

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING SOVEREIGNTY OVER
PULAU LIGITAN AND PULAU SIPADAN**

INDONESIA/MALAYSIA

**MEMORIAL OF
MALAYSIA**

VOLUME 1

2 NOVEMBER 1999

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PART ONE

Chapter 1

INTRODUCTION

1.1. This is the Memorial of the Government of Malaysia (hereinafter called “Malaysia”) filed pursuant to the Order of the Court made on 10 November 1998.

1.2. The case comes before the Court by virtue of a Special Agreement concluded between Indonesia and Malaysia on 31 May 1997. Instruments of ratification were exchanged on 14 May 1998 and the Special Agreement entered into force on that date.¹ The Special Agreement was registered with the United Nations on 29 July 1998 and was notified to the Registrar of the Court on 2 November 1998.

1.3. The Special Agreement places before the Court a dispute between the Parties relating to sovereignty over two islands, Ligitan and Sipadan, lying a short distance south of the Semporna Peninsula off the north-east coast of the island of Borneo. The question submitted to the Court is as follows:

“Article 2. Subject of the Litigation

The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia or to the Republic of Indonesia.”

The Parties have agreed in Article 4 that:

“The principles and rules of international law applicable to the dispute shall be those recognised in the provisions of Article 38 of the Statute of the Court.”

¹ Annexes, vol. 2, annex MM33.

Chapter 2

THE CORE OF MALAYSIA'S CASE AND THE SCHEME OF THE PRESENT MEMORIAL

A. Overview of the Dispute and the Positions of the Parties

2.1. The present case involves sovereignty over two small islands, Ligitan and Sipadan within the State of Sabah, a constituent part of Malaysia. The two islands are, and for many years have been, in the possession and subject to the administration of Malaysia and of its predecessors in title. Those predecessors in title were, from 1878, the British North Borneo Company (hereinafter "the Company"), which in 1889 came under the protection of Great Britain (hereinafter "Britain") and then Britain itself, after it had changed the status of North Borneo from a protectorate to a colony in 1946. (In the period from 1889-1946, the territory now known as Sabah was officially referred to as the State of North Borneo.)

2.2. The reason for this long and uninterrupted possession and administration of the islands, to the exclusion of Indonesia and its predecessors, is not far to seek. The fact is that a series of agreements, made with States which at one time or another had interests in the area, establish and confirm Malaysia's sovereignty over the islands. In particular, Malaysia can show that, in addition to possessing and administering the islands in the locality appurtenant to the east coast of North Borneo, it has acquired sovereignty over them, as a result of the following series of transactions:

In 1878: A grant to North Borneo by the Sultan of Sulu of certain territory and islands, on the basis of which North Borneo administered Ligitan and Sipadan;

In 1885: The relinquishment by Spain, in its capacity as sovereign of the Sultanate of Sulu, through a treaty with Britain, of any claim to the territory of North Borneo and adjacent islands;

- In 1907:** Agreement by the United States (after it had acquired sovereignty over the Spanish territories, including Sulu) to North Borneo's continued administration of certain islands not covered by the 1878 grant, including Ligitan and Sipadan;
- In 1930:** Cession by the United States to Britain of the islands administered by North Borneo under the Agreement of 1907.

These transactions were open and public at the time.¹ The evidence shows that the Netherlands accepted that the islands concerned were part of the dominions of Sulu in the period before 1878, and that it did nothing thereafter to challenge the transactions between Spain and Britain, and later between the United States and Britain, in relation to the islands.

2.3. This being so, Malaysia's sovereignty over the islands is clearly established. But in any event, even if — hypothetically — those transactions had never occurred, the *fact* of long and peaceful possession and administration dating from as long ago as 1878 and unchallenged by any opposing conduct of Indonesia or its predecessor in title, the Netherlands, must be decisive. That fact, even if it stood alone, would be a quite sufficient basis for upholding Malaysia's sovereignty over the islands as against Indonesia.²

2.4. The present dispute arose in 1969 when, in the course of discussions between Malaysia and Indonesia over their respective maritime boundaries off the east coast of Borneo, Indonesia for the first time asserted a claim to Ligitan and Sipadan. As a result, the Parties were only able to agree on a partial maritime delimitation, not covering the waters to the east of Borneo.³

2.5. The present Indonesian claim was never advanced by the Netherlands itself. As thus far made known to Malaysia, it is based on Indonesia's interpretation of the language of Article IV of the Boundary Treaty of 20 June 1891 between the Netherlands and Britain (hereinafter "the 1891 Boundary Treaty").⁴ That Treaty had

¹ For details of these transactions see below, Chapter 5.

² For details of these acts of administration see below, Chapter 6.

³ For the Agreement of 27 October 1969, see Annexes, vol. 2, Annex MM 32. See further below, paragraph 4.4.

⁴ See Annexes, vol. 2, Annex MM 17.

the express purpose of delimiting the land boundary between North Borneo (which is now the Malaysian State of Sabah) and the Dutch territories on Borneo (which is now the Indonesian territory of Kalimantan). Indonesia argues that, in addition to its expressed purpose of delimiting the land boundary, Article IV of the 1891 Treaty also allocated to the Netherlands two North Borneo islands, located more than 40 nautical miles away from the nearest Dutch possessions. These islands, Ligitan and Sipadan, are the subject of this dispute.

2.6. The land boundary delimited by the 1891 Treaty can be seen from the Sketch Map, **Insert 1** on page 5, which also shows the location of the offshore islands adjacent to the coast of the Dutch territory on Borneo (Sebatik, Nunukan, Tarakan, etc.). Ligitan and Sipadan are located considerably further to the east, adjacent to the coast of North Borneo. The same features also appear in the first official Dutch map of the area published after the 1891 Boundary Treaty. That map was published by the Netherlands Indies Topographical Office in Batavia in 1913,⁵ and part of it, in reduced form, appears as **Insert 2** on page 6.

2.7. Article I of the 1891 Treaty prescribed that the boundary “shall start from 4° 10' north latitude on the east coast of Borneo” and proceed in a westerly direction along a described course. However, because an island, Sebatik, lies off the coast of Borneo just east of the starting point of the boundary on the mainland, Article IV of the Treaty provided as follows:

“From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the island of Sebatik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands.”

⁵ See Annexes, vol. 5, Map 1.

2.8. In the course of diplomatic discussions since 1969, Indonesia made the following arguments: (a) that the boundary along the 4° 10' N parallel drawn by Article IV should be extended into and over the sea eastwards of Sebatik; (b) that any islands to the south of that parallel were accordingly Dutch, not British, after 1891; and (c) that these now belonged to Indonesia and not Malaysia, irrespective of their subsequent administration or of any subsequent dealings with them. Indonesia relied in particular on a Dutch map, prepared by the Netherlands immediately after the conclusion of the Treaty for internal use.⁶ That map showed the 4° 10' N parallel extending some way to the east of Sebatik. Malaysia rejected that interpretation of Article IV, as well as the argument based on the internal Dutch map. It continues to do so today.

2.9. In short, as Malaysia sees the matter, there are at present only two issues before the Court: (i) the confirmation of Malaysia's sovereignty over the islands based upon long and effective possession and administration, and on treaties with the other interested States (Spain and the United States); and (ii) the rejection of Indonesia's claim based upon its interpretation of the 1891 Boundary Treaty and on the internal Dutch map.

2.10. It is no doubt possible that Indonesia may present its case in such a way as to broaden the scope of the argument. Malaysia reserves the right to respond to any such new developments in its Counter-Memorial.

B. The Scheme of Malaysia's Memorial

2.11. The scheme of this **Volume 1** is as follows. In the rest of this **Part One**, Malaysia will briefly describe the geographical setting of this dispute (Chapter 3), and will give a brief account of its diplomatic history (Chapter 4). It will then, in **Part Two**, analyze the transactions by which its administration of and title to the islands were recognized (Chapter 5), and will show that its title has been accompanied, and is evidenced, by long and peaceful possession and administration (Chapter 6). That long and peaceful possession and administration will be contrasted with Netherlands and Indonesian inactivity in relation to the Islands (Chapter 7). In **Part Three**, Malaysia will show that the Indonesian claim is not supported either

⁶ See Annexes, vol. 5, Map 2.

by the 1891 Treaty itself (Chapter 8), or by the subsequent processes of ratification and implementation of the Treaty and demarcation of the boundary it established (Chapter 9). Finally, in **Part Four**, Malaysia will review the map evidence, and will show that taken as a whole it too strongly supports Malaysia's title (Chapter 10). The Memorial concludes with Malaysia's submissions.

2.12. Attached to this volume are 4 volumes of annexes:

Volume 2 is the Treaty Annex, setting out in chronological order relevant treaties, agreements, grants and other instruments.

Volume 3 sets out in chronological order relevant diplomatic and other documents.

Volume 4 sets out the documentary evidence of North Borneo, British and Malaysian administration of the islands since the late nineteenth century, also in chronological order.⁷

Volume 5 is the Map Annex, reproducing relevant maps.

⁷ There exists substantial literature dealing with the relations of Borneo and Sulu in the nineteenth century, the administration of North Borneo (including the off-shore islands) after 1878, and with the Dutch administration of Kalimantan. In this Memorial, Malaysia will refer exclusively to the primary documents and contemporary records and journals. However the story told in these various secondary sources corroborates and supports the argument of this Memorial. Nowhere in the secondary literature is it suggested that the disputed islands, or any other part of North Borneo, was subject to Dutch sovereignty or was under the control of the Sultan of Bulungan (from whom the Dutch Government derived its claim to the east coast of Borneo). See, in particular:

Belcher, E, *Narrative of the Voyage of HMS Samarang during the years 1843-46* (2 vols, London, 1848);

Black, Ian, *A Gambling Style of Government: The Establishment of Chartered Company's Rule in Sabah, 1878-1915* (Kuala Lumpur: OUP, 1983);

Black, Ian, *Native Administration by the British North Borneo Chartered Company, 1878-1915* (Ph.D. thesis, ANU, 1970).

Hunt, J, "Some Particulars Relating to Sulo, in the Archipelago Felicia", in Moor, JH (ed), *Notices of the Indian Archipelago and Adjacent Countries* (London: Cass, 1968) (first published 1837), Appendix, pp.31-60;

Irwin, G, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry* (The Hague, Martinus Nijhoff, 1955);

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- Majul, CA, "Political and Historical Notes on the Old Sulu Sultanate" (1965) 38 *J Malaysian Branch Royal Asiatic Society* 23-42;
- Martin, H, *De Engelschen en de Nederlanders in den Indischen Archipel met terugzigt op eene besproken vestiging der Belgen op Borneo* (Amsterdam, G. Theod. Bom, 1866);
- Maxwell, WG & Gibson, WS, *Treaties and Engagements affecting the Malay States and Borneo* (London, 1924);
- Paulus, J (ed.), *Encyclopaedia van Nederlands-Indië* (s-Gravenhage/Leiden: Nijhoff/Brill, 2nd. ed., 1917);
- Pryer, WB, "Notes on Northeastern Borneo and the Sulu Islands" (1883) 5 *RGS Procs* 91;
- Pryer, WB, "On the Natives of British North Borneo" (1887) 16 *J Royal Anthropol Inst* 229-36;
- Resink, GJ, *Indonesia's History between the Myths. Essays in Legal History and Historical Theory* (The Hague, Van Hoeve, 1968);
- Reynolds, John Keith, *Towards an Account of Sulu and its Borneo Dependencies 1700-1878* (MA Thesis, University of Wisconsin, 1970).
- Rutter, O, *British North Borneo: an account of its history, resources and native tribes* (London, 1922);
- Saleeby, NM, *The History of Sulu* (Manila, 1908, reprinted 1963);
- Sather, C, "Sulu's Political Jurisdiction over the Bajau Laut" (1971) 3 (2) *Borneo Research Bulletin* 58-62.
- Sather, Clifford, *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-eastern Sabah* (Oxford University Press, Kuala Lumpur, 1997);
- Tarling, Nicholas, *Sulu and Sabah. A Study of British policy towards the Philippines and North Borneo from the late eighteenth century* (Oxford University Press, Kuala Lumpur, 1978);
- Tregonning, KG, *Under Chartered Company Rule: North Borneo, 1881-1946* (Singapore: University of Malaya Press, 1958);
- von Dewall, H, "Aanteekingen Omtrent de Noordoostkust van Borneo" in (1855) 4 *Tijdschrift voor Indische Taal-, Land- en Volkenkunde* 423-458;
- Warren, James F, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909. The Pacification of a Maritime, Nomadic People* (Athens: Ohio University Centre for International Studies, Papers in International Studies, Southeast Asia Series No. 22, 1971);
- Warren, JF, "The Sulu Zone: Commerce and the Evolution of a Multi-ethnic Polity, 1768-1898" (1979) 18 *Archipel* 133-68;
- Warren, JF, *The Sulu Zone, 1768-1898* (Singapore: Singapore University Press, 1981);
- Willi, J, *The Early Relations of England with Borneo to 1805* (Berne, Langensalza, 1922);
- Wright, LR, *The Origins of British Borneo* (Hong Kong University Press, Hong Kong, 1970, reprinted 1988).

Chapter 3

THE GEOGRAPHICAL SETTING

A. The Macro-geographical Setting

3.1. The territories of Malaysia fall into two main geographical areas: the Malay peninsula and the northern part of the island of Borneo, extending from the west to the east coast. Associated with each of those areas are many offshore islands. So far as the east coast of Borneo is concerned, all these islands are well known, have names and are described in authoritative sailing guides and pilots. They are also shown on maps of the 18th and 19th century, with names which are for the most part the same as or similar to the names they have today. Even those islands which were not permanently inhabited were visited by fishermen and others and their resources harvested (whether in the form of forest products, coconuts, shellfish or turtle eggs) throughout the period for which records exist. They have long been subject to administrative control by Malaysia and its predecessors in title. There can be no suggestion that any one of them is, or at any relevant time was, *terra nullius*.

3.2. Indonesia is an archipelago consisting of thousands of islands of varying sizes of which the principal ones are Java, Sumatra, Sulawesi (the Celebes), Maluku (the Moluccas) and Irian Jaya. Indonesia also includes the southern part of the island of Borneo, under the name of Kalimantan.

3.3. All boundaries between the two parties are maritime boundaries, with the exception of the boundary on the main island of Borneo and the adjacent island of Sebatik. Here the boundary was laid down by their respective predecessors in title, Britain and the Netherlands, by the 1891 Boundary Treaty.¹ The boundary was formally demarcated by a further treaty of 1915.²

¹ Annexes, vol. 2, annex MM 17.

² Annexes, vol. 2, annex MM 27. It was later amended in relation to an area on the western part of Borneo (not relevant to the present case) by a treaty of 1928 (Annexes, vol. 2, annex MM 28).

3.4. To the north and east of the large island of Borneo are many small islands stretching in the direction of the Philippines across the Sulu Sea and the Celebes Sea. A particular feature of the region to the east is the chain of islands still known as the Sulu Archipelago. Its main town of Jolo was, from the eighteenth until the early twentieth century, the seat of the Sultan of Sulu who held sway over these islands and many others in the surrounding seas, up to and including the north-east coast of Borneo itself.

B. The Micro-geographical Setting

3.5. The north-east coast of Borneo consists of a series of bays and indentations interspersed with peninsulas, with associated offshore islands.³ These bays and indentations include, from the north, Teluk Paitan (known as Paitan Bay in the British period), Teluk Labuk (Labuk Bay), Sandakan Harbour, Teluk Lahad Datu (Darvel Bay), and, south of the Semporna Peninsula, Sibuko Bay, a large bay formerly known as St. Lucia Bay. Within Sibuko Bay and north of the island of Sebatik is Teluk Tawau (Cowie Bay). The north shoreline of Cowie Bay is the site of Tawau (Tawao), the local administrative centre and, slightly to the east of it, Batu Tinagat. Sailing east from the island of Sebatik itself, there is nothing but open sea with some shoals until, 30 n.m. away, is encountered Terumbu Ligitan (Ligitan Reefs). Sipadan and Ligitan are respectively 8.2 n.m. and 19.5 n.m. further to the south-east of Terumbu Ligitan.

3.6. These various features, islands and places are shown on the sketch map which is **Insert 3**, opposite. Identified on that map are a number of locations to which reference will be made in this Memorial: these include Lahad Datu, Semporna, Danawan and Si Amil, Ligitan itself, Omdal and Sipadan.

3.7. In the nineteenth and twentieth century, the islands and reefs along the north-east coast of Borneo have been inhabited and used by the Bajaus, otherwise known as Bajau Laut or Sea Gypsies. They lived mostly in boats, or in settlements of stilt houses above water, and indeed many still do. There is a large settlement in Trusan Treacher, near Semporna, the result of the resettlement efforts of the Company after 1906 (described in Chapter 6). The Bajaus have their

³ In this Memorial, Pulau Ligitan and Pulau Sipadan will be referred to simply as Ligitan and Sipadan. The word *Pulau* (abbreviation: P.) is Malay for island.

own language (Sama or Samal). Their occupation at times relevant to the present case was mostly fishing and the collection of forest products. They were a key part of the “procurement system” operated from Sulu until the 1880s, whereby goods such as edible birds nests, trepang (bêche-de-mer), rattan etc. were collected by them and traded through the port of Jolo, especially with China. The role of Jolo was largely taken over by the trading centre of Semporna after its establishment by the Company in 1887. The local leaders, who were often Sulu, were appointed by the Sultan of Sulu, and given such titles as Panglima, Datu, Temengong, etc. The Company assumed that prerogative after 1878 and confirmed in office or subsequently appointed a number of local leaders who had previously held office under the Sultan. The names of some of the indigenous leaders are contained in a table, taken from J.F. Warren, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909. The Pacification of a Maritime, Nomadic People*, which is reproduced in Annexes, vol. 4, annex MM 90.⁴ The area around Semporna inhabited by the Bajaus and administered by the Company is shown by Warren in the map reproduced as **Insert 4** on page 14.

3.8. In 1903 the *British North Borneo Herald* published an interesting account of the Bajau cemetery on Omadal, referring also to the Bajau settlements at Silam, Danawan, and Semporna.⁵ As will be seen in Chapter 6, Bajaus from Danawan have long held the license to collect turtle eggs on Sipadan, granted initially by the Sultan of Sulu and subsequently recognized by North Borneo.

(i) **Ligitan**

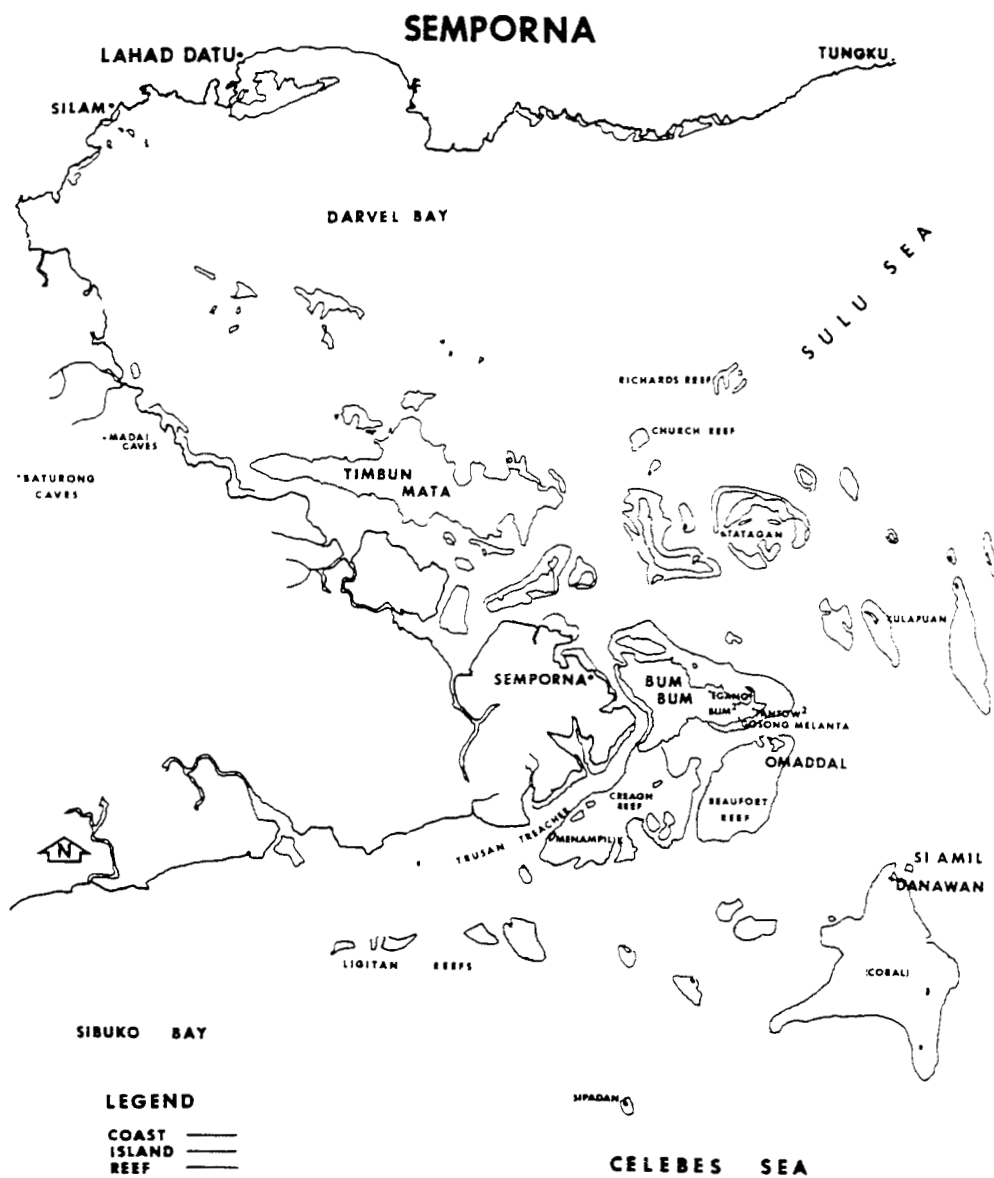
3.9. Ligitan is the southern extremity of an extensive star-shaped reef that extends southward from Danawan and Si Amil Islands,

⁴ Athens: Ohio University Centre for International Studies, Papers in International Studies, Southeast Asia Series No. 22, 1971, pp. 111-112. A more recent anthropological account of the Bajau, also valuable, is C. Sather, *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-eastern Sabah* (Oxford University Press, Kuala Lumpur, 1997). Copies of the works by Warren and Sather have been lodged with the Court.

