

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)**

COUNTER-MEMORIAL

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Volume 1

2 AUGUST 2000

TABLE OF CONTENTS

	<u>Page</u>
CHAPTER I INTRODUCTION	1
CHAPTER II SUMMARY OF INDONESIA'S AND MALAYSIA'S CASES AS PRESENTED IN THE PARTIES' MEMORIALS	5
Section 1. The Straightforward Nature of Indonesia's Case	5
Section 2. Confusion and Inconsistency in the Case Presented by Malaysia.....	6
Section 3. Areas of Agreement between the Parties.....	8
CHAPTER III THE FALLACIES UNDERLYING MALAYSIA'S CLAIMED ROOTS OF TITLE	11
Section 1. Lack of Original Territorial Title Inherited by Malaysia.....	11
Section 2. Malaysia's Argument Based on the Presence of the Bajau Laut in the Disputed Area.....	19
A. A "Bajau Laut" Entity Comprising Ligitan and Sipadan?.....	20
B. The Supposedly Exclusive Links between the Bajau Laut and the Sultan of Sulu, the BNBC and the British Administration	26
Section 3. Conclusion: The Absence of Malaysian "Original" Title.....	37
CHAPTER IV THE ABSENCE OF TITLE OVER THE ISLANDS VESTING IN THE BNBC OR BRITISH NORTH BORNEO	43
Section 1. Introduction	43
Section 2. The Absence of Title Vesting in the BNBC and British North Borneo	44
A. The 1878 Grant to Dent and Overbeck Excluded the Disputed Islands.....	44
B. The 1885 Protocol Confirmed the Absence of British Title over the Islands.....	51
C. The 1903 Confirmation Did Not Include the Islands and Was of No Legal Relevance.....	52

CHAPTER V	TITLE BASED ON THE 1891 CONVENTION	57
	Section 1. Introduction	57
	Section 2. The Terms of the 1891 Convention.....	59
	A. The Nature of the Convention	59
	B. Interpretation of Article IV of the 1891 Convention	64
	(i) The Immediate Textual Context.....	65
	(ii) The General Context of the Treaty's Conclusion	69
	(iii) Agreement in Connection with the Conclusion of the 1891 Convention	70
	(iv) Instrument Accepted as Being Related to the 1891 Convention	72
	(v) Object and Purpose of the 1891 Convention.....	72
	(vi) Subsequent Agreement or Practice.....	77
	C. Alleged Spanish Sovereignty over Sipadan and Ligitan.....	79
	Section 3. The 1891 Convention: <i>Travaux Préparatoires</i>	82
	Section 4. Dutch Ratification of the 1891 Convention.....	89
	A. The Map Attached to the 1891 Dutch Explanatory Memorandum.....	90
	B. The Explanatory Memorandum	92
	C. The Dutch Act of 20 May 1892	97
	D. Modification of the Boundaries of Boeloengan to Conform to the 1891 Convention	97
	Section 5. The 1915 and 1928 Demarcation Agreements	98
	A. Agreement of 28 September 1915	100
	B. Convention of 26 March 1928	104

CHAPTER VI	THE ABSENCE OF TITLE OVER THE ISLANDS VESTING IN SPAIN AND THE UNITED STATES	107
	Section 1. Introduction	107
	Section 2. The Absence of Spanish Title over the Disputed Islands	107
	Section 3. The Absence of U.S. Title Following the 1898 and 1900 Treaties	111
	A. The 1898 and 1900 Treaties Did Not Include Ligitan and Sipadan.....	111
	B. U.S. Activities in the Relevant Area.....	113
	C. The 1930 Convention Confirmed that the Islands Did Not Belong to the United States	116
	Section 4. Conclusions as to Malaysia's Arguments Based on Conventional Title Over the Disputed Islands	117
CHAPTER VII	MALAYSIA'S ASSERTIONS OF POSSESSION AND ADMINISTRATION OF THE ISLANDS POST-1891 DO NOT CONFIRM ANY MALAYSIAN TITLE	121
	Section 1. The Legal Role of <i>Effectivités</i> in the Case	121
	Section 2. Brief Commentary on the So-Called Acts of Administration Relied Upon by Malaysia	126
	A. The Alleged Process of Establishing Effective Administration over the Mainland and Adjacent Islands	126
	B. Collection of Turtle Eggs.....	129
	C. Bird Sanctuary	133
	D. Construction and Maintenance of Lighthouses.....	134
	E. Control of Tourism	135
	Section 3. Dutch and Indonesian Activities Relating to the Islands.....	136
	Section 4. Post 1969 Activities of the Parties and the Diplomatic History of the Case	140
	Section 5. The Map Evidence as an Element of the Conduct of the Parties and Their Predecessors	143

A. Certain Key Aspects of the Map Evidence Demonstrating Dutch and Indonesian Title to the Disputed Islands.....	144
B. The Maps Introduced by Malaysia Do Not Support Its Claim of Title over the Disputed Islands	149
C. Conclusions as to the Maps	151

SUBMISSIONS

MAP ANNEX

CERTIFICATION

LIST OF ANNEXES

MAPS

Facing Page

Map 3.1	Map of Sama-Bajau settlements taken from Lopian, A.B. and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", reprinted from <i>Asian Research Trends: A Humanities and Social Science Review</i> , No. 6, 1996	32
Map 3.2	Toponym map showing places, the names of which include "Bajau" or "Bajo"	32
Map 4.1	Map of Borneo, prepared by Edward Stanford, London, 1903, with enlargement	54
Map 5.1	<i>Kaart van een Gedeelte van Borneo met Aanwijzing van de Grens tusschen het Nederlandsch Gebied en dat van het Britsche Protectoraat</i> (Map attached to the Explanatory Memorandum on the Ratification of the Anglo-Dutch Convention of 1891)	78
Map 6.1	Map showing the Philippine Islands as defined by the Treaty of Peace, 1898 and the Treaty between the U.S. and Spain, 1900	112
Map 6.2	Map showing the 1930 Convention line between the United States and the United Kingdom	116
Map A.1	Map entitled <i>Malaysia, Singapurak, Brunei: pemerentahan</i> (Political map of Malaysia, Singapore & Brunei), issued by the Directorate of National Mapping of Malaysia, 1966	
Map A.2	"Top Secret" map of Borneo issued by the Geographical Section of the British General Staff in 1944	

CHAPTER I

INTRODUCTION

1.1 This Counter-Memorial is filed by the Republic of Indonesia pursuant to the Order of the Court dated 11 May 2000 fixing 2 August 2000 as the time-limit for the submission of Counter-Memorials by the Parties.

1.2 Indonesia's Counter-Memorial comprises seven chapters. After this Introduction, Chapter II will summarise Indonesia's and Malaysia's cases as presented in their respective Memorials. Section 1 will highlight the essential elements of Indonesia's case, which is straightforward in nature. Section 2 will thereafter attempt to untangle Malaysia's alleged chains of title which, in contrast to Indonesia's submissions, are confused and contradictory. For the convenience of the Court, Section 3 of Chapter II will briefly set out certain important areas of agreement between the Parties.

1.3 Chapter III will then analyse in greater detail the fallacies underlying Malaysia's claimed roots of title. This chapter will first show that the Sultan of Sulu did not possess an original title over Ligitan and Sipadan. Thereafter, it will rebut Malaysia's arguments based on the alleged presence of the Bajau Laut in the disputed area.

1.4 In Chapter IV, Indonesia will demonstrate that neither the British North Borneo Company (hereinafter the "BNBC") nor British North Borneo ever held title over the disputed islands and that Malaysia, consequently, could not have inherited a title from Great Britain. In this regard, Chapter IV will show that the disputed islands were not included in the following legal instruments on which Malaysia relies: the Grant by the Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo in January 1878 to Messrs. Dent and Overbeck; the 1885 Protocol recognising the sovereignty of Spain over the Archipelago of Sulu; and the 1903 statement, or Confirmation, signed by the Sultan of Sulu concerning islands lying beyond three marine leagues off the mainland coast which were not included in the 1878 grant.

1.5 Chapter V will then review the basis of Indonesia's title, namely the 1891 Convention between Great Britain and The Netherlands¹, and rebut the arguments advanced by Malaysia in its Memorial concerning the effect of this Convention. The first two sections will deal with the terms of the Convention and the *travaux préparatoires*, while the last two sections will address the Dutch ratification process and the 1915 Agreement and the 1928 Convention between the United Kingdom and The Netherlands.

1.6 Chapter VI will show that the alternative chain of title advanced by Malaysia, namely that title passed via Spain to the United States and thence to Great Britain, is unfounded as well. In particular, Indonesia will show that the islands of Ligitan and Sipadan were not considered to be part of the Sulu Archipelago ceded by the Sultan of Sulu to Spain and that the disputed islands were not included within the territories transferred by Spain to the United States under the 1898 and 1900 treaties, or by the United States to Great Britain under the 1930 Anglo-U.S. Convention.

1.7 Chapter VII contains a rebuttal of Malaysia's assertion that its title is confirmed by an alleged pattern of possession and administration of the islands. In Section 1, Indonesia will analyse the legal role of *effectivités* in the case, Section 2 will then comment on the so-called acts of administration relied on by Malaysia. Following this, Section 3 will review the Dutch and Indonesian activities relating to the islands which confirm Indonesia's title. Section 4 charts the post-1969 activities of the Parties and the diplomatic history of the case and comments on the legal relevance of these events for the case. Finally, Section 5 will address the map evidence adduced by the Parties and will show that this evidence overwhelmingly confirms the fact that the islands were deemed first to fall under Dutch sovereignty and thereafter as appertaining to Indonesia following the latter's independence.

¹ Malaysia refers throughout to the 1891 Convention as the "1891 Treaty". Its full title is the "Convention between Great Britain and The Netherlands defining Boundaries in Borneo". See IM, Annex 75, Vol. 3 and MM, Annex 17, Vol. 2. In this Counter-Memorial Indonesia will, except where quoting from Malaysia's Memorial, continue to refer to it as the "1891 Convention".

1.8 A further section has been added at the end of this Counter-Memorial, referred to as a Map Annex. This Map Annex contains detailed comments rebutting Malaysia's position regarding the map evidence.

1.9 There is one additional volume attached to Indonesia's Counter-Memorial containing further documentary evidence and other materials relied on by Indonesia, which has been organised in Annexes numbered from 1 to 38. An index of these Annexes may be found at the end of this volume.

CHAPTER II

SUMMARY OF INDONESIA'S AND MALAYSIA'S CASES AS PRESENTED IN THE PARTIES' MEMORIALS

Section 1. The Straightforward Nature of Indonesia's Case

2.1 The basis of Indonesia's sovereignty over Pulau Ligitan and Pulau Sipadan is straightforward. Indonesia inherited its title from The Netherlands whose title over the islands was confirmed by the 1891 Anglo-Dutch Convention.

2.2 Prior to the 1891 Convention, uncertainty existed over the precise extent of the territories of the Sultan of Boeloengan, to which The Netherlands had succeeded, and the territories forming part of the British Protectorate of North Borneo, which had previously been granted to the BNBC by the Sultans of Brunei and Sulu. However, a strong presumption existed at the time that the disputed islands formed part of the dominions of the Sultan of Boeloengan. As Indonesia demonstrated in its Memorial, and will show again in Chapter V hereto, the 1891 Convention resolved any remaining uncertainties by delimiting the respective territories of The Netherlands and British North Borneo both on the mainland and with respect to islands situated in the relevant area.

2.3 The subsequent activities of the interested parties, including The Netherlands, Great Britain, Indonesia and Malaysia, confirmed that sovereignty over the disputed islands vested first in The Netherlands and subsequently, by virtue of State succession, in Indonesia. In particular, the map attached to the Dutch Explanatory Memorandum prepared in connection with the ratification of the 1891 Convention and forwarded to the British Government confirmed that the line established by the 1891 Convention extended eastward from Sebatik, resulting in the islands in question falling on the Dutch side of the boundary. Moreover, maps issued by British sources on behalf of the BNBC and by official agencies of the Malaysian Government confirmed the scope of the 1891 delimitation as did the activities of The Netherlands in sending a naval vessel to the islands following the signature of the 1891

Convention and the conduct of Indonesia and Malaysia in granting oil concessions and erecting navigational aids in the relevant area¹.

2.4 As for the activities of third States in the region – notably Spain and the United States – they reveal that the disputed islands fell well outside of any areas that were deemed to appertain to them. The islands did not fall within the possessions of the Sultan of Sulu and were not considered to be part of Spanish territory that was transferred to the United States pursuant to the 1898 and 1900 treaties. Moreover, the 1930 Convention between the United States and Great Britain confirmed that the United States had no rights or interests in areas lying as far south or west as Pulau Ligitan or Pulau Sipadan.

Section 2. Confusion and Inconsistency in the Case Presented by Malaysia

2.5 In contrast with Indonesia's case which is based on a clear conventional title, the case advanced by Malaysia is founded on a series of complex and contradictory theories.

2.6 Although Malaysia's Memorial states that Malaysia's sovereignty over Ligitan and Sipadan is based on two separate, albeit – in Malaysia's view – inter-dependent strands², in reality Malaysia appears to be claiming sovereignty over the disputed islands on the basis of *three* distinct strands, as follows:

First, Malaysia, despite admitting that the disputed islands fell outside the scope of the 1878 grant³, seeks to argue that title over the disputed islands was nonetheless transferred by the Sultan of Sulu to Messrs. Dent and Overbeck with the 1878 grant, subsequently transferred to the BNBC (Dent and Overbeck's successor), then to the British Government in 1888 with the agreement creating the State of North Borneo, and finally, by virtue of State succession, to Malaysia.

Second, Malaysia claims, quite inconsistently with its first theory, that title was transferred by the Sultan of Sulu to Spain with the Protocol confirming the Bases of

¹ See, generally, Chapter VI of Indonesia's Memorial (hereinafter IM).

² Malaysia's Memorial (hereinafter MM), para. 5.1.

³ *Ibid.*, para. 5.19.

Peace and Capitulation in 1878, then by Spain to the United States with the Convention of 1900 supplementing the Treaty of Paris of 1898, subsequently by the United States to the British Government pursuant to the 1930 Convention, and finally to Malaysia by Britain with the 1963 Agreement, under which North Borneo became part of the Federation of Malaysia.

Third, Malaysia asserts that, in any event, the disputed islands have been administered by the BNBC, Great Britain and Malaysia itself. According to Malaysia, this administration was challenged neither by Spain, The Netherlands nor by its successor in title, Indonesia.

2.7 The first obvious problem with the case presented by Malaysia is that it rests on the wholly unsubstantiated assertion that the Sultan of Sulu had title over the islands of Ligitan and Sipadan and was therefore in a position to convey that title either to the BNBC or to Spain. However, Malaysia has failed to adduce any evidence demonstrating that sovereignty over either island did indeed vest in the Sultan of Sulu at the relevant time.

2.8 Malaysia attempts to brush aside this embarrassing lacuna by alleging that an inter-connection exists amongst all the islands of the area by virtue of human and economic factors. Pursuant to this argument, it is said that the allegiance to the Sultan of Sulu of certain nomadic tribes active in the area, i.e. the Bajau Laut, shows that these indigenous peoples, and the islands around which they occasionally fished, were under the control of the Sultan.

2.9 As Indonesia will demonstrate in Chapter III, Malaysia has failed to show that the alleged links between the Bajau Laut and the Sultan of Sulu amounted to anything more than personal and commercial relations. Nothing in the documentary evidence submitted by Malaysia even remotely suggests that the islands of Ligitan and Sipadan fell within the limits of Sulu jurisdiction.

2.10 Moreover, even admitting, *arguendo*, that the first step of Malaysia's construction is valid, i.e. that the Sultan of Sulu had title over the disputed islands, the logic of Malaysia's two-headed arguments still remains problematic. The different strands of Malaysia's alleged

title cannot all be maintained at the same time: either the Sultan of Sulu ceded his title to Dent and Overbeck or to Spain. Malaysia cannot have it both ways.

2.11 If, on the one hand, title had been ceded to Dent and Overbeck, then there can be no chain of title passing through Spain, the United States and thence Great Britain. On the other hand, if title over Ligitan and Sipadan remained with Spain, then the BNBC could not have acted, as Malaysia argues, "on the basis" that it had control over the islands, and its so-called acts of administration on the islands could not displace Spain's pre-existing legal title.

2.12 In any event, Malaysia has been unable to produce any evidence demonstrating that, specifically, the islands of Ligitan and Sipadan were under the sovereignty of the Sultan of Sulu or that they were included in any of the relevant transactions and conventional instruments vesting ultimate title in Great Britain and Malaysia. In each case, Malaysia's arguments are built on unsupported and general assertions which are contradicted by the relevant treaties and conventions and ignore the settlement achieved with the 1891 Convention.

Section 3. Areas of Agreement between the Parties

2.13 Unsurprisingly, the Parties' Memorials disagree on a number of important issues, including the interpretation of the conventional and factual history of the case. However, in Indonesia's view, it is significant that the Parties' submissions contain some areas of agreement on certain key issues in the case. For the convenience of the Court, this section will summarise the main points of agreement between the Parties as evidenced in their Memorials.

2.14 Although the chains of title invoked by the Parties differ, they both agree that, albeit uninhabited, the islands of Ligitan and Sipadan were never *terrae nullius* during the relevant period⁴. As a result, the islands were not open to occupation by any State. Moreover, the fact that the islands were not *terrae nullius* means that any alleged *effectivités* invoked by

⁴ *Ibid.*, para. 5.8(c) and IM para. 4.1.

Malaysia must be considered in their proper legal context and in the light of the relevant legal instruments.

2.15 Both Parties agree that the disputed islands were not covered by the 1878 grant by the Sultan of Sulu since they are situated more than three marine leagues from the coast⁵. Moreover, with respect to the 1903 Confirmation from the Sultan of Sulu to Great Britain, the Parties concur that this document did not mention the disputed islands as falling within that cession⁶.

2.16 The Parties also agree on the definition of the territory relinquished by Spain in favour of Great Britain pursuant to Article III of the 1885 Protocol between Spain, Great Britain and Germany, and they recognise that the islands of Ligitan and Sipadan fell outside the terms of Article III of this Protocol⁷.

2.17 In addition, there is agreement that the islands of Sipadan and Ligitan do not fall within the line drawn by the 1898 Treaty between the United States and Spain⁸. This, in Indonesia's view, confirms the fact that neither the Sultan of Sulu nor Spain had a claim to the disputed islands.

2.18 Finally, the Parties agree that the dispute crystallised in 1969 during the negotiations over their respective maritime boundaries⁹. In Indonesia's view, this date has important legal consequences in the light of which the subsequent conduct of the Parties must be assessed.

2.19 As a concluding remark, Indonesia considers it important to note its agreement with Malaysia's comment at para. 4.5 of its Memorial that the diplomatic exchanges between the Parties do not affect the legal issues before the Court. Indonesia notes, however, that despite this agreement, Malaysia has relied on certain arguments made by Indonesia in the course of

⁵ *Ibid.*, para. 5.19 and the location map at Insert 8, on p. 39 showing the disputed islands outside the band of nine nautical miles from the coast; see also IM, paras. 3.28, 7.3, 7.4, and Map 3.1 facing p. 14.

⁶ IM, paras. 7.15-7.16 and MM, paras. 5.33-5.35.

⁷ See Chapter VII in IM in general, and in particular paras. 7.28, 7.29, 7.34-7.39 and 7.58, as well as paras. 3.34 and 3.63 and Map 5.1 opposite p. 64; see also MM, paras. 5.17-5.19.

⁸ See MM, para. 5.22 and Insert 9 on p. 44, and IM, paras. 7.30-7.31 and Map 7.2 opposite p. 140.

⁹ See MM, para. 2.4 and IM para. 8.3.

diplomatic discussions since 1969¹⁰, and has annexed to its Memorial the Joint Report on Discussions between Dato' Seri Anwar Ibrahim, Deputy Prime Minister of Malaysia and Mr. Moerdiono, Minister, State Secretary of the Republic of Indonesia, on the Issue of Sovereignty over Pulau Ligitan and Sipadan and their recommendations¹¹. Because of the lack of its legal relevance, Indonesia has not deemed it appropriate to refer to this material.

2.20 The points outlined in this section represent the most important areas of agreement between the Parties. With respect to the numerous issues on which the Parties disagree, these will be discussed as necessary by Indonesia in subsequent chapters. Failure by Indonesia to address all of the points raised by Malaysia in its Memorial, however, in no way signifies that Indonesia agrees with Malaysia's account.

¹⁰ *Ibid.*, para. 2.8.

¹¹ *Ibid.*, Annex 75, Vol. 3.

CHAPTER III

THE FALLACIES UNDERLYING MALAYSIA'S CLAIMED ROOTS OF TITLE

3.1 The purpose of this chapter is to show that Malaysia has failed to establish in any way the existence of a territorial title over the disputed islands, which it claims to have inherited in one way or another from its predecessors (Section 1). In particular, the uncertain interconnection between the Bajau Laut and the Sultan of Sulu does not establish any such territorial title (Section 2). The absence of any original title belonging to the Sultan of Sulu thus clearly excludes both "strands" of the Malaysian argument (Section 3).

Section 1. Lack of Original Territorial Title Inherited by Malaysia

3.2 Among the points of agreement between the Parties¹, there is at least one undisputed issue which is of great importance. In Malaysia's words: "[t]here can be no suggestion that any [of the islands] is, or at any relevant time was, *terra nullius*"². This implies that the Parties (and their predecessors) possess and have possessed at all relevant times a *title* which created or established their territorial sovereignty³.

3.3 As already noted in Chapter II, Malaysia's argument becomes very confused as soon as it seeks to determine precisely on *which* title its territorial claim is founded.

3.4 At para. 5.1 of its Memorial, Malaysia explains with more clarity than it generally uses on this issue that 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"⁴.

¹ See Chapter II Section 3, above.

² MM, para. 3.1. See also, MM, para. 5.8 and IM, para. 4.1.

³ Kohen, M.G., *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 148.

⁴ MM, para. 5.1; see also paras. 2.1-2.3.

3.5 The decision to follow both lines of argument simultaneously poses complex problems regarding the internal logic of the exercise. It is difficult to understand how Malaysia can claim that its title derives from the cession granted by the Sultan of Sulu to Spain of the whole of "the Archipelago of Sulu and the dependencies thereof" in 1878⁵ while also claiming that its title derives from the continuous administration of the disputed islands by Malaysia's "predecessors", namely the BNBC (similarly since 1878) and then Great Britain. Either way, the same issue must be addressed: either Ligitan and Sipadan were ceded to Spain, in which case neither the BNBC nor Great Britain could have administered them "as sovereign"⁶, or alternatively they belonged exclusively to the BNBC and then Great Britain as a result of the 1878 grant in which case Malaysia cannot claim a chain of title through Spain, followed by the United States, followed by Great Britain upon the coming into force of the 1930 Convention⁷.

3.6 In any event, what is significant is that, according to both hypotheses, the Sultan of Sulu held original title over the islands⁸. Yet there is no point in its Memorial where Malaysia establishes, even in a tenuous manner, that the Sultan, as sovereign or otherwise, ever exercised any authority over Ligitan and Sipadan or claimed the islands *à titre de souverain*.

3.7 Malaysia's argument merely consists in asserting that the Sulu Sultanate extended over a section of the north-eastern coast of Borneo, an area which was in fact the subject of a competing claim by the Sultan of Brunei⁹. In Indonesia's opinion, this argument confirms Indonesia's analysis of "the legal notion of territory as historically perceived by local Rulers" as set out in Chapter IV, Section 2 of Indonesia's Memorial. Malaysia completely fails to establish in any way the precise southern extent of the Sultanate of Sulu and even less that the Sultanate included the islands of Ligitan and Sipadan, which, it should be recalled, are some distance from the coast and were uninhabited.

3.8 In this regard, a series of peremptory assertions cannot take the place of evidence, all the more so since these affirmations are contradicted by the actual documents upon which they are apparently based.

⁵ *Ibid.*, para. 5.13.

⁶ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B No. 53*, p. 22 at p. 46.

⁷ See MM, para. 5.43.

⁸ *Ibid.*, paras. 5.3-5.8.

⁹ *Ibid.*, para. 5.6.

3.9 In describing the "Dependencies of the Sultanate of Sulu on the East Coast of Borneo"¹⁰, Malaysia asserts that: "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"¹¹. It is, however, quite obvious that Sipadan and Ligitan lie to the *south* of what was then British North Borneo and Darvel Bay, and to the *south and west* of the outermost islands of the Sulu Archipelago. It is impossible to see how they can conceivably be included in a description of "islands lying *between mainland Borneo and the Philippines*" or as part of the Sulu Archipelago itself. For example, Map No. 7.2 in Indonesia's Memorial, which is reproduced in this Counter-Memorial as Map 6.1 facing page 112, shows both the spatial relationship "between mainland Borneo and the Philippines" and the location and extent of the Sulu Archipelago, which, for these purposes, may be considered as extending no further than the important island of Sibutu. Similarly, a map published in 1901 in the Journal of the Royal Netherlands Geographical Society and reproduced at Annex 1, shows that the "former limit of Boeloengan" extended up to Tinagat as shown by the line of red crosses¹². The 1903 Stanford map of Borneo¹³, reproduced opposite page 54 as Map 4.1, again shows clearly that Sipadan and Ligitan are in the north-western part of the Sulawesi (Celebes) Sea, and can in no way be described as lying in the Sulu Sea or as forming part of the Sulu Archipelago.

3.10 By way of contrast, this section of Malaysia's Memorial merely *assumes* that Sipadan and Ligitan are, as a matter of fact, part of the Sulu Archipelago and that they can be described as "islands lying between mainland Borneo and the Philippines". It goes on to describe the "procurement system"¹⁴ used by the Sultanate of Sulu, under which "trading in a whole range of commodities (birds' nests, trepang, etc.) occurred *via Sulu*, and local people *made frequent visits* there [presumably, to Sulu] for this and other purposes"¹⁵. Subsequently, there is a description by James Hunt of the procurement system and the Mangidora district in the early part of the 19th century, presumably, intended to identify the Sulu dominions as including Sipadan:

¹⁰ *Ibid.*, paras. 5.3-5.8.

¹¹ *Ibid.*, para. 5.3. Emphasis added.

¹² For further discussion of this map, see para. 5.85, below.

¹³ IM, Map No. 6.4, facing p. 118 and Map Atlas, Map No. 9.

¹⁴ For a description of the "procurement system", see Reynolds, J.K., *Towards an Account of Sulu and its Borneo Dependencies – 1700-1878*, thesis, Master of Arts (History), University of Wisconsin, 1970, pp. 50-64.

¹⁵ MM, para. 5.3. Emphasis added.

"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"¹⁶.

An examination of Insert 7 at p. 32 of Malaysia's Memorial¹⁷ shows the locations just identified. Presumably the north-west part of the bay is marked by Silam and Lahad Datu, although the Giong river is not shown on Insert 7. Silam, which is in the north-west part of Darvel Bay is some 56 miles from the island of Sipadan and some 61 miles from the island of Ligitan and Darvel Bay itself would appear to have no geographic relation to the islands whatsoever. The island identified as "Pulo Gaya" is shown to the north-east of Semporna and almost due west of the island of Sibutu; again, it is many miles away from Ligitan (and even further from Sipadan) and has no connection with either island.

3.11 The purpose of this "identifying" description thus seems to be to describe not the extent of the dominions of Sulu, which the wording of the section heading appears to imply, but rather the location and nature of the "very valuable articles for commerce" there identified, such as "birds' nests [...], camphor, elephants, cattle" and the like. The first paragraph of the quotation by James Hunt at para. 5.4 of Malaysia's Memorial shows that the geographical scope of the description covers an area far removed from the disputed islands: "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]". Yet a mere glance at Insert 7 on p. 32 of Malaysia's Memorial reveals that Tanjung Unsang lies on the north-eastern coast of the far eastern promontory of north-east Borneo, across the Sulu Sea from Palawan, facing Sulu (Jolo) and, further afield, facing the south-western tip of Mindanao Island within the Philippine Archipelago. It is quite clear that Hunt's description of local produce and resources does not indicate the geographical scope of the "Dependencies of the Sultanate of Sulu", but was rather intended to indicate only the commodities that could be obtained by "local people" and processed through the "procurement system" quite obviously dominated, in those areas, by the Sultan of Sulu by virtue of his maritime power in the region. This is, however, far from identifying "*Separan* [Sipadan]" as forming a geographical *part* of the Sulu dominions, rather than being a neighbouring island with commodities that were sought after by the local people from Sulu

¹⁶ *Ibid.*, para. 5.4.

¹⁷ See also Map No. 9 in Indonesia's Atlas.

and elsewhere¹⁸. This is confirmed by the title itself of Dalrymple's chart of these seas on which this "description" is based, namely: *A Map of part of Borneo and the Sooloo Archipelago*¹⁹ and which does not indicate any territorial limits for any of the political entities in the region.

3.12 The subsequent paragraphs in Malaysia's Memorial advance the matter no further. Indeed, the reference in para. 5.5 to the Rennel manuscript adds nothing. It locates the "Dominions of Sooloo" as being, again, "between the Philippines and Borneo", and as including "a large part of the Coast of Borneo", the island of Palawan (far to the north), and "the islands that form the Strait of Balabar". The latter do not appear on Insert 7 since they lie too far to the north: the "Strait of Balabar" is now called the "Balabac Strait", the far western entrance to the Sulu Sea, stretching approximately from 116° 30' to 118° E, 7° 30' N, between Balabac Island (south-west of Palawan) and the island of Banggi off the coast of Sabah. It is some *three hundred miles* from Sipadan and Ligitan.

3.13 Para. 5.7 of Malaysia's Memorial details an 1875 attack by Bajaus from Omadal on an Austrian frigate. Omadal is to the north of Danawan and Si Amil, which are in turn to the north of Ligitan. However, it is revealing that the letter of the British Acting Consul at Labuan of 15 July 1875 on the subject of this attack notes that:

"The Dutch also are unusually active on the east coast, extending their influence from Coti over Berow and Bulungan, which they have long neglected, and where the English merchants of Singapore have trading Settlements. A vessel under that flag from Macassar recently loaded a cargo of pearl-shell at the Tawi Tawi Islands, and her captain communicated with Sulu without being put to much inconvenience by the so-called blockade"²⁰.

Since the Tawi Tawi islands belong to the Sulu Archipelago, this makes it clear that at that time the Dutch were present in this area²¹.

¹⁸ James Hunt's description is also referred to at MM, para. 3.14.

¹⁹ Annex 2.

²⁰ MM, Annex 77, Vol. 4, p. 3.

²¹ On this point, see paras. 3.66 *et seq.*, below.

3.14 The next section of this part of Malaysia's Memorial deals with the 1870 map by van Carnbée and Versteeg²². The map, however, shows virtually nothing of interest. Sipadan and Ligitan – the latter of which is wrongly located – are not coloured in any way that might indicate that they appertain to the "*Gebied van Soeloe of Solokh*" (territory of Sulu or Solok). There is no visible difference between their depiction and that of "P. Sibalik" (Sebatik). It is obvious that they are close to a "boundary" between local powers, but that is not surprising. Indeed, the limited usefulness of this map is apparent from the very words used by Malaysia in its Memorial:

"To the north and well to the east of the boundary line 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"²³.

3.15 No one denies that Sipadan and Ligitan lie close to the line of territorial allocation – to be subsequently determined in 1891 between Great Britain and The Netherlands, and no one denies that they lie close to the notional boundary, vague though it may have been, separating the respective areas of overlapping claims of the Sultan of Sulu and the Sultan of Boeloengan. But to conclude on the basis of a "highly inaccurate depiction" that Sipadan and Ligitan fell within the Sultanate of Sulu is impressionistic in the extreme, and even that vague impression can be seen to have been corrected, precisely and to the minute, by the Anglo-Dutch Convention of 1891 adopting the 4° 10' N parallel as the line of latitude for the of allocation for offshore territories.

3.16 No more needs to be said about the quotations given from the parliamentary questions in The Netherlands concerning the 1878 Sulu grant to Dent and von Overbeck. What useful inference can be drawn from a statement as vague as that given: "We have never disputed the authority of Spain over the dependencies of Sulu *in the north-east portion of the island* [of Borneo]"²⁴

3.17 Similarly, at para. 5.42, Malaysia makes the unsubstantiated affirmation:

²² Map 3 in Malaysia's Atlas.

²³ MM, para. 5.8 (a). Emphasis added.

²⁴ *Ibid.*, para. 5.8 (b). Emphasis added. Regarding the Malaysian interpretation of the Dutch Memorandum in relation to the Bajau Laut, see para. 3.54, below.

"There is no doubt that a license had been validly granted to the Company [BNBC] 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".

On the contrary, nothing could be less certain. In particular, Malaysia not only omits any reference to the fact that the 1878 grant did not cover islands situated beyond "three marine leagues of the coast"²⁵, but also sees it fit to include only a selective and misleading quotation from the relevant provision²⁶, when the two islands in dispute are situated well outside of this description.

3.18 To summarise, Malaysia's own description of the Sultanate of Sulu is extremely vague: the 1837 description by James Hunt relates to the general area, and is quite imprecise as to the geographic location of Sipadan, which is lumped together with disparate and distant features and is clearly mentioned here *as a source of commodities* for Sulu rather than as a *possession* of Sulu; the Rennel manuscript reference is wholly off the point; and the 1875 account of the Bajau attack applies to islands noticeably to the north of Ligitan and indeed confirms the presence of the Dutch in the region north of the islands at that time²⁷. Finally, the discussion of the vague and imprecise 1870 van Carnbée and Versteeg map and of the BNBC grant is tendentious and inconclusive and merely shows the uncertainty surrounding the pre-1891 situation.

3.19 In any event, Malaysia's assertions are categorically rejected by His Highness Datu Bungso T. Amilusin, the pretender to the throne of the Sultanate of Sulu, who made a formal declaration on 30 April 1997 in the context of the current dispute, in which he solemnly declared and acknowledged that:

"1) Tawau residency consisting [of] the Island of Sipadan and the Island of Ligitan belongs to the Sultanate of Bulungan.

"2) The Island of Sipadan and the Island of Ligitan, were never have been a part of the Sultanate of Sulu.

"3) The Letter of Grant of 22nd of January, 1878 and the Letter of Confirmation of 22nd of April, 1903, signed by His Highness the late Sultan Jamalul Adzam and the late Sultan Jamalul Kiram Alhaj, did not include the

²⁵ See IM, Vol. 2, Annex 17.

²⁶ See MM, para. 5.11.

²⁷ See also, para. 3.67, below.

Island of Sipadan and the Island of Ligitan as those two Island[s] belong to the Sultanate of Bulungan"²⁸.

3.20 Indonesia recognises that the islands in question were certainly not *res nullius* when Borneo was colonised by The Netherlands and Great Britain. As Indonesia has demonstrated in its Memorial²⁹ and as is evidenced by the solemn declaration of the current pretender to the Sultanate of Sulu referred to above, the islands fell under the sovereignty of the Sultan of Boeloengan. At most, even if some confusion persisted and even if, in view of the special characteristics of the local rulers' relationship to their territorial possessions, one were to consider the situation prior to 1891 as somewhat ill-defined, any uncertainty was removed with the conclusion of the 1891 Convention.

3.21 Moreover, any uncertainties that did exist tended to confirm that Sipadan and Ligitan lay beyond the limits of the possessions of the Sultan of Sulu. Thus, it seems that the Sultan of Sulu acquired "legal title" (admitting the concept existed at all at that time in the relevant area) over his possessions in North Borneo as a result of a cession granted by the Sultan of Brunei in 1704. M.O. Ariff considers that what had been ceded by the Sultan of Sulu in 1763 to the East India Company would have been the land "which he had acquired from the Sultan of Brunei in 1704"³⁰. According to L. Wright, "[i]ndeed, the legitimacy of the Sulu claim to the territory is in considerable doubt [...] and only the weight of the Sulu tradition supports the claim"³¹. Even though it may be argued that the date of 1704 is not entirely reliable, there can be no doubt that the Sultan of Sulu's "title" (if any) over North Borneo derives from a cession from the Sultan of Brunei³². As this cession is said to cover the mainland area "together with all the islands which lie within nine miles from the coast"³³, the Sultan of Sulu

²⁸ Annex 3.

²⁹ IM, paras. 4.55-4.72.

³⁰ M.O. Ariff, *The Philippines Claim to Sabah: Its Historical, Legal and Political Implications*, Singapore, Oxford University Press, p. 5. See also Dalrymple, A., *A Full and Clear Proof that the Spaniards Can Have No Claim to Balambangan*, London, 1774, p. 31, cited by L. Wright, *The Origins of North Borneo*, Hong Kong University Press, 1970, reprinted 1988, at p. 35, fn. 22.

³¹ *Ibid.*, p. 35. L. Wright also notes that in the mid 1860s, "most of [the local chiefs in the northern part of Brunei] considered themselves independent and were so recognized later on when the British North Borneo Company commenced buying these enclaves and granting pensions to the rulers", *ibid.*, p. 39.

³² See, for instance, "The Case of North Borneo", CO 1030/536, p. 1, which indicates 1850 as the date of the cession. See also Ko Swan Sik, "Asian Territorial Disputes, with Special Reference to the Islands of Sipadan and Ligitan: Succession to Dutch and British Titles?" in T.D. Gill and W.P. Heere (ed.), *Reflections on Principles and Practice of International Law – Essays in Honour of Leo J. Bouchez*, Nijhoff, The Hague, Boston, London, 2000, p. 116. The author dates the cession at 1704, while recognizing that there is uncertainty in this respect. However, in his very detailed study of the cession, B.K. Short gives 1704 as the most likely date for the cession, see "Brunei, Sulu and Sabah: an Analysis of Rival Claims", *Brunei Museum Journal*, Vol.1, No. 1, 1969, pp. 133-134, Annex 4.

³³ See "The Case of North Borneo", *op. cit.*, p. 2.

cannot have acquired title over Sipadan and Ligitan from the Brunei cession, and neither island fell under his territorial jurisdiction. This conclusion has been implicitly confirmed by Professors A.B. Lapian et N. Kazufumi, when they write that Sitang-kai Pulau was "a tiny island situated in the southwestern end of the Sulu Archipelago"³⁴. As this island, representing the south-western end of the Sulu Archipelago, is situated well to the east of Ligitan³⁵, it would appear that neither Sipadan nor Ligitan could have formed part of the Sultan of Sulu's possessions.

3.22 A further document is revealing in this respect. In an article first published in the *Java Bode* in February 1882 and republished in the *Singapore Straits Times* of 9 February 1882, where it was reproduced as an enclosure to a letter from Sir Rutherford Alcock, Chairman of the North Borneo Company to Earl Granville, it was reported that when the Assistant Resident of Cotie "visited the districts beyond the frontier as it then stood, and inquired of the inhabitants whether they owed allegiance to Bulungan or Sulu", not only the inhabitants of the districts up to the Sibuko River, but also those having emigrated from the north of the river "declared that when they dwelt in their previous Settlement beyond that river they considered themselves as subjects of Bulongan"³⁶. Since the mainland coast fell under the sovereignty of the Sultan of Boeloengan, it follows that the islands of Sipadan and Ligitan, lying off this coast, would likewise fall under the Sultan of Boeloengan's sovereignty.

Section 2. Malaysia's Argument Based on the Presence of the Bajau Laut in the Disputed Area

3.23 Malaysia similarly places great emphasis on the relationship that existed between the Sultan of Sulu and the Bajau Laut, whose presence in the disputed area allegedly proves Sulu sovereignty over Ligitan and Sipadan.

3.24 At no point in its Memorial does Malaysia specifically undertake a factual and legal discussion regarding the presence of the Bajau Laut on the north-eastern coast of Borneo and on the neighbouring islands. Nevertheless, Malaysia tries to make extensive use of this alleged presence, especially in Chapters 3, 5 and 6 of its Memorial. In this regard, two distinct arguments can be discerned:

³⁴ "Research on Bajau Communities : Maritime People in Southeast Asia", *Asian Research Trends: A Humanities and Social Science Review*, No. 6, 1996, p. 50 at Annex 5.

³⁵ *Ibid.*, maps on p. 47. See also Map 3.1 reproduced following p. 31.

³⁶ Annex 6.

- (a) that the Bajau Laut allegedly were at the heart of the creation of a sort of self-contained set of islands, including Ligitan and Sipadan; and
- (b) that the Bajau were allegedly subjects of the Sultan of Sulu before becoming subject to British administration, whilst they never had any ties with the Dutch authorities.

3.25 These two arguments are inseparable in the sense that it is only if one can speak of a "Bajau Laut State" or "entity" which included the disputed islands *and* only if this State or entity was under the sovereignty of the Sultan of Sulu, and subsequently Great Britain, that the existence of an original Malaysian title over Ligitan and Sipadan inherited from its predecessors can be accepted. However, these two arguments do not stand up to scrutiny either individually or collectively.

