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Chapter 1

INTRODUCTION

1.1. This is the Counter-Memorial of Malaysia in the present proceedings, filed pursuant to the Order of the President made on 11 May 2000. It responds to the Memorial of the Republic of Indonesia of 2 November 1999.

The geographical setting

1.2. Before turning to summarise the cases of the two parties as presented in their respective memorials, it is useful to recall the geographical setting of the dispute. **Insert 1**, opposite, shows that setting, with key place names as they were (or were thought to be) at about the time of the 1891 Anglo-Dutch Boundary Convention, on which the Indonesian case hangs.¹ The case concerns two small islands off the coast of North Borneo, part of a group of small islands and reefs surrounding the Semporna Peninsula.

1.3. It is useful to review the European understanding of the geography of the two islands at the time of the 1891 Boundary Convention. Useful for this purpose are the contemporary sailing directories or pilots, to which mariners and other Europeans concerned with the region would have referred. Annex 1 to this Counter-Memorial extracts the relevant pages from the directory entitled *Eastern Archipelago, Part I (Eastern Part)*, published in London for the Hydrographic Office of the Admiralty in 1890.² Under the general rubric of “Darvel Bay”, it deals with a series of locations (settlements, islands, reefs, etc.) running from north to south. The entry for the Ligitan islands reads as follows:

¹ For the 1891 Boundary Convention see Annex MM 17, vol. 2, p. 70.

² J.P. Maclear (comp.), *Eastern Archipelago, Part I (Eastern Part)* (London, Hydrographic Office, Admiralty, 1890) pp. 182-191; Annex MCM 1, vol. 2, pp. 1-11.

“**Ligitan islands.**—Of this group, lying off the north coast of Sibuko bay there is very little information, but they appear to be surrounded by dangers. Si Amil, the north-easternmost, appears by the chart to be wedge-shaped, and 800 feet high; Danawan, to the westward of it, appears to be low.

A **small islet** with a few shrubs on it lies in latitude $4^{\circ} 12\frac{1}{2}'$ N., longitude $118^{\circ} 54'$ E. From it, Si Amil island bears N. 5° W. Reefs extend 4 or 5 miles from this islet in an easterly direction, and it appears to be connected by a reef to Si Amil; this reef is dangerous, as there are no symptoms except breakers about one mile eastward of the islet.

Sipadan, the southernmost of the group, is 120 feet high. Coming from the eastward Sipadan should be kept to the northward of west, as the extent of the reefs to the eastward of it has not been determined; they do not appear to the southward of the island.”³

The directory then goes on to deal with Sibuko or St. Lucia Bay. It refers *inter alia* to Batu Tinagat point, and notes “the entrance of the little river Tawao, on the left bank of which the Dutch have a small settlement”,⁴ as well as to Sebatik island and the Sibuko river.

1.4. The passage is of considerable interest. It names three of the four Ligitan islands (Si Amil, Danawan and Sipadan), but does not name Ligitan itself, which from the description given and its bearing to Si Amil one can nonetheless identify as the “small islet”. It treats all four islands as part of the Ligitan group, and treats them in conjunction with other islands and features associated with Darvel Bay.⁵ It notes that Si Amil and the small islet (Ligitan) are physically connected by a reef, but in other respects shows considerable uncertainty about the geography and the navigational hazards: for example it is unclear to the compiler whether there are reefs to the

³ Ibid., pp. 187-8.

⁴ Ibid., p. 190.

⁵ Commander Field of the *Egeria* drew heavily on these sailing directions in his hand-written notes which are at Annex IM 90, vol. 3, p. 239. Again Sipadan is treated as part of the Ligitan Group and Ligitan itself is not named: its position is only given approximately.

eastwards of Sipadan (in fact there are not, since Sipadan is an oceanic pillar). Of particular note for present purposes is that it locates Ligitan in the wrong longitude, though in approximately the correct latitude. The position is as follows:

Coordinates of Ligitan

<u>1890 Directory</u>	<u>Actual</u>
Lat: 4° 12½' N.	lat: 4° 09' 48" N.
Long: 118° 54' E.	long: 118° 53' 04" E.

The coordinates of Sipadan are not given. The directory also notes (as if by way of exception) the existence of a small Dutch settlement on the left bank of the Tawao River at its entrance, and the availability of information about Sebatik from Dutch charts. Otherwise all references are to British vessels, settlements and surveys.

The basis of the Indonesian case

1.5. As developed in its Memorial, the Indonesian case does not differ from that disclosed in earlier negotiations, going back to 1969 when the Indonesian claim to the islands was first made. In its essentials, Indonesia argues that:

- (a) The islands were part of the dominions of the sultanate of Bulungan under Dutch protection and sovereignty;
- (b) There was a dispute concerning the islands between the Netherlands and Britain (on behalf of North Borneo) before 1891;
- (c) The dispute was resolved in favour of the Netherlands by the 1891 Boundary Convention, because the Convention can be seen (with the crucial aid of an internal Dutch map) to have drawn not only a boundary but an allocation line, running eastwards along the parallel of 4° 10' N, placing the islands under Dutch sovereignty;

- (d) The Netherlands and subsequently Indonesia retained the sovereignty attributed to them in 1891, despite the fact that they never exercised administrative control or jurisdiction over the islands.

1.6. This argument faces severe difficulties. They include the following:

- (a) There is no evidence whatever that the claims of the Sultan of Bulungan extended to the islands or that he exercised the slightest authority there; all the evidence is to the contrary;
- (b) All descriptions of the boundary dispute before 1891, whether given by Dutch or British officials, make it clear that the dispute concerned exclusively the area to the west and south of Batu Tinagat, and had nothing to do with islands further to the east;
- (c) The 1891 Boundary Convention cannot bear the interpretation Indonesia prefers, which is also flatly contradicted by the Anglo-Dutch Agreement of 1915 and the attached, agreed map;
- (d) The internal Dutch map, even if it did support that view (and it is equivocal), is inadmissible as evidence of the intention of the parties, and even if it was admissible, it could not prevail over the express terms of the Convention;
- (e) The Netherlands cannot have gained in 1891 sovereignty over islands which then belonged to a third State (Spain) and which were subsequently ceded to Great Britain without any protest whatever by the Netherlands, or any action to sustain the claim now made.

The basis of the Malaysian case

1.7. By contrast, Malaysia's case is clear and unshaken by anything argued or disclosed in Indonesia's Memorial. It may be summarised as follows:

- (a) The two islands were part of the dominions of Sulu before 1878, at the time the Sultan of Sulu granted to the promoters of the British North Borneo Company the right to administer North Borneo and certain inshore islands;
- (b) There is a clear and unbroken chain of administration of the islands by North Borneo, which began following the grant of 1878;
- (c) After the United States acquired Spain's rights in the region in 1900, the United States specifically claimed sovereignty over the two islands, a claim which Britain expressly recognised;
- (d) In turn, by Exchange of Notes of 1907 the United States allowed North Borneo to continue to administer the islands; then in 1930 the islands were ceded to North Borneo by a Treaty between Britain and the United States;
- (e) The islands have been continuously administered by Malaysia and its predecessors in title ever since.

The task of the Court

1.8. Evidently, the task of the Court faced with these conflicting arguments is to reach its own conclusion, as provided for in Article 2 of the Special Agreement concluded between Indonesia and Malaysia on 31 May 1997.⁶ In a case brought by Special Agreement neither party bears any formal onus of proof. Nonetheless, in the particular circumstances of the present dispute, Indonesia most certainly does have a substantial onus, since it is asking the Court:

⁶ Annex MM 33, vol. 2, p. 139.

- (a) to disturb the well-attested, uninterrupted possession and administration of the islands by Malaysia and its predecessors in title, dating back more than a century;
- (b) to do so on the basis of a unilateral interpretation of a Convention of 1891 which has no textual foundation in the Convention or in its *travaux* and is supported, if at all, only by an internal map never officially communicated to the other party and not opposable to it;
- (c) to do so on the basis of an interpretation which the Netherlands itself never placed on the Convention, and in support of a claim which the Netherlands never made;
- (d) to do so on the basis of an interpretation which is contradicted by the subsequent practice of the parties to the Convention, as well as of the parties to this case;
- (e) and to do all this in circumstances where, even if the parties had wanted to, they could not have affected sovereignty over the islands at the time of the 1891 Convention, because they then belonged to a third State, Spain.

The material presented by Indonesia does nothing to discharge that onus. On the contrary, it confirms Malaysia's sovereignty over the two islands. That sovereignty was acquired by a clear and well attested chain of transactions, and in particular by the Boundary Convention between Britain and the United States of 1930, at which time sovereignty and administration of the islands were reunited in the State of North Borneo under British protection. But if there were any doubt about this, the fact of the undisturbed administration of the islands by Malaysia and its predecessors in title for more than a century must be decisive.

The structure of this Counter-Memorial

1.9. Since Indonesia's case depends on the 1891 Boundary Convention, in this Counter-Memorial Malaysia will first show that none of the Indonesian arguments as to the effect of that Convention has any weight (Chapter 2). It will then, so far as necessary in response to Indonesia's Memorial, deal with the transactions which

did concern the two islands and which *did* involve administration over them, in particular, the transactions between the United States and Britain in right of North Borneo in 1907 and 1930 (Chapter 3). The conduct of Indonesia and Malaysia and their predecessors in title in relation to the islands will then be surveyed, and the Indonesian account of that practice refuted. It will be shown that it clearly supports Malaysia's title to the islands (Chapter 4). Finally the map evidence adduced by Indonesia will be discussed, and a number of further Dutch and Indonesian maps reviewed. Taken together, the map evidence provides useful supplementary support for Malaysia's sovereignty over the two islands. In particular there is not a single map which in terms attributes them to Indonesia (Chapter 5).

1.10. Appended to Volume 1 is a report by an authority on Dutch colonial history, Professor Houben, showing that the present Indonesian claim via the Sultanate of Bulungan is lacking any historical foundation.⁷ Volume 2 contains certain additional documents and maps referred to in this Counter-Memorial.

⁷ See below, Appendix 1.

Chapter 2

THE 1891 BOUNDARY CONVENTION DID NOT AFFECT THE DISPUTED ISLANDS

A. The Territorial Title Alleged by Indonesia

2.1. Indonesia's claim to the islands of Ligitan and Sipadan rests exclusively on the Boundary Convention of 20 June 1891 between Great Britain and the Netherlands. As the Indonesian Memorial says:

“While for the reasons explained in Chapter IV there were various uncertainties as to the exact location of the boundary between Dutch and British possessions in North Borneo, those uncertainties were brought to an end by the conclusion of the Convention between Great Britain and The Netherlands Defining Boundaries in Borneo of 20 June 1891. The terms of that Convention, and its contemporaneous interpretation by the Parties, leave no doubt as to the inclusion of both Ligitan and Sipadan within the colonial domains of The Netherlands.”¹

2.2. Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930.²

¹ IM, para. 5.1., p. 61.

² See MM, ch. 5 & Chapter 3 below.

2.3. Given the importance of the 1891 Boundary Convention for the Indonesian case, this Chapter will examine closely the argument put forward in the Indonesian Memorial. Unfortunately for Indonesia, neither the terms of the Boundary Convention, nor its contemporaneous interpretation by the Parties to the Convention, support its conclusion.

B. Background to the Boundary Convention of 20 June 1891

2.4. The authority of the Sultan of Sulu on the coastal territory of northeast Borneo in the middle of the 19th century is not in dispute between the Parties to the present proceedings. The effective authority of the Sultan of Bulungan over the territory claimed by the Netherlands in 1891 is much more questionable, contrary to the assertions of the Indonesian Memorial.³ The dependencies of the Sultan of Sulu at the time of the 1878 concession overlapped in the south with the Dutch claims to the Sultanate of Bulungan, but that overlap never extended to the islands now claimed by Indonesia, as the following account will show.

2.5. The grant by the Sultan of Sulu to Messrs. Overbeck and Dent of 22 January 1878 was 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

³ IM, paras. 4.55 ff.

the Sibuku River together with all the islands included therein within nine miles of the coast.”⁴

2.6. On 28 February 1846, the Governor-General of the Netherlands East Indies issued a resolution fixing the northern limit of the Dutch administrative divisions at the 3° 20' north latitude, or at the river Atas. The resolution declared:

“The parts of Borneo on which Netherlands does not exercise any influence are:

(a) The States of the Sultan of Bruni or Borneo proper, extending from Tanjong Datu on the west to the River Kemanis on the east, situated on the north-west coast.

(b) The State of the Sultan of the Sulu Islands, having for boundaries on the west the River Kemanis, the north and north-east coasts as far as 3° north latitude, where it is bounded by the River Atas forming the extreme frontier towards the north with the State of Berou dependant on the Netherlands.

(c) All the islands of the northern coasts of Borneo.”⁵

The description is precise, given the geographical knowledge of the area at the time.⁶ The mouth of the Atas river was thought to be located at 3° 20' N.⁷

⁴ Annex MM 9, vol.2, p. 31. The first reference to the limit of this kind seems to be in the Treaty of Friendship and Commerce of 27 May 1847 between Britain and the Sultan of Borneo, Annex IM 11, vol. 2, p. 69, Article X, which refers to a 10 geographical mile limit.

⁵ Annex IM 10, vol. 2, pp. 55 ff.

⁶ See above, paragraphs 1.2-1.3.

⁷ It is shown in that location by Indonesia in its sketch map at IM, opposite page 64. On modern maps no such river is shown, but rather a series of bays and indentations. Some maps show a river by the name of Antjam at about that location: whether it is the River Atas of the documentary record is unclear.

2.7. On 27 August 1849, the resolution was modified by decree. The new text dropped the reference to the 3° 20' N parallel. It did not give any precision as to the location of the northern boundary.⁸

2.8. The Contract between the Sultan of Bulungan and the Government of the Netherlands East Indies of 12 November 1850 provided in article 2:

“The territory of Boeloengan is located within the following boundaries:

...with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.

The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto.”⁹

2.9. But, contrary to the stipulations of the Treaty of 1824, the Contract was never notified to the British Government, as the Dutch Minister of Foreign Affairs admitted in the Second Chamber of the States-General on 8 March 1892.¹⁰ There would have been no reason for the British Government to protest in 1850, as it had no way of knowing about the Contract. The first notification of the Dutch claim was on 17 January 1880, after the 1878 Sulu concession: only when the Contract with the Sultan of Bulungan was renewed in 1878 was it communicated to the British authorities.¹¹

2.10. Reference to “the small islands belonging thereto” in the Contracts of 1850 and 1878 obviously concerned the islets immediately adjacent to the large islands mentioned there. Contrary to the assertion of the Indonesian Memorial implying that the Parties

⁸ Annex IM 12, vol. 2, pp. 71 ff.

⁹ Annex IM 13, vol. 2, pp. 81 ff.

¹⁰ Annex IM 84, vol. 3, p. 199.