⁵ See Annexes, vol. 4, annex MM 88. For a photograph of the cemetery see page 26.

Insert 4

Map of the Semporna District



Source: Warren, James F, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909. The Pacification of a Maritime, Nomadic People* (Athens: Ohio University Centre for International Studies, Papers in International Studies, Southeast Asia Series No. 22, 1971), p. 11.

which are respectively 8.6 n.m. and 8.9 n.m. north of Ligitan. The islands which form part of the reef structure are often referred to on charts as the Ligitan Group: the Bajaus living on Danawan and Si Amil made use of the whole reef area for fishing, and of Ligitan itself for drying fish and other purposes. Ligitan lies about 21.5 n.m. south east of the nearest point on the coast (the foothill of Hood Hill), and about 15.5 n.m. east of Sipadan. Most of the reef is submerged, though it shows dry patches in irregular shapes of between 0.3 and 1.2m in height. In 1903 the island was described in a United States naval report as follows:

“This island is inaccessible to all except small boats owing to its distance from the edge of the reef on which it stands. It is uninhabited and covered with scrub bush and a few trees of no value.”⁶

At the northern tip of the reef, Danawan lies approximately 15.5 n.m. southeast of the Semporna peninsula. Nearby, about 0.5 n.m. to the north-east of Danawan, there is a separate island, Si Amil, on which there is a lighthouse operated by Malaysia. There is also a lighthouse operated by Malaysia on Ligitan itself: its coordinates are 4° 09' 48" N, 118° 53' 04" E.

3.10. Ligitan is covered in rocks, wild grass and trees called bilang-bilang. It is not permanently inhabited, but until very recently there were a number of huts on stilts which were intermittently occupied. The island is often used to dry fish. Ligitan's name originates in the fact that in Bajau “Ligit” means thorns; thus the words “Pulau Ligitan” mean “island of thorns”.

3.11. A satellite image of Ligitan, showing its relation to the star-shaped reef and to Sipadan, is shown as **Insert 5** on page 16.

(ii) Sipadan

3.12. The island of Sipadan lies at lat. 4° 06' 39" N and long. 118° 37' 56" E. It is 14.8 n.m. from the nearest point on the coast (Tanjung Tutop) and 42.0 n.m. to the east of the island of Sebatik. The general direction of the closest mainland coast line in Sibuko Bay is eastwards along the Semporna peninsula, terminating at Pantau at the

⁶ See Annexes, vol. 3, annex MM 63.

eastern end of Bum Bum Island. Sipadan is 42.0 n.m. from the island of Sebatik; the nearest Indonesian island (Pulau Ahus) is 51.2 n.m. away. Sipadan is neither geographically, ethnographically nor economically associated with any part of Indonesia.

3.13. The following entry appears in the seventh edition of the *Eastern Archipelago Pilot* (1963):

“Sipadan island (Lat. 4° 07' N, Long. 118° 38' E), 7½ miles southward of Mabul island, is wooded, and 165 feet (50m³) high to the tops of the trees; it lies on the north-western side of a reef which is steep-to. Turtle frequent the island in considerable numbers. A light is exhibited, at an elevation of 80 feet (24 m.), from a white metal framework tower 72 feet (21 m.) in height near the southern extremity of Sipadan island.”⁷

3.14. The name “Sipadan” apparently derived from the fact that a body of one “Paran” was found on the shore of the island. The prefix “Si” means “Mr” and so the island came to be called “Siparan” and, in due course, “Sipadan”.⁸ In the description by Hunt given in 1837, the author refers to the coast of the Bay of Giong (later renamed Darvel Bay) and states that the island of “*Pulo Giya*, off this coast, abounds with deer, & *Separan* with abundance of green turtle”.⁹

3.15. In a United States naval report of 1903 Sipadan was described as follows:

“This island is densely wooded with tall timber and is the resort of many turtles. There is no water and it is, in consequence, uninhabited. It may be approached from the Northwest but there is no anchorage.”¹⁰

3.16. Sipadan is the oval-shaped peak of a seamount which rises abruptly from a depth of about 600m. It has a low profile and a sandy beach. The whole structure may be likened to a mushroom of which

⁷ *Eastern Archipelago Pilot*, vol. I, 7th ed., (1963) p. 189. The term “steep-to” refers to the fact that the island drops steeply into deep water from the narrow fringing reef.

⁸ See the deposition of Haji Tilaran Abdul Majid, the son of Panglima Abu Sari, 23 January 1975: Annexes, vol. 4, annex MM 117, para. (11).

⁹ Annexes, vol. 3, annex MM 34.

¹⁰ Annexes, vol. 3, annex MM 63; and see below, paragraph 5.28.

the stem stands on the seabed and the cap protrudes only a few metres above the surface. The outer edge of the cap is only about 30 metres from the low water line.

3.17. Sipadan was originally covered with thick jungle until the time Panglima Abu Sari planted some coconut trees and some maize.¹¹ A well was dug on the island by Panglima Johan and Panglima Nujum to provide fresh water on the occasions that they spent nights on the island to collect turtle eggs. They also built a semi-permanent wooden hut.¹²

3.18. Sipadan is part of the administrative district of Semporna in Malaysia: earlier it was part of the district of Lahad Datu.¹³ Neither the Netherlands nor Indonesia has ever exercised any authority over it. The situation is fully set out in Chapter 6 below.

3.19. Because of its unusual structure and unspoiled coral, Sipadan is a very popular tourist centre, especially for scuba divers.¹⁴ This diving activity led to the development on the island of a number of diving establishments and chalets. At its height there were 191 regular residents on the island (none of whom were Indonesian); the number has now been substantially reduced in order to protect the island from over-exploitation. The chalets and diving companies are registered with the Registrar of Companies, Domestic Trade and Consumer Affairs Ministry, Sabah, with the exception of Pulau Bajau Resort which is registered with the Semporna District Council. About 100 visitors are present on the island on any given day. Over the past 15 years, 115,053 tourists, mostly foreign, have visited the island.

3.20. The nearest inhabited island is Mabul, some 8 n.m. to the north of Sipadan. About 90 people work at the hotel complex called Sipadan Water Village which was built in 1994. In addition there is

¹¹ See the deposition of Haji Tilaran Abdul Majid, 23 January 1975: Annexes, vol. 4, annex MM 117, para. (12).

¹² See the deposition of Panglima Nujum, 24 January 1975: Annexes, vol. 4, annex MM 118 para. (9). For the eventual fate of the hut see the Sabah High Court judgment of 28 April 1995: Annexes, vol. 4, annex MM 122.

¹³ See Administrative Divisions Proclamation 1982, General Notification of Sabah No. 7 of 1982: Annexes, vol. 4, annex MM 121.

¹⁴ For a photographic guide to Sipadan and its marine life, see MP Wong, *Sipadan. Borneo's Underwater Paradise* (Odyssey Publishing, Singapore, 1991). Copies of this book have been deposited with the Court.

a settlement of about 1,000 people. Some are of Sulu and Philippine origin who are now resident on the island. Many of them live in structures built on poles. There are about 40 sea Bajaus, who live mainly in boats moored within a few metres of the shore and live by fishing. A selection of photographs of these various features follows at the end of this Chapter.

3.21. Sipadan is part of a group of small islands comprising Mabul, Omadal, Kapalai, Danawan, Si Amil, Ligitan and Sipadan. In the first edition of the *Eastern Archipelago Pilot*, published in 1890, it is described as “the southernmost of the group”, immediately following a description of Si Amil, Danawan and Ligitan and before the brief mention of Mabul.¹⁵ The geographical closeness of these islands has led to constant movement between them all. The extent to which these islands were closely interconnected in the subsistence economy of those who lived there (principally fishing and turtle egg collection) is vividly shown in the affidavits attached as Annexes, vol. 4, annexes MM 116 - MM 120. Thus Haji Tilaran in his affidavit of 23 January 1975 referred to the fact that his father, Panglima Abu Sari, was made Chief of Pulau Danawan by the Sultan of Sulu and that the islands under his control and jurisdiction were Ligitan, Si Amil, Kapalai and Sipadan.¹⁶ Panglima Abu Sari was responsible for controlling the collection of turtle eggs on Sipadan and for control of the fisheries in the waters around the islands. Further details of turtle collection and associated activities on Pulau Sipadan are set out in Chapter 6.

3.22. The location of Ligitan and Sipadan, and their relation to the other places mentioned here, can be seen from the satellite image of the region, which is **Insert 6** on page 20.

¹⁵ JP Maclear (comp.), *Eastern Archipelago, Part I (Eastern Part)* (Hydrographic Office of the Admiralty, London, 1890) p. 188.

¹⁶ Deposition of Haji Tilaran Abdul Majid, 23 January 1975: Annexes, vol. 4, annex MM 117, para. (5).

Chapter 4

THE DIPLOMATIC HISTORY OF THE DISPUTE BETWEEN INDONESIA AND MALAYSIA

4.1. Many territorial and boundary disputes have a long history of diplomatic negotiations before being referred to judicial or arbitral settlement. By contrast the diplomatic background to the Special Agreement of 1997 is relatively brief.

4.2. As will be seen in more detail in Chapter 5, the islands of Ligitan and Sipadan have during the last two centuries been under the sovereignty, first, of the Sultan of Sulu, then of Spain, then of the United States, then of Great Britain and now of Malaysia. From 1878 onwards, the only polity to exercise actual jurisdiction or control over the two islands was North Borneo and its successors in title. At no time during that period was any adverse claim made to the now-disputed islands by Indonesia or its predecessor in title, the Netherlands or the Sultan of Bulungan. No public governmental act or act of sovereignty was carried out on or in relation to the islands by the Netherlands or Indonesia. No native ruler on the east coast of Borneo, other than the Sultan of Sulu, ever laid claim to Ligitan or Sipadan as part of his possessions.

4.3. Until 1969, therefore, the effective possession and administration of the islands by Britain and then by Malaysia had remained unquestioned by Indonesia and its predecessor in title, the Netherlands. Only when the parties commenced negotiations in 1969 for the purpose of delimiting their respective areas of continental shelf did Indonesia for the first time advance a claim to the islands.

4.4. Following those negotiations, a delimitation agreement was concluded on 27 October 1969. It entered into force on 7 November 1969. But by reason of the disagreement that then arose over the two islands, the maritime area it covered did not extend to the area lying to the east of Borneo.¹ An exchange of notes took place on 22

¹ See Annexes, vol. 2, annex MM 32.

September 1969, after the Agreement had been initialled but before it was signed, in which both States recorded their “understanding that both the negotiations and the Agreement are purely and wholly of a technical nature”.²

4.5. Subsequently there have been exchanges of diplomatic correspondence between the Parties. However, they do not affect the legal issues now before the Court, and Malaysia does not propose to burden the Court with a mere recitation of their content.

4.6. In October 1991, the two Parties agreed to establish a Joint Working Group on the position of the islands. This Group held several meetings in the period 1992-1994, exchanging written memoranda and documentation. However, no agreement was reached, and eventually the matter was referred to special envoys of the two sides. In June 1996, they made a joint recommendation that the question should be placed before the International Court of Justice.³ The Special Agreement was concluded on 31 May 1997.

² See Annexes, vol. 3, annex MM 74.

³ See the Joint Report of Discussions dated 21 June 1996: Annexes, vol. 3, annex MM 75.

PART TWO

Chapter 5

INTERNATIONAL ACTS ESTABLISHING MALAYSIA'S SOVEREIGNTY OVER THE ISLANDS

A. Introduction

5.1. As outlined in Chapter 2, Malaysia's sovereignty over Ligitan and Sipadan is based on two independent but also intersecting strands. First, title to the islands was acquired by grant of the previous sovereign, a situation which was recognized by and was opposable to all relevant States in the region as a result of published treaties. Secondly, following from the 1878 grant to Baron von Overbeck, the islands have been peacefully and continuously administered by Malaysia's predecessors in title, and by Malaysia. That administration was never contested by the Netherlands or (until 1969) by Indonesia, and it continues to the present day. Each of these strands is by itself sufficient to uphold Malaysia's position as against Indonesia. Taken together they are decisive of this case.

5.2. This Chapter deals with the first of the strands identified in the previous paragraph. Chapter 6 will deal with the second. The sequence of events described in detail in this Chapter is presented in summary form on the following page.

B. The Dependencies of the Sultanate of Sulu on the East Coast of Borneo

5.3. In the 18th and throughout the 19th century until 1878, the coastal territory of north-east Borneo and its adjacent islands was a dependency of the Sultanate of Sulu, and something needs to be said accordingly about this Sultanate. The Sultanate was a substantial maritime power, exercising authority over a considerable number of islands lying between mainland Borneo and the Philippines, as well as over the Sulu Archipelago itself. In fact a great deal of the Sultan's revenue came from the region of north-eastern Borneo under

**Chronology of Main Steps in the Acquisition of North Borneo and
Offshore Islands (including Ligitan and Sipadan)**

<i>Date</i>	<i>Instrument or Action</i>	<i>Annex</i>
29 December 1877	Grants by Sultan of Brunei to Dent and Overbeck of Territories on north west and north east coast of Borneo, to Sibuko River, with certain islands	vol. 2, Annexes MM 6 – 8
22 January 1878	Grant by Sultan of Sulu to Dent and Overbeck of Territories on north west and north east coast of Borneo, to Sibuko River, with certain islands	vol. 2, Annexes MM 9 & MM 10
1 November 1881	Charter of British North Borneo Company	vol. 2, Annex MM 14
7 March 1885	Protocol, Article III: Spain & Germany recognize British administration of territories in 1878 Grant	vol. 2, Annex MM 15
12 May 1888	British Protectorate proclaimed over North Borneo	vol. 2, Annex MM 16
20 June 1891	Great Britain–Netherlands, Convention defining the boundaries in Borneo	vol. 2, Annex MM 17
10 December 1898- 7 November 1900	United States acquisition of the Philippines (including Sulu Archipelago)	vol. 2, Annexes MM 19 & 21
22 April 1903	Sultan of Sulu–British North Borneo Co., Confirmation of Cession of Certain Islands	vol. 2, Annex MM 22
3 & 10 July 1907	Great Britain–United States, Exchange of Notes concerning the Administration and Lease of Certain Small Islands on the North Borneo Coast by the British North Borneo Company	vol. 2, Annex MM 23 & MM 24
28 September 1915	Great Britain–Netherlands, Agreement approving Joint Report of Commissioners pursuant to Article 3 of the 1891 Convention (demarcating the 1891 boundary)	vol. 2, Annex MM 27
2 January 1930	United Kingdom–United States, Boundary Convention recognizes offshore islands as part of North Borneo	vol. 2, Annex MM 29
26 June 1946	British North Borneo Protectorate becomes a British colony	vol. 2, Annex MM 30
16 September 1963	Malaysia Agreement of 9 July 1963 comes into force incorporating North Borneo (Sabah) in Malaysia	vol. 2, Annex MM 31

the procurement system, being traded through Sulu with China, Singapore and elsewhere. Under the procurement system, trading in a whole range of commodities (birds' nests, trepang, etc.) occurred via Sulu, and local people made frequent visits there for this and other purposes.

5.4. The position was described in some detail by James Hunt in "Some Particulars relating to Sulo, in the Archipelago of Felicia", first published in 1837. His account reads in part as follows (modern place names are underlined in brackets):

"The province of Mangidora forms the north eastern part of Borneo, extending itself towards the Sulo Archipelago in a long narrow point named Unsang, or cape Misfortune [Tanjung Unsang]. The whole of this district yields very valuable articles for commerce and in considerable quantities, birds' nests, black and white in great abundance, camphor, elephants, cattle, dammer, wax, lackawood, rattans, and great quantities of the purest gold in lumps and dust of a very soft pliable texture like wax, &c...

Giong river is situated on the north-west part of the bay of that name [Darvel Bay]; here are considerable quantities of blackish birds nests procurable. *Pulo Giya* [P. Gaya], off this coast, abounds with deer, & *Separan* [Sipadan] with abundance of green turtle. There is also a species of birds' nests like driven snow found on Pulo Giya and much tripang is collected about the bay..."¹

After referring to the Sulu port of Sabahan, Hunt goes on to describe points further south, including Tidong (where there was in 1837 "a small fort with seven or eight large guns under Sulo"). Then, in "the last province on Borneo belonging to Sulo", which was named the province of Tirun, he mentions the Sibuko river, followed by other rivers along the coast before arriving at Bulungan. The key places mentioned here are shown in **Insert 7**, on the following page.

5.5. The dependencies of the Sultanate of Sulu from Marudu Bay in the north down to below the Sibuko River were acknowledged in the

¹ Annexes, vol. 3, annex MM 34.

19th century, as this account shows. The origins of Sulu authority were said to go back to a grant of the Sultan of Brunei, given to Sulu in the early 18th century in return for their assistance in a civil conflict. Brunei subsequently denied the existence of any such grant, but there is no doubt that the effective authority was vested in the Sultan of Sulu. Thus the Rennel manuscript of 1762-3 notes that:

“The Dominions of Sooloo are composed of about 140 or 150 islands situated between the Philippines and Borneo; together with a large part of the Coast of Borneo; the Island of Paragoa or Palawan, & the islands that form the Strait of Balabar.”²

5.6. The earlier history of Brunei sovereignty over the coasts of Borneo was the reason why Baron von Overbeck in 1877-8 obtained two grants covering exactly the same territory, one from Brunei, one from Sulu.³ But by the 1870s it was agreed that Brunei exercised no effective authority on the north-east coast and that the Sultan of Sulu exercised control there.

5.7. This control resulted from the allegiance of the local people and the appointment of their local chiefs by the Sultan. For example, Nakoda Gomba was the Sultan’s Agent on the north-east coast of Borneo. When in 1875 a party from the Austrian corvette *Friedrich* was attacked in Sibuko Bay while collecting wood, it was to the Sultan of Sulu that Nakoda Gomba reported.⁴ In his statement Gomba notes that he is “the agent of the Sultan of Sulu charged with the superintendence of the trade on the north-east coast of Borneo”. As to the attack on the Austrians, he reports that:

“The people who attacked the boat of the Austrian frigate are Bajows of Omadar [Omadal], a small island near Pulo Gaya... They mistook the flag of the frigate and thought the ship belonged to their enemies, the Spaniards. I have written all the information I can collect on the subject to

² T. Harrison, “The Unpublished Rennel Manuscript: A Borneo Philippine Journal, 1762-63” (1966) 39 *Journal of the Malaysian Branch of the Royal Asiatic Society* p. 105.

³ See Annexes, vol. 2, annexes MM 6-9, and for a contemporary explanation by Acting Consul-General Treacher of this duplication see Annexes, vol. 3, annex MM 35.

⁴ See Annexes, vol. 4, annex MM 76. See also the comment by the British Acting Consul at Labuan: Annexes, vol. 4, annex MM 77.

the Sultan of Sulu, and soon expect to receive his orders. I think he will certainly order the apprehension and execution of two of the Chiefs.”

It is significant that Gomba was one of the Sulu officials who continued to hold office when the Company assumed governance of the region, being appointed native magistrate of Darvel Bay in 1882.⁵ He was also one of the signatories of a “Protest of Chiefs of Sandakan against Spanish Occupation” signed on the occasion of an abortive attempt by a Spanish frigate to take over the settlement of Sandakan in September 1878, shortly after the Sultan’s capitulation to Spain.⁶ The signatories state that “the matter of the transfer of this country to an English Company having been referred to us by the Sultan six months ago, we have agreed to that transfer and are bound by it”.

5.8. The Sultan of Sulu’s authority over north-eastern Borneo was recognized by other States and is evidenced, for example, in the following documents:

(a) In 1870 there was published in Leiden the second edition of a “General Atlas of the Netherlands Indies”. Its full title as shown on the title page may be translated as follows: “General Atlas of the Netherlands Indies compiled from official sources and with approval of the Government. Second edition with improved maps”. It was edited by Baron Melvill van Carnbée and W.F. Versteeg, both officers of the Government of the Netherlands Indies.⁷ The map of the east coast of Borneo shows a boundary running westwards of an island named “P. Sebalik” [*sic*]. To the north of that line is the inscription “*Gebied van Soeloe of Solokh*” (“Dominion of Soeloe or Solokh”). To the north and well to the east of the boundary line

⁵ See *North Borneo Herald*, 1 July 1886, pp. 121-2: Annexes, vol. 4, annex MM 81.

⁶ See Annexes, vol. 4, annex MM 78, and the telegram by Treacher, Annexes, vol. 4, annex MM 79.