A. A "Bajau Laut" Entity Comprising Ligitan and Sipadan?

3.26 The essential nature of the Bajau Laut is the tribe's maritime nomadism³⁷, which is indeed recognised by Malaysia when it describes the Bajau Laut as "Sea Gypsies"³⁸. Consequently, Malaysia's use of these Bajau settlements, which by their very nature were temporary and shifting, in order to establish the existence of any territorial title, is peculiar³⁹.

3.27 This is all the more so since it is widely acknowledged that the Bajau Laut's presence stretched over a very wide geographical zone. According to Clifford Sather for example:

³⁷ The Bajau Laut should not be confused with the Bajau Darat, a land-based tribe. See Sather, C., *The Bajau Laut. Adaptation, History, and Fate in a Maritime Fishing Society of South-Eastern Sabah*, Oxford University Press, 1997, p. 8: " 'Bajau Laut' may also be applied, not simply to boat nomads and former nomads, but to all coastal-dwelling 'Bajau', as opposed to those who live inland from the sea for whom the Malay label 'Bajau Darat', literally 'inland Bajau', is sometimes used (Asmah, 1980). In this book, the name 'Bajau Laut' is used in the prior sense [...]"; see also p. 63 where Sather describes them as "sea people". They are also sometimes called Bajau Samal (See Piper, M., "Settlements on Eight Semporna Islands", *Sabah Society Journal*, Vol. VII (4), 1984, pp. 305 and 317).

³⁸ MM, para. 3.7; see also para. 3.45, below.

³⁹ See para. 3.47, below for a discussion of the *Western Sahara* case in this regard.

"the Bajau Laut [...] lacked a single focus of settlement. Instead they were scattered in small enclaves throughout the entire Sulu Archipelago, and *beyond as well*"⁴⁰,

an assertion which he confirmed over twenty years later, by emphasising that:

"the nomadic Bajau Laut [...], being highly mobile, were scattered over much of the Sulu zone and beyond"⁴¹.

3.28 This zone not only covers the Sulu archipelago, but also the Philippines in their present form, Johore, Singapore, Celebes and the whole of the eastern coast of Kalimantan, as is confirmed in a recent study by Clifford Sather:

"the Bajau Laut, the largest and most widely dispersed of these groups, [were] living in the Sulu Archipelago of the Philippines, eastern Borneo, Sulawesi, and the islands of eastern Indonesia"⁴².

More precisely, Clifford Sather notes:

"If the identification of Dinawan is correct, Dewall's account suggests that during the early nineteenth century, Semporna may well have served as a rendezvous and staging point from which the Bajau Laut fleets sailed southward into Indonesian waters. This would corroborate local Bajau Laut oral tradition which points to regular contacts in the past between Semporna and Bajau Laut settlements in the Straits of Macassar"⁴³,

and that:

"In eastern Indonesia, the largest numbers of Sama-Bajau are found in the smaller islands and coastal districts of Sulawesi [...]. Elsewhere, settlements are reportedly present near Balikpapan in East Kalimantan, on Maratua, Pulau Laut, and Kakaban, and in the Balabalangan islands off the eastern Kalimantan coast [⁴⁴]"⁴⁵.

⁴⁰ Sather, C., "Sulu's Political Jurisdiction over the Bajau Laut", in Sather C., (ed.), "Traditional States of Borneo and the Southern Philippines", Borneo Research Bulletin, Vol. 3, No. 2, December 1971, Borneo Research Council, pp. 58-62, at p. 59. Emphasis added.

⁴¹ Sather, C., *The Bajau Laut. Adaptation, History, and Fate in a Maritime Fishing Society of South-Eastern Sabah*, op. cit., p. 40. Emphasis added.

⁴² *Ibid.*, p. 321.

⁴³ *Ibid.*, p. 30.

⁴⁴ Darmansjah, A.D.H. and Noor, B., *Bahasa Bajau*, Jakarta: Pusat Pembinaan dan Pengembangan, Department Pendidikan dan Kebudayaan, 1979, pp. 7-10; Sather, C., "Bajau" in Levinson, D., (ed.), *Encyclopedia of World Cultures*, Vol. 5, *East and Southeast Asia*, G.K. Hall, Boston, 1993, p. 30.

⁴⁵ Sather, C., *The Bajau Laut Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, op. cit., p. 4. See also the map at Annex 7 which shows that the islands of Maratua and of Kakaban are situated very far to the south of Sipadan and Ligitan.

3.29 This presence of the Bajau Laut on the eastern coast of Borneo is coupled, moreover, with a presence on the western coast⁴⁶.

3.30 Traces of their activities in the southern-most section of the disputed area can be found dating back to the 18th century. J.F. Warren thus noted that:

"The reefs, islets, and bays of the southeast coast of Borneo have long been places of rendezvous and encampment for the Samal Bajau Laut. As early as 1773, Forrest encountered nomadic Samal fishermen along the southern edge of the zone"⁴⁷.

3.31 Studies of the mythical origins of the Bajau Laut confirm this, in that they are based on the belief that the Bajau originated from *Johore*. This mythology seems to correspond very much with the reality of the situation, since it is agreed upon by the various Bajau Laut populations⁴⁸. According to A.B. Lapian and K. Nagatsu, their research into Bajau legends permitted them to conclude that:

"There are [...] good reasons to suggest that in former times the Bajau occupied a much wider area than today"⁴⁹.

This presence had, moreover, been noted by the Dutch and is recorded in writings dating from 1682 of Robertus Padbrugge, who was the Dutch East India Company Governor of Maluku in the 17th century⁵⁰, and in the later writings from 1839 of Vosmaer, a Dutch trader⁵¹. This familiarity of the Dutch with the Bajau Laut dating as far back as the 18th century is confirmed by the use of the term "Bajau" in Dutch ethnographic literature from this period⁵².

⁴⁶ See, for example, Tregonning, K.G., *A History of Modern Sabah (North Borneo 1881-1963)*, University of Malaysia Press, 1967, p. 43.

⁴⁷ Warren, J.F., *The Sulu Zone 1768-1898*, Singapore University Press, 1981, p. 69.

⁴⁸ See Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 17, and generally pp. 17-20. See also Evans, I.H.N., "Notes on the Bajaus and Other Coastal Tribes of North Borneo", *Journal of the Malayan Branch of the Royal Asiatic Society*, Vol. 25, No. 158, 1952, p. 49.

⁴⁹ Lapian, A.B. and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", *Asian Research Trends : A Humanities and Social Science Review*, No. 6, 1996, pp. 43- 70, at p. 49; see also pp. 46-47, and in particular Map 1 at p. 47, which confirms the presence of the Bajau Laut in the south-east of Borneo, Annex 5.

⁵⁰ *Ibid.*, p. 50.

⁵¹ *Ibid.*, p. 52.

⁵² See Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, pp. 6-8.

3.32 Furthermore, the Dutch familiarity with the Bajau Laut sometimes resulted in closer links being forged. For example, in the writings of M. Piper, there are descriptions of the assistance that the Bajau Laut gave to the Dutch authorities in the gathering of information:

"They were reported off eastern Borneo in 1779 by Capt. T. Forrest [⁵³] who commented : 'These people (Bajaus) are very useful to the Dutch East India Co., in carrying intelligence speedily from place to place, and giving information of whatever happens'"⁵⁴.

3.33 Further journeys, other than those described in the original myths⁵⁵, subsequently took place regularly:

"Until the 1920s, the Semporna Sama Dilaut, who were then still boat-living, regularly sailed southward through the Straits of Makassar to visit related Sama Dilaut communities along the eastern coast of Kalimantan. From here, a few sailed on to southern Sulawesi"⁵⁶.

3.34 These journeys gave concrete expression to the idea of the Bajau Laut belonging to a common "family". In fact, at the start of the century:

"the Semporna Bajau Laut continue[d] to regard those living in East Kalimantan as, belonging like themselves, to a larger Sama Dilaut population"⁵⁷.

3.35 Far from being occasional, these journeys were considered as normal. According to Clifford Sather:

"In the past, the Bajau Laut moved *easily* between Sabah, the southern Philippines, eastern Kalimantan, and Sulawesi"⁵⁸.

This author further clarifies:

"It was not uncommon at the time for families to sail 48 kilometres to the east and southeast of Bangau-Bangau, and some 24-32 kilometres to the north, south, and west"⁵⁹.

⁵³ Fn. 10 refers to Capt. T. Forrest : *Voyage to New Guinea and the Maluccas from Balambangan*. 1774 – 1776 pub. 1779

⁵⁴ Piper, M., "Settlements on Eight Semporna islands", *Sabah Society Journal*, VII (4), p. 318.

⁵⁵ See para. 3.31, above.

⁵⁶ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 87. Emphasis added.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 87. Emphasis added.

⁵⁹ *Ibid.*, p. 105.

3.36 Indeed, it would appear that the emergence of European colonisation in the area had the effect of increasing these migrations. A review of the works of M. Yoshihiko reveals, for example, that:

"as a consequence of European colonization of insular Southeast Asia, migrating activities of the Bajau became more active, in order to avoid colonization"⁶⁰.

3.37 The special case of the Balignini tribe, who were a subgroup of the Bajau Laut, is also enlightening in this regard. W.B. Pryer, in his study of "Natives of British North Borneo", remarks that these people:

"used, as professional kidnappers, to harry the seas from Macassar, Batavia, and Singapore on the south to Manila on the north"⁶¹.

3.38 For T. Harrison, far from being anecdotal, the wide-spread maritime presence of the Bajau Laut, had significant consequences for the region concerned:

"In the present writers' [sic] reading of Bornean history and prehistory, the Bajaus – using the term broadly and without pedantry – have played a key contact role in the circulation not only of the island cultures but of inter-human relations throughout the region"⁶².

3.39 Although they were scattered in numerous groups, there is no doubt that the Bajau Laut constituted an important group on the eastern coast of the Semporna district, the subject of the study which Clifford Sather has devoted to them. But the legal importance of this study for the present case should not be over-estimated. As its title indicates, it relates exclusively to the Semporna region, situated in Sabah. Moreover, this is a common feature of most of the studies dedicated to this people. Professor Lapian thus observed in a recent study that during a 1995 international conference on the Sama/Bajau:

"the area covered by the papers was more extensive than ever before. A lot of papers dealt with Sama-Bajau communities in Sulawesi and the northwestern coast of Sabah, in addition to those in Sulu and northeastern Sabah".

⁶⁰ Lapian, A.B. and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", *op. cit.*, p. 58 at Annex 5.

⁶¹ Pryer, W.B., "On the Natives of British North Borneo", 16 *J. Roy. Anthropol. Inst.*, 1887, p. 230.

⁶² Harrison, T., "The Bajaus : Their Origins and Wide Importance", *Sabah Society Journal* VI (1), p. 39 at Annex 8.

He concluded from this that research on the Bajau Laut was far from exhausted, and this led him to draw up a list of new studies to be undertaken⁶³. A quick review of this list is enough to show that: (i) the presence of the Bajau Laut is not confined to the eastern coast of Sabah, even if existing studies are confined to this area; (ii) there are still many grey areas in the bank of knowledge about this people, which encourages caution in the use of the available sources. T. Harrisson has furthermore criticised the "classical" studies available⁶⁴.

3.40 The above facts can only lead to the following conclusion: even if Bajau Laut tribe members from Dinawan carried out fishing, including possibly in the waters surrounding Ligitan and, perhaps, Sipadan, and collected sea turtle eggs on the latter island:

- (a) they were not alone with regard to the collection of sea turtle eggs on Sipadan. This is referred to, for example, at para. 5.28 of Malaysia's Memorial⁶⁵;
- (b) they were not permanently established (if at all) anywhere other than in an area clearly to the north of the disputed islands, since the southernmost limit of their settlement was the island of Dinawan. This is confirmed by Annex 88 of Malaysia's Memorial⁶⁶, in which the following description of the "Bajau country" is given:

"The Bajau country may be said to lie within a square formed by Latitudes 4° and 5° North and Longitudes 118° and 119° East. [...] the most easterly and southerly boundary of the Bajau country is the island of Danawan [...]"

Indonesia certainly does not challenge the fact that Bajau Laut were present in the region. Nonetheless, neither fishing nor the collection of turtle eggs by a fiercely independent and nomadic group of people can in any way be seen as a display of territorial sovereignty⁶⁷.

⁶³ Lapijan, A.B., and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", *op. cit.*, p. 59 at Annex 5.

⁶⁴ See Harrisson, T., "The Bajaus: Their Origins and Wide Importance", *Sabah Society Journal*, VI (1), in particular pp. 38-39 at Annex 8.

⁶⁵ The passage cited in this paragraph shows that other Bajau Laut than those residing on the island of Dinawan collected these eggs. See also para. 7.28, below.

⁶⁶ *British North Borneo Herald*, 2 February 1903, pp. 31-33.

⁶⁷ See paras. 7.14-7.22, below.

B. The Supposedly Exclusive Links between the Bajau Laut and the Sultan of Sulu, the BNBC and the British Administration

3.41 Notwithstanding the above analysis, which shows that the Bajau Laut were widely dispersed in the region, it is important to note that Malaysia has not established that the Bajau Laut, in their entirety, pledged allegiance to the Sultan of Sulu or to anybody else. To the contrary, it appears that they were an uncontrollable people, who maintained commercial ties not only with the Sultan of Sulu, the BNBC and the British administration in the north of Borneo but also with the Sultans of Berou and Boeloengan and the Dutch administration in the south, who collaborated with the British in a concerted effort to suppress piracy, which the Bajau had turned into a speciality of theirs.

3.42 Without venturing to say so categorically, Malaysia attempts to create an "atmospheric picture" by presenting the Bajau Laut as an ethnic group subject to the Sultan of Sulu. Thus, Malaysia states:

"The local leaders, who were often Sulu, were appointed by the Sultan of Sulu and given such titles as Panglima, Datu, Temengong, etc."⁶⁸;

"This control resulted from the allegiance of the local people and the appointment of their local chiefs by the Sultan"⁶⁹;

"The Sultan of Sulu's authority over north-eastern Borneo was recognized by other States and is evidenced" by many documents⁷⁰.

3.43 Apart from the fact that almost all of these generalised assertions are not supported by any convincing proof, it would not seem possible to infer from them anything relating to the issue of territorial sovereignty over the specific islands now in dispute. For example, it is possible that the Sultan of Sulu had appointed at certain times (and in order for it to have any probative value, this must have occurred before 1878, or, in any event, before 1891) the leaders of certain groups of Bajau Laut. However, on the one hand, this is not attested to by

⁶⁸ MM, para. 3.7.

⁶⁹ *Ibid.*, para. 5.7.

⁷⁰ *Ibid.*, para. 5.8.

any contemporaneous evidence in Malaysia's Memorial⁷¹ and, on the other hand, there is nothing to prove that any such appointments concerned any groups settled in the immediate vicinity of Ligitan or Sipadan – the disputed islands themselves being uninhabited. In the same way, the reasoning contained in para. 5.8 of Malaysia's Memorial is too general to be relevant to the islands of Sipadan and Ligitan, all the more so since the logic used seems to be founded on a questionable *a contrario* argument.

3.44 It is all the more incongruous for Malaysia to try to establish the existence of any sort of territorial link between the Sultan of Sulu and the disputed islands via the supposed sovereignty (or suzerainty) of the Sultan over the Bajau Laut, since the latter not only travelled over extensive territories where they were scattered⁷², but they were characterised by their nomadic nature and by the fact that they were resistant to any form of political or other type of control.

3.45 The term "gypsies of the seas" which is often attributed to the Bajau Laut⁷³ is illustrative: like the gypsies of Europe (and unlike the Bajau Darat, another branch of the Bajau), they did not settle in a well-defined territory but rather led a nomadic existence (on the seas) over vast areas which covered, as Indonesia has shown above⁷⁴, many States in the region. The result of this was that:

"the sea nomads, distinguish themselves not by the name of a particular island group [...] but by identification with the sea itself, as 'sea people' (*a'a dilaut*). As a consequence, the nomadic Sama possessed the most readily transportable identity of all, one capable of being carried in the past virtually anywhere within the entire vast archipelagic world inhabited by the Sama-Bajau speakers"⁷⁵.

⁷¹ Malaysia produces some affidavits (see, for example, MM, para. 6.7) where the authors only report information as hearsay.

⁷² See paras. 3.26 *et seq.*, above.

⁷³ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 26, and Sopher, D., *The Sea Nomads: A Study Based on the Literature of the Maritime Boat People of Southeast Asia*, Memoir of the National Museum, No. 5, Singapore, 1965; Pelras, C., "Notes sur quelques populations aquatiques de l'Archipel Nusantarien", *Archipel*, No. 3, 1972, pp. 133-168 and Reynolds, J.K., *Towards an Account of Sulu and its Borneo Dependencies – 1700-1878*, thesis, Master of Arts (History), University of Wisconsin, 1970, pp. 76-77.

⁷⁴ Paras. 3.26-3.39, above.

⁷⁵ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 36.

3.46 This nomadic nature of the Bajau Laut had an impact on the way in which they were perceived by other land-based peoples. Thus, the nomadic Tausug tribe of the Bajau Laut was perceived as being "disconnected" from the Sulu Sultanate:

"Without a territorial base of their own, they were perceived by their neighbours as living outside, and so only tangentially connected to, the system of personal coalitions that came to define political and economic relations in Sulu. Reflecting this *status of social and political exclusion*, sea-nomadic communities were identified by outsiders by pejorative terms, such as *pala'au* or *luwa'an*, meaning, literally, 'that which is spat or vomited out' [⁷⁶]⁷⁷.

3.47 Even if the presence of nomads over a territorial area has, without doubt, certain legal effects and excludes the possibility of the territory in question being considered *terra nullius*⁷⁸, such a situation does not lend itself to the establishment of a territorial title. In reality, the situation bears similarities to some aspects of the *Western Sahara* case that the Court took an interest in: there may have been ties of alliance between the Sultan of Sulu and some, but only some, Bajau Laut groups⁷⁹ (even though Malaysia's Memorial does not establish this); these ties, which are of a personal nature, are not sufficient in any event to establish territorial sovereignty in the sense in which the expression is understood in contemporary international law⁸⁰.

3.48 Further, as the Arbitral Tribunal noted in the first stage of the *Eritrea/ Yemen* case:

"There can be no doubt that the concept of historical title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area. A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters"⁸¹.

3.49 Furthermore, and here too, the similarities with the *Western Sahara* case are striking, each Bajau Laut group was highly autonomous. As Clifford Sather observed:

⁷⁶ Keifer, T.M., "The Tausug Polity and Sultanate of Sulu: A Segmentary State in the Southern Philippines", *Sulu Studies*, No. 1, 1972, p. 22; Sather, C., "Sea and Shore People: Ethnicity and Ethnic Interaction in Southeastern Sabah", *Contributions to Southeast Asian Ethnography*, 1984, pp. 12-13.

⁷⁷ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 16. Emphasis added.

⁷⁸ *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 12 at p. 39, para. 81.

⁷⁹ *Ibid.*, at p. 49, para. 107 and p. 57, para. 129.

⁸⁰ See IM, paras. 4.3-4.18.

⁸¹ Award of 9 October 1998, *Territorial Sovereignty and Scope of the Dispute*, p. 35 at p. 123.

"Bajau society [was] geographically dispersed [and] highly fragmented, being divided into a multitude of distinct subgroups, all locally named and most geographically interspersed with one another and with non-Sama-speaking peoples as well [...] within the entire vast archipelagic world inhabited by Sama-Bajau speakers"⁸².

3.50 The same is true in respect of the Bajau Laut of Semporna:

"The Bajau population of Semporna, as of the Sulu Archipelago beyond, is fragmented into a number of named subgroups, each associated with a particular island homeland, place of origin, or area of local settlement"⁸³.

3.51 The logical and inevitable consequence of this fragmentation was the absence of any political unity over the Bajau Laut, as Clifford Sather emphasises:

"The Bajau have *never constituted a unified political entity* however, and prior to European penetration local communities in Sabah and the southern Philippines were under the *tenuous* jurisdiction of the Sulu Sultanate, and in eastern Indonesia, Buginese, Makassarese, and lesser political units, most of them dominated by non-Bajau rulers or their local political agents"⁸⁴.

3.52 This does not exclude the formation of certain groupings, but they cannot be described as "political". Clifford Sather notes in effect that:

"Both at sea and in his home village, the Bajau Laut faces choice in his permanent group affiliations and in forming more ephemeral associations among his kindred or those related by local ties or convergent interests"⁸⁵.

3.53 Without doubt there probably existed links – primarily of a linguistic nature⁸⁶ – between the different Bajau Laut populations, between the Bajau and the local land-based populations, and between the Bajau and the authorities upon whom they were on occasion dependent. There is no doubt, for example, that in a territory under the Sulu Sultanate's authority the Bajau Laut maintained relations with the Sultan of Sulu, which could, in certain cases, be relatively close, and even include allegiance. For example, it would not have been

⁸² Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 36.

⁸³ *Ibid.*, p. 30.

⁸⁴ Sather, C., "The Bajau Laut", in V.T. King (ed.), *World Within: The Ethnic Groups of Borneo*, pp. 222-223 at Annex 9. Emphasis added.

⁸⁵ *Ibid.*, p. 244.

⁸⁶ See Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, pp. 8-12.

unusual for the Sultan of Sulu to have appointed Bajau chiefs on the island of Dinawan, an island which was situated on the periphery of the Sulu empire⁸⁷ – however, Malaysia provides no concrete evidence that this was the case.

3.54 Similarly, there is nothing surprising about the fact that in the Explanatory Memorandum to the Dutch Parliament which accompanied the 1891 Convention, the ministers in question pointed out that:

"the Badjans [Bajau], who live on the islands off the north-east coast of Borneo, which belong to the Sultanate of Sulu, still regularly gather forest produce in the disputed area without taking the least notice of the Sultan of Bulungan"⁸⁸.

Contrary to Malaysia's interpretation of this Memorandum⁸⁹, which does not specify which islands are referred to, there is no basis for the assertion that *all* the islands where the Bajau Laut had settlements were included within the Sultan of Sulu's possessions.

3.55 In fact, the truth is that only *when* the islands in question belonged to the Sultan of Sulu did the Bajau consider themselves linked to him, which is quite a different matter. The point being made in the Explanatory Memorandum is precisely that the Bajau linked to the Sultan of Sulu ignored – as was typical of Bajau behaviour generally – the rights of the Sultan of Boeloengan on the parts of the mainland belonging to him: those rights nevertheless existed, as was implicitly accepted by the recognition of Boeloengan transitional rights to collect jungle produce in Article VII of the 1891 Convention. Moreover, in this respect, the Memorandum specifies that, generally speaking, it is dealing with the border zone between Boeloengan and Sulu, where the boundary was uncertain:

"In view of both this fact and the absence of any document concerning the delineation of the boundary between the Sultanates of Bulungan and Sulu, it was considered very difficult to determine the precise extent of the domain of the Bulungan"⁹⁰.

⁸⁷ Clifford Sather states that, "the Semporna district", which the island of Dinawan is part of, is seen as "lying at the periphery of the Sulu zone", *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah, op. cit.*, p. 39.

⁸⁸ IM, Annex 77, Vol. 3, p. 124.

⁸⁹ See MM, para. 5.8(c), see also para. 9.11.

⁹⁰ IM, Annex 77, Vol. 3, p. 124.

Nor did the Dutch administration know the exact extent of Boeloengan⁹¹, which, it must be stressed again, is no surprise since, as recalled in a recent study:

"The idea of detailed spatial delimitation by way of boundaries being unfamiliar in the relations between the regional kingdoms and principalities of the time, it was unavoidable and understandable that competing claims to authority (or, for that matter, "sovereignty" or "ownership") over large tracts of land and their sparse population were not uncommon and persistent"⁹².

3.56 Moreover, as shown on Map 3.1 reproduced on the following page, far from being confined to the islands and coasts controlled by the Sultan of Sulu, the Bajau Laut are dispersed over a vast area including the entire east coast of Borneo, the whole island of Sulawesi, the coasts of Komodo and Flores down to Roti. Regardless of the extent of Malaysia's view of the Sultanate of Sulu, there cannot be the slightest doubt that it did not exercise any kind of authority over those areas which are recognised as being under the exclusive sovereignty of Indonesia. Indeed, this map shows the actual settlements of Bajau Laut. Moreover, toponym Map 3.2 reproduced following Map 3.1 shows a great number of places, the names of which include the term "bajau" or "bajo", and reveals that these settlements existed in a remote past.

3.57 This confirms the fact that, like the ties that united the nomadic tribes of Bilad Chinguiti and those of Western Sahara before the colonisation of this territory by Spain, these "were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region"⁹³. But such ties most certainly do not suffice to establish the existence of "any tie of territorial sovereignty"⁹⁴ between the territories in which the Bajau Laut were nomads and the Sultanate of Sulu.

3.58 To the contrary, the Bajau Laut were resistant to authority in all its forms, and this represented another one of their characteristics. Thus, I. Black writes:

"The blue-green waters of the [Darvel] bay were dotted with innumerable islands, and a loose chain of islands connected south-eastern Sabah with Sulu,

⁹¹ *Ibid.*, paras. 4.55, *et seq.*

⁹² Ko Swan Sik, "Asian Territorial Disputes, with Special Reference to the Islands of Sipadan and Ligitan: Succession to Dutch and British Titles?" in T.D. Gill and W.P. Heere (ed.), *Reflections on Principles and Practice of International Law – Essays in Honour of Leo J. Bouchez*, Nijhoff, The Hague, Boston, London, 2000, p. 116.

⁹³ *Western Sahara, Advisory Opinion, I.C.J. Reports, 1975*, p. 12 at p. 65, para. 152; see also pp. 66-67, paras. 158-159.

⁹⁴ *Ibid.*, p. 68 at para. 162.

making quite artificial any political boundaries established by the Company or by the Spanish and the Dutch. Here, the Bajau peoples remained elusive and reluctant to accept any permanent subjection to the Company" (in the 1880s)⁹⁵.

The author concludes that the Bajau Laut:

"do appear to have shared a characteristically limited sense of community and loose political leadership"⁹⁶.

3.59 Indeed, the Bajau Laut were described in the *Handbook of British North Borneo*, 1886, as "a tribe the most difficult to manage in the territory"⁹⁷.

3.60 Leigh R. Wright has interpreted this situation as meaning that the Bajau Laut were exercising *de facto* control over the concerned territories:

"Although recognized as sovereign over the Sulu Archipelago it is not at all certain that the Sulu Sultans held sovereignty over any part of North Borneo. What is clear is that they never held *de facto* control there. Until 1878 power along the coast of Northeast Borneo was in the hands of rapacious pirates, mainly the Illanun and Balagnini but including some Sulus"⁹⁸.

As Leigh R. Wright puts it:

"It is certain that the local chiefs considered themselves independent of Sulu and acted accordingly [⁹⁹] just as the chiefs along the northwest coast considered themselves independent of Brunei [...] that chaotic conditions along the coasts and the weakness of Brunei and Sulu prevented either state from maintaining control over the area; that pirates were the only effective power over large areas of North Borneo [...]"¹⁰⁰.

3.61 This resistance to political integration appears to form the very nature of the Bajau Laut, resulting particularly from their nomadic life. According to J. F. Warren, for example:

"The Samal Bajau Laut possessed neither a territorial base nor the internal political structure necessary to weld localised kindred groups into viable political communities [...]. The maritime nomadic fishermen had limited

⁹⁵ Black, I., *A Gambling Style of Government. The Establishment of the Chartered Company's Rule in Sabah, 1878-1915*, Oxford University Press, 1983, p. 66.

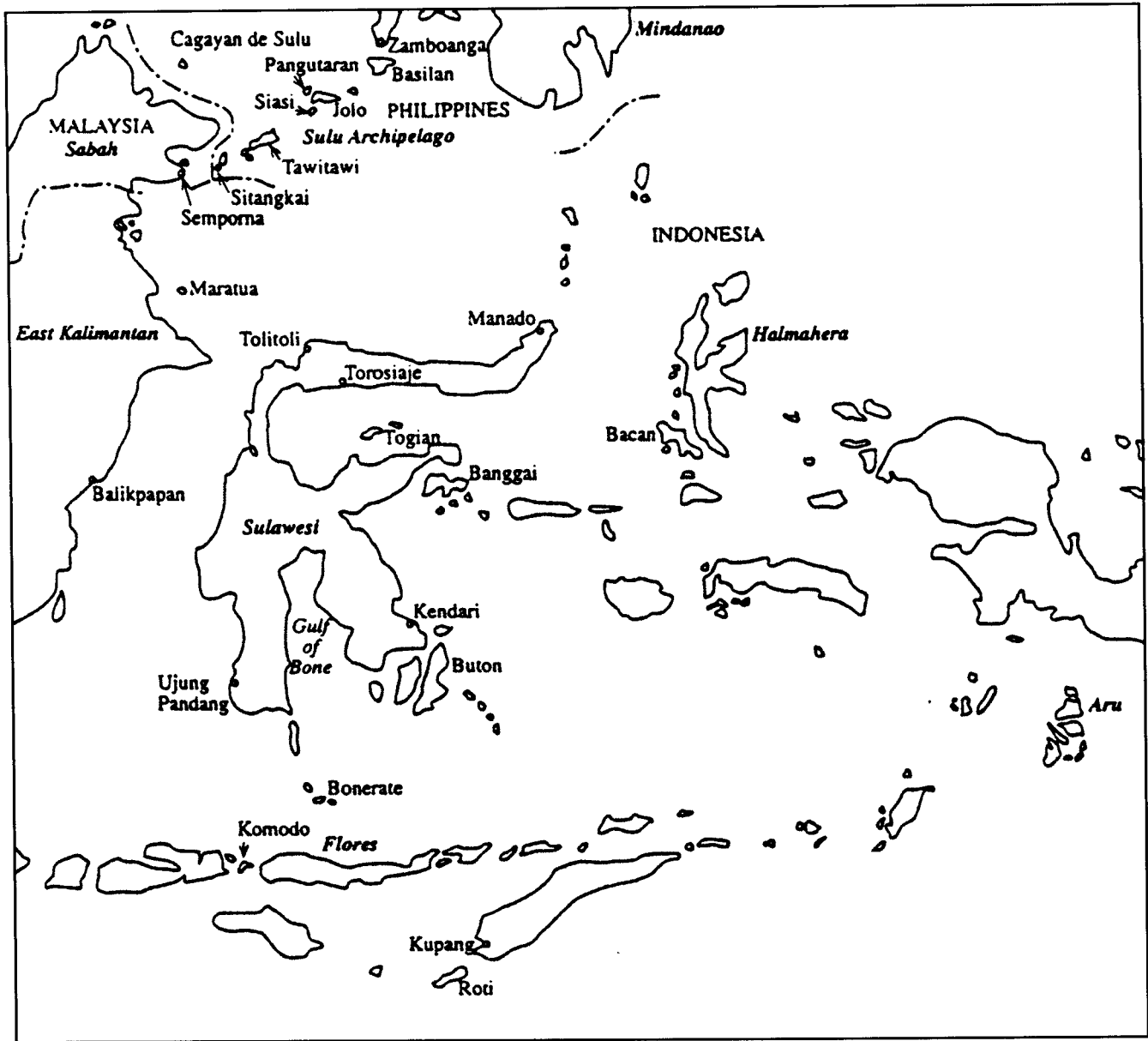
⁹⁶ *Ibid.*, pp. 21-22.

⁹⁷ *Handbook of British North Borneo*, London, William Clowes & Sons Limited, 1886, p. 21 at Annex 10.

⁹⁸ Wright, L.R., "Historical Notes on the North Borneo Dispute", *Journal of Asia Studies*, Vol. xxv, No. 3, May 1966, p. 471, see also pp. 480-481.

⁹⁹ Treacher, W.H., "British Borneo", in *JRASSB*, No. 21, June 1890, pp. 48-55 at Annex 11.

¹⁰⁰ Wright, L.R., *op. cit.*, p. 481.



Map 1. Sama-Bajau Settlements Reported in Fox 1984

Map 3.1

Lapian, A.B. and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", reprinted from *Asian Research Trends: A Humanities and Social Science Review*, N°6, 1996, p. 47.

100

III-08 / 320

scope for interaction with the majority of the population, and played only a marginal role in the life of the zone"¹⁰¹.

3.62 This opinion is shared by Clifford Sather, who states:

"In contrast to other Bajau groups, the Bajau Laut lacked an internal political structure linking separate villages, and each settlement, as we have seen, was joined directly to a neighboring shore community"¹⁰².

3.63 In any case, it is a recognised fact that the Bajau Laut not only maintained relations with the Sultan of Sulu, the BNBC and the British colonial authorities, as Malaysia goes to great lengths to show¹⁰³ but also, and to the same extent, with Berou, the Sultan of Boeloengan and the Dutch administration¹⁰⁴. This is especially striking from two points of view. First, the Bajau Laut traded with the Dutch, and, second, The Netherlands, in the same way as Great Britain, tried to put an end to the acts of piracy in which the Bajau Laut were accused of engaging throughout the region.

3.64 As regards the first point, numerous sources attest to the close and frequent commercial relations between the Bajau Laut and the coastal regions of Kalimantan and the Dutch administrative power¹⁰⁵. The document at Annex 34 of Malaysia's Memorial, entitled "Some Particulars Relating to Sulu, in the Archipelago of Felicia", by J. Hunt, is relevant in this respect, since it reads at page 50:

"Capt. Carteret mentions having seen a hundred sail of them from twelve to twenty tons burthen at Bonthian under Dutch colors"¹⁰⁶.

¹⁰¹ Warren, J.F., *The Sulu Zone 1768-1898*, *op. cit.*, pp. 68-69.

¹⁰² Sather, C., "Sulu's Political Jurisdiction over the Bajau Laut", in Sather, C., (ed.), "Traditional States of Borneo and the Southern Philippines", *op. cit.*, p. 61.

¹⁰³ See MM, paras. 6.5, *et seq.*

¹⁰⁴ The same applies in particular to the "Dinawan community" which Clifford Sather describes (see para. 3.40, above). Without dwelling on it, the author points out: "In the early nineteenth century, leaders of the Dinawan community are said to have [this expression shows, at the very least, much caution on the part of this undisputed specialist of the region] held a concession grant from the Sultan of Sulu giving them exclusive rights to collect and trade in sea-turtle eggs from nearby Sipadan Island": but he adds immediately: "In addition to Sulu, its leadership maintained political connections with Bulungan", *The Bajau Laut. Adaptation, History and Fate in Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 29.

¹⁰⁵ Given the indomitable character of the Bajau Laut (see paras. 3.58 *et seq.*, above), these "close and frequent relations" sometimes degenerated in acts of hostility against the Dutch. See, for example, the examples of abductions of Dutch subjects mentioned by W.H. Treacher in "British Borneo: Sketches of Brunai, Sarawak, Labuan and North Borneo", *op. cit.*, p. 100 at Annex 11.

¹⁰⁶ MM, Annex 34, Vol. 3.

3.65 This trade was directed in particular towards:

(a) the birds nests; it is for this reason that Clifford Sather remarks that:

"In the pre-Company period, the majority [of edible birds' nests] appear to have been transhipped by way of Omadal Island to Maimbung and Jolo, the chief market ports of Sulu, and to Bulungan and Berau in East Kalimantan. Being beyond the sphere of Company control, the Semporna district became, following the establishment of Sandakan, a refuge for those who continued to profit from this traditional procurement economy, including the birds' nest trade"¹⁰⁷

(b) or the slave trade; once again according to Clifford Sather:

"Slaves were a major trading commodity and moved from Sulu through Omadal to Bulungan in eastern Kalimantan"¹⁰⁸.

3.66 Malaysia emphasises the struggle led by the British authorities against the pirate activities of the Bajau Laut¹⁰⁹. It is difficult to deduce from these attempts at suppressing piracy that Great Britain duly derived an alleged legal title over the islands which are now claimed by Malaysia. Nonetheless, the British did not have a monopoly over this policing activity. As noted by I. Black:

"Two British naval vessels had appeared in the Sulu Sea in April 1879, Dutch ships also cruised the area, and later in the year Spanish warships arrived"¹¹⁰.

3.67 It is also worth noting that in 1875-1877 a Dutch warship, HNLMS *Admiraal van Kinsbergen*, intensively patrolled the coast of the Sultanate of Boeloengan because of the threat of piracy conducted by the Bajau Laut in the region. The ship's log book contains an entry on 10 June 1876 which refers to cruising around the island of Sipadan, and even landing armed sloops on the island of Mabul (which shows that at the time the Dutch considered that the island belonged to the Sultan of Boeloengan)¹¹¹.

¹⁰⁷ Sather, C., *The Bajau Laut. Adaptation, History and Fate in Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 50.

¹⁰⁸ *Ibid.*, p. 45.

¹⁰⁹ See MM, paras. 6.5-6.6.

¹¹⁰ Black, I., *A Gambling Style of Government. The Establishment of the Chartered Company's Rule in Sabah, 1878-1915*, *op. cit.*, p. 23.

¹¹¹ An extract from the ship's log book is included in Annex 12.

3.68 The presence of Dutch ships, even north of the 4°10' N parallel, is confirmed by the *Handbook of British North Borneo* of 1886, where it is noted, for example, that :

"the Company, on the 7th September, 1883, hoisted their flag on the south bank of the Sibuku, while the Dutch have erected an obelisk on Batu Tinagat, and keep a gunboat stationed at the Tawas river"¹¹².

The Handbook specifies that :

"Between Batu Tinagat and the Sibuku River, the southern boundary of British North Borneo, is an extensive bay recently surveyed by the Dutch. [...] The Dutch have a gunboat stationed at the Tawao River, but there are no villages to be met with, nor even boats, save occasionally some wandering Bajows engaged in the bêche-de-mer fishery, which is capable of great development, and only awaits the settlement of the boundary dispute with Holland [...]"¹¹³.

This was also confirmed by W.H. Treacher:

"in September, 1883, in order to practically assert the Company's claims, I, as their Governor, had a very pleasant trip in a very small steam launch and steaming at full speed past two Dutch gun-boats at anchor, landed at the South bank of the Sibuko, temporarily hoisted the North Borneo flag, fired a *feu-de-joie*, blazed a tree, and returning, exchanged visits with the Dutch gun-boats, and entertained the Dutch Controlleur at dinner. Having carefully given the Commander of one of the gun-boats the exact bearings of the blazed tree, he proceeded in hot haste to the spot, and, I believe, exterminated the said tree. The Dutch Government complained of our violated Netherlands territory, and matters then resumed their usual course, the Dutch station at Batu Tinagat, or rather at the Tawas River, being maintained unto this day"¹¹⁴.

3.69 Similarly, Clifford Sather refers to a report written by a BNBC official who visited Semporna with Pryer in which he noted that the inhabitants:

"complained of being hunted down by the Dutch vessels of war, as pirates, although they say they have never been guilty of piracy"¹¹⁵.

¹¹² *Handbook of British North Borneo*, London, William Clowes & Sons Limited, 1886, p. 20 at Annex 10.

¹¹³ *Ibid.*, p. 29.

¹¹⁴ Treacher, W.H., "British Borneo: Sketches of Brunai, Sarawak, Labuan and North Borneo", *op. cit.*, p. 54 at Annex 11.

¹¹⁵ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, p. 51.

3.70 The HNLMS *Lynx* incident, equally attests to the control exercised by the Dutch over acts of piracy committed by the Bajau Laut after 1891, depending on which side of the 4° 10' N parallel they occurred¹¹⁶.

3.71 There is one particular incident in which pirates were pursued by both the Dutch and the British authorities acting together which is of special interest. This incident was summarised as follows in the *British North Borneo Herald* of 1 May 1892:

"The Government Cruiser Petrel was despatched to Silam on the 7th April to capture or punish some people who had raided Tambak [...]. They were traced to Dinawan and as they could not be found [...]. The main body have been traced to Dutch territory and we are informed that an application for their rendition is being made"¹¹⁷.

This incident proves the existence of a sort of task-sharing between the British and the Dutch with regard to the suppression of piracy following very precise maritime limits. Moreover, according to a note from the *British North Borneo Herald* in January 1895, the Governor of British North Borneo had suggested to the Governor-General of Netherlands India the "taking of joint measures against piracy in the waters under their respective jurisdictions in North Borneo"¹¹⁸.

3.72 The relations between the Bajau Laut and the Dutch colonial administration were not only limited to the suppression by the latter of the acts of piracy of the former; certain examples reveal the age-old submission of the Bajau Laut to the Dutch Authorities. Thus, the German ethnographer von Dewall mentions in a 1855 report that each family of certain Bajau Laut living on the south-west side of the island of Pulau Panjang:

"provided the Sultan of Gunong Tebur with an annual tribute of 12 *katis* of *tripang* and 100 dried fish, for which they received in return cloth and agricultural produce. They bartered for rice in Berau. The Bajau also trade with the people of Berau and Kutai, and with the inhabitants of the west coast

¹¹⁶ See IM, Chapter VI, Section 1.