¹¹ IM, para. 3.22., p. 15.

to the 1891 Boundary Convention had in mind “all territorial issues between them, including those concerning the neighbouring islands”,¹² the British and Dutch authorities at no time gave the slightest indication that islands so far out at sea as Sipadan and Ligitan were concerned by that boundary delimitation. Whenever the Dutch authorities refer to islands, it is in the proximate sense. For instance, Count de Bylandt affirms, in a letter dated 8 April 1881, that the sovereignty of the Netherlands extends to:

“2. Les Iles Terrakan, Manoekan, et Sibittikh avec les îlots *adjacents*.”¹³

On 19 June 1893 the description of the territory of Bulungan in the 1878 Contract was amended to adapt the Contract to the 1891 Treaty. The new description was in the following terms:

“The Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik situated to the south of the above boundary-line, described in the “Indisch Staatsblad” of 1892, No. 114, belong to Boeloengan, as well as the small islands *belonging to the above islands*, so far as they are situated to the south of the boundary-line last mentioned.”¹⁴

2.11. The small islands referred to were “adjacent” or “belonging to” the larger islands of Tarakan, Nanoekan or Sebatik. They could in no way designate Sipadan or Ligitan, which were certainly not adjacent to or belonging to the larger islands mentioned. Sipadan is 42 nautical miles east of the island of Sebatik. Ligitan is some 15 nautical miles still further east.

2.12. The overlapping claims in the south were bound to create conflict. To assert their perceived rights, the Netherlands hoisted the flag in 1879 at Batu Tinagat and occupied the nearby village of

¹² IM, para. 4.72., p. 60.

¹³ Annex MM 41, vol. 3, p. 27 (emphasis added).

¹⁴ Annex MM 54, vol. 3, p. 114 (emphasis added).

Tawau, whilst Dutch warships occasionally patrolled the north-east coast.

2.13. The cape of Batu Tinagat, on the northern coast of Sibuko or St. Lucia Bay, was the extreme eastern claim of the Netherlands on the east coast of Borneo and was consistently described as such. As early as 1 December 1882, the Dutch Minister in London, Count de Bylandt, considered that any territory east of Batu Tinagat was beyond Netherlands territory:

“La notice que j’ai l’honneur de remettre ci-prés à votre Excellence contient un ensemble de faits qui permettent de considérer comme fort probable que la rivière désignée dans les Concessions sous le nom de “Siboeboe” est située à l’est de Batoe Tinagat et par conséquent en dehors du territoire Néerlandais. En ce cas toute cette controverse tomberait d’elle-même; elle n’aurait en réalité jamais existé.”¹⁵

2.14. The note sent by Count de Bylandt to the Marquis of Salisbury on 22 December 1888 confirmed that Batu Tinagat was the most eastern point of the Dutch possessions on the Island of Borneo:

“Le Gouvernement du Roi a cru devoir prendre comme limites extrêmes à l’ouest: Tandjong Datoe, et à l’est: Batoe Tinagat, étant donné que les droits de souveraineté des Pays-Bas sur ces deux points extrêmes de l’Ile de Bornéo ne sauraient être contestés.”¹⁶

2.15. The Netherlands Delegates to the Joint Commission noted at the second meeting, on 19 July 1889:

¹⁵ Annex IM 31, vol. 2, p. 280 (emphasis added).

¹⁶ Annex IM 37, vol. 2, p. 329.

“7. Admitting that the statements of Mr. Treacher should be correct insofar as the regions are concerned to the *eastward* of Batoe Tinagat, they certainly are incorrect as to the disputed district which was not occupied by the Sulu chiefs.”¹⁷

2.16. But, as the Minister of Foreign Affairs admitted in the ratification debate in 1892, “...the claim of the Netherlands to fix the boundary of its territory on the east coast of Borneo so far as the Tawao river and Batoe Tinagat was not in reality indisputable”, adding that “...the claims of Boeloengan to Batoe Tinagat could not be proved and were in reality imaginary.”¹⁸ The hold of the Netherlands on territory north of Sibuko Bay was shaky to say the least, as the Indonesian Memorial concedes.¹⁹ The Explanatory Memorandum submitted by the Dutch Government to the Parliament admits:

“A local inspection carried out by the deputy assistant resident of Koetei revealed that the Bajaus who live on the islands located at the North Eastern coast of Borneo, which belong to the Sultanate of Solok, still continuously collect forest products in the disputed area and show no concern whatsoever for the Sultan van Boeloengan.”²⁰

It may be recalled that the Bajaus, or sea gypsies, were living in the vicinity of Sipadan and Ligitan, as they still do.²¹ They were principally based on Danawan, the headmen of which had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan. They were considered as a Sulu population. No single document so far disclosed in this case states or even suggests that they were under the authority of Bulungan and the Netherlands.

¹⁷ Annex MM 45, vol. 3, pp. 51-52 (emphasis in original).

¹⁸ Annex IM 84, vol. 3, pp. 197-198, 206.

¹⁹ IM, para. 5.23., p. 73.

²⁰ Annex MM 51, vol. 3, p. 91.

²¹ MM, pp. 12-19.

2.17. The history of the negotiations prior to the 1891 Treaty confirms the views of the deputy assistant resident of Koetei. He reported that the Sultan of Bulungan...

“was prepared to act unconditionally according to the arrangements to be made by the Dutch and English Governments, but would rather see that to the population of Boeloengan for the term of 15 years be given the right to collect forest products free of tax in the area between Broershoek and Batoe Tinagat.”²²

2.18. That was so decided in the Treaty, Article VI. The interesting point is that the Sultan of Bulungan at no time asked for the right to collect products of the sea on islands east of Batu Tinagat, which would have been turned over to British North Borneo. Valuable commodities could be collected on the islands, in particular turtle eggs. If the Sultan of Bulungan had considered the islands east of Batu Tinagat as within his possessions, he would no doubt have claimed the same rights for his people.

2.19. In 1888, Great Britain entered into agreements establishing protectorates over Sarawak, Brunei and the territory of the British North Borneo Company. The Dutch Foreign Minister was “somewhat taken aback” by the news. But the Dutch Government did seize the opportunity to propose an agreement on the boundaries of Borneo. As the Explanatory Memorandum submitted to the Dutch Parliament puts it, “the border dispute had become automatically a matter for negotiation between the Dutch and British Governments.”²³ In 1889, the Foreign Secretary, Lord Salisbury, agreed to refer the question for consideration and advice to a small committee of representatives of the two States. Great Britain appointed Sir Philip Currie, Permanent Under-Secretary of State for Foreign Affairs and Sir Edward Hertslet. The Netherlands appointed the Count de Bylandt, Dutch Minister in London and Mr.

²² Explanatory Memorandum, Annex MM 51, vol. 3, p. 91.

²³ Ibid., p. 90.

A.H. Gysbert, official of the Netherlands Ministry of the Colonies.²⁴
Negotiations could begin.

2.20. In relation to Ligitan and Sipadan, the following points may be noted on the eve of the negotiations:

- (a) The boundary dispute between Great Britain and the Netherlands concentrated on the land boundary on the Island of Borneo and, in particular on the point on the east coast where the boundary would start.
- (b) The “extreme” Dutch claim to the east was the cape of Batu Tinagat. All the territory east of that point was considered British or Spanish territory by the Dutch authorities themselves.
- (c) The only islands in the vicinity of the north coast of Sibuko Bay mentioned in any documents, whether Contracts with the Sultan of Bulungan, administrative Dutch delimitation or diplomatic exchanges between the two Governments were the islands of Tarakan, Nunukan and Sebatik and the “small islands belonging thereto” or “adjacent” to those islands.
- (d) The Sultan of Bulungan had little or no control on the area in dispute, let alone over islands well to the east. He was only too happy to secure the right for his people to collect forest products free of tax for 15 years, but never advanced the slightest claim to islands, or the product of islands, east of Batu Tinagat. On the contrary, the Bajau people, living on the coast of North Borneo, felt free to roam in the area, owing allegiance to the Sultan of Sulu.

C. The Negotiations for the 1891 Convention

2.21. The negotiations lasted for two years. The Joint Commission held three meetings, on 16, 19 and 27 July 1889. Diplomatic exchanges ironed the major issues which had been

²⁴ MM, pp. 91-94; IM, pp. 63-70.

pointed out by the Joint Commission. The Boundary Convention was signed on 20 June 1891.

2.22. As Sir Edward Hertslet, the second British member of the Joint Commission, had noted:

“...it may be well to call attention to the great importance of not allowing the Dutch to enjoy the sole right of navigating the Sibuco and the numerous other rivers which flow from the interior of the Island of Borneo into the sea, in the Sibuco or Sainte-Lucia Bay, to the south of Batu Tinigat, as to admit such a claim might have the effect of depriving the Company of a large portion of their possessions, as the actual course of the Sibuco is not known, and it might be found to rise considerably to the north of Batu Tinigat, and to flow through a vast extent of territory in the interior belonging to the North Borneo Company.

The question of the navigation of these rivers, then, is really the only important point in dispute...”²⁵

2.23. Contrary to what is asserted by Indonesia,²⁶ the Dutch were not “on the retreat, yielding territory to which they had strong claims” between Broershoek and Batu Tinigat. Rather, as the Netherlands Government readily admitted in the Explanatory Memorandum submitted to the Parliament,²⁷ they were seeking a settlement which would give them “a quite correctly described borderline which puts an end to all difficulties in the future, not only concerning that part of Borneo which was connected with the border dispute but also concerning the whole island.”²⁸ During the Parliamentary debate in The Hague, the Ministers insisted, in the words of Mr. Van Tienhoven, Minister of Foreign Affairs, that...

²⁵ Further Memorandum, 9 January 1889, Annex MM 43, vol. 3, p. 35.

²⁶ IM, para. 5.24, p.74. But see IM, para. 5.23, p.74: “The Dutch Government regarded acceptance of the 4° 10'N line as not involving the loss of any possessions which were unquestionably Dutch.”

²⁷ Annex MM 51, vol. 3, pp. 91, 93.

²⁸ Ibid., p. 93.

“... it cannot be said that we are now retracting and giving up territory that undoubtedly belongs to us.”²⁹

As the Explanatory Memorandum puts it, in the eyes of the Netherlands Government “... the boundary is much more favourable for the Dutch than the British desired.”³⁰

2.24. The Joint Commission did propose that the boundary start from a point about 4° 10' north on the coast, then “pass between the islands of Sebatik and East Nanoekan”. This was a British proposal, advanced by Sir Philip Currie to ensure access of British ships to the estuary of the Sibuko River. It was related to the overriding concern about navigation and was in no way “clearly envisaged in principle as one which, starting on the coast, ran eastwards *at sea* for an indeterminate distance (although at least between the two named islands), i.e., out to the open sea”, as Indonesia incorrectly puts it.³¹ If such had been the intention of the British Government, Britain would have singled out the issue when Count de Bylandt finally rejected the proposal. In fact the ensuing negotiation was exclusively concerned with navigation and not with a boundary running out to the open sea.

2.25. The decision to adopt the parallel of 4° 10' N latitude as the starting point for the boundary, westward across the island of Borneo and eastward across the island of Sebatik, was an obvious compromise, roughly half way between the British proposal of 4° north and the location of Batu Tinagat, thought to be at about 4° 19' north.³² The choice of the parallel continued across Sebatik island was a convenient way of ensuring equal access to the Sibuko River. Other alternatives (such as enclaving the little Dutch settlement on

²⁹ Annex IM 84, vol. 3, p. 198.

³⁰ Annex MM 51, vol. 3, p. 93.

³¹ IM, para. 5.23., p. 73.

³² Annex MM 40, vol. 3, p. 24, Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880.

the Tawau River) were too complex and would have created a future “hornets nest”, in Count de Bylandt's words.³³

2.26. The order in which the decisions were taken gives the key to the structure of the Boundary Convention. The point is of interest, given the elaborate Indonesian demonstration as to the significance of the articles of the Convention.³⁴ Sir Edward Hertslet noted, on the first meeting of the Joint Commission, “...in the event of a satisfactory understanding being arrived at with regard to the disputed boundary... on the north-east coast, in the neighbourhood of the Sibuco River, the British and Netherland Governments will proceed without delay to define, short of making an actual survey, and marking the boundary on the spot, the inland boundary-lines...”³⁵ The *first step* was to determine the starting point on the east coast of mainland Borneo. As Sir Philip Currie remarked, “...until the boundary on the coast was settled, the question of the frontier inland must remain in suspense...”³⁶ At the third meeting, Sir Philip proposed “That the boundary-line on the coast should start from the point called Broers Hoek, in about 4° 10' north latitude...”³⁷ The Joint Commission agreed to the proposal. The *second step* was the determination of the boundary inland, to the west. On 2 February 1891, Count de Bylandt proposed to Lord Salisbury the adapted watershed line between the rivers Simengaris and Soedang, as finally written into the Boundary Convention.³⁸ The *third step* was the agreement to divide the Island of Sebatik by following the 4° 10' parallel north from the west coast to the east coast of the Island.³⁹ That order of negotiation is reflected in the order of the relevant articles of the Boundary Convention.

2.27. The only offshore islands that were mentioned or thought to be relevant were certain offshore islands, in the immediate vicinity of the coast of Borneo. A member of the Dutch delegation,

³³ Annex MM 47, vol. 3, p. 66.

³⁴ IM, para. 5.43. pp. 83-86.

³⁵ Annex MM 44, vol. 3, p. 39.

³⁶ Annex MM 46, vol. 3, p. 64.

³⁷ Annex MM 46, vol. 3, p. 62.

³⁸ Annex MM 50, vol. 3, pp. 85-88.

³⁹ Ibid.

Mr. Elias, mentioned that a decree of the Governor-General of Netherlands East Indies dated 2nd February 1877 had specified that “the Islands of Sibbitich, Nanoekkan and Tarakkan” belonged to the Netherlands.⁴⁰ These islands were adjacent to the mainland coast, well within the three-mile limit. In the *Guinea/Guinea Bissau* case, in somewhat comparable circumstances, the French Government had mentioned during the ratification debate “les îles situées le long de la côte... de même que celles qui se trouveront dans les eaux des possessions françaises”. The arbitral tribunal noted that “Il semble que cela n’ait visé que les îles côtières, qui étaient indubitablement situées dans les eaux territoriales.”⁴¹ The islands mentioned by Mr. Elias were in the direct vicinity of the proposed boundary lines and would necessarily be affected by the choice of the boundary. They were part and parcel of the mainland boundary dispute. No other islands were mentioned, either directly or indirectly, during the negotiations. There was no question of any line running eastwards at sea.

2.28. To sum up, in relation to the present dispute:

- (a) The negotiations were dominated by the issue of access to the rivers on mainland Borneo and freedom of navigation on these rivers.
- (b) The compromise proposal was a balanced one. The Netherlands Government strongly denied it was yielding any territory.
- (c) The negotiators settled the starting point on the east coast first, then determined the course of the boundary westward across mainland Borneo, then the course of the boundary eastward across the Island of Sebatik.
- (d) The only islands mentioned during the negotiations were Tarakan, Nunukan and, naturally, Sebatik. These islands, adjacent to the coast of Borneo were necessarily affected by the mainland boundary dispute.

⁴⁰ Annex MM 45, vol. 3, p. 59.

⁴¹ Arbitral award, 14 February 1985, para. 61.

- (e) There never was any question of a boundary-line running eastwards out to the open sea.

D. The Survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda*, 30 May – 19 June 1891

2.29. Indonesia underlines the importance of the naval survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda* in June 1891. Malaysia agrees this is a useful element for the understanding of the present case. But the slight confusion noticeable in Indonesia's presentation of the facts calls for clarification.