⁷ See Annexes, vol. 5, Map 3. The authors’ titles are shown on the frontispiece as:
P. Baron MELVILL VAN CARNBÉE, Knight of the Order of the Netherlands’ Lion and of the Legion of Honour, Commander at Sea and Secretary of the Commission for the Improvement of Indian Nautical Charts at Batavia, and
W.F. VERSTEEG, Knight of the Military Order of William and of the Order of the Netherlands’ Lion, Officer of the Order of the Crown of Oak, former Lieutenant-Colonel of the Royal Engineers and Chief of the Topographical Bureau at Batavia.

depicted on the map are shown certain islands clustered around Darvel Bay, including specifically “P. Siparan” (Sipadan) and “P. Legetan” (Ligitan). The depiction of the islands and coastline here is highly inaccurate, by comparison with the areas further to the south where the Dutch had at that time some measure of control. But it is plain from the map that the islands named and the other territories to the north of the depicted boundary were considered in 1870 as belonging to Sulu, and were not claimed by the Netherlands in right of Bulungan or otherwise.

(b) Following the Sultan of Sulu’s 1878 grant to von Overbeck and Dent, questions were raised in the Dutch Parliament on the assertion of Dutch claims to control over Borneo. In reply the Dutch Minister of Colonies said:

“The north-east and north-west portions of Borneo have never been under our dominion. We have never disputed the authority of Spain over the dependencies of Sulu in the north-east portion of the island...”⁸

(c) This position was expressly reaffirmed in the Explanatory Memorandum to the Dutch Parliament which accompanied the 1891 Boundary Treaty.⁹ The two relevant Ministers reported that:

“the Bajaus who live on the islands located at the North-Eastern coast of Borneo, which belong to the Sultanate of Solok, are still continuously collecting forest products in the disputed area and show no concern whatsoever for the Sultan van Boeloengan. Because of this and also because of the absence of any document establishing the boundary between the Sultanates of Boeloengan and Solok, it was considered very difficult indeed to determine the extent of the area of Boeloengan.”

This is a revealing passage showing a number of things relevant to the present case. First, it shows a clear awareness on the part of the Dutch Government that the Sultan of Bulungan (through whom that Government itself claimed) had no control and no claims over “the

⁸ Extract from Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880: Annexes, vol. 3, annex MM 40.

⁹ Annexes, vol. 3, annex MM 51.

islands located at the North-Eastern coast of Borneo”. Secondly, it recognized that these islands belonged to the sultanate of Solok (Sulu), were inhabited and were not *terra nullius*. Thirdly, it shows that the islands were not “the disputed area” for the purposes of the 1891 Treaty. Rather the area in dispute was exclusively the land area on the East coast “between the Tawao and Siboeokoe rivers”. Fourthly, it shows that even as to *that* area, the authority of Bulungan was not clearly established.

C. The Grant by the Sultanate of Sulu of 1878 and its Implementation

5.9. For some time before 1878 Spain had been trying to conquer Sulu, but with very limited success. So far as Great Britain was concerned, the position at that time was regulated by a Convention of 1877 between Germany, Britain and Spain.¹⁰ Under the Protocol of 1877, Spain accepted that “[c]ommerce and direct trading by ships and subjects of Great Britain, Germany and other powers... shall be absolutely free with the Sulu Archipelago and in all parts thereof, as well as the right of fishery” (Article I). This was subject to certain rights of regulation by Spain, but these rights were limited to “the places occupied by Spain in the archipelago of Sulu... *while such places are effectively occupied*” (Article III, emphasis added).

5.10. On 22 January 1878, while the struggle between Spain and Sulu was intensifying, the Sultan of Sulu granted to Baron von Overbeck and Mr. Alfred Dent, as representatives of a British company yet to be incorporated...

“together with their heirs associates successors and representatives for ever all the rights and powers belonging to us over all the territories and lands which are tributary to us on the mainland of the island of Borneo from the Pandasan River on the west extending along all the lands on the east coast as far as the Sibuku River in the south and including all the territories on the coast of the Pandasan River and the coast lands of Paitan, Sugut, Bonggaya, Labuk, Sandakan, Kinabatangan, Mumiang, and all the other territories and coast lands to the southward thereof on the coast of

¹⁰ Annexes, vol. 2, annex MM 5.

Darvel Bay as far as the Sibuku River together with all the islands included therein within nine miles of the coast.”¹¹

The Sibuko River is well south and west of Ligitan and Sipadan.

5.11. On the same day the Sultan signed a commission appointing Baron von Overbeck...

“Dato’ Bendahara and Rajah of Sandakan with the fullest power of life and death over all the inhabitants of these countries and over all matters that were ours ... with the right of making laws ... as he may deem fit and proper with all powers properly exercised by sovereign rulers in general.”¹²

The territory over which this authority was to be exercised was defined in the following terms:

“all the lands towards the eastward on the coast on the Island of Borneo from the Pandasan River including all the territories on the coast of the Sibuku River and the coast lands of Paitan, Sugut, Bonggaya, Labok, Sandakan, Kinabatangan, and Mumiang, and the other lands and coast lands near Darvel Bay as far as the Sibuku River together with all the islands included therein...”¹³

5.12. The approximate extent of the Sultan’s grant of 1878, with references to the locations mentioned above, is shown in the sketch

¹¹ See Annexes, vol. 2, annex MM 9.

¹² Annexes, vol. 2, annex MM 10.

¹³ The territorial extent of the Sultan’s grant of 1878 was also explained in a letter of Acting Consul-General Treacher, written from Sulu on 22 January 1878: Annexes, vol. 3, annex MM 36. Treacher refers to a Sulu claim to the east coast as far south as Balik Pappan, well south of the Sibuko River, and notes that...

“a compromise was effected and the limits fixed from the Pandasan River to the Sibuko River, the latter limit being, according to a Dutch official chart, in the Baron’s possession, the northern limit of Dutch territory on that coast, though, as I have not with me the Treaty said to exist with Holland confining its right to colonize in these seas within certain limits, I am unable to state whether they are justified in coming so far north on that coast.”

The letter also notes the revenues obtained from the Sultan from the East coast, which continued to be considerable despite the difficulties caused by the Spanish blockade.

map (**Insert 8**) on page 39. A more detailed map is at Annexes, vol. 5 Map 4.

5.13. The final capitulation of the Sultan of Sulu to Spain occurred later in the same year. Six months after the grant to von Overbeck and Dent, Spain compelled the Sultan to sign a Protocol confirming the Bases of Peace and Capitulation of 22 July 1878. Article I of the Protocol of 22 July 1878 declared “as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof”.¹⁴

5.14. Subsequently Alfred Dent purchased the interests of Baron von Overbeck in the 1878 Sulu grant, and established a “Provisional Association” to which these rights were transferred, as envisaged by the grant itself. The Association petitioned the British Government for a Royal Charter to establish the British North Borneo Company, and on 1 November 1881 the Charter was granted.¹⁵ It recited that Dent’s interests, including “his interests and powers in and over and affecting territories, lands, and property in Borneo and islands lying near thereto, including Labuan”, had in turn been acquired by the Company. It also recited the terms of the grants from the Sultans of Brunei and Sulu. The British Government was given substantial powers of oversight over North Borneo.

5.15. In the meantime the process of extending the Company’s administration to the territory and islands of North Borneo had already begun. Details of the actual administration of North Borneo and its adjoining islands during this period are given in Chapter 6.

5.16. On 12 May 1888 an agreement was concluded between the British Government and the British North Borneo Company.¹⁶ This acknowledged that the territories governed by the Company were an independent state called “the State of North Borneo”. The Agreement provided that “the State of North Borneo shall continue to be governed and administered as an independent State by the Company... under the protection of Great Britain”. Under the Agreement, it was

¹⁴ See Annexes, vol. 2, annex MM 12.

¹⁵ See Annexes, vol. 2, annex MM 14.

¹⁶ Annexes, vol. 2, annex MM 16.

provided that the relations between North Borneo and all foreign States were to be conducted by the British Government, and the Government had substantial powers of oversight, including the determination of the boundaries of North Borneo.

D. The Recognition by Spain of British Rights to North Borneo

5.17. Following the Spanish conquest of Sulu in June 1878 and the Protocol of 22 July 1878 between Sulu and Spain, and despite repeated assurances given by Spain to Great Britain, Spanish officers in the Philippines sought to assert rights over North Borneo. The Sultan was required to write to von Overbeck revoking his grant of January 1878, and in September 1878 a Spanish warship attempted to take control of the North Borneo settlement of Sandakan, without success. Britain protested at these attempts¹⁷ and, after extensive diplomatic correspondence, the matter was regulated by a further treaty between Britain, Germany and Spain.

5.18. This was the Protocol concluded on 7 March 1885.¹⁸ Under Article I, Germany and Great Britain recognized Spanish sovereignty over the whole of the Sulu Archipelago as defined, including over islands not yet occupied by Spain. Article II defined the Archipelago as including “all the islands which are found between the western extremity of the Island of Mindanao on the one side, and the continent of Borneo and the Island of Paragua [Palawan] on the other side, with the exception of those which are indicated in Article III”. The Archipelago was defined “conformably to the definition contained in Article I of the treaty signed September 23rd 1836, between the Spanish Government and the Sultan of Sulu”. Article III of the 1885 Protocol provided as follows:

“The Spanish Government renounces, as far as regards the British Government, all claims of sovereignty over the territory of the continent of Borneo, *which belong, or which have belonged in the past* to the Sultan of Sulu

¹⁷ Annexes, vol. 3, annex MM 37.

¹⁸ Annexes, vol. 2, annex MM 15. The Protocol of 1885 was confirmed (with amendments not relevant for present purposes) by a further agreement between the same three States on 30 March 1897: Annexes, vol. 2, annex MM 18.

(Jolo), and which comprise the neighbouring islands of Balambangan, Banguey and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the 'British North Borneo Company'."

By using the words in italics, the parties avoided taking any position on the meaning or validity of the 1878 grant. According to the British view, the 1878 grant was valid because the Sultanate of Sulu had not yet been effectively occupied by Spain. According to Spain that was not the case, and the territories covered by the grant remained Sulu territory subject to Spanish sovereignty. But whichever view was taken, by the 1885 Protocol Spain relinquished "as far as regards the British Government, all claims of sovereignty" over territory covered by the Sulu grant of 1878, including its offshore islands within three marine leagues (nine nautical miles) of the coast. Whatever the position may have been in 1878, the sovereignty of Spain over the Sulu Archipelago was clearly established in 1885. Thus Spain was competent in 1885 to relinquish to Britain "all claims of sovereignty" over the territories covered by the Sulu grant of 1878.

5.19. The islands of Ligitan and Sipadan lie more than three marine leagues (9 n.m.) from the coast of Borneo.¹⁹ Literally they fell outside the terms of the Sultan's grant of January 1878 and outside the terms of Spain's retrocession or recognition in Article II of the Protocol of 1885. Despite this, the Company went ahead and acted on the basis that it had authority over those islands, and others similarly situated (as will be seen in further detail in Chapter 6). Spain appears to have been quite indifferent to this and never opposed their administration from and by North Borneo. The issue was not raised until the United States had acquired sovereignty over the Philippines, following the Spanish-American War of 1898, by the peace treaties of 1898 and 1900.

¹⁹ Sipadan is 14.8 n.m. from the nearest point on the coast (Tanjong Tutop). Ligitan is 21.5 n.m. from the nearest point on the coast (the foothill of Hood Hill).

E. The Recognition by the Netherlands of British Rights to North Borneo

5.20. Shortly after the proclamation of the British protectorate over North Borneo in 1888,²⁰ Great Britain and the Netherlands began negotiations to resolve the sole remaining issue between them in relation to Borneo, viz. the location of the boundary between their respective possessions. The 1891 Boundary Treaty is discussed in Chapters 8 and 9 below.²¹ Only the following comments are called for here.

(a) The Treaty gave express Dutch recognition to the British protectorate over North Borneo and expressly renounced Dutch claims to territory on or adjacent to the coast of North Borneo, with the exception of the southern part of the island of Sebatik and the immediately adjacent islands.

(b) The Treaty did not refer to Ligitan or Sipadan. The Netherlands made no claim to those islands, nor did it ever subsequently assert any title to those or any other islands off the coast of North Borneo.

(c) So far as those islands were concerned, the remaining question concerned the identification of which islands belonged to Britain because they were within three marine leagues of the Borneo coast, and which belonged to Spain. The Netherlands had nothing whatever to do with that question. But in fact that question was not raised even by Spain; it was not until 1903 that it was raised by the United States, as successor to Spain, and during the period from 1878 to 1903 the Company proceeded to establish an administration over all the offshore islands, whether or not they were within three marine leagues of the coast.

(d) Of course, in relation to any islands which belonged to Spain after 1885, Britain had no title which it could convey to the Netherlands in 1891. Thus, even if the 1891 Treaty had purported to convey the islands to the Netherlands (which it did not), it could not have had this effect as a matter of law.

²⁰ See Annexes, vol. 2, annex MM 16.

²¹ For the text of the Treaty see Annexes, vol. 2, annex MM 17.

F. The Recognition by the United States (as successor to Spain) of British Rights to North Borneo, including the Disputed Islands

5.21. As noted above, there was no discussion of which islands fell on which side of the three marine league line as between Britain and Spain. Spain was evidently willing to allow the administrative *status quo* in relation to the offshore islands to remain unchanged.

5.22. In 1898, however, following the Spanish-American war, Spain ceded to the United States “the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line...”.²² The line drawn by the Treaty of Paris of 1898 is shown in the sketch map which is **Insert 9**, on the following page. Evidently, Ligitan and Sipadan did not fall within that line. However by a supplementary Convention of 7 November 1900,²³ Spain relinquished to the United States...

“all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that treaty and particularly to the islands of Cagayan Sulú and Sibusú and their dependencies”.

In this context, the reference to islands “lying outside the lines described” in Article III was to islands lying west and south of the 1898 Treaty line.

5.23. For his part the Sultan of Sulu expressly recognized United States sovereignty “over the whole Archipelago of Jolo and its dependencies” by an Agreement of 20 August 1899.²⁴

5.24. Since the United States acquired over the Philippines only the rights which Spain had previously had, Spain’s relinquishment in 1885 of any claims to territory covered by the 1878 grant was clearly binding on the United States. The position was carefully analysed by

²² Treaty of Paris, 10 December 1898, Article III: Annexes, vol. 2, annex MM19.

²³ Annexes, vol. 2, annex MM 21.

²⁴ 187 CTS 481: Annexes, vol. 2, annex MM 20. The Agreement of 20 August 1899 between the United States and the Sultan of Sulu was cancelled by the United States in 1915, and the Sultanate itself was suppressed in 1936.

Secretary of State Hay in a letter of 3 April 1903, in which he concluded that:

“The Spanish Government was, therefore, at the time of the signature of the Treaty of Peace, December 10, 1898 fully seized of sovereignty over the whole of the Sulu Archipelago up to three marine leagues of the mainland coasts of British North Borneo, with exception of the three named islands of Balambangan, Banguay and Malawali, as to which latter Spain had relinquished, so far as Great Britain was concerned, all claim of sovereignty, and was competent to cede, and did in fact cede and relinquish to the United States, by the Treaties of 1898 and 1900 all title and claim of title she then possessed in and to the Sulu Archipelago.”²⁵

5.25. The 1900 Convention was understood as covering Ligitan and Sipadan, amongst other islands lying between the three nautical mile limit and the line originally established by the 1898 Treaty. In 1903, in response to a direction from the Secretary of the Navy,²⁶ the United States Hydrographic Office published a chart of the “Northern Shore of Sibuko Bay”. This showed a line passing between the coast of North Borneo and Mabul Island, on the one side, and, *inter alia*, Ligitan and Sipadan on the other side. The line also separated those two islands from Netherlands territory to the west and south. For convenience an extract from the map is reproduced on page 46, as **Insert 10**: a copy of the complete map is in the Map Annex.²⁷

5.26. The line shown on the map is described as a “boundary line”. It is accompanied by this caption “The outlying islands, islets and reefs of Borneo lying outside of the boundary line - - - - - are under the sovereignty of the United States of America”. The method observed in “delineating the S.W. boundary of the United States possessions in the Philippines” was described in a United States Hydrographic Office note of 8 August 1903.²⁸ It took into account the

²⁵ Annexes, vol. 3, annex MM 55.

²⁶ Annexes, vol. 3, annex MM 62.

²⁷ Annexes, vol. 5, Map 5.

²⁸ Annexes, vol. 3, annex MM 62.

3 marine league limit, and explicitly included, as islands under United States sovereignty, all the islands outside that limit, including Ligitan and Sipadan. It is true that that line was not a “boundary line” in the proper sense, and in fact these words are placed in inverted commas in the note of 8 August 1903. It delimited the area within which lay the islands and other territories claimed by the United States pursuant to the 1900 Agreement. This map represented a public assertion by the United States of its sovereignty over the additional islands ceded to it by the 1900 Treaty, an assertion which occasioned no reaction from the Netherlands.

5.27. The United States claim to sovereignty over Ligitan and Sipadan (and other similarly placed islands) was developed in the course of 1903 as a result of the voyage to the area of the *U.S.S. Quiros*. The Commander, Lieutenant Francis Boughter, provided detailed reports of the islands visited by him. Their names were included in a list of the islands “under the sovereignty of the United States lying off the coasts of British North Borneo”. The report entitled “Report of the Islands under the sovereignty of the United States...”, is annexed.²⁹ In a cablegram of July 1903, the Commander-in-Chief of the U.S. Asiatic Fleet recorded that the *Quiros* had visited and proclaimed sovereignty over, *inter alia*, Danawan and Si Amil (islands in the Ligitan group).³⁰ In a further cablegram of 1 August 1903, the following was recorded:

“Notice of Sovereignty posted on additional Islands
North Mangsi South Mangsi Tambulian Tibbakan
Booan Langaan Baguan Kapolai *Sipidan* by Quiros June
and July.”³¹

(emphasis added)

5.28. Having described his discussions with the Malay residents of Danawan and Si Amil (in the Ligitan group), Lieutenant Boughter added:

“I am informed that the island of Sipadan lying to the Southward and Westward of Danawan has always been understood by the natives as being appanage of the latter

²⁹ Annexes, vol. 3, annex MM 63.

³⁰ Annexes, vol. 3, annex MM 60.

³¹ Annexes, vol. 3, annex MM 61.

named island whose inhabitants, by native custom, have enjoyed the monopoly of collecting the turtle eggs deposited there. Recently Bajaus from other localities have been poaching and complaint has been lodged with the resident at Lahat Datu.”

This passage is significant in that it confirms:

- (a) that Sipadan was regarded by the local people as a dependency or appurtenance (“appanage”) of the Ligitan group, especially Danawan;
- (b) that it was regularly exploited by them in accordance with native custom; and
- (c) that problems arising in relation to Sipadan were referred to the Government Resident at Lahad Datu on the mainland of North Borneo; the Resident was of course an agent of the North Borneo Government.

5.29. Although these reports were not themselves public documents at the time, the assertion of United States rights was made openly. In addition to the notice referred to above, a tablet was placed on each of the islands visited. This notice and tablet may be compared to the ones on which the French claim to the Clipperton Islands was based and upheld.³²

5.30. Certainly the voyage of the *U.S.S. Quiros* came to the attention of the Company. On 24 June 1903 the Resident at Lahad Datu, in response to a letter from Lieutenant Boughter informing him that the islands of Tatagan and Danawan were beyond the three marine league line and were therefore under the sovereignty of the United States, responded that:

“These islands have always been administered by us since our advent here and the Spanish have never claimed or exercised any sovereign rights over them as far as I know.”³³

³² See (1932) 2 UNRIAA 1105.

³³ E.H. Barrault, Resident, Lahat Dato to Lieut. Boughter, Commanding *U.S.S. Quiros*, 24 June 1903; Annexes, vol. 3, annex MM 56. See also the telegram sent by the Resident to the Governor, apparently on the same day: Annexes, vol. 3, annex MM 57.

On the following day, the Governor wrote to the Chairman of the British North Borneo Company, pointing out that:

“though the Sultan of Sulu’s agreement of 22nd January 1878 ceding certain islands refers to those that are within three marine leagues of the coast, his commission dated the same day to Baron Overbeck in its preamble recital omits that definition. It is certain that under that Commission the representative of the Chartered Company has always administered the islands referred to.”³⁴

The view of the Company was that the three marine league line did not strictly limit the islands under its jurisdiction, and that Spain had acquiesced in the Company’s administration of the islands located beyond three marine leagues from the coast. At any rate, it was “certain” that the Company was administering the islands to the exclusion of all others.

5.31. This letter was followed by further action on the part of the Company. In a letter of 13 July 1903,³⁵ the Chairman wrote to the Foreign Office on behalf of the Court of Directors of the Company, protesting against the actions of the *U.S.S. Quiros* and explaining that the various islands off North Borneo had been peacefully administered by the Company since 1881, without any opposition from Spain. The letter read in part:

“10. Almost immediately after the formal occupation [in 1878] ...the Illunan pirates, who made a base of the islands fringing the north-east coast, infested Sandakan and other places on the coast, killing and capturing many of the inhabitants, who appealed to our officials for protection. The appeal was, in view of our authority under the Commission [to Baron von Overbeck], promptly responded to, and with the assistance of Mr Cowie’s steamer ‘Far East,’ which was subsidised by the North Borneo Government, and acted as their gun vessel, the pirates were dispersed, and all their abandoned island haunts, which from time immemorial had politically and geographically formed part of North

³⁴ Annexes, vol. 3, annex MM 58.

³⁵ Annexes, vol. 3, annex MM 59.

Borneo, were annexed, and have ever since been administered by the North Borneo Government as an integral portion of their territory.

11. And at no time, since the occupation of the island by us, did the Spanish authorities ever object to our occupation and control of them; nor, so far as the Court are aware, have the American authorities, previous to the action of which we have complained, ever questioned our right of possession.”