¹¹⁷ MM, Annex 83, Vol. 4.

¹¹⁸ Annex 13. It may also be noted that other incidents confirm the Dutch claims north of the Sibuko river before 1891: see, for example, the letter from Sir Alcock to Earl Granville, dated 20 December 1883, at Annex 14 concerning an incident in 1883 and the letter from W.B. Pryer to the Captain of the Netherlands vessel *Atjeh*, dated 4 July 1880, at Annex 15, concerning a similar incident in 1880. See also Annex 16 which reproduces the *Estimates for Netherlands India for the Financial Year 1880*, which includes provision for a cruiser to stand watch over a Netherlands flag hoisted at the mouth of the Tawau River.

of Sulawesi, who come to Pulau Panjang to collect sea products from the area. In earlier times, boats from Sulu came to Pulau Panjang to fight over these products. Also pirates from Balangingi (*zeeschuimers van Blahnjehnjeh*) who harried the Bajaus, so that they moved away to Tondoni and Toli-Toli, on the coast of Sulawesi, up until last year [1848], when they returned again to Pulau Panjang. Here they have not been disturbed since then. They fly a Dutch flag to show that they have surrendered to the 'Company' and the *panggawa* [*penggawa*] has an open letter from the king of Gowa, which he used as a kind of passport or recommendation. About twenty Bajau families also live in the islands to the south of the Kuran river (under Tanjung); their leaders are Sri-Bangsawan and Pakassah"¹¹⁹.

3.73 The global picture which emerges from this account of the facts is the following: the Bajau Laut, also known as the "sea gypsies" (their life-style has largely remained unchanged up to the present day), never, as a whole, pledged allegiance to a specific political power. Deprived of a fixed territorial base, they scoured the seas of the region, and the commercial or other links which they maintained with the territorial sovereigns were dictated by expediency and did not imply the existence of any "tie of territorial sovereignty" in the words used by the Court in the *Western Sahara* case¹²⁰. *A fortiori*, one cannot deduce from these ties the existence of any territorial title belonging to the Sultan of Sulu over the territories over which the Bajau Laut were nomads, be that over Pulau Ligitan, Pulau Sipadan or elsewhere.

Section 3. Conclusion: The Absence of Malaysian "Original" Title

3.74 Indonesia has considered it important to reply in a fairly detailed manner to Malaysia's claims concerning the original territorial status of the disputed islands as this issue is of significance in discussing the two "strands" forming part of Malaysia's submissions. On the one hand, Malaysia, not having established that Ligitan and Sipadan were possessions of the Sultan of Sulu, cannot consequently claim that it "inherited" the islands via one or other of the chains of alleged title. On the other hand, in the absence of any original title, the alleged acts of administration in which Malaysia prides itself are insufficient to establish its sovereignty over the islands in question as they do not fulfil the criteria necessary to establish a transfer of sovereignty.

¹¹⁹ Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, *op. cit.*, pp. 29-30, in which he translates H. von Dewall, "Aanteekeningen Omtrent de Noordoostkust van Borneo" ("Notes concerning the north-east coast of Borneo"), in *Tijdschrift voor Indische Taal-, Land- en Volkenkunde, Deel IV*, 1855.

¹²⁰ See para. 3.57, above.

3.75 In essence, Malaysia's first claim consists in arguing that "title to the islands was acquired by grant of the previous sovereign" (which is supposed to have originated in the Sultan of Sulu - which as Indonesia has shown was not the case)¹²¹. This first claim is itself split into two distinct strands. On the one hand, Malaysia argues that it inherited its territorial title through the BNBC and then Great Britain; on the other hand, Malaysia also contends that it inherited its title via Spain, the United States and finally by Great Britain through the 1930 Treaty between Great Britain and the United States. Indonesia has shown at para. 3.5 that these two claims are fundamentally incompatible and that they cannot be presented simultaneously.

3.76 In truth, both claims are vitiated by a fundamental flaw: from the moment that Malaysia fails to establish that the Sultan of Sulu held territorial title over Ligitan and Sipadan - a title which the current pretender to the Sultanate of Sulu also formally denies the existence of¹²² - title could not have been passed on to Malaysia by any means: *nemo plus juris transferre potest quam habet*¹²³.

3.77 As Max Huber, the arbitrator in the *Island of Palmas* case, clearly explained:

"Titles of acquisition of territorial sovereignty in present-day international law [...] like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceding territory"¹²⁴.

3.78 Huber's Award continued:

"The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and

¹²¹ See MM, para. 5.1.

¹²² See para. 3.19, above.

¹²³ This maxim is considered to be a general legal principle in accordance with Article 38, paragraph 1(c) of the Statute of the International Court of Justice and has been largely supported in authoritative/academic works (see, for example, Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., Longman, London, Vol. I, p. 682; Malcolm Shaw (citing the 1928 Award), *International Law*, 4th ed., 1997, p. 339; see also the commentary by the ILC of draft Article 11 on Succession of States in Respect of Treaties, *ILC Yearbook*, 1974, Vol. II, p. 210.

¹²⁴ Award of 4 April 1926, *RIAA*, Vol. II, p. 829 at p. 839.

therefore also those concerning the Island of Palmas (or Miangas). It is evident that Spain could not transfer more rights than she herself possessed"¹²⁵.

"The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain"¹²⁶.

3.79 The same situation exists in the present case. In other words:

- (a) the Sultan of Sulu could not transfer more rights than he himself possessed, be that through the cession granted to the BNBC or through the 1878 Treaty with Spain;
- (b) this is all the more true given that, contrary to the facts in the *Island of Palmas* case, neither the cession nor the Treaty with Spain comprised the islands in dispute within their geographic sphere. Indeed the first instrument expressly excluded them as the limit stipulated was nine nautical miles from the coast¹²⁷, which confirms the declaration of the current pretender to the throne of Sulu;
- (c) the above remains true, in spite of the absence of any reserves or protests by The Netherlands, as there is no evidence that the Dutch were made aware of the cession at the time of its conclusion;
- (d) in any case, the Dutch Government had no reason to protest against a cession which did not bear on the islands in dispute.

3.80 The Sultan of Sulu therefore could not have ceded any sovereign title to islands over which he did not exercise any exclusive sovereignty, either to the future BNBC (who received their grant from Messrs. Dent and Overbeck), or to Spain.

¹²⁵ *Ibid.*, p. 842.

¹²⁶ *Ibid.*, p. 866.

¹²⁷ See MM, Annex 9, Vol. 2.

3.81 Malaysia's entire case rests on the assumption that the Sultan of Sulu had a title over the islands in dispute before the colonisation by Great Britain. This assumption is clearly erroneous. Not only has Indonesia shown that the Sultan of Sulu's possessions did not extend to the islands of Sipadan and Ligitan, but there is a strong presumption in support of Indonesia's argument that the Sultan of Boeloengan¹²⁸ possessed exclusive territorial title over the islands¹²⁹ as shown, in particular, by the 1850 and 1878 Contracts of Vassalage¹³⁰, even though the picture is not entirely clear.

3.82 This situation is not particularly surprising, given the significant uncertainties prevalent at the time in this part of the world over the exact extent of the respective territories of different local rulers, whose notions regarding territorial ties did not reflect modern accepted norms of international law, as Indonesia has explained in its Memorial¹³¹.

3.83 It was precisely the border area between Boeloengan and Sulu that was the subject of the territorial dispute between Great Britain and The Netherlands prior to the conclusion of the 1891 Convention. The exact geographical extent of the domains of these two Sultans in north-eastern Borneo was very difficult to establish in practice, and this was reflected in the negotiations between Great Britain and The Netherlands leading to the 1891 Convention¹³². It is important to recall that the 1891 Convention was entered into in order to resolve these uncertainties, as is clear from the Dutch Explanatory Memorandum¹³³, which is quoted twice by Malaysia¹³⁴. This document also establishes the importance the negotiators placed on determining the two States' respective possessions over the neighbouring islands.

¹²⁸ It must be noted that Malaysia is clearly wrong to assert that in the early part of the 19th century, the southern part of the east coast of Borneo was subject to the Sultan of Boeloengan (MM, para. 7.2): that area was, at the time, subject to the Sultan of Bandjermasin (see IM, paras. 4.55 *et seq.*); it was the central and northern part of the east coast of Borneo that belonged to the Sultan of Boeloengan.

¹²⁹ See IM, paras. 4.55, *et seq.*

¹³⁰ IM, Annexes 13 and 19. See IM, paras. 4.66-4.71. It is to be noted that Malaysia contradicts itself when it states (at para. 7.5) that the Contract of Vassalage of 1878 provided for the first time that the territory of the Sultan of Boeloengan extended in the north-east up to Batoe Tinagat, while, at para. 7.3 it acknowledges that the limits of the Sultan's territory as defined in the 1850 Contract were fixed at Batoe Tinagat.

¹³¹ See IM, Chapter IV, Section 2.

¹³² Even though Boeloengan was not (and could not have been) concerned, it has to be recalled that, in addition, further confirmations of the extent of the domain of the Sultan of Sulu depend on the definition of the limits of the Spanish and US possessions in the region (see Chapter VI, below).

¹³³ See para. 3.55, above.

¹³⁴ See fn. 90, above.

3.84 Indonesia has clearly established the following in its Memorial¹³⁵: the 1891 Convention, by its object and purpose, its terms, and its context – in particular as confirmed by the Dutch Explanatory Memorandum Map which was immediately communicated to Great Britain – established the 4° 10' N parallel of latitude as the dividing line between the respective possessions of the Parties in the area. As a result of this, the situation was considerably simplified.

3.85 From this point onwards, and whatever the previous uncertainties may have been regarding the respective limits of the local Sultans' territories, the boundary between The Netherlands, on the one hand and Great Britain on the other, was no longer a contentious issue. Just as was the case in the case concerning the *Territorial Dispute* between Chad and Libya, where the Court did not deem it relevant to examine "the history of the 'Borderlands' claimed by Libya on the basis of title inherited from the indigenous people"¹³⁶ because of the existence of an international convention resolving the matter (the 1955 Treaty between Libya and France), so also in this case is the Court not required to settle the question of whether the Sultan of Sulu or the Sultan of Boeloengan held territorial sovereignty over the disputed islands because of the existence of the 1891 Convention. As the Arbitral Tribunal noted in the *Rann of Kutch* case with respect to the argument put forward by Pakistan regarding the principle of reversion to the pre-colonial situation:

"While the principle of which it is an illustration is of interest, application of such a principle would be difficult and would introduce an element of instability in the relationship between nations which for a long time have been under foreign domination"¹³⁷.

3.86 Whatever may have been the pre-1891 situation, the agreement between the two colonial powers "logically and legally adversely affects any pre-existing title"¹³⁸. As Indonesia will again demonstrate in Chapter V, the 1891 Convention constitutes the

¹³⁵ See IM, Chapter V.

¹³⁶ *Territorial Dispute (Libyan Arab Jamahiriya / Chad)*, Judgment, *I.C.J. Reports 1994*, 3 February 1994, p. 6 at p. 38, para. 75.

¹³⁷ *Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)*, *ILR*, Vol. 50, p. 471. See also Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, 5th ed., 1998, p. 671.

¹³⁸ Award of 9 October 1998, *Eritrea/Yemen, Territorial Sovereignty and Scope of the Dispute*, p. 35 at para. 124.

indisputable title¹³⁹ which confirmed Dutch sovereignty over the islands of Ligitan and Sipadan, both of which are situated to the south of the 4° 10' N parallel.

3.87 This colonial title being firmly established, it could only be overcome by another superior title. However, Malaysia has failed to demonstrate that the so-called effective acts of administration, in which it prides itself, are sufficient to displace Dutch sovereignty over the islands in question as they do not fulfil the criteria necessary to produce a transfer of sovereignty from the true title-holder. Indonesia will return to this aspect of the case in Chapter VII.

¹³⁹

In accordance with the well known definition proposed by Sir Robert Jennings, a title "is the vestitive facts which the law recognizes as creating a right" *The Acquisition of Territory in International Law*, Manchester UP, 1963, p. 4.

CHAPTER IV

THE ABSENCE OF TITLE OVER THE ISLANDS VESTING IN THE BNBC OR BRITISH NORTH BORNEO

Section 1. Introduction

4.1 As previously noted¹, Malaysia's claimed roots of title over Ligitan and Sipadan are based on a confused and inherently contradictory series of propositions. In Chapter III, Indonesia demonstrated how the premise underlying both of Malaysia's claimed chains of title – that sovereignty over the islands originally vested in the Sultan of Sulu – is totally unsupported. Notwithstanding this fundamental flaw in its case, Malaysia asserts at the very outset of its Memorial that its predecessors in title were, from 1878 (at the time of the grant from the Sultan of Sulu to Messrs. Dent and Overbeck), the BNBC and then Great Britain itself after it changed the status of North Borneo from a protectorate to a colony in 1946². In the same breath, Malaysia also contends that its chain of title was passed from the Sultan of Sulu not to the BNBC, but rather to Spain, then to the United States under the 1898 and 1900 Conventions, then to Great Britain by virtue of the 1930 Anglo-U.S. Treaty.

4.2 The Court will appreciate that these two alleged chains of title are fundamentally incompatible. While each originates with the Sultan of Sulu, who is said to have held an original title to the islands³, Malaysia argues that the Sultan effectively ceded the islands both to the BNBC and to Spain. Obviously, both chains cannot be correct. The BNBC and Spain (subsequently the United States from 1900 to 1930) could not have possessed sovereignty over the islands simultaneously. At least one of Malaysia's strands must, therefore, be incorrect.

¹ Para. 3.3, above.

² MM, para. 2.1.

³ *Ibid.*, paras. 5.3-5.8.

4.3 But the fact that one of these chains must, by Malaysia's own reasoning, be wrong, does not mean that the other chain is somehow validated. In this chapter, Indonesia will show that none of the international instruments on which Malaysia relies to establish its title provides any support for the BNBC and subsequently Great Britain having a valid claim of sovereignty over the islands during the relevant period prior to Malaysia's independence. In Chapter VI, Indonesia will demonstrate that the second chain of title also does not stand up to scrutiny and that neither Spain nor the United States ever enjoyed sovereign title over the disputed islands which could have subsequently been passed on to Great Britain under the 1930 Convention.

Section 2. The Absence of Title Vesting in the BNBC and British North Borneo

A. The 1878 Grant to Dent and Overbeck Excluded the Disputed Islands

4.4 The 1878 grant by the Sultan of Sulu to Messrs. Dent and Overbeck is discussed in paras. 5.9 to 5.16 of Malaysia's Memorial. This narrative refers by way of background to the 1877 Protocol between Germany, Great Britain and Spain, which established free trade and commerce in the Sulu Archipelago for the contracting parties, and then deals with the 1878 grant from the Sultan of Sulu and the simultaneous commission appointing Baron von Overbeck Dato' Bendahara and Rajah of Sandakhan⁴.

4.5 Malaysia's Memorial subsequently moves on to discuss the 1878 Capitulation of the Sultan of Sulu to Spain, which allegedly confirmed Spanish sovereignty "over all the Archipelago of Sulu and the dependencies thereof"⁵. Following this, Malaysia recounts how Alfred Dent purchased Baron von Overbeck's interest in the 1878 Sulu grant and how this interest was in turn acquired, after the issuance of a Royal Grant in 1881, by the British North Borneo Company⁶. This overview is then concluded with a mention of the 1888 agreement between the British Government and the BNBC establishing the State of North Borneo⁷.

⁴ *Ibid.*, paras. 5.9-5.12.

⁵ *Ibid.*, para. 5.13.

⁶ *Ibid.*, para. 5.14.

⁷ *Ibid.*, para. 5.16.

4.6 Significantly, the portions of Malaysia's Memorial dealing with the Sulu grant of 1878 and other pertinent conventional instruments do not contain any mention of the islands of Ligitan and Sipadan. This is not surprising since the disputed islands were not included within the scope of any of these instruments. The language of the 1878 grant – in the version quoted in Malaysia's Memorial – clearly describes the extent of the territorial possessions that the Sultan of Sulu intended to transfer to Dent and Overbeck against payment of an annual sum in the following terms:

"... 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 Darvel Bay as far as the Sibuku River together with all the islands included therein within nine miles of the coast."⁸

4.7 The terms of this grant left no room for ambiguity: islands lying beyond nine miles of the coast of North Borneo were not part of the territories over which rights and powers had been acquired by Dent and Overbeck by virtue of the 1878 grant by the Sultan of Sulu. It is common cause between the Parties that Ligitan and Sipadan fall more than nine miles from the coast and thus were excluded from the terms of the grant. As Malaysia's Memorial correctly points out: "Literally they [Pulau Ligitan and Pulau Sipadan] fell outside the terms of the Sultan's grant of January 1878..."⁹.

4.8 The clear reference made in the 1878 grant to islands lying within nine miles of the coast (language which had also been contained *verbatim* in the 1877 concession to Dent and Overbeck by the Sultan of Brunei) acquires a greater significance in the light of the customary lack of precision in determining territorial possessions in the area which had been recognised by the colonial powers themselves¹⁰. It is evident that the Sultan of Sulu – by indicating a

⁸ *Ibid.*, para. 5.10. Emphasis added. Indonesia had also annexed a copy of the grant enclosed in the despatch from Consul-General Treacher to the Earl of Derby on 22 January 1878 as Annex 17, Vol. 2 of its Memorial. It should be noted that that version refers to islands situated "three marine leagues from the coast".

⁹ *Ibid.*, para. 5.19.

¹⁰ See IM Chapter IV, in particular, paras. 4.20-4.45.

measure of distance from the coast – wanted to achieve as precise as possible an identification of the territorial possessions which formed the object of the grant.

4.9 This conclusion is consistent with the terms of the commission cited by Malaysia pursuant to which the Sultan of Sulu appointed Baron von Overbeck Dato' Bendahara and Rajah of Sandakhan. The document in question defined the territory over which Baron von Overbeck's authority was to be exercised as including "all the lands toward the eastward on the coast on the island of Borneo... *together with all the islands included therein*"¹¹. This was plainly a *renvoi* to the terms of the grant, which limited von Overbeck's offshore authority to islands lying nine miles off the coast.

4.10 The maps relied on by Malaysia to illustrate the geographic extent of the 1878 grant also confirm the fact that Ligitan and Sipadan fell outside of the grant. Malaysia has drawn a dotted red line around the coast of North Borneo on Insert 8 at page 39 of its Memorial to show the distance of nine nautical miles from the coast indicated in the grant of the Sultan of Sulu. Since the map is purported to depict only the localities mentioned in the grant, the islands of Ligitan and Sipadan are not shown. However, it is clear from the map that the islands are situated well beyond the nine mile limit. Similarly, Map 4 of Malaysia's Atlas – which is a 1906 map of British North Borneo published by the BNBC on which Malaysia has added some colouring to show the localities ceded by the Sultan of Sulu in 1878 – plainly shows that the islands of Ligitan and Sipadan fell outside the scope of the Sulu concession¹². This much is agreed between the Parties.

4.11 None of the subsequent events – either the capitulation of the Sultan of Sulu to Spain and the resulting Protocol of 22 July 1878, the Royal Charter granted to the BNBC in 1881, the 1885 Protocol between Spain, Great Britain and Germany, the 1903 Confirmation or the agreement creating the State of North Borneo – contained any language expanding or in any way modifying the territorial terms of the original 1878 grant so as to include either Ligitan or Sipadan. The geographical extent of the region being administered by Dent and Overbeck, and subsequently by the BNBC and the State of North Borneo, remained as defined by the

¹¹ MM, para. 5.11. Emphasis added.

¹² Map 4 of Malaysia's Atlas.

original grant by the Sultan of Sulu which did not extend to islands, such as Ligitan and Sipadan, situated further than nine nautical miles from the coast¹³.

4.12 It should be noted, however, that the fact that the islands of Ligitan and Sipadan were excluded from the Sulu grant does not mean that they somehow remained within the dominions of the Sultan of Sulu and could be disposed of by Spain, who succeeded to the Sultan's rights by a subsequent treaty. As Indonesia showed in the previous chapter, the islands never fell within the Sulu dominions in the first place.

4.13 The correct position, as Indonesia explained in its Memorial, was that the islands of Ligitan and Sipadan were part of the territory transferred to The Netherlands by the Sultan of Boeloengan in the 1850 and 1878 Contracts of Vassalage¹⁴. Malaysia argues that the disputed islands were not included within the scope of these instruments because the reference to "small islands" contained therein did not concern the islands of Sipadan and Ligitan, but other small islands in the area¹⁵.

4.14 Indonesia does not agree with this self-serving conclusion. Nonetheless, whatever ambiguities may have existed before 1891 as to the geographical scope of the territories belonging respectively to the Dutch, who succeeded to the rights and interests of the Sultan of Boeloengan, and British North Borneo were removed by the territorial allocation agreed between the British and Dutch Governments in the 1891 Convention and by the Supplementary Contract between the Ruler of Boeloengan and the Dutch Government of 19 June 1893, which brought the previous Contracts of Vassalage in conformity with the settlement resulting from the Convention.

4.15 Malaysia also alleges that when the Dutch Government was informed of the 1878 grant by the Sultan of Sulu to Dent and Overbeck, "its reaction was acquiescent"¹⁶. Malaysia goes on to suggest that 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

¹³ The implications of the 1903 Confirmation are discussed at paras. 4.27-4.32, below.

¹⁴ IM, paras. 4.66-4.71.

¹⁵ MM, paras. 7.3-7.5.

¹⁶ *Ibid.*, para. 7.6.

territory which was covered by the 1878 grant related to 'districts which are not under the sway of the Netherlands' ¹⁷. Nothing in the record supports either of these assertions.

4.16 If anything, the record shows that The Netherlands took appropriate steps to protect its interests in the area. The relevant Dutch activities included the following:

- (a) Dutch authorities raised the national flag at Batoe Tinagat in 1878 to show that Dutch territories extended as far north as that location;
- (b) During the period from 1875 to 1877, the Dutch vessel HNLMS *Admiral van Kinsbergen* conducted patrolling activities both around the island of Sipadan and even around islands lying further to the north (see para. 3.67, above and Annex 12);
- (c) When, in 1883, the first Governor of North Borneo hoisted the North Borneo flag on the south bank of the Sibuko river and put a marker on a tree in the vicinity, the Dutch complained of what they perceived as a violation of their sovereignty and destroyed the tree (see para. 3.68, above);
- (d) In 1888, when the British Government concluded certain agreements establishing Protectorates over Sarawak, Brunei and the territory of the BNBC, the Dutch Government expressed its concern as to their territorial implications and stressed the importance of reaching an agreement for the final settlement of the boundary dispute (see IM, para. 5.11);
- (e) After the signature of the 1891 Convention, the record shows that the Dutch and the British cooperated in a joint effort to combat piracy in the area, with the British and Dutch Governments focusing their activities on areas lying to the north and south of the 1891 Convention delimitation respectively. Significant in this respect are the reports published by the *British North Borneo Herald* of 1 May 1892 and January 1895 (recalled at para. 3.71 above). Another pertinent example of this task-sharing activity with regard to the

¹⁷ *Ibid.*, para. 7.11(1).

suppression of piracy is provided by the patrolling of the Dutch vessel HNLMS *Lynx* in the area around Sipadan and Ligitan in 1921 (see IM, paras. 3.72-3.74).

4.17 Thus, the record shows that the Dutch authorities, prior to 1891, were active in monitoring the situation in the area in order to avoid any possible British territorial encroachments and, after 1891, respected the limits of the British-Dutch jurisdictions as defined in the 1891 Convention. The Dutch Government received repeated assurances from the British Government that the BNBC was a purely private venture and that Britain's policy was to set up chartered commercial companies throughout the world "without any aim of territorial acquisition". Britain also assured The Netherlands that its goal was "not to set up any dominion, or to enter upon any controversy with respect to territorial claims, but simply, if we saw an opportunity, to promote the development of the resources of the country under discussion"¹⁸. In the light of these pledges by Britain, the Dutch Government was naturally confident that the actions by the BNBC did not involve a British attempt to encroach upon The Netherlands' territorial possessions in North Borneo.

4.18 With respect to Malaysia's allegation of Dutch acquiescence, the Memorial of Malaysia quotes from a reply given by the Dutch Minister of the Colonies to a question posed in the Committee of the Second Chamber of Parliament in 1879 in an effort to show that it was the Dutch Government's understanding that the Sulu concession did not infringe on Dutch territory¹⁹. Malaysia fails to point out, however, that at the last meeting of the Joint Commission on Borneo on 27 July 1889, the Dutch Minister to Great Britain, Count de Bylandt, made The Netherlands' position very clear. His account is contained in his own transcript of the Joint Commission meeting in the following terms:

"In the protocol of our former meeting, Sir Philip Currie is reported to have said, that in 1879 the then Netherlands Minister for the Colonies (Baron de Golstein) had assured the States General that the concessions granted by the Sultans of Sulu and Brunei to Messrs. Overbeck and Dent, did not infringe on Netherlands rights, or territory. This is not quite correct. With the official record of that sitting in my hand I can show that the Minister, replying to an interpellation of a Member of the House, simply said that it did not appear that our rights had been infringed by the concessions, and that this assumption could not as yet be proved. And why not? Because, though the Minister was

¹⁸ IM, Annex 24, Vol. 2. pp. 12-13. See also IM, para. 3.36.

¹⁹ MM, para. 7.6 and Annex 38, Vol. 3.

aware that the concessions had been granted, he was at that time utterly unacquainted with their contents and could therefore not expect that our rights would be infringed by a friendly power"²⁰.

4.19 Count de Bylandt went on to say that he had, on several occasions, asked the British Government to provide him with a copy of the 1878 grant, but had always been told that "the British Government could not dispose of private documents which were not their own property". Although he subsequently obtained a copy of the grant, Count de Bylandt remained puzzled by the inexplicable reluctance shown by the British Government to "provide a friendly government with fair information on a subject in which political interests of some importance for my country were involved"²¹. He further recalled that his Government had previously objected strongly to the terms of the Charter granted to Messrs. Dent and Overbeck in a note sent to Earl Granville on 8 April 1881²².

4.20 Count de Bylandt's concluding remarks do nothing to conceal his displeasure at Britain's conduct:

"...we had repeatedly received, verbally and in writing, the most reassuring declarations that we had only to do with a private commercial undertaking, of no political character whatever; that there was no question of the British Government settling in North Borneo, nor of a British protectorate there, nor even of the hoisting of the British flag. But all of these reassuring and misleading declarations have been belied by subsequent facts. We have been all along kept in the dark and placed, uninformed, before accomplished facts. The draft of the Charter was no doubt communicated to us by courtesy, a few weeks before it was decided upon, leaving us scarcely the time to consider it and to present our objections. In fact, those objections reached me here in London only the day before the meeting of the Privy Council in which the draft of the Charter had to be considered and decided upon, so that this pro forma courtesy, was practically quite valueless to us"²³.

4.21 This is hardly the reaction of a country said to be acquiescing in another country's behaviour. On the contrary, the Dutch authorities were clearly concerned with the protection of The Netherlands' legitimate territorial rights and interests in the area and, suspecting that another friendly Government – despite its assurances that the BNBC's activities were of a purely private and commercial nature – had surreptitiously encroached upon these, were

²⁰ Emphasis in the text. See Annex 17, Vol. 2, p. 1.

²¹ *Ibid.*

²² For a copy of the note by de Bylandt to Earl Granville, see MM, Annex 41, Vol. 3.

²³ Annex 17, Vol. 2, pp. 1-2. Emphasis in the text.

anxious to obtain a formal settlement of the position. This explains the subsequent negotiation and agreement of the 1891 Convention.

4.22 Nothing in the diplomatic correspondence justifies Malaysia's assertion that The Netherlands recognised that Dutch claims did not extend east of the coast of North Borneo. As will be seen in Chapter V, the documentary and map evidence shows that, during the negotiations of the 1891 Convention, the Dutch Government repeated their earlier claims which extended as far north as Batoe Tinagat – well to the north of the 4° 10' N latitude – and which specifically mentioned offshore islands. Moreover, the sketch maps exchanged between the Dutch and British negotiators further demonstrate that the proposed delimitation was intended to extend in a seaward direction so as to allocate between the parties islands and other offshore features²⁴. The fact that Pulau Ligitan and Pulau Sipadan were ultimately deemed to belong to The Netherlands was confirmed by the 1891 Dutch Explanatory Memorandum Map – a map which was forwarded to Great Britain and which did not provoke any adverse reaction.

B. The 1885 Protocol Confirmed the Absence of British Title over the Islands

4.23 Paras. 5.17-5.19 of Malaysia's Memorial describe how Spain, by virtue of the 1885 Protocol, relinquished in favour of Great Britain all claims of sovereignty over the territory covered by the Sultan of Sulu's grant of 1878, including offshore islands situated within nine nautical miles of the coast.

4.24 Malaysia correctly notes that the islands of Ligitan and Sipadan, which lay more than nine nautical miles from the coast, fell "outside the terms of Spain's retrocession or recognition in Article II of the Protocol of 1885"²⁵. Although Indonesia agrees with the general conclusion that the disputed islands could not have fallen within the scope of the 1885 Protocol, it should be noted that Malaysia's reference to Article II of the 1885 Protocol as the relevant provision in this regard is incorrect. Article II of the Protocol contained a general definition of the Sulu Archipelago in conformity with the definition provided in the 1836

²⁴ See paras. 5.71-5.74, below.

²⁵ MM, para. 5.19.

Treaty between Spain and the Sultan of Sulu. While these provisions will be dealt with in greater detail in Chapter VI, it is appropriate to recall here that both of them concerned islands located well to the north of Ligitan and Sipadan.

4.25 The relevant provision of the 1885 Protocol with respect to the relinquishment of territory by Spain in favour of Great Britain is Article III, which provided as follows:

"The Spanish Government relinquishes, 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 (Jolo), including therein the neighbouring islands of Balambangan, Banguey and Malawali, as well as all those comprised within a zone of three marine leagues [nine nautical miles] along the coasts, and which form part of the territories administered by the company styled the 'British North Borneo company'^{m26}.

4.26 As can be seen, this provision was entirely consistent with the terms of the 1878 grant to Dent and Overbeck in limiting British rights to islands lying within three marine leagues (or nine nautical miles) of the coast. Moreover, the geographic references contained in this provision mention specific islands which are situated well to the north, and the east, of Ligitan and Sipadan. It can therefore be concluded that there could be no question of the disputed islands ever having been transferred by either the Sultan of Sulu or Spain to the BNBC or to Great Britain.

C. The 1903 Confirmation Did Not Include the Islands and Was of No Legal Relevance

4.27 As noted in Indonesia's Memorial, on 22 April 1903 the Sultan of Sulu signed a statement referred to as a "Confirmation", approved by the British Governor of North Borneo on 29 April, in which the Sultan specified the names of certain islands – situated beyond nine nautical miles from the coast of Borneo - which were deemed to be included in the 1878 grant to Dent and Overbeck. This document identified a number of islands by name, including Omadal, Si Amil, Dinawan, Kapalai and Mabul and made a generic reference to "other islands

²⁶ Emphasis added. A copy of the 1885 Protocol with English translation was attached to IM at Annex 33, Vol. 2.

near, or round, or lying between the said islands"²⁷. Significantly, the islands Muliangin Kechil, Bilian, Tegaypil, Lang Kayen and Kapalai are referred to by name in this instrument, but Sipadan and Ligitan are not, despite the fact that they are of a similar size. This omission clearly indicates that neither Sipadan nor Ligitan were intended to be covered by the 1903 Confirmation.

4.28 Despite this rather glaring lacuna, Malaysia alleges that the reference in the Sultan's Confirmation to "other islands near, or round, or lying between the said islands" must have been a reference to Ligitan and Sipadan which were therefore included within this document²⁸. This argument is pure wishful thinking which is supported neither by the text of the document in question nor by the surrounding events.

4.29 In the first place, it should be noted that the Confirmation was an artificial device of dubious legality which was nothing more than a unilateral expansion of the original 1878 grant. As conceded in a British Foreign Office Memorandum of 10 March 1905, "the Sultan's declaration cannot be adduced in support of the Company's claim, as the limits of sovereignty in the Sulu Archipelago had already been fixed by international agreement and no statement on the part of His Highness could possibly alter them"²⁹. Indeed, even Malaysia recognises the weakness of its argument when it observes that:

"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 [...] Even the Company itself came to realise that its title, as opposed to its right to administer the islands based upon actual administration and control, might be open to question"³⁰.

4.30 Of equal importance, as discussed in Indonesia's Memorial at para. 7.16, was the fact that the 1903 Confirmation only dealt with islands lying *north* of the 4° 10' N parallel and thus was fully consistent with the 1891 Convention. A simple geographic inspection of Map 7.1 facing page 134 of Indonesia's Memorial reveals that Sipadan and Ligitan are situated to the south of this line of latitude that had been agreed in the 1891 Convention, unlike the islands of

²⁷ A copy of this document is contained in IM, Annex 99, Vol. 3.

²⁸ MM, para. 5.34.

²⁹ IM, Annex 109, Vol. 3, pp. 424-425.

³⁰ MM, para. 5.35.

Omadal, Si Amil, Dinawan, Kapalai, Mabul and the other islands which were specifically named in the Confirmation, all of which lay north of the 4° 10' N latitude. Nor could it be said that Ligitan and Sipadan were *round* the named islands; again, they are to the south of them and consequently fell under Dutch sovereignty pursuant to the terms of the 1891 Convention.

4.31 Finally, it is quite evident from the map prepared by Stanford for the BNBC in 1903, shortly after the Confirmation was signed, that neither Ligitan nor Sipadan were deemed to lie *between* those islands³¹. For convenience, the Stanford map - which reflected the territorial extent of the BNBC after the Confirmation was signed - is reproduced as Map 4.1 opposite this page. As can be seen from the enlargement of the relevant area reproduced following Map 4.1, both Ligitan and Sipadan lie to the south of the red line appearing on the map which tracked the 1891 Convention line along the 4° 10' N latitude and which represented the southern limits of British North Borneo. Had the intention been to include Ligitan and Sipadan within the Confirmation, it would have been a simple matter to refer to them by name. Given that they were excluded from that instrument and lie to the south of the limits of the BNBC as shown on the Stanford map, it is impossible to give credence to the statement contained in Malaysia's Memorial that "[t]he 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"³².

4.32 Obviously, if for purposes of argument Malaysia's theory that the 1903 Confirmation covered the islands of Ligitan and Sipadan were to be accepted, this would mean that all of Malaysia's arguments based on Spanish title must be rejected. In other words, to the extent that Britain received confirmation from the Sultan of Sulu in 1903 that the disputed islands had been ceded to Dent and Overbeck in 1878, they could not have been disposed of by Spain in favour of the United States with the 1898 and 1900 Conventions.

4.33 Be that as it may, even supposing – which is denied – that the Sultan of Sulu had sovereignty over the islands of Ligitan and Sipadan, the fact of the matter is that neither the

³¹ A copy of this map appears as Map No. 9 in Indonesia's Map Atlas. See also IM, paras. 6.43-6.45 and paras. 6.52-6.56

³² MM, para. 5.34.

1878 grant from the Sultan of Sulu to Dent and Overbeck, nor the 1885 Protocol, nor the 1903 Confirmation provide any evidence supporting Malaysia's contention that the disputed islands were ever transferred or ceded to the BNBC or Great Britain. This being so, Malaysia's first chain of title must inevitably fail.

CHAPTER V

TITLE BASED ON THE 1891 CONVENTION

Section 1. Introduction

5.1 Indonesia set out its case on the significance of the Anglo-Dutch Convention of 20 June 1891 principally in Chapter V of its Memorial. At paras. 5.65-5.70 of its Memorial Indonesia summarised this part of its case as follows:

- (a) Whatever doubts there might have been up to the late 1880s as to the course of the dividing line between Dutch and British possessions in north-eastern Borneo, with the conclusion and ratification of the Convention of 20 June 1891 between Great Britain and The Netherlands any such doubts were finally set aside.
- (b) The Convention, by its terms, its context, and its object and purpose, established the 4° 10' N parallel of latitude as the dividing line between the parties' respective possessions in the area now in question. The islands presently in dispute – Ligitan and Sipadan – lie to the south of that parallel. It therefore follows that under the Convention title to those islands vested in The Netherlands and now vests in Indonesia.
- (c) By its conduct at the time, and in particular by virtue of the Explanatory Memorandum Map and its variation of the Contract with the Sultan of Boeloengan, the Dutch Government demonstrated its understanding of the meaning to be attributed to Article IV of the 1891 Convention. It did so by means which were not only public knowledge at the time, but also by means of which the British Government were officially informed. Great Britain's failure to protest, or in any other way to dissent from the Dutch Government's views of which it had such public and official knowledge, showed that it accepted those views as the correct interpretation of the 1891 Convention.

- (d) As envisaged in Article V of the 1891 Convention, further elaboration of parts of the 1891 boundary line was contained in later agreements concluded in 1915 and 1928; but since the 1891 line had been determined by a parallel of latitude its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation.

5.2 Malaysia set out its position on the 1891 Convention principally in Chapters 8 and 9, Sections B and C of its Memorial¹. In its Memorial Malaysia adopts the following positions:

- (a) Malaysia regards the 1891 Convention as solely a treaty determining the Anglo-Dutch boundary on land, and denies that it was intended to extend seaward east of Sebatik².
- (b) Malaysia contends that in any event, since Ligitan and Sipadan belonged to Spain, Great Britain could not by the 1891 Convention have given them to The Netherlands³.
- (c) Malaysia regards the Explanatory Memorandum Map as a purely unilateral internal Dutch map, which depicted a line which was not opposable to Great Britain⁴.
- (d) Malaysia regards the Explanatory Memorandum itself as confirming that the Anglo-Dutch dispute only concerned the mainland boundary, and made no mention of any allocation of offshore islands⁵.
- (e) Malaysia regards the Dutch implementing statute of 1892 as confirming that the Dutch Government did not regard the Convention as affecting title to Sipadan and Ligitan⁶.

¹ See also, MM, paras. 2.5-2.8, 5.20, 7.11-7.12 and 7.13.

² *Ibid.*, paras. 8.7, *et seq.*

³ *Ibid.*, para. 8.22.

⁴ *Ibid.*, paras. 9.3-9.9.

⁵ *Ibid.*, paras. 9.10-9.15.

⁶ *Ibid.*, para. 9.16.

- (f) Malaysia regards the modification of Boeloengan's boundaries by the variation of the "Contract of Vassalage" in 1893 as giving no indication of a Dutch view that the Convention allocated title to Sipadan and Ligitan to The Netherlands or to the Sultan of Boeloengan⁷.
- (g) Malaysia regards the 1915 Agreement as evidence that the parties intended the 1891 Convention to deal only with the land boundary and to go no further eastward than the east coast of Sebatik⁸.

5.3 Indonesia, for the reasons to be set out below, does not accept the Malaysian position summarised in the preceding paragraph.

Section 2. The Terms of the 1891 Convention

A. The Nature of the Convention

5.4 The directly relevant provision of the 1891 Convention is Article IV. For convenience its terms are set out again here:

"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".

5.5 Malaysia contends that the 1891 Convention "was intended to be a land boundary treaty.... There is nothing in the Treaty to suggest that it was intended to divide sea areas or to allocate distant off-shore islands"⁹.

⁷ *Ibid.*, para. 9.17.

⁸ *Ibid.*, paras. 9.18-9.20.

⁹ *Ibid.*, para. 8.8.

5.6 Malaysia asserts that "[i]n 1891 the distinction between a boundary treaty and an allocation treaty was well known"¹⁰. Malaysia does not offer any support for this assertion – an assertion which, Indonesia notes, runs counter to the observations of the Court in the *Frontier Dispute* case between Burkina Faso and Mali¹¹. In that case the Court treated the distinction made by legal writers between "delimitation disputes" and "disputes as to attribution of territory" as more important in theory than in practice, and regarded such classifications as not decisive for the Court's task¹². So too the alleged distinction drawn by writers between an allocation treaty and a boundary treaty is in the present context irrelevant: *both* kinds of treaties attribute territorial sovereignty to one or other of the States concerned.

5.7 Moreover, categories such as "boundary treaty" and "allocation treaty" are somewhat artificial concepts, developed to rationalise and classify separately what were perceived by later commentators as treaties with different purposes. In reality, States do not pay much regard to such rationalisations. Indonesia is unaware of any example of States concluding a treaty which is in substance an allocation treaty and referring to it in the treaty itself as an "allocation treaty".

5.8 Indonesia is, however, aware of treaties which would clearly be classified by writers as allocation treaties but which the States concerned have not only not called them such but have in fact entitled them "boundary" or "frontier" treaties. One need look no further than the 1930 Anglo-U.S. Convention relied on by Malaysia¹³. This Convention was, according to its preamble, concluded for the purpose of "delimiting definitively the *boundary* between the Philippine Archipelago ... and the State of North Borneo"¹⁴. Article I identified a line "separating the *islands*"¹⁵ belonging to the one side or the other, allocating them under Article III according to their locations on one side of the prescribed line or the other. Thus this self-proclaimed "boundary" treaty dealt with – indeed, dealt only with – the position of islands and not at all with land boundaries.