2.30. On 29 December 1890, Lord Salisbury requested the British Minister in The Hague, Sir Horace Rumbold, to ask the Netherlands Government:

“...whether, if Her Majesty's ship 'Egeria' should proceed on a surveying cruise to the east coast of Borneo early next year, they would consent to an investigation being made by the officers of that vessel, with a view to ascertain the exact point where 4° 10' north latitude reaches the sea, on the clear understanding that any mark which the British naval officers may think it necessary to place is without prejudice to the conflicting claims of the Netherlands East India Government and the British North Borneo Company with regard to the boundary of their respective territories on the east coast of Borneo.”⁴²

2.31. On 20 January 1891, the Dutch Foreign Minister, Mr. Hartsen, accepted the request. He added:

“Eu égard, cependant, à la possibilité que ce point (le point sur la côte où se trouve le parallèle 4° 10' latitude sud [*sic*] soit adopté par la suite comme point de départ

⁴² Annex IM 63, vol. 3, p. 51.

de la limite entre les possessions Néerlandaises et Anglaises sur l'Ile de Bornéo, le Gouvernement des Pays-Bas est d'avis qu'il serait désirable que l'étude dont il est question se fasse conjointement avec des officiers d'un navire de la marine Néerlandaise."⁴³

Hartsen proposed a combined expedition and suggested that the purpose of the mission be extended to explore and determine the course of the rivers Simengaris and Soedang, in the vicinity of Broershoek⁴⁴.

2.32. In the meantime, the two governments agreed that the 4° 10' north parallel be considered as the boundary on the Island of Sebatik. The Dutch Minister proposed on 7 April 1891 to instruct the combined expedition to fix the exact points at which the parallel crosses the coasts of the island and to draw up the necessary maps. But there was no question of extending the scope of the combined expedition to any other islands.⁴⁵

2.33. The report of the Dutch surveying vessel *Banda* is precise.⁴⁶ The *Banda* arrived in St. Lucia Bay at 10 o'clock in the morning on 1st June 1891. Buoys were put in their places on the coast, just north of Broershoek and on Sebatik Island. The rivers were explored as instructed. The *Banda* left on 21 June at 8:30 o'clock for the return voyage. The combined expedition was concluded. There was never any question of the *Banda* demarcating a maritime boundary further east, let alone visiting Ligitan or Sipadan.

2.34. As the Indonesian Memorial correctly points out, "a map, entitled *Plan shewing the Result of the Determination of Parallel of 4° 10' N on the East Coast of Borneo, and Examination of the Rivers in the Vicinity*, June 1891 appears to be the 'tracing' referred

⁴³ Annex IM 65, vol. 3, p. 59.

⁴⁴ Ibid.

⁴⁵ Annex IM 69, vol. 3, pp. 77-84.

⁴⁶ Annex IM 80, Inclosure No. 3, vol. 3, pp. 138-140.

to in the Admiralty letter of 24 September 1891 as illustrating the combined work of the two British vessels.”⁴⁷ The map is produced as Map No. 6 in the Indonesian Atlas and as Map No. 12 in the Malaysian Atlas: for the purposes of illustration it appears again in photo-reduced form opposite, as **Insert 2**. Indonesia argues that, because the 4° 10' N parallel is continued out to sea beyond the Island of Sebatik, “it is therefore to be noted that one of the results on which both Governments had expressed their agreement was this tracing showing the relevant parallel extending out to sea.”⁴⁸ If the point is to show that parallels run through land and sea alike, it is quite evident. The more important point, however, is that the parallel is considered on the map as a topographical feature and certainly not as a boundary, extended in the same manner westward towards inland Borneo and eastward out to sea. The beacons erected on Sebatik Island are correctly located, but the boundary was not yet decided at the time of the survey. And even more important, the map stops 12 miles off Sebatik. Any further maritime survey was beyond the province of the joint expedition.

2.35. The joint expedition ended on 21 June 1891. But that is not the end of the story. The *Egeria* did visit Sipadan Island, but in May.⁴⁹ It had arrived in March in the area and was instructed to survey the coast and islands around Darvel Bay. No notice was given to the Netherlands Government, no authorisation was called for, no combined expedition was organised, as this was undoubtedly British territory.⁵⁰

⁴⁷ IM, para. 5.38, p. 80.

⁴⁸ Ibid.

⁴⁹ Annex IM 89, vol. 3, p. 231.

⁵⁰ As the account of the Darvel Bay survey in the *British North Borneo Herald* put it:

“The survey of the South coast of Darvel Bay extending from Silam in the North-west to Richard’s Reef... thence by the Eastern side of Pulo Gaya on to Si Amil Island and stretching to the westward as far as Egeria shoal including Sipadan Island was completed on 15th August...”

Annex IM 89, vol. 3, p. 233.

2.36. According to the Indonesian Memorial:

“These references (in the report of the *British North Borneo Herald*) to Ligitan and Sipadan, an account of survey conducted by British vessels in association with a Dutch vessel at the time of the conclusion of the 1891 Convention, show that those islands were very much in mind at the time, were hydrographically significant, and were in waters which it was important to survey properly in the general interests of navigation.”⁵¹

It appears that, due to the “almost totally unsurveyed condition of this portion of the territory under the rule of British North Borneo Government”, several vessels were grounded in the reef-bestrewn waters.⁵² HMS *Egeria* was accordingly ordered to undertake the survey and arrived at Sandakan on 14 March 1891. The *Egeria* stayed in the area till 27 August, then returned to resume the survey of Darvel and St. Lucia Bays from 28 March to 29 August 1892.

2.37. The *Egeria* did survey Sipadan and Ligitan. Stations were installed, in particular on Mabul and Sipadan. But all this took place in the beginning of May and was a strictly British operation. Contrary to what is implied by the Indonesian Memorial, the Dutch vessel was in no way associated with the survey of the islands off the coast of British North Borneo

2.38. The Indonesian Memorial notes that “...the Dutch were directly engaged in maritime activities in the area and were unwilling to let British naval vessels carry out such activities on their own.”⁵³ This is probably true as to the survey of territory claimed by the Dutch and of the proposed boundary with British North Borneo. It is not true for the territory and islands to the east, which were administered by British North Borneo, including Ligitan and Sipadan.

⁵¹ IM, para. 5.39. P. 81

⁵² *British North Borneo Herald*, Annex IM 89, vol. 3, p. 230.

⁵³ IM, para. 5.36, p. 80.

2.39. After having surveyed certain islands off the British North Borneo coast, including Sipadan, between 13 and 19 May, the *Egeria* met HMS *Rattler* and HNLMS *Banda* on 1 June close to Broershoek for the combined expedition, to ascertain the points and erect beacons on the 4° 10' N parallel on the east coast of mainland Borneo and the east and west coasts of Sebatik. They also explored the Simengaris River as instructed. British and Dutch officers established a cordial relationship, hunted wild pigs together. The Dutch report of the expedition noted that “the most agreeable souvenirs will remain on both sides of the time passed by them in the Bay of St. Lucia.”⁵⁴ The conversation was bound to have touched upon the survey of the *Egeria* in the preceding weeks. But the Dutch officers did not consider it worth mentioning in their report, much less did they protest at what (according to Indonesia’s position now) would have been a unilateral British survey of Dutch islands and waters.

2.40. The *Egeria* returned the following year to complete the survey of the islands off North Borneo. She visited Sipadan and Ligitan during her cruise.⁵⁵ They were obviously considered as part of the group of islands associated with the Ligitan reef, soundly within British territory. The *Egeria* cruised on to the island of Sebatik to check the boundary beacons placed the year before.

2.41. The visit of HMS *Egeria* to the area is instructive in a number of ways. To summarise:

- (a) Great Britain and the Netherlands considered it necessary to organise a combined expedition to survey the proposed boundary before signing the 1891 Treaty.
- (b) The combined expedition was instructed to ascertain the points where the 4° 10' N parallel met the east coast of the island of Borneo, the east and west coast of the island of

⁵⁴ Annex IM 80, vol. 3, p. 138.

⁵⁵ Annex IM 90, vol. 3, pp. 242, 245.

Sebatik, to explore the rivers Simengaris and Soedang and to draw maps thereof. A map was drawn and communicated to the Dutch authorities. It clearly was limited to the coast and the vicinity of Sebatik Island.

- (c) The *Egeria* was also instructed to survey the islands off the coast of British North Borneo, in the vicinity of Darvel Bay, among which were included Ligitan and Sipadan. This was done a few weeks before the combined expedition and was a purely British venture.
- (d) The Dutch authorities had insisted on the presence of a Dutch vessel to survey the boundary on the east coast of Borneo. They could not ignore the purely British survey of Sipadan and Ligitan. They did not object to the activities of the *Egeria* in an area under British sovereignty and, quite to the contrary, congratulated the British authorities for “the good understanding with the English officers”.

2.42. **Insert 3**, opposite, is a sketch map of the voyages of the *Banda* and the *Egeria* in the region in 1891 and 1892. The focus of the *Egeria*'s voyages around Darvel Bay is obvious enough. The limited focus of the *Banda*'s voyage is equally obvious. The contrast with the Indonesian vision of a “joint” operation is stark. There was a joint operation, but it was limited to Sebatik and inshore waters. So, evidently, was the 1891 Convention.

E. The Interpretation of the 1891 Boundary Convention

*“The ... claims were in reality imaginary”*⁵⁶

2.43. The claims were “imaginary”. Mr. Van Dedem, the Dutch Minister for Colonies, was talking about the claims of the Sultan of Bulungan to Batu Tinagat. The same can be said of Indonesia's

⁵⁶ Mr. Van Dedem, Minister of the Colonies, Second Chamber of the States-General, 8 March 1982, Annex IM 84, vol. 3, p. 206.

interpretation of the Boundary Convention between Great Britain and the Netherlands defining boundaries in Borneo, dated 20 June 1891. Whereas the natural and ordinary meaning of the Treaty is straightforward, as Malaysia has demonstrated in its Memorial, Indonesia writes into the Boundary Convention words that are not there and traces an imaginary “boundary” line 50 miles out to sea to support its claim to Ligitan and Sipadan. Not a word in the 1891 Boundary Convention supports the Indonesian claim.

2.44. The relevant terms of the Treaty are the following:

“ARTICLE I.

The boundary between the Netherland possessions in Borneo and those of the British protected States in the same island, shall start from 4° 10' north latitude on the east coast of Borneo.

ARTICLE II.

The boundary-line shall continue westward from 4° 10' north latitude, and follow in a west-north-west direction, between the Rivers Simengaris and Soedang...

ARTICLE III.

From the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo, the boundary-line shall follow the watershed of the rivers running ...

ARTICLE IV.

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.

ARTICLE V.

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 British Governments may think fit.”⁵⁷

2.45. Malaysia reads the Treaty, according to the natural and ordinary meaning of its terms, as a land boundary treaty and not an allocation treaty, purporting to divide islands fifty miles off the coast. Indonesia claims the contrary.

2.46. The Boundary Convention is the exact reflection of the negotiation process. Article I determines the starting point on the east coast of Borneo. Articles II and III describe the course of the boundary westwards across mainland Borneo. Article IV describes the course of the boundary eastwards, across Sebatik Island to the east coast of the island and no further. Whatever ambiguity might have resulted from such a description is eliminated by the more precise description of the subsequent agreement of 1915, where the starting point is on the east coast of Sebatik Island and the boundary line runs west across mainland Borneo.

2.47. Indonesia advances thirteen arguments in support of its claim.⁵⁸ There is no substance in any of them.

(a) First (according to Indonesia), Article I establishes the boundary between “possessions” and would be providing for territorial attribution of possessions to the Netherlands and to Great Britain. Doing so by way of a straight line out to the sea was a usual method among colonial powers.

Unfortunately for Indonesia, the text says nothing of the sort. The initial British proposal referred to a “line”. The Netherlands insisted on a “boundary-line”.⁵⁹ The importance of the change

⁵⁷ Annex MM 17, vol. 2, pp. 70-71.

⁵⁸ IM, para. 5.43. pp. 83-86.

⁵⁹ Annex IM 73, vol. 3, p. 101.

should not be overlooked. This was not any delimitation, any ordinary line drawn on a map. Insistent reference to boundaries does not indicate an allocation treaty, but a boundary treaty. The “straight line” out to sea is a pure invention, as the text says nothing of the sort, either for the east coast or for the west coast. The “boundary-line” was necessarily a land boundary-line. At most, it could concern inland waters. But there was no way of qualifying a line out in the open sea, far beyond the three-mile limit, as a boundary-line in 1891.

(b) Second, Article IV provides that, from the starting point laid down in Article I, the boundary line is to be “continued eastward”; the notion of “continuation” would not embrace a line of only limited extent with a nearby terminal point, but rather a line of indeterminate extent.

But Article II uses the same notion of “continuation” westward, i.e. inland, to a point specified in Article III, Tandjong-Datoe on the west coast.

(c) Third, in the absence of any specified limit, the line should divide all territorial possessions, in particular islands or territories whose attribution might be problematical.

But there is a specified limit, the island of Sebatik. The whole purpose of Article IV was to divide the island so as to ensure access by sea to the mainland to each Party.

(d) Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, an interpretation which would leave open the question of attribution of various small offshore island would be inconsistent with this purpose.

But the Dutch belief could only concern the adjacent islands mentioned in the official Dutch documents. Nothing in the text of the Treaty or in the Dutch official documents implies such a wild strike 50 nautical miles offshore, way beyond the limits of the territorial sea. Such a provision would have been explicitly mentioned in the text.

- (e) *Fifth, the history of the negotiations show that the initial British proposal was for a boundary line running out from Broershoek, through the channel between the islands of Sebatik and Nanoekan; such a maritime line would inherently be a line continuing out to the sea.*

But Britain never claimed a line continuing out to the sea and there was nothing “inherent” about the proposal. The British North Borneo Company was anxious about access to the rivers, but never contemplated a line continuing out to the sea. In any case, the line was changed and certainly did not “run out to sea”.

- (f) *Sixth, the only indication given as the location of the line is that it runs “along that parallel”, i.e. the 4° 10' parallel north. The use of the term “along” would confirm a line of indeterminate length.*

But the end of the sentence qualifies the expression: “...along that parallel, across the Island of Sebittik”.

- (g) *Seventh, the words, “across the Island of Sebittik” are a subordinate element; “not a limiting part of the main clause, but merely a subsidiary description”.*

The attempt to strike out these words on the basis that they are separated from the first part of the phrase by a comma is pure fiction. There is nothing natural and ordinary about such a convoluted grammatical hypothesis.

- (h) *Eighth, the ordinary meaning of “across” conveys the meaning of “through and beyond” or “crossing and continuing over” the island of Sebatik.*

But Indonesia simply strikes out the words after the semi-colon “that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to The Netherlands”. The semi-colon indicates a close grammatical and functional relation between the two parts of the sentence. The words mean that the line across the island is to divide the island itself, nothing more, nothing less. Furthermore, there can be little doubt that the word “across” (*over* in the Dutch text) in its ordinary meaning means in such a context: “running along the

surface, it extends until: going from one side to the other, with the aim of reaching the other side”.⁶⁰

- (i) *Ninth, the fact that article IV mentions the island of Sebatik would show that the boundary prescribed by the 1891 Treaty is not limited to the main island of Borneo.*

But Sebatik was mentioned principally because of the issue of access to the rivers by both Parties. And because it was an important island immediately adjacent to the main coast.

- (j) *Tenth, that clarification, in a subsidiary clause, should not place a limit on the principal thrust of the text, which is that the boundary continues eastward along the 4° 10' parallel north.*

But the “principal thrust” is imaginary. The clarification says what it says, i.e. that the boundary crosses the island of Sebatik, dividing it into two.

