude and proceeding in an easterly direction "across the Island of Sebittik . . .". What, crucially, is in dispute is whether the words of Article IV, in allocating to the British North Borneo Company the territory north of this line and "the portion south of that parallel to the Netherlands", intended it to stop at the east coast of "Sebittik" or to continue on its mission of allocation in an easterly direction. If the former, then the 1891 Convention would have nothing to say about title to Ligitan and Sipadan, thereby properly focusing the Court's attention on subsequent *effectivités*. If the latter, however, the Convention would allocate Ligitan and Sipadan to the Netherlands, thereby making recourse to subsequent *effectivités* irrelevant in the absence of evidence of Dutch abandonment of title.

23. What, then, if anything, does the 1891 Convention say about the two contested islands? Nothing at all. But that should not be an end to the Court's search for its meaning. More specifically, what adjectival law may be of help to the Court in its task of construing the Convention?

24. The first stop in any search for applicable legal principles to guide the Court is the Vienna Convention on the Law of Treaties. Article 31 of that instrument lays down the principle that the text of a treaty is to be understood in its "ordinary meaning" and "in the light of [the treaty's] object and purpose". It is acknowledged by the Parties and this Court that these two adjectival legal principles — requiring a search for the words "ordinary meaning" and the Convention's overall contextual "object and purpose" — must guide the Court.

6. The "Ordinary Meaning" Principle

25. First, then, the Court is obliged to give their "ordinary meaning" to Article IV's words. Key, here, is the phrase "across the Island of Sebit-

tik". While Malaysia has insisted, in effect, that these words must be read to imply the additional definite words "and no further", Indonesia has insisted that the phrase can be construed to imply the additional defining words "and beyond". Unfortunately, neither Party can demonstrate that the ordinary meaning of "across the Island of Sebittik" necessarily implies either the one clarifying phrase or the other. Quite simply, in ordinary usage, the word "across" can equally mean "over and beyond" or "over but no further". There is no one "ordinary" meaning. There are several. They are equally valid. Examine them as one will, they cannot resolve the riddle of Article IV's applicability to Ligitan and Sipadan.

7. The "Object and Purpose" Principle

26. That, however, cannot exhaust our search for meaning and intent. Article 31 of the Vienna Convention also alerts us to interpret treaties in accordance with their "object and purpose". To the same effect is the Decision of the Eritrea-Ethiopia Boundary Commission regarding *Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia* (13 April 2002, para. 3.4). The key provisions of the Vienna Convention had become the customary law of treaty interpretation.

27. While the text of the Convention is of little help in determining an "ordinary meaning", it is quite responsive to the quest for its "object and purpose". The 1891 Dutch-British Convention's preamble stipulates its purpose: that of "defining the boundaries between the Netherland[s] possessions in the Island of Borneo and the States in that island which are under British protection". Accordingly, the parties "resolved to conclude a Convention to that effect . . . for that purpose". The history of the negotiations leading up to the Convention make even clearer the largesse of this purpose. They wanted to solve, once and for all, the problems that could arise between adjacent imperial Powers. Could it have been that the parties, nevertheless, willingly left two islets, some 50 miles east — or, indeed, any other bits and pieces of their Borneo empire — to future disputation, regardless of what that might do to undermine the closure so evidently being sought? For it *was* closure the parties wanted. It was the object and purpose of their agreement. The presumption of a desire for closure was central to this Court's decision in the *Temple of Preah Vihear (Cambodia* v. *Thailand)* case, when it interpreted the French-Thai frontier settlement of 1904-1908 as intended "to achieve certainty and finality" in an area where, "very long frontiers" had been the "cause of uncertainty, trouble and friction" leading to "growing tension" (*Merits, Judgment, I.C.J. Reports 1962*, p. 34). Why has the Court

not presumed the 1891 Convention to have had the same object and purpose?

28. According to Malaysia, when the parties declare themselves to be: "Desirous of defining the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which are under British protection . . ." (Memorial of Malaysia, Vol. 1, p. 89, para. 8.7) they intended only that the Convention "was intended to be a land boundary treaty" (*ibid.*, para. 8.8) which, in the words of Article I of the 1891 Convention, would define only "The boundary between the Netherlands possessions in Borneo and those of the British-protected States in the same island . . ." *(ibid.)*. In Malaysia's view, the treaty's use of the designation "in Borneo" colours the entire project, making it exclusively a designation of British and Dutch possessions on that one giant island — with the exception of Sebatik, provided for specifically in Article IV — and not anywhere else in the vicinity.