The letter went on to refer to recent discussions with the Sultan of Sulu, before concluding as follows:

“23. ...[T]he Court think that the American Government, when placed by the Secretary of State in possession of the foregoing facts, will readily agree to instruct their local officials to remove the flags and tablets they placed on islands which, notwithstanding anything else, have been under British jurisdiction for nearly a quarter of a century.

24. For the information of the Secretary of State, I have attached a map, showing clearly the respective spheres of influence and control.

25. All the islands and territory to the east of the red line have since our occupation of North Borneo been under the suzerainty of Spain and the United States respectively; while those to the west of it have been administered by the Government of our State.”

5.32. As has been seen, Ligitan and Sipadan were among the islands visited by the *U.S.S. Quiros* and which are referred to in paragraph 23 of the Company’s letter. They are to the west of the line on the map attached to that letter, and that line was in turn reproduced and expressly referred to in the map attached to the 1907 Exchange of Notes, discussed in paragraphs 5.38-5.40 below and shown opposite page 55 of this Memorial. The Company’s letter is further evidence of its administration of the islands in the period after 1878.

5.33. At the same time the Company took steps to obtain confirmation from the Sultan of Sulu of its authority over the off-shore islands beyond three marine leagues. On 22 April 1903 the

Sultan of Sulu signed a certificate at Sandakan which provided as follows:

“Whereas We, His Highness the Sultan Haji Muhammad Jamalulkiram son of His Highness the late Sultan Jamaluladzam, who possess the throne of sovereignty of the State of Sulu and all its dependencies solemnly declare in this certificate that We have been pleased to cede of our own free will to the Government of British North Borneo all the islands in the neighbourhood of the mainland of North Borneo from the island of Banggi to Sibuku Bay. These are their names:- Mulayangin. Mulayangin Kechil, Malawali, Tigabu, Bilian, Tagapil, Langkayan, Boan, Lahiman, Bakungan, Bakungan Kechil, Libaran, Taganak, Baguan, Mantanbuan, Gaya, Omadal, Siamil, Mabul, Kapalai, Dinawan, and other islands near, or round, or lying between the said islands named above.

The reason why the names of these islands were not mentioned in the agreement made with Baron de Overbeck and Mr. (now Sir) Alfred Dent on the 19th day of Muharram A.H. 1295 corresponding to the 22nd January, 1878, is because it was known and mutually understood that these islands were included in the grant of the countries and islands mentioned in the agreement above referred to.”³⁶

This declaration was approved by the Governor of North Borneo on 29 April 1903.

5.34. It should be noted that the two inhabited islands of the Ligitan group, Si Amil and Danawan, were mentioned by name in the Sultan’s Confirmation of 1903. Furthermore, the valuable rights over Sipadan belonged to the local headmen of Danawan under an earlier Sulu grant. The reference in the Confirmation to the “other islands near, or round, or lying between the said islands named above” was sufficiently extensive to cover, and undoubtedly did cover, Ligitan and Sipadan.

³⁶ See Annexes, vol. 2, annex MM 22.

5.35. However, the British Foreign Office evidently had doubts about the legal effect of the Sultan's certificate, since whatever the position may have been in 1878, the Sultan no longer had any international status whatever, and could not cede territory belonging to the United States. Even the Company itself came to realize that its title, as opposed to its right to administer the islands based upon actual administration and control, might be open to question. When the United States pressed its claim to the additional islands under its 1900 Treaty with Spain, the British Government did not object, but rather sought an arrangement with the United States that would ensure the continuity of the Company's administration. The Company itself rather reluctantly accepted this position, as indeed it was bound to do under the terms of the 1881 Charter.³⁷

5.36. The correspondence on this matter, between the British Ambassador in Washington and the U.S. Secretary of State, is set out in Annexes, vol. 3, annexes 32-34. Only the key passages need be referred to here. On 10 December 1904, the Secretary of State, Mr Hay, responded to the oral inquiry by the British Ambassador "as to the status of certain islands near the coast of British North Borneo".³⁸ In relevant respects Mr Hay's letter reads as follows:

"The title of Spain to the Sulu Archipelago, of which Cagayan and Subutu formed part, rests on historical facts and repeated act of submission of the Sulu chiefs to the Crown of Spain, and the territorial limits of Spanish jurisdiction in that quarter are stated in general terms in the protocols signed between Great Britain, Germany, and Spain in 1877, 1885, and 1897, from which it appears that Spain relinquished in favour of Great Britain all claim of sovereignty over the territories of the mainland of Borneo which then belonged or had belonged in the past to the Sultan of Sulu, including therein the neighbouring islands of Balambangan, Banguay, and Malawali, 'as well as all those islands lying within a zone of 3 marine leagues along the coast, and which form part of the territories administered by the company styled British North Borneo Company,' while as to the rest of the islands pertaining to her under

³⁷ See Annexes, vol. 2, annex MM 14.

³⁸ See Annexes, vol. 3, annex MM 65. The places mentioned here are shown on Insert 8 at page 39, and on a larger map in Annexes, vol. 5 Map 4.

the Suluan capitulations and submissions Spain reserved and was admitted to have sovereignty whether they were effectively occupied by Spain or not.

I am not aware that at any time between the conclusion of the protocols of 1877, 1885, and 1897, and the conveyance by Spain to the United States in 1900, of all title and claim of title in that quarter, any effective tracing of the 3-league water boundary along the North Bornean coasts was made or attempted by Great Britain and Spain. Both countries appear to have rested content with the treaty definition and with the Spanish reservation of sovereignty outside of the line so defined. It is one of the common cases where a conventional description of a boundary line has not been carried into effect by a physical demarcation, and where the coterminous sovereignties may at any time give effect thereto by actually laying down the line as a proper proceeding under their existing treaty rights.

The geographical features of the Bornean coast and the adjacent islands are, however, such as would seem to preclude an exact definition of the treaty line between its land and water territories and those of the Sulu groups, without positive knowledge upon which the two Governments could base an intelligent agreement. A line traced 3 marine leagues seaward from the windings of an irregular coast is necessarily somewhat arbitrary and, all other things being equal, considerations of mutual convenience may be taken into account, as for instance, when an island other than those enumerated in the existing protocols should be cut in two by the 3-league line. Again, the protocols are silent as to the points of the North Bornean coast where the 3-league line begins and ends. As to these matters I see no reason why they should interfere with the settlement of the whole question by a mutually satisfactory agreement.

As a step toward that desirable end the Government of the United States would be willing to come to an understanding with His Majesty's Government whereby a joint examination of the North Bornean neighbourhood shall be made by two experts, one on

behalf of each Government, under instructions to agree if possible upon a tentative line which shall conveniently and fairly represent the intention of the parties to the protocol of 1885, making report thereof to their respective Governments with statement of any points upon which they may not be able to agree. Upon receipt of these reports, the two Governments will be in a position to determine upon a definitive settlement of the matter in such way as shall be found appropriate.

If this proposal should be acceptable to His Majesty's Government your reply to that effect will be regarded as perfecting the agreement by exchange of notes."

5.37. The British Ambassador in reply suggested that the United States might be prepared to relinquish title to the islands in question "out of consideration for the fact that the North Borneo Company had during many years carried on the administration of them under the apparent belief that the islands formed part of the company's territory".³⁹ Since the United States already accepted that the islands within the 3 marine league line were part of British North Borneo, it is clear from the context, and from the preceding events, that this was a reference to islands lying outside the 3 marine league line which were nonetheless administered by the Company.

5.38. The United States was, however, not prepared to cede these additional islands to North Borneo. After considerable further discussion, it was agreed, by an Exchange of Notes of 3 and 10 July 1907⁴⁰, that the Company would continue to administer them, subject to certain conditions, and in particular subject to termination on one year's notice. The terms of the arrangement included the following:

"Firstly: that the said Company is left undisturbed in the administration of the islands in question without any agreement specifying details, the United States Government simply waiving in favour of the said company the right to such administration in the meantime, in other words that the existing status be continued indefinitely at the pleasure of the two governments concerned.

³⁹ See Annexes, vol. 3, annex MM 66.

⁴⁰ See Annexes, vol. 2, annex MM 23-24.

Secondly: that such privilege of administration shall not carry with it territorial rights, such as those of making grants or concessions in the islands in question to extend beyond the temporary occupation of the company, and any grant, concession or license, made by the company shall cease upon the termination of the company's occupation.

Thirdly: that the temporary waiver of the right of administration on the part of the United States Government shall cover all the islands to the westward and southwestward of the line traced on the map which accompanied Sir H.M. Durand's memorandum of the 2nd of June, 1906, and which is annexed to and to be deemed to form part of this Note."

The accompanying map (set out for convenience in a photo-reduced copy as **Insert 11** opposite) was based on information provided by the Company to the Foreign Office in a despatch of 13 July 1903. It contains a red line drawn alongside the east coast of Borneo down to 4° N, i.e. extending southwards beyond the latitudes of Ligitan and Sipadan, which are clearly shown on the map.⁴¹

5.39. In the 1907 Exchange of Notes, Great Britain thus recognized the continuing sovereignty of the United States, as successor to Spain, over the islands beyond the 3 marine league line. On the other hand the United States accepted that these islands had been in fact administered by the British North Borneo Company and agreed to allow that situation to continue, subject to termination on 12 months' notice.

5.40. It is clear from all relevant sources that the islands covered by the 1907 Exchange of Notes included all those adjacent to the North Borneo coast beyond the three marine league line. These sources include: (a) the correspondence associated with the voyage of the *U.S.S. Quiros*; (b) the Sultan's certificate of 1903 which, whatever its legal effect may have been, identified the islands affected and confirmed that they were being administered by North Borneo; and (c) the map attached to the 1907 Exchange of Notes. These sources are fully consistent with each other, and it is clear that they covered, *inter alia*, Ligitan and Sipadan.

⁴¹ For a larger version of the map see Annexes, vol. 5, Map 6.

5.41. The 1907 Exchange of Notes was published at the time by the United States⁴² and by Britain.⁴³ It attracted no protest on the part of the Netherlands Government.

5.42. The legal position as between the United States and Britain (acting on behalf of North Borneo) continued to be regulated by the 1907 Exchange of Notes for nearly 25 years. It was not without its inconveniences, as noted in a Memorandum by a British official, W.J. Worth on 14 July 1922:

“In the absence of any precise determination of this [i.e. the three league] line it is impossible to say exactly how many of the islands are under American sovereignty and how many are under North Borneo sovereignty.”⁴⁴

But this uncertainty was limited to the question of sovereignty. There is no doubt that a license had been validly granted to the Company to administer the islands to the west of the line drawn by the 1907 Exchange of Notes, which, for the reasons already given, clearly covered Ligitan and Sipadan.

5.43. The matter was finally resolved by a treaty between the United States and Britain of 2 January 1930 (hereinafter “the 1930 Treaty”), which came into force after exchange of ratifications on 13 December 1932.⁴⁵ Under the 1930 Treaty it was agreed that the islands of the Philippine Archipelago and the islands belonging to the State of North Borneo should be separated by a line joining 10 specified points. The 1930 line was drawn so as to begin and end at points on the 1898 Treaty of Paris line: in other words, it allocated in sovereignty all of the islands, formerly belonging to Spain, which were to the south and west of the 1898 line. Its effect, as compared with the 1898 and 1907 lines, can be seen from **Insert 12**, on the following page.

⁴² See *Foreign Relations of the United States 1907 Part I* p. 543 (published 1910).

⁴³ 102 *British and Foreign State Papers* 636.

⁴⁴ Annexes, vol. 3, annex MM 72.

⁴⁵ Annexes, vol. 2, annex MM 29.

5.44. Under the 1930 Treaty, all islands to the north and east of the line were to belong to the Philippine Archipelago and all islands to the south and west were to belong to the State of Borneo. Evidently, Ligitan and Sipadan lie to the south and west of the line, as can be seen from **Insert 12** on page 57, which compares the effect of the 1898, 1907 and 1930 lines. The 1930 Treaty was published by both the United States and Britain and was published in the League of Nations Treaty Series.⁴⁶ In consequence of the 1930 Treaty, the United States relinquished sovereignty over its islands to the south and west of the line (including many of those covered by the 1907 Exchange of Notes) to North Borneo under British protection. The Treaty evoked no reaction from the Netherlands, though one might have been expected if the islands disposed of by it were claimed by the Netherlands.

G. The Conversion of North Borneo from British Protectorate to Colony

5.45. The position of North Borneo as a separate protected State came to an end in 1946. On 26 June 1946 an agreement was concluded between the British Government and the Company by which the latter ceded to the Crown all its sovereign rights and its assets in North Borneo.⁴⁷ The State of North Borneo thus ceased to exist and was replaced by the British Colony of North Borneo. This change had no effect on the extent of the territory belonging to North Borneo.

H. The Inclusion of North Borneo in Malaysia

5.46. On 9 July 1963, the Malaysia Agreement was signed between the Governments of the Federation of Malaya, the United Kingdom, North Borneo, Sarawak and Singapore. Pursuant to the Agreement, which came into effect on 16 September 1963, North Borneo became a State within Malaysia under the name of Sabah.⁴⁸

⁴⁶ See League of Nations Treaty Series vol. 136-7 p. 293.

⁴⁷ Annexes, vol. 2, annex MM 30.

⁴⁸ Annexes, vol. 2, annex MM 31.

I. Conclusion

5.47. The express recognition by the United States in 1907 that the islands in question would continue to be administered by the British North Borneo Company, although belonging in sovereignty to the United States, and the continued administration of the islands by the Company under British protection without the least protest or attempt on the part of the Netherlands to disturb this situation, are dispositive of the present dispute. So too is the express retrocession of these same islands by the United States to Britain by the 1930 Treaty. These transactions show beyond a shadow of a doubt that none of the States in the region contested the *status quo*, whether in terms of peaceful administration or sovereignty. There is absolutely no indication that any of those States ever entertained the idea that the unexpressed effect of the 1891 Boundary Treaty was – as Indonesia now, belatedly, argues – to transfer Ligitan and Sipadan to the Netherlands.

Chapter 6

THE CONTINUOUS PEACEFUL POSSESSION AND ADMINISTRATION OF THE ISLANDS BY MALAYSIA AND ITS PREDECESSORS IN TITLE

A. INTRODUCTION

6.1. As already indicated,¹ a second and parallel basis for upholding Malaysia's title to the two islands, as against Indonesia, is by reference to their continuous peaceful possession and administration, without objection from Indonesia or its predecessors in title.

6.2. It is hardly necessary to cite authority for the proposition that, in the absence of agreement to the contrary, long and undisputed possession and administration of territory is sufficient to support the peaceful occupier's title. The cases show that the relevant factual ingredients include such activities as the adoption of legislation relating to the area, the incorporation of the area in the administrative districts of the State concerned, the extension of judicial and police activities to the area, the maintenance of navigational aids and lights in the area, reaction to foreign incursions and the absence of any competing activity or opposition by the other claimant. See, *inter alia*, the *Clipperton Island* arbitration (*France v. Mexico*),² the *Island of Palmas Case* (*Netherlands v. U.S.*),³ and the *Minquiers and Erechos Case* (*France v. U.K.*).⁴ The manner in which the area has been treated in maps is also relevant. The map evidence in this case will be discussed in Chapter 10 of this Memorial.

6.3. This approach, founded upon long, peaceful and undisputed administration, is not, it must be emphasized, one involving the assertion by Malaysia of a prescriptive title against Indonesia. To invoke prescription would involve an implied acknowledgement that

¹ See above, paragraph 5.1.

² (1932) 26 *AJIL* 390.

³ (1928) 2 *UNRIAA* 829.

⁴ *ICJ Reports* 1953, p. 47.

at some time in the past Indonesia (or a predecessor in title) had possessed sovereignty over the islands. That is not at all the case here, as has already been shown. Indonesia and the Netherlands never had title to the islands; so there is no question of their having been deprived of it by prescription. Only if the Court should find that somehow the Netherlands had acquired title to the islands at some earlier stage, would Malaysia need to invoke prescription as the basis for converting its long time possession into a prescriptive title.

6.4. The evidence of administration of the islands successively by the Company under British protection, by Britain and then by Malaysia will now be reviewed.

B. ADMINISTRATION BY MALAYSIA AND ITS PREDECESSORS IN TITLE, 1878 TO THE PRESENT

6.5. In 1878, the Company established three residencies for North Borneo, of which the one relevant for present purposes was the East Coast Residency at Sandakan. Settlements were established at Silam, Lahad Datu, Semporna and later Tawau. (For the location of these places, see the sketch map which is **Insert 13**, on the following page.) Key steps in the process of establishing an effective administration over the mainland and adjacent islands included the following:

- 11 February 1878: Company Resident William Pryer takes up residence at Sandakan Bay.
- 24 September 1878: Spanish warship visits Sandakan but retreats after Sandakan Sulus refuse to hoist Spanish flag.⁵
- 30 August 1879: Following action against pirate settlement at Tungku, Sulu and Bajau chiefs submit to Pryer on board *HMS Kestrel*.
- July 1881: Company post established at Silam, Darvel Bay.
- August 1881: Following approval of Royal Charter, Treacher installed as Governor.
- 1882: Nakoda Gomba appointed Native Magistrate, Darvel Bay.⁶
- 1884: Usman appointed customs clerk at Omodal, subsequently expelled by local Bajaus.

⁵ Annexes, vol. 4, annex MM 79.

⁶ *NBH*, 1 July 1886, pp. 121-2; Annexes, vol. 4, annex MM 81.

- November 1885: Callaghan appointed Assistant Resident, Darvel Bay.
- 24 June 1886: Punitive action by *HMS Zephyr* against Omadal.⁷
- May 1887: Governor Treacher selects site of Semporna, inaugurated June 1887.⁸
- 1888: East Coast Residency moved to Lahad Datu.
- April 1891: Punitive action against Danawan by *NBS Petrel*.⁹
- August 1892: Punitive action against Omadal, settlement temporarily closed.¹⁰
- 1892: Establishment of Company post at Tawau.
- October 1892: *HMS Egeria* charts Bajau settlements in Darvel Bay including Danawan, Si Amil.¹¹
- 1896: Bajau boat settlement in Trusan Treacher founded.¹²
- 1901: Imposition of boat tax & system of jungle passes, made effective in period to 1905.¹³
- 1909: Resettlement of remaining Bajaus from islands surrounding Darvel Bay to Trusan Treacher near Semporna.¹⁴

6.6. Contemporary accounts of the administration of the islands along the north-east coast are included, for example, in the pages of the *British North Borneo Herald* and in the papers of the Company now in the Public Record Office, London. There were initial problems with some Bajau communities, especially on Omadal, and repeated punitive expeditions proved necessary. An example is given in a despatch by Lieutenant C.K. Hope, commander of *H.M.S. Zephyr*, on 28 June 1886, in relation to an action taken against Omadal.¹⁵ Actions such as those taken against Tungku (1879), Omadal (1886), Danawan (1891) and again Omadal (1892) demonstrated the authority of North Borneo over the Bajau

⁷ Annexes, vol. 4, annex MM 80.

⁸ *NBH*, 1 June 1887, pp. 119-121; Annexes, vol. 4, annex MM 82.

⁹ *NBH*, 1 May 1892, p. 137; Annexes, vol. 4, annex MM 83.

¹⁰ *NBH*, 1 September 1892, p. 285; Annexes, vol. 4, annex MM 84.

¹¹ *NBH*, 1 November 1892, p. 378; Annexes, vol. 4, annex MM 85.

¹² *NBH*, 16 April 1896, p. 133; Annexes, vol. 4, annex MM 86.

¹³ See Boats and Fisheries Proclamation 1901: Annexes, vol. 4, annex MM 87.

¹⁴ *NBH*, 16 March 1909, p. 63; Annexes, vol. 4, annex MM 89.

¹⁵ Annexes, vol. 4, annex MM 80.

communities on the various islands. Three measures which were important in extending the authority of the Company over the islands were: the foundation of Semporna (1887); the relocation of the Bajau encampments to Trusan Treacher (1896-1909); and the imposition of a boat licensing system in 1901.¹⁶ Before 1878, the procurement system had been focused on Sulu. Now it came to focus on Semporna. Details of these developments are contained in the contemporary reports cited in paragraph 6.5, and also in the substantial literature about the Company administration of North Borneo referred to in paragraph 2.12 above. The places mentioned in the immediate locality of Semporna are shown on the sketch map which is **Insert 13** on page 62.

6.7. A crucial aspect of the Company administration was its co-option of local leaders. In the earlier years these tended to be Sulus who had earlier served the Sultan: for example, Nakoda (later Datu Tumonggong) Gomba (also spelt Gumbah), the Native Magistrate of Darvel Bay, has already been mentioned.¹⁷ In 1903, the Company appointed Panglima Udang (also spelt Uddang), a Bajau, as the Native Magistrate of Darvel Bay. He was based at Semporna. The jurisdiction of Panglima Udang extended to all the kampongs in Semporna and included Tetagan, Danawan, Omodal and Sipadan. He visited these places every two or three months. Datuk Panglima Abdullah, the son of Panglima Udang, signed an affidavit with this information on 25 January 1975, at a time when he was more than 70 years old. He also stated that during his young days he used to accompany his father to Sipadan to collect the turtle eggs which were abundant there.¹⁸ Datuk Panglima Abdullah joined the Colonial Service as a District/Native Clerk in 1924. In 1928 he was promoted to the position of Native Chief, Semporna. His last appointment was as Deputy Assistant District Officer, Semporna, until 1960, when he retired.

6.8. As to Ligitan and Sipadan, at that time the islands were not permanently inhabited, but they were frequently visited and they were fully part of the marine economy of the Bajau. Official interest took such obvious and sufficient forms as control over the taking of turtles and turtle eggs; settlement of disputes; the creation of a bird

¹⁶ For the decree of 1901 see Annexes, vol. 4, annex MM 87.