- (k) *Eleventh, there was no contemporaneous reason that the 4° 10' north line should have been extended out to the high seas, other than the attribution of islands to one Party or the other.*

Indonesia is correct in that there was no reason, contemporaneous or other, to extend the 4° 10' N line out to the high seas. There were no disputed islands to allocate, as the report of the *Egeria*, among others, clearly demonstrates. That is why such a provision was not included in the Treaty and why the boundary-line stops on the east coast of Sebatik Island.

- (l) *Twelfth, continuation of the 4° 10' north line out to the sea would have been consistent with the location of other Dutch possessions to the east, south of the Philippines.*

The 1891 Boundary Convention was not concluded with Spain, but with Great Britain. The issue was not a neat delimitation of the Dutch and Spanish possessions, but the

⁶⁰ See *Woordenboek der Nederlandsche taal (Dictionary of the Dutch language)*, vol. XI (*ooit-ozon*), The Hague/Leiden: Nijhoff/Sijthoff, 1910, p. 1591. Text in Dutch: “*F. Het begrip: boven langs de oppervlakte gaande, breidt zich uit tot dat van: gaarde van de eene zijde van iets naar de andere, met het doel aan den overkant te komen.*”

fixing of the boundary on the island of Borneo between the Netherlands possessions and the British Protected States.

(m) *Thirteenth, the evident interest of both Parties to the access to the estuary of the Sibuko river and their contemporaneous joint maritime activities in the area, including Ligitan and Sipadan, would show that their concerns did not stop at the eastern limit of Sebatik but continued eastward into navigationally significant waters out to sea.*

Freedom of navigation on Borneo rivers in the vicinity of Sebatik certainly was a preoccupation and was dealt with in Article VI of the Treaty. It was the principal reason why the boundary crossed the island of Sebatik. But it is simply not true that the joint maritime activities of the Parties extended out to sea. They were limited by instructions to the exploration of the rivers concerned and to the east and west coast of the island of Sebatik. Contrary to what Indonesia alleges, the reports of HMS *Egeria* and HNLMS *Banda* show that the Treaty boundary stopped on the east coast of Sebatik and that the islands east of that point were considered by both Parties as lying within British sovereignty.

2.48. Malaysia maintains that the natural and ordinary sense of the words used in the 1891 Convention, its object and purpose, all point to boundary delimitation on the mainland of the island of Borneo and the adjacent island of Sebatik. No mention was made of any delimitation out into the sea. As the arbitral tribunal in the *Guinea/Guinea Bissau* case pointed out, “Dans ce silence des textes, il est fortement à présumer que les négociateurs n’ont jamais envisagé autre chose que des frontières terrestres.”⁶¹ A “boundary-line” could in no way be drawn in the open seas, especially in 1891, when maritime delimitation could not extend beyond territorial waters. There is no indication whatsoever that the 4° 10' N parallel would constitute a delimitation of the possessions of the Parties out at sea. Ligitan and Sipadan are not mentioned directly or by any sort of implication compatible with the rules of interpretation of international treaties. The rest is “imaginary”.

⁶¹ Arbitral award, 14 February 1985, para. 79.

F. The Ratification of the Boundary Convention and the Map

2.49. Indonesia's "trump card" is a map attached to the Memorandum of Explanation submitted by the Netherlands Government to the two Chambers of the States-General. In fact it is quite a lonely card.

2.50. The main point is that *there is no map*. There is no map attached to the Boundary Convention. There is no map mentioned in the Boundary Convention. The Parties never agreed to a map. True, there is an official map, but it is not the one mentioned by Indonesia. It is not attached to the 1891 Boundary Convention, but to the 1915 Agreement and will be examined shortly. But given the importance of the internal domestic map for the Indonesian case, it will be first considered within its context, i.e. the ratification debate. In that perspective, it is important to state the facts correctly before analysing the legal consequences.

(1) The facts

2.51. The ratification procedure of the 1891 Boundary Convention in the Netherlands started immediately after the signing of the 20 June Boundary Convention. The Dutch Government drafted an Explanatory Memorandum (*Memorie van Toelichting*), dated 25 July 1891 to accompany the Bill of ratification, submitted to the two Chambers of the States-General.⁶² The Commission of Reporters reported to the Second Chamber of the States-General on 2 December 1891.⁶³ The Government on 20 February 1892 submitted a Memorandum in Response, answering certain parliamentary questions.⁶⁴ The Second Chamber examined the report on 8 March 1892.⁶⁵ The Committee of Rapporteurs of the First Chamber adopted its Final Report on 31 March 1892.⁶⁶ The

⁶² Annex MM 51, vol. 3, pp. 89-97.

⁶³ Annex MM 53, vol. 3, pp. 105-113. The order of the two Memoranda is mistakenly inverted in volume 3 of the Malaysian Memorial.

⁶⁴ Annex MM 52, vol. 3, pp. 98-104.

⁶⁵ Annex IM 84, vol. 3, pp. 159-207.

⁶⁶ Annex IM 85, vol. 3, pp. 209-211.

First Chamber examined and adopted the Report on 1 April 1892.⁶⁷ The Netherlands ratified the Boundary Convention on 20 May 1892.⁶⁸ Ratifications were exchanged in London on 22 May 1892.⁶⁹

2.52. The 1891 Boundary Convention was the object of close and careful scrutiny. The Explanatory Memorandum was discussed, questions were asked, objections were voiced. Certain members considered that the Dutch negotiators should have kept to the blue line on the map and refused to cede Batu Tinagat. Others would have preferred arbitration. The Government reaffirmed that it was not ceding any territory. The Minister of Foreign Affairs pointed at the objective of a “satisfactory border on the entire width of the island of Borneo.” An arbitration could not have produced such a result. The division of the island of Sebatik would allow to “control all access to the deltas beyond” and exclude any danger of future border issues.

2.53. No islands were mentioned other than Sebatik, except for a fleeting reference in the Report to the First Chamber to “neighbouring small islands”. There certainly was no mention of any line running out into the open sea.

2.54. The internal Dutch map was attached to the Explanatory Memorandum.⁷⁰ It carries, among other lines, one line coloured red, which extends to the open sea for approximately 50 miles (less than ten miles in the first draft⁷¹). It does not show the islands in dispute, but only P. Mabul. It was not an agreed map and was drawn unilaterally by the Dutch Government after the conclusion of the

⁶⁷ Annex IM 86, vol. 3, pp. 213-218.

⁶⁸ Annex IM 88, vol. 3, pp. 223-225.

⁶⁹ IM, para. 5.44.

⁷⁰ Annexes MM, vol. 5, Map 2.

⁷¹ Malaysia produced the first draft of the internal map in its Memorial, Insert 15, p. 98. The existence of an earlier draft is hinted at in IM, para. 6.46, pp. 115-116, but the map was not produced.

Boundary Convention.⁷² The very first draft was made by the Dutch Ministry of Colonial Affairs on 23 June 1891⁷³.

2.55. Why then the discrepancy between the text of the Boundary Convention and the Map? Why then the red line running out to the sea? No question was asked by the members, no explanation was given by the Ministers. As Malaysia pointed out in its Memorial, an earlier draft of the map showed a shorter line eastward out to the sea, slightly beyond Batu Tinagat.⁷⁴ The map annexed to the Memorandum of Explanation shows as the British Government proposal a green line out to the sea, slightly beyond Sebatik and Nunukan. But it shows no line out to sea at Batu Tinagat for the initial Dutch claim. Why was the red line lengthened between the two drafts? To indicate the course of the 4° 10' north parallel? Why was it not continued out until it met the Spanish possessions? There is no logic to all this. And nobody seemed to care.

2.56. The Dutch Government does not seem to have attached particular importance to the map, except to illustrate the proposed land boundaries. The Commission of Reporters of the Second Chamber asked for a declaration of the Government to the effect that “all that lies south of the new border should be recognised by Great Britain as: ‘the Netherland possessions in the Island of Borneo’.”⁷⁵ In its Memorandum in response, the Government answered that:

“The Government need also have no hesitation in making the desired declaration that all that lies south of the border (as defined in the agreement) be acknowledged by the British as being: “the Netherlands possessions *in the island of Borneo*.”⁷⁶

⁷² MM, paras. 9.2-9.15, pp. 96-102.

⁷³ ARA, *Min. van Kol.*, 2.10.02, inv. No. 6202; MM, Insert 15, p. 98.

⁷⁴ MM, pp. 97-98.

⁷⁵ Annex MM 53, vol. 3, p. 106.

⁷⁶ Annex MM 52, vol. 3, p. 99 (emphasis added).

The Government would certainly have referred to the map and not only to the agreement if it had intended to continue the boundary out to sea, as nothing of the sort was “defined in the agreement”.

2.57. The Government was criticised by the opposition for giving up Batu Tinagat. Nobody had ever pretended that territory east of Batu Tinagat had been under Netherlands sovereignty in the past, quite to the contrary.⁷⁷ If the Government had considered a delimitation at sea as a compensation for accepting the 4° 10' north parallel, it would have used the argument in the parliamentary debate. Nobody pointed to the issue, because it was a non-issue.

2.58. This also explains why the British Government did not react to the Map. There is no evidence that the Map was officially communicated by the Dutch Government to the British Government,⁷⁸ but it was available for consultation in the Dutch Parliament and was to that extent “a matter of public knowledge” for those concerned.⁷⁹ The British Minister in The Hague, Sir Horace Rumbold, did call the attention of the Marquis of Salisbury to the Map in his despatch of 26 January 1892.⁸⁰ But he did not single out the line running out to the open sea. Neither Sir Edward Hertslet nor Lord Salisbury reacted, because it was a purely indicative document for the Dutch Parliament, drawn for illustrative purposes. What interest Rumbold found in the Map was more probably the land boundary as traced across the island of Borneo and the comparison between the four proposals.

2.59. To sum up, in relation with the present dispute:

⁷⁷ See above, paragraph 2.16.

⁷⁸ Despite a search of the files, no formal note or letter of transmittal by the Dutch to the British Government has been found, and none has been produced by Indonesia. Rumbold's own letter implies that there was no formal communication; he simply says that the map “has lately been published in the official journal”: Annex IM 81, vol. 3, p. 143.

⁷⁹ IM, para. 5.54., p. 91

⁸⁰ Annex IM 81, vol. 3, p. 143.

- (a) The Dutch Parliament scrutinised very closely the Boundary Convention.
- (b) Neither the Government, nor the majority, nor the opposition ever suggested that the boundary-line extended to the open sea.
- (c) The Map attached to the Explanatory Memorandum was used for illustrative purposes in the debate, but no one asked any question or even seemed to notice the extension of the 4° 10' north red line 50 miles out at sea. When questioned about Dutch possessions south of the boundary line, the government referred to the text of the Boundary Convention and not to the Map.
- (d) The British Government did not react to the Map, which was an internal Dutch document used only for illustrative purposes in the parliamentary debate.

(2) Legal consequences of the ratification debate

2.60. The ratification debate gave an interesting indication of the view of the Netherlands Government and Parliament on the 1891 Boundary Convention. It certainly confirmed the opinion that the Boundary Convention was only concerned with the land boundary and the island of Sebatik. It added nothing to the text of the Convention.

2.61. The Map attached to the Explanatory Memorandum did not appear as a “contemporary exposition by the Dutch Government of the meaning of Article IV of the 1891 Convention.”⁸¹ But even if it were so, it would be irrelevant for the interpretation of the 1891 Boundary Convention for the following reasons.

2.62. The Map cannot be considered as an element of the *travaux préparatoires*. It was drawn unilaterally by one of the Parties and

⁸¹ IM, para. 5.51., p. 88

after the signature on 20 June 1891 of the Convention. It can give no indication as to the common intention of the Parties in the drafting of the Convention.

2.63. The Map is certainly not an element of the context within the meaning of Article 31 (2) (b) of the Vienna Convention on the Law of Treaties. The Dutch Government or Parliament made no attempt to incorporate it into the Treaty. The Dutch act of ratification says nothing of the sort.⁸² The other Party did not accept it as an instrument related to the treaty.

2.64. Indonesia's comparison with the *Livre jaune* map in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case⁸³ is not to the point. The text of the Declaration of 1899 was "not free from ambiguities... Different interpretations were possible."⁸⁴ The *Livre jaune* map was not annexed to the 1899 Franco-British declaration, but the Parties repeatedly referred to it as if it had been annexed. Speaking of the Franco-Italian exchange of letters of 1900, the Court noted that "The map referred to could only be the map in the *Livre jaune* which showed a pecked line indicating the frontier of Tripolitania."⁸⁵ In the present instance, quite to the contrary, the Parties *never* referred to the map after it was produced for the purposes of the Dutch parliamentary debate. Instead, they took the opportunity of the first subsequent agreement to annex a very different map illustrating their true common intention, as will be shown.

2.65. There is no similarity with the *Temple*⁸⁶ case either. The internal Dutch map was never the subject of negotiations between the two Governments. The circumstances did not call for any particular reaction, as the map had not been mentioned in the

⁸² Annex IM 88, vol. 3, p. 225.

⁸³ IM, para. 5.52., p. 90

⁸⁴ I.C.J. Reports 1994, p. 30 (para. 58).

⁸⁵ I.C.J. Reports 1994, p. 37 (para. 61).

⁸⁶ *Temple of Preah Vihear, Merits*, I.C.J. Reports 1962, p. 6 at pp. 23, 32-34.

parliamentary debate and no one had noted the extension of the boundary-line out to the sea. Moreover, the map was never used or even referred to by the Parties, either before ratification of the treaty or at a later stage, in the implementation and interpretation of the Boundary Convention. The Parties, by their conduct, certainly did not recognise the red line on the internal Dutch map as a boundary-line. To the contrary, they formally agreed in 1915 to a map which showed that the boundary-line did not run out to sea.

2.66. Indonesia insists on the considerations of stability and finality as an important objective in boundary settlements.⁸⁷ Malaysia agrees. But there was no territorial dispute as to sovereignty on islands beyond the land boundary in Borneo, either westwards beyond Tanjong Datu with Sarawak or eastwards beyond Sebatik with British North Borneo. No one could imagine a wild claim fifty miles out at sea. The Boundary Convention, as drafted, was considered by both Parties as a stable and final settlement and proved so for nearly a century.

G. The Subsequent 1915 Agreement

2.67. In Malaysia's opinion, the practice of the Parties to the 1891 Boundary Convention does not qualify as subsequent practice in the sense of Article 31 (3) (b) of the Vienna Convention on the Law of Treaties. That practice will be considered later. But Article 31 (3) (a) of the Vienna Convention considers that there shall be taken into account, together with the context, "any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions".

2.68. There is an important subsequent agreement that must be taken into consideration for interpretation of the 1891 Boundary Convention: the 1915 Agreement. The Indonesian Memorial notes that "Further clarifications of the line on mainland Borneo were made by a subsequent Agreement of 1915 and by a 1928

⁸⁷ IM, paras. 5.59 ff.

Convention between The Netherlands and Great Britain in implementation of Article V of the 1891 Convention.”⁸⁸ The Memorial adds: “Clearly, since the line had been determined by reference to a parallel of latitude, its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation.”⁸⁹ In other words, it all but ignores the subsequent agreement. But, contrary to what is asserted by Indonesia, the 1915 Agreement also concerns the boundary on the Island of Sebatik and eliminates any possible misunderstanding as to the meaning of Article IV of the 1891 Convention.