29. Indonesia, to the contrary, claims that the parties, in drawing up the 1891 Convention, were "motivated by a wish to put an end once and for all to their territorial problems in the area" (Reply of Indonesia, Vol. 1, p. 16, para. 1.24 *(c)*). Therefore, the 4° 10′ line was chosen, starting at Broershoek and "continued eastward along that parallel" (Art. IV). This line, Indonesia asserts "passing to the north of Sipadan and Ligitan, established that [the parties intended that title to the two islands] belonged to [t]he Netherlands (. . . now to Indonesia)" (Reply of Indonesia, Vol. 1, p. 16, para. 1.24).

30. There is collateral evidence to support Indonesia's contention. It cites a British Foreign Office Minute that sets out a proposal for a compromise line which, albeit along latitude 4° and thus south of 4° 10′, is eastward to longitude 118° 44′ 30″, well east of Sipidan (but not Ligitan): the point being that the British, all along, were also thinking about an allocational line extending to territories in the sea east of Sebatik (Reply of Indonesia, Vol. 1, p. 21, para. 1.31; and p. 22, Map 1).

31. That the Dutch, certainly, were thinking about a line prolonged eastward beyond Sebatik is apparent from the map attached to the Explanatory Memorandum by means of which the Dutch Government requested ratification of the 1891 Convention by its Parliament (States-General) in compliance with the Netherlands Constitution and with Article VIII of the 1891 Convention. This map (Memorial of Indonesia, Vol. 1, p. 88, Map 5.2) shows the agreed 4° 10′ line extending well beyond Sebatik, although stopping west of Ligitan and Sipadan. Whether or not an acceptance of this extension of the 4° 10′ line is imputable to the British Government, on the ground that it knew of the map and did not object to it, will be discussed below. For present purposes it is relevant

simply to note that the map illustrates the Netherlands Government's belief that the 4° 10′ line was meant to extend further east than the eastern coast of Sebatik: that, in other words, to the Netherlands the term "across Sebbitik" in Article IV of the Convention implied "across and beyond" rather than "across and no further".

32. The British Government, moreover, did know what the Dutch were thinking. There is no disagreement between the Parties that the Dutch Government's Explanatory Memorandum and accompanying map was published and freely available, that through the ministrations of Sir Horace Rumbold, the British Minister at The Hague, it reached the British Government after being specifically commented upon by him as "the only interesting feature" of the Memorandum, and that it was duly filed without objection or comment. At a minimum, this seems to me to demonstrate that the British Government, like the Dutch, did not believe that the 4° 10′ line established by the 1891 Convention terminated at the east coast of Sebatik. Moreover, the British Government, closely observing the debates in the Dutch Parliament, may well have heard (or read) the Netherlands Minister for the Colonies, Mr. van Dedem's, public explanation to the First Chamber that the treaty was made to "prevent conflict" and regularize relations "both in Borneo itself and on the neighbouring smaller islands" (Memorial of Indonesia, Vol. 1, p. 94, para. 5.61; *ibid.*, n. 102). This cannot have been a surprising comment, given the context. Would it not have been much more surprising if Mr. van Dedem had explained that the Convention was intended to prevent conflict in Borneo *but not on the neighbouring small islands*?

33. These facts suggest the parties' "object and purpose" in entering into the 1891 Convention. That the Convention, in its preamble, speaks of "the island of Borneo" does not, to me, demonstrate, *a contrario*, that a treaty dealing with "Borneo" intended to exclude these minute islands situated a short distance (57.6 miles, in the case of Ligitan, the more distant of the two) east of Sebatik. Is it credible to infer that, had the parties in 1891 thought of Ligitan and Sipadan as possible future arenas of disputation, they would nevertheless deliberately have chosen to defer resolution of these potential irritants to another time and place? Would they have said to one another: "Let's see who most zealously guards against piracy on those islands, or who best administers the gathering of its turtle eggs?" In order to rebut the narrowest rendering of the 1891 Convention's preambular reference to an intent of the parties to fix their mutual boundary "in Borneo" is it realistic to insist that they should instead have stipulated "in Borneo, Ligitan and Sipadan"? Or even that they should at least have made a separate reference in Article IV to those tiny islands alongside the reference to the much larger and more strategically important island of Sebatik, risking an *inclusio unis est exclusio alterius* effect on other reefs and islets left unmentioned?