¹⁷ See above, paragraph 5.7.

¹⁸ Annexes, vol. 4, annex MM 120.

sanctuary; the establishment of lighthouses and the licensing of boats used to fish the waters around the islands.

(1) Collection of turtle eggs

6.9. The right to collect and to control the collection of turtle eggs on Sipadan sheds significant light on the exercise of authority over the island. Turtle eggs were for many years the most significant harvestable commodity on the island and the right to collect them was a valuable asset. The right to collect those eggs had been granted by the Sultan of Sulu well before 1878, and was subject to a license fee payable in kind. Once granted, the right was treated as a heritable right of the grantee and his heirs. The devolution of the right was a matter regulated by customary law and passed by gift or inheritance from person to person. The devolution of these rights in relation to Sipadan is the subject of sub-section (2) below. As will be seen, the ownership of the rights was at all material times vested in local Bajaus who acknowledged the authority of the Company. They alone were entitled to collect the eggs. No other persons were authorised so to do. In so far as there were occasional interlopers, they appear never to have come from the area under Netherlands control but were either locals or Sulu immigrants.

6.10. So far as governmental involvement in the subject is concerned, that was always a matter for the British authorities in the East Coast Residency at Tawau or, more locally, the District Officer at Semporna. There was never any Netherlands or Indonesian involvement in the matter.

6.11. As early as 1914 Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan.¹⁹

6.12. The position is clearly illustrated by a letter dated 26 June 1910 from the Assistant District Officer at Semporna to the Resident, East Coast regarding the right to collect turtle eggs on Sipadan.²⁰ There was a dispute between two local chiefs. As can be seen from the letter, the District Officer had no doubt that the matter was one to be resolved by the British administration. There is no hint that the Netherlands authorities could have any concern with it. Nor was this the first official intervention in relation to turtle eggs on Sipadan

¹⁹ Annexes, vol. 4, annex MM 93.

²⁰ Annexes, vol. 4, annex MM 91.

because the letter indicates that the District Commissioner had himself settled an earlier problem in relation to Sipadan.²¹ The resolution of the matter was approved by the Resident, East Coast, on 26 June 1910 and was noted by the District Officer on 21 July 1910.²²

6.13. In a letter of 26 January 1916 from the Acting Resident, East Coast, to the Government Secretary, Jesselton, approval was sought for a grant of the monopoly of collecting turtle eggs on Sipadan. This refers to a grant made by an earlier Resident in 1913.²³ A minute addressed to the Resident of the East Coast on 3 May 1916 is of interest not only in relation to this episode but also as containing a statement indicative of the long-standing involvement of the North Borneo authorities in disputes relating to turtle eggs on Sipadan:

“When His Excellency was Resident of the East Coast, a claim was made by a relative of Panglima Kayen and was dismissed by him as he followed a ruling of Mr. Barrault who spent some years in settling such claims.”²⁴

6.14. On 6 May 1916 the then Acting Resident of the East Coast, Mr. G.C. Irving executed a *Surat Katrangan* (a letter of confirmation) acknowledging that the Government of British North Borneo recognized the customary rights vested in Panglima Abu Sari and Maharaja Mahmud and their heirs to collect turtle eggs from Sipadan.²⁵

6.15. On 18 August 1918 an agreement was executed before the Native Chief of Semporna, Panglima Udang, finally settling the respective shares of Panglima Abu Sari and the descendants of Maharaja Mahmud. On 29 August 1918 G.C. Irving approved the agreement.²⁶ This document is referred to in a further document dated 5 July 1957, signed by Panglima Abdullah, the son of Panglima Udang,²⁷ the person who signed the affidavit of 25 January 1975.²⁸

²¹ Annexes, vol. 4, annex MM 91.

²² Annexes, vol. 4, annex MM 92.

²³ Annexes, vol. 4, annex MM 94.

²⁴ Annexes, vol. 4, annex MM 95.

²⁵ Annexes, vol. 4, annex MM 96.

²⁶ Annexes, vol. 4, annex MM 98.

²⁷ Annexes, vol. 4, annex MM 105.

²⁸ Annexes, vol. 4, annex MM 120.

6.16. On 2 June 1919 Sipadan was declared to be a native reserve for the collection of turtle eggs, pursuant to section 3 of the Turtle Preservation Ordinance of 1917.²⁹ This provision was mentioned by the Assistant District Officer, Semporna, in a letter dated 20 October 1958 to the District Officer, Lahad Datu, in which he refers to information given to him by Panglima Sanulki regarding the ownership and devolution of rights to collect turtle eggs on Sipadan.³⁰

6.17. In 1923 the Government of British North Borneo published a document entitled “Commercial Sea Products from the coasts of British North Borneo”. Reference is there made to turtle eggs in the following terms:

“The sandy shores of some of our islands, notably Taganac off Sandakan, Turtle Island near Pulau Tiga on the West Coast, and Sipadan Island in Sibuko Bay, abound with turtle eggs...”³¹

This was a clear and public indication of the view of the North Borneo Government that Sipadan was part of the Colony.

6.18. On 28 April 1954 the District Officer at Tawau issued a license under the Turtle Preservation Ordinance 1917 to take a limited number of turtles (as opposed to turtle eggs) in an area which was stated to include “the islands of Sipadan, Ligitan, Kapalat, Mabul, Dinawan and Si-Amil”.³² This led to complaints from residents of Kampong Danawan who feared that their right to collect turtle eggs might be affected. The complaints were made to the District Officer, Lahad Datu and were passed by him on 27 August 1954 to the District Officer, Tawau.³³ As a result, the latter wrote on 1 September 1954 to the General Manager, Borneo Abaca Ltd., at

²⁹ Annexes, vol. 4, annex MM 97. The Turtle Preservation Ordinance was enacted on 1 June 1917. Its territorial ambit was “the State [i.e. North Borneo] or the territorial waters thereof”. Section 3 gave the Governor power to specify native reserves for the collection of turtle eggs: in the absence of such action, the collection of turtle eggs was an offence under the 1917 Ordinance. Thus the continued exercise of the customary right to collect turtle eggs on Sipadan depended on a decision of the Governor of North Borneo.

³⁰ Annexes, vol. 4, annex MM 106.

³¹ Annexes, vol. 4, annex MM 99.

³² Annexes, vol. 4, annex MM 102.

³³ Annexes, vol. 4, annex MM 103.

Tawau requesting him to give instructions that his Cocos Islanders cease taking turtles at Sipadan.³⁴

6.19. A document reaffirming the gift by Maharaja Mahmud and Panglima Abu Sari of part of their share in the right to collect turtle eggs on Sipadan was executed in 1957 by Panglima Nujum and Kaneh in front of the Native Chief of Semporna, Datuk Panglima Abdullah.³⁵

6.20. On 22 December 1962, Mr. Edge, the Resident of Tawau, also wrote to the District Officer, Semporna in terms which indicate that he clearly regarded Sipadan as falling within his jurisdiction.³⁶

6.21. These instances of the involvement of North Borneo officials in disputes over the right to collect turtle eggs on Sipadan confirm a pattern established long before. It will be recalled that when the U.S.S. *Quiros* visited the islands in 1903, Lieutenant Boughter recorded that...

“I am informed that the island of Sipadan lying to the Southward and Westward of Danawan has always been understood by the natives as being appanage of the latter named island whose inhabitants, by native custom, have enjoyed the monopoly of collecting the turtle eggs deposited there. Recently Bajaus from other localities have been poaching and complaint has been lodged with the resident at Lahad Datu.”³⁷

(2) Devolution of the right to collect turtle eggs on Sipadan

6.22. At the turn of the century, the rights to collect turtle eggs on Sipadan were held by Panglima Abu Sari.³⁸ He was appointed headman of Danawan by the Company in 1899. Abu Sari gave Maharaja Mahmud the rights to collect eggs for 5 nights in a season (Maharaja Mahmud was himself appointed headman of Danawan in 1905). These rights then passed by succession to, in turn: Maharaja Anggai, Kaneh, Maharaja Mahajud and Maharaja Alukan.

³⁴ Annexes, vol. 4, annex MM 104 .

³⁵ Annexes, vol. 4, annex MM 119.

³⁶ Annexes, vol. 4, annex MM 112.

³⁷ Annexes, vol. 3, annex MM 63.

³⁸ He is referred to as Panglima Basari in the list of indigenous leaders in Annexes, vol. 4, annex MM 90.

Apparently a dispute between Abu Sari and Maharaja Mahmud was settled through the mediation of Panglima Udang. In appreciation of this, it is said that Abu Sari and Mahmud each gave Panglima Udang 5 nights of their share. The total of 10 nights was in due course inherited by Panglima Udang's son, Datuk Panglima Abdullah.³⁹

6.23. The details are of limited concern. What matters for present purposes is, again, that the valuable entitlement to collect turtle eggs on Sipadan belonged to leading members of the Island community inhabiting the Ligitan group (especially Danawan), that these entitlements were recognized by North Borneo officials, and that disputes concerning collection of turtle eggs were referred to North Borneo officials to resolve.

(3) Bird Sanctuary

6.24. On 19 December 1932 the Conservator of Forests at Sandakan forwarded to the Government Secretary, Sandakan, a proposal under section 28 of the Land Ordinance, 1930 for a megapode preserve on Sipadan.⁴⁰ The proposal was implemented in the form of a notification in the Official Gazette of 1 February 1933.⁴¹ Sipadan is shown as a bird sanctuary in the map at Annexes, vol. 5, Map 13.

(4) Construction and maintenance of lighthouses

6.25. As regards lighthouses, the Colony of North Borneo Annual Report 1960 referred to a grant for various navigational aids and facilities "including the establishment of 15 mile lights at... Sipadan..."⁴² The project met with some opposition from a resident of Danawan who had the right to collect turtle eggs on Sipadan. He complained to the Assistant District Officer, Semporna, who reported the protest to the Resident at Tawau on 25 October 1961.⁴³ Nonetheless the lighthouse was built.

³⁹ Annexes, vol. 4, annex MM 120. For a slightly different version of the story, see Annexes, vol. 4, annex MM 117.

⁴⁰ Annexes, vol. 4, annex MM 100. Megapodes are large mound-building birds.

⁴¹ Annexes, vol. 4, annex MM 101.

⁴² Annexes, vol. 4, annex MM 108.

⁴³ Annexes, vol. 4, annex MM 109.

6.26. The Colony of North Borneo Annual Report, 1961, refers to the completion during the previous year of a “75 foot Light Tower at Sipadan (Alice Channel), completed in October; 300 – mm light to be established early next year”.⁴⁴

6.27. Publicity was given to this new construction by the Government of North Borneo. On 10 July 1962 a Notice to Mariners (No.9 of 1962) was issued. It bore the heading “Colony of North Borneo”. The principal sub-heading was “Borneo - East Coast - Sibuko Bay (Pulo Sipadan)”. The notice contained information about the location and operation of the light.⁴⁵ It elicited no reaction from Indonesia.

6.28. The same is true of a similar notice issued on 17 July 1963 (No.6 of 1963) in relation to a light “establishment on the small islet in the south part of Ligitan Reef”.⁴⁶ The coordinates given are those of Pulau Ligitan.

6.29. A letter of 2 August 1973 on behalf of the Director of Marine (in Malay, *Pengarah Laut*) to the Director, Lands and Surveys (*Pengarah Tanah dan Ukur*) at Kota Kinabalu, states:

“It is confirmed Light Towers are established on the above islands, Sipadan constructed and completed in July 1962 and Ligitan in July 1963. Correspondence with Resident, Tawau and District Officer, Semporna dating back to 1961 on their proposal was all copied to you at the time. These are unwatched Light Towers (in other words, no lightkeepers) serviced at six monthly intervals (April/October yearly) and in continuous operation for coastal navigation.”⁴⁷

These lights exist to this day. They are regularly maintained and fall within the administrative responsibility of the Sabah Marine Department. Photographs of the lights maintained on the two islands are shown at pages 22 and 25 above.

⁴⁴ Annexes, vol. 4, annex MM 110.

⁴⁵ Annexes, vol. 4, annex MM 111.

⁴⁶ Annexes, vol. 4, annex MM 113.

⁴⁷ Annexes, vol. 4, annex MM 115.

(4) Control of tourism

6.30. The development of tourism on Sipadan was described in Chapter 3.⁴⁸ It has involved the Malaysian Government in extensive official action in relation to that island. Access to Sipadan is exclusively via Malaysia, and except for visitors who are nationals of States with visa exemption arrangements with Malaysia, visitors have to apply for Malaysian visas, stating their intended destination.

6.31. Effective from 25 September 1997, Sipadan and Ligitan became protected areas under the Protected Areas Order 1997 (made under the Protected Areas and Protected Places Act 1959).⁴⁹ At the same time action has been taken to enforce applicable planning and building regulations. In order to limit the number of tourists visiting Sipadan, special approval to visit has to be obtained from the Sabah Office, National Security Division, Prime Minister's Department.

C. CONCLUSION

6.32. The material presented above demonstrates very clearly the continuous exercise by North Borneo, Britain and Malaysia over the islands around the Semporna Peninsula, including Ligitan and Sipadan. This activity has related to the principal aspects of life on the islands with local importance. The satisfaction of the rules relating to the acquisition and retention of title to territory, as laid down in well-known jurisprudence of this Court and arbitral tribunals, has thus been fully demonstrated by Malaysia.

⁴⁸ See above, paragraph 3.19.

⁴⁹ Annexes, vol. 4, annex MM 123.

Chapter 7

NETHERLANDS AND INDONESIAN INACTIVITY IN RELATION TO LIGITAN AND SIPADAN

A. Introduction

7.1. In contrast with the many acts of British and Malaysian administration presented above, Malaysia has been able to trace only rare and isolated examples of action taken by Indonesia or its predecessors in relation to the islands, and none of it reflects a claim of right based on evidence of title to the islands in dispute. The failure of the Netherlands at any relevant time to assert any claim to Ligitan or Sipadan is itself a significant fact in this case, to be contrasted with the chain of title, and the positive evidence of administration by the Company and by Britain, as set out in Chapters 5 and 6 above. So too is the failure of Indonesia to make such a claim in relation to Britain or Malaysia until 1969, and the absence, before and since, of any exercise by Indonesia of any administration or control whatever over the two islands.

B. Absence of any claim by the Netherlands to Ligitan and Sipadan

7.2. In the early part of the nineteenth century, the southern part of the east coast of Borneo was subject to the Sultan of Bulungan. But Dutch maps of the period showed the islands offshore of North-east Borneo as being part of the possessions of the Sultan of Sulu,¹ and contemporary statements of the responsible Dutch Ministers are to the same effect.² The "Contract of Vassalage" of 12 November 1850 between the Dutch East Indies Government and the Sultan of Bulungan defined the latter's territory in the following words:

"The territory of Boeloengan lies within the following limits:-

Towards Goenoeng Teboer: from the sea-shore inland,

¹ See above, paragraph 5.8 (a).

² See above, paragraph 5.8 (b).

the River Karanliegan, from its mouth to its source beyond the Batoe-Bevekkier and the Palpakh Mountain;

Towards the Zulu possessions on the sea-shore, the cape called Batoe Tinagat and beyond the River Tanwan.

The following islands shall belong to Boeloengan, namely, Terakkan, Nenoekkan, and Sebittikh, together with the small islands belonging to them.

This determination of the frontiers is to be considered as provisional, and they shall be revised in detail and fixed afresh.”³

7.3. None of the places identified in the Contract of 1850 as belonging to Bulungan is anywhere near Ligitan or Sipadan. The furthest limit of the territory of Bulungan, according to this rather equivocal claim, was the mouth of the Tawau River and a neighbouring point called Batu Tinagat. In fact there was little or no evidence of control or influence on the part of Bulungan so far north, or even beyond the Sibuko River, which was the southernmost point of the Sulu grant of 1878, and this weakness was candidly conceded in the Explanatory Memorandum by the Dutch Government which accompanied the proposal for Parliamentary approval of the 1891 Treaty.⁴ In 1879, the Dutch flag was hoisted at Batu Tinagat, but the Netherlands could not sustain its claim to so northerly a point, and in the 1891 Boundary Treaty the limit of the Dutch claim was reduced to a point on the mainland coast, namely Broershoek, opposite the island of Sebatik. Even as to that immediate offshore island, Dutch title was accepted only as to its southern half. The town of Tawau, after its

³ Contract of 12 November 1850: Annexes, vol. 2, annex MM 3. The original text in Dutch reads:

“Het gebied van Boeloengan ligt binnen de volgende grenzen:
met Goenoeng Teboer: van af het zeestrand naar binnen 's lands, de rivier Karantiegan, van af hare monding tot aan haren oorsprong, voorts de Batoe-Beoekkier en de berg Palpakh;
met de Solokse bezittingen: aan zee de hoek genaamd Batoe Tinagat, en voorts de rivier Tauwan.
Tot Boeloengan zullen de volgende eilanden behooren Terakkan, Nenoekkan en Sebittik, met toebehoorende eilandjes.
Deze grensscheiding wordt als voorlopig aangenomen, en zal nader geheel worden nagegaan en op nieuw vastgesteld.”

⁴ See above, paragraph 5.8(c); see also below, paragraph 9.11 (c).

establishment by the Company in 1892, became a North Borneo administrative centre.

7.4. The Bulungan Contract of 1850 also referred to “Terrakan, Nenuoekkan and Sebittik together with small islands belonging to them” (“*met toebehoorende eilandjes*”). But it is clear that this was a reference to the small islands immediately surrounding and between the three named islands, which can also be seen on the Sketch map on page 32 above. None of these islands was anywhere near Sipadan or Ligitan. Two of the three named islands, Tarakan and Nunukan, clearly lie to the south of the 4° 10' N parallel. There are, in fact, two islands of Nunukan, distinguished as East and West. Lying south of them, and between them and Tarakan Island, are a number of small islands very close inshore, such as Boekat, Espada, Mail, Schildred, Tirens, Tibu, Sadow and Pulo Bunju, and some others, even smaller. These were evidently “the small islands belonging to them” referred to in the Contract of 1850. There was certainly no reference to islands much further to the north-east (some 40-50 n.m. to the east of Sebatik) and closely associated with the coast of the Semporna Peninsula.

7.5. A further contract of vassalage was concluded between the Netherlands Indies and the Sultan of Bulungan on 2 June 1878.⁵ In this contract it was provided for the first time that the latter's territory extended in the north-east up to Batu Tinagat (at 4° 20' N). But this is not to say that either the Dutch or the Sultan of Bulungan exercised any control in these northern territories. For example, in 1880 the Resident of the Southern and Eastern Division of Borneo reported that in “Berouw and Boeloengan... the trade with the inhabitants of the Sulu archipelago consists mainly of exchanging trade goods for kidnapped people, who are sold in our territory as slaves”.⁶ There were trading links between the Sulu Archipelago and its Borneo dependencies and Bulungan, but no element of political control on the part of Bulungan. And this situation did not change. As late as 1917 the then Resident reported that the Dutch administrative involvement only extended to the coastal area and the lower stream area of the Kajan River. The Tidoeng lands and other areas forming the northern parts of Bulungan, “remained virtually excluded from the exercise of authority”.⁷ The

⁵ See Annexes, vol. 2, annex MM 11.

⁶ Memorandum of Transfer by Resident Meijer, 2 March 1880, microfiche ARA 267 1+2: extract in Annexes, vol. 3, annex MM 39.

⁷ Memorandum of Transfer by Resident H.J. Grijzen, 3 September 1917,

authoritative *Encyclopaedia of the Netherlands Indies* states that by that time nothing more than sketch maps existed of the South and Eastern Division of Borneo.⁸

7.6. When the Netherlands was informed of the 1878 grant by Sulu to Baron von Overbeck, its reaction was acquiescent. The Minister of Colonies stated the Dutch position in a Parliamentary reply in the following terms:

“The north-east and north-west portions of Borneo have never been under our dominion. We have never disputed the authority of Spain over the dependencies of Sulu in the north-east portion of the island... We did not oppose the American undertaking in the north of Borneo, which was a forerunner of that of Baron Overbeck. What right and what reasons should we have to assume a hostile attitude towards the latter? If it were a question of a Settlement made in that island by the British Government we might appeal to the general tenour of the London Treaty of 1824 to show that a common occupation by England and Holland of the same island in the Indian Archipelago ought to be avoided. But as it appears this is simply a question of the establishment of a private Company in virtue of concessions which have been granted by native chiefs who are independent of our authority. Were our private or commercial interests injured thereby it might be affirmed that the Government should take measures to protect the interests of our country *even in districts which are not under the sway of the Netherlands*. But there is, as it appears, little reason to apprehend any such danger from the undertaking in question, and it would be difficult to prove that our rights have been infringed by the concessions which have been granted. This holds good at any rate as regards the Brunei concession. As far as the Sulu concession is concerned it is not quite certain whether the contracting parties are well

microfiche ARA 272-1: extract in Annexes, vol. 3, annex MM 69, and see the sketch map, above, p. 32 for the locations mentioned.