2.69. Article V of the Boundary Convention called for eventual subsequent agreements to delimit the boundary between the Parties. Britain and the Netherlands agreed that knowledge of Borneo was scant in 1891 and that the boundary should be more fully explored and determined by the Parties. Article V states:

“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 British Governments may think fit.”

2.70. Article V was used twice, in 1915 and 1928, to determine the exact positions of the boundary-line. The first time was by the Agreement signed in London on 28 September 1915 by Lord Grey and R. de Marees van Swinderen.⁹⁰ A problem had arisen in 1905 as to the interpretation of Article II of the Convention. The Dutch Government disagreed with the BNBC as to the course of the boundary inland from Broershoek. After investigation, the British Government accepted the Dutch interpretation of Article II.⁹¹ Commissioners were later appointed to demarcate the sector of the

⁸⁸ IM, para. 3.62., p. 28.

⁸⁹ IM, para. 5.65., p. 97.

⁹⁰ For the text of the Agreement, Annex IM 118, vol. 3, pp. 461-468 (without the map); Annex MM 27, vol. 2, pp.104-108 (with the map); the map is included in Annexes MM, vol. 5, Map 23.

⁹¹ Baron Gericke to Marquess of Lansdowne, 16 March 1905; Marquess of Lansdowne to Baron Gericke, 18 October 1905. See Annex MCM 2, vol. 2, pp. 13-16.

boundary concerned. Astronomical observations and topographical surveys were made, pillars were erected. The Commissioners reported their agreed solutions in the Tawao Report of 1913; these were incorporated in the 1915 Agreement. The Agreement concerns the boundary-line between the State of British North Borneo and the Netherlands possessions in the island, starting on the west coast of the island of Sebatik and running inland on Borneo till it meets the watershed between the Sedalir and the Sejasap rivers.

2.71. The Preamble of the Agreement states:

“His Britannic Majesty’s Government and the Government of Her Majesty the Queen of the Netherlands have 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, for the delimitation of the boundary line between the States in the Island of Borneo which are under British protection and the Netherland possessions in that island, and relating to the boundary between the State of North Borneo and the Netherland possessions in the island...”⁹²

2.72. The Preamble is interesting in that it explicitly refers to Article 5 of the 1891 Boundary Convention. It agrees on the joint report with the accompanying map, which is an official map, annexed to the Agreement.

2.73. Paragraph 3 of the Tawao Report of 1913 concerns the coastal boundary. It is in the following terms:

“3. We have determined the boundary between the Netherland territory and the State of British North Borneo, as described in the Boundary Treaty

⁹² Annex IM 118, vol. 3, p. 464.

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 pillars.

(2) Starting from the boundary pillar on the west coast of the island of Sebetik, 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) ...⁹³

2.74. Paragraph 3 (1) confirms that the boundary line starts on the east coast of the island of Sebatik, traversing the island following the parallel of 4° 10' N. Whereas the 1891 Boundary Convention line, for reasons analysed above, started on the east coast at Broershoek and ran both westwards, towards inland Borneo, and eastwards, across Sebatik Island, the 1915 boundary-line more logically starts with the easternmost point, on the east coast of Sebatik, and runs due west, through the Island of Sebatik, then across to the coast and through mainland Borneo. Nothing is said about any continuation whatsoever of line eastwards into the open sea. Reference to the "interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments" implicitly, but decisively, excludes any other mutually accepted agreement in the vicinity. If the Netherlands had really believed that such an agreement existed in 1891 to prolong the line out to the sea, that agreement would necessarily have been mentioned.

⁹³ Annex MM 25, vol. 2, pp. 95-96.

2.75. The map attached to the 1915 Agreement confirms that the boundary did not extend out to the open sea. It is an official map, attached to the agreement and mentioned in the Preamble. It represents the common intent of the Parties as to the exact location of the boundary. The red dotted line representing the boundary clearly starts from the east coast of the island of Sebatik and does not extend to the sea. Beyond Sebatik, eastwards, the 4° 10'N parallel is depicted by the same straight black lines as the other parallels shown on the map. An extract from the official map attached to the 1915 Agreement is shown on the following page, as **Insert 4**.

2.76. The importance of this map need hardly be underlined. It certainly supersedes any alleged agreement to the internal Dutch map of 1891. The text of the 1915 Agreement and the official map attached, in Malaysia's opinion, are conclusive.

2.77. If necessary, the 1928 Boundary Convention confirms the 1915 Agreement. Not that it adds anything to the text or the map. It is only concerned with an inland sector of the boundary, from the summits of Gunong Api to Gunong Raya. But it certainly was another opportunity, for the Netherlands Government, if it had any second thoughts, to correct the 1915 Map and Agreement, in particular if it had considered the HNLMS *Lynx* cruise of 1921 as calling for an affirmation of sovereignty east of Sebatik. But such was not the case.

2.78. To sum up, the subsequent Agreements of 1915 and 1928 are relevant to the issue of sovereignty over Ligitan and Sipadan in the following way:

- (a) The 1915 Agreement clearly interprets the 1891 Boundary Convention as starting the boundary line on the east coast of Sebatik Island and running west along the 4° 10' N parallel with no extension east into the open sea.

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- (b) The official map attached to the 1915 Agreement, which is the only official map relevant to the case during the colonial period, confirms that there is no boundary line beyond the island of Sebatik.
- (c) The 1928 Boundary Convention implicitly confirms the conclusion, as the Netherlands did not take this opportunity to raise any question as to the boundary line so determined.

G. General Conclusions

2.79. The general conclusions regarding the 1891 Boundary Convention can be summarised as follows.

- (a) The boundary dispute between Great Britain and the Netherlands concentrated on mainland Borneo and in particular on the point on the east coast where the boundary-line should start.
- (b) The only islands mentioned by the Parties before or during the negotiations were the islands of Tarakan, Nunukan and Sebatik and the “small islands belonging thereto” or “adjacent”, which could not by any standards refer to Sipadan or Ligitan.
- (c) The joint expedition by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda* in June 1891 was strictly limited by instructions to survey of the rivers in the vicinity of Broershoek and the Island of Sebatik, as shown by the reports and the maps attached. Sipadan and Ligitan were surveyed, as were other islands in the vicinity of Darvel Bay, but by a strictly British operation beforehand.
- (d) The natural and ordinary meaning of the 1891 Boundary Convention clearly does not extend the boundary out to the open seas.
- (e) The ratification debate before the Netherlands States-General at no point mentioned the disputed islands. The internal Dutch map attached to the Explanatory Memorandum was the

object of no specific comment during the debate and did not call for any particular reaction.

- (f) The subsequent Agreement of 28 September 1915 starts by stating that the frontier line traverses the island of Sebatik following the parallel of 4° 10' N latitude marked on the east and west coasts by boundary pillars, then follows the parallel westward. The drafting is exclusive of any prolongation of the line eastward. The map referred to in the Preamble and attached to the 1915 Agreement, which is the only official map agreed by the Parties, confirms that the boundary-line starts on the east coast of Sebatik Island and does not concern Ligitan or Sipadan.

Chapter 3

MALAYSIA'S RIGHT TO THE ISLANDS BASED ON ACTUAL ADMINISTRATION COMBINED WITH A TREATY TITLE

A. Introduction

3.1. Chapter 7 of the Indonesian Memorial discusses the relations between British North Borneo, Spain and the United States. It seeks, naturally enough in the context of the present dispute, to dismiss as irrelevant such events as the voyage of the USS *Quiros* (during which the United States expressly claimed sovereignty over the two islands), and such transactions as the 1878 Sulu grant, the 1907 Exchange of Notes and the 1930 Boundary Convention between Great Britain and the United States. Malaysia's position on these transactions was set out in Chapter 5 of its Memorial, and may be shortly summarised:

- (a) Before 1878, the Dutch Government expressly recognized "the authority of Spain over the dependencies of Sulu in the north-east portion of the island",¹ and an authoritative Dutch map of the period clearly showed "Siparan" and "Legetan" as within the dominion of Sulu.² This was a simple recognition of the factual situation, since at no stage did the Netherlands nor its vassal Bulungan exercise any authority to the east of Batu Tinagat, and even south and west of Batu Tinagat their authority was largely nominal.³
- (b) BNBC authority over the territory covered by the Sulu grant of 1878 (extending down to the Sibuko River) was expressly recognised by Spain in the Protocol of 7 March 1885.⁴

¹ Annex MM 40, vol. 3, p. 24.

² MM, para. 5.8, p. 35 & Annex MM, vol. 5, Map 3.

³ As the responsible Dutch Ministers acknowledged in the Dutch Parliament: MM, para. 5.8, p. 35 & Annex MM 51, vol. 3, p. 89 at p. 91.

⁴ MM, para. 5.18 & Annex MM 15, vol. 2, p. 64.

- (c) The Sulu grant of 1878 did not extend to islands (such as Sipadan and Ligitan) which were more than 9 nautical miles offshore, but in fact these islands were administered by the BNBC and were occupied and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC.⁵
- (d) Although Spain never insisted on the 9 nautical miles limitation in the grant of 1878, the United States did so, and it laid claim to the islands as successor to Spain after 1900, both by performance of ceremonial acts on the islands,⁶ by a map,⁷ and in diplomatic correspondence with Britain.⁸ United States sovereignty was acknowledged by Britain in the Exchange of Notes of 1907 and accompanying map,⁹ but the BNBC continued to administer them with the agreement of the United States.
- (e) This situation continued until the Anglo-American Convention of 1930, which rectified the line dividing their respective island possessions, and retroceded to Britain all the islands, covered by the 1907 Exchange of Notes, which lay to the west and south of the line drawn by that Treaty.¹⁰ Sipadan and Ligitan lay to the west and south of that line.
- (f) The BNBC, Britain and Malaysia have continued to administer the islands ever since 1930. There was no protest from the Netherlands or Indonesia to this administration until the dispute suddenly broke out in 1969.¹¹

3.2. Nothing in the Indonesian Memorial casts any doubt on these conclusions. Reliance upon definitions of the Sulu Archipelago, in an attempt to show that the Sultan of Sulu had no claims to the two

⁵ MM, paras. 5.19, 5.28, 5.31-5.34, 6.5-6.8 & documents there referred to.

⁶ MM, paras. 5.24-5.29, pp. 43-48.

⁷ Annexes MM, vol. 5, Map 5.

⁸ Annexes MM 65-67, vol. 3, pp. 167-170; MM, paras. 5.36-5.38, pp.52-55.

⁹ Annexes MM, vol. 5, Map 6.

¹⁰ Annex MM 29, vol. 2, pp. 116-124; MM, paras. 5.34-5.44, pp. 51-58.

¹¹ MM, para. 4.3, p. 27; IM, Ch. VIII deals with the negotiations, and the element of "surprise", at length. The impartial reader will observe (a) that it was Malaysia's delegation which was surprised and unready to counter a new and previously unheard of claim, and (b) that who was surprised by whom in 1969 no longer matters.

islands, ignores the fact that, in addition to his control over Sulu itself, the Sultan claimed allegiance over a significant portion of the north and east coasts of Borneo, at least down to the Sibuko River, as well as the fact that the local people acknowledged their allegiance to the Sultan. In particular, Malaysia demonstrated in its Memorial the allegiance of the Bajaus of Danawan and surrounding islands to Sulu.¹² Individuals on Danawan had and exercised the right to collect turtle eggs on Sipadan.¹³ That right had been granted and confirmed by the Sultan of Sulu. Following the Sulu grant of 1878, and the effective takeover of Sulu by Spain later in the same year, their allegiance was transferred to the BNBC.¹⁴ The east coast settlements of the BNBC — including Sandakan, Lahad Datu, Semporna and, after 1892, Tawao — became the new focus of the trade and administration of the local Bajaus. The captain of the *Quiros* noted in 1903 that disputes over turtle egg collection on Sipadan were taken to the BNBC Resident at Lahad Datu.¹⁵

3.3. Faced with detailed evidence of this kind, as well as evidence of international transactions (specifically affecting the islands off Semporna) between the BNBC under British protection, Sulu, Spain and the United States, Indonesia's repeated reliance on the 1891 Boundary Convention is merely conclusory. There is not the slightest evidence that any of the actors (including the Netherlands itself) considered that Convention to have any relevance to the islands off Semporna, including the two islands in dispute. In the years after 1878, these were incontrovertibly part of the social and administrative system of Darvel Bay and surrounding islands, including Si Amil and Danawan. The 1891 Boundary Convention was wholly irrelevant, and remained so until it became the focus of the Indonesian claim in 1969.

3.4. The Indonesian counter-arguments will be briefly dealt with in this Chapter, first in relation to the Sulu/Spanish period before 1900,

¹² MM, paras. 6.5-6.7, pp. 61-64.

¹³ MM, paras. 6.9-6.21, pp. 65-68.

¹⁴ MM, para. 5.7, pp. 33-34 & para. 6.5, pp. 61-63.

¹⁵ MM, para. 5.28, pp.47-48.

then in the context of the relations between Britain on behalf of North Borneo and the United States.

B. The East Coast Islands of Borneo, Sulu and Spain

3.5. An initial point of agreement between the parties should be noted. There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*.¹⁶ They were part of the social system of the local people, and there was at all times a social and political organization including those people, within the meaning of that term as expressed by the Court in the *Western Sahara* advisory opinion.¹⁷ Thus when the Sultan of Sulu granted to the promoters of the BNBC all the islands within 9 nautical miles (3 marine leagues) of the coast, it was not because the islands outside that line did not belong to him; on the contrary, they were formally reserved from the grant.

3.6. The parties also agree that Sipadan and Ligitan fell outside the terms of the Sulu grant of 1878 because they were outside the 9 nautical mile line.¹⁸ But these seem to be the only points of agreement in the present case, and it is to the points of disagreement that we must turn.

(i) The extent of the Sultanate of Sulu before 1878

3.7. It is not necessary for present purposes to discuss the earlier acquisition by Sulu of its possessions on Borneo.¹⁹ The fact of those possessions was noted by Spain in the Capitulations of 1836,²⁰ and it was also clearly recognised by the Dutch.²¹ The only point to note here is that the controversy related to the competing claims of the Sultan of Brunei: there is nowhere in any of the papers or records of

¹⁶ IM, para. 4.1, p. 37.

¹⁷ ICJ Reports 1975 p. 12.

¹⁸ IM, para. 7.4, p.130; cf. MM, Insert 8, p. 39.

¹⁹ See IM, paras. 4.29-4.30, pp.46-47 & MM, para. 5.5, pp. 31-32.

²⁰ Annex MM 1, vol. 2, pp. 1-3.

²¹ MM, paras. 5.8 & references.

the time any suggestion that the Sultan of Bulungan had any claim or interest in islands off the Semporna peninsula.

3.8. In 1878, the Sultan granted to the BNBC's promoters all the east coast of Borneo and offshore islands within 9 miles, down to the Sibuko River. The sketch map in the Indonesian Memorial is misleading, since it only shows the 1878 grant extending down to Sebatik, approximately at 4°10'N.²² This is an anachronism: in fact, of course, the 1878 grant extended considerably further south. It was in response to that grant and to the subsequent extension of BNBC administration on the east coast that the Dutch laid claim to Batu Tinagat. But the Dutch claim expressly did not extend anywhere to the east of Batu Tinagat, and certainly not to islands off (what became) Semporna.²³ Dutch and British maps of this period, showing the area in dispute, are entirely consistent and clear on this point.