34. It has been argued that the intent of the Parties, and the object and purpose of the 1891 Convention, can be gleaned from the way the Parties subsequently dealt with Ligitan and Sipadan. This, however, is an arid record. The 1912 Boundary Commission began its work of demarcation in a westerly direction from the east coast of Sebatik, and this is what the map accompanying the 1915 Agreement shows. But what else does it demonstrate? The task of demarcation was to establish more precisely the land boundary between the Dutch and British possessions. To the east of Sebatik, there was no land boundary to be demarcated since the 4° 10′ line traversed no territory. Ligitan and Sipadan were south of that meridian and not traversed by it. In any event, since the 1891 Convention did not purport to apportion sovereignty over the adjacent seas east of Sebatik, and since the whereabouts of the 4° 10′ meridian was neither susceptible to, nor in need of, demarcation — being entirely an imaginary line over water — it proves nothing that the 1915 Agreement and map did not take that area into further account.

35. Something more substantial, as to the Parties' understanding of the import of the 1891 Convention, may be gleaned from their respective practice regarding the granting of oil exploration concessions. Here it is evident that, in the 1960s, both Malaysia and Indonesia thought that the 4° 10′ line extended to sea well east of Sebatik, for both States granted concessions up to, but not beyond, a point at sea precisely 30″ short of the 4° 10′ line. No other reasons have been proffered to explain this happenstance and, in their absence, the coincidence is highly suggestive. This Court has held that, while oil concessions cannot shift existing delimitations, "the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 448, para. 304). In the present instance, the behaviour of the Parties may well confirm their identical belief as to the vigour of the 4° 10′ line in the area east of Sebatik, a belief inconsistent with a Malaysian claim to the two disputed islands. The case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* similarly recognized the value of compatible concessions granted by disputants as evidence of their *de facto* agreement (*Judgment, I.C.J. Reports 1982*, p. 84, para. 117). It is a deduction that might well have found resonance in this decision.

8. The Presumption of the Conclusiveness and Completeness of Defined Frontiers

36. Still, the words of the 1891 Convention and the sparse evidence of the parties' object and purpose in entering into the treaty do not make

absolutely clear that the 4° 10′ line *was*, or *was not*, intended to extend beyond Sebatik as far east as Ligitan and Sipadan. What does emerge with some clarity is that the Netherlands entered the agreement in the belief that the 4° 10′ line extended east of Sebatik and that, early in the run-up to the negotiations leading to the Convention, the British also thought that the designated eastward line could extend east of Borneo beyond Sebatik.

37. We do not know, however, how far east the parties may have expected the line to extend. A probable explanation for the failure of either party to specify a terminal point for the 4° 10′ line is that they may have been uncertain as to where the effect of such a line would begin to trench upon Spanish (or Sulu) titles. While the Netherlands sovereignty clearly extended for many hundreds of miles southward of any designated eastward limit, the extent of British possessions northward of such a terminal point would have been far from clear in 1891. It may thus have appeared prudent to leave the eastern terminus of the 4° 10′ line indeterminate, since its length need not have affected actual British or Dutch jurisdiction but might unnecessarily have aroused Spanish (or Sulu) concerns. This, too, of course is pure speculation. Once again, all that we know for sure is that the Netherlands thought that the 1891 Convention established a line at 4° 10′ that did continue east of Sebatik and that the British knew of this and voiced no objection.

38. With so much being uncertain, this Court essentially had two divergent paths along which it could have proceeded. It could either have left the disposition of the matter to be settled by a weighing up of the few real *effectivités* claimed to have been conducted by each Party, or it could have enunciated a legal presumption by which to dispel the uncertainty created by the examination of the words, purpose and context of the 1891 Convention. It chose the former course, whereas I prefer the latter.

39. On its chosen path, the Court relies substantially on a weighing of the Parties' contending factual evidence of *effectivités*. As to this I can but observe once again that I find it unpersuasive: this weighing of a handful of feathers against a handful of grass. Moreover, the admissibility in evidence of these *effectivités* is contingent upon an absence of any legal title derived from a treaty. This was the conclusion of the Chamber of this Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case (*Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63). *Effectivités*, also in the present case, are of use only on the assumption of an absence of legal title.

40. If the 1891 Convention did confer legal title on one of the Parties, *effectivités* cannot override that title, absent evidence of its abandonment (*Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959*, pp. 227-230). But *does* the 1891 Convention

establish such title? We have already observed the ambiguities inherent in the text. What seems to me to have been demonstrated is that the treaty established a line, that the Dutch believed it to have continued eastward of the island of Sebatik, and that the British did not rebut that belief. The rest is speculation.