¹⁰ *Ibid.*, para. 8.7.

¹¹ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

¹² *Ibid.*, at p. 564, para. 18.

¹³ MM, para. 5.43, and Annex 29, Vol. 2; see also IM, Annex 126, Vol. 4.

¹⁴ *Emphasis added.*

¹⁵ *Emphasis added.*

5.9 In fact, whatever designation may be given to the treaties concerned, the attribution of sovereignty over islands is frequently done by way of their relationship to prescribed lines.

As expressed by Oxman:

"It is not uncommon for treaties dealing with cessions or allocations of sovereignty over islands or other territory to define the areas ceded or allocated between those states on the basis of lines drawn at sea. The essential purpose of those lines is to provide a convenient reference for determining which islands and territories are ceded or allocated to a particular party. Among other things, this approach avoids the need to identify precisely all islands and other territory ceded"¹⁶.

5.10 The fact that the Dutch Government contemporaneously with the 1891 Convention regarded it as allocating title to various islands situated to the south of the 4° 10' N line is clearly shown by the terms of the variation made by The Netherlands to the "Contract of Vassalage" in 1893 to give effect to the 1891 Convention. Those terms are quoted by Malaysia in its Memorial¹⁷. In that variation the major islands of Tarakan, Nanoekhan and the southern part of Sebatik are mentioned by name, while their unnamed associated "small islands" are simply mentioned as having been allocated by virtue solely of their location south of the 4° 10' N line. This is entirely consistent with the "not uncommon" practice referred to by Oxman.

5.11 This "allocation" aspect of the variation of the "Contract of Vassalage" was known to the British Government, to which the terms of the variation were officially communicated¹⁸: the British Government, by its silence, acquiesced in this position. The consequential absence of any specific mention of small islands on the Dutch side of the agreed line no more denies Dutch sovereignty over them (if south of the agreed parallel) than the equivalent lack of specific mention of small islands on the British side of the line denies British sovereignty over them. For it must be recalled that, by virtue of Article IV of the Convention, the British Government was similarly entitled to treat all islands lying to the north of the 4° 10' N line as having been allocated to British North Borneo.

¹⁶ Oxman, B.H., "Political, Strategic and Historical Considerations", in Charney, J.I., and Alexander, L.M., (ed.), *International Maritime Boundaries* (1993), Vol. 1, p. 32.

¹⁷ Para. 9.17; see also IM, para. 5.62.

¹⁸ IM, para. 5.62.

5.12 Malaysia's attempt to treat the 1891 Convention as a "boundary treaty" rather than an "allocation treaty" is not only thus inconsistent with State practice and the behaviour of the parties, but is in principle misconceived. States do not consistently use the term "boundary" to refer only to land boundaries. Thus a treaty "defining the boundaries" between two States' territories is not necessarily solely concerned with their land boundary, and may not even be concerned with land boundaries at all. For example, the Convention between France and China of 26 June 1887¹⁹ dealt with both offshore islands and the land boundary, even though in preamble it is referred to as a Convention concerning the delimitation of the "boundary". An even clearer example is afforded by the 1930 Anglo-U.S. Convention also already referred to para. 5.8 above. Similarly, Article 1 of the 1968 Iran-Saudi Arabia Agreement Concerning the Sovereignty over the Islands of Al-'Arabiyah and Farsi prescribes "a *boundary* line separating the territorial seas of the two islands"²⁰.

5.13 Rather than attempting to rely on somewhat academic terminological classifications, what matters most are the terms actually agreed by the parties. The 1891 Convention begins (Article I) by prescribing the starting point "on the east coast of Borneo" for the "boundary between the Netherland possessions in Borneo and those of the British protected States in the same island": this language does not differ in any material respect from the language of the preamble in which the parties recorded what they wished to do. Articles II and III describe the course of the boundary westwards from that point; and Article IV describes the course of the boundary eastwards.

5.14 From these actual terms of the Convention it is evident that:

- (a) Malaysia is in error in stating that the 1891 Convention "had the *express* purpose of delimiting the land boundary between North Borneo ... and the Dutch territories on Borneo"²¹: there is no provision in the Convention expressly referring to its delimitation of only a *land* boundary, and as just noted the use of the term "boundary" carries with it no necessary implication to that effect²².

¹⁹ Prescott, J.R.V., *Map of Mainland Asia by Treaty*, Melbourne University Press, 1975, pp. 453-456, at Annex 18.

²⁰ *United Nations Treaty Series*, Vol. 696, p. 189; Charney, J.I., and Alexander, L.M., (ed.), *op. cit.*, Vol. II, p. 1526. Emphasis added.

²¹ MM, para. 2.5. Emphasis added.

²² See paras. 5.8 and 5.12, above.

- (b) The parties were prescribing a line to separate their "possessions" – a term as apt for islands as it is for mainland territory.
- (c) By referring in terms to the island of Sebatik, the Convention was demonstrably *not* limited to the mainland territory of Borneo.
- (d) Malaysia, in acknowledging that the Convention dealt, "by implication, [with] the narrow belt of water between Sebatik and the main island of Borneo"²³, accepts that the Convention is not even limited to either mainland or insular land territory.
- (e) The references in the Convention to Sebatik and (by implication) the water between Borneo and Sebatik show that the parties, in referring to possessions "in Borneo", were not restricting themselves to the mainland of that major island. It is, in fact, by no means unusual to include adjacent islands within the scope of a legal instrument dealing primarily, and by name, with a principal mainland territory. A clear example is to hand in the Sultan of Sulu's grant of January 1878 to Dent and Overbeck. The text as given by Malaysia is (in translation) headed "Grant by Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo. Dated 22nd January, 1878"²⁴: yet despite this express reference to the grant being of *mainland* territories and lands, the terms of the grant cover also all islands within 9 miles of the coast.

5.15 As regards that part of the defined boundary line which is immediately relevant to sovereignty over Sipadan and Ligitan, Article IV prescribes that, starting from the identified point on the east coast of the mainland of Borneo, "the boundary line shall be continued eastward along that parallel [i.e. 4° 10' N]". This is the main clause of the sentence. Contrary to Malaysia's assertion that the line goes no further than the east coast of Sebatik²⁵, Article IV contains nothing which suggests that the line stops at the east coast of Sebatik: on the

²³ MM, para. 8.9.

²⁴ *Ibid.*, Annex 9, Vol. 2.

²⁵ *Ibid.*, para. 8.11.

contrary, the stipulation that the line was to be "continued" eastward along the prescribed parallel requires a prolongation of the line so far as was necessary to achieve the Convention's purposes²⁶.

B. Interpretation of Article IV of the 1891 Convention

5.16 Malaysia further contends that the "plain and ordinary meaning" of the phrase "across the island of Sebittik" is that the line crosses Sebatik from the west coast to the east coast "and goes no further"²⁷. For the reasons given in Indonesia's Memorial²⁸, Indonesia does not accept that that phrase has such a restricted meaning, which Indonesia considers not to be in accordance with the ordinary meaning of the words used in their context and in the light of the Convention's object and purpose.

5.17 The Court has held that customary international law found expression in Article 31 of the Vienna Convention on the Law of Treaties 1969, and that as a result the rules reflected in Article 31 of that Convention may be applied by the Court even as between States which were not parties to the Convention and also in respect of a treaty concluded before the Vienna Convention entered into force (*in casu* a treaty concluded in 1890): case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*²⁹.

5.18 By virtue of Article 31 of the Vienna Convention:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

It is thus not just "the ordinary meaning" of the treaty's terms which governs their interpretation, but that meaning (i) in their context and (ii) in the light of the treaty's object and purpose.

²⁶ See IM, para. 5.43(c).

²⁷ MM, para. 8.11.

²⁸ IM, para. 5.43.

²⁹ *Kasikili / Sedudu Island (Botswana / Namibia), Judgment, I.C.J.*, 13 December 1999, at para. 18; see also *Territorial Dispute (Libyan Arab Jamahiriya / Chad), Judgment, I.C.J. Reports 1994*, p. 6 at pp. 21-22, para 41.

(i) **The Immediate Textual Context**

5.19 The immediate textual context of the phrase now in question ("across the island of Sebittik") is that it is subordinate to the main clause stipulating that the line starts at a point on the mainland coast and is "continued" eastward. The purpose of that subordinate phrase is to make it clear that the line does indeed "continue" directly eastward and crosses the island of Sebatik, rather than, for example, going round that island before joining up again with the 4° 10' N parallel beyond its eastern coast, or leaving the island subject to some sort of shared sovereignty. Apart from thus clarifying the course to be taken by the boundary line as it crosses the island of Sebatik, that subordinate phrase contains no other limitation upon its course.

5.20 In order to convey the restricted sense of the phrase for which Malaysia contends, it would be necessary to add to the terms of the 1891 Convention words which do not appear in it, such as "and goes no further" or "to its eastern coast". If that had been the intention of the drafters of the Convention they could have easily made provision to that effect, *as they did in relation to the westward extension of the boundary*, as noted in para. 5.21, below. But in any event, the negotiators clearly had in mind an extension out to sea (which was necessary in order to put an end to all further disputes over possessions in the area), and any attempt to stop the agreed delimitation at the east coast of Sebatik would have been objected to by the Dutch.

5.21 In this respect the terms of Article IV regarding the eastward continuation of the line may be contrasted with the terms of Article III, in which for the westward extension of the boundary line the drafters *did* stipulate a terminal point for the line. That Article provides that the line shall follow a certain route "to Tandjong-Datoe on the west coast of Borneo". Thus the westward line stopped there. No equivalent terminal point was stipulated in Article IV for the eastward continuation of the line.

5.22 Malaysia's assertion that the meaning which it attributes to that subordinate phrase "accords with the usual primary definition of "across" and, in Dutch, "over" given in dictionaries" is unfounded³⁰.

(a) As regards the English language, in the context of Article IV and the phrase "continued eastward ... across the island of Sebittik", the word "across" is, grammatically, either a preposition expressing the relation between the 4° 10' N line and the island of Sebatik, or an adverb qualifying the verb "shall be continued". In those roles dictionaries give the word "across" numerous meanings³¹, no one of which can be singled out as the primary meaning: everything depends on the word's grammatical role, and the context in which it is used.

(i) There are perfectly normal meanings of the word which signify, as Indonesia submits is the ordinary meaning of the word in its present context, "through and beyond" or "crossing and continuing over"³². Most of the many dictionary meanings are consistent with continuation beyond the far side of the object being crossed. Thus the sentence "Across the river there is a range of mountains" signifies in ordinary usage that somewhere on the other side of the river and beyond it there is a range of mountains – not that the range of mountains rises immediately on the far bank of the river. The use of the term "across" is accordingly fully consistent with the continuation of the 4° 10' N line beyond Sebatik's east coast.

(ii) It is therefore evident that the word "across" does not solely or even primarily convey the meaning for which Malaysia contends, namely that whatever is doing the crossing (in this case, the agreed line) stops at the far side of the object being crossed (i.e. the island of Sebatik). The use of the term

³⁰ See MM, para. 8.11.

³¹ *The Oxford English Dictionary*, 2nd Ed., at Annex 19.

³² IM, para. 5.43(h).

"across" therefore does not of itself imply that the line terminates at the far side of Sebatik.

- (b) As regards the Dutch language, the Dutch word "over" has many meanings, according to the authoritative Dutch dictionary by Van Dale³³. These meanings vary according to the context. In the present context the meaning is definitely not restricted to the meaning attributed to it by Malaysia. It is also beyond doubt that the meaning attributed to the word by Indonesia is among those which in the present context the word can properly bear. Thus, in Dutch one says "*De evenaar loopt over het eiland Borneo*" (the translation of which is: "The Equator runs across the island of Borneo"). Clearly, the Equator does not stop where the island ends, but continues beyond Borneo.

5.23 In any event, no purely grammatical or dictionary meaning of a term with as many nuances as the word "across" is likely by itself definitively to resolve questions as to the proper interpretation of Article IV. Indonesia's view as to the interpretation of Article IV is derived from the terms, context and purpose of Article IV, supported by the *travaux préparatoires* and confirmed by the post-signature conduct of the Dutch and British Governments. It is sufficient for present purposes to note that in both English and Dutch the ordinary grammatical and dictionary meaning of "across" supports the interpretation which Indonesia attributes to Article IV.

5.24 Malaysia also seeks support for its interpretation of the subordinate phrase in Article IV from the terms of that part of the Article which follow the colon³⁴ mid-way through its text. That passage attributes the northern part of Sebatik to the British North Borneo Company and the southern part to The Netherlands. Malaysia argues that this second part of the Article "can only be read as referring to the island of Sebatik itself, and that this supports the understanding that the references to the island in the first part are likewise limited to the island itself"³⁵.

³³ *Van Dale Groot Woordenboek Der Nederlandse Taal*, 11th Ed., at Annex 20.

³⁴ Not a semi-colon, as stated by Malaysia in MM, para 8.12.

³⁵ MM, para. 8.12.

5.25 Indonesia accepts that the second part of Article IV refers back to the island of Sebatik mentioned in the first part of the Article, and also that the reference³⁶ to the island of Sebatik in the first part of the Article is limited to the island itself (although in both contexts the reference to the island implicitly includes its territorial sea). That, however, is not the main point, which is rather that, as explained above, the main clause of the Article is a simple stipulation that the boundary line "shall be continued eastward": the subordinate phrase about the line crossing Sebatik is added so as to clarify the course to be taken by the line when it meets Sebatik³⁷, and the second part of the Article, after the colon, further clarifies the position by stating expressly, *in relation to that clarificatory subordinate phrase*, what the consequence is of the boundary line crossing the island – namely, that it divides Dutch territory from British territory.

5.26 Neither the subordinate phrase in the first part of the Article, nor the second part of the Article, assist Malaysia's argument that the line described in the opening main clause of the Article goes no further than the east coast of Sebatik. Indonesia agrees with Malaysia that Article IV describes the boundary line as crossing the island of Sebatik: it clearly does so. But that admitted and obvious proposition does not touch upon the question whether the line extends seawards beyond Sebatik. For the reasons given in Indonesia's Memorial³⁸, the correct interpretation of Article IV, in the context of the Convention and in the light of all the surrounding circumstances, is that the line prescribed by Article IV does extend seaward of Sebatik.

5.27 Malaysia is incorrect in asserting that Article IV "was introduced solely to deal with Sebatik"³⁹, and was dealing only with the "problem posed by the presence of the island of Sebatik" without serving the additional purpose of allocating title in respect of islands lying further east⁴⁰. That Article IV did deal with "the problem of Sebatik" is undoubted; and that problem was one of particular concern to the parties in the negotiations leading to the conclusion of the Convention⁴¹. But the fact that Article IV addressed a specific problem

³⁶ In the singular, not the plural as stated by Malaysia.

³⁷ See para. 5.19, above.

³⁸ At para. 5.43.

³⁹ See MM, para. 8.9.

⁴⁰ *Ibid.*, para. 8.8

⁴¹ See IM, paras. 5.25-5.31.

does not mean that it did not *also* cover other matters where (as here) its terms are apt for that wider purpose.

5.28 Malaysia's suggestion that Sebatik was dealt with because it was in effect ("virtually") part of the island of Borneo by virtue of being so close to the coast of Borneo⁴² is an attempt by Malaysia to get round the undoubted facts that Sebatik *is* an island and is *not* part of the main island of Borneo. Along the 4° 10' N parallel it is separated from the east coast of the mainland of Borneo by a belt of water some 4 miles wide, and from the south coast of the mainland in the region of Tawau by a belt of water of a width of some 3 miles. It is an offshore island like numerous others in the area. It merited special mention in the Convention not because of its physical closeness to the mainland of Borneo but because of its size and its significance for navigation rights and the interest shown in it by the parties in the negotiations.

(ii) The General Context of the Treaty's Conclusion

5.29 It is not, however, sufficient to treat only the immediate textual context of a treaty provision in order to arrive at its true interpretation. In the first place, the context of a term of a treaty "is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole"⁴³. Moreover, account must also be taken of the general context of the treaty's conclusion. Thus in the *Anglo-Iranian Oil Company Case (Jurisdiction)*⁴⁴, the Court looked beyond the purely grammatical interpretation of the text before it and considered the general circumstances which had given rise to its preparation. Similarly, in the *Aegean Sea Continental Shelf* case the I.C.J. treated the circumstances surrounding the conclusion of an agreement as relevant to its interpretation⁴⁵. Again, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*⁴⁶, the Court, having held that what were referred to as "the Doha Minutes" constituted an international

⁴² MM, para. 8.8.

⁴³ *Year Book of the International Law Commission*, 1966, Vol. II, p. 221 (para. 12 of the Commentary to draft article 27 on the law of treaties).

⁴⁴ *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 93 at pp. 104-107.

⁴⁵ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3 at p. 23, para. 55.

⁴⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6.

agreement⁴⁷, had recourse to the general circumstances surrounding their adoption in deciding upon the correct interpretation to be given to them⁴⁸.

5.30 In relation to the 1891 Convention this general context includes the following elements, all of which affect the interpretation to be given to Article IV, and support the position adopted in this respect by Indonesia and contradict that put forward by Malaysia:

- (a) the clear claims of the Sultan of Boeloengan to inland areas north of the Tawau coast and well to the north of 4° 10' N, which were acknowledged by Great Britain in agreeing, in Article VII of the 1891 Convention, to the Sultan having certain continuing transitional rights to jungle produce⁴⁹;
- (b) Dutch activity in the area evidencing Dutch claims to sovereignty extending to the north of the eventual 4° 10' N line⁵⁰.
- (c) the prevailing uncertainty at the time as to the precise extent of the territories belonging to the two parties⁵¹;
- (d) the occurrence of occasional Anglo-Dutch confrontations as a result of these uncertainties;
- (e) the desire to resolve the uncertainties once and for all so as to avoid future disputes⁵².

(iii) Agreement in Connection with the Conclusion of the 1891 Convention

5.31 Article 31.2 of the Vienna Convention provides that for the purpose of the interpretation of a treaty its context includes:

⁴⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at pp. 126-127, para. 41.

⁴⁸ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6 at pp. 17-21, paras. 31-40.

⁴⁹ See IM, para. 5.22.

⁵⁰ See para. 4.16, above.

⁵¹ See IM, paras. 5.3-5.4.

⁵² *Ibid.*, paras. 5.56, 5.58-5.60.

"(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty".

5.32 In Indonesia's submission the interaction of the British and Dutch Governments in relation to the so-called Explanatory Memorandum Map⁵³ establishes an agreement between the two governments regarding the seaward course of the Anglo-Dutch boundary east of Sebatik. Without prejudice to the fuller statement of the position at paras. 5.48 *et seq.* of Indonesia's Memorial, Indonesia recalls that the essentials of the position concerning this map are that:

- (a) the map depicted a line extending well out to the east of Sebatik along the 4° 10' N parallel of latitude;
- (b) it was officially prepared by the Dutch Government immediately after the conclusion of the 1891 Convention and in connection with its approval by the Netherlands States-General as specifically required by Article VIII of the Convention;
- (c) it was publicly and officially available at the time;
- (d) it was officially known to the British Government at the time in the context of the 1891 Convention;
- (e) the British Government, in the face of its official knowledge of the map, remained silent, neither expressing dissent from it nor protesting against it, and is thereby to be regarded as having assented to it as an accurate reflection of the intention and meaning of the 1891 Convention.

⁵³ *Ibid.*, para. 5.48.

5.33 For these reasons⁵⁴ Indonesia maintains that the circumstances constitute an agreement relating to the 1891 Convention which forms part of the context of the Convention within the meaning of Article 31.2(a) of the Vienna Convention.

5.34 Malaysia asserts that the Explanatory Memorandum Map was merely an internal Dutch map and that nothing establishes that the line drawn on the map and extending seaward of Sebatik "was agreed by or opposable to Britain"⁵⁵. Malaysia appears to have been unaware of (at least, it did not in its Memorial draw the attention of the Court to) the full facts of the situation as set out in Indonesia's Memorial, from which the British Government's official knowledge of the map, and its silence (and thus acquiescence) in the face of that knowledge, is clear.

(iv) Instrument Accepted as Being Related to the 1891 Convention

5.35 Article 31.2 of the Vienna Convention also provides that for the purpose of a treaty's interpretation its context includes:

"(b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

5.36 Without prejudice to the preceding argument that the interaction between the Dutch and British Governments in relation to the Explanatory Memorandum Map establishes an agreement between them for purposes of Article 31.2(a) of the Vienna Convention, Indonesia submits additionally, as well as in the alternative, that for the reasons there set out that interaction establishes the map as an instrument made by the Dutch Government in connection with the conclusion of the 1891 Convention (particularly its Articles IV and VIII) and accepted by the British Government as an instrument related to it.

(v) Object and Purpose of the 1891 Convention

5.37 Indonesia agrees that the ordinary meaning of a term is to be determined in the light of the object and purpose of the treaty. Malaysia asserts that "[i]t would not be in accord with

⁵⁴ More fully set out at IM, paras. 5.48 *et seq.*

⁵⁵ See MM, para. 9.9, and paras. 9.3 *et seq.*

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 ... along the latitude of 4° 10' N"⁵⁶. Indonesia rejects the conclusion thus advanced by Malaysia. Malaysia's statement calls for several comments.

5.38 First, in the preamble to the 1891 Convention the parties stated that they were "desirous of defining the boundaries" (in the plural) between the Dutch and British possessions in Borneo. In itself that expression of the parties' intention was as apt for island territories as for the mainland (given that the words "boundaries" and "in the Island of Borneo" cannot be given a purely mainland meaning – as discussed in paras. 5.12 and 5.14, above). Moreover, the reference to the desire to define the boundaries between "the Netherlands possessions" in Borneo and the British States there implies, by the use of "the", that it was the boundaries relating to *all* the Dutch possessions in the area which were to be settled.

5.39 Second, the preamble to the 1891 Convention merely describes what the parties were doing in concluding the Convention. It is, however, necessary to look not only to the preamble but also to the dealings between the parties leading up to the conclusion of the Convention, from which their object and purpose may be discerned. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* the Court ascertained the object and purpose of the so-called "Doha Minutes" from an enquiry into the underlying attitudes of the Parties at the time the Minutes were adopted⁵⁷. Given the underlying uncertainties over the extent of each party's territory and the consequential likelihood of continuing dispute⁵⁸, the reason why they wished to define the boundaries between Dutch and British possessions in the north-east region of Borneo area was to resolve the uncertainties once and for all⁵⁹. The uncertainties extended to island territories as well as to mainland territories, and the terms of Article IV were appropriate for giving effect to the Convention's object and purpose in relation to islands lying eastward of Sebatik and are to be understood in that sense. It is fully in accord with that object and purpose for the Convention to deal with

⁵⁶ *Ibid.*, para. 8.8.

⁵⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6 at p. 19, paras. 35-36.

⁵⁸ See paras. 5.30 (c) and (d), above.

⁵⁹ See IM, paras. 5.56, 5.58-5.60.

all offshore islands in the region; equally, it is not in accord with that object and purpose to treat Article IV as dealing only with the island of Sebatik, thus leaving open other potential sources of territorial differences. The allocation of title to offshore islands was not just an "additional" purpose of the Convention, but an integral part of its main purpose.

5.40 Third, the allocation of title by Article IV was not just a one-way action in favour of The Netherlands. The allocation had effect in relation to both parties – while islands to the south of the line would not be claimed by the British North Borneo Company, equally islands north of the line would not be claimed by The Netherlands. Thus it was made clear that, for example (and apart from the line's impact upon Sipadan and Ligitan), there would be no Dutch claim to Mabul or Kapalai (both a similar distance to the north of the line as Sipadan is south of it, and both about as far east of Sebatik, i.e. approximately 45 miles) or to Si Amil (similarly about the same distance east of Sebatik as Ligitan, i.e. about 59 miles), and no British claim to Nanoekhan or Tarakan, an island approximately as far from Sebatik as Sipadan, and mentioned expressly in the Dutch Government's 1893 amendment to the "Contract of Vassalage" which was quoted by Malaysia⁶⁰. Thus possible future disputes about all the many islands in the relevant waters were to be avoided by an allocation of sovereignty over them to Great Britain (through the BNBC) or The Netherlands, as the case might be.

5.41 Fourth, although Sipadan and Ligitan are the islands currently in dispute, it is wrong to treat Article IV as relevant only to those islands (as does Malaysia in MM, para. 8.10, treating Sipadan as the first island east of Sebatik to be reached by the 4° 10' N line). Other islands in the area are equally affected by the prescribed boundary line⁶¹, and some of them are closer to Sebatik than Sipadan (e.g. Kalumpang, Silungan and Gusungan). That there is no dispute about them is precisely because both Parties (and their predecessors) have accepted the stipulations of Article IV, and have not questioned their attribution to the one party or the other in accordance with those stipulations: it is regrettably otherwise in relation to Sipadan and Ligitan.

⁶⁰ See MM, para. 9.17; see also IM, para. 5.62.

⁶¹ See preceding paragraph.

5.42 The situation is well illustrated by the incident in 1876 involving the activities at Mabul island of the Dutch warship HNLMS *Admiraal van Kinsbergen*⁶². At that time Mabul, which lies to the north of the eventual 4° 10' N line, was regarded as belonging to the Sultan of Boeloengan, and The Netherlands accordingly felt entitled to land armed sloops on Mabul. But after the 1891 Convention Mabul, along with other islands similarly to the north of 4° 10' N, was accepted as being British, and when subsequently the Dutch warship HNLMS *Lynx* had occasion to patrol the same waters it observed the limit of that line and made no territorial incursion north of it⁶³.

5.43 Fifth, the implication that there is something wrong or unusual in prescribing a line which extends eastwards "indefinitely" is unjustified. As already noted⁶⁴, the line extends eastwards so far as may be necessary for the purposes of the Convention to be achieved. The line is extended "indefinitely" in that no end-point is stipulated, but this does not mean that the line is extended endlessly: the limit to its eastward extent is provided by the context of the Convention, and in particular by the purpose which the Convention was intended to achieve – the settlement, once and for all, of possible Anglo-Dutch territorial differences in the region.

5.44 It is not unusual for indefinite lines to be stipulated. Thus:

- (a) Gambia/Senegal Maritime Boundary Agreement 1975⁶⁵: Articles One and Two of the Agreement identify a starting point for the maritime boundary at or near the coast and then stipulate that the seaward extension of the boundary from that point "follows the parallel of latitude 13° 35' 36" North"⁶⁶: no terminal point is given or described.
- (b) Guinea-Bissau/Senegal Maritime Boundary 1960⁶⁷: the Agreement prescribed an azimuth of 240° for the delimitation of the territorial sea boundary, and then provided that beyond the territorial sea "the delimitation would consist of the

⁶² Para. 3.67, above.

⁶³ See IM, para. 6.3.

⁶⁴ See para. 5.15 above, and IM, para. 5.43(c).

⁶⁵ See Charney, J.I., and Alexander, L.M., (ed.), *op. cit.*, Vol. 1, p. 854.

⁶⁶ Article Two uses the same language, but the relevant parallel is 13° 03' 27" North.

⁶⁷ *Ibid.*, p. 872.

straight line extension in the same direction of the territorial sea boundary": no terminal point is given or described.

- (c) Canada/Denmark Agreement relating to the Delimitation of the Continental Shelf 1973⁶⁸: the Agreement prescribes a delimitation line joining 127 identified points and then provides, in Article II.4:

"For the time being the Parties have not deemed it necessary to draw the dividing line further north than point No. 127 or further south than point No. 1."

Thus the parties acknowledged that the dividing line extended at both ends beyond the 127 specified points, but its terminal points were neither given nor described.

- (d) Numerous agreements do not give a terminal point for a maritime boundary line although they do describe the circumstances which will eventually determine its eventual termination. Examples include: (i) USA-USSR Maritime Boundary Agreement 1990⁶⁹, which defines the boundary by reference to an initial starting point from which "the maritime boundary extends north along [a specified] meridian through the Bering Strait and Chukchi Sea into the Arctic Ocean as far as permitted under international law"; (ii) Colombia-Costa Rica Maritime Boundary Agreement 1977⁷⁰, Article I of which stipulates that "From the intersection of [a specified parallel and meridian] the boundary shall continue north along the said meridian to where delimitation must be made with a third State"⁷¹. As with the 1891 Anglo-Dutch Convention the context of which establishes that the 4° 10' N line continues for so far as may be necessary to fulfil the purposes of the Convention, these agreements do not identify by precise coordinates the terminal point of the prescribed line, but do indicate the

⁶⁸ *Ibid.*, p. 380; *United Nations Treaty Series*, Vol. 950, p. 147.

⁶⁹ See Charney, J.I., and Alexander, L.M. (ed.), *op. cit.*, Vol. 1, p. 455.

⁷⁰ *Ibid.*, p. 474.

⁷¹ Similar provisions will be found in the maritime boundary agreements concluded e.g. between Colombia-Dominican Republic 1978, Art. II (Charney, J.I., and Alexander, L.M. (ed.), *op. cit.*, p. 488); Colombia-Honduras 1986, Art. I (*ibid.*, p. 517); Colombia-Panama 1976, Art. I.A.2 and B.2 (*ibid.*, p. 532); Dominican Republic-Venezuela 1979, Art. 2.1 (*ibid.*, p. 588); Trinidad and Tobago-Venezuela 1989, Art. II (*ibid.*, 672); USA-Venezuela 1978, Art. 2 (*ibid.*, p. 701); Colombia-Costa Rica 1984, Art. 1.B (*ibid.*, p. 806).

consideration according to which the terminal point will be determined when it is necessary to do so.

(vi) Subsequent Agreement or Practice

5.45 In addition to the context of the 1891 Convention, Article 31.3 of the Vienna Convention requires that there 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;..."

5.46 Without prejudice to the arguments set out above at paras. 5.31-5.36 that the interaction between the Dutch and British Governments in relation to the Explanatory Memorandum Map establishes an agreement between them for purposes of Article 31.2(a) of the Vienna Convention and/or an instrument for the purposes of Article 31.2(b) of the Vienna Convention, Indonesia submits additionally, as well as in the alternative, that for the reasons set out in those paragraphs that interaction establishes the Explanatory Memorandum Map as a subsequent agreement or as subsequent practice for the purposes of Article 31.3(a) and (b) of the Vienna Convention.

5.47 As regards the existence of a *subsequent agreement*, Indonesia submits that the interaction of the British and Dutch Governments in relation to the Explanatory Memorandum Map shown on the following page as Map 5.1 establishes an agreement between the two governments regarding the seaward course of the Anglo-Dutch boundary east of Sebatik⁷². That agreement – constituted by the official and public promulgation of the Explanatory Memorandum Map, knowledge of it by the British Government, and that Government's acquiescence in its contents – related to the interpretation of the 1891 Convention or the application of its provisions, in particular Article IV.

⁷² IM, para. 5.48; and para. 5.32, above.

5.48 As regards the existence of a *subsequent practice*, the Map was produced immediately after the signature of the Convention, and as part of its ratification by The Netherlands. Ratification by the States General was expressly required by Article VIII of the Convention. The production of the Map as part of that process was thus an official and public act of the Dutch Government in the application of the Convention, known to and acquiesced in by the British Government. By virtue of the conduct of the two Governments, their practice in relation to the Explanatory Memorandum Map established their agreement regarding the interpretation of the 1891 Convention, and in particular Article IV.

5.49 Indonesia recalls that the behaviour of the Dutch and British Governments with regard to the Explanatory Memorandum Map offers very close parallels with the circumstances surrounding the so-called "*Livre Jaune*" map prepared and published by France at the time of the conclusion of a Franco-British "Additional Declaration" of 21 March 1899⁷³. The Court held that map, publicly available and unopposed by the British Government, to have amounted to an authoritative interpretation of the Declaration⁷⁴.

5.50 Indonesia would also recall the map prepared in 1903 by Edward Stanford. He was effectively the official cartographer for the BNBC and in 1888 had prepared for the BNBC the base-map used by both sides during the 1889 Joint Commission meetings and the subsequent 1891 Convention. In 1903 he published a further map⁷⁵ showing a similar understanding to that recorded in the Explanatory Memorandum Map, by marking the southern offshore boundary of North Borneo's Elphinstone Province by a line which coincides with the course of the 1891 line running seaward of Sebatik along 4°10' N parallel to a point lying to the north and east of Ligitan and Sipadan islands.

⁷³ *Ibid.*, para. 5.52.

⁷⁴ *Territorial Dispute (Libyan Arab Jamahiriya / Chad)*, Judgment, I.C.J. Reports 1994, p.6 at p. 18, para. 28, p. 30, para. 58, p. 33, para. 61 and 34, paras. 64-65.

⁷⁵ The map is reproduced in Chapter IV above as Map 4.1. See IM, paras. 6.52-6.56, with interleaved copies of Map 6.4 and an enlargement of the relevant area. This map is also in Indonesia's Map Atlas, No. 9.

C. Alleged Spanish Sovereignty over Sipadan and Ligitan

5.51 Malaysia argues that in any event the 1891 Convention could not have allocated Sipadan and Ligitan to The Netherlands since at that time they belonged to Spain⁷⁶. As will be explained below in Chapter VI, the islands did not belong to Spain in 1891. Consequently, no question of Spanish title prevents the 1891 Convention having the effect for which Indonesia contends.

5.52 Nevertheless, treating this Malaysian argument based on Spanish sovereignty with a respect which it scarcely deserves, Malaysia argues that Spain's title meant that "Britain had no title which it could convey to the Netherlands in 1891"⁷⁷ and that "Britain could not have agreed to cede [the islands] to the Netherlands"⁷⁸. As explained, the premise that Spain had title to the islands is not accepted by Indonesia. But in any event, Malaysia misrepresents the effect of the 1891 Convention. It did not involve any British cession of mainland territory or islands to The Netherlands, or any equivalent cession by The Netherlands to Great Britain. The disputed areas were, by definition, not previously indisputably under the sovereignty of either party so as to enable it to cede them to the other, or to enable that other to accept such a purported cession: both parties no doubt considered that mainland territories and islands on their side of the agreed line were *already* theirs, rather than that they had *become* theirs by virtue of a treaty cession. The 1891 Convention involved, in relation to disputed areas, less a cession of territory than a relinquishment of claims to mainland territory and islands on the other party's side of the agreed line and a recognition of the other party's title over territories on that party's side of the line. In effect, Great Britain was, and Malaysia is now, precluded both from asserting its own title to territories south of the 4° 10' N line and from denying Dutch title to such territories.

5.53 Malaysia asserts that although in law the Sultan of Sulu had not transferred Sipadan and Ligitan to Dent and Overbeck by virtue of the 1878 grant (for Malaysia acknowledges that they were more than 3 marine leagues from the Borneo coast at para. 5.19 of its

⁷⁶ MM, paras. 5.20(d) and 8.22.

⁷⁷ *Ibid.*, para. 5.20(d).

⁷⁸ *Ibid.*, para. 8.22.

Memorial), and although thereafter the islands had not been covered by Spain's 1885 relinquishment of title in favour of Great Britain (for Malaysia equally acknowledges in the same paragraph that for the same reason they fell outside the scope of that instrument), nevertheless ("Despite this") the British North Borneo Company "went ahead and acted on the basis that it had authority over" them⁷⁹. Malaysia offers no evidence of any such activity on the part of the BNBC *in relation specifically to the islands of Sipadan and Ligitan* in the period between the making of the grant and the conclusion of the 1891 Convention, and Indonesia does not accept that any authority was exercised by the BNBC over the islands. However, if *arguendo* the BNBC was, as asserted by Malaysia, in actual possession of the islands at the time, that possession (which Malaysia is precluded from denying) was a sufficient basis for Great Britain's disclaimer under the 1891 Convention of further interest in title to the islands.

5.54 It is further to be noted that it is apparent from Malaysia's version of events that the islands did not legally come within the scope of the territories later placed under the authority of the British North Borneo Company. The Company, says Malaysia, simply "went ahead and acted on the basis that it had authority over those islands"⁸⁰. Thus if the facts as to the Company's exercise of authority over the islands were as stated by Malaysia (which Indonesia denies), the Company was clearly acting unlawfully. *Ex injuria jus non oritur*.

5.55 Malaysia seeks to legitimise this illegality by asserting that "Spain appears to have been quite indifferent to this and never opposed their administration from and by North Borneo"⁸¹: in effect, therefore, Spain is alleged to have implicitly acquiesced in the Company's usurpation of Spanish rights over the islands. But this attempt to justify the Company's activities is inadequate. Once again, Malaysia offers no evidence for any Spanish acquiescence *in relation to Sipadan and Ligitan*. First, no evidence is given of any activity on Sipadan and Ligitan in which Spain could have been said to have acquiesced; second, Spain is not shown to have had any knowledge on the basis of which its acquiescence could

⁷⁹ *Ibid.*, para. 5.19.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

have been based. In any event, for the reasons given in paras. 6.3-6.13, Spain's acquiescence, even if it could be established, is legally irrelevant since title to the islands did not vest in Spain in the years leading up to 1891.

5.56 Malaysia asserts that British sovereignty over the islands was definitively established by eventual Spanish and U.S. renunciation of sovereignty in favour of Great Britain in agreements of 1885, 1907 and 1930⁸². Indonesia denies that those agreements had that effect. But even if it were to be supposed, solely for the purpose of argument, that they could have had that effect the result would be different from that for which Malaysia contends.

- (a) Any Spanish renunciation of sovereignty in favour of Great Britain in 1885 must today be seen in the light of the subsequent 1891 Anglo-Dutch Convention. By that Convention Great Britain acknowledged, *vis à vis* The Netherlands, that territories south of the 4° 10' N line were Dutch.
- (b) As regards the Anglo-U.S. agreements of 1907 and 1930, the 1891 Convention was still in force in 1907 and 1930 between the United Kingdom and The Netherlands. If the agreements of 1907 and 1930 had had any effect in relation to Sipadan and Ligitan in favour of the United Kingdom, then as against The Netherlands the United Kingdom was still bound by its 1891 relinquishment of claims to mainland territory and islands to the south of the line agreed in the 1891 Convention and its recognition of Dutch title south of that line.

5.57 Accordingly, any title allegedly acquired by Great Britain as a result of the 1885, 1907 and 1930 agreements became immediately non-opposable to The Netherlands by virtue of the provisions of the 1891 Convention. Any such title (which in any event Indonesia denies was ever established) would therefore now similarly be non-opposable by Malaysia as against Indonesia.

⁸² *Ibid.*, paras. 2.2, 5.18, 5.39-5.40 and 5.43.

5.58 For the reasons given in the preceding paragraphs, Malaysia's argument based on alleged Spanish title to Sipadan and Ligitan in 1891 is untenable, and Indonesia rejects it. It is to be noted that nowhere in the records of the meetings of the Joint Commission in 1889, is there any suggestion that territories in the boundary areas being discussed were or might be subject to any other State's sovereignty. The parties were satisfied that all the possessions in issue in their negotiations were not *terrae nullius*, and belonged to one or other of them and to no one else, and they proceeded to settle their differences once and for all on that basis. They acted correctly in doing so.

Section 3. The 1891 Convention: *Travaux Préparatoires*

5.59 Malaysia asserts that the *travaux préparatoires* of the 1891 Convention confirm the interpretation of Article IV for which Malaysia contends – namely, that it is limited in its scope to the island of Sebatik. Indonesia disagrees.

5.60 Recourse to the *travaux préparatoires* of a treaty is one of the supplementary means of interpretation, as provided for in Article 32 of the Vienna Convention on the Law of Treaties 1969. This Article, like Article 31, may be treated as reflecting customary international law.

5.61 Under Article 32 recourse to *travaux préparatoires* is permitted only in limited circumstances: first, in order to confirm the meaning resulting from Article 31, and second in order to determine the meaning when interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

5.62 In submitting that the general rule of interpretation set out in Article 31 of the Vienna Convention leads to Article IV of the 1891 Convention being given the meaning that the 4° 10' N line stops at the east coast of Sebatik "and goes no further" (additional language added by Malaysia), Malaysia asserts⁸³ that that interpretation is neither manifestly absurd nor unreasonable. Indonesia for its part believes that its own interpretation of Article IV (whereby the 4° 10' N line is "continued eastward", as stipulated in Article IV itself and

⁸³ *Ibid.*, para. 8.13.

without the need for additional language) equally cannot be characterised as manifestly absurd or unreasonable. While each Party rejects as incorrect the other's interpretation, Indonesia assumes that the question of the manifest absurdity or unreasonableness of either Party's interpretation of Article IV is not in issue.