⁸ See J. Paulus (ed.), *Encyclopaedia van Nederlands-Indië*, vol. I (s-Gravenhage/Leiden: Nijhoff/Brill, 2nd edn, 1917) p. 356: Annexes, vol. 3, annex MM 70.

acquainted with the precise frontier-line of the Netherlands territory on the east coast of Borneo. With a view to preventing possible misapprehensions, orders have been issued for the Netherlands flag to be hoisted on the border (at the Bato Tinagat Rock, situated at the mouth of the Tinagat River in 4° 19" north latitude and 117° 51" east longitude, according to the last survey) to be placed for the present under the protection of a cruizer, whilst the Sultan of Boloengau has been requested to maintain a Representative at this point on his side of the frontier-line in question.”⁹

7.7. Subsequently, in relation to the proposed grant of the Royal Charter to the Company in 1881, the Dutch Minister in London made a formal reservation of rights, in the following terms:

“It is with a view to avoiding any such misunderstanding that the King’s Government desires, once for all, whilst abstaining from more detailed observations, to point out that the sovereignty of the Netherlands on the north-east of the Island of Borneo extends—

1. Over the region which, situated on the left bank of the Sibuco, constitute the territory of the ancient districts of Tadang, depending in their turn on Boelongan, a State tributary to the Netherlands;

2. Over the Islands of Tarrakan, Monockan [sic], and Sibittikh, with the lesser islands adjacent, and that these various territories cannot, therefore, have been ceded to Messrs. Overbeck and Dent.”¹⁰

7.8. This reservation notwithstanding, when the Royal Charter was granted in August 1881,¹¹ it recited the original language of the Sulu grant of 1878 with its reference to territories and islands down to

⁹ Extract from the Answer of the Minister of Colonies to Inquiries made by the Committee for the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880 (emphasis added). The Extract was attached to a letter from Mr Stuart, British Ambassador to the Netherlands to the Marquess of Salisbury, 24 October 1879: Annexes, vol. 3, annex MM 38.

¹⁰ Count de Bylandt to Earl Granville, 8 April 1881: Annexes, vol. 3, annex MM 41.

¹¹ Annexes, vol. 2, annex MM 13.

the River Sibuko. In the subsequent Dutch parliamentary debate, members expressed a range of views. Mr van der Hoeven noted that “to a great extent our establishments in Borneo are little more than nominal” and Mr Keuchenius was reported as having made a “a long speech in which, with reference to Borneo, he said that it was certainly very doubtful whether the Netherlands had any rights over the northern part of that island, and that at any rate, as appeared by a map executed some time since, the dominion of Holland did not extend to the territory which was the subject of the concession to Mr. Dent”.¹² In reply the Minister of Foreign Affairs said that...

“He did not see how the Netherlands government could do more, and in his opinion they would have incurred an immense responsibility if they had provoked a difference on a question on which, even here in Holland, opinions differed so much, as appeared from the speech of M. van der Hoeven, whose opinion on colonial questions was so authoritative.”¹³

7.9. In the subsequent correspondence with Britain, the absence of any Dutch claim to territory to the east of Batu Tinagat was equally clear. Reference may be made, for example, to a memorandum by Sir Edward Hertslet dated 9 January 1889, relating to the boundary dispute.¹⁴ In that memorandum, Hertslet referred to a Dutch note of 22 December 1888, which formulated the Dutch claim as follows:

“En partant du point extrême à l’ouest, Tandjong Datoe, jusqu’au point extrême à l’est, Batoe Tinigat, la chaîne de Montagnes formant la ligne de faite qui sépare les eaux ayant leur embouchure sur le territoire Néerlandais des eaux qui se déversent le territoire de Sarawak, Brunei, et de la ‘British North Borneo Company,’ entre les deux points extrêmes susmentionnés.”¹⁵

Hertslet stressed that “[t]he real question in dispute is the right of the Dutch to claim territory on the east coast as far north as Batoe Tinigat”, and he went on to say:

¹² Sitting of 6 December 1881: Annexes, vol. 3, annex MM 42.

¹³ Ibid.

¹⁴ PRO, FO 881/5822: Annexes, vol. 3, annex MM 43.

¹⁵ Ibid., p. 6.

“The Netherlands Government have raised the question as to the right of the Sultan [sic] of Brunei and Sulu, at the date of the Cessions made to the North Borneo Company, to cede any territory situated *south and west of Batu Tinigat*, which they say now forms part of the possessions of the King of the Netherlands; but it will be seen from what follows that in a Dutch Map published in Breda in 1857, and to all appearance under official sanction and authority, the territory north of the Atas River was stated to belong to the Sultan of Sulu, whose independence the Dutch Minister for Foreign Affairs (Baron de Leyden) admitted on the 9th October, 1880 (after the grant of the Sulu Concessions) was fully recognized by the Netherlands Government.”¹⁶

In fact the Dutch Government had subsequently extended its claim on the east coast up to Batu Tinigat, and in this respect it no longer adopted the position expressed in the map of 1857. But what matters for present purposes is that the entire dispute related to the area *south and west* of Batu Tinigat, which was for the Dutch “[le] point extrême à l’est”, the extreme easterly point of its claim. There was no question of the Dutch claiming any territory further to the north and east.

7.10. Subsequently, Britain offered to allow the Netherlands an enclave around Batu Tinigat, but this was rejected. As the Dutch negotiator Count de Bylandt reported: “an enclave of an uninhabited and useless piece of ground can in future perhaps bring a hornets' nest of all sorts of difficulties and conflicts, to which the Netherlands' flag, in my view, should not be exposed without unavoidable necessity.”¹⁷ Again, there was no question that territory or islands well to the east of Batu Tinigat would be conceded to the Dutch.

7.11. From the correspondence of this period, the following points emerge:

¹⁶ Ibid., p. 7 (emphasis added). On the accompanying map, the Atas River is shown at approximately 3° 20' N, opposite the island of Tarakan. No such river is shown on modern maps.

¹⁷ Letter of Count de Bylandt to Minister of Foreign Affairs, 28 July 1889, ARA, *Min. of For. Affairs*, 2.05.03, inv no 134, no. 713 (translated from Dutch): Annexes, vol. 3, annex MM 47.

(1) The Dutch Government recognised that the territories on the coast of North East Borneo belonged to the Sultan of Sulu, and that, for the most part at least, the territory which was covered by the 1878 grant related to “districts which are not under the sway of the Netherlands”.

(2) There was, according to the Dutch view, an area of overlapping claims in the south, but this concerned only the coast, not distant off-shore islands, and it related only to the region between the Sibuko River and Batu Tinagat.

(3) The only islands mentioned in this regard were “Islands of Tarrakan, Monockan [*sic*], and Sibittikh, with the lesser islands adjacent”, which phrase clearly cannot include islands 50 miles to the east and north east, adjacent to a coast which the Dutch claim, even at its most extreme, did not cover.

(4) Authoritative Dutch sources denied that they had any valid claim to the disputed sector. In fact the eventual Boundary Treaty conceded Batu Tinagat and the northern half of Sebatik to Britain: i.e. it involved a *withdrawal* of the Dutch claim in the north, not a further extension well to the north east.

7.12. **Insert 14** is a sketch map, on the following page showing the area of overlapping claims, which area was divided by the Boundary Treaty of 1891.

C. Absence of Administration of the Islands by the Netherlands

7.13. There was never at any time any attempt by the Netherlands to establish a territorial administration over any point on the coast eastwards of Batu Tinagat, or to any islands eastwards of Sebatik. On the contrary, as will be seen in Chapter 9, official statements of the extent of Dutch territory in this sector were *reduced* following the 1891 Treaty, and the description of the territory of the Sultan of Bulungan was adjusted accordingly.¹⁸

¹⁸ See below, paragraph 9.17.

7.14. Admittedly, there were occasional Dutch naval activities along the north-east coast of Borneo. Perhaps the most notable example of such activity was the voyage of the survey vessel *Macasser* in 1903. A manuscript report of its activity survives in the Dutch General State Archives.¹⁹ The annex to the report, written by the commander of the *Macasser*, is headed “Bearings taken by *H.M.S. Macasser* on British North Borneo, 21-27 October 1903”. Paragraph 2 focuses on the island of Sipadan and records various bearings in relation to that island, taken from an inshore island. By contrast the report notes that Ligitan and Danawan are located too far from the coast to allow for a reliable measurement. In referring to Ligitan and Sipadan along with other localities in the region which were unquestionably British, it would appear that the Commander of the *Macasser* treated all the islands mentioned as being part of British North Borneo.

7.15. Reference may also be made to the patrol of the Dutch torpedo boat *Lynx* in November 1921.²⁰ The inspection of the area by *Lynx* included, among other islands, Ligitan and Sipadan. As the report makes clear, the patrol was in direct response to concerns about alleged sea piracy by Bajaus from the Philippines. There is nothing in the report which indicates that Ligitan and Sipadan were considered Dutch territory, or under Dutch jurisdiction. The *Lynx* visited Sipadan seeking information about suspected “pirate” praus on Si Amil, but found only turtle egg collectors and no information. There are many instances in colonial history where the colonial powers cooperated in cross-border operations to suppress “piracy” in their border areas: the fact that the Commander of the *Lynx* communicated with British authorities suggests that this was a further example of cooperative action of this kind. The Dutch Commander was instructed to take any seized native praus to the Dutch island of Tarakan for investigation. The *Lynx*'s mission triggered discussions among Dutch authorities on the territorial sea boundary between the

¹⁹ See letter from Commander van Straaten to Dutch Naval Commander, Batavia, 26 November 1903, ARA, 4.HYDRO.31, inv. 3, no. 108: Annexes, vol. 3, annex MM 64.

²⁰ See the patrol report in Annexes, vol. 3, annex MM 71.

British North Borneo Company and the Netherlands Indies off the island of Sebatik. During these extensive discussions, no single reference was made to Ligitan or Sipadan.

7.16. There is no indication that the voyage of the *Lynx* involved the lodging of a territorial claim to islands visited (analogous, for example, to the formal acts performed by Lieutenant Boughter of the *Quiros*).²¹ Nor was there any such follow up activity (e.g. the publication of maps proclaiming sovereignty over the area or diplomatic correspondence) as followed the voyage of the *Quiros*.²² On the contrary, the Dutch Resident of South and Eastern Borneo, van Kempen, confirmed in 1923 that according to the Batavian Petroleum Company the mineral wealth of Sibatik was of no particular interest. Reporting on a recent mission to the northern part of the region, he stated:

“The island itself is nearly uninhabited and the fisherman’s trade, conducted along the shores, is not in the hands of the indigenous population of Boeloengan. When fishing takes place, it is performed by the well-known Badjaus from the Solo archipelago.”²³

The Resident described the area beyond the island of Sebatik in the following words: “In this particular area there are no islands; only the open sea”.²⁴

²¹ See above, paragraph 5.31.

²² See above, paragraphs 5.25, 5.29 and 5.30.

²³ Mr van Kempen, Resident of South and Eastern Borneo, letter of 24 November 1923, in ARA, *Min. van Kol., Openbaar Verbaal*, 1901-1952, 2.10.36.06, inv. no. 2637, no. 11: Annexes, vol. 3, annex MM 73.

²⁴ Ibid.

D. Absence of Protest by the Netherlands in relation to British Administrative Acts concerning the Islands

7.17. In addition to the failure of the Netherlands to take any steps itself to administer the islands, it did nothing to protest at their administration by North Borneo. In particular, there was no protest or other action taken by the Netherlands on a number of occasions when it might have been expected to be aware of developments adversely affecting its pretended interest in these islands.

7.18. For example, as far as the record shows, there was no protest at any of the following transactions:

- (a) The Protocol of 1885 between Britain, Germany and Spain;²⁵
- (b) The Spain-United States Convention of 1900, ceding to the United States islands which included the two islands in dispute;²⁶
- (c) The voyage of the *U.S.S. Quiros* in 1903, and the publication by the U.S. Hydrographic Office of the map "Northern Shore of Sibuko Bay";²⁷
- (d) The 1907 Exchange of Notes and the map attached thereto;²⁸
- (e) Administrative acts by North Borneo affecting the islands in the whole of the period following the grant of 1878, including the licensing of boats frequenting the islands, the licensing of turtle egg collection and the establishment of bird sanctuaries;²⁹

²⁵ See above, paragraph 5.18.

²⁶ See above, paragraph 5.22.

²⁷ See above, paragraphs 5.25, 5.27.

²⁸ See above, paragraph 5.38.

²⁹ See above, paragraphs 6.6, 6.11, 6.24.

- (f) Such publications as the official British report in 1923 on “Commercial Sea Products from the Coast of British North Borneo”;³⁰
- (g) The inclusion of Sipadan as a native reserve for the collection of turtle eggs;³¹
- (h) The proclamation in 1933 of a bird sanctuary on Sipadan;³² and
- (i) The publication of Admiralty chart 2660B, showing the boundary across Sebatik stopping at its east coast,³³ as well as the other maps referred to in detail in Chapter 10.

E. Absence of Administration of the Islands by Indonesia after Independence

7.19. On becoming independent, Indonesia succeeded to the position of the Netherlands.³⁴

7.20. Indonesia did not include Ligitan and Sipadan within the area of its territorial and archipelagic waters as proclaimed in 1960. By Act No. 4 of 18 February 1960,³⁵ Indonesia identified the location of the points of baselines of Indonesian waters. Lines joining these points in the relevant area do not embrace Ligitan and Sipadan, nor does the 12 nautical mile maritime belt constructed upon those lines. This can clearly be seen from the map referred to in Article 2 of the Act and annexed to it.³⁶ The importance of this Act as a statement of

³⁰ See above, paragraph 6.17.

³¹ See above, paragraph 6.16.

³² See above, paragraph 6.24.

³³ See below, paragraph 10.6.

³⁴ Indonesia proclaimed its independence on 17 August 1945. The transfer of sovereignty by the Netherlands is dated 27 December 1949.

³⁵ Annexes, vol. 4, annex MM 107.

³⁶ See Annexes, vol. 5, Map 7.

Indonesia's claim to archipelagic and territorial waters and, hence, by clear implication, as evidence of the absence of a claim to the islands outside those waters, is indicated by the concluding sentence of the Act: "In order that the Act be known to everybody whomsoever it is instructed that this Act be promulgated by publication in the Government Gazette".

7.21. So far as any pertinent Indonesian oil concession in the area is concerned, the northern limit of the northern-most Indonesian license of which Malaysia has any notice is 30' south of the 4° 10' N line. That grant does not cover Sipadan since the northern limit of the eastern boundary of the grant to JAPEX appears to lie west of Sipadan.³⁷

F. Absence of Protest by Indonesia in relation to British and Malaysian Administrative Acts concerning the Islands

7.22. Like the Netherlands before it, Indonesia failed to protest at the continuing administration by Britain, and then by Malaysia, of the islands it now claims. Indonesia remained silent at the time of the construction of a light tower on Sipadan, publicity to which was given both in the Colony of North Borneo Annual Reports for 1960 and 1961 and in Notices to Mariners in 1962 and 1963.³⁸ Nor, for example, was there any reservation of rights over the two islands at the time of decolonization in 1963, when Sabah became a component state of Malaysia.

G. Conclusion

7.23. The record demonstrates a complete absence of actual administration or of any other acts, by the Netherlands or by Indonesia, from the earliest times to 1969 or subsequently. The record of the conduct of the parties is wholly inconsistent with the Indonesian claim to these islands. Further, the absence of any protest,

³⁷ See Annexes, vol. 4, annex MM 114.

³⁸ See above, paragraphs 6.27, 6.28.

either by the Netherlands or Indonesia, demonstrates their acquiescence in British and Malaysian conduct in relation to the islands. That acquiescence is clearly inconsistent with the claim to sovereignty that Indonesia now makes.

PART THREE

Chapter 8

THE 1891 BOUNDARY TREATY DOES NOT SUPPORT INDONESIA'S CLAIM TO LIGITAN AND SIPADAN

A. Introduction

8.1. It appears from the diplomatic negotiations mentioned above¹ that Indonesia founds its claim to the two islands primarily upon the 1891 Boundary Treaty. Accordingly, Malaysia will offer some observations on the Treaty, without prejudice to its position in relation to such arguments as Indonesia may in due course develop in the present proceedings.

8.2. It will be shown in this Chapter that nothing in the 1891 Boundary Treaty, or in the *travaux préparatoires* or in other materials to which resort may be had in interpreting treaties, supports the Indonesian claim. Rather, the ordinary and natural interpretation of the Treaty, and relevant rules of law, plainly refute it. Moreover it will be shown in Chapter 9 that neither the subsequent ratification process of the Treaty nor its implementation (in particular through the Demarcation Agreement of 1915) support the Indonesian claim. Indeed, if the 1891 Boundary Treaty stands in need of interpretation in this respect, the 1915 Agreement is an authoritative interpretation of Article IV in the contrary sense to that advocated by Indonesia.

8.3. The basic principle of treaty interpretation applicable to the present case is that contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which, though not formally applicable to treaties made before 1982, have been accepted as relevant to the interpretation of all treaties. In particular, as the Court said in the *Case Concerning the Territorial Dispute (Libya/Chad)*:

“Interpretation must be based above all on the text of the treaty... [I]n accordance with customary international

¹ See above, paragraph 4.6.

law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”²

Similarly, in the *Case relating to the Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal)* the Court said:

“The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to these in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court resort to other modes of interpretation, and seek to ascertain what the parties really did mean when they used these words.”³

B. The Interpretation of the 1891 Boundary Treaty in Accordance with the Applicable Rules of Treaty Interpretation

8.4. Article IV of the 1891 Boundary Treaty consists of a single sentence, which reads as follows:

“From 4° 10' north latitude on the east coast the boundary line shall be continued eastward along that parallel, *across* the island of Sebittik; that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands.”⁴

In the equally authoritative Dutch text of the Treaty, the word “across” in Article IV is rendered by its Dutch equivalent “*over*”, and not by the Dutch word “*voorbij*” (“beyond”).

² I.C.J. Reports 1994, p. 22, para 41.

³ I.C.J. Reports 1991, p. 69, para 48.

⁴ Annexes, vol. 2, annex MM 17 (emphasis added).

8.5. Indonesia has hitherto contended that the boundary line described in Article IV not only extends across the island of Sebatik, in the sense of stretching from the island's west coast to its east coast, but also stretches beyond the east coast seawards along that parallel of latitude to an undefined point said to be at least some 50 miles distant. Indonesia supports this interpretation of the text on the basis of a Netherlands Government map of 1891, hereinafter referred to as the "internal Dutch map".⁵

8.6. It should be stressed that the 1891 Boundary Treaty itself refers to no map, and no map was annexed to it. The map has never been printed in any treaty series as associated with the 1891 Boundary Treaty, and no English-language version of the map is known to exist. It is neither part of the text of the Treaty, nor of its *travaux préparatoires*. Malaysia will accordingly deal, in this Chapter, with the meaning of the words actually used in the Treaty and subsequently, in Chapter 9, with the internal Dutch map.

8.7. The preamble to the Treaty states clearly its object and purpose. The Parties declared 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, have resolved to conclude a Convention to that effect."

In 1891 the distinction between a boundary treaty and an allocation treaty was well known. A boundary treaty established a boundary line between adjacent areas of land territory. An allocation treaty described a line of division on the sea, not for the purpose of dividing maritime areas, but for the purpose of allocating to one or the other State sovereignty over islands on one or other side of the line.

8.8. It is quite clear, when the 1891 Treaty is read as a whole, that it was intended to be a land boundary treaty. This follows both from the words of the Preamble, quoted above, and from the opening words of Article I: "The boundary between the Netherlands possessions in Borneo and those of the British-protected States in the same island..." There is nothing in the Treaty to suggest that it was intended to divide sea areas or to allocate distant off-shore islands. Article I provides that the boundary "shall start from 4° 10' north

⁵ Annexes, vol. 5, Map 2.

latitude on the east coast of Borneo”, while Article III provides for the extension of the line to Tanjung Datu on the west coast of Borneo. The Treaty thus provides for the territorial division of the island of Borneo from its east coast to its west coast. In addition, Article IV deals with the problem posed by the presence of the island of Sebatik which lies so close to the coast of Borneo as to be virtually part of it. It would not be in accord with the manifest object and purpose of the Treaty to interpret Article IV as serving the additional purpose of allocating title to the Netherlands in respect of islands south of a line in the sea extending indefinitely eastwards from the east coast of Sebatik along the latitude of 4° 10' N.

8.9. Article IV provides that the boundary line shall continue eastward along the parallel of 4° 10' N. This means that the extension starts from the east coast of Borneo and runs eastward across Sebatik, in contrast with the main part of the boundary line, which starts at the same point, but runs westwards. Article IV is thus a unique provision introduced solely to deal with Sebatik and, by implication, the narrow belt of water between Sebatik and the main island of Borneo, which could be assimilated (then and now) to internal waters. In this context it should be recalled that at the relevant time neither Britain nor the Netherlands claimed to exercise sovereignty beyond the three-mile belt of territorial waters.

8.10. Specifically, Article IV provides that “...the boundary line shall be continued eastward along that parallel, across the island of Sebatik”. Indonesia contends that the word “across” means that the line crosses Sebatik on its way from the east coast of Borneo to some more distant terminus in the sea, not specified in the Treaty but alleged to be at least 50 miles to the east of Sebatik. If the line was much shorter, it would affect no islands at all, since none lie to the east of Sebatik before Sipadan itself is reached.

8.11. This is not the plain and ordinary meaning of the words “across the island of Sebatik”. These words mean, in English and in Dutch, a line that crosses Sebatik from the west coast to the east coast and goes no further. This meaning accords with the usual primary definition of “across” and, in Dutch, “*over*” given in dictionaries.

8.12. This is clearly confirmed by the words following the semicolon after the words in question: “that portion of the island situated to the north of that parallel shall belong unreservedly to the British

North Borneo Company, and the portion south of that parallel to the Netherlands”. The fact that Article IV was drafted as a single sentence divided into two parts only by a semi-colon indicates the close grammatical and functional connection between the two parts. The second part can only be read as referring to the island of Sebatik itself, and this supports the understanding that the references to the island in the first part are likewise limited to the island itself. A contextual interpretation of Article IV produces exactly the same result as the literal interpretation of the word “across” (“*over*”): that is to say, it is limited in its scope to the island itself.