41. Did it extend so far eastward — at least to 119° east longitude — as to allocate to the Netherlands the title to two tiny islands lying just to the south of the 4° 10′ latitude? The ambiguities cannot be dispelled by grasping at the straws of even more ephemeral facts. The 1915 map could prove something but it could just as well prove nothing, given the limited mandate of the Commission which drew it. Other "facts" are equally open to opposing interpretations. Instead of focusing on these, the Court could — and in my opinion should — have endorsed an interpretative or adjectival principle of evidentiary law: the presumption first stated by the Permanent Court of International Justice in its 1925 Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*:

> "It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." (*1925, P.C.I.J., Series B, No. 12,* p. 20.)

As has been noted, Article IV of the 1891 Convention was "designed to fix a frontier" *(ibid.)*. The Convention certainly may "be so interpreted that the result of the application of its provisions in their entirety" *(ibid.)* conduces to "the establishment of a precise, complete and definitive frontier" *(ibid.)* across not only Borneo and Sebatik but also the adjacent spaces that could become *loci* of disputation. Why, then, not do so? This Court should have adopted the beneficial presumption that, absent strong evidence to the contrary, a treaty between two States to end territorial disputes and preclude disputation should be read in the way most likely to accomplish the presumed objective of obviating all such disputes as might arise between them.

42. As Judge Shahabuddeen pointed out in his separate opinion in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the colonial boundary treaty considered in that case "must . . . be construed so as to produce a comprehensive definition of the frontiers" (*Judgment, I.C.J. Reports 1994*, p. 44) unless there are "compelling reasons to the contrary" *(ibid.)*. Judge Shahabuddeen appropriately noted that this deductive evidentiary principle would not apply in "cases in which the adjoining areas are so extensive as to make it both practical and sensible for parties to agree a boundary for some particular sector only" (*ibid*, p. 49). The "adjoining area" of Ligitan and Sipadan, however, are distinctly not

"so extensive" as to have made a special agreement pertaining to them a "practical and sensible" option in 1891. Therefore, the treaty should have been construed as a comprehensive definition of the frontiers.

43. In the present case, this Court might have built on the *Lausanne* and *Preah Vihear* precedents to confirm the legal presumption in favour of the dispositiveness of frontiers defined in a treaty, i.e., that, when a treaty is made for the purpose of defining a boundary, it should be construed, *if possible*, to have succeeded in doing so to the full extent of the interface between the parties, unless there is persuasive evidence that some areas were meant to be exempt from its allocation. The onus of proving the intent to create such an exemption, however, should lie with the party asserting it.

44. Presumptions are necessary and well-established aspects both of common and civil law and cannot but be a part of the fabric of public international law. They capture the common experience of persons everywhere that make inferences an essential part of rational thought and action. As such, they are often captured in legal maxims recognized across diverse legal systems (Henri Roland, Laurent Boyer, *Adages du droit français*, 3rd ed., 1992, p. 38; and see examples indexed under the title *"Présomption"* at p. 1009.) As Professor Bin Cheng has pointed out:

> "Without going so far as to holding them to be true, it is legitimate for a tribunal to presume the truth of certain facts or of a certain state of affairs, leaving it to the party alleging the contrary to establish its contention. These presumptions serve as initial premises of legal reasoning." (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, p. 304.)
>
> "In general, it may be said that what is normal, customary or the more probable is presumed, and that anything to the contrary has to be proved by the party alleging it." (*Ibid.*, p. 306).

The same point, citing various instances, is made by Professor Thirlway:

> "presumptions can and do play an important part in directing the reasoning of a tribunal . . . in the delicate operation of ascertainment of the intention of one or more States . . . This results from the fact that direct circumstantial evidence of an intention may be very hard to come by, or may in the nature of things not exist." (H. W. A. Thirlway, "Evidence before International Courts and Tribunals", in *Encyclopedia of Public International Law*, Vol. Two, 1995, p. 303.)

45. In the present case, there is circumstantial evidence that the Parties thought they were resolving all the territorial problems arising out of their overlapping imperial claims in the Borneo area. Even were that evidence inconclusive, it is surely sufficient to invoke the rebuttable pre-

sumption, based on the common sense and experience of diplomacy and recognized by several international tribunals, to the effect that when States negotiate a boundary allocating or confirming their respective areas of sovereignty over territories, these shall be presumed to have intended to resolve all outstanding and potentially disputatious claims in the area in question, subject only to convincing evidence to the contrary.

46. If the Court had applied this legal presumption to the Indonesia-Malaysia dispute, it would have concluded, as I do, that the 1891 Convention intended Ligitan and Sipadan to be Dutch and, now, Indonesian.

47. I respectfully dissent.

(Signed) Thomas FRANCK.