5.63 Malaysia also regards the meaning of Article IV as neither ambiguous nor obscure but as being clear⁸⁴. Indonesia equally regards the meaning of Article IV as clear and as neither ambiguous nor obscure. Neither Party, therefore, acknowledges that recourse may be had to the *travaux préparatoires* on the ground of ambiguity or obscurity of the text. The two Parties, however, differ as to what the "clear" meaning of the text is. In these – not unusual – circumstances, recourse to the *travaux préparatoires* in order to shed light on the meaning of Article IV seems inescapable.

5.64 Under Article 32 of the Vienna Convention recourse may be had to *the travaux préparatoires* in order to confirm the meaning which results from the application of the general rule of interpretation in Article 31 of the Vienna Convention. The Parties agree with that statement of principle, although, of course, they differ as to the meaning which in their respective views results from the application of the general rule of interpretation.

5.65 In its Memorial Malaysia states that:

"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 or Bulungan to the island of Ligitan and Sipadan and an acknowledgement of that claim by the British Government"⁸⁵.

5.66 In Indonesia's submission, that formulation of the question is inaccurate and incomplete. A better formulation is:

"The question is whether the preparatory work of the 1891 Convention revealed any trace of a claim by the Netherlands to the islands of Ligitan and Sipadan and an acknowledgement of that claim by the British Government, or any trace of a claim by the British Government to the islands of Ligitan and

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 8.15.

Sipadan and an acknowledgement of that claim by The Netherlands Government".

5.67 Malaysia has advanced no suggestion that the islands of Ligitan and Sipadan were specifically mentioned by either side during the negotiation of the 1891 Convention. Indonesia for its part has found no such specific mention of the now-disputed islands in the *travaux préparatoires*. Thus in terms of express references to the islands, neither Party can derive any benefit from the *travaux préparatoires*.

5.68 Instead both Parties have to rely on references in the *travaux* to surrounding circumstances which in their view indirectly confirm the interpretation for which they respectively contend. Thus Malaysia seeks support for its view in the following circumstances (in each case the statement of Malaysia's contention is immediately followed by Indonesia's comment on it, introduced by the word "However"):

- (a) The northern limit of Dutch claims was at Batoe Tinagat, on the northern shore of Sibuko Bay, just to the north of Sebatik and a few miles east of Tawau – and more than 40 nautical miles to the west of Sipadan⁸⁶.

However, this assertion is factually incorrect: the northern limit of Dutch claims was well north of Batoe Tinagat and extended inland even further north to about 4° 31' N. Moreover, wherever the *northern* limit may have been, it says nothing about the easterly limit of those claims, i.e. to the east of Sebatik. And the very facts that even Batoe Tinagat is located at roughly 4° 14' N latitude and that Dutch claims inland extended to about 4° 31' N, demonstrate that the islands of Sipadan and Ligitan were well to the south of Batoe Tinagat and the northern limit of the mainland area then claimed by The Netherlands. The fact that the Sultan of Boeloengan had actual rights, or at least strong claims, in areas to the north of Batoe Tinagat was acknowledged by the British Government in according the Sultan certain transitional rights in those areas in Article VII of the 1891 Convention⁸⁷.

⁸⁶ *Ibid.*, para. 8.16.

⁸⁷ See para. 5.30(a), above.

- (b) The Netherlands never suggested that Sipadan or Ligitan or any other islands close to the northern shore of Sibuko Bay adhered to the mainland territory of the Sultan of Boeloengan or belonged to the Dutch⁸⁸.

However, as already noted, the *travaux préparatoires* contain no specific mention of Sipadan or Ligitan as being either Dutch or British, and the absence of any specific mention of them is thus of neutral significance. That the Sultan of Boeloengan did have offshore possessions is clear from the successive Contracts of Vassalage⁸⁹. Their extent may have been uncertain, like that of the offshore possessions of the Sultan of Sulu (for equally, the *travaux* reveal no specific mention of Sipadan or Ligitan as being among his possessions): it was this uncertainty that the 1891 Convention was intended to resolve once and for all, and did so by providing for the 4° 10' N line "to be continued eastward".

- (c) The Dutch negotiators admitted that regions to the east of Batoe Tinagat were under the rule of the Sultan of Sulu⁹⁰.

However, the statement of the Dutch representative must be seen in its context. The statement had no relevance to islands more than nine miles from the coast (thus including the islands of Sipadan and Ligitan). It was made in response to a statement by the British Acting Consul-General Treacher which referred to Sulu rule over the territory mentioned in the grant made to Dent and Overbeck. As noted elsewhere⁹¹ the territories mentioned in the grant did not include islands beyond nine miles from the coast. Since the islands of Sipadan and Ligitan are well beyond that distance from the coast, neither Mr. Treacher's remarks nor the response of the Dutch representative to those remarks "in so far as the regions are concerned to the eastward of Batoe Tinagat" referred to the islands now in dispute. Apart from the fact that those islands were not being referred to by either the Dutch or British representatives, the term "regions" used by Mr. Treacher and in the Dutch response suggests that in both cases it was only mainland territory which was under discussion.

⁸⁸ MM, para. 8.16.

⁸⁹ See IM, paras. 5.2 and 5.62.

⁹⁰ MM, para. 8.17.

⁹¹ See paras. 4.6 *et seq.*, above.

- (d) Consideration of the boundary on the coast never extended to cover islands east of Batoe Tinagat, but went no further than Sebatik⁹².

However, as is shown by the incident in 1876 involving HNLMS *Admiraal van Kinsbergen* and the island of Mabul⁹³, whatever may have been the position on the mainland coast, Dutch and Boeloengan assertions of sovereignty extended to islands well to the east of Sebatik, including the island of Mabul which lies fractionally further east of Sebatik than does Sipadan. Moreover, demonstrating that the 1891 Convention did deal with the island of Sebatik, and in particular divided it by a west-east line along the 4° 10' N parallel, all of which Indonesia accepts, does not imply that that line was not "continued eastward" in accordance with the terms of Article IV so as to deal with other islands which had been or might have become the source of territorial disputes: thus, by the adoption of the 4° 10' N line, the Dutch gave up their claims to Mabul and the British acknowledged Dutch rights over Sipadan and Ligitan.

- (e) The need for each side to have its own access to the waters lying on its side of the line between Sebatik and the mainland was decisive in leading to the island of Sebatik being divided⁹⁴.

However, this again merely demonstrates (which is not denied by Indonesia) that Article IV did deal with the island of Sebatik: what it does not do is show that that was the only island affected by Article IV or why the terms of Article IV – "the line shall be continued eastward" – should not be applied as they stand.

5.69 In so far as Malaysia introduced this last argument by observing that the need for access to waters around Sebatik was, "A relevant consideration in the negotiations", so too would Indonesia note that, as pointed out in Indonesia's Memorial⁹⁵, a relevant consideration was the desire to put an end once and for all to Anglo-Dutch territorial disputes in the whole north-east Borneo area⁹⁶. That consideration strongly confirms Indonesia's interpretation of Article IV as continuing the 4° 10' N line eastward so far as necessary for the purposes of the

⁹² MM, paras. 8.18-8.19.

⁹³ See para. 5.42, and para. 3.67, above.

⁹⁴ MM, para. 8.20.

⁹⁵ IM, paras. 5.56, 5.58-5.60.

⁹⁶ See, paras. 5.30(e) and 5.39, above.

Convention to be achieved which, since the ownership of islands on either side of that line was at the time uncertain, involved its extension at least as far east as to cover the islands presently in dispute.

5.70 The position advanced by Indonesia as to the continuation eastwards of the 4° 10' N line is confirmed by papers found in the Dutch archives. These include the papers of the Dutch delegation in the Joint Commission meetings which led to agreement upon the 4° 10' N starting point on the east coast of Borneo⁹⁷. The day after the conclusion of the Joint Commission meetings Count de Bylandt sent a report to his Foreign Minister [Mr. Hartsen] on 28 July 1889⁹⁸. In this report Count de Bylandt recorded the proposal made by the British Government⁹⁹ and accompanied it with "a skeleton map that goes with it" (in fact the Stanford map of 1888, with additional markings)¹⁰⁰. In the northern part of the map there is an indication of the frontier line asserted by the Dutch, running north from "Batu Tinagat" (Batoe Tinagat) and then curving round to the west. On this map Count de Bylandt marked with a small black cross a point "on about 4° 10' N" that would be the starting point for the frontier. Count de Bylandt noted that this proposal would leave East and West Nanoekhan to The Netherlands but would assign Sebatik to Great Britain: i.e. the dividing line would run through the channel between Sebatik and Nanoekhan – and indeed the map enclosed with Count de Bylandt's report shows pencil lines marking this channel. Count de Bylandt suggested an alternative to this British proposal, in the form of a coastal starting point at about 4° 17' N – a point he indicated on the map with "a small black dash". Count de Bylandt also referred to "a semi-official or personal" suggestion by Admiral Mayne (of the British delegation, and also a director of the BNBC) that the Dutch should keep Batoe Tinagat as an enclave: the sketch map again shows pencil lines indicating such an enclave. The sketch map also shows a pencil line which, starting from the point marked "X" by Count de Bylandt (i.e. at about 4° 10' N), runs eastward through and beyond the island of Sebatik and continuing along the 4° 10' N parallel out to the margin of the map (well beyond the location of Sipadan and Ligitan. When negotiations for the 1891 Convention began the effect

⁹⁷ The Dutch archives reference is ARA BuZa code 2.05.03, inv. 134.

⁹⁸ Annex 21.

⁹⁹ See IM, para. 5.20.

¹⁰⁰ Annex 22. An enlargement of the relevant part of the map highlighting the additional markings is also included in Annex 22.

upon Sebatik of the agreed 4° 10' N coastal starting point was a matter of considerable interest for the Parties¹⁰¹.

5.71 Also in the Dutch archives¹⁰² is a further relevant map¹⁰³. This is the copy of the *Kaart van het Noordelijk Gedeelte van het Eiland Borneo* apparently used by Count de Bylandt in the negotiations. On it is marked in pencil the 4° 10' N line, again extending out to sea beyond Sebatik (and beyond Sipadan and Ligitan) and out to the margin of the map: in the margin is a manuscript note, which appears to be in Count de Bylandt's handwriting, which in translation¹⁰⁴ reads "10' proposal by Admiral Mayne".

5.72 The first of those maps is not only available in the Dutch archives but a similar map is also available in the Sabah State Archives¹⁰⁵, having formerly formed part of the BNBC's archives. This map also shows a pencil line extending along the 4° 10' N parallel out to the margin of the map. This demonstrates that the continuation eastwards of the 4° 10' N line shown on the Explanatory Memorandum Map was no subsequent invention by the Dutch Government, but was a reflection of an earlier understanding on the part of the negotiators.

5.73 These three maps need to be seen also in the context of the maps already submitted by Indonesia as Maps Nos. 3 and 4 of its Map Atlas. Map No. 3, using a base map published in 1888 for the British North Borneo Company, was an illustration by the Company of a proposal, eventually adopted by the British Government in the negotiations for the 1891 Convention. The significance of this map is explained in Indonesia's Memorial at para. 6.44. In brief, it illustrated by a manuscript dotted line coloured in green, a compromise line running from Broershoek on the Borneo coast (at 4° 10' N) and continuing at sea between the islands of Sebatik and Nanoekhan and extending across Sibuko Bay and out to the margin of the map (well beyond Sipadan and Ligitan) along the 4° N parallel. Although this "compromise" line was not in the event the line agreed, it shows compellingly that during the negotiations the British already envisaged that the line dividing their possessions from the Dutch would continue for a very considerable distance off shore.

¹⁰¹ See IM, paras. 5.26-5.31.

¹⁰² The Dutch archives reference is ARA BuZa code 2.05.03, inv. 134.

¹⁰³ Annex 23. An enlargement of the relevant part of the map highlighting the manuscript annotation is also included in Annex 23.

¹⁰⁴ In Dutch it reads: "10' voorstel van Adm. Mayne".

¹⁰⁵ The Sabah archives reference is Map P51/94.

5.74 The same point is to be made in relation to Map No. 4. It too contains various lines prepared by the British Government in the context of the negotiations for the 1891 Convention¹⁰⁶, one line going north of Sebatik and the other going to the south. *Both* lines are continued out to sea well beyond the eastern coast of Sebatik along their respective parallels of latitude.

5.75 Taken together the five maps referred to in the preceding paragraphs, all of which were used in the course of the negotiations, show a consistent pattern of the line of proposed settlement, wherever it might finally run, being extended out to sea along a relevant parallel of latitude.

5.76 For the foregoing reasons, it is impossible to read into the *travaux préparatoires* of the 1891 Convention any confirmation of the interpretation of Article IV of that Convention contended for by Malaysia. On the contrary, for those reasons and for the reasons set out in Indonesia's Memorial¹⁰⁷, the *travaux préparatoires* confirm that, as contended by Indonesia, the ordinary meaning to be given to Article IV of the 1891 Convention, in particular its central stipulation that the "line shall be continued eastward", in accordance with the general rule of interpretation forming part of customary international law, is that that line continues eastward at least until it reaches and passes to the north of Sipadan and Ligitan, thereby establishing that they belonged to The Netherlands, and now to Indonesia.

Section 4. Dutch Ratification of the 1891 Convention

5.77 Malaysia contends that the Dutch ratification of the 1891 Convention and subsequent Dutch actions implementing the Convention confirm Malaysia's position¹⁰⁸. Indonesia rejects this contention, both for the reasons already given in Indonesia's Memorial¹⁰⁹ and for the reasons to be given in the present section of this Counter-Memorial in commenting on a number of specific points raised by Malaysia in Section B of Chapter 9 of its Memorial. In

¹⁰⁶ Map No. 4 was included within a group of maps with the hand-written legend on the cover sheet "Borneo - Copies of Maps handed in at the Joint Commission July 1889": PRO Ref. FO 12/86.

¹⁰⁷ Particularly IM, paras. 5.2-5.33.

¹⁰⁸ MM, Chapter 9.

¹⁰⁹ IM, paras. 5.44-5.64.

short, Malaysia has misunderstood or misrepresented certain key aspects the historical record, which rather, when properly appreciated, fully support Indonesia's position as to the meaning to be given to the 1891 Convention.

A. The Map Attached to the 1891 Dutch Explanatory Memorandum

5.78 As Indonesia stated in its Memorial, this map was prepared by the Dutch Government to assist the Dutch Parliament in assessing the contents of the 1891 Convention¹¹⁰. The map was not a part of the Convention as such, but was annexed to the Explanatory Memorandum prepared by the Government which accompanied the Bill for ratification of the Convention.

5.79 The map was based on a draft sketch prepared at the Ministry of the Colonies. As Malaysia pointed out, even this preliminary sketch already had a dotted line extending seaward from the coast of Sebatik island. This precisely is the important point: the fact that the line extended beyond the coast, for an undetermined distance offshore along the 4° 10' N parallel, emphasises that it had always been the intention of the parties that the Convention line should also divide any outlying territory (i.e. islands) which might be present in the area, in order to settle once and for all the territorial questions between Great Britain and The Netherlands with respect to northern Borneo. It is immaterial exactly how far offshore the dotted lines extended on the sketch and on the map subsequently produced for the Dutch Parliament. For present purposes it is the extension offshore as such that matters: it confirms that the parties had in mind also the attribution of sovereignty over their respective outlying offshore possessions.

5.80 Both parties during the negotiations used such lines extending offshore¹¹¹. There can be little doubt that they noted these on their respective maps during the meetings of the Joint Commission as for example with the copy of the map personally used by Count de Bylandt during the negotiations which shows the 4° 10' N line drawn in pencil eastward from Sebatik

¹¹⁰ *Ibid.*, para. 5.46.

¹¹¹ See paras. 5.70-5.75, above.

island right across St. Lucia Bay, to the eastern margin of the map¹¹². A copy of this map is reproduced in Annex 23. As also noted in para. 5.73 above, a similar map is available in the Sabah State Archives. Since these Archives contain the local papers formerly belonging to the BNBC, it is thus evident that on the British side also there was an awareness that the line under discussion was going to continue out to sea to the east of Sebatik. Other British maps are to the same effect, as noted in relation to the extended lines on two copies of the 1888 Stanford map mentioned in para. 6.44 of Indonesia's Memorial (Map Atlas, Map Nos. 3 and 4)¹¹³.

5.81 These various maps fully support Indonesia's position, namely:

- (a) that the extension eastward and out to sea of whatever line was eventually to be agreed was in the minds of the parties during the negotiations, and
- (b) that the Explanatory Memorandum Map, far from being some unilateral invention by the Dutch Government, was fully consistent with the course of the negotiations.

5.82 It should also be stressed that the map annexed to the Explanatory Memorandum was known to the British Government before Great Britain ratified the Convention. Instruments of ratification were exchanged on 22 May 1892. This was some 10 months after the date of the Explanatory Memorandum to which the map was annexed. The British Government had had ample time and opportunity to convey to the Dutch Government its views on this map, should it have found any reason to do so on the basis of the way in which the Dutch Government had depicted its understanding of what had been agreed in the Convention.

5.83 It is also immaterial that the map did not show the islands of Sipadan and Ligitan. In St. Lucia Bay there were many other islets and reefs, on both the British and Dutch side of the line, which were not shown on this map. The base map on which various lines were superimposed was simply the map regarded by the Dutch Government as the most suitable base map to be used for the immediate purpose. Given the "not uncommon" practice referred

¹¹² See para. 5.70, above.

¹¹³ See paras. 5.73-5.74, above.

to earlier of drawing lines of allocation at sea¹¹⁴, there was no need for the Dutch Government's map to identify all the many individual islands.

5.84 The consistency of the Dutch position as to the seaward extension of the 4° 10' N line is not only borne out by the 1893 modification of the boundaries of Boeloengan to conform to the 1891 Convention¹¹⁵ but also by a map published later by a Dutch naval officer who had been the Dutch surveyor on board HNLMS *Banda* and who had in that capacity participated in the survey work undertaken in June 1891 for the purpose of locating the 4° 10' N line on the shores of Sebatik.¹¹⁶ The officer – R. Posthumus Meyjes (Lt. Cmdr., RNLN) – after his retirement prepared a paper which was published in the Journal of the Royal Netherlands Geographical Society, Second Series, Part XVIII, 1901. It was entitled "*De astronomische plaatsbepalingen ten dienste der hydrographie in Nederlandsch-Indie*" ("The astronomical position-finding for the purpose of hydrographic surveying in the Netherlands Indies"). The article contains a technical review of relevant activities from 1857, including a more detailed account of the years 1891-1894. He attached to his paper a map a copy of which is reproduced at Annex 1. It shows a clear red line (described in the Legend as the boundary line ("*Grenslijn*")) which continues eastward from Sebatik along the 4° 10' N parallel right up to the edge of the map, well beyond any notional territorial sea.

B. The Explanatory Memorandum

5.85 Malaysia refers in its Memorial to a number of passages in the Dutch Explanatory Memorandum which are said by Malaysia to support its position¹¹⁷. Indonesia rejects any such reading of the Explanatory Memorandum. Nothing in it lends any credence to the argument that those islands were henceforth to be regarded as British (let alone Spanish as Malaysia inconsistently also argues), or that they were anything other than attributed to The Netherlands.

¹¹⁴ See para. 5.9, above.

¹¹⁵ See IM para. 5.62; see, also, paras. 5.95 *et seq.*, below.

¹¹⁶ *Ibid.*, paras. 5.34-5.39.

¹¹⁷ See MM, paras. 9.10-9.15.

5.86 Malaysia asserts that the Memorandum describes the dispute as concerning "the disputed area between the Tawao and Siboekeo Rivers"¹¹⁸, and described the dispute exclusively as a land boundary dispute: i.e. "a border arrangement which she [the Dutch Government] had wished for the whole width of Borneo from the Eastern to the Western Coast"¹¹⁹.

5.87 The Explanatory Memorandum's description of the nature of the dispute does not exclude that offshore islands would also be involved. Clearly, the main practical concerns – and the matter which was primarily in the minds of the members of the Dutch legislature to whom the Memorandum was addressed – were with the land boundary on the mainland of Borneo and navigation rights through the waters around Sebatik, in the very heart of the disputed area of north-eastern Borneo where attention was focussed at the time. But that does not demonstrate that those were the parties' only concerns. As Indonesia has shown¹²⁰, it was also intended to put an end to disputes over the extent of the parties' possessions in the area as a whole. As amply demonstrated already by Indonesia, the continuation of the 4° 10' N line seaward beyond Sebatik was fully consistent with (indeed, was necessary to achieve) that overriding objective, with the parties' understandings during the course of the negotiations as shown by the maps which they were using, with the terms eventually agreed in Article IV of the 1891 Convention, and with the parties' subsequent actions connected with the ratification and implementation of the Convention.

5.88 Malaysia also asserts that no mention is made of Ligitan or Sipadan, or indeed any islands further east than Sebatik¹²¹. This is correct: but it does not establish that those islands were beyond the intended scope of the Convention.

- (a) The fact that there was never any specific mention of Sipadan or Ligitan is not at all surprising in view of their tiny size. The same is true of the other islands in the area, including those to the north (i.e. British) side of the 4° 10' N line, but

¹¹⁸ *Ibid.*, para. 9.10.

¹¹⁹ *Ibid.*, para 9.11(b).

¹²⁰ IM, paras. 5.56, 5.58-5.60; and paras. 5.30(e) and 5.39, above.

¹²¹ MM, para. 9.11(a).

the failure to mention those islands does not call into question their British attribution¹²².

- (b) The small size of these outer islands, taken together with the principal and immediate practical focus of the parties being on the mainland area and on navigation rights around Sebatik, is amply sufficient to explain the lack of any mention of them, especially since the adoption of a line of attribution meant that there was no need to name them individually: for reference to the "not uncommon" practice of drawing lines of attribution of this kind, see para. 5.9, above.
- (c) The Explanatory Memorandum made it clear that the aim of the Dutch Government – which had been achieved in the Convention – was to put an end to Anglo-Dutch disputes in the North Borneo areas. The Memorandum said:

"...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"¹²³.

It was thus clear from the Memorandum itself that "*all* difficulties in the future" had been dealt with and "not only [those] concerning the part of Borneo which was connected with the border dispute", which necessarily means that the question of ownership of *all* possessions in the area had been resolved, even in relation to islands (for to read the reference to the settlement having covered "the whole island" as referring only to the mainland would be to ignore the fact that it demonstrably dealt expressly at least with the island of Sebatik). To read the Memorandum as in some way acknowledging that certain potential disputes had been left open flies in the face of the terms of the Memorandum and the intentions of the two Governments to settle the matter.

¹²² See paras. 5.40-5.41, above.

¹²³ This is the text quoted by Malaysia, MM, at para. 9.11(c) on the basis of – although slightly different from – its translation of the Explanatory Memorandum, MM, Annex 51, Vol. 3, at p. 93. The text of the same passage, as translated by Indonesia is as follows:

".. a very accurately delineated boundary has now been accepted which obviates all difficulties in the future not only concerning the part of Borneo to which the boundary dispute related but also concerning the whole island." (IM, Annex 77, Vol. 3, at p. 126).

5.89 Malaysia draws attention to "the admitted weakness of the Dutch claim to the disputed area" and Dutch uncertainties as to the extent of their territories¹²⁴. However, it must be recalled that there was a dispute between the British and the Dutch, and it is of the very nature of such a circumstance that the legal positions of *both* sides are less than watertight and are imbued with uncertainty. That is precisely why they sought to arrive at a *compromise* solution and negotiate an agreement to settle the matter, and transform past uncertainty into future certainty.

5.90 This is evident from the passages from the Explanatory Memorandum relied on by Malaysia. Those passages make it clear that, as a matter of fact, certain Bajaus collected forest products in the disputed area without regard to the position of the Sultan of Boeloengan, that there was no document stipulating the boundary between the Sultanates of Boeloengan and Sulu, that it was difficult to determine the extent of the area belonging to Boeloengan, and that the Sultan of Boeloengan's rights in the disputed area were not indisputable. All of this is precisely the sort of uncertainty which is an inherent part of a dispute about territorial possessions. None of it suggests that the Sultan of Boeloengan had no rights in the area, or that the Sultan of Sulu did have clear rights there: both evidently had rights and claims – attended by much uncertainty¹²⁵. As the Explanatory Memorandum says (in the second passage quoted by Malaysia), instead of the previous uncertainty "there is now accepted a quite correctly described borderline which makes an end to all difficulties in the future"¹²⁶.

5.91 Moreover, it is to be recalled that even though at the end of the day the Dutch Government was ready to recognise the inherent, objective territorial uncertainty of the situation in the North Borneo area, at the time the Dutch Government nevertheless asserted, and took the appropriate steps to protect, what it conceived of as its territorial rights: any uncertainty was far removed from a renunciation of rights or claims. Thus when in 1878 the Dutch Government heard that concessions awarded to Dent and Overbeck purported to extend to the Sibuko River¹²⁷, it ordered the hoisting of the Dutch flag at Batoe Tinagat to

¹²⁴ MM, para. 9.11(c).

¹²⁵ IM, para. 5.2.

¹²⁶ For Indonesia's translation of this passage, see fn.123, above.

¹²⁷ See IM, para. 3.28.

show that Dutch territories extended as far north as that location¹²⁸. Again when, in 1879, Dent and Overbeck sought the grant of a Royal Charter (eventually granted in 1881¹²⁹) the Dutch Government protested at what they suspected might involve British encroachment upon Dutch territorial rights, but were assured by the British Government that this was a purely private matter and did not involve any political aspirations by the British Government¹³⁰. Similarly, when in September 1883 the first Governor of North Borneo sought to assert territorial rights by hoisting the North Borneo flag on the south bank of the Sibuko River and establishing a marker on an adjacent tree, the Dutch authorities immediately chopped down the marker tree¹³¹. Again, when the British Government established Protectorates over territories in northern Borneo, the Dutch Government was quick to assert its concern at the possible territorial implications¹³². For other similar examples of Dutch assertions of sovereignty in the years before 1891, see above at para. 4.16.

5.92 Malaysia finally notes that the Explanatory Memorandum said nothing about any supposed offshore allocation line, and Malaysia quotes a passage describing what the Dutch wanted (and what was agreed) in relation to Sebatik, namely a partition along the 4° 10' N line. That a passage referring to the settlement reached regarding the island of Sebatik had nothing to say about the settlement reached on matters further to the east should be no cause for surprise, and should lead to the drawing of no adverse conclusions.

5.93 At the present time, when Indonesia and Malaysia are in dispute about these two, small and uninhabited islands, it is perhaps easy to note the absence of any mention of them in the Explanatory Memorandum and at the same time to forget the nature and purpose of that Memorandum. It was prepared in order to explain to members of the Dutch legislature the main purposes and achievements of the Convention, so that they would know what was being proposed for ratification. It was not prepared as a detailed textual analysis of the Convention. Thus it did not mention the possibility of the later demarcation agreements envisaged in Article V, nor the westward extension of the boundary from the central mountain range to Tandjong-Datoe as provided for in Article III, or the exclusion from the "free navigation"

¹²⁸ *Ibid.*, para. 3.38.

¹²⁹ *Ibid.*, para. 3.44.

¹³⁰ *Ibid.*, paras. 3.31-3.32, 3.36-3.37 and 7.7.

¹³¹ *Ibid.*, para. 5.4.

¹³² *Ibid.*, para. 5.11.

provision of Article VI of the transport of raw material. So far as concerns the eastwards extension of the 4° 10' N line beyond Sebatik, the silence of the Memorandum on what was *at that time* (although not now) at best a secondary matter has to be set against the clear indication in the text of Article IV and in the accompanying map that the line did continue eastwards out to sea.

C. The Dutch Act of 20 May 1892

5.94 The language of the Dutch Act by which the 1891 Convention was approved does not (contrary to what Malaysia appears to suggest at para. 9.16 of its Memorial) imply any limitation of the 1891 boundary to the mainland of Borneo. The Act approved the Convention¹³³. It thus gave the Convention being approved its correct formal designation, i.e. the Act simply copied the title of the Convention itself (in Dutch). This title (in English, "Convention between Great Britain and The Netherlands defining Boundaries in Borneo"), whether in the Convention or in the Act approving it, does not limit the scope of the Convention in the way Malaysia suggests since the use of neither the term "Boundaries" nor the term "in Borneo" suffices to exclude the insular possessions of the parties¹³⁴.

D. Modification of the Boundaries of Boeloengan to Conform to the 1891 Convention

5.95 Malaysia suggests that the variation of the definition of the boundaries of Boeloengan necessitated by the 1891 Convention is prejudicial to Netherlands sovereignty over islands within the domain of the Sultan of Boeloengan.¹³⁵ Not only is this not so, but the terms of the variation are precisely to the opposite effect, confirming the position taken by Indonesia.

5.96 The relevant part of the terms of the 1893 variation to the earlier so-called "Contract of Vassalage" reads as follows:

"... 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

¹³³ *Ibid.*, Annex 88, Vol. 3, p. 223.

¹³⁴ See paras. 5.14(b) and (e), above.

¹³⁵ MM, para. 9.17.

Indisch Staatsblad of 1892, No. 114, belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line..."¹³⁶.

This specific reference to islands located south of the 4° 10' N line as belonging to the Sultan of Boeloengan, demonstrates clearly:

- (a) the Dutch Government's (and the Sultan's) contemporary understanding that the 4° 10' N line extended seaward eastwards from Sebatik, and
- (b) the attribution to Boeloengan (and thus to The Netherlands) of all islands lying to the south of that line, and thus including Sipadan and Ligitan which are located south of that line.

As already noted by Indonesia¹³⁷, the terms of the variation of the "Contract of Vassalage" were officially communicated to the British Government, which by its silence on the matter evidenced its acquiescence.

Section 5. The 1915 and 1928 Demarcation Agreements

5.97 Malaysia argues¹³⁸ that "the 1915 Demarcation Agreement ... definitively confirms the conclusion that the 1891 Treaty did not establish any allocation line in the seas to the east of Sebatik"¹³⁹. Indonesia denies that any such conclusion is to be drawn from the adoption of the 1915 Demarcation Agreement.

5.98 Rather, in Indonesia's submission the 1915 Agreement, together with the later 1928 Agreement (which Malaysia fails to mention in this context)¹⁴⁰, were irrelevant to the application of the 1891 Convention to the islands of Sipadan and Ligitan. Article IV

¹³⁶ IM, Annex 91, Vol. 3.

¹³⁷ *Ibid.*, para. 5.62; and para. 5.11, above.

¹³⁸ MM, paras. 9.18-9.20 and 9.22.

¹³⁹ *Ibid.*, para. 9.22.

¹⁴⁰ Except for a passing comment at MM, page 10, fn. 2, that the 1928 agreement amended part of the 1915 agreement in an area which was not relevant to the present case. While the area in question is not relevant to the case, the *fact* that the 1928 agreement, like the 1915 agreement, covered part only of the boundary is relevant as demonstrating the non-comprehensive character of both of them.

prescribed a parallel of latitude as the line separating British and Dutch possessions. Eastwards out to sea from the mainland coastal terminus of that line at Broershoek there was no need for, nor any possibility of, any demarcation of that line – with the sole exception of the island of Sebatik, which was the only island which the agreed line crossed. Beyond Sebatik, the agreed parallel of latitude was itself wholly sufficient as the agreed location of the line and called for nothing more in the way of physical demarcation pursuant to Article V of the 1891 Convention.

5.99 In any event, the 1915 and 1928 Agreements were manifestly only in *partial* implementation of the 1891 Convention. Since therefore they did not purport to deal comprehensively with the boundary between the Dutch and British territories as laid down in the 1891 Convention, the fact that they did not concern areas to the east of Sebatik in no way implies that those areas were excluded from the scope of that Convention.

5.100 It is necessary to look more closely at these Agreements and the background to them.

5.101 Given the state of knowledge at the end of the 19th century, and the difficulties of the terrain on the island of Borneo, the delimitation of the boundary in that region was inevitably complex. Even while the 1891 Convention was being negotiated, arrangements were being made for a survey of the eastern parts of the region in June 1891 by HMS *Egeria*, HMS *Rattler* and the Dutch naval vessel *Banda*¹⁴¹.

5.102 It is relevant that the original proposal which led to the 1891 Convention was based on agreement that, if the coastal boundary point could be agreed, then the two Governments would:

"proceed without delay to define, short of making an actual survey, and marking the boundary on the spot, the inland boundary-lines ...¹⁴²".

¹⁴¹ See IM, paras. 5.34-5.39.

¹⁴² *Ibid.*, para. 5.18.

Thus the parties understood that, unencumbered by any real knowledge of the terrain to which their delimitation was to apply, the delimitation would essentially lay down principles to be followed.

5.103 In the Convention itself, the parties accordingly recognised from the outset that the boundary described in the Convention would need further elaboration in detail. They made provision accordingly. The starting point for the boundary having been established by Article I of the 1891 Convention on the east coast of Borneo, Articles II and III delimited that boundary line in a westwards direction, and Article IV delimited it eastwards. Article V then provided:

"The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit".

Two later agreements – of 1915 and 1928 – were concluded pursuant to this provision, in relation to parts of the 1891 Anglo-Dutch boundary line.

A. Agreement of 28 September 1915

5.104 On 19 November 1910 the Dutch Chargé d'Affaires left with the Foreign Office an aide mémoire¹⁴³ explaining that the Netherlands Minister for the Colonies thought it advisable to proceed as soon as possible to the indication on the ground of the frontier, as fixed in the 1891 Convention. All that had been done so far, he said, was the placing of beacons by an Anglo-Dutch Commission on the points where the parallel of 4° 10' N crossed the east coast of Borneo near Broershoek and where it crossed the west and east coasts of the island of Sebatik, and the replacing of those beacons by granite poles¹⁴⁴. "Both Governments consider these poles as fixing the exact position of the line of the frontier at the coast, as meant in Article V of the Treaty." But, he continued, uncertainty remained as to the actual course of the line of the frontier described in Article II, giving rise to various practical problems along the course of the mainland frontier between Dutch possessions and British

¹⁴³ Annex 24.

¹⁴⁴ IM, paras. 5.34-5.40.

North Borneo. He therefore thought that the time had come to open the negotiations with the British Government mentioned in the 1891 Convention, concerning the indication of the frontier between British North Borneo and the Netherlands territory, and suggested that a mixed Commission be appointed "to indicate the frontier on the ground, to describe it and to prepare a map of same".

5.105 In April and May 1912 the Dutch and British authorities appointed Commissioners to delimit on the spot the boundary between The Netherlands' possessions in Borneo and British North Borneo. The Boundary Commissioners – Messrs. Schepers and Vreede for The Netherlands, and Bunbury and Keddell for Great Britain – carried out their work "in the neighbourhood of the frontier" from 8 June 1912 to 30 January 1913. They prepared and jointly signed their Report (in English only) at Tawau, British North Borneo, on 17 February 1913¹⁴⁵.

5.106 So far as concerns that part of the boundary now in question, paragraph 3 of the Boundary Commissioners' Report stated that they had:

"determined the boundary between the Netherland territory and the State of British North Borneo, as described in the Boundary Treaty supplemented by the interpretation of Article 2 of the treaty mutually accepted by the Netherland and British Governments in 1905 as taking the following course:

(1.) 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 pillars¹⁴⁶.

(2.) Starting from the boundary pillar on the west coast of the island of Sibetik, the boundary follows the parallel of 4° 10' north latitude westward until it reaches the middle of the channel, thence keeping a mid-channel course until it reaches the middle of the mouth of Troesan Tamboe.

(3.)"

¹⁴⁵

Annex 25.

¹⁴⁶

These pillars had been placed previously (during the survey visit by HMS *Egeria* and *Rattler* and the Dutch vessel *Banda* in 1891 (IM, para. 5.37) and in 1901 by HMS *Waterwitch* and the Dutch naval vessel *Makasser* (IM, para. 5.40), and not by the 1912/1913 Boundary Commission; see paragraph 2 of the Commission's Report.

5.107 Thus the Boundary Commissioners (a) began their work on the east coast of the island Sebatik; (b) next went westwards across to the west coast of the island; (c) then to the mid-channel of the waters lying to the west of the island; (d) then along that mid-channel to the mouth of the River Tamboe; and (e) thereafter by the route described into the island of Borneo. The line joining points (a), (b) and (c) was simply described as "follow[ing] the parallel of 4° 10' north latitude".

5.108 The Boundary Commissioners' Report, although clearly prepared in the context of the 1891 Convention, did not expressly say that their work had been undertaken in the context of Article V of the Convention. The Report was submitted to the two Governments. On 28 September 1915 they signed an "Agreement between the United Kingdom and The Netherlands relating to the Boundary between the State of North Borneo and the Netherland Possessions in Borneo"¹⁴⁷. In that Agreement they recorded that they:

"agreed in a spirit of mutual goodwill to confirm the joint Report with the accompanying map prepared by their respective Commissioners in accordance with Article 5 of the Convention signed at London on the 20th June, 1891, and relating to the boundary between the State of North Borneo and the Netherland possessions in the island".

The two Governments "hereby confirm[ed] the aforesaid joint Report and map, as signed by their Commissioners at Tawau on the 17th February, 1913", the text of which was set out in the body of the Agreement.

5.109 That Agreement, and the Boundary Commissioners' Report and map incorporated into it, by their terms related only to part of the boundary between the Dutch and British territories in Borneo – namely, the island of Sebatik and a particular area of the eastern part of the mainland of Kalimantan on the island of Borneo. The reason for dealing with Sebatik in this way was simply that the island was shared – no such reason was relevant for any other islands. The sector of the boundary dealt with is indicated by the blue line on the sketch map at Annex 26. So far as their work on the island of Sebatik was concerned, the Boundary Commissioners of 1912-1913 made no new contribution of substance, doing no more than acknowledge the pre-existing boundary markers and repeat the 4° 10' N boundary line; their

¹⁴⁷ IM, Annex 118, Vol. 3.

substantive work thus only concerned parts of the mainland boundary, in respect of which they confirmed that they had agreed on the survey and the establishment of boundary markers in some parts of the mainland of Kalimantan, based on the general mapping indications given in the 1891 Convention.

5.110 Nothing in Article V of the 1891 Convention precluded partial specification of the boundary. On the contrary, it stipulated that the exact positions of the boundary line as described in the Convention was to be "determined hereafter by mutual agreement, at such times as the Netherland and British Government may think fit": the use of the plural "such times" shows that action could be taken under the Article at different times, in relation to different parts of the boundary. It was left to the discretion of the two Governments to decide when and how to implement Article V: "at such times as [they] may think fit".

5.111 Accordingly, the fact that the 1915 Agreement, and the 1913 Report incorporated into it, said nothing about the boundary eastwards from the island of Sebatik, i.e. out to sea in the direction of, and to the north of, Sipadan and Ligitan, carries with it no implication that the 1891 Agreement did not make provision for the eastward course of the boundary out to sea.

5.112 Moreover, the nature of the 1891 and 1915 agreements called for no further action to the eastward of Sebatik by which the "exact positions of the boundary-line ... shall be determined". Eastward from the island of Sebatik the line was simply to follow the parallel of 4° 10' N latitude; since there were no islands to the east which that parallel would cross, there was no need for any further specification of the line, and the stipulation that it followed a particular parallel of latitude (4° 10' N) removed any further need for more precise delimitation or for demarcation. This is consistent with the Dutch Chargé d'Affaires' initial suggestion in 1910 for a demarcation of the boundary, when he referred to the then-existing uncertainties as having given rise to various practical problems¹⁴⁸: no such "practical problems" would arise in applying a straight parallel of latitude at sea.

¹⁴⁸ See para. 5.104, above.

5.113 Nor, given the maritime nature of the area, was there any practical opportunity for erecting boundary pillars at appropriate places. To the west of Sebatik, however, in Dutch and British internal waters, there was a practical need to specify exactly the position of the boundary, and this was accordingly done by reference to the mid-channel of the river waters in that area.

B. Convention of 26 March 1928

5.114 The parties acknowledged that partial, and successive, detailed delimitations of the boundary set out in the 1891 Convention were permitted by concluding, on 26 March 1928, a further "Convention between His Majesty in respect of the United Kingdom and Her Majesty the Queen of the Netherlands respecting the Delimitation of the Frontier between the States in Borneo under British Protection and Netherlands Territory in that Island"¹⁴⁹. The Convention was subject to ratification: ratifications were exchanged at The Hague on 6 August 1930.

5.115 In the Convention the parties recorded that they were "desirous of further delimiting part of the frontier established in Article III of the Convention signed at London on the 20th June, 1891", and went on to agree that the boundary as defined in Article III of the Convention was to be further delimited between the summits of the Gunong Api and of the Gunong Raya. The sector of the boundary dealt with by the 1928 Convention concerned only part of the boundary between Sarawak and Dutch Borneo, and is indicated by the red line on the sketch map at Annex 26.

5.116 Again, it is apparent that the 1928 Convention was another partial delimitation of the frontier established by the 1891 Convention. This is clear both from the substance of the Convention, but also from its terms which refer to the wish of the parties further to delimit "*part of the frontier established in article III of the [1891] Convention*". Like the 1915 Agreement, it in effect supplemented the 1891 Convention by giving greater precision to the delimitation of part of the boundary expressed in it: in the officially published *Index of British Treaties 1101-1968*¹⁵⁰ it is listed as having "supplemented" the 1891 Convention.