C. The *Travaux préparatoires* of the 1891 Boundary Treaty confirm the Literal and Contextual Interpretation of Article IV

8.13. In the circumstances set out above, resort to the preparatory work leading up to the conclusion of the 1891 Treaty is not necessary. The meaning of the text, as derived from the words used in their context and in the light of their object and purpose, is quite clear. It is impermissible to refer to the *travaux préparatoires* in order to support any other meaning than that which emerges from the interpretation of the text itself, since the language is neither “ambiguous” nor “obscure” (Vienna Convention on the Law of Treaties, Article 32 (a)), and the meaning derived from the interpretation of the text is certainly neither “manifestly absurd” nor “unreasonable” (Article 32 (b)). However it is permissible to refer to the *travaux préparatoires* “in order to confirm the meaning resulting from” textual and contextual interpretation, and in fact the *travaux préparatoires* do provide such confirmation.

8.14. The relevant negotiations between the British and Dutch Governments took place principally during the period 1889-1891. At that time the Dutch Government relied on the territorial claims of the Sultan of Bulungan under the Contracts of 1850 and 1878.⁶ The British Government represented the interests of the British North Borneo Company, which derived its rights from the Sultan of Sulu in 1878, as expressly recognised by Spain in 1885, and from its actual administration of the islands adjacent to the coast.

⁶ See above, paragraph 7.7.

8.15. The question is whether the preparatory work of the 1891 Treaty revealed any trace of a claim by the Netherlands on behalf of the Sultan of Bulungan to the island of Ligitan and Sipadan and an acknowledgement of that claim by the British Government. The answer is emphatically: No.

8.16. At the time of the negotiations, the Dutch Government took the position that the northern limit of the territories of the Sultan of Bulungan was at Batu Tinagat, a location on the northern shore of Sibuko Bay, just to the north east of Sebatik Island and a few miles east of Tawau (see **Insert 14**, above, page 80). This location was more than 40 n.m. to the west of Sipadan and even further from Ligitan. At that time there was no suggestion by the Netherlands that those islands, or any others close to the northern shore of Sibuko Bay, adhered to the mainland territory of the Sultan of Bulungan, or that they belonged, or should in future belong, to the Netherlands Indies.

8.17. At the first meeting of the Joint British–Dutch Negotiating Commission on 16 July 1889, the British delegates referred to the following statement by its Acting Consul-General, Mr. Treacher:

“7. That, at the time of the Dent and Overbeck Concessions, Acting Consul-General Treacher reported that the territory mentioned in the grants made to them was ‘actually under Sulu rule, and occupied by Sulu Chiefs’.”⁷

In response thereto the Dutch delegation said on 19 July 1889:

“7. ‘Admitting that the statements of Mr. Treacher should be correct in so far as the regions are concerned *to the eastward of Batoe Tinagat*, they certainly are incorrect as to the disputed district which was not occupied by Sulu Chiefs.’”⁸

The important part of this passage is the admission by the Dutch representative that the regions to the eastward of Batu Tinagat were actually under Sulu rule – thereby excluding the rule of the Sultan of Bulungan, from which it necessarily followed that the Dutch were not claiming those eastern areas on his behalf.

⁷ Annexes, vol. 3, annex M 44.

⁸ Annexes, vol. 3, annex MM 45 (emphasis added).

8.18. Consistent with this Dutch position the consideration of the boundary on the coast never extended to cover the islands east of Batu Tinagat. This appears clearly, for example, from the records of the meeting of 27 July 1889.⁹ When, on 2 April 1890, the Netherlands representative, Count Bylandt, indicated the Dutch willingness to accept a compromise line “across the whole area of the Island [of Borneo] from a point to be established on the east coast until Tandjong – Datoe on the west coast”, the starting point on the east coast of Borneo was to be Broershoek, the point eventually adopted by the 1891 Boundary Treaty for this purpose. The Dutch also proposed at the same time, but in a separate paragraph, that “the island of Sebittik remains within the Netherlands”.

8.19. The Court of Directors of the Company submitted its comments on the Dutch proposal on 22 July 1890. It proposed that the whole of Sebatik Island be retained by the Company:

“This seems to the Court a fair arrangement, as they are of opinion that the Island of Sebatik—forming as it does one side of the channels into which all the rivers between Broershoek and Batu Tinagat flow—should be under their jurisdiction; but should it unfortunately not meet with the consent of the Netherland Government, they would be prepared to accept a continuation of the parallel 4° 10' north latitude across the island *to the east corner*, which would give to each party all the portion lying opposite its own territory”.¹⁰

In adopting and communicating these views to the Dutch Government on 13 August 1890, the British Government stated the position in relation to Sebatik as follows:

“...the boundary-line should run along the parallel of 4° 10' eastward, as well as westward, from Broershoek, so as to divide the island equally between themselves and the Netherlands Government.”¹¹

⁹ Annexes, vol. 3, annex MM 46.

¹⁰ FO 881/6071, at p. 56; Annexes, vol. 3, annex MM 48 (emphasis added).

¹¹ Annexes, vol. 3, annex MM 49.

The proposal made by the Netherlands to the British Government on 2 February 1891 took a similar approach.¹²

8.20. A relevant consideration in the negotiations was that each party should have its own means of access to the waters lying on its side of the line between Sebatik and the mainland. This was perhaps the decisive factor which led to the island of Sebatik being divided into two along the same line as the adjacent mainland. But that consideration had nothing to do with any islands further to the east, and the record of the discussions shows that no consideration whatever was given to those islands.

8.21. For these reasons, it is impossible to read into this mention of the equal division of Sebatik Island in the *travaux préparatoires* of the 1891 Boundary Treaty any idea that the line so dividing it should extend eastward into the sea for an indefinite distance so as to allocate Ligitan and Sipadan to the Netherlands. As the *travaux préparatoires* reveal, the line under discussion:

- (1) was a boundary line, not an allocation line (and certainly not both);
- (2) was adopted as a compromise only *after* the 4° 10' N line was agreed as a boundary line for the mainland of Borneo; and
- (3) related only to the island of Sebatik and not to other islands well to the east.

The *travaux préparatoires* thus confirm the interpretation of Article IV which derives from the interpretation of the actual words considered in their context and in the light of their object and purpose.

¹² Annexes, vol. 3, annex MM 50.

D. In any event, the 1891 Boundary Treaty could not have had the effect of allocating to the Netherlands islands belonging to Spain

8.22. Finally, even if (*quod non*) the 1891 Boundary Treaty had purported to allocate to the Netherlands islands which were well to the east of Sebatik, that bilateral allocation could not have had any consequence for islands which at that time belonged to Spain. *Nemo dat quod non habet*: Britain could not have agreed to cede to the Netherlands islands which fell outside the three marine league line contained in the 1878 Sulu grant, a line expressly and publicly recognised by Britain and Spain in the Protocol of 1885. This is a further reason for rejecting the Indonesian argument based on the 1891 Boundary Treaty.

Chapter 9

THE IMPLEMENTATION OF THE 1891 TREATY AND THE DEMARCATION AGREEMENT OF 1915 CONFIRM MALAYSIA'S POSITION

A. Introduction

9.1. In the period subsequent to the conclusion of the 1891 Boundary Treaty, two episodes need to be considered, for the light they shed on the Indonesian contention that Article IV allocated Ligitan and Sipadan to the Netherlands (and thus, eventually, to Indonesia). They are:

- (1) the process of ratification and implementation of the 1891 Boundary Treaty by the Netherlands, and in particular the internal Dutch map; and
- (2) the agreed demarcation of the boundary, which occurred in 1915.

B. Dutch Ratification of the 1891 Treaty, the Internal Dutch Map and Subsequent Dutch Actions implementing the Treaty

9.2. The 1891 Convention required ratification, and in accordance with Dutch constitutional procedures it was submitted to the Dutch Parliament for approval. A number of documents were submitted to the Parliament in that context, and subsequently a number of actions were taken by the Netherlands in the implementation of the Treaty.

(1) The Internal Dutch Map

9.3. The first item which falls to be considered is the internal Dutch map. This was attached to the Government's "Explanatory Memorandum No. 3", dated 25 July 1891, which was presented to the Netherlands Parliament during the procedure for the ratification of the 1891 Treaty. This map carries on it, among other lines, one coloured

red which extends eastward into the sea for a distance of approximately 50 miles from the point on the east coast of Sebatik where it is reached by the parallel of 4° 10' N.¹ The map legend describes the red line as the boundary line established in the 1891 Convention. In the bilateral discussions between Indonesia and Malaysia,² Indonesia has relied very heavily on this map as showing the intention of the parties in 1891 to allocate all islands south of the line to the Dutch East Indies. The map does not support such an extravagant interpretation, *inter alia* for the following reasons.

9.4. First, and despite suggestions sometimes made to the contrary, the map was not attached to the Treaty and is not referred to either in the Treaty itself, or in the *travaux*. The map was an entirely unilateral document prepared by the Netherlands Government for illustrative purposes in the Netherlands parliamentary proceedings.

9.5. In fact the very first draft of the map exists. It is reproduced on page 98 as **Insert 15**. This first hand-drawn version was apparently prepared on 23 June 1891, which was three days after the signature of the 1891 Boundary Treaty. Thus it is quite clear that the map, which exists only in the Dutch language, was not an agreed map, was never discussed between the parties, and was never formally delivered to the British negotiators. Indeed it was not even in existence at the time of the conclusion of the Treaty.

9.6. The Treaty itself clearly indicates that no map was attached or agreed, since the Parties expressly foresaw that the exact positions of the boundary line had still to be determined. Article V provided:

“The exact positions of the boundary line, as described in the four preceding articles, shall be determined hereafter by mutual agreement, at such time as the Netherlands and British Governments may think fit.”

The “four preceding articles” include Article IV relating to the line across Sebatik. So it is evident that “the exact position” of the boundary line prescribed in that article had still to be determined.

¹ See Annexes, vol. 5, Map 2.

² See above, paragraph 4.6.

9.7. Secondly, the original draft of the internal Dutch map does not show the islands in dispute; neither does the final version attached to the Explanatory Memorandum, which shows only P. Mabul to the north of the line.

9.8. Thirdly, the 4° 10' N line, coloured blue on the hand-drawn map shown on page 98 above, is drawn only a short distance into the sea, just past the location of Batu Tinagat, which was the last point on the coast claimed by the Netherlands. In other words, the original version of the line was quite different, much shorter, and certainly did not have the purpose now attributed to it. It was only in its printed version that the line (coloured red) was so extended.

9.9. Nothing was said at the time to justify or explain the extended line on the internal Dutch map, let alone to establish that the line so drawn was agreed by or opposable to Britain. On the contrary the Explanatory Memorandum, to which the final version of the internal Dutch map was attached, contradicts the argument which is now drawn from it.

(2) **The Dutch Explanatory Memorandum**

9.10. The text of the Explanatory Memorandum, in a translation provided by Malaysia, is set out in **Annexes, vol. 4, annex MM 51**. The Explanatory Memorandum briefly recounts the history of British acquisitions of “the Northern part of Borneo which was not under our authority”. It notes that the Dutch Government felt unable to resist the proclamation of a British protectorate over North Borneo in 1888 “because no rights of the Dutch have been assaulted and no stipulations of the treaty have been violated and to broach again the interpretation of the treaty of 1824 would surely not yield any result”. It notes further that the Sulu grant of 1878 extended to the Sibuko River, whereas the Dutch boundary “according to the contract made with the sultan of Boelongan at the coast is formed by the Batoe Tinagat and further inland by the Tawao river”. Thus the boundary dispute is described – with complete accuracy – in the Explanatory Memorandum as concerning “the disputed area between the Tawao and Siboekeo Rivers”.

9.11. The following additional points should be made about the Explanatory Memorandum:

(a) It made no mention of Ligitan and Sipadan, or indeed, any islands at all further east than Sebatik.

(b) It described the dispute exclusively as a land boundary dispute: i.e. “a border arrangement which she [sc. the Dutch Government] had wished for the whole width of Borneo from the Eastern to the Western Coast”.

(c) It candidly admitted the weakness of the Dutch claim to the disputed area:

“A local inspection carried out by the deputy assistant resident of Koetei revealed that the Bajaus who live on the islands located at the North-Eastern coast of Borneo, which belong to the sultanate of Solok, are still continuously collecting forest products in the disputed area without being concerned about the Sultan of Boeloengan whatsoever. Because of this and also because of the absence of any document about the stipulation of the boundary between the sultanates of Boeloengan and Solok, it was considered very difficult indeed to determine the extent of the area of Boeloengan.”

And, referring to the different lines shown on the internal Dutch map, it went on to say that:

“If a comparison of these different lines appears to give the impression that the Dutch have given up a part of its territory, we should not forget that before there was a dispute about the boundary, the Dutch Government has never paid much attention to her territory at the Eastern coast of Borneo which was unknown to her and moreover totally uninhabited; that the rights of the Sultan of Boelongan on the disputed area cannot be called indisputable and finally that instead of a highly uncertain boundary through a stretch of mostly inaccessible land which was unknown, there is now accepted a quite correctly described borderline which makes an end to all difficulties in the future, not only concerning the part of Borneo which was connected

with the border dispute but also concerning the whole island.”

(d) As to the part of the line relating to Sebatik, the Memorandum said nothing at all about any supposed off-shore allocation line:

“Therefore from this side there is the preference to have the island which is totally uninhabited parted in two with the parallel of 4° 10' as the boundary between the two parts; because of this partition the Dutch and the British North Borneo Company would have that part of the island which consists of the bank of the fairway along which either of them has to reach the coastal area they possess; this is fair and rational.”

9.12. To summarise, not only is the Explanatory Memorandum totally silent on any question of an allocation line or off-shore islands; it is clearly and expressly concerned only with issues of the determination of a land boundary on Borneo and on Sebatik (“the boundary through the disputed area at the Eastern coast”).

9.13. Following the tabling of the Explanatory Memorandum, a committee of five Members of the Parliament was asked to look into the issue. As regards the agreed boundary line on Sebatik, the committee report read:

“The division of the island of Sebatik met with reservations by some members of the committee. They feared that as a consequence new border disputes would arise. But this opinion was contradicted by other members, who, taking the nature of the island into consideration, did not fear border disputes and were of the opinion that it could be important to keep at least part of Sebatik, which by its location controls the access to the river mouths behind it.”³

9.14. A further “Memorandum in Response”, submitted by the two Ministers on 20 February 1892,⁴ again indicated their view that the

³ *Handelingen der Staten-Generaal, Tweede Kamer. Bijlagen. 1891-1892*, no. 43, no. 3, 2 December 1891, p. 3. Translation provided. See Annexes, vol. 3, annex MM 52.

⁴ Annexes, vol. 3, annex MM 53.

function of the line across Sebatik was limited to the “division of the island.” Their specific comment on Article V of the Treaty is also pertinent:

“During the above-mentioned survey conducted on the east coast of Borneo by Dutch and British marine officers, the border points at Broershoek and on both shores of the island of Sebitik were indicated on the territory by means of poles.”

9.15. On 8 March 1892 the Second Chamber of the Dutch parliament approved the Convention. Instruments of ratification were exchanged on 11 May 1892.

(3) The Dutch Statute implementing the 1891 Treaty

9.16. In this context, note may be taken of the language of the Netherlands statute of 20 May 1892, in which the Treaty was described as “defining the borders separating Dutch possessions on the island of Borneo and the British Protectorate States on the said island”. Clearly, there was no thought here of the boundary affecting title to islands lying more than 40 n.m. seawards to the east, which had never been claimed by the Netherlands and regarding which no dispute existed.

(4) Modification of the boundaries of Bulungan to conform to the 1891 Boundary Treaty

9.17. Following the ratification of the 1891 Treaty, the claimed boundaries of the Sultanate of Bulungan were amended to bring them into line with the Treaty. The new official description of the boundaries was signed on 19 June 1893 by the Dutch Resident of the South and East Division of Borneo and certified by the [Dutch] Government Secretary and the Secretary-General of the Ministry of the Colonies.⁵ It specifically includes within the territories of Bulungan:

“The Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik situated to the south of the above boundary-line, described in the ‘Indisch Staatsblad’ of 1892, no.114, belong to Boeloengan, as well as the

⁵ Annexes, vol. 3, annex MM 54.

small islands belonging to the above islands, so far as they are situated to the south of the boundary-line last mentioned.”

The last phrase, referring to “the small islands belonging to the above islands”, reflects the same words used in the earlier agreements of 1850 and 1878, which have been considered in paragraphs 7.4-7.5 above. Again there is no indication at all of a Dutch view that the 1891 Treaty allocated Ligitan and Sipadan to the Netherlands Indies or to the Sultanate of Bulungan.

C. Subsequent Agreements between the Parties: the 1915 Demarcation Convention

9.18. As foreseen in Article V of the 1891 Treaty, the Parties in due course began the process of reaching “mutual agreement” on “the exact positions of the boundary-line”. At some date prior to December 1914 (probably in 1901),⁶ beacons were fixed by an Anglo-Dutch Commission on the points where the parallel of 4° 10' N latitude north met the west and east coast of Sebatik. But in 1910 the Netherlands Government indicated that it wished to proceed as soon as feasible to the indication on the ground of the agreed border. The procedure got under way in 1912 and the Commission of two Dutch and two British representatives reported on 17 February 1913.⁷ They stated in paragraph 3 that they had “determined the boundary – as described in the Boundary Treaty”, and they then proceeded to describe the boundary in detail “as taking the following course”. They began at the eastern end:

“Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude, as already fixed by Article 4 of the Boundary Treaty and marked on the east and west coasts by boundary pillars.”

From these words alone it is clear that the termination of the boundary on the east coast of Sebatik had already been marked by pillars, the location of which was not questioned. There is no mention at all of any seaward projection eastward of the line across

⁶ See the Dutch letter of 7 April 1914: Annexes, vol. 3, annex MM 68.

⁷ See Annexes, vol. 2, annex MM 25.

Sebatik. Such a thought evidently never entered the heads of the Commissioners, and this is confirmed by the line drawn on the map accompanying their Report, which they all signed without reservation.⁸ As can readily be seen, the boundary line marked on the map starts on the east coast of Sebatik and runs westwards. The line in the sea eastward of Sebatik is no more than the line marking 4° 10' N. It is identical in character with the other lines marking 10' intervals.

9.19. On 6 May 1914 the Netherlands and British Commissioners formally agreed as follows:

“In accordance with instructions received from our respective Governments we have taken as the boundary the straight line between the granite pillars on the East and West of Sebatik Island, which were erected in 1901 by a Commission consisting of H.M. Macassar and H.M.S. Waterwitch and upon that line we have erected 16 concrete pillars.”⁹

If it were possible for any doubt to remain regarding the use of the word “across the Island of Sebitik” in Article IV, it must be completely put to rest by the words “we have taken as the boundary the straight line between the granite pillars on the East and West of Sebatik Island”.

9.20. The Report of the Commissioners and the accompanying map were formally confirmed by an Agreement between the Netherlands and British Governments signed on 28 September 1915, which was published.¹⁰ Attached to that Agreement is a signed map of Sebatik and the adjacent coastal areas to the west,¹¹ which clearly shows that the boundary line stops at the east coast of Sebatik. This is entirely consistent with the language of the 1891 Treaty and with the proceedings of the Demarcation Commission.

⁸ See Annexes, vol. 2, annex MM 25.
⁹ See Annexes, vol. 2, annex MM 26.
¹⁰ See Annexes, vol. 2, annex MM 27.
¹¹ See Annexes, vol. 5, Map 23.

D. Conclusion

9.21. According to Article 31 of the Vienna Convention on the Law of Treaties, in the interpretation of a treaty:

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

It is clear from Article 31 (3) that the only subsequent material which can be taken into account in the interpretation of a treaty is that which evidences an agreement between the parties as to the interpretation of the treaty. Indeed such an agreement may be authoritative. On the other hand purely unilateral or internal practice by one party to a treaty is not opposable to the other party and may not be used to support an interpretation adverse to that party, *a fortiori* if that material comes into existence after the conclusion of the treaty.

9.22. Thus, the 1915 Demarcation Agreement is certainly relevant in the interpretation of the 1891 Boundary Treaty and, as seen above, it definitively confirms the conclusion that the 1891 Treaty did not establish any allocation line in the seas to the east of Sebatik. By contrast the internal documents and discussions within the Dutch Government and Parliament do not have the same status. They were not agreed documents. They do not constitute part of the *travaux* of the 1891 Treaty. They were produced after the Treaty had been concluded. In accordance with Article 31 (3) of the Vienna Convention, they may not be referred to in the interpretation of that Treaty.

9.23. Thus, *even if* the internal Dutch documents and the internal Dutch map established clearly that the Dutch Government thought that the 1891 Treaty had established an allocation line 50 n.m. to the east of Sebatik, the documents and map would not be admissible to establish the interpretation of Article IV of the Convention in that

sense. Strictly speaking, they are legally irrelevant to the present dispute.

9.24. But in fact (and for whatever the fact may be worth), the internal documentation establishes that the Dutch Government and Parliament were under no such misapprehension. On the contrary it is clear from the materials that, like the British Government, they were concerned only with the settlement of a land boundary dispute concerning “the disputed area between the Tawao and Siboekeo Rivers”. It is that dispute which the 1891 Boundary Treaty settled, leaving to British North Borneo all areas to the north and east, and all off-shore islands except for the southern part of Sebatik and its immediately adjacent small islands. That is the beginning, and the end, of the story.