3.9. Indonesia asserts, first, that the Sultanate of Sulu did not have any claim to the islands,²⁴ and secondly, that those islands were part of the (Dutch) Sultanate of Bulungan.²⁵

- The **first** proposition is belied by the evidence of actual allegiance of the local people (in particular the Bajaus of Si Amil and Danawan) to Sulu,²⁶ as well as by Dutch maps and statements.²⁷ It should be noted that in 1891, the Netherlands accepted the effect of the 1878 grant in relation to the northern half of Sebatik itself and areas inland, and this was consistent with earlier Dutch recognition of the Sulu dominions in northeast Borneo.²⁸ The 4°10'N line was only adopted after agreement had been reached on Broershoek as the place on the coast where the boundary across the

²² IM, Map 3.1, opposite p. 14. See, more accurately, MM, p. 39.

²³ See MM, para. 7.3, p. 73.

²⁴ See e.g. IM, para. 7.4, p. 130.

²⁵ See IM, Map 4.2, opposite p.54 (though even this is equivocal).

²⁶ See MM, para. 5.7, pp. 33-34.

²⁷ See MM, para. 5.8, pp. 34-36.

²⁸ Indonesia argues (IM, para.7.36, p. 141) that the two islands in dispute do not lie "between" Mindanao and Borneo within the meaning of Article II of the 1885 Protocol. But Article II has to be read in its context, having regard to its reference to the islands administered by the BNBC which were or had been part of the Sultanate of Sulu. See below, paragraph 3.11.

mainland could start. Picking on Broershoek was an obvious compromise between overlapping claims: the British did not press the BNBC claim between Broershoek and the Sibuko River; the Dutch withdrew their earlier claim to territory between Broershoek and Batu Tinagat. The 4°10'N line was a further compromise so far as concerned Sebatik itself, in order to ensure that each party had access by sea to their respective coasts behind Sebatik. None of this had anything to do with offshore islands much further to the east, which the Dutch had earlier recognised, and continued to recognise, as part of the dominions of Sulu/Spain, to the extent that they were not part of North Borneo itself.

- As to the **second** proposition, the Indonesian Memorial produces no single item of evidence linking the two islands, or any other island east of Sebatik, to Bulungan. No single person from, or owing allegiance to, Bulungan is named in the Indonesian Memorial as having had any association with these islands; compare the many individual Bajaus named in the Malaysian Memorial and referred to in the annexes and in the literature. No single document is cited which mentions the islands by name in terms which indicate that they were claimed by Bulungan or the Netherlands. For the crucial Dutch period, Indonesia confines itself to the statement that Sipadan and Ligitan were among the “small islands belonging thereto” (i.e. to Sebatik), referred to in the Dutch contracts with Bulungan of 1850 and 1878.²⁹ This is mere assertion. Malaysia attaches to this Counter-Memorial a report by a reputable Dutch historian of the Netherlands East Indies, dealing with the status and extent of the Sultanate of Bulungan.³⁰ The report makes it clear that Bulungan in the nineteenth century was a small land-based sultanate, with no claim to effective control over the islands off the Semporna peninsula. The same conclusion follows from the Dutch map of 1913, based on an administrative decision establishing the boundaries of districts in East Borneo. The district based on Bulungan stops at the east coast of Sebatik.³¹

²⁹ IM, para. 4.66, p. 58 & para. 4.70, p. 59.

³⁰ See below, Appendix 1, Prof.dr.V.J.H. Houben, “The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)”.

³¹ See below, Insert 12, p. 106.

3.10. In its Memorial Indonesia relies on various definitions of the “Sulu Archipelago” which in its view exclude the disputed islands. The argument proves too much, since it is clear that the Sulu Archipelago as a geographical entity did not include Borneo or adjacent islands, yet everyone at the time accepted the existence of Sulu dominions there. Throughout the nineteenth century, the British Government insisted on the distinction between the Sulu Archipelago itself and Sulu possessions on the island of Borneo, and made it clear that, even if it came to recognise Spanish claims to the Archipelago, it would not allow Spain to acquire any part of Borneo. This can be seen by a brief examination of the documents and definitions on which Indonesia now relies.

3.11. The first of these is the 1836 Capitulations of Peace, Protection and Commerce between Spain and Sulu.³² Indonesia remarks that the definition of Sulu given in Article I related only to North Borneo, and that the islands in dispute lie “well to the south and west of any areas that could realistically be considered to lie between Mindanao and the North Borneo mainland”.³³ But Article I of the Capitulations makes no reference to “North Borneo” at all: it would have been anachronistic to do so. Rather Article I refers to “the islands situated within the limits of the Spanish jurisdiction”³⁴ as including the area which extends, “..... from the western point of Mindanao (Mangidanao) to Borneo..., with the exception of Sandakan and the other countries tributary to the Sultan *on the continent of Borneo*”³⁵ (emphasis added). Nothing is said in Article I about how extensive these Borneo territories are, but they are all excepted from the scope of the Capitulations. Indonesia also ignores the contemporary evidence of Hunt that at this time there was a Sulu province of Tirun to the south of Mangidora, and also to the south of the Sibuko River.³⁶

³² Annex MM 1, vol. 2, pp. 1-3.

³³ IM, para. 7.24. p.136

³⁴ Annex MM1, vol. 2, p. 1.

³⁵ Ibid.

³⁶ See the passage from Hunt’s account (1837), cited in MM, para. 5.4, p. 31 and for the complete account, Annex MM 34, vol. 3, p. 1.

3.12. Secondly, Indonesia relies on Articles 1-3 of the 1885 Protocol to show that “Sipadan and Ligitan did not constitute part of the Sulu Archipelago”.³⁷ Again this confuses the Sulu Archipelago as a geographical entity and the extent of the dominions of Sulu. The fact that the Sultan did not grant islands beyond 3 marine leagues to the BNBC did not mean that he did not claim or own those islands, or that the islands were part of the Sulu Archipelago in the geographical sense. There could have been, and were, islands adjacent to the coast of Borneo which were not granted to BNBC in 1878: Danawan itself was in that category, yet no one has suggested that it was part of the Sulu Archipelago. It should be stressed that Articles 1-3 of the 1885 Protocol constitute an express recognition by Spain of the extent of the BNBC’s territory in Borneo based on the Sulu grant of 1878. In other words, Spain expressly recognised the BNBC’s control down to the Sibuko River. If BNBC territory extended so far south, no one could possibly have argued that two small islands in Darvel Bay had somehow been reserved for the Dutch.

3.13. Thirdly, Indonesia relies on the limited definition of the Sulu Archipelago in a Spanish encyclopedia of 1927.³⁸ In accordance with that definition, the Sulu Archipelago lay well to the east. Again the definition seems to refer to the archipelago as a geographical and not a political entity, and it was certainly not concerned with the Sulu provinces on Borneo 50 years earlier. Spain itself had no doubts that the Sulu dominions extended to Borneo, as witness its attempt to take Sandakan in 1878.³⁹

3.14. The clear distinction drawn in the State practice and treaties between the Sulu Archipelago and the Sulu possessions on Borneo is in the end conceded even by Indonesia. It concludes by asserting that “Sipadan and Ligitan... never formed part of the Sulu Archipelago, and they were not part of the Sultan of Sulu’s Bornean dominions *either*.”⁴⁰ Malaysia agrees with the former proposition: it is clear that

³⁷ IM, para. 7.29, pp. 138-139. For the 1885 Protocol see Annex MM 15, vol. 2, pp.64-66.

³⁸ IM, para. 7.24, p. 136.

³⁹ As to which see MM, para. 5.17, p. 40.

⁴⁰ IM, para. 7.25, p.136 (emphasis added).

Sipadan and Ligitan, like Danawan, Si Amil and Omadal, were considered at the time as appurtenant to Borneo and not as part of the Sulu Archipelago itself.⁴¹ But the Indonesian Memorial does not begin to demonstrate the latter proposition, and the evidence adduced by Malaysia clearly contradicts it.

(ii) The effect of the Grant of 1878 and the Confirmation of 1903

3.15. As to the Sulu grant of 1878, Indonesia contents itself with noting that the two islands in dispute fell outside the scope of that grant, because they were more than 9 nautical miles offshore.⁴² It goes on to stress the significance of the administrative boundaries of North Borneo, as shown on Stanford's map of 1903.⁴³ That map will be dealt with in Chapter 5:⁴⁴ for present purposes it is enough to note that (despite Indonesia's claims to the contrary) the map shows Ligitan as within the administrative boundary of Elphinstone Province. It is true that Sipadan is shown as outside that boundary, but it is not shown as Dutch, and in fact it was administered (as were the islands in the Ligitan group) from the provincial administrative centre, Lahad Datu. Later maps do not show the administrative boundary of the Lahad Datu district with any form of southerly closing line,⁴⁵ and Sipadan was specifically included in administrative maps issued by North Borneo for such relevant purposes as the protection of turtles and wild life.⁴⁶ It may also be noted that the Dutch administrative map of 1913 shows the district of Bulungan as stopping at the east coast of Sebatik, and makes no attempt to portray the islands to the east around Semporna.⁴⁷

⁴¹ The distinction is made by Hunt in his account of Sulu (1837) quoted in MM, para. 5.4, p. 31; see Annex MM 34, vol. 3, p. 2. Hunt refers to the Sulu province of Mangidora (including P. Gaya and P. Sipadan), and notes that the province extends "towards the Sulo Archipelago in a long narrow point named Unsang, or cape Misfortune" (emphasis added). See also the sketch map above, opposite page 1.

⁴² IM, para. 7.10, pp. 131-132.

⁴³ IM, paras. 7.13-7.14, pp. 132-133 & Map 6.4, opposite p.118.

⁴⁴ See below, paras. 5.10-5.11.

⁴⁵ See below, paras. 5.21, (b), (d), (f).

⁴⁶ See e.g. MM, Annexes, vol. 5, Maps 13 & 18.

⁴⁷ See below, para. 5.15, and Insert 12, at p. 106.

3.16. Indonesia also deals briefly with the Sultan of Sulu's "Confirmation" of 1903. It argues that it did not extend to Sipadan and Ligitan since "all of the islands mentioned in the Confirmation lie to the north of the 4°10' N line of latitude".⁴⁸ This of course begs the question. The Confirmation made no mention of the 4°10' N line or of the 1891 Convention. It listed only inhabited islands, including the two in the Ligitan group, but it also referred to "the other islands that are situated alongside, or round or between the islands that are above mentioned". In fact the 1903 Confirmation (the legal validity of which was not recognised by either the United States or the British Government) coincided with the voyage of the *Quiros* and the express United States' claim to, *inter alia*, Sipadan and Ligitan, and it was one of the events leading to the 1907 Exchange of Notes. It was explained in the letter of the BNBC Chairman to the Foreign Office of 13 July 1903,⁴⁹ which contained a plea to the United States "to instruct their local officials to remove the flags and tablets they placed on islands which, notwithstanding anything else, have been under British jurisdiction for nearly a quarter of a century". The map accompanying the Chairman's letter of 1903⁵⁰ described the "red line" which later appeared on the map annexed to the 1907 Exchange of Notes.⁵¹ There can be no doubt from this series of events that the 1903 Confirmation — and much more importantly, the 1907 Exchange of Notes — was considered as covering Ligitan and Sipadan.

C. Transactions between Britain (on behalf of North Borneo) and the United States

3.17. Evidently, if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900. Conversely, if Spain had such rights, or if its earlier claims to the Borneo islands beyond 9 nautical miles had been lost by reason of the BNBC's uncontested

⁴⁸ IM, paras. 7.16, p.134 & Map 7.1 opposite p. 134. To similar effect, IM, para. 7.58, p.148.

⁴⁹ Annex MM 59, vol. 3, pp. 131-133.

⁵⁰ Malaysia has made extensive efforts to locate the 1903 map, without success. It appears to have gone missing from the relevant archive in the 1920s. There is however no doubt as to its effect, due to the annotation on the map accompanying the 1907 Exchange of Notes, which makes express reference to it.

⁵¹ MM, Annexes, vol. 5, Map 6.

administration of the islands after 1878, then any possible claim of the Netherlands was already doomed to failure. Nothing that has happened since 1900 could possibly have *strengthened* a Dutch or Indonesian claim to the two islands. Neither the Netherlands nor Indonesia have ever administered the islands. Nor (prior to 1969) did either government protest at their administration as part of North Borneo and later Sabah. To that extent, it is possible for the Court to dismiss the Indonesian claim without considering the relations between the BNBC, Britain and the United States after 1900 so far as they concerned the two islands. In the first place, Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Bulungan, a valid claim to the islands before 1891, and (b) that the Netherlands retained sovereignty over them under the 1891 Boundary Convention.⁵² In fact it can show neither, for the reasons already given, and its claim must accordingly fail.

3.18. Nevertheless, the relations between the BNBC, Britain and the United States are significant for the present case, and Indonesia devotes considerable space to them in its Memorial.⁵³ From Malaysia's point of view they are significant for two reasons: (a) they provide excellent, detailed evidence of the continued actual administration of the islands from North Borneo; and (b) in the event, the title of Malaysia to sovereignty over the two islands arose as a result of those transactions, and specifically the Treaty of 1930. Correspondingly, Indonesia seeks to explain them away. In particular, three general issues are contested by Indonesia and require to be dealt with.

⁵² Although it is *necessary* for Indonesia to establish these two propositions, it is not *sufficient* for it to do so. Even if the Netherlands had maintained a claim to the two islands before 1891, and that claim had survived the Boundary Convention, it would in Malaysia's view have been lost as a result of the long-standing acquiescence of the Netherlands and Indonesia at British and Malaysian administration of the islands in the period from 1891 onwards. That administration was not carried on by agreement or license from the Netherlands, and thus constituted adverse possession.

⁵³ See IM, paras. 3.63-3.70, 7.30-7.61.

(i) The extent to which the United States succeeded to Spain under the Treaties of 1898 and 1900

3.19. It is common ground that the allocation lines laid down in the Treaty of Paris of 1898 did not include the North Borneo islands.⁵⁴ The deficiency was soon realised and addressed in the Treaty of 7 November 1900.⁵⁵ Indonesia argues that the Treaty of 1900 covered only Cagayan Sulú and Sibutú and their dependencies.⁵⁶ But this clearly misdescribes the 1900 Treaty, which applied “to any and all islands belonging to the Philippine Archipelago... *and particularly* to the islands of Cagayan Sulú and Sibutú and their dependencies”⁵⁷ (emphasis added). The intention of the 1900 Treaty was to mop up all the Spanish islands in the region which were not within the lines laid down in the Treaty of Paris. For example, it intended to cover the Turtle Islands, which were also administered by the BNBC and which were also not mentioned by name in the Treaty of 1900.