¹⁴⁹ IM, Annex 125, Vol. 4.

¹⁵⁰ Annex 27.

5.117 Thus, as is evident from the sketch map at Annex 26, the 1915 and 1928 agreements together delimit only part of the boundary established by the 1891 Convention. They do not even demarcate the whole of the land boundary on the mainland of Borneo, to the west of Broershoek. That fact does not in any way call into question the validity or effectiveness of the mainland land boundary in those undemarcated stretches; similarly the fact that the two Agreements do not in terms deal with the disposition of sovereignty to the east of Sebatik is no argument for denying the validity or effectiveness of the 1891 Convention in respect of those eastern areas - maritime areas in which no further demarcation was necessary or possible beyond the straightforward stipulation in the 1891 Convention that the relevant line followed a specified parallel of latitude, namely 4° 10' N.

5.118 The territorial dispositions in the areas not covered by the 1915 and 1928 Agreements remain as determined by the 1891 Convention. In the area relevant to the present proceedings, that boundary remains effectively along the parallel of 4° 10' N latitude, eastward from the island of Sebatik, and therefore running to the north of the islands of Sipadan and Ligitan.

CHAPTER VI

THE ABSENCE OF TITLE OVER THE ISLANDS VESTING IN SPAIN AND THE UNITED STATES

Section 1. Introduction

6.1 Indonesia has shown in Chapter III that there is no evidence that the Sultan of Sulu ever possessed an original title to Ligitan or Sipadan which it could have passed on to either the BNBC or to Spain. Following from this, Indonesia has also shown in Chapter IV that Malaysia's first chain of title, according to which sovereignty over the islands of Ligitan and Sipadan was acquired by the BNBC under the 1878 grant to Dent and Overbeck, cannot be sustained.

6.2 In this Chapter, Indonesia will demonstrate that Malaysia's alternative chain of title – that the islands were passed from the Sultan of Sulu to Spain, thence to the United States and finally to Great Britain in 1930 – fares no better. Once again, none of the relevant instruments even remotely suggests that the islands formed part of the Sultan's dominions or those of Spain. Since Spain never possessed sovereignty over the islands, it had no title which it could have relinquished to Britain under the 1885 Protocol¹ or subsequently have passed on to the United States under the 1898 and 1900 treaties. The United States, in turn, had no title over the islands that could have been transferred to Great Britain under the 1930 Anglo-U.S. Convention.

Section 2. The Absence of Spanish Title over the Disputed Islands

6.3 Any Spanish title over the islands of Ligitan and Sipadan would necessarily have derived from a previous title vested in the Sultan of Sulu. Malaysia argues that Spain allegedly acquired title from the Sultan by virtue of the Capitulations of Protection and Commerce of 23 September 1836, the Convention of 19 April 1851 and the Protocol

¹ See, paras. 4.24-4.26.

confirming the Bases of Peace and Capitulation of 22 July 1878². Under this thesis, Malaysia contends that the 1891 Convention "could not have had any consequence for islands which at that time belonged to Spain"³.

6.4 With respect to the 1836 Capitulations, this document contained a description of sufficient clarity to show that the islands of Ligitan and Sipadan could not have been included in the territories which were deemed to have been ceded to Spain by the Sultan. The Capitulations described the area of Spanish rights as extending:

".... from the western extremity of Mindanao to Borney and La Paragua [Palawan], with the exception of Sandacan and the other territories tributary to the Sultan on the mainland of Borney"⁴.

6.5 A glance at Map 6.1 (a reproduction of Map 7.2 facing page 140 of Indonesia's Memorial) reproduced opposite page 112 shows that this definition could not have included the islands of Ligitan and Sipadan which lie well to the south and west of the places mentioned in the Capitulations. Indeed, the definition included in the Capitulations referred to the Sulu Archipelago proper, which – according to an entry in the Spanish *Enciclopedia Universal Ilustrada Espasa* published in 1927 – was situated between the island of Mindanao and North Borneo, approximately between the latitudes of 4° 40' N and 8° N⁵. The islands of Ligitan and Sipadan fell well to the south of this area and thus could not have been considered to form part of the territories ceded by the Sultan of Sulu to Spain. Moreover, as explained in Chapter III, there is absolutely no evidence that the Sultan ever held sway over either Ligitan or Sipadan. Consequently, the alleged basis on which Spain's title is said to have vested is defective at the outset.

6.6 Moreover, neither the 1851 Convention nor the 1878 Protocol support Malaysia's contention that Ligitan and Sipadan were part of the territories which Spain acquired from the Sultan of Sulu. The 1851 Convention provided for the incorporation of "the Island of Sooloo with all its dependencies" with the Crown of Spain (Article I), and referred to "the territory of Sooloo and its dependencies, as a part of the Archipelago belonging to the Spanish

² A copy of these documents may be found at IM, Annex 9, Vol. 2 and MM, Annexes 4 and 12, Vol. 2.

³ MM, para. 8.22.

⁴ IM, Annex 9, Vol. 2.

⁵ *Ibid.*, para. 7.24 and Annex 124, Vol. 4.

Government"(Article II), to the "Island of Sooloo and all its dependencies, being incorporated with the Crown of Spain" (Article III), and to "The Island of Sooloo, and its dependencies, being declared an integral part of the Philippine Archipelago which belongs to Spain" (Article VI).

6.7 By the 1878 Protocol, Sulu "declare[d] as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof" (Article I). Both these treaties dealt with Sulu (either the island or the archipelago of that name) and its dependencies. Such language does not establish that the particular islands of Sipadan and Ligitan were included within the Sulu territories which were placed under Spanish sovereignty; nor has Malaysia produced any evidence leading to that conclusion. Mere assertion is not evidence.

6.8 As discussed in Chapter IV, in 1885 a Protocol was concluded between Great Britain, Spain and Germany. For present purposes, the relevant articles of the Protocol are Articles I and II which read as follows:

" I. The Governments of Great Britain and Germany recognize the sovereignty of Spain over the places effectively occupied as well as over those places not yet so occupied, of the archipelago of Sulu (Jolo'), whereof the boundaries are determined in Article II.

II. The Archipelago of Sulu (Joló), conformably to the definition contained in Article 1 of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló) *comprises 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 exception of those which are indicated in Article III.* It is understood (entendu) that the island of Balabac and of Cagayan-Joló form part of the Archipelago"⁶.

6.9 As can be seen from Map 6.1, this definition clearly concerned, and mentioned specifically, islands which were located well to the north and east of Ligitan and Sipadan. Quite evidently, Spain did not consider that either of the disputed islands formed part of its domains.

⁶ Emphasis added. This translation of the Protocol was prepared by the British Foreign Office. It is contained in IM, Annex 33, Vol. 2.

6.10 At several junctures, Malaysia's Memorial itself confirms that Spain showed no interest over the islands⁷. For example, Malaysia claims that Spain was quite indifferent to alleged (but not demonstrated) British activities on Ligitan and Sipadan⁸. Elsewhere, Malaysia asserts that, with respect to the question of which islands appertained to British North Borneo after 1878, Spain was not interested⁹. And Malaysia even goes so far as to quote from a 1903 report by a local official in North Borneo which stated with respect to the islands that "the Spanish have never claimed or exercised any sovereign rights over them as far as I know"¹⁰.

6.11 Spanish indifference to the islands of Ligitan and Sipadan can be readily explained. Spain was under no illusion that it possessed sovereignty over either island – hence Spain's lack of interest in the 1891 Convention which settled the territorial status of Ligitan and Sipadan once and for all between The Netherlands and Great Britain.

6.12 If any further confirmation of the lack of Spanish title over the disputed islands is necessary, it is provided by examining the territories that Spain ceded to the United States following the Spanish-American War. As the next section will show, neither island fell within the scope of the territories which Spain relinquished to the United States pursuant to the 1898 and 1900 treaties.

6.13 In Indonesia's submission, the only possible conclusion is that Spain's claims – and presumed rights to islands off the coast of North Borneo – only concerned the Philippine Archipelago, while the islands of Ligitan and Sipadan were never part of the Spanish – or Sulu – possessions; nor had they ever been so claimed. This is not surprising since the disputed islands fell under Dutch sovereignty. Naturally, The Netherlands had not been a party to the various treaties regulating Spanish and British possessions in the area because its rights and interests were not concerned.

⁷ MM, paras. 5.19, 5.20(c), 5.21 and 5.30.

⁸ *Ibid.*, para. 5.19.

⁹ *Ibid.*, para. 5.20(c).

¹⁰ *Ibid.*, para. 5.30.

Section 3. The Absence of U.S. Title Following the 1898 and 1900 Treaties

6.14 Malaysia's argument continues with a section entitled "The Recognition by the United States (as Successor to Spain) of British Rights to North Borneo, including the Disputed Islands"¹¹. In this section, Malaysia abandons its argument that title over Ligitan and Sipadan was transferred by the Sultan of Sulu to the BNBC and Great Britain in favour of the thesis that title remained with Spain up to the 1898 and 1900 treaties at which time it was passed to the United States. Malaysia tries to by-pass the inconsistencies of its legal arguments by asserting that "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"¹². Quite apart from the fact that there was no British administration over the disputed islands at the time, this last statement seems to indicate that Spain, which was the legitimate sovereign over the territory according to Malaysia's alternative thesis, accepted – for unspecified reasons – that another government carry out the administration of that territory.

A. The 1898 and 1900 Treaties Did Not Include Ligitan and Sipadan

6.15 The fact that, according to Malaysia, Spain retained title over the disputed islands is the necessary link to include the U.S. Government within Malaysia's alternative chain of title. Indonesia does not dispute that Spain ceded the Philippine Archipelago to the United States through the Peace Treaty of 10 December 1898, and that on 7 November 1900 the parties signed a further treaty for the cession of the islands lying outside the boundary line set forth in Article III of the 1898 Treaty. However, there is no evidence that the Philippine Archipelago, as defined in these treaties, extended as far south so as to include the islands of Ligitan and Sipadan.

6.16 Malaysia admits that the 1898 Treaty did not include the disputed islands. However, it alleges that "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

¹¹ *Ibid.*, paras. 5.21-5.44.

¹² *Ibid.*, para. 5.21.

the 1898 Treaty"¹³. Quite remarkably, Malaysia does not produce any evidence to substantiate this ambitious assertion.

6.17 As will be recalled, the 1900 Treaty contained only one provision, which read as follows:

"SOLE ARTICLE

Spain relinquishes 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 Sibutú and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines"¹⁴.

6.18 The language of this provision is unambiguous: the 1900 Treaty only referred to islands forming part of the Philippine Archipelago lying outside of the line agreed to in the 1898 Treaty. In particular, the 1900 Treaty provided that the islands of Cagayan Sulu, Sibutu and their dependencies were amongst the territories ceded by Spain to the United States. According to the plain and ordinary meaning of this provision, Ligitan and Sipadan were patently not considered part of the Philippine Archipelago; nor could they be viewed, given their position, as "dependencies" of Cagayan Sulu and Sibutu which lay far to the north.

6.19 Consequently, the official position of the Dutch Ministry of Foreign Affairs, recorded in correspondence exchanged with the Dutch envoy in Spain, was that the 1900 Treaty did not concern the Netherlands East Indies' possessions, since the islands of Cagayan Sulu and Sibutu were not located in proximity of the Dutch territories, but were situated "between BRITISH NORTH BORNEO and the PHILIPPINES"¹⁵.

6.20 A mere glance at Insert 9 on page 44 of Malaysia's Memorial or at the map reproduced opposite as Map 6.1, shows how far away Ligitan and Sipadan lay from the islands of Cagayan Sulu and Sibutu; certainly too far to be conceivably referred to as being related to them in any way. Moreover, the fact that prior to the 1898 and 1900 treaties Spain had never

¹³ *Ibid.*, para. 5.25.

¹⁴ IM, Annex 94, Vol. 3.

¹⁵ See letter from Van Weede to the Dutch Minister of Foreign Affairs of 3 March 1900, at Annex 28 and letter from the Dutch Minister of Foreign Affairs to the Dutch envoy in Madrid, 19 April 1900, at Annex 29, Vol. 2.

indicated any interest over either Ligitan or Sipadan provides further evidence that these islands were not within the Spanish territories transferred to the United States.

6.21 As will be seen in the following sections, this conclusion is supported by subsequent events. Although the documentary evidence shows that U.S. officials were uncertain as to the precise extent of the U.S. possessions in the area, and that therefore different positions were tentatively advanced at different times, these were subsequently amended or withdrawn, and finally resolved with the 1930 Convention between the United States and Great Britain by fixing the southern limits of the U.S. possessions along the 4° 23' N parallel of latitude, i.e. well to the north of the 4° 10' N line of latitude established by the 1891 Convention.

B. U.S. Activities in the Relevant Area

6.22 In 1903, the U.S. authorities sent one of their vessels to the area to monitor the situation. The voyage of the U.S.S. *Quiros* in 1903 and its related correspondence show that the U.S. Government was unclear as to the extent of the U.S. possessions in the Sulu Archipelago and that, contrary to Malaysia's assertions, any U.S. claims over islands lying off the north-eastern coast of Borneo were subsequently retracted by the United States itself¹⁶. With respect to the disputed islands, it will be recalled that, although a log book dated 24 June 1903 shows that the island of Sipadan had been visited by the *Quiros*, the documentary evidence produced by Malaysia confirms that there is no record that the vessel ever stopped on the island of Ligitan.

6.23 Whatever the U.S. position in the summer of 1903, in October of the same year the U.S. Navy Department recommended that the boundary line shown on certain U.S. charts be omitted. Interestingly enough, this recommendation concerned in particular the chart of the "Northern Shore of Sibuko Bay" issued by the U.S. Hydrographic Office in June 1903 – i.e. after the voyage of the *Quiros* – an extract of which has been reproduced by Malaysia as Insert 10 at page 46 of its Memorial and to which Malaysia attaches considerable importance. In fact, this map was one of a number of maps which was withdrawn from distribution pending

¹⁶ IM, paras. 7.41-7.51.

final resolution of the boundary situation following the instructions of the U.S. Navy¹⁷. It follows that no evidentiary value can be attached to it.

6.24 As already noted in Indonesia's Memorial, the correspondence between the U.S. State Department and the U.S. Secretary of War following the voyage of the U.S.S. *Quiros* shows that the U.S. Government had serious doubts as to the soundness of lines drawn *ex parte*¹⁸. In particular, the U.S. Acting Secretary of War, John Hay, in a letter which appears to refer precisely to the chart issued by the U.S. Hydrographic Office which is reproduced in Malaysia's Memorial, noted as follows:

"Any line drawn by either part in interest for itself alone would necessarily be tentative unless assented to by the other party".

6.25 The letter continued:

"Under these circumstances this department is unable to either confirm or alter the line drawn *ex parte* upon the chart you have received from the Hydrographic Office of the Navy Department. It may be remarked, however:-

"1. The prolongation of the red tracing from the east-ward of Sibutu to and around Sipadan Island and thence north-wardly to Darval Bay would probably require to be supported by evidence that Sipadan and the included keys and rocks had been recognised as lying within the dominions of Sulu described in the conventions between Spain on the one hand and Great Britain and Germany on the other. *This is a question of fact which the department of state has no means of determining and considering which an opinion would be mainly ex parte.* The treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as exceptional and as a limit to the claims of Spanish dominion to the south-west of the Sulu group"¹⁹.

6.26 It is thus clear that the 1903 Hydrographic Office Chart, far from being a "public assertion" of U.S. sovereignty, as suggested by Malaysia, was a tentative internal position which was subsequently withdrawn after more careful consideration. As such, it cannot be seen as an official document which called for protest or any other reaction by The

¹⁷ The back of the map carries a number of stamps including "15826/5 NAVY DEPT SECRETARY'S OFFICE Rec'd JUL 30 1903". This stamp number is referred to in a letter from the President of the General Board to the Secretary of the Navy dated 25 November 1903 to identify one of the charts where the boundary line should be omitted pending final agreement with Great Britain. The letter and the relevant section of the back of the map are attached as Annex 30, Vol. 2.

¹⁸ IM, para. 7.41.

¹⁹ IM, Annex 104, Vol. 3. Emphasis added.

Netherlands, particularly in light of the fact that this chart was withdrawn shortly after its publication. At most, the line defined on the chart proves only that the U.S. authorities were confused as to the limits of the former Sulu possessions. It is also worth recalling, as noted in *Indonesia's Memorial*, that according to U.S. sources, the uncertainty over the official position to be taken by the U.S. Government regarding the boundary continued at least until October 1906. In the meantime, the Secretary of War ordered that all official maps of the area contain a reference to the 1885 Protocol, the 1898 Peace Treaty and the 1900 Treaty²⁰.

6.27 The 1907 U.S.-British exchange of notes deserves a separate mention. As explained in *Indonesia's Memorial*, this exchange consisted of a temporary arrangement whereby the United States waived in favour of the BNBC the administration of certain islands located "to the westward and southwestward of the line traced on the map which accompanied Sir H. M. Durand's memorandum of the 23rd of June, 1906"²¹. Any such waiver, however, was without prejudice to the issue of sovereignty.

6.28 The islands of Ligitan and Sipadan could not have been covered by the 1907 exchange of notes, nor, for that matter, by any other previous arrangement or instrument, for the simple reason that they formed part of the territorial possessions attributed to The Netherlands by virtue of the 1891 Convention. After that date, the islands and land territory lying south of the 4°10' N latitude were under Dutch sovereignty. Again, no protest from the Dutch Government was called for since its sovereign rights were not involved²².

6.29 As for the map attached to the 1907 Exchange of Notes, it was also not opposable to The Netherlands since the Dutch Government was never aware of it and the map, in any event, did not purport to deal with territorial limits or sovereignty.

²⁰ *Ibid.*, Annex 111, Vol. 3.

²¹ *Ibid.*, Annex 113, Vol. 3.

²² It should be noted, incidentally, that, contrary to what is stated in para. 5.41 of *Malaysia's Memorial*, the 1907 exchange of notes was not published "at the time" by the United States and Britain. As stated in *MM*, para. 5.41, fn. 42, the exchange of notes was not published by the United States until 1910. As to Great Britain, Vol. 102 of the *British and Foreign State Papers* referred to at *MM*, para. 5.41, fn 43, was not published until 1913, i.e. 6 years after the exchange of notes.

C. The 1930 Convention Confirmed that the Islands Did Not Belong to the United States

6.30 As pointed out in Indonesia's Memorial, whatever uncertainty might have existed with regard to the respective U.S. and British possessions in the area, the Convention of 2 January 1930 between Great Britain and the United States, and the resulting boundary line, resolved the situation once and for all.

6.31 The 1930 Convention confirmed that the islands forming the subject matter of the present dispute did not belong to the United States. As can be seen from Map 6.2 on the opposite page (a reproduction of Map 7.3 of Indonesia's Memorial), the line resulting from the 1930 Convention allocated to the United States, as part of the former Spanish possessions, islands lying well to the north and east of Ligitan and Sipadan. It is therefore obvious that the disputed islands were not attributed to the United States as a result of this Convention.

6.32 Malaysia alleges, however, that, pursuant to the 1930 Convention, the United States relinquished sovereignty over islands lying south and west of the delimitation line in favour of the State of North Borneo. The implication is that Ligitan and Sipadan are included in these islands so relinquished. Malaysia also attaches significance to the fact that the Convention provoked no reaction from The Netherlands.

6.33 Article I of the Convention described the boundary line separating the islands belonging to the United States to the islands belonging to British North Borneo. Article III provided as follows:

"All islands to the north and east of the said line and all islands and rocks traversed by the said line, should there be any such, shall belong to the Philippine Archipelago, and all islands to the south and west of the said line shall belong to the State of North Borneo"²³.

6.34 While it is true that this provision stated that all islands situated south and west of the line defined in Article I belonged to the State of North Borneo, this language cannot be interpreted in isolation since it contained no geographical limits to Britain's possessions.

²³ IM, Annex 124, Vol. 4.

Under Malaysia's reading of the Convention, any islands – whether undisputedly Dutch or not – lying to the south and west of the Convention line belonged to Great Britain. The fact of the matter is that Article III of the 1930 Convention must be interpreted within the context of the other international instruments that had been concluded by the concerned parties in the area, in particular the 1891 Convention between Great Britain and The Netherlands.

6.35 The provisions of the 1930 Convention were without prejudice to the position of The Netherlands as to which the Convention was *res inter alia acta*. The Convention could not have disposed of islands which already belonged to another State – i.e. The Netherlands – by virtue of a previous convention entered into by Great Britain. As the disputed islands had been allocated to The Netherlands as a result of the 1891 Convention, which fixed the limits of the respective British and Dutch possessions along the 4° 10' N latitude east of the island of Sebatik, neither the United States nor Great Britain had sovereignty over Ligitan and Sipadan.

6.36 In summing up the situation, it is appropriate to recall the words of Judge Huber in the *Island of Palmas* case. In disposing of the argument that the United States had title to the island in question under the Treaty of Paris of 1898, Judge Huber stated: "It is evident that Spain could not transfer more rights than she herself possessed"²⁴ (*nemo dat quod non habet*). The disputed islands of Ligitan and Sipadan could not have been transferred by Spain to the United States because Spain had no title over them. By the same reasoning, they could not have been transferred by the United States to Great Britain in 1930.

Section 4. Conclusions as to Malaysia's Arguments Based on Conventional Title Over the Disputed Islands

6.37 In light of the foregoing analysis, Malaysia's arguments that title over the islands of Ligitan and Sipadan was acquired through a series of treaties and other conventional instruments – whether based on a chain of title passing through the BNBC and Great Britain or on a chain of title passing through Spain, the United States and Great Britain – must be rejected for the following reasons:

²⁴ RIAA, p. 829, at p. 842.

- (a) The 22 January 1878 grant by the Sultan of Sulu to Messrs. Dent and Overbeck was restricted to islands lying within nine nautical miles from the coast of North Borneo and thus did not concern the disputed islands which lie beyond this distance from the coast;
- (b) The Royal Charter granted to the BNBC in November 1881 and the 12 May 1888 agreement instituting the State of North Borneo simply confirmed the geographic scope of the 1878 grant of the Sultan of Sulu and thus did not include the disputed islands;
- (c) Article III of the Protocol signed in March 1885 by Great Britain, Germany and Spain concerned the islands of the Sulu Archipelago and other islands belonging to the Sultan of Sulu, including those which lay within nine nautical miles from the coast of North Borneo. The disputed islands fall more than nine nautical miles from the coast and the definition of the Sulu Archipelago in Article II of the Protocol confirmed the fact that the Sulu Archipelago did not comprise either Ligitan or Sipadan;
- (d) At no time did Spain ever claim the disputed islands or exhibit any interest in them;
- (e) The Treaty between the United States and Spain of 7 November 1900 concerned the islands of Cagayan Sulu and Sibutu and their dependencies and therefore could not have included the disputed islands which were geographically remote from the areas covered in the Treaty;
- (f) The statement by the Sultan of Sulu of 22 April 1903, notwithstanding the doubts concerning its legal validity, did not identify the disputed islands as part of the Sulu possessions which were deemed to be part of the 1878 grant by the Sultan of Sulu and cannot be construed in the sense of including the islands within those possessions. All of the islands named in the Sultan's Confirmation as forming part of the original grant to Dent and Overbeck lay to the north of the 4° 10' N line of latitude agreed in the 1891 Convention. This

position was confirmed in the 1903 Stanford map which depicted the eastern limits of the BNBC as tracking the seaward prolongation of the 4° 10' N line of latitude as provided for in the 1891 Convention;

- (g) The 1907 exchange of notes between the United States and Great Britain focused on claims to former Spanish possessions in the Sulu Archipelago situated further north than the disputed islands and thus bore no relation to them. In any event, these exchanges were *res inter alios acta* as far as The Netherlands was concerned;

- (h) The Convention of 2 January 1930 between the United States and the United Kingdom confirmed that the disputed islands were not part of U.S. territorial possessions. Furthermore, the disputed islands could not have been allocated to Great Britain as a result of the 1930 Convention because they already belonged to The Netherlands by virtue of the 1891 Convention.

CHAPTER VII

MALAYSIA'S ASSERTIONS OF POSSESSION AND ADMINISTRATION OF THE ISLANDS POST-1891 DO NOT CONFIRM ANY MALAYSIAN TITLE

7.1 In Chapter 6 of its Memorial, Malaysia bases its claim on "the continuous peaceful possession and administration of the islands by Malaysia and its predecessors in title" in an attempt to support the second "strand" of its argument¹, according to which, even if the Sultan of Sulu did not have original title over Ligitan and Sipadan, this continuous possession would have sufficed to confer territorial title over the disputed islands to Malaysia.

7.2 Just as Malaysia errs in its interpretation of the 1891 Convention, so does it misinterpret the legal role of *effectivités* in relation to the question of title (Section 1). It fails to establish its sovereignty through acts of effective administration by it or by its predecessors (Section 2), while unjustifiably downplaying the scope of Dutch and Indonesian activities relating to the islands (Section 3) and neglects the significance of the 1969 negotiations and the diplomatic history of the case (Section 4). Finally, Malaysia's Memorial misrepresents the import of the map evidence in the case. Indonesia will thus show that the map evidence constitutes an element of the conduct of the Parties and their predecessors which must be taken into consideration and which fully confirms Indonesia's title over the islands (Section 5).

Section 1. The Legal Role of *Effectivités* in the Case

7.3 As has been noted², the Parties agree that the disputed islands have never been considered *terrae nullius*, at least during the relevant period for the purposes of this dispute³. Nonetheless, Malaysia dismisses out of hand any possibility that the notion of prescriptive acquisition applies to the islands:

¹ See para. 5.1.

² See paras. 2.14 and 3.2, above.

³ See IM, para. 4.1 and MM, paras. 3.1 and 5.8.

"This approach, founded upon long, peaceful and undisputed administration, is not, it must be emphasised, one involving the assertion by Malaysia of a prescriptive title against Indonesia. [...] Indonesia and the Netherlands never had title to the islands; so there is no question of their having been deprived of it by prescription"⁴.

7.4 The entire reasoning behind Malaysia's argument is based on a fundamentally flawed premise: that Indonesia lacks territorial title to the islands in question. On the one hand, as Indonesia recalled in Section 1 of Chapter III, there is every reason to believe that prior to colonisation by The Netherlands, the Sultan of Boeloengan held territorial title over Ligitan and Sipadan – a conclusion which is confirmed by the solemn declaration made by the present pretender to the Sultanate of Sulu⁵. Moreover, to the extent that there was any ambiguity as to the extent of the Sultan's possessions, the Anglo-Dutch Convention of 1891 settled the question.

7.5 In the light of this, the administrative acts, of which Malaysia boasts, must have been of such a nature so as to *displace* an existing title and not merely to *confirm* it. Indonesia reserves its position on the question of whether a transfer of sovereignty may result from a long period of undisputed occupation, be that through acquisitive prescription – a concept which is doubtful under international law⁶ – or by any other means, without the consent of the dispossessed State. In any event, further discussion on this point is of little relevance given that Malaysia specifically dismisses this line of argument and that the acts on which it relies are insufficient to establish its sovereignty over Ligitan and Sipadan, even if the situation were *res nullius*, which it is not.

⁴ MM, para. 6.3.

⁵ Annex 3.

⁶ In case of any doubts on this point, see, in particular, Judge Moreno Quintana's dissenting opinion in the case concerning *Rights of Passage over Indian Territory*, which considers that "prescription, a private law institution [...] finds no place in international law", *Rights of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6 at p. 88. See also the cautious approach followed by the Court in its Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana / Namibia), Judgment, I.C.J.*, para. 97 and the careful consideration of the issue in Sir Robert Jennings and Sir Arthur Watts eds., *Oppenheim's International Law*, 9th ed., London, Longman, 1992, Vol. I, pp. 705-708; See also Brownlie, I., *Principles of Public International Law*, 5th ed., Oxford University Press, 1998, p. 156, and the very comprehensive presentation of the whole problem in Kohen, M. G., *Possession incontestée et souveraineté territoriale*, PUF, Paris, 1997, pp. 17-34, 49-56 and 60-71.

7.6 In the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court found that once it had established that the 1955 Treaty between Chad and Libya provided it with an answer to the issue before it:

"the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, [were] ... not matters for determination in this case"⁷.

The same solution must prevail in the present case because of the existence of the 1891 Convention. Despite the importance given by Malaysia to the alleged "continuous peaceful possession and administration of the islands by Malaysia and its predecessors in title"⁸, this does not coincide with the Court's conclusion in that case.

7.7 The fact remains that *effectivités* carry a different weight and legal significance, depending on whether they are invoked to replace a non-existent title, support an existing one, or overturn sovereignty based on an existing title.

7.8 These distinctions were made clearly by the Chamber of the Court which decided the *Frontier Dispute* case between Burkina Faso and Mali in 1986. After having defined the "colonial *effectivités*" as "the conduct of the administrative authorities as proof of the exercise of territorial jurisdiction in the region during the colonial period", the Chamber went on to state, "in general terms, what legal relationship exists between such acts" and "the relevant titles". The Chamber held that:

"For this purpose, a distinction must be drawn among several eventualities.

(i) "Where the acts correspond exactly to law, where effective administration is additional" to the title, "the only role of *effectivité* is to confirm the exercise of the right derived" from this legal title;

⁷ *Territorial Dispute (Libyan Arab Jamahiriya / Chad)*, Judgment, I.C.J. Reports 1994, p. 6 at p. 38, para. 76. See para. 3.85, above.

⁸ MM, Chapter 6.

(ii) "Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title"⁹;

(iii) "In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration;

(iv) "Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates"¹⁰.

7.9 In the present case, these last two hypotheses are not relevant given that:

- (a) there can be no doubt as to the "territorial expanse" to which the title relates: the allocation of territories between The Netherlands and the United Kingdom was realised by means of the continuation of parallel 4° 10' N eastward across the island of Sebatik, and seaward; and
- (b) as Indonesia has already noted¹¹, the Parties agree that the disputed islands were never *terrae nullius* during the relevant period¹².

7.10 Consequently, it is only the first two hypotheses defined by the Chamber of the Court in 1994 that should be taken into consideration. In this regard, the effect of the principles identified by the Court depends on whether one considers the issue from the perspective of a State that has evidence of territorial title, or from the perspective of a State that contests such a territorial title. In the first case (in the current dispute the hypothetical State would be Indonesia or its predecessor in title, The Netherlands), the *effectivités* invoked by a State can have a confirmatory role and constitute an illustrative depiction of its exercise of sovereignty (first hypothesis). Alternatively, in the second case (the hypothetical State being Malaysia),

⁹ One could debate whether this wording allows for the acquisition of a prescriptive title, a question which is often disputed in international law. However, since Malaysia expressly states that it does not invoke such a title (MM, para. 6.3), Indonesia does not consider it necessary to enter into this debate. Nevertheless, Indonesia deems it necessary to point out that the supposed *effectivités* which Malaysia invokes would clearly not justify any such prescriptive acquisition, even if such a concept were admissible in international law, which is not the case.

¹⁰ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at pp. 586-587, para. 63. See also *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351 at p. 436, para. 125.

¹¹ See, for example, para. 7.3, above.

¹² It is unclear whether the Parties agree over what constitutes the relevant period. However, this does not detract from their agreement over the principle in question.

according to the Chamber of the Court, a State cannot avail itself of its own possible *effectivités* (or those of its predecessor) in the face of a holder of legal title.

7.11 These principles are well established and confirmed by consistent case law. Thus, in the case concerning the *Temple of Preah Vihear*, where title derived from Thailand's acceptance of a map, the Court found it:

"difficult to regard such local acts [Thailand's acts on the ground] as overriding and negating the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped"¹³.

Similarly, in the case concerning the *Land, Island and Maritime Frontier Dispute*, a Chamber of the Court also analysed the 1986 decision, making clear that in determining the frontier between El Salvador and Honduras in the context of the *uti possidetis* situation, at the time of the two States' respective independence, it could not take into consideration only "the colonial *effectivités*" and not post-colonial acts of administration¹⁴.

7.12 It is in the light of these principles that Malaysia's use and presentation of its alleged *effectivités* (and those of its predecessor), as well as its claim concerning the alleged inactivity of The Netherlands and Indonesia over the disputed islands, should be examined.

7.13 In the present case, as will be seen in Section 2, below, it would be extreme to consider that the two disputed islands had been "effectively administered" by Malaysia before the critical date (i.e. before 1969). However, even if this had been the case, Malaysia cannot validly claim that its alleged *effectivités* prevail over the conventional title of Indonesia.

7.14 Furthermore and in any case, whether considered in isolation or taken as a whole, the acts relied upon by Malaysia do not establish the existence of a continuous peaceful possession and administration of the islands capable of displacing Indonesia's title or of creating a territorial title in its favour.

¹³ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 30.

¹⁴ *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351 at pp. 398-399, paras. 61-62.

Section 2. Brief Commentary on the So-Called Acts of Administration Relied Upon by Malaysia

7.15 In paras. 6.5 to 6.31 of its Memorial, Malaysia describes a number of acts that it attributes either to the BNBC, to the British colonial administration or to itself, which allegedly establish Malaysia's acquisition and retention of territorial title over the two disputed islands¹⁵. For the sake of convenience, Indonesia will examine these acts in the same order as that used by Malaysia.

A. The Alleged Process of Establishing Effective Administration over the Mainland and Adjacent Islands

7.16 In the first instance various facts are set out, which, according to Malaysia, illustrate the progressive establishment of Britain's colonial administration in the region. The principal acts relied upon by Malaysia are the following:

- (a) the establishment of a BNBC Residency at Sandakhan (and subsequently in Lahad Datu) and of various posts along the coast of the area that is now called Sabah, and the creation of Semporna;
- (b) the repressive acts carried out against the native inhabitants, notably on Tungku, Omodal and Dinawan, the imposition of a boat tax and the resettlement of "remaining Bajaus" near Semporna¹⁶; and
- (c) the nomination of local chiefs by the BNBC at Darvel Bay and Omodal¹⁷.

7.17 However, *not one of these acts* concerned either Ligitan or Sipadan. All of them, without exception, related to towns or islands located north of the 4° 10' N line of latitude. The places on the mainland of Borneo mentioned by Malaysia were all allocated to Great Britain under the 1891 Convention and the closest island to the boundary line – though still

¹⁵ See MM, para. 6.32.

¹⁶ The initial push to regroup the Bajaus on Trusan Treacher occurred in 1896.

¹⁷ MM, paras. 6.5-6.7.

14.9 kilometres (8 nautical miles) away – is Dinawan, which is situated on the northern tip of Ligitan reef, whereas Pulau Ligitan is on the southern tip¹⁸.

7.18 In this context it should also be noted that in certain passages of its Memorial Malaysia infers the legal status of Ligitan island from that of Ligitan reef; on a number of occasions, Malaysia relies on activities relating to the island of Dinawan and alleges that these examples demonstrate activities concerning the island of Ligitan itself. At para. 6.6 of its Memorial for example, Malaysia asserts:

"Actions such as those taken against [...] Danawan [...] demonstrated the authority of North Borneo over the Bajau Laut communities on the various islands"¹⁹.

This assimilation is unacceptable and has no foundation in law. It is furthermore expressly contradicted in Chapter 3 ("The Geographical Setting") of Malaysia's Memorial²⁰ where Ligitan island and Ligitan reef are carefully and correctly distinguished.

7.19 In the light of this, Malaysia's argument simply proves that the British, as well as the Dutch, interpreted the 1891 Convention as having allocated both terrestrial and insular possessions located north of latitude 4° 10' N to Great Britain. It further illustrates that the local inhabitants, notably the Bajau, did not meekly accept the administration imposed by the BNBC. This is clearly shown by the recurrent punitive actions led against them and the fact that the customs clerk appointed in Omadal in 1884 was "subsequently expelled by local Bajaus"²¹, and even by their forced resettlement to Trusan Treacher in 1909²². Moreover, the incident of 24 September 1878 when a Spanish warship retreated from Sandakan after the inhabitants refused to hoist the Spanish flag, related by Malaysia²³, is of such a nature as to raise serious doubts about the sovereignty of the Sultan of Sulu over this part of the Borneo

¹⁸ The distinction is clearly made in Sather, C., *The Bajau Laut. Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, op. cit., pp. 105-106 and in a recent article by Professor Ko Swan Sik, "Asian Territorial Disputes, With Special Reference to the Islands of Sipadan and Ligitan: Succession to Dutch and British Titles?" in Terry D. Gill and Wybo P. Heere (ed.), *Reflections on Principles and Practice of International Law*, Nijhoff, The Hague, Boston, London, 2000, p. 111.

¹⁹ See also MM, para. 6.7 which deals with the co-option of local leaders.

²⁰ MM, paras. 3.9 and 3.11; see also MM, para. 6.28 and Annex 113, Vol. 4.

²¹ *Ibid.*, para. 6.5.

²² See MM, Annex 89, Vol. 4.

²³ *Ibid.*, para. 6.5.

coast. Contrary to the picture Malaysia seeks to present, this refusal of the Sandakhan chiefs (who do not in any way refer to themselves as "Sulu") was not based on an attachment to the Sultan of Sulu, but on the fact that they wished to take "no part in any wars between Spain or Sulu"²⁴.

7.20 According to Malaysia, "A crucial aspect of the Company administration was its co-option of local leaders"²⁵. Malaysia gives only two "examples" of this: that of Nakoda Gomba, in Sandakhan, and of Panglima Udang, in Semporna. In the second case, Malaysia relies on an affidavit signed in 1975 by the son of the person concerned²⁶, who states that his father's jurisdiction included Sipadan and that he used to accompany his father on excursions to gather turtle eggs. Although the second assertion has a plausible air about it²⁷, the first assertion leads one to conclude that Panglima Udang was a high-ranking local to whom the inhabitants of Semporna would turn in case of disputes concerning precisely the gathering of turtle eggs and nothing more.

7.21 In its Award of 9 October 1998 in the case between Eritrea and Yemen, the Arbitral Tribunal dealt with a similar problem. In this case, Yemen invoked the fact that local fishermen had recourse to a "customary law system of arbitration of local disputes under the authority of an *aq'il* – 'a person known for wisdom and intelligence'"²⁸, whose decisions were binding²⁹. However, the Tribunal considered that:

"the rules applied in the *aq'il* system do not find their origin in Yemeni law, but are elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a *lex pescatoria* maintained on a regional basis by those participating in fishing (...). The fact that this system is recognized or supported by Yemen does not alter its essentially private character"³⁰.

This same conclusion must prevail in the present case.

²⁴ *Ibid.*, Annex 78, Vol. 4.

²⁵ *Ibid.*, para. 6.7.

²⁶ The annexes mentioned in this document (MM, Annex 120, Vol. 4) are not in fact attached; their consultation may be of a certain interest.

²⁷ See paras. 7.23 *et seq.*, below.

²⁸ *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, p. 89 at para. 337.

²⁹ *Ibid.*, p. 89 at para. 338.

³⁰ *Ibid.*, pp. 89-90 at para. 340.

7.22 None of these facts establishes the administration of the islands in question by Malaysia *à titre de souverain*³¹.

B. Collection of Turtle Eggs

7.23 Malaysia devotes no less than four and a half pages to the "right to collect and to control the collection of turtle eggs on Sipadan"³². In these pages, Malaysia retraces a history leading back to "well before 1878"³³ and attempts to establish that the "local Bajaus who acknowledged the authority of the Company [BNBC]" or "leading members of the Island community inhabiting the Ligitan Group (especially Danawan)"³⁴ had been granted a exclusive right to the gathering of turtle eggs, and "that these entitlements were recognised by North Borneo officials, and that disputes concerning collection of turtle eggs were referred to North Borneo officials to resolve"³⁵.

7.24 Indonesia does not contest these facts, but notes once again that Malaysia exaggerates these acts and gives them a legal significance that they do not deserve. Moreover, Malaysia ignores the fact that Indonesians too used to collect turtle eggs on Sipadan before the occupation of the island by Malaysia.

7.25 There is no doubt that some of the Bajau Laut based on the islands north of the 4° 10' N parallel, and notably on Dinawan, used to gather turtle eggs on Sipadan. However, nothing regarding territorial title to the island can be inferred from this: the presence, be it seasonal or permanent, of foreign peoples operating in a private capacity within a territory does not usurp the rightful holder's sovereign title over the territory in question.

7.26 A similar argument to that put forward by Malaysia was used by Namibia and rejected by the Court in the recent *Kasikili/Sedudu Island* case. In this dispute, Namibia relied on the presence of Masubia tribesmen on Kasikili/Sedudu Island (who depended on Namibia). The Court recognised the existence of a "peaceful and public use of Kasikili/Sedudu, over a period

³¹ *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B No. 53, p. 22 at p. 46.*

³² *MM*, paras 6.9-6.23.