PART FOUR

Chapter 10

THE MAP EVIDENCE SUPPORTS MALAYSIA'S SOVEREIGNTY

A. General Principles

10.1. Malaysia now turns to examine the maps and charts pertinent to the case. In this connection the following observations of this Court in the *Frontier Dispute (Burkina Faso/Mali) Case* are relevant:

“...maps merely constitute information which varies in accuracy from case to case; of themselves and by virtue solely of their existence, they cannot constitute a territorial title that is a document endorsed by international law with intrinsic legal force for the purpose of establishing territorial rights... Except in this clearly defined case [where maps are annexed to an official text of which they form an integral part] maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.”¹

10.2. Two maps have already been considered in detail. The first is the internal Dutch map of 1891, so heavily relied upon by Indonesia. As has been demonstrated in Chapter 9, there is nothing in this map that supports the Indonesian argument that this map shows that the words “eastwards across the island of Sebatik” mean that the boundary projects seaward for approximately 50 nautical miles.

10.3. The second map is that attached to the 1913 Boundary Commission Report, approved and accepted as binding by both the Netherlands and British in the 1915 Agreement.² This map illustrates

¹ ICJ Reports 1986, at p. 582.

² See above, paragraphs 9.18-9.20, and for the map annexed to the 1915 Agreement see Annexes, vol. 5, Map 23.

the text of the Report and shows that the Commissioners were agreed that the eastern terminus of the boundary was the point on the east coast of Sebatik Island where it is met by the line 4° 10' N. This map clearly was legally binding on the predecessors in title of Indonesia and Malaysia. It is binding on both the present parties.

10.4. The position thus shown on the 1913 Report map is fully reflected in a series of other maps which show either or both of the following two features:

- (a) that the boundary line does not extend into the sea east of Sebatik (hereinafter called "Feature (a)");
- (b) that Ligitan and Sipadan are both regarded as being British or Malaysian islands (hereinafter called "Feature (b)").

10.5. These maps can most conveniently be presented in two groups: first, a number of British Admiralty charts; secondly, other maps.

B. British Admiralty Charts

10.6. On each of the following British Admiralty charts, the boundary is marked running from the west to the east coast of Sebatik. The boundary is not projected eastwards into the sea. The dates of the charts are set out below against their numbers, and the earlier editions have been checked to see when they were first marked. It is evident that the British understanding of the situation has been public since an early date and has elicited no adverse reactions from the Netherlands or Indonesia.

- (i) British Admiralty chart No. 1681, "Northern Shore of Sibuko Bay" (first drawn 1891-92 and corrected many times between 1920 and 1963).³ This shows Ligitan and Sipadan, but does not extend westwards to show Sebatik. However, it comes close to Sebatik (118° 5' 55" E) and shows no seaward projection of the boundary eastwards from the island, let alone one which could suggest that Ligitan or Sipadan belonged to the Netherlands Indies or Indonesia (Feature (a)).

³ See Annexes, vol. 5, Map 8.

(ii) British Admiralty chart No. 2576, "Sulu Archipelago and the North East Coast of Borneo from British Admiralty Surveys to 1892, from United States Government Charts to 1934, from Netherlands Government Charts to 1936".⁴ This shows Sebatik Island with the boundary drawn across it from the west to the east coast, but not projecting eastwards into the sea (Feature (a)).

(iii) British Admiralty chart No. 2660B, "China Sea - Southern Portion" (first drawn in 1881).⁵ New editions were published in 1882, 1900, 1901, and at intervals until 1954. This shows the boundary clearly drawn on the main Borneo territory and also drawn on Sebatik, but only between the west and east coast. There is no extension into the sea eastwards of Sebatik (Feature (a)).

(iv) British Admiralty chart No. 1852, first published in 1960, shows the same pattern (Feature (a)).⁶

C. OTHER MAPS

10.7. In June 1891 a plan was drawn up in the British Hydrographic Office "shewing the result of the determination of parallel of 4° 10' N. on East Coast Borneo, and examination of rivers in vicinity, June 1891 - Black from preliminary surveys by British officers, red from Dutch charts".⁷ The 4° 10' N line is shown on the map as a parallel, but there is no indication that it is a boundary.

10.8. In 1906 the Company published a map of British North Borneo on a scale of 1:633,600 (10 miles to the inch). It was available for public purchase at Stanfords, the well-known map publishers and sellers in London, for 2s./6d. The map shows clearly the boundary between Elphinstone Province of British North Borneo and Dutch territory passing across Sebatik Island but not extending east of it (Feature (a)). The map bore an indication that it had been compiled from British Admiralty charts and from surveys and explorations of various named persons. A copy of this map was used for the purposes of the 1907 Exchange of Notes,⁸ and its significance

⁴ See Annexes, vol. 5, Map 9.

⁵ See Annexes, vol. 5, Map 10.

⁶ See Annexes, vol. 5, Map 11.

⁷ See Annexes, vol. 5, Map 12.

⁸ See Annexes, vol. 5, Map 6.

is the greater for carrying the endorsement: "This is the map mentioned in the third term of the agreement respecting the administration of certain islands on the East Coast of Borneo by the British North Borneo Company, effected by exchange of notes on July 3, 1907", and signed by the relevant officials. The endorsement shows that the map had been seen by and acted on by both the British and United States Governments.

10.9. In 1913 the Netherlands Indies Government Topographical Office published the first official map (on a scale of 1:750,000) of the Southern and Eastern Division of Borneo. This shows clearly both that the boundary drawn by the 1891 Treaty stops at the east coast of Sebatik (Feature (a)), and that that the group of islands (Sipadan, Mabul (Maboel), Kapalai, Ligitan, Danawan and Si Amil (Siamil)) appertain to the "Gouv^l van Britisch Noord-Borneo" (Feature (b)). The relevant portion of that map is reproduced at page 6 above.⁹

10.10. On a map issued by the Survey Department at Jesselton in September 1935 entitled "Plan of Semporna, District of Lahad Datu", both Ligitan and Sipadan appear specifically marked towards the south-eastern limit of the map with the words "Bird Sanctuary" attached to Sipadan (Feature (b)).¹⁰ These words reflect the application to the island of the terms of section 28 of the Colony of North Borneo Land Ordinance 1930, which has been described in paragraph 6.24 above.

10.11. North Borneo G.S.G.S. No 4311 – 1941, Map of North Borneo, shows the East Coast Residency,¹¹ on a scale 8 miles to an inch. It was first published in 1941, bearing on its face the rubric "Drawn and reproduced from printed copy of North Borneo G.S.G.S. No. 4311 (dated 1941), by L.H.Q. Cartographic Co. Aust. Survey Corps. Oct. 44". The map is particularly interesting as demonstrating a clear understanding that Sipadan was part of the State of North Borneo (Feature (b)) and a deliberate intention to include it, since the island appears just beyond the bottom line of the framework of the map. The same map also shows quite clearly that the international boundary between North Borneo and Netherlands territory along the

⁹ See *Schetskaart van de Residentie Zuider- en Oosterafdeeling van Borneo*, Topografische Inrichting, Batavia, 1913: Annexes, vol. 5, Map 1.

¹⁰ See Annexes, vol. 5, Map 13.

¹¹ See Annexes, vol. 5, Map 14.

parallel of 4° 10' N extends no further east than the east coast of Sebatik (Feature (a)).

10.12. In 1964 the Director of National Mapping (Malaysia) produced a pair of maps, headed respectively “Pulau Sebatik” and “Tawau”, showing the west and east coasts of Sebatik. The boundary clearly stops at the east coast (Feature (a)).¹²

10.13. The same presentation appears on a slightly larger scale map (6 miles to the inch) of “The Colony of North Borneo”. This is described as “Revised 1947 map”: it is dated 1952 and contains the statements “Compiled and drawn by the Survey Department, Jesselton, Colony of North Borneo” and “Printed by the Survey Dept. Federation of Malaya No. 71 - 1953” (Feature (a)).¹³

10.14. A map of the Lahad Datu Police District drawn in 1958 on a scale of 3 miles to the inch shows the south-eastern trending western boundary of the Police District.¹⁴ Among the names of the islands in the district are those of Ligitan and Sipadan. The map bears the inscription “Compiled from various sources and drawn by S.M. Ross, Lahad Datu, 1958” (Feature (b)).

10.15. In 1979 the Directorate of National Mapping of Malaysia published a map of Malaysia’s continental shelf boundaries in which both Ligitan and Sipadan are drawn as lying well within the limits of the Malaysian area (Feature (b)).¹⁵

10.16. Correspondingly, an Indonesian map, published in 1960 on a scale of 1:14,250,000, shows the baselines of the Indonesian archipelago in the 12-mile territorial sea constructed thereon.¹⁶ The basepoint for the baseline at the northern extremity of Kalimantan is the eastern end of Sebatik. If at the time the map was drawn Indonesia had considered that Sipadan was Indonesian territory, the base point chosen in this region would undoubtedly have been Sipadan, thus extending Indonesia’s claims some 40 miles seaward into what are otherwise Malaysian waters (Feature (b)).

¹² Ref. Series T735, sheets 4/117/15 and 4/117/16, edition 3, GSGS: Annexes, vol. 5, Maps 15, 16.

¹³ See Annexes, vol. 5, Map 17.

¹⁴ See Annexes, vol. 5, Map 18.

¹⁵ See Annexes, vol. 5, Map 19.

¹⁶ See Annexes, vol. 5, Map 7.

10.17. As is not unusual with map evidence, the maps are not completely consistent. There are two Malaysian maps and one British map which represent the situation differently. A map produced by the National Mapping of Malaysia in 1967 shows a so-called Malaysian-Indonesian boundary with Sipadan, but not Ligitan, lying to the south of it.¹⁷ A further map published by Malaysia in 1972¹⁸ and one published by the British Government in 1978¹⁹ also show a so-called Indonesian-Malaysian maritime boundary with Ligitan lying on the Malaysian side. Neither map actually shows Sipadan, but the “maritime boundary” would apparently place Sipadan on the Indonesian side. However any significance this might conceivably have (and since Sipadan is not even shown on the maps that significance would be minimal) is excluded entirely by the fact that, in one form or another, each map carries a disclaimer. The Malaysian charts carry the words: “This map is not an authority for international boundaries”. The British map was an operational navigational chart and carries the words: “Charts produced under the direction of the Director of Military Survey are not to be taken as necessarily representing the view of the UK Government on boundaries or political status”.

10.18. The legal effect of a disclaimer has been described by a leading authority in the following terms:

“The disclaimer will have the particular effect of avoiding any assertion that the government publishing the map has become bound to accept the alignments by the virtue of legal concepts of estoppel, admission, acquiescence or recognition.”²⁰

10.19. A more recent author has added the view that “a disclaimer is an excellent warning to those consulting the map that certain issues are uncertain or that they do not fall within the scope of the map”.²¹

¹⁷ See Annexes, vol. 5, Map 20.

¹⁸ See Annexes, vol. 5, Map 21.

¹⁹ See Annexes, vol. 5, Map 22.

²⁰ I. Brownlie, *African Boundaries* (London, 1979), p. 5.

²¹ Akweenda, “The Legal Significance of Maps in Boundary Questions,” 60 *British Yearbook of International Law* 205 at p. 211 (1989).

D. Conclusions in Relation to the Map Evidence

10.20. In Malaysia's submission, the material presented in the preceding chapters demonstrates fully and cogently that the 1891 Treaty did not have the effect of placing Ligitan and Sipadan under the sovereignty of Indonesia. Malaysia's position is that its title to the islands, derived from a series of transactions with Sulu, Spain and the United States dating from 1878 to 1930, is strongly supported by the facts of use and administration of the islands by North Borneo, Britain and Malaysia for more than a century, without any competing activity by the Netherlands or Indonesia. That position remains unaffected in any degree by the 1891 Treaty. It is supported by the preponderance of map evidence, as reviewed in this Chapter.

SUBMISSIONS

In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

Agent of Malaysia

Kuala Lumpur

2 November 1999

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5. The Protocol of Sulu of 1877 between Spain, Germany and Great Britain, May 30, 1877.
6. Grant by Sultan of Brunei of Territory comprising Gaya Bay and Sepanggar, December 29, 1877.
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11. Contract of Vassalage between the Netherlands and the Sultan of Boeloengan, June 2, 1878.
12. Protocol between Spain and Sulu confirming the Bases of Peace and Capitulation, July 22, 1878.
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14. Charter of Incorporation of the British North Borneo Company, November 1, 1881.
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18. Agreement between Britain, Germany and Spain, March 30, 1897.
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21. Treaty between the United States and Spain, November 7, 1900.
22. Confirmation by the Sultan of Sulu of Cession of Certain Islands, April 22, 1903.
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24. Exchange of Notes concerning the Administration and Lease of Certain Small Islands on the North Borneo Coast by the US Government, July 10, 1907.
25. Boundary Delimitation between the Netherland Possessions and the State of British North Borneo, February 17, 1913.
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29. Convention between Great Britain and the United States regarding the Boundary between the Philippines and North Borneo, January 2, 1930.
30. Agreement for the Transfer of the Borneo Sovereign Rights and Assets from the British North Borneo Company to the Crown, June 26, 1946.
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35. Letter from Acting Consul-General Treacher to the Earl of Derby, January 2, 1878.
36. Letter from Acting Consul-General Treacher to the Earl of Derby, January 22, 1878.
37. Letter from The Marquis of Salisbury to Mr. West, October 1, 1878.
38. Letter from Stuart, British Ambassador to the Netherlands to Marquis of Salisbury, October 24, 1879.
39. Extract from Memorandum of Transfer, Resident Meijer of the Southern and Eastern Division of Borneo, March 2, 1880.
40. Extract from Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880.
41. Letter from Count de Bylandt to Earl Granville, April 8, 1881.
42. Summary of Debate in the Second Chamber of the Netherlands parliament, 6 December, 1881.

43. Further Memorandum by Sir. E. Hertslet on the Disputed Boundary between the North Company and the Dutch Possessions on the North-East Coast of that Island, January 9, 1889.
44. First Meeting of the Joint British-Dutch Negotiating Commission, July 16, 1889.
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47. Extract from Letter from Count de Bylandt to Mr. Hartsen, Minister of Foreign Affairs of Netherlands, July 28, 1889.
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49. Letter from the British Foreign Office to the Dutch Government, August 13, 1890.
50. Letter from Count de Bylandt to Lord Salisbury, February 2, 1891.
51. Explanatory Memorandum No.3 of the Dutch Government submitted to the Dutch Parliament accompanying the 1891 Convention, on July 25, 1891.
52. Report of Dutch Parliamentary Committee to study the government proposal to ratify the 1891 Boundary Agreement, December 2, 1891.
53. Memorandum in Response dated 20 February 1892, Ratification of the Agreement concluded between the Netherlands and the Great Britain/Ireland on 20 June, 1891 and Defining the Boundaries between the Dutch Possessions on the Island of Borneo and the British Protectorate States on the said Island, February 20, 1892.

54. Description of the Boundaries of the Territory of Boeloengan and List of the Islands Belonging Thereto Signed Between Mohamad Mimeoedin Pangeran Mangkoe Datoe Sahoedin and the Resident of the Southern and Eastern Division of Borneo, June 19, 1893.
55. Letter from John Hay, US Secretary of State to the Secretary of The Navy, April 3, 1903.
56. Letter from E.H. Barraut, Resident of East Coast of North Borneo to Lieutenant Francis Boughter, June 24, 1903.
57. Telegram from E.H. Barraut to Governor, June 24, 1903.
58. Letter from E.W. Birch to the Chairman of the British North Borneo Company, June 25, 1903.
59. Letter from the Chairman of the British North Borneo Company to the Foreign Office, July 13, 1903.
60. Cablegram to the US Secretary of the Navy Regarding Proclamation of Sovereignty over Certain Islands off the Coast of Borneo, July 24, 1903.
61. Cablegram from Stirling to the US Secretary of the Navy Regarding Proclamation of Sovereignty over Additional Islands, August 1, 1903.
62. Hydrographic Office Note, August 8, 1903.
63. Report on the Islands under the Sovereignty of the United States lying off the Coasts of British North Borneo recently visited by the U.S.S Quiros by Lieutenant Francis Boughter, November 10, 1903.
64. HMS Macasser Report, November 26, 1903.
65. Letter from John Hay to the British Ambassador, December 10, 1904.

66. Letter from H.M. Durand to the US Secretary of State, September 29, 1905.
67. Durand Memorandum from the British Ambassador in Washington to the United States Secretary of State, June 23, 1906.
68. Letter from Secretary-General Hahhdia to Sir A. Johnstone, April 7, 1914.
69. Extract from Memorandum of Transfer, Resident H.J. Grijzen of the Southern and Eastern Division of Borneo, September 3, 1917.
70. J. Paulus (ed), *Encyclopaedia van Nederlands-Indië*, vol 1, 's-Gravenhage/Leiden: Nijhoff/Brill, 1917, 2nd ed., p.356.
71. HMS Lynx Report, November 25, 1921.
72. Memorandum Regarding Islands off the North-East and East Coasts of North Borneo by W.J. Worth , July 14, 1922.
73. Extract from a letter from Resident Van Kempen of the Southern and Eastern Division of Borneo to the Governor-General of the Netherlands Indies, Bandjermasin, November 24, 1923.
74. Exchange of Notes between Professor Dr. Mochtar Kusumaatmadja and Mr. Mahyuddin Haji Mohd Zain after the talks on the Delimitation of the Continental Shelves between Malaysia and Indonesia, September 22, 1969.
75. Joint Report of Discussions between Dato' Seri Anwar Ibrahim and Moerdiono, June 21, 1996.

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77. Letter from Acting Consul-General Hugh Low to the Earl of Derby, July 15, 1875.
78. Protest of Chiefs of Sandakan against Spanish Occupation, September 7, 1878.
79. Telegram from Acting Consul-General Treacher to the Marquis of Salisbury, September 24, 1878.
80. Despatch by Lieutenant C.K. Hope, Commander of H.M.S Zephyr in Relation to an action taken against Omadal, June 28, 1886.
81. British North Borneo Herald, July 1, 1886, pp. 121-122.
82. British North Borneo Herald, June 1, 1887, pp. 119 –121.
83. British North Borneo Herald, May 1, 1892, p. 137.
84. British North Borneo Herald, September 1, 1892, p.285.
85. British North Borneo Herald, November 1, 1892, p.378.
86. British North Borneo Herald, April 16, 1896, p. 133.
87. Boats and Fisheries Proclamation 1901 (Proclamation XVIII of 1901).

88. British North Borneo Herald, February 2, 1903, pp. 31-33.
89. British North Borneo Herald, March 16, 1909, p. 63.
90. Chart Containing the Names of Indigenous Leaders of the East Coast of North Borneo taken from J.F. Warren, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909*.
91. Letter from the Assistant District Officer of Semporna to the Resident of East Coast June 26, 1910.
92. Note from the Resident of East Coast to Assistant District Officer of Semporna, July 21, 1910.
93. Proclamation XXX , December 21, 1914.
94. Letter from the Acting Resident of East Coast to the Government Secretary, January 26, 1916.
95. Minute to Resident of East Coast, May 3, 1916.
96. Surat Katrangan issued by G.C. Irving, Acting Resident of the East Coast, May 6, 1916.
97. Turtle Preservation Ordinance, June 1, 1917.
98. Agreement executed between Panglima Abu Sari and Descendants of Maharaja Mahmud, approved by G.C. Irving on August 29, 1918.
99. Commercial Sea Products from the Coast of British North Borneo, 1922.
100. Letter from the Conservator of Forests, Sandakan to the Secretary of North Borneo, December 19, 1932.
101. Government Notification No. 69 issued under Section 28 of the Land Ordinance 1930, February 1, 1933.

102. Licence issued by the District Officer of Tawau to take Turtle under Section 2 of the Turtle Preservation Ordinance 1917, April 28, 1954.
103. Letter from the District Officer of Lahad Datu to the District Officer of Tawau, August 27, 1954.
104. Letter from the District Officer of Tawau to the General Manager of Borneo Abaca Ltd, September 1, 1954.
105. Extension of the 6 May 1916 Letter signed by O.K.K. Panglima Abdullah bin Panglima Uddang, July 5, 1957.
106. Letter from the Assistant District Officer of Semporna to the District Officer of Lahad Datu October 20, 1958.
107. Act No. 4 concerning Indonesian Waters promulgated by the President of the Republic of Indonesia, February 18, 1960.
108. Colony of North Borneo Annual Report 1960.
109. Letter from Assistant District Officer of Semporna to the Resident of Tawau, October 25, 1961.
110. Colony of North Borneo Annual Report 1961.
111. Notice to Mariners No. 9 of 1962 issued by the Director of Marine, July 10, 1962.
112. Letter from the Resident of Tawau to the District Officer of Semporna, December 22, 1962.
113. Notice to Mariners No. 6 of 1963, issued by the Director of Marine, July 17, 1963.
114. Chart of the Concession Block Granted to JAPEX by the Government of Indonesia, January 19, 1967.
115. Letter from J. Walls to Director of Land and Surveys, Kota Kinabalu, August 2, 1973.

116. Affidavit of Panglima Imam Malang bin Panglima Imam Jamlang, January 23, 1975.
117. Affidavit Of Tilaran @ Haji Abdul Majid bin Panglima Abu Sari, January 23, 1975.
118. Affidavit of Panglima Nujum bin Panglima Abu Sari, January 24, 1975.
119. Affidavit of Maharaja Alukan bin Kaneh, January 24, 1975.
120. Affidavit of Datuk Panglima Abdullah Bin Panglima Uddang, January 25, 1975.
121. Administrative Divisions Proclamation, 1982, Government Notification of Sabah No. 7 of 1982.
122. Sabah High Court Judgment, April 28, 1995.
123. Protected Areas Order 1997.

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