3.20. Indonesia cites Secretary Hay’s letter of 3 April 1903 as showing that the US made no claim to other islands beyond Cagayan Sulú and Sibutú,⁵⁸ but again this is not what the document says. It correctly identifies Sibutu as “the most southwesterly of the Sulu group proper” but notes that there were other islands, not part of “the main Archipelago” which were also outside the 3 marine league line from the coasts of Borneo and therefore remained subject to Spain after 1885. After analysing the various 19th century treaties, it concluded that Spain was competent to, and did in fact, cede to the United States “the whole of the Sulu Archipelago up to three marine leagues of the mainland coasts of British North Borneo, with the exception of the three named islands of Balambangan, Banguay and Malawali”. In referring to “the whole of the Sulu Archipelago” in this passage, Secretary Hay was using the phrase in a broad sense, as compared with “the Sulu group proper... the main Archipelago”. He thus agreed with the view of the Secretary of the Navy that “the

⁵⁴ For the Treaty of Paris see Annex MM 19, vol. 2, pp. 74-80. For a sketch map showing the effect of the 1898 line see MM, p. 57.

⁵⁵ For the Treaty of 1900 see Annex MM 21, vol. 2, pp. 85-86.

⁵⁶ See IM, paras. 7.32-7.33, p.140.

⁵⁷ Annex MM 21, p.86.

⁵⁸ IM, paras. 7.34-7.36, p. 141. The letter is at Annex IM 98, vol. 3, pp. 311-329; also Annex MM 55, vol. 3, pp. 115-129. It is analysed in MM, para. 5.24, pp. 43-45.

sovereignty of the United States covers all outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo, except the islands of Balambangan, Banguey and Malawali".⁵⁹ It was on this basis that the Navy's Hydrographic Office in June 1903 prepared the map "Northern Shore of Sibuko Bay", which clearly shows Danawan, Si Amil, Ligitan and Sipadan as "under the sovereignty of the United States of America".⁶⁰ Far from showing, as Indonesia argues, that Sipadan and Ligitan, not being part of the Sulu Archipelago, "could not have passed to the United States" under the Sole Article of the 1900 Treaty, the Hay letter shows precisely the contrary. And whatever definition might be given to the "Sulu Archipelago",⁶¹ the United States did in fact claim all these islands, as the 1903 map shows.

3.21. Even if the various islands had not passed under the 1900 Treaty (because they should not have been considered as part of the Philippine Archipelago even in the extended sense of the 1900 Treaty), the islands were not relinquished by the United States, which was the territorial successor to the Philippines and had all rights which Spain had as successor to the Sultan of Sulu. The Turtle Islands are not part of the Sulu or Philippine Archipelagos in geographical terms, yet they were clearly treated as coming within the scope of the Treaty of 1900, and they ended up as part of the Philippines. No islands in the vicinity were left to Spain, or became *terra nullius* in 1900. Moreover if the United States was to be considered as having relinquished the islands by the treaties of 1898 and 1900 (which it did not, as witness the voyage of the *Quiros*), the islands would not have accrued to the Netherlands. The only relevant later action by the Netherlands was the 1915 Agreement, which confirmed that Dutch territory ended at the east coast of Sebatik. By contrast the BNBC administered the islands, as did its successors in title. They, not the Netherlands, would have been the beneficiaries of any relinquishment or abandonment by the United States.

⁵⁹ Ibid., p. 115 (underlining in original).

⁶⁰ See MM, Map Annex, Map 5.

⁶¹ In fact the Treaty of 1900 did not use the phrase "Sulu Archipelago". Rather it referred to "any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III" of the Treaty of Paris.

(ii) The voyage of the Quiros and the 1907 Exchange of Notes

3.22. Of course there was no relinquishment, but a vigorous assertion of legal title on the part of the United States, which was rapidly accepted and acknowledged by Great Britain. Faced with this, all that Indonesia can say is that “[t]he United States therefore mistakenly claimed sovereignty over certain islands outside the three-league limit from the coast of British North Borneo”.⁶² The term “mistakenly” is not explained. The United States acted on a considered and entirely defensible view of the legal position resulting from the Treaty of 1900, and the only other State claiming an interest in the matter, Great Britain, immediately agreed with its view.⁶³ The two States then took action, completed in 1907, to formalise the administrative status quo. As Malaysia showed in its Memorial,⁶⁴ these actions were made public at the time and elicited no protest from the Netherlands. It is true that Britain and the United States did not “evoke – as relevant to the discussions – the 1891 Convention”.⁶⁵ There was absolutely no reason why they should have done, and if the Netherlands had thought the Convention relevant to the events occurring well to the east of Sebatik, it should have said so. But it remained silent.

3.23. As to the voyage of the *Quiros*, Indonesia is evasive. It accepts that Lt. Boughter landed on and claimed Sipadan for the United States, but suggests that there is no record of him actually stopping on Ligitan.⁶⁶ Even if that may be true, the *Quiros* clearly included Ligitan in the scope of its inquiries and described it in some detail: it was expressly included in the United States claim, as shown by the log of the *Quiros* and the 1903 Hydrographic Office map.

⁶² IM, para. 7.39, p.142.

⁶³ Indonesia states that “[e]ventually, the British Government came around to the U.S. position...”, referring to a British Memorandum of 10 March 1905 (Annex IM 109, vol 3, p. 407). The Memorandum, however, makes it clear that Great Britain recognised the validity of the US position “in the summer of 1903”, i.e. immediately following the voyage of the *Quiros*. There was nothing eventual about it.

⁶⁴ MM, para. 5.41, p. 56.

⁶⁵ IM, para. 7.43, p. 144.

⁶⁶ IM, para. 7.40, p.142.

Indonesia also admits that the BNBC “was informed of the Quiros’ visit to the Turtle islands and other islands off the port of Sandakhan [sic] and protested...”⁶⁷ But of course the BNBC was informed about the visit to the islands around Darvel Bay, including Sipadan, and protested those as well.⁶⁸ The fact of the BNBC’s actual possession of the islands was disputed neither by Great Britain nor the United States (and it is evident from the log of the *Quiros* itself⁶⁹). What was disputed was its having acquired sovereignty over islands beyond the nine mile line, and on that point Britain sided with the United States, not the BNBC. It is not for Indonesia now to assert that the views of the relevant actors were “mistaken”.

3.24. Indonesia has little to say about the 1907 Exchange of Notes itself, which is rather surprising given the clear purport of the annexed map⁷⁰ (especially when it is read against the Hydrographic Office map of 1903⁷¹). Indonesia makes only two points:

- First, it seeks to set against the 1903 and 1907 maps a large scale 1902 map of the Philippines, which was tendered by the United States in evidence in the *Island of Palmas* case as showing the extent of the Philippines administrative departments in that year.⁷² It is far from clear what is to be drawn from the 1902 United States map. Neither the Turtle islands nor the Darvel Bay islands beyond 9 n.m. from the coast are shown as falling within the Department of South Philippines, but that is hardly surprising. In 1902 those islands were administered as of right by the BNBC, and had been for some years. It was only later that it seems to have occurred to the United States that it had a claim to additional Bornean islands beyond the 9 n.m. line. The Secretary of the Navy only raised that issue with the Secretary of State on 14 March 1903.⁷³ But whatever the purport of the 1902 map, it cannot be considered as affecting the actual transactions of the period 1903-1907, in particular the Exchange of Notes and its annexed, agreed, map.

⁶⁷ IM, para. 7.44, p. 144.

⁶⁸ See MM, paras. 5.30 & 5.31, pp. 48-49 with references to relevant BNBC protests.

⁶⁹ See MM, paras. 5.27-5.29, pp. 47-48, Annex MM 63, vol. 3, p. 138.

⁷⁰ MM, Annexes, vol. 5, Map 6.

⁷¹ MM, Annexes, vol. 5, Map 5.

⁷² IM, para. 7.46, p. 145; the map is in IM, Map Atlas, Map 8.

⁷³ See Annex MM 55, vol. 3, p. 115.

- Secondly, Indonesia stresses the provisional character of the 1907 arrangement, and asserts that “any ambiguity concerning the division of the territorial possessions of Great Britain and the United States was definitively settled” by the 1930 Convention.⁷⁴ But the 1907 Exchange of Notes is not to be ignored because it was later replaced by a different and more permanent territorial settlement. It showed, definitively, that the affected islands were administered by the BNBC; it permitted them to continue to be so administered. It resolved doubts about sovereignty over those islands (even though precisely which islands fell within the 9 n.m. line remained uncertain). Its publication called for a protest by the Dutch, if they had claimed islands affected by it. And it provides an essential basis by which the final disposition of the islands in 1930 is to be understood. In all these respects it supports Malaysia’s claim to the islands.

(iii) The 1930 Boundary Convention between the United States and Great Britain

3.25. Finally there is the 1930 Convention itself.⁷⁵ Read in its own terms, and against the background of the transactions of 1903-1907, the Hydrographic Office Map of 1903 and the agreed map of 1907, its effect is perfectly clear. It specified in Article III that “all islands to the south and west of the said line shall belong to the State of North Borneo”. Sipadan, Ligitan, Danawan, Si Amil and Mabul (all lying outside 9 n.m. from the coast of Borneo) were plainly affected by it. It is true, as Indonesia notes, that the southern-most point on the 1930 line is well north of 4°10’.⁷⁶ But this is because there were no islands the United States wished to retain which fell south or west of the 1930 line. If “there was no question of any possible claim of the United States to the islands in issue in this case”,⁷⁷ this was because those islands, previously administered under license pursuant to the 1907 Exchange of Notes, were relinquished to North Borneo. In 1903, as we have seen, there was a clear and explicit claim by the United States to those very islands.

⁷⁴ IM, paras. 7.50-7.51, p.146.

⁷⁵ See Annex MM 29, vol. 2, p. 116, and MM, paras. 5.43-5.44, pp. 56-58.

⁷⁶ IM, para. 7.55, p. 147.

⁷⁷ Ibid.

3.26. The effect of the 1930 line was well understood at the time. In an Admiralty memorandum of July 1927, the contemporary legal situation was analysed, so far as relevant, in the following terms: “under a strict application of the Madrid Protocol [of 1885], such islands as Mantabuan, Puan, Boheian and the Ligitan Group would fall to America, while if such ‘contiguous’ islands as Bum-Bum are accepted as the base of the 9 mile zone, the boundary would be extended eastward to include Puan within British territory, while such islands as Boheian and the Ligitan group would be of doubtful ownership (as Pulo Gaia would be in the previous case), the boundary of the 9 mile zone passing through them”⁷⁸. The negotiators of the 1930 Convention sought to resolve such ambiguities, with the United States insisting on Great Bakkungaan and the Turtle Islands, and leaving the smaller North Borneo islands (including Sipadan and Ligitan) to Britain. It is significant that the author of the 1927 memorandum was in no doubt on two points: (a) that the sovereignty over such islands as the Ligitan group was at stake; and (b) that the only relevant parties were the United States and Great Britain: “any territory which cannot be shown to be British is definitely American”⁷⁹. Subsequently, the Admiralty noted the effect of the actual line proposed for the 1930 Convention, in the following terms:

“Even taking that interpretation of the 9 mile limit which is most advantageous to the British North Borneo Company, the balance of gain and loss involved in accepting this line would be as follows:-

The United States would receive Great Bakkungaan Island, which may be claimed as belonging to British North Borneo,

but

British North Borneo would receive Buaning, Lankayan, Mantabuan, Matakang and Ligitan Islands, to none of which she has any valid claim.”⁸⁰

⁷⁸ See Annex IM 123, vol. 4, pp. 51-64 at p. 62.

⁷⁹ Ibid. at p. 51. It may be noted that the chart cuttings used to illustrate the 1927 Admiralty memorandum show the 1891 boundary stopping at the east coast of Sebatik.

⁸⁰ See vol. 2, MCM Annex 3, p.18.

3.27. In the light of these contemporary views, Indonesia's modern sketch map illustrating the effect of the 1930 Convention is, again, purely conclusory.⁸¹ Its Map 7.3 shows the 1930 line and what is described as the "1891 Convention line", reaching as far as 119°E. But there was of course no 1891 Convention line eastwards of Sebatik; there was only a line on a Dutch internal map, not opposable to the United Kingdom and (as far as appears) completely unknown to the United States. Moreover the line on the Dutch internal map is considerably shorter than that shown on Map 7.3; if Indonesia wishes to continue the 4° 10' N line in an easterly direction across the sea, it is far from clear why it should stop at 119°E, just after Ligitan. Such a line is a pure *post hoc* construct, which formed no part of the intentions of the parties to the 1930 Convention (any more than it did for Britain and the Netherlands when they concluded the 1891 Convention).

3.28. The point may be tested in the following way. If Indonesia is right, what are the consequences for the group of five islands (Kapalai, Danawan, Si Amil, Ligitan and Sipadan) which lie to the south of the 1930 Convention line, but more than 9 n.m. from the coast of Borneo? According to Indonesia, the United States had no claim to any of those islands, and did not intend to transfer sovereignty over them to North Borneo. It would follow, apparently, that Kapalai, Danawan and Si Amil were left as *terra nullius*. But if those three, why not Ligitan and Sipadan? The United States had no knowledge of the internal Dutch map, and no intention to cede any islands to the Netherlands in a Convention to which the Netherlands was not a party. There is no basis in the 1930 Convention for distinguishing three of these islands from the other two. The Indonesian claim lacks all logical and legal foundation.

D. Conclusion

3.29. Indonesia's arguments in Chapter 7 as to the effect of the various transactions between the BNBC and Britain, on the one hand, and Sulu, Spain and the United States, on the other hand, depend in the final analysis upon the proposition that the territory of Bulungan

⁸¹ IM, Map 7.3, opposite page 146.

in 1890 extended to the islands off the coast of the Semporna peninsula, including Sipadan and Ligitan. There is absolutely no evidence that any of the actors at the time considered that possibility. The Dutch claim which led to the 1891 Convention repeatedly made it clear that Batu Tinagat was “the extreme easternmost point” of its claim.⁸² Nor is there the slightest evidence of any actual Bulungan or Dutch administration of the two islands, or of any other islands in the vicinity, before 1891. This is not just the familiar question⁸³ which of two States has shown more evidence of administrative and other acts affecting a particular territory or island. There is no evidence whatever of *any* administrative act by the Netherlands at any time prior to 1903, affecting these islands, or of *any* claim or intention on the part of the Netherlands to acquire them. In the absence of such evidence Indonesia’s case lacks a coherent basis. If the Netherlands did not already hold the two islands in 1890, the 1891 Boundary Convention must be irrelevant. Britain could not have ceded to the Netherlands in 1891 islands which (Indonesia agrees) were not part of the territory covered by the Sultan’s grant of 1878, recognised by Spain as belonging to North Borneo in the Protocol of 1885. But if the Netherlands did not hold the islands in 1890, how could it have acquired them since? It exercised no administration over the islands after 1891, and made no new claim to them. By contrast the transactions between Britain and the United States in 1907 and 1930 show a clear intention to cover all the offshore islands beyond 3 nautical miles and to resolve all outstanding issues. The criterion applied was simple. Before 1930, the position was that “the mainland of British North Borneo and a certain number of islands are British, and any territory which cannot be shown to be British is definitely American”.⁸⁴ In 1930, the United States ceded to Britain “all islands to the south and west” of the line described in Article I of the Boundary Treaty. Sipadan and Ligitan, which had previously been claimed by the United States, lie to the south and west of that line. The United States’ claim to the islands, acknowledged as justified by

⁸² See the note of Dutch Foreign Minister Hartsen to Count Bylandt, dated 22 December 1888, communicated to the Marquess of Salisbury on 3 January 1889: IM, Annex 37, vol. 2, p. 327. Hartsen repeatedly referred to Batu Tinagat as “[le] point extrême à l’est”, so far as the Dutch claim was concerned. Mr. Hartsen’s note is quoted and discussed fully by Sir Edward Hertslet in his Further Memorandum of 9 January 1889: Annex MM 43, vol. 3, p. 30.