³³ *Ibid.*, para. 6.9.

³⁴ *Ibid.*, paras. 6.9 and 6.23.

³⁵ *Ibid.*, para. 6.23.

of many years, by Masubia tribesmen from the Eastern Caprivi"³⁶; but the Court considered it impossible to infer from this that such a presence could be considered either as a "subsequent practice in the application of the [1890] treaty within the meaning of Article 31, paragraph 3(b), of the Vienna Convention on the Law of Treaties"³⁷, or "acts of State authority capable of providing alternative justification for prescriptive title"³⁸:

"even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e. that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes..."³⁹.

7.27 Similarly, in the recent arbitration between Eritrea and Yemen, the Arbitral Tribunal found that:

"... although substantial evidence of individual fishing practices in the record may be taken as a different form of "*effectivité*" – i.e., one expressive of the generally effective attitude and practice of individual citizens of Eritrea or of Yemen – it is not indicative as such of state activity supporting a claim for administration and control of the Islands. This varied and interesting evidence, on both sides, speaks eloquently concerning the apparent long attachment of the populations of each coast to the fisheries in and around the Islands (...). However, it does not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*"⁴⁰.

7.28 The same reasoning applies in the present case. The Bajau who were under the administration of the British authorities had gathered turtle eggs in Sipadan for many years; however, they were not the only ones to do so. Indonesia annexed to its Memorial a number of affidavits which establish that Indonesian fishermen also used to fish in the waters around Sipadan without being disturbed by the Malaysian authorities, whom they had never encountered before this dispute arose⁴¹. Moreover, as can be seen from the affidavit

³⁶ *Kasikili/Sedudu Island (Botswana / Namibia), Judgment, I.C.J.*, 13 December 1999, para. 75.

³⁷ *Ibid.*, para. 75. The Treaty of 1890 was the instrument which had established the limits of the spheres of influence of the two predecessor States, Great Britain and Germany.

³⁸ *Ibid.*, para. 99.

³⁹ *Ibid.*, para. 98.

⁴⁰ *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, pp. 84-85 at para. 315.

⁴¹ IM, Annexes I to M, Vol. 5.

attached to the present Counter-Memorial, Indonesian nationals also used to collect turtle eggs in Sipadan before the Malaysian occupation of the island in the 1970s. Thus, Mr. Paraggam, a Bajau from Derawan island, testified:

"Circa 1960's I was asked by my relative, Haji Abdul Hamid, a Bajau Tribe from Sampurna, Malaysia to look after turtle eggs at Sipadan Island, where I stayed for two months. During my stay on the island I have never faced any problems from anybody, either Indonesian or Malaysian patrol"⁴².

This shows clearly that the collection of turtle eggs on Sipadan was regarded as a "Bajau matter" which had nothing to do with sovereignty over the island.

7.29 These activities prove nothing as to the territorial title of this island. To paraphrase the decision of the Court in the *Kasikili/Sedudu Island* case: as far as The Netherlands, and subsequently Indonesia were concerned, the intermittent presence of Bajau from British Borneo on the island did not trouble anyone and was tolerated, not least because it did not appear to be connected with any interpretation of the 1891 Convention⁴³.

7.30 The same is true for the regulations issued by the British and the rules established for the resolution of disputes between *Malaysian* nationals which are described in the Malaysian Memorial. Generally, they concern the exercise of *personal* and not *territorial* jurisdiction. It is normal and legitimate for a State or a colonial power to concern itself with the regulation of the activities of its nationals abroad and also with disputes that may arise between its nationals, all the more so if one takes into account local circumstances (for example, difficulties of access, a spread-out population). Neither The Netherlands nor, subsequently, Indonesia were able to impose a strong presence either on the northern part of the coast of Kalimantan or on the surrounding islands⁴⁴.

7.31 It is true that Malaysia refers to various documents that it misleadingly tries to use as proof that the British authorities acted as though they considered that the island of Sipadan belonged to them⁴⁵. However, this is not the case.

⁴² Annex 31.

⁴³ *Kasikili/Sedudu Island (Botswana / Namibia), Judgment, I.C.J.*, 13 December 1999, para. 74.

⁴⁴ See Section 3, para. 7, below.

⁴⁵ See MM, paras. 6.11 and 6.16.

7.32 The 1917 Ordinance on turtle preservation⁴⁶ distinguishes between two areas, stipulating different rules accordingly. In the first area, licenses must be obtained from the colonial administration. In the second area, according to Section 3 of the Ordinance:

"The areas specified by the Governor from time to time in Schedule C shall be deemed to be native reserves for the collection of turtle eggs, and nothing contained in this Ordinance shall be deemed to affect the collection of turtle eggs by natives therein, and no license or concession granted hereunder shall be deemed to include such areas: provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry".

Schedule C thus only mentions Ligitan and Sipadan as "native reserves"⁴⁷.

7.33 Indeed, the BNBC's Charter stipulates a policy of respect for indigenous customs⁴⁸. It does not follow from this regulation that the BNBC decision to create "native reserves" can be regarded as an act *à titre de souverain*, but rather that the BNBC was acting, within the limits of its commercial attributions, to protect the interests of the native population and their right to collect turtle eggs. The Ordinance of 1917 shows merely that the British colonial authorities endeavoured to regulate the activities of their nationals in order to avoid friction in the indigenous community and to resolve disputes within that community.

7.34 On the other hand, it is true that the document dated 1922 reproduced in Annex 99 of Malaysia's Memorial and entitled "Commercial Sea Products from the Coast of British Borneo" mentions Sipadan as one of "our islands". But no details of the author of what appears to be a descriptive study printed by the Government Printing Office of British Borneo are given, nor are any details provided about who was involved in the study. In any case, a one-off document of this type does not constitute valuable proof of the existence of sovereignty and, still less, of its displacement.

⁴⁶ *Ibid.*, Annex 97, Vol. 4.

⁴⁷ Neither the 1914 Proclamation (MM, Annex 93, Vol. 4), which states in a perfectly neutral way that it is applicable "within British North Borneo" and to "the islands within the State" nor the decisions reproduced in MM, Annexes 91, 94-96, and 102-106 (Vol. 4) mention Ligitan or Sipadan.

⁴⁸ MM, Annex 23, Vol. 2, p. 284, items 8-10.

7.35 Besides, and more generally, it is quite understandable that the local inhabitants and even the local British authorities lacked a clear idea as to who was the owner of Sipadan: in fact, the former were used to gathering turtle eggs in full cooperation with local Bajau inhabitants who were governed by the Dutch administration (and the same was true in relation to fishing)⁴⁹. Moreover, it seems that this activity concerned essentially the Bajau Laut, whose relationship with the territory had nothing in common with the concept now accepted in public international law⁵⁰. Given this situation, it is logical that the British administrators did not ask questions about who held sovereignty over the island and were concerned above all with ensuring that order prevailed among the population under their administration. However, nothing can be inferred from this sound administrative logic in relation to the issue of territorial title over Sipadan.

C. Bird Sanctuary

7.36 Malaysia discusses the creation of a "megapode preserve on Sipadan" proposed by the conservator of forests of Sandakhan⁵¹, which was the subject of a notice in the *Official Gazette* of 1 February 1933. Malaysia adds that the island "is shown as a bird sanctuary in the map at Annexes, vol. 5, Map 13"⁵².

7.37 This 1935 map is indeed interesting. It was drawn up on the basis of Survey and Forest Department records. Sipadan is shown on the map, with the legend "Bird Sanctuary". But, significantly, this island, unlike all the other islands situated north of latitude 4° 10' N, is not surrounded by lines which are seen around the other islands and which seem to demarcate the extent of the administrative boundaries.

7.38 In any case, the commendable ecological zeal on behalf of the Sandakhan Conservator of Forests does not amount to proof of the colonial authorities' wish to behave *à titre de souverain* over Sipadan.

⁴⁹ See para. 7.28, above.

⁵⁰ See Chapter III, in particular, para. 3.47, above.

⁵¹ MM, Annex 100, Vol. 4.

⁵² *Ibid.*, para. 6.24.

D. Construction and Maintenance of Lighthouses

7.39 It cannot be considered surprising that Indonesia did not object to the construction of lighthouses on Sipadan in 1962 and on Ligitan a year later:

- (a) such activities were of general interest for navigation, even though Indonesia did not have the necessary funds to carry them out;
- (b) the authorities in Jakarta, whether during Dutch colonisation or after independence, have only been able to deal with this remote, sparsely populated and inaccessible region in accordance with its special characteristics (which contrast with the situation on the other side of the border)⁵³;
- (c) and the whole of the first half of the decade of the 1960s was a difficult period for Indonesia, marked by serious tensions with Malaysia in particular.

7.40 In any case, the construction and maintenance of these lighthouses (which the photographs appearing on pages 22 and 25 of Malaysia's Memorial show as very light structures, made of metal bars) does not constitute proof of occupation *à titre de souverain*.

7.41 Here again the Arbitral Award of 9 October 1998 in the case of *Territorial Sovereignty between Eritrea and Yemen* is relevant. In this case, the Tribunal clearly stated:

"The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty"⁵⁴.

7.42 This is in accordance with statements made by the Court in the *Minquiers and Ecrehos* case in 1953. In this case, the French Government contended:

"that since 1861 it has assumed the sole charge of the lighting and buoying of the Minquiers for more than 75 years, without having encountered any objection from the United Kingdom Government"

⁵³ See Section 4, below.

⁵⁴ *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, p. 87 at para. 328.

and put forward various other actions of the same nature. The Court firmly dismissed its claims:

"The Court does not find that the facts, invoked by the French Government, are sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned acts from the nineteenth and the twentieth centuries in particular, including the buoying outside the reefs of the group, such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such character that they can be considered as involving a manifestation of State authority in respect of the islets"⁵⁵.

7.43 The same is true in this case. Just as France had established and maintained buoys outside the reefs of the relevant group with the purpose of "aid[ing] navigation to and from French ports and protect shipping against the dangerous reefs of the Minquiers"⁵⁶, here Malaysia set up the two lighthouses in question with a view "to assist navigation and vessels between Tawau and Sandakan using the Alice Channel route"⁵⁷.

E. Control of Tourism

7.44 Malaysia refers to the fact that it has established a tourist complex on the island of Sipadan⁵⁸ and that it declared Sipadan and Ligitan protected areas in 1997⁵⁹.

7.45 These recent facts are, unfortunately, only too true. Indonesia has protested on many occasions about these developments⁶⁰, which constitute infringements of its territorial sovereignty and are simply *voies de fait* (egregiously illegal acts), which occurred after the relevant date. As such, they cannot have any legal effect⁶¹ and are furthermore contrary to the commitment given by Malaysia in 1969 to uphold the existing *status quo* in existence regarding the two islands as has been shown in the Indonesian Memorial. Indonesia will come back briefly to this aspect of the case in the Section 4 below.

⁵⁵ *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 47 at pp. 70-71.

⁵⁶ *Ibid.*, p. 47 at p.70.

⁵⁷ Colony of North Borneo, *Annual Report*, 1960, MM, Annex 108, Vol. 4.

⁵⁸ MM, paras. 3.19, and 6.30.

⁵⁹ *Ibid.*, para. 6.31, p. 71.

⁶⁰ See IM, paras. 8.71-8.76.

⁶¹ *Ibid.*, paras. 8.71-8.76 and para. 8.31.

Section 3. Dutch and Indonesian Activities Relating to the Islands

7.46 In Chapter 7 of its Memorial, Malaysia deals with Dutch and Indonesian activities with respect to Sipadan and Ligitan and submits that these are insufficient to uphold Indonesian sovereignty over the islands. In this section of the Counter-Memorial, Indonesia will deal with these contentions and will conclude that they are based on erroneous interpretations of the facts. Rather, the Dutch and Indonesian activities, as explained below, confirm that the islands were regarded as belonging to the Netherlands East Indies and, subsequently, Indonesia.

7.47 After the entry into force of the 1891 Convention, the Dutch activities continued⁶², but restricted to the islands lying south of the 4°10' N allocation line stipulated in the 1891 Convention. During the period of pirate activity in these areas (that is until the last expedition by HNLMS *Lynx* in 1921), the Dutch Navy periodically patrolled the seas around islands located off the north-east Borneo coast which were considered to be under Dutch sovereignty. This is shown by the considerable number of warships listed in the *Koloniale Verslagen* (Annual Reports on the Colonies, presented to Parliament by the Dutch Government) which are shown to have been present off the coast of north-eastern Borneo⁶³. The islands considered to be under Dutch sovereignty included Sipadan and Ligitan, as is shown by the log-books of ships conducting these patrols. The *Lynx* expedition has already been mentioned in Indonesia's Memorial⁶⁴. Another case involved HNLMS *Koetei* which was present in the area in 1910. This ship's log-book contains an entry for 30 September 1910 specifically mentioning cruising near Sipadan and Ligitan⁶⁵. The patrols by the Dutch Navy continued even after the danger of pirate activity had ceased⁶⁶.

7.48 This practice also confirms the interpretation submitted by Indonesia⁶⁷ that the definition of the territory of the Sultan of Boeloengan (as a self-governing part of the Netherlands East Indies) annexed to the Contract of Vassalage of 1878, as amended in 1893, contrary to the contentions of Malaysia, continued to include Sipadan and Ligitan.

⁶² As for the activities before 1891, see para. 4.16, above.

⁶³ Annex 32.

⁶⁴ IM, paras. 3.72-3.74 and 6.2-6.5.

⁶⁵ Annex 33.

⁶⁶ See the list of warships at Annex 32.

⁶⁷ See IM, paras. 4.68-4.71 and 5.62.

7.49 Malaysia seems to lay some stress on the fact that the Netherlands Indies Government did not exercise effective control over parts of the domain of the Sultan of Boeloengan until early in the 20th century⁶⁸. Even if that were correct, this certainly does not apply to the maritime element of that domain. As shown above, the Dutch Navy patrolled these areas effectively from the 1870s. The materials relied upon by Malaysia in this part of its Memorial (in particular Annexes 39, 69 and 70) specifically concern the land domain of the Sultan of Boeloengan and say nothing about the effectiveness of the control exercised by the Dutch in their maritime domain.

7.50 In para. 7.14 of its Memorial, Malaysia mentions the hydrographic surveying activities of HNLMS *Macasser* in 1903. Indonesia has also referred to these activities at para. 5.40 of its Memorial. However, the Malaysian interpretation of the report by the commanding officer, i.e. that he appeared to treat all islands mentioned (including Sipadan and Ligitan) as being part of British North Borneo, is unfounded. For surveying purposes it is normal to treat all maritime features in a purely geographical, and politically neutral, way. Rather, the real significance of this report is that it shows Dutch activities in the area, demonstrating that the Dutch had interests there: the Dutch ship was there because of the need to survey the waters surrounding Dutch islands. This survey by the *Macasser* resulted in the publication in 1905 of chart No. 59 by the Netherlands Hydrographic Office. Updated editions of this chart have subsequently been issued several times, based on new data collected by the Dutch navy. This shows that the Dutch Government continued to regard it as its responsibility to ensure the safety of navigation in this area by maintaining updated nautical charts.

7.51 Para. 7.15 of Malaysia's Memorial refers to the November 1921 activities of the Dutch destroyer HNLMS *Lynx*. Indonesia has already dealt with the highly significant *Lynx* expedition in its Memorial⁶⁹ and will therefore be brief. Contrary to what Malaysia states, the activities of this Dutch warship are a crystal clear expression of the Dutch views on sovereignty over the islands in this particular area. There can hardly be a clearer demonstration of sovereignty than the exercise of police activities as carried out by the *Lynx* with respect to Sipadan and Ligitan. Malaysia dismisses the *Lynx* activities as just an example of cross-border co-operation by the Dutch and British authorities in the fight against piracy. It

⁶⁸ See MM, paras. 7.5-7.6.

⁶⁹ IM, paras. 3.72-3.74 and 6.2-6.5.

is true that the *Lynx* activities also demonstrate cross-border co-operation, but Malaysia misses an important point in this particular case: the way these activities were conducted demonstrates at the same time the respect shown for the territorial sovereignty of both sides. The commander of the *Lynx* stayed outside the territorial sea of British islands, and went ashore only on Dutch islands.

7.52 There certainly was no need for the Netherlands Indies Government to perform any formal acts with respect to Sipadan or Ligitan at that time (as Malaysia seems to suggest at para. 7.16 of its Memorial), since they were already under Dutch sovereignty. It should also be kept in mind here that the nature and intensity of the control over territory required from a State by international law for it to uphold its sovereignty in the face of possibly competing claims varies according to the nature of the territory in question. Pronouncements to this effect can be found in a number of international arbitral and judicial decisions⁷⁰. The Dutch activities with respect to these remote and uninhabited islands must be considered more than sufficient for this purpose.

7.53 Finally, in paras. 7.19-7.21 of its Memorial, Malaysia refers to two instances from which there could allegedly be deduced an absence of administration of the islands of Sipadan and Ligitan by Indonesia after it obtained independence. Both instances are irrelevant.

7.54 The first concerns the drawing by Indonesia of archipelagic baselines in 1960. It is correct that at that time Indonesia did not include Sipadan or Ligitan as basepoints for the purpose of drawing baselines and defining its archipelagic waters and territorial sea, but this cannot be interpreted as demonstrating that Indonesia regarded the islands as not belonging to its territory. It should be stressed here that international law neither requires States, which are entitled to do so, to establish archipelagic waters nor, when establishing such waters, to use all basepoints permitted under international law. The archipelagic State has the discretion not to use particular basepoints which are allowed under international law. Consequently, even if Indonesia would have been entitled to draw archipelagic baselines to Sipadan and/or Ligitan

⁷⁰ See, for example, the Arbitral Award in the *Island of Palmas* case, *RIAA*, Vol. 2, p. 829 at p. 840; *Clipperton Island* Arbitration of 1931, *RIAA*, Vol. 2, p. 1110; *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J.*, Series A/B No. 53, p. 22 at pp. 46-47; and more recently, in the Award of the Arbitral Tribunal dated 9 October 1998, *Eritrea/Yemen* Territorial Sovereignty and Scope of the Dispute, para. 452.

there was no requirement to do so and also no requirement to explain in each and every case the reasons for not drawing a particular baseline⁷¹. The same observations apply to decisions by Indonesia subsequent to 1960 concerning its archipelagic baselines in this particular region.

7.55 In this connection it is illustrative to note that, while Malaysia deals with the Indonesian Act of 1960 in an attempt to show that Indonesia did not consider the islands of Sipadan and Ligitan as belonging to its territory, Malaysia in its Memorial does not mention its own failure to use the islands as basepoints for determining the extent of its territorial sea before 1969. It is only after the dispute with Indonesia arose that Malaysia started to use the islands for these purposes.

7.56 The oil concessions issued by Indonesia are the other instance mentioned by Malaysia as allegedly showing an absence of administration by Indonesia after independence. First it should be noted that the JAPEX concession mentioned by Malaysia extended not to 30' (30 minutes - approximately 30 miles) south of the 4° 10' N parallel, as contended by Malaysia⁷², but to only 30" (30 seconds - i.e. approximately half a mile) south of that line. Indonesia has already dealt extensively with these oil concessions at paras. 6.10-6.16 of its Memorial, and merely wishes to recall its conclusion here that the JAPEX/Total licence demonstrates that Indonesia considered that its jurisdictional rights extended up to the 4° 10' N line and that Malaysia did not object. Indonesia, in granting its concession, created a 0.5 mile "buffer zone" south of the 1891 Convention line. Leaving this kind of narrow buffer zone is not uncommon practice when oil concessions follow international boundaries⁷³.

7.57 It is again quite remarkable that Malaysia passes over its own oil concession activities. As Indonesia has demonstrated in its Memorial⁷⁴, Malaysia has in its practice (in particular the

⁷¹ It should also be recalled that in the 1969 continental shelf delimitation negotiations, Malaysia recognised Indonesian sovereignty over a number of islands that were not specifically included in the 1960 Act. See Map Annex para. A.41.

⁷² MM, para. 7.21.

⁷³ See the 1968 Iran-Saudi Arabia Agreement delimiting the submarine areas between the two States, which provided that neither party should drill within 500 M. of either side of the boundary line, Charney, J.I., and Alexander, L.M., (ed.), *International Maritime Boundaries* (1993), Vol. 2, p. 1526. Other examples of boundary agreements providing for "buffer zones" are: the 1974 boundary agreement between Iran and Dubai, Charney, J.I., and Alexander, L.M., (ed.), *op. cit.*, p. 1538; the 1971 delimitation agreement between Iran and Bahrain, Charney, J.I., and Alexander, L.M.; (ed.), *op. cit.*, p. 1487; and the delimitation agreement between Iran and Oman, Charney, J.I., and Alexander, L.M., (ed.), *op. cit.*, p. 1503.

⁷⁴ IM, paras. 6.17-6.27.

Teiseki oil concession) also respected the 1891 Convention's allocation line by creating a "buffer zone" equivalent to that established by Indonesia. Equally significant is the map published in 1968 by the Malaysian Ministry of Lands and Mines showing the 4°10' N allocation line as the international boundary. This is discussed in detail at paras. 7.74-7.83 below.

7.58 Malaysia's Memorial also passed over the mutual practice of the maintenance of buoys in the region. As Indonesia has demonstrated in its Memorial at paras. 8.41-8.45, both Parties have strictly respected the 4°10' N line established in the 1891 Convention, when placing and maintaining navigational aids in the area.

7.59 Apart from the fact that the so-called "absences of Indonesian administrative acts with respect to the islands" alleged by Malaysia totally misrepresent the situation, as demonstrated in the preceding paragraphs, it is important to stress that there have also been Indonesian activities additional to the ones mentioned above. These have been dealt with in paras. 6.6-6.9 of Indonesia's Memorial. In particular the naval patrols to the islands of Sipadan and Ligitan between 1965 and 1968 demonstrate that Indonesia considered these islands as falling under its sovereignty before the dispute arose in 1969. Also the traditional fishing activities carried out by Indonesian fishermen on and around the islands should be recalled.

Section 4. Post 1969 Activities of the Parties and the Diplomatic History of the Case

7.60 As explained in Indonesia's Memorial, the activities of the Parties after the "critical date" must be considered with some measure of caution⁷⁵. While they cannot alter an existing title, they may confirm the legal situation existing when the dispute crystallised. This is all the more so in the present case since the circumstances in which the dispute arose are of no particular significance.

7.61 In its Memorial, Malaysia claims to set out "The diplomatic history of the dispute" in its short Chapter 4⁷⁶. Malaysia's account is incomplete and paints an inexact picture. For its part, Indonesia has already related in Section 1 of Chapter VIII of its Memorial, the details of

⁷⁵ *Ibid.*, paras. 8.46-8.51.

⁷⁶ MM, paras. 4.1-4.6.

the emergence of the dispute in as complete a manner as possible and, in particular, the 1969 negotiations⁷⁷. Indonesia will therefore not repeat this account in its Counter-Memorial but will rather limit itself to demonstrating to what extent Malaysia's presentation of events is faulty, on the basis both of the comments made by it and by what is left unsaid.

7.62 Malaysia is however right in noting that in the present case, "the diplomatic background to the Special Agreement of 1997 is relatively brief"⁷⁸. It was in fact only twenty eight years earlier, during bilateral negotiations relating to the delimitation of their respective continental shelves, that Indonesia was suddenly made aware of Malaysia's claims over the disputed islands, which up to that point Indonesia had always considered to be under its sovereignty, given that they are situated south of the 4° 10' N parallel which was stipulated in the 1891 Convention as the limit between the respective possessions of the two States.

7.63 In its Memorial, Malaysia feigns astonishment at the fact that at no point in time has Indonesia, nor its predecessor in title, ever claimed "the now disputed islands"⁷⁹. This fact is far from surprising: neither The Netherlands nor Indonesia had any reason to make a claim over the islands, which belonged to them by virtue of a properly concluded treaty, and which were situated off a rather inaccessible region in Kalimantan and which, what is more, were themselves uninhabited. Indeed, even if Great Britain, or Malaysia itself, had occasionally taken measures relating to one or the other island, Indonesia, who for the most part paid little attention to them⁸⁰, did not, however have any particular reason to worry about acts which in no shape or form could be interpreted as evidence of any *animus occupandi*.

7.64 In truth, Indonesia could play Malaysia at its own game and feign astonishment itself: until 1969, it considered itself the holder of an indisputable conventional title, which established its sovereignty over the islands in question and it was only when the Parties commenced negotiations for the purpose of the delimitation of their respective areas of continental shelf that Malaysia, for the first time, advanced a claim to the islands⁸¹.

⁷⁷ IM, paras. 8.5-8.28.

⁷⁸ MM, para. 4.1.

⁷⁹ *Ibid.*, paras. 4.2-4.3.

⁸⁰ See para. 7.28, above.

⁸¹ See MM, para. 4.3.

7.65 Indonesia has described in its Memorial⁸² the precise circumstances in which Malaysia first made known this unexpected claim. Indonesia does not believe there to be any useful purpose in discussing this issue anew and would ask the Court to refer back to its Memorial for further details.

7.66 With the benefit of hindsight, it is easier to understand Malaysia's sudden interest in the islands, which contrary to its declarations, had not been previously "administered", but regarding which Great Britain and then Malaysia had taken some measures aimed exclusively at regulating the sporadic activities carried out by their respective nationals in the area and facilitating navigation to and from Tawau. This was the period during which there was talk of potential hydrocarbon wealth in the continental shelf of the region.

7.67 Moreover, the development of an important tourist project on Sipadan also explains this late Malaysian interest in the island. According to Malaysia, the tourist centre at Sipadan has seen more than 115,000 tourists over fifteen years, but Malaysia remains remarkably coy on the subject in its Memorial⁸³; for a good reason: as stated above⁸⁴, its establishment is in total contravention of the undertaking made by the two Parties in 1969, whereby both sides agreed not to do anything that might disrupt the *status quo*⁸⁵.

7.68 Legally speaking, nothing can be inferred from this, given that the 1969 negotiations represent the critical date after which acts carried out by the Parties cannot alter the legal situation in existence prior to this date⁸⁶. However, Malaysia's activities on the disputed islands, and especially on Sipadan, the island lying farthest from its coast, helps to shed some light, retrospectively, over the circumstances in which Malaysia suddenly made public its claim in 1969, which had never been hinted at before.

7.69 Another recent dramatic event must be mentioned: the taking of hostages on Pulau Sipadan by a group of Philippine terrorists. Since the dispute concerning sovereignty over the

⁸² IM, paras. 8.10-8.14.

⁸³ See MM, paras. 3.19 and 6.30.

⁸⁴ Para. 7.45, above.

⁸⁵ See IM, para. 8.20. This interpretation of the 1969 agreement is confirmed e.g. by David, H., *Tensions Within ASEAN, Malaysia and its Neighbours*, Monographs on South-East Asian Politics and International Relations, N° 1, Dept. of South-East Asian Studies, University of Hull, 1966, p. 71, Annex 34, or Ko Swan Sik, "Asian Territorial Disputes, With Special Reference to the Islands of Sipadan and Ligitan: Succession to Dutch and British Titles?" in Terry D. Gill and Wybo P. Heere eds., *Reflections on Principles and Practice of International Law*, Nijhoff, The Hague, Boston, London, 2000, p. 113.

⁸⁶ See IM, paras. 8.23-8.27.

island had been submitted to the Court before this event took place, it is not a relevant fact with regard to the settlement of the dispute. However, Indonesia wishes to stress that, since newspapers have frequently referred to Sipadan as a "Malaysian island" – an understandable mistake since Malaysia illegally occupies the island – Indonesia carefully recalled that it considers Sipadan as part of its territory and that the dispute is still *sub judice*⁸⁷.

Section 5. The Map Evidence as an Element of the Conduct of the Parties and Their Predecessors

7.70 In its Memorial, Indonesia reviewed the considerable body of cartographic evidence which, consistently over a period of some 80 years, confirmed the fact that the line running eastward from the Island of Sebatik along the 4° 10' N parallel, established by the 1891 Convention, was viewed by all the interested parties as representing the respective limits of Dutch (later Indonesian) and British (later Malaysian) territorial possessions in the relevant area⁸⁸. The repeated appearance of the 1891 line extending seaward of Sebatik on Dutch, British, Indonesian and particularly Malaysian maps is an important element of the conduct of the Parties supporting the conclusion that both Sipadan and Ligitan belong to Indonesia.

7.71 There appears to be agreement between the Parties that the map evidence is relevant in assessing what the views of the interested parties were with respect to the territorial situation in the area of concern. Indeed, Malaysia itself has attempted to rely on a selection of maps to support its position⁸⁹, and Malaysia has furnished the Court with a Map Atlas (Volume 5 to its Memorial) setting forth a sample of such maps.

7.72 In the present section, Indonesia will, without recanvassing all that was said in its Memorial on the subject, review some of the more important aspects of the map evidence. A detailed analysis of the maps that have been supplied by Malaysia in its Map Atlas may be found in the Map Annex attached to this pleading.

⁸⁷ Annex 35.

⁸⁸ See IM, paras. 6.30-6.79.

⁸⁹ MM, Chapter 10.

A. Certain Key Aspects of the Map Evidence Demonstrating Dutch and Indonesian Title to the Disputed Islands

7.73 Any examination of the map evidence must necessarily start with the cartographic materials that were prepared in connection with the negotiation and ratification of the 1891 Convention since it is agreed between the Parties that this instrument represents a crucial element in the case. Indonesia has discussed the events surrounding the conclusion of the 1891 Convention in Chapter V above⁹⁰. Suffice it to recall three essential conclusions which may be drawn from the cartographic materials that were either presented or exchanged between the Dutch and British in connection with the 1891 Convention.

- (a) *First*, it is apparent even from British sketch maps that were prepared during the course of the negotiation of the Convention that the British envisaged that the eventual boundary line would continue out to sea. Indonesia presented as Map 3 in its Map Atlas a British map prepared in 1888 showing a proposed line of territorial allocation extending out to sea, albeit passing to the south of the island of Sebatik⁹¹. While the parties ultimately decided on a different course for the boundary, it is significant that the British deemed it important to extend the line out to sea indefinitely, presumably so as to deal with all territorial questions in issue.
- (b) *Second*, Indonesia has shown in Chapter V above that the Dutch negotiators of the Convention also presented maps which showed the ultimate boundary line extending seaward of Sebatik, specifically along the 4° 10' N parallel of latitude⁹². There is no evidence that Britain objected to the extension of the boundary line seaward of Sebatik.
- (c) *Third*, and most importantly, the map attached to the Dutch Explanatory Memorandum prepared in the course of the ratification process of the 1891 Convention clearly showed the boundary line extending seaward from Sebatik

⁹⁰ See paras. 5.77-5.94, above.

⁹¹ See IM, paras. 5.20 and 5.23(a).

⁹² Para. 5.70, above.

along the 4° 10' N line of latitude. This map, which Malaysia itself has attached as Map 2 to its Map Atlas (although the map is misleadingly labelled there as an "Internal Dutch Map (1891)"), was communicated to the British authorities who raised no objection. As such, the Explanatory Memorandum Map is entitled to considerable, if not dispositive, probative value as reflecting the agreed view of Great Britain and The Netherlands as to the scope of the boundary agreed in the 1891 Convention (as discussed in paras. 5.32-5.33 and para. 5.47 above).

7.74 In August 1903, Stanford, which effectively acted as the official cartographer of the BNBC, prepared a highly pertinent map which purported to show the administrative limits of the various provinces comprising the BNBC's possession in North Borneo⁹³. The map is important in three key respects.

- (a) *First*, in showing the administrative divisions of the BNBC, the map clearly depicted the southern limits of the Elphinstone Province as extending seaward from the Island of Sebatik *along the 4° 10' N line of latitude to a point to the north and east of the islands of Sipadan and Ligitan*. There were no disclaimers on the map. It follows that Stanford, and by implication the BNBC, were of the view that the southern limits of the possessions of the BNBC were defined by the precise line that had been agreed in the 1891 Convention. There could be no other conceivable reason why the limits of administrative divisions of the BNBC tracked the 4° 10' N parallel so faithfully. The necessary implication of the map was that islands lying south of this line – e.g., Sipadan and Ligitan – appertained to The Netherlands.
- (b) *Second*, Stanford's map was prepared just four months after the April 1903 Confirmation of Cession signed by the Sultan of Sulu. It will be recalled that this Confirmation, of dubious legal value⁹⁴, identified a number of specific islands falling more than three marine leagues (nine nautical miles) from the coast which were belatedly considered by the Sultan to have been included in

⁹³ A copy of this map with the relevant portions enlarged may be found opposite p. 118 of Indonesia's Memorial. It also appears as Map 4.1 opposite p. 54 of this Counter-Memorial.

⁹⁴ See para. 4.29, above.

his original 1878 grant to the BNBC. All of the islands so named were located to the *north* of the 4° 10' N line of latitude; hence, all were included on Stanford's map as appertaining to the BNBC. In contrast, neither Sipadan nor Ligitan were included in the 1903 Confirmation. Nor did they fall within the BNBC's possessions as confirmed by the map.

- (c) *Third*, the Stanford map was also prepared after the 1898 and 1900 Treaties by which Spain relinquished its possessions in the Sulu Archipelago to the United States. Malaysia has suggested, as one of its alleged chains of title, that the islands belonged to the United States at the time⁹⁵. However, the Stanford map shows the southern extent of U.S. possessions in the area as Sibutu Island, well to the north and east of Sipadan and Ligitan. Hence, the map also contradicts any notion that the disputed islands were considered to be U.S. possessions at the time.

7.75 Given the fact that the 1903 Stanford map runs so directly contrary to Malaysia's version of events, it is not surprising that Malaysia did not see fit to reproduce this map in its Map Atlas. Nonetheless, the map provides eloquent testimony as to the contemporaneous views of British experts familiar with the territory in question that Sipadan and Ligitan were recognised as forming part of The Netherlands' possessions.

7.76 Apart from Dutch and British maps such as these which confirm Indonesia's submissions, there are a large number of Malaysian maps which themselves show that Malaysia considered the islands in question as belonging to Indonesia. Without reviewing all the examples which were discussed at paras. 6.66-6.76 of Indonesia's Memorial, there is one such map which merits particular attention.

7.77 This was the map published by the Malaysian Ministry of Lands and Mines in 1968, a copy of which was attached following page 106 of Indonesia's Memorial and which, for convenience, is reproduced in Annex 36 hereto.

7.78 The map was prepared at a time when Malaysia was taking an active interest in the prospect of oil and gas exploration in the offshore areas lying in the vicinity of Ligitan and

⁹⁵ This aspect of Malaysia's case has been fully rebutted in Chapter VI above.

Sipadan and was thus examining the area carefully. It depicted the limits of various oil prospecting licences in the area which were outlined by red lines on the map. Of particular interest are the limits of the licence granted to the Japanese firm, Teiseki, offshore Semporna. As can be seen from the map, the southern limits of the licence reflected the 4° 10' N parallel of latitude⁹⁶.

7.79 What is of even greater interest is that the map, which it must be recalled was prepared by an official agency of the Malaysian Government, also depicted Malaysia's international boundaries around Sabah by means of a black, dashed line. There were no disclaimers on the map. It showed, very clearly, the international boundary with Indonesia as extending seaward from the Island of Sebatik along the 4° 10' N latitude to a point well to the east of Ligitan and Sipadan where the boundary met up with the prolongation southward of the boundary between Malaysia and the Philippines agreed under the 1930 Anglo-U.S. Convention.

7.80 The map as such merits the highest degree of probative value as an admission against interest by the Malaysian Government. It was prepared before the emergence of the dispute in 1969. Moreover, it directly contradicts the basic premise upon which Malaysia's case rests – namely, the contention that the 1891 Convention did not establish the 4° 10' N line of latitude east of Sebatik as the limit of Dutch and British territorial possessions in the area. Sipadan and Ligitan do not appear on the map, but they both lie to the south of the international boundary line depicted on the map and thus on the Indonesian side of the boundary.

7.81 Malaysia conspicuously omitted referring to this crucial map in its Memorial. Indeed, as noted previously in this chapter⁹⁷, Malaysia has avoided any discussion of its own history of granting oil concessions in the area, a history which so strikingly confirms the fact that Malaysia viewed the 4° 10' N line as constituting the limit of its jurisdiction in the vicinity of the disputed islands.

7.82 The 1968 Malaysian Ministry of Lands and Mines map is simply one of a large number of official Malaysian maps which depict the 4° 10' N line as the boundary of the Parties' respective territorial possessions lying offshore. In this respect, the Court is

⁹⁶ As documented in Indonesia's Memorial the southern limits of the Teiseki license actually ran along the 4° 10' 30" N line of latitude, thus creating a 30" (approximately half a mile) buffer zone to the north of the 1891 Convention line.

⁹⁷ See para. 7.56, above.

respectfully referred back to the discussion of these maps which appear at paras. 6.66 to 6.79 of Indonesia's Memorial. What is more, Malaysia itself is forced to concede that a number of its official maps depict the 4° 10' N line as representing the boundary with Indonesia east of Sebatik and it refers to two maps in particular⁹⁸.

7.83 Malaysia seeks to escape from the adverse inferences to be drawn from these maps by arguing that some of the Malaysian maps showing the 4° 10' N line included disclaimers on them⁹⁹. What Malaysia fails to point out, however, is that perhaps the most relevant of all the maps – the 1968 Ministry of Lands and Mines map – contained no such disclaimer; it showed the international boundary with Indonesia exactly as Indonesia has described it in its pleadings.

7.84 In any event, the continuous appearance of the 1891 line extending east of Sebatik on Malaysian and other maps was not an accident. Clearly, Malaysia was of the view that a line of territorial allocation existed with Indonesia in the area and that that line was the boundary fixed by the 1891 Convention. This line appeared in the Dutch Explanatory Memorandum of 1891; it appeared in the 1903 Stanford map showing the administrative limits of the BNBC's territory; and it was consistently depicted on Malaysian maps of the area following Malaysia's independence in 1963 until Malaysia self-servingly changed its position in 1979, well after the critical date in the case. It also appeared on Indonesian maps as, for example, the 1953 Indonesian atlas map which is attached as Annex 37 hereto.

7.85 As pointed out in Indonesia's Memorial, even after the dispute over the status of the islands emerged in 1969, Malaysia continued for a time to depict the 1891 line as a boundary line in the relevant area¹⁰⁰. Moreover, the Parties also respected the 1891 line in practice when they erected navigation aids on Roach Reef and Alert Reefs in 1994¹⁰¹.

⁹⁸ See MM, para. 10.17 and Maps 20 and 21 in Malaysia's Map Atlas.

⁹⁹ *Ibid.*

¹⁰⁰ See IM, paras. 6.76 and 8.36-8.42.

¹⁰¹ IM, para. 8.41-8.45 and see para. 7.58, above.

B. The Maps Introduced by Malaysia Do Not Support Its Claim of Title over the Disputed Islands

7.86 The maps introduced by Malaysia in no way detract from the fact that the map evidence, taken as a whole, overwhelmingly supports Indonesia's submission that Sipadan and Ligitan were regarded as belonging, after the conclusion of the 1891 Convention, first to The Netherlands and subsequently to Indonesia. While detailed comments on the Malaysian Map Atlas are included in the Map Annex at the end of this pleading, a number of general comments may be offered here to place the matter in perspective.

7.87 The first point to make is that virtually none of the maps relied on by Malaysia actually shows the islands as Malaysian possessions. In fact, the only map which depicts the disputed islands as Malaysian possessions, by virtue of the fact that the islands fell within Malaysia's continental shelf claim, is a map prepared in 1979 to illustrate Malaysia's claim in the area¹⁰². Indonesia discussed this map at paras. 8.59-8.69 of its Memorial. The key point to bear in mind in considering this map is that it was published ten years after the dispute over the islands crystallised in 1969. Published, as it was, well after the critical date in the case, the map was entirely self-serving in nature and was immediately protested by Indonesia. As such, the 1979 map is without legal relevance in the case.

7.88 Secondly, Malaysia also purports to rely on a number of maps which do not depict the 1891 line as extending out the sea. Malaysia appears to find that this is significant. However, the true position is that these maps are entirely neutral with respect to the territorial attribution of the islands of Sipadan or Ligitan.

7.89 The 1891 line was not, at the time it was agreed, a maritime delimitation line. Indeed, the concept of the continental shelf did not exist at the time. Rather, the purpose of the 1891 Convention was to define the respective Dutch and British territorial possessions in the area. The mere fact that maps may have been prepared which did not show the 1891 line as extending east of Sebatik in no way demonstrates that the islands in question were deemed to be British (or Malaysian). Consequently, these maps are of no assistance to Malaysia's case.

¹⁰² Map 19 in Malaysia's Map Atlas.

7.90 A good example of this practice concerns the various British Admiralty Charts that Malaysia has discussed in its Memorial and attached to its Map Atlas¹⁰³. These maps were precisely what they purported to be - maritime charts produced by the British Admiralty for navigation purposes - not maps designed to depict sovereignty over the islands in question. With respect to the disputed islands, they were completely neutral.

7.91 Another map, which Malaysia appears to attach particular significance to, is a map prepared by The Netherlands in 1913 in connection with the 1915 demarcation, *on the land*, of the boundary established by the 1891 Convention¹⁰⁴. There was no need for this map to include the line extending eastward of the island of Sebatik along the 4° 10' N parallel since it was concerned with the territorial situation on the mainland. Moreover, as Malaysia itself points out, the map was a topographical map prepared by The Netherlands Topographical Office¹⁰⁵. It thus showed the topography of the mainland, but not of the islands with which it was not concerned. It follows that the map lends no support to Malaysia's case.

7.92 Malaysia's Memorial then goes on to discuss a number of so-called "Other Maps"¹⁰⁶. These maps are addressed in detail in the Map Annex. Suffice it to say that none of the maps supports Malaysia's contentions as to sovereignty over the islands. This is in stark contrast to maps which Indonesia has introduced which clearly show, whether by way of admissions against interest by Great Britain and Malaysia, or as evidence of general repute, that the status of the 1891 line separating the Parties' territorial possessions east of Sebatik was never questioned until Malaysia's striking change of position in 1979. Indeed, as noted above, Malaysia is forced to concede in its discussion of these maps that its official agencies published maps which clearly contradict the position as to sovereignty now advanced in Malaysia's Memorial¹⁰⁷.

¹⁰³ See, para. 10.6 ad maps 8, 9, 10 and 11 in Malaysia's Map Atlas.

¹⁰⁴ *Ibid.*, paras. 10.3-10.4 and Map 1 in Malaysia's Map Atlas.

¹⁰⁵ MM, para. 10.9.

¹⁰⁶ *Ibid.* paras. 10.7-10.19.

¹⁰⁷ See paras. 7.82-8.83 above.

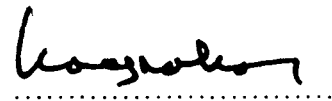
C. Conclusions as to the Maps

7.93 The fact of the matter remains that the 1891 line was repeatedly portrayed on both British and Malaysian maps as having the status of a boundary separating the territorial possessions of the parties in the area of concern. Had one of the purposes of the 1891 Convention not been to deal with Dutch and British insular territories lying east of Sebatik, as Malaysia maintains, then there would have been no reason for the extension of the 1891 line along the 4° 10' N line of latitude east of Sebatik to appear at all on the maps. But it was no accident that the line was placed on key maps of the area. Its persistent appearance, sometimes expressly labelled as the international boundary of Malaysia on Malaysian maps, conclusively confirms Indonesia's sovereignty over the islands of Sipadan and Ligitan.

SUBMISSIONS

On the basis of the considerations set out in this Counter-Memorial, the Government of the Republic of Indonesia requests the Court to adjudge and declare that:

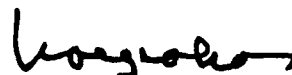
- (a) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
- (b) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia.



Mr. Nugroho Wisnumurti
Agent of the Republic of Indonesia

CERTIFICATION

I have the honour to certify the accuracy of the translations into English made by Indonesia which appear in the Counter-Memorial and its Annexes. I also certify that the documents annexed are true copies and conform to the original documents.



.....

Mr. Nugroho Wisnumurti
Agent of the Republic of Indonesia

MAP ANNEX

COMMENTS ON MALAYSIA'S POSITION CONCERNING MAP EVIDENCE

A.1 As is apparent from their Memorials, both Parties attach legal significance to the map evidence. Malaysia's main argument on the cartographic evidence, developed in Chapter 10 of its Memorial, is that the relevant maps in this case show either or both of the following features:

- (a) that the boundary between British and Dutch possessions did not extend into the sea east of Sebatik, and;
- (b) that Ligitan and Sipadan were both regarded as being either British or Malaysian islands.

A.2 In this Annex, Indonesia will review the maps considered in Chapter 10 of Malaysia's Memorial to see whether they support Malaysia's analysis in the light of the considerable map evidence which Indonesia has introduced which contradicts Malaysia's claims. It should be noted at the outset that the 1891 Explanatory Memorandum Map and the map attached to the 1915 Agreement have been discussed in detail in Chapter V of Indonesia's Counter-Memorial and will therefore not be reviewed further in this Annex.

Section 1. British Admiralty Charts

A.3 In reviewing four British Admiralty charts, drawn between 1881 and 1963, Malaysia argues that, while depicting a land boundary "running from the east to the west coast of Sebatik", these maps show no eastward projection of the land boundary. The maps in question are:

- (a) Chart no. 1681, *Northern Shore of Sibuko Bay*, (first drawn in 1891-92 and subsequently corrected to 1997), which appears as Map 8 in Malaysia's Atlas and Map No. 22 in Indonesia's Map Atlas;

- (b) 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*, which appears as Map 9 in Malaysia's Atlas;
- (c) Chart No. 2660B, *China Sea – Southern Portion*, (first drawn in 1881), which appears as Map 10 in Malaysia's Atlas; and
- (d) Chart No. 1852, *Tawau to Tarakan*, (first published in 1960), which appears as Map 11 in Malaysia's Atlas.

A.4 It should be recalled, as a general point, that the purpose of these charts was to assist navigation in the areas covered and not to reflect political boundaries. As noted in *The American Practical Navigator* published by the U.S. Defense Mapping Agency (1995 ed.), the function of a nautical chart is to show:

"water depth, the shoreline of adjacent land, topographic features, aids to navigation, and *other navigational information*. It is a work area on which the navigator plots courses, ascertains positions, and views the relationship of the ship to the surrounding area. It assists the navigator in avoiding dangers and arriving safely at his destination."¹

A.5 Moreover, pursuant to the *Chart Specifications* of the International Hydrographic Organisation (1988 Edition), "Boundaries and limits of no significance to navigation or fishing should be omitted from navigational charts".

A.6 This is clearly illustrated by the first chart listed above, Map 8 in Malaysia's Atlas, which shows no boundaries at all. This is not surprising, since its purpose was to depict the geographical features of the northern shore of Sibuko Bay. It was for this reason that Indonesia reproduced it in the Atlas annexed to its Memorial, as an illustrative and descriptive aid to Chapter II relating to the geographical description of the area.

¹ At p. 23. Emphasis added.

A.7 Regarding the other three charts, Maps 9, 10 and 11 in Malaysia's Atlas, it should be emphasised that they all bear legends specifying that the boundary between North Borneo and the Dutch territories is "approximate" only. In addition, it is significant that, although all these nautical charts show a number of offshore features over which sovereignty is clearly undisputed such as islands of the Philippines group, the sovereignty of these features is not indicated.

A.8 Finally, Malaysia itself, at para. 10.17 of its Memorial, downplays the significance of navigational charts regarding political boundaries. Malaysia's position is therefore inconsistent to the extent it relies on such charts only when they appear to be in its favour.

A.9 For the reasons mentioned above, these maps bear absolutely no weight regarding the position of the boundary and cannot be viewed as a graphic depiction of the "British understanding of the situation" as Malaysia argues².

Section 2. Other Maps

A.10 Under this heading, Malaysia groups some sixteen maps of various provenance published between 1891 and 1978 which, it alleges, show either that the boundary line does not extend east of Sebatik island or that Ligitan and Sipadan are to be regarded as being British or Malaysian, or both. These maps will be reviewed in the order used by Malaysia in its Memorial.

² MM, para. 10.6.

A. Map 12 of Malaysia's Atlas: *Plan Shewing the Result of the Determination of Parallel of 4° 10' N on East Coast Borneo and Examination of Rivers in Vicinity, June 1891*

A.11 The first of these maps was drawn up by the British Hydrographic Office and is entitled *Plan Shewing the Result of the Determination of the Parallel of 4° 10' N. on East Coast Borneo and Examination of Rivers in Vicinity, June, 1891*. Malaysia notes that "the 4°10' N line is shown on the map as a parallel, but there is no indication that it is a boundary"³. It should be noted that the 4° 10' N line drawn on the map runs across both land and sea. If Malaysia's argument that the seaward extension of this line is not a boundary were to be accepted, this would imply that the line traversing the land territory is similarly not a boundary.

A.12 Moreover, as observed by Indonesia in its Memorial, this map is significant for this dispute only if seen in its proper context⁴. In this respect, it should be recalled that, prior to the conclusion of the 1891 Convention, the British Government proposed to the Dutch Government to conduct a joint maritime survey of the area to ascertain the point at which the 4°10' N latitude reaches the sea and to explore and determine the course of the rivers Simengaris and Soedang, which flow into the sea near Broershoek. The map in question appears to illustrate the results of the survey carried out by the ships HMS *Egeria* and HMS *Rattler*⁵. This map, also known as a "tracing", i.e. an original map traced onto partially transparent paper, was transmitted by the British Minister in The Hague to the Dutch Foreign Minister, who replied on 1 December 1891 stating that the results of the British survey were consistent with results obtained by the Dutch officers and that his Government accepted the results obtained⁶.

³ *Ibid.*, para. 10.7.

⁴ IM, paras. 5.34-5.40.

⁵ *Ibid.*, Annex 78, Vol. 3.

⁶ *Ibid.*, para. 5.38.

A.13 This map, and its background, are thus important in two respects:

- (a) They show that the Dutch and British Governments worked in close co-operation in conducting the survey, showing evident concern for their conflicting claims in the area extending east of the island of Sebatik, and
- (b) These events are evidence of the fact that the tracing showing the parallel of 4° 10' N *extending out to sea* was one of the issues on which both the Dutch and British Governments had expressly agreed.

**B. Map 6 of Malaysia's Atlas: *Map of British North Borneo*,
Stanford, 1906**

A.14 The second map examined by Malaysia in its Memorial is the *Map of British North Borneo* issued by Stanford in 1906 and annexed by Malaysia as Map 6 of its Atlas.

A.15 Malaysia points to the fact that the boundary between Elphinstone Province and Dutch territory depicted on this map runs across Sebatik but does not extend eastward into the sea, thus allegedly indicating that there is no extension of the line east of Sebatik. However, it should be noted that the purpose of this map appears to be to portray the internal provincial divisions of British North Borneo. This is done by means of red lines drawn alongside the borders of the different provinces, none of which extends seaward. Given the purpose of this map, it can be assumed that the line running across the island of Sebatik was intended to delimit the land boundaries of the administrative jurisdiction of the Elphinstone Province and, as such, had no relevance for international boundaries.

A.16 As regards the jurisdiction of British North Borneo over offshore features in the area, this, rather than being done with lines drawn at sea, appears to have been done on this map by colour coding. Thus, the southern part of Sebatik and the island of Nanoekhan are coloured orange, as is the mainland Dutch territory, whilst the northern part of Sebatik is coloured pink, as is mainland British North Borneo. With regard to the disputed islands, a close inspection of the map reveals that, while islands in Sibuko Bay, such as Si Amil, Dinawan, Mabul and

Kapalai are coloured pink, indicating British North Borneo, Sipadan and Ligitan are coloured neither pink nor orange. This can be readily seen by viewing the enlargement of this map, which Indonesia has reproduced at Annex 38.

A.17 This 1906 map should be compared to an earlier map, also published by Stanford and dating from 1903, shortly after the Confirmation of Cession, which was considered at some length in Indonesia's Memorial⁷. In the 1903 map the boundaries of the BNBC's provinces are shown to extend seaward by dotted red lines⁸. In particular, the southern boundary of the Elphinstone province is shown to run across the island of Sebatik, continuing seaward, leaving the islands of Ligitan and Sipadan outside of the BNBC's territory. These two maps are thus consistent in showing, albeit through different graphic means (colour coding as opposed to actual lines drawn) that the disputed islands did not fall within the BNBC's administrative domain.

A.18 Malaysia also states that the significance of the 1906 map is all the greater as a result of the hand-written legend appearing on it⁹, which refers to the fact that this was the map mentioned in "the third term" of the agreement effected by the exchange of notes between the British Ambassador and U.S. Acting Secretary of State on 3 and 10 July 1907. The letter from the British Ambassador dated 3 July 1907 referred to "the line traced on the map which accompanied Sir H. M. Durand's memorandum of the 23rd of June, 1906 and which is attached to and deemed to form part of this Note"¹⁰. A copy of the 1906 Stanford's map is indeed attached to the original copy of the U.S. Government's formal adherence to the 1907 arrangement kept in the Public Record Office.

A.19 The red line drawn on Map 6 in Malaysia's Memorial is accompanied by the manuscript words: "Red line referred to in paragraph 24 of despatch dated 13 July 1903 to Foreign Office". That despatch has been exhibited by Indonesia as Annex 102 of its Memorial. The despatch was sent by the Chairman of the BNBC, Richard B. Martin to the British Foreign Office and expressed the Company's concern regarding the visit that a U.S.

⁷ Map No. 9 in Indonesia's Map Atlas.

⁸ See, IM, paras. 6.52-6.53.

⁹ MM, para. 10.8.

¹⁰ IM, Annex 113, Vol. 3.

vessel had paid to islands "*situated off the port of Sandakan*", on which it "had fixed tablets and flags"¹¹. The despatch concluded that the British Government should inform the U.S. authorities that the BNBC had been administering those islands and request that they remove any flags and tablets placed on them. A map was attached to the despatch according to para. 24 which reads:

"24. For the information of the Secretary of State, I have attached a Map, showing clearly the respective spheres of influence and control."¹²

A.20 It should be noted that the BNBC did not refer in that paragraph to a particular delimitation line, but simply to "spheres of influence and control" appearing on a map. The purpose of the map, readily understandable from the context of the despatch, was to notify the U.S. authorities of the limit of the BNBC's administration of islands in the northern part of North Borneo. The Dutch Government was not privy to these communications since they did not touch upon their possessions or their interests.

A.21 The line appearing on Map 6 of Malaysia's Memorial, extending south of the land boundary dividing British North Borneo from the Dutch territories, appears however to include within the British sphere of influence territories which were indisputably Dutch. This fact alone is sufficient to undermine the significance of such a line.

A.22 Moreover, the southern limit of this line appears to be totally arbitrary, particularly if one considers the numerous other maps published subsequently, some of which have also been included in Malaysia's Atlas, which show a similar line stopping north of the disputed islands. Reference in this respect should be made to Maps 14, 17, 19, 20, 21, 22 and 25 of Malaysia's Atlas and Maps Nos. 8, 9, 10, 12, 14, 15, 16, 18 and 20 of Indonesia's Atlas. All these maps reflect the line described in Article I of the 1930 Convention between Great Britain and the United States setting out the definitive division of territorial possessions between the two States in the area, well to the north of the 4°10' N latitude established by the 1891 Convention.

¹¹ *Ibid.*, Annex 102, Vol. 3. Emphasis added.

¹² *Ibid.*

A.23 Thus, with regard to this map, it may be concluded as follows:

- (a) The 1906 map was part of an arrangement between Great Britain and the United States concerning the administration of islands situated off the north-eastern coast of the island of Borneo, well to the north of the disputed islands. In any event, this arrangement was *res inter alios* as far as The Netherlands was concerned;
- (b) The length of the line is unprecedented in the light of the rest of the map evidence. Moreover, the line appears to end arbitrarily at the 4° N parallel of latitude, well south of the land boundary of British North Borneo and it inexplicably extends further south of what was unquestionably Dutch territory.

**C. Map 1 of Malaysia's Atlas: *Schetskaart Van De Residentie
Zuider – En Oosterafdeeling Van Borneo* (Extract)**

A.24 Malaysia then considers a Dutch map reproduced as Map 1 in Malaysia's Atlas and as Insert 2 at page 6 of Malaysia's Memorial. According to Malaysia, this map shows that the Dutch Government recognised that the 1891 Convention boundary stops at the east coast of the island of Sebatik, and that it also shows that "the group of islands (Sipadan, Mabul (Maboel), Kapalai, Ligitan, Danawan and Si Amil (Siamil)) appertain to the 'Gouvt van Britisch Noord-Borneo'"¹³.

A.25 It should be noted that Malaysia has failed to provide any information regarding the origin of this map other than that it was published in 1913 by the Netherlands Indies Government Topographical Office, thus asserting that it is "the first official map (on a scale of 1:750,000) of the Southern and Eastern Division of Borneo"¹⁴.

¹³ MM, para. 10.9.

¹⁴ *Ibid.*

A.26 As recalled in para. 7.91 above, the purpose of this map was to provide a topographical description of the area and not to show attribution of sovereignty over territory. The map offers no basis for Malaysia's allegation that the islands of Sipadan, Ligitan, Mabul, Kapalai, Dinawan and Si Amil form a "group" of islands or that they are attributed by this map to the Government of British North Borneo. No attribution of sovereignty over the disputed islands is given, by means of colour coding or otherwise.

A.27 In Indonesia's view, a much more significant feature of the map is the fact that, were the line running across the island of Sebatik on this map to be extended eastward, the islands of Ligitan and Sipadan, given their position, would fall on the Dutch, now Indonesian, side of the line.

D. Map 13 of Malaysia's Atlas: *Plan of Semporna, District of Lahad Datu*, Survey Department, Jesselton, 1935

A.28 Next in Malaysia's analysis is a map dated 1935 entitled *Plan of Semporna, District of Lahad Datu* issued by the Survey Department at Jesselton. According to Malaysia, the mere fact that the islands of Ligitan and Sipadan appear on the map is evidence of their appurtenance to Great Britain. However, a closer examination of this map reveals that the disputed islands, like other offshore features situated in Sibuko Bay, are not depicted as part of the District of Lahad Datu which is identified as the territory included within the cross-dashed boxes.

A.29 As to the significance of the words "Bird Sanctuary" which appear on the island of Sipadan, it will be recalled that, as noted in Chapter VII of Indonesia's Counter-Memorial, the notice published in the *Official Gazette* of 1 February 1933 concerning a megapode reserve, and similar measures regarding the collection of turtle eggs, provides no evidence that the British colonial authorities acted as sovereign over the island of Sipadan¹⁵.

¹⁵ Paras. 7.36- 7.38.

E. Map 14 of Malaysia's Atlas: *The State of North Borneo*, 1941

A.30 This is similarly the case regarding the next map produced by Malaysia, which is entitled *The State of North Borneo* and was published in 1941. According to Malaysia, this map demonstrates both "a clear understanding that Sipadan was part of the State of North Borneo [...] and a deliberate intention to include it" within the limits of that State¹⁶.

A.31 Malaysia's assertion that the map demonstrates a "clear understanding" that Sipadan was part of the State of North Borneo is misleading and erroneous. Indonesia would point out that the map shows a number of features and territorial possessions which were indisputably *not* part of the State of North Borneo, for example, the southern part of the island of Sebatik and the mainland part of the Dutch territory. In the light of this, the inclusion of Ligitan and Sipadan in this map has no significance for purposes of attribution of territory. In Indonesia's view, much more relevant is the fact that this map shows a line labelled "Boundary between the Philippine Archipelago and the State of North Borneo", very similar to the line drawn on Map 6 discussed above, which stops well to the north of the disputed islands, undermining the arguments made by Indonesia regarding the "red line" marked on the latter map.

F. Maps 15 and 16 of Malaysia's Atlas: *Tawau*, Director of National Mapping, Malaysia, 1964; *Pulau Sebatik*, Director of National Mapping, Malaysia, 1970

A.32 Malaysia then introduces two maps published in 1964 and 1970 by the Malaysian Director of National Mapping, which, it alleges, show that the "boundary line clearly stops at the east coast" of Sebatik¹⁷. One map is entitled *Tawau* and shows a small part of the eastern portion of Sebatik with a 4°10' line running across the island but not extending offshore. The map carries the disclaimer, "This map must not be considered an authority on the delimitation of international boundaries and does not in any event cover the islands in dispute".

¹⁶ MM, para. 10.11.

¹⁷ MM, para. 10.12.

A.33 The second map, which is dated 1970, is entitled *Pulau Sebatik* and only includes the section of this island nearest to the mainland and is therefore totally irrelevant. The map also carries the following disclaimer: "This map is not an authority for boundaries".

A.34 It is worth noting, in this respect, that Indonesia included two maps in its Memorial, entitled *Pulau Sebatik* and *Tawau* and dated 1964 and 1965 respectively¹⁸, which were both prepared by the United Kingdom Ministry of Defence for the Director of National Mapping, Malaysia, both of which show an offshore extension of the 4°10' N boundary line beyond Pulau Sebatik. Even admitting, for the sake of argument, that the probative value of these maps is diminished by the fact that they carry similar disclaimers to those appearing on the maps included in Indonesia's Atlas, they undermine any relevance of the maps presented by Malaysia.

G. Map 17 of Malaysia's Atlas: *The Colony of North Borneo*, Survey Department, Jesselton, 1952

A.35 The remaining maps introduced by Malaysia in Chapter 10 of its Memorial are inconsistent in their portrayal of offshore boundaries. The 1952 map of *The Colony of North Borneo*¹⁹, compiled and drawn by the Survey Department, Jesselton, does show Ligitan and Sipadan (the latter outside the framework of the map), but it also shows the southern part of the island of Sebatik and the adjacent landmass, which were indisputably Dutch possessions. It should also be noted that, here too, the line portraying the limit of the Philippine Archipelago stops well to the north of the islands of Sipadan and Ligitan.

H. Map 18 of Malaysia's Atlas: *Lahad Datu Police District*, 1958

A.36 Malaysia then refers to a 1958 map of the Lahad Datu Police District²⁰, arguing that the disputed islands fell within the police district, apparently on the basis that they lie on one side of what appears to be an offshore district boundary line marked on the map. However,

¹⁸ Maps No. 11 and 13 in Indonesia's Map Atlas.

¹⁹ MM, para. 10.13.

²⁰ *Ibid.*, para. 10.14.

the provenance of and justification for this line, which reflects no other line depicted on any other maps submitted to the Court, are not indicated on this map or elsewhere by Malaysia.

A.37 Indeed, no explanation is given for the source of this map generally, and Malaysia's reference to the map's legend, which states "Compiled from various sources and drawn by S.M. Ross, Lahad Datu, 1958", is unsatisfactory given its general nature and failure to make reference to any official source. In the light of the above, this map should be viewed as of minimal relevance.

I. Map 19 of Malaysia's Atlas: *Map Showing Territorial Waters and Continental Shelf Boundaries of Malaysia*, Director of National Mapping, Malaysia, 1979

A.38 The next map in Malaysia's collection is entitled *Map Showing Territorial Waters and Continental Shelf Boundaries of Malaysia*, dates from 1979 and was published and printed by the Director of National Mapping, Malaysia²¹. This map has already been discussed by Indonesia in its Memorial²². It includes the disputed islands within Malaysia's maritime zone, but no reference is made to any legislation to support this boundary line. If compared with other Malaysian maps dating from 1963 to 1974 all of which depict the offshore extension of the line established by the 1891 Convention²³, this map, prepared 10 years after the dispute emerged in 1969, cannot be considered as having any probative value and merely illustrates the extent to which Malaysia's claims have been artificially constructed and represent an encroachment upon the agreed 1891 boundary line.

A.39 Malaysia compares this 1979 map with the map annexed to Indonesia's Act No. 4 of 18 February 1960²⁴, remarking that Sipadan was not included as a base-point. This issue has been dealt with in Indonesia's Memorial²⁵, but for the convenience of the Court, Indonesia's position will be summarised again here.

²¹ MM, para. 10.15. This map had also been reproduced by Indonesia as Map No. 21 in its Map Atlas.

²² IM, paras. 8.59- 8.69.

²³ See, for example, Maps No. 11, 12, 13, 14, 16, 18 and 20 of Indonesia's Map Atlas.

²⁴ Map No. 7 in Malaysia's Map Atlas.

²⁵ IM, paras. 8.11-8.13.

A.40 This legislation was drawn up in haste at a time when Indonesia's priority was to gain recognition for the notion of archipelagic waters at the Second United Nations Conference on the Law of the Sea²⁶. More concerned with that important issue, Indonesia did not make a detailed inventory of the approximately 17,000 islands making up the Indonesian archipelago and as a result many of them were overlooked.

A.41 In this respect, it should be recalled that Malaysia recognised Indonesian sovereignty over a number of islands that were not specifically included in the 1960 Act²⁷.

J. Maps 20, 21 and 22 of Malaysia's Atlas: *Semporna*, Directorate of National Mapping, Malaysia, 1967; *Malaysia Timor Sabah*, Directorate of National mapping Malaysia, 1972; *Operational Navigation Chart L -11*, U.K. Director of Military Survey, 1978

A.42 The inconsistencies in the maps presented by Malaysia are recognised by Malaysia itself in an attempt to justify two Malaysian maps which had also been included in Indonesia's Atlas as Maps No. 15 and 18, and a further map published by the British Government in 1978, which show a boundary line between Indonesia and Malaysia extending out to sea following the line resulting from the 1891 Convention²⁸.

A.43 Malaysia dismisses these maps as insignificant because they all carry disclaimers. Although Indonesia acknowledges the role of a disclaimer in evaluating the probative weight of map evidence, it has to be recognised that the importance of disclaimers such as those appearing on the maps in question, is of diminished effect in the face of a consistent pattern delineating the boundary in a particular position. What is important is the fact that these official maps represent the considered view of the Malaysian Government as to the outer limit of its territorial claims.

²⁶ See, Affidavit of Admiral Sumardiman, IM, Annex B, Vol. 5.

²⁷ For example, Pulau Tokong Boro, Pulau Pengibu, Tandjung Parit and Pulau Batu Mandi. IM, para. 8.12.

²⁸ MM, paras. 10.17-10.19.

A.44 Indeed, the Malaysian maps mentioned in Malaysia's Memorial depicting the islands of Sipadan and Ligitan on the Indonesian side of the line are not unique. They are merely some examples of a number of maps issued by Malaysian authorities prior and subsequent to the 1969 *status quo* agreement showing the offshore extension of the line between Indonesia and Malaysia running through the island of Sebatik and into Sibuko Bay along the 4° 10' N latitude as provided for under the 1891 Convention. These maps include:

- A map entitled *Pulau Sebatik* published for the Director of National Mapping of Malaysia by the British Ministry of Defence in 1964 (Map No. 11 in Indonesia's Atlas);
- A map entitled *Malaysia Timor Sabah* drawn by the Department of Lands and Surveys of Sabah in 1964 and printed and published by the Malaysian Directorate of National Mapping in 1966 (Map No. 12 in Indonesia's Atlas);
- A map entitled *Tawau* published for the Director of National Mapping of Malaysia by the British Ministry of Defence in 1965 (Map No. 13 in Indonesia's Atlas);
- A map by the same title issued by the Malaysian Directorate of National Mapping in 1967 (Map No. 14 in Indonesia's Map Atlas);
- A map entitled *Metalliferous Mineral Prospecting Licenses* issued by the Malaysian Ministry of Lands and Mines in 1968 (Map No. 16 in Indonesia's Map Atlas);
- A map called *Malaysia Timor Sabah* issued by the Malaysian Directorate of National Mapping in 1972 (Map No. 18 in Indonesia's Map Atlas);
- A map entitled *Negeri Sabah, Population and Housing Census. Map Showing Distribution of Population* prepared and published by the Malaysian department of Statistics in 1974 (Map No. 20 in Indonesia's Map Atlas);

- A map entitled *Malaysia, Singapura & Brunei: pemerintahan (Political map of Malaysia, Singapore & Brunei)*, issued by The Directorate of National Mapping of Malaysia and dated 1966. This map, which is being reproduced for the first time by Indonesia as Map A.1 and can be viewed overleaf, shows the 1891 line running through the island of Sebatik and extending in a seaward direction²⁹.

A.45 Similarly, there are examples of British maps attributing the disputed islands to Indonesia. Map A.2, displayed after Map A.1, is a Top Secret map of the island of Borneo issued by the Geographical Section of the British General Staff in 1944. As can be seen, once more, the 1891 line extends east of the island of Sebatik, showing unequivocally that the British view of the 1891 delimitation line was that the boundary did not terminate on the eastern-most point of the island of Sebatik.

A.46 Another example of the British official position is a 1973 Tactical Planning Chart (No. L 11-C) issued by the British Ministry of Defence and a copy of which is reproduced in Indonesia's Map Atlas as No. 19. As can be seen from the enlargement of this map contained in Indonesia's Atlas, the map shows the 4° 10' N latitude line running across Sebatik island and extending into the sea in an easterly direction.

Section 3. Conclusions

A.47 The cartographic material deployed by Malaysia is contradictory and does not provide any evidence to support Malaysia's claim to the disputed islands. In fact, Malaysia has not succeeded in counteracting the consistent cartographic pattern shown in Indonesia's Memorial and by the further maps reproduced in this Counter-Memorial which confirms that the line resulting from the 1891 Convention extended seaward from the island of Sebatik, thus dividing the territorial possessions of the Parties and leaving the islands of Ligitan and Sipadan under Dutch or Indonesian sovereignty.

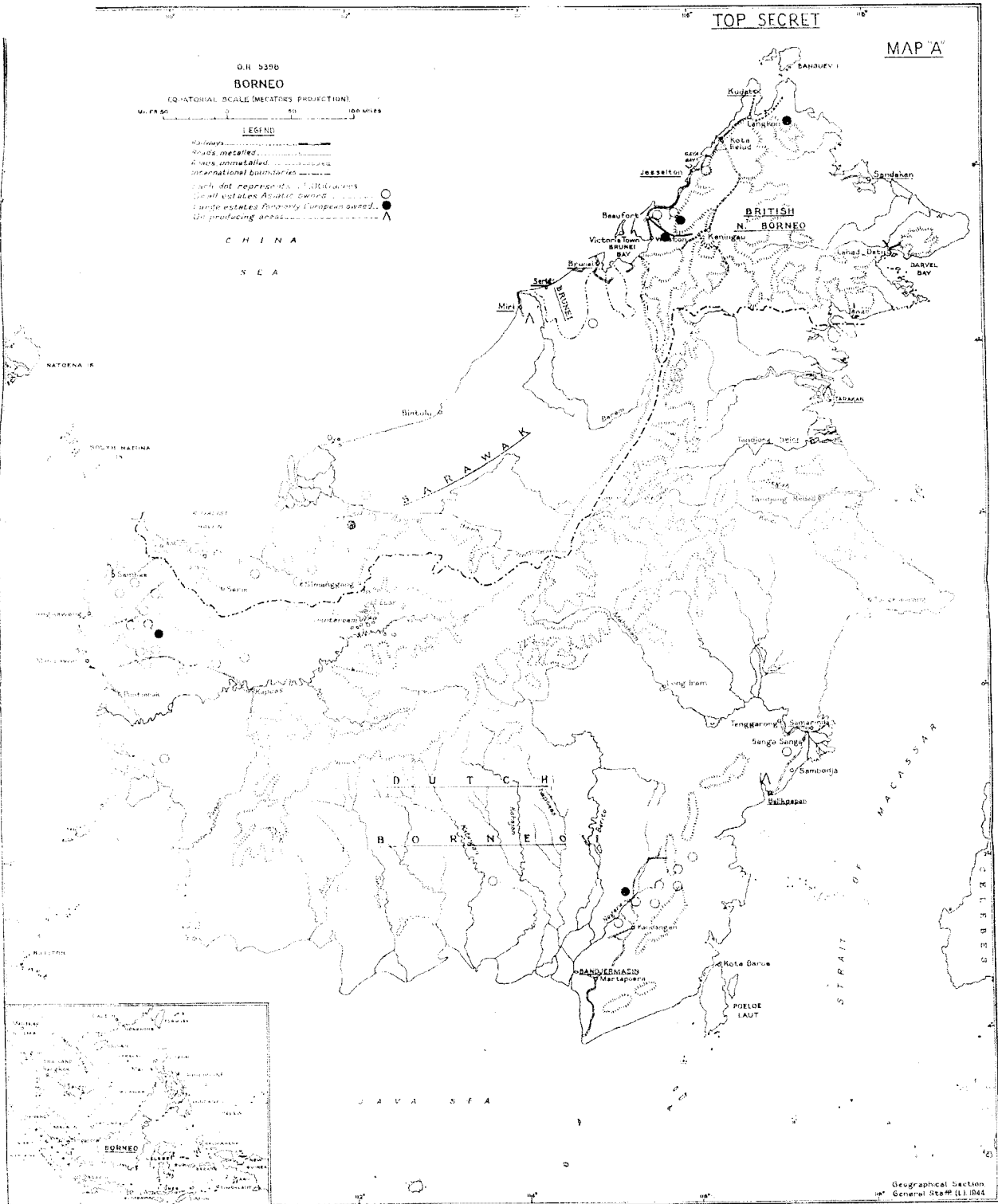
²⁹ The map can be found in the Library of the School of Oriental and African Studies in London. The Library holds only the E. sheet of a two-sheet map.

A.48 The British cartographic evidence presented by Malaysia is either irrelevant for purposes of sovereignty – for example, the British nautical charts – or its importance is undermined by the existence of other British maps showing Sipadan and Ligitan as Dutch possessions or as falling on the Indonesian side of the line agreed upon in the 1891 Convention.

A.49 As regards Malaysia's official cartography, Indonesia has shown that, since independence in 1963, Malaysia has consistently represented the disputed islands as forming part of Indonesia's possessions. Similarly, a number of Malaysian maps created prior to 1969 depicted the 1891 Convention line as running across the island of Sebatik and extending in an easterly direction along the 4° 10' N line of latitude. The position taken by Malaysia in those years is particularly significant as it represents the considered and objective view of that Government as to the extent of its territorial sovereignty.

A.50 After 1979, long after the dispute arose, Malaysian maps changed in a self-serving manner to depict the islands as falling under Malaysian sovereignty. However, as the award in the *Beagle Channel* arbitration demonstrates, such tactical changes in official cartography serve only to reinforce the legal significance to be attached to the consistent pattern displayed in the earlier cartography³⁰.

³⁰ *Beagle Channel* arbitration, *International Law Reports*, (ed. E. Lauterpacht), Vol. 52, p. 93 at p. 121, paras. 148-162.



Map A.2

12/11/11

IN - 1 1000 1000 1000

LIST OF ANNEXES

(Volume 2)

1. Map entitled *Sint-Lucia Baai (N.O. Borneo)*, from *Tijdschrift van het Koninkl. Nederl. Aardrijksk. Genootschap* (Journal of the Royal Netherlands Geographical Society), 1901.
2. *A Map of part of Borneo and the Sooloo Archipelago, Laid down chiefly from Observations made in 1761,2,3 and 4 by Dalrymple, with enlargement.*
3. Declaration of His Highness Datu Bungso T. Amisulin, dated 30 April 1997.
4. Short, B.K., "Brunei, Sulu and Sabah: an Analysis of Rival Claims", *Brunei Museum Journal*, Vol. 1, N°1, pp. 133-145, 1969.
5. Lopian, A.B. and Nagatsu, K., "Research on Bajau Communities: Maritime People in Southeast Asia", reprinted from *Asian Research Trends: A Humanities and Social Science Review*, N°6, 1996.
6. *Extract from an Article published in the "Java Bode" in February 1882, and republished in the "Singapore Straits Times" of February 9, 1882, reproduced as an enclosure in a letter from Sir Rutherford Alcock, Chairman of the North Borneo Company to Earl Granville.*
7. Map showing the location of islands of Maratua and Kakaban.
8. Harrisson, T., "The Bजाus: Their Origins and Wide Importance", *Sabah Society Journal* VI (1), pp. 38-41, 1973-74, published by the Sabah Society, Kota Kinabalu, Malaysia.
9. Sather, C., "The Bajau Laut" in V.T. King (ed.), *World Within: The Ethnic Groups of Borneo*, pp. 222-249, S. Abdul Majeed & Co Publishing Division.
10. *Handbook of British North Borneo, Colonial and Indian Exhibition, 1886, London: William Clowes & Sons, Limited, 1886.*
11. Treacher, W.H., "British Borneo: Sketches of Brunai, Sarawak, Labuan and North Borneo", *Journal of the Straits Branch of the Royal Asiatic Society* N°21, Chapters VII-XI, pp. 48-121, June 1890.
12. Extract from the log-book of HNLMS *Admiraal van Kinsbergen* for 10 and 11 June 1876 (Dutch original and English translation of excerpt)
13. Excerpt from *The British North Borneo Herald*, January 1, 1895, p. 9.
14. Letter from Sir. R. Alcock to Earl Granville, 20 December 1883.

15. Letter from W.B. Pryer, Resident, to Jonkheer H.O. Wickers, Captain Netherlands Iron-clad, *Atjeh*, 4 July 1880, Appendix (A) to Inclosure 1 (*Memorandum on the North Borneo Cessions*, 28 May 1881) to letter from Sir R. Alcock to Earl Granville, 1 July 1882.
16. Extract from the *Nieuwe Rotterdamsche Courant* of October 20, 1879 (translated from the Dutch) STATES-GENERAL, SECOND CHAMBER. *Estimates for Netherlands India for the Financial Year 1880*, Appendix (B) to Inclosure 1 (*Memorandum on the North Borneo Cessions*, 28 May 1881) to letter from Sir R. Alcock to Earl Granville, 1 July 1882.
17. General Remarks made by Count Bylandt in the last Meeting of the Commission about Borneo on Saturday the 27th of July 1889 (copy of the original and transcription) and letter from Count Bylandt to H.E. Mr. Hartsen, 1 August 1889 (Dutch original and English translation).
18. Convention between France and China, concerning the identification of the boundary between China and Tonkin, signed in Peking, 26 June 1887, and Supplementary Convention, 20 June 1895, Prescott, J.R.V., *Map of Mainland Asia by Treaty*, Melbourne University Press, 1975, pp. 453-456.
19. *The Oxford English Dictionary*, 2nd ed., prepared by J.A. Simpson and E.S.C. Weiner, Volume I, Clarendon Press, Oxford, 1989, pp. 121-122.
20. *Van Dale Groot Woordenboek Der Nederlandse Taal*, 11th ed., Utrecht/Antwerpen, 1984, pp. 2050-2051.
21. Letter from Count de Bylandt to Mr. Hartsen, 28 July 1889. (Dutch original and English translation)
22. *Extract from a Map of British North Borneo*, Stanford, E., for the British North Borneo Company, 1888, sent as an attachment to the letter from Count de Bylandt to Mr. Hartsen, 28 July 1889, with enlargement highlighting the additional markings.
23. Map entitled *Kaart van het Noordelijk Gedeelte van Het Eiland Borneo*, 1885, (Sheet N°10 from Atlas Stemfoort & Ten Siethoff, 1st ed., 1885), with enlargement highlighting the manuscript annotation.
24. Aide Mémoire Communicated by the Netherland Chargé d'Affaires to the Foreign Office, 19 November 1910.
25. Report entitled *Boundary Delimitation Between The Netherlands Possessions and The State of British North Borneo*, 17 February 1913.
26. Sketch map showing the boundary line on the Map attached to the Agreement of 28 September 1915 and the boundary line on the Map attached to the Convention of 26 March 1928.

27. *An Index of British Treaties 1101-1968*, compiled and annotated under the auspices of the International Law Fund and the British Institute of International and Comparative Law, by Clive Parry LL.D. and Charity Hopkins M.A., LL.B., pp. 434-435, 520-521, 584-585, 720-721, London, HMSO, 1970.
28. Letter from Van Weede to the Dutch Minister of Foreign Affairs, 3 March 1900 (Dutch original and English translation).
29. Letter from the Dutch Minister of Foreign Affairs to the Dutch envoy in Madrid, 19 April 1900 (Dutch original and English translation).
30. Letter from the President of the General Board to the Secretary of the Navy, 25 November 1903 and the back of the map entitled *Northern Shore of Sibuko Bay* issued by the Hydrographic Office in June 1903.
31. Affidavit of Mr. Paraggam, 6 February 2000. (Indonesian original and English translation).
32. List of ships of the Royal Netherlands Navy present off the coast of Northeast Borneo during the period 1895-1928 (Source: *Koloniale Verslagen*).
33. Extract from the log-book of HNLMS *Koetei* for 30 September 1910 (Dutch original and English translation of extract).
34. David, H., "Tensions within ASEAN – Malaysia and its Neighbours", in *Monographs on South-East Asian Politics and International Relations* N° 1, Chapter 5, pp. 64-78, Department of South-East Asian Studies, University of Hull, 1996.
35. Press releases and documents from the Indonesian Government concerning the hostage-taking situation on Sipadan in April 2000.
36. Map entitled *Oil Prospecting Licences and Leases*, from the *Annual Report of the Geological Survey, Borneo Region, Malaysia 1967*, Malaysian Ministry of Lands and Mines, 1968.
37. Map of Borneo taken from *Atlas Indonesia Untuk Sekolah Rakja*, ed. by Soekarno C.S., Penerbitan dan balai buku Indonesia, Djakarta, Amsterdam, Surabaya, 1953.
38. Enlargement of *Map of British North Borneo*, Stanford, E., 1906.