⁸³ Cf. the *Minquiers & Ecrehos* case ICJ Reports 1953 p. 47.

⁸⁴ See the confidential Admiralty Memorandum, “Boundary between British North Borneo and the Philippines”, July 1927, p. 1: Public Record Office, FO 371/12050; Annex IM 123, vol. 4, p. 51.

Great Britain in the period 1903-1907, was thereby resolved. In continuing to administer the islands after 1930 (to the exclusion of any other claimant), the BNBC and its successors united sovereignty and administration. Nothing said in Indonesia's Memorial as to these transactions casts any doubt on this conclusion.

Chapter 4

THE PRACTICE OF THE PARTIES AND THEIR PREDECESSORS CONFIRMS MALAYSIA'S TITLE

A. Introduction

4.1. Malaysia has demonstrated, in its Memorial, continual peaceful administration of the islands, since time immemorial and certainly since the end of the 19th Century, by the Sultanate of Sulu, the BNBC, Britain and Malaysia.¹ It has also demonstrated Dutch and Indonesian inactivity during that period.² The present Chapter will focus on practice of the parties and their predecessors in the area, and on possession and administration of the two islands of Ligitan and Sipadan, in response to the arguments put forward in the Indonesian Memorial.

B. Practice relating to the Islands before 1963

4.2. In discussing practice in the pre-independence period, five points need to be mentioned. They are, firstly, the relations between the Netherlands and the Sultanate of Bulungan; secondly, the scope and purpose of Dutch and British naval activities in the region; thirdly, Dutch deliberations on a maritime boundary east of Sebatik in the 1920s, fourthly, the actual administration of the islands, and fifthly, Indonesia's own maritime boundary proclamation of 1960.

(i) Relations between the Netherlands and the Sultanate of Bulungan

4.3. So far as Malaysia has been able to discover from an extensive review of the documents and literature, there is no trace whatsoever of any activity of the Sultan of Bulungan on the two islands. Certainly Indonesia produces none. The islands were far away from

¹ MM, Chapter 6.

² Ibid., Chapter 7.

Bulungan, and from any area the Sultan of Bulungan can be shown to have controlled. The Sultanate was a small land-based entity, with no maritime activities worth mentioning. On the other hand, the Sultanate of Sulu was a maritime State. Its mainland possessions were annexes of the Sulu archipelago. The Bajaus, who in effect had a monopoly on the adjacent islands, considered themselves and were considered by others as under Sulu authority.

4.4. The Sultanate of Bulungan was in fact a rather weak political entity and a tiny one compared with the Sultanates of Sulu and Brunei. Contrary to what Indonesia asserts in Chapters III and IV of its Memorial, the successive Sultans of Bulungan did not manage to exercise real power even within their dominion on land, let alone in maritime areas. The limited power of the Sultans of Bulungan is described in the annexed report by Professor Houben, an internationally recognised expert on the region.³

4.5. During the nineteenth century the Dutch concluded various contracts with the Sultan of Bulungan, although throughout most of the nineteenth century they pursued a policy of abstention with regard to Borneo. As documented in Professor Houben's report, the Dutch interference with Bulungan was cursory, and mainly meant to assert their territorial claims on the mainland of Borneo vis-à-vis the British. Apart from piracy patrols and attempts to suppress the slave trade, they took no particular interest in the sea areas of north-eastern Borneo. Bulungan, for its part, was not a naval power and had not even the capacity to do so. Trade with Bulungan was carried in foreign ships, especially Sulu praus.⁴

³ See below, Appendix 1, Prof.dr.V.J.H. Houben, "The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)".

⁴ Hageman reports that Bulungan and Tidung had no praus of their own: J. Hageman, "Aanteekeningen omtrent een gedeelte der Oostkust van Borneo", in *Tijdschrift van de Indische Taal-, Land- en Volkenkunde*, vol. 4 (1855), pp. 71-106 at p. 78.

(ii) Naval activities by Great Britain and the Netherlands

4.6. The first activities of the colonising powers were naval activities: surveys and attempts to impose a minimum public order. Sipadan and Ligitan were part of the islands included in the Darvel Bay group. The islands were surveyed by Great Britain. The *Egeria* cruise in 1891 is one of the first documents mentioning the islands. As demonstrated above, it was an exclusively British activity, part of the Darvel Bay survey.⁵

4.7. Of the many hundreds of islands along the east coast of Borneo, only a minority have permanent settlements. Given the limited resources available, the colonial powers were more intent on collaboration than on affirmation of respective sovereignties on these small and often featureless islands, as the HNLMS *Macasser* cruise shows.⁶ Commander van Straaten's report focuses principally on the exact location of Gusungan Island, estimated at 4° 18' 55" N, much further north than the 4° 10' N parallel and chosen as the third point for his survey. He rejected Sipadan as too far out at sea for reliable measurements. The Dutch navy had no qualms about sailing in British waters and the British authorities did not complain. Collaboration was necessary for a complete survey of the coast to establish reliable navigation charts, and relations between the officers were good.

4.8. Collaboration was also necessary to control banditry and the slave trade. It is in that perspective that one must appreciate the only Dutch activity mentioned by Indonesia to support its claim to the islands: the incident of the *Lynx* in 1921. The Indonesian Memorial examines the incident under the title "Activities of the Netherlands and Indonesia with Respect to the Islands. A. Dutch Activities". It says:

"A highly relevant example of such a practice following the 1891 Convention is provided by the policing

⁵ See above, paragraphs 2.29-2.42.

⁶ Annex MM 64, vol. 3, pp. 163-166. Annex IM 105, vol. 3, pp. 385-394 translates a different part of the report, but is not contradictory.

activities carried out in the area by ships of the Royal Netherlands Navy ...A report by the commanding officer ... provides a detailed account of one such expedition.”⁷

The problem is that it is not an example but the sole instance. Moreover as an incident it proves nothing.

4.9. The *Lynx* incident certainly did not amount to a claim of sovereignty on Pulau Sipadan. No flag was hoisted, no tablets were fixed, unlike the cruise of the *Quiros* nearly twenty years earlier. There was no reason for the British authorities to protest or even to complain. Quite to the contrary, as the Dutch navy was giving a helping hand in policing the pirate-infested waters.

(iii) Internal Dutch deliberations on a maritime boundary east of Sebatik

4.10. To judge from its Memorial, Indonesia is not aware of the well-documented internal Dutch deliberation during the 1920s of a maritime boundary east of Sebatik, in the period subsequent to the voyage of the *Lynx*.⁸ It shows that the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Boundary Convention.

4.11. In a letter dated 9 August 1922 to the Governor-General of the Netherlands East Indies, the Vice-Admiral of the Netherlands-Indies suggested three options for the boundary line delimiting the Dutch and British territorial waters east of Sebatik.⁹ He included a sketch map with calculations of the course of the boundary for these options:

⁷ IM, para. 6.2, p. 101.

⁸ See MM, para. 7.15-7.16, pp.81-82; and cf. IM, paras. 6.2-6.5, pp.101-103.

⁹ Fully reported by the Governor-General of the Netherlands East Indies to the Minister of Colonies, 10 December 1922 (translated from Dutch): see vol. 2, Annex MCM 4, pp. 19-25.

the original map, and a clearer version with text in English, are included here as **Inserts 5 and 6**, on the following two pages.

4.12. According to the Vice-Admiral, the three options were:

- “a) a line which is an extension of the land boundary (AB on the map);
- b) a line perpendicular to the coastal line at the boundary point on the beach (AD on the map);
- c) a line from the boundary point on the beach to the point of intersection of the territorial waters of the Netherlands East Indies and British North Borneo (AC on the map).”

In his view, option *b*) would make the most sense. The Governor-General concurred:

“...the coastal waters being recognised as state territory, not least for defence at sea, it would hence be absurd to take the — merely accidental — last course of the land boundary as the determining factor for the maritime boundary, and subsequently, as demonstrated by this case, to leave the possibility open that an area of foreign maritime waters is located in front of the land area of another state.”¹⁰

The 4° 10' N line would have exactly this cut-off effect. Thus in terms as plain as could be, one of the highest marine officers of the Netherlands East Indies expressed the view (a) that a maritime boundary had not been established as at 1922; (b) that one should be established, and (c) that it should be of limited length only. Not a single reference was made to the island of Sipadan, just visited by the *Lynx*, let alone to Ligitan or to the waters surrounding these two islands. As the Indonesian Memorial points out,¹¹ the Commander of Naval Forces Netherlands East Indies had been fully informed by the Commander of the *Lynx* of the cruise on 4 January 1922.

¹⁰ Ibid. (translated from Dutch).

¹¹ IM, para. 6.3, p. 101.

4.13. In a memorandum submitted by the Legal Department of the Netherlands' Ministry of Foreign Affairs, dated 8 August 1923, the Head of the Department advised the Minister of Colonies to maintain the continuation of the land boundary.¹² He gave a number of reasons, including:

- (1) The adoption of the 1891 Convention relating to the division of Sebatik along the 4° 10' N. parallel, as elaborated in the Explanatory Memorandum to Parliament: "By this division of the island both the Netherlands and British North-Borneo will have that area of the island in possession which forms the shore of the waterway along which each has to reach the coastal area allocated to them; this is fair and rational";
- (2) The map accompanying the Explanatory Memorandum on which the boundary is continued into the sea along the 4° 10' N. parallel: "As far as I could ascertain, this map does not result from actual consultation between the Netherlands and England; however, I view it as not impossible that that map is known to the British Government."

These two circumstances were not, in his view...

"of such a nature that, should very significant Dutch interests be damaged by a delimitation of Dutch territorial waters east of Sibetik along the parallel of 4° 10' N., an attempt should not be ventured to seek recognition from the British Government for a delimitation of the territorial waters along the perpendicular line, erected at the eastern coastal boundary point of Sibetik at sea. However, so far it does not appear that such great Dutch interests are at stake as to risk a possible rebuff from the British Government."

4.14. Like the Vice-Admiral, the Head of the Legal Department evidently did not regard the 4° 10' N. line as an established maritime boundary. Nor was it opposable to Britain. But he was concerned that it might provide the British with an argument in favour of a maritime

¹² Ministry of Foreign Affairs, Legal Department, No. 1252/7634, 8 August 1923 (translated from Dutch). The full text plus translation is set out in vol. 2, Annex MCM 5, pp. 27-43.

boundary (continuing the land boundary) which cut off the Dutch coast of Sebatik. At the same time he confirmed that the reason for the 4° 10' N line was to provide access by sea to the respective coastal areas to the west and north west of Sebatik.

4.15. Thereupon, at the request of the Dutch Minister of Colonies, the Governor-General of the Netherlands East Indies consulted a wide circle of authorities in the Netherlands East Indies on the issue, including the Resident of the South and Eastern Division of Borneo, the Directors of Public Works and Home Affairs and the Head of the Naval Department. All concluded that no particular Dutch interests would be at stake in establishing a territorial sea boundary different to the line of the land boundary, since among other reasons, in “this particular area there are no islands; only the open sea”.¹³ Nevertheless, Vice-Admiral Gooszen emphasized that it would be necessary to determine a maritime boundary “which currently is still undetermined and subject to different views.”¹⁴ In a letter of 5 April 1924, the Governor-General of the Netherlands East Indies transmitted all these memoranda to the Minister of Colonies and stated that the Council of the Netherlands East Indies and he were of the view that “no particular Dutch interests would be violated by extending the land boundary but that determination of a boundary, whatever it would be, would be necessary”.¹⁵ On 13 May 1924 the Minister of Colonies sent all relevant documents to his counterpart in Foreign Affairs and requested him to reconsider this matter.

4.16. After further consultation, the Minister of Foreign Affairs finally advised the Minister of Colonial Affairs on 27 September 1926:

“...I cannot recommend raising with the British Government the matter of the boundary between the Dutch and British territorial waters on the Eastern coast of the island of SIBETIK, because I do not consider it

¹³ See MM, para 7.16, p. 82.

¹⁴ See vol. 2, Annex MCM 6, p. 45 (emphasis in original; translated from Dutch).

¹⁵ Text in ARA, *Min. van Kol.*, 2.10.36.04, inv. No. 2637, no. 11. Translated from Dutch.

desirable to raise a question without reason and it does not appear that the British Government would object to the perpendicular line on the coast as the boundary line in this area. As this is the most evident solution, it seems not unlikely to me that the British Government itself will subscribe to it. The fact that this solution is in accordance with the principles of international law most adhered to, derives in my view from the recognition of the right to territorial waters in general, namely the desirability that the water in FRONT of the coast falls under the same agreement as the coast. In the case of deviation from the perpendicular line, no justice is given to this principle. However, a fully definitive rule in international law cannot be given.”¹⁶

4.17. The final conclusion of the Dutch Minister of Colonies, in October 1926, is therefore that a fixing of the boundary line between the Dutch and British territorial waters is not urgent: “The matter can hence be left in abeyance.”¹⁷ No further deliberations on the maritime boundary took place until the Dutch transferred sovereignty to Indonesia after the Second World War.

4.18. In sum, notwithstanding extensive internal Dutch deliberation during the 1920s among a large number of Dutch officials in The Hague and in the Netherlands East Indies on the maritime boundary in the area, a carefully considered decision was taken by the Dutch ministers of Colonial Affairs and Foreign Affairs in 1926 not to raise the matter of a maritime boundary with Great Britain. It was assumed that the perpendicular line would apply, and this was indeed in accordance with the prevailing law of the sea at that time. The sketch maps show that the Dutch were well aware of the fact that such a maritime boundary would only be of limited length and would not extend in the direction of the islands of Sipadan and Ligitan.

¹⁶ See vol. 2, Annex MCM 7, p. 47 (translated from Dutch).

¹⁷ See Decision of the Minister of Colonies, 2 October 1926, in ARA, *Min. van Kol.*, 2.10.36.04, inv. No. 2877, no. 41/1191: vol. 2, Annex MCM 8, p. 51 (translated from Dutch).

(iv) British administration of the islands

4.19. The principal economic activity on Sipadan for the colonial period was the collection of turtle eggs. Turtle eggs were a precious commodity. The island was famous for its turtle. The activity was a monopoly of the Danawan people. The concession derived from the Sultan of Sulu and was inherited under local custom by successive headmen of Danawan. The nature of the activity and the various steps taken by the British administration to regulate that activity are summed up in the Malaysian Memorial, vol. 1, pp. 65-69. Not a single equivalent act is cited by Indonesia.

4.20. The Indonesian Memorial does however draw attention to the Turtle Preservation Ordinance of 1 June 1917. It notes the following:

“Significantly, Section 3 of the Ordinance specifically excluded from this licensing régime areas deemed to be “native reserves”, i.e., areas within which the collection of turtle eggs was reserved to natives only..... As such, the island of Sipadan was not deemed as falling within the territory which was considered to be part of the State of North Borneo for the purposes of this Ordinance.”¹⁸

4.21. The Indonesian interpretation of the 1917 Ordinance is farfetched, indeed extraordinary. The Ordinance very specifically concerns the territory of North Borneo and only its territory.¹⁹ Section 2 provides:

“2. (i) No person shall search for, capture or destroy turtles or search for or collect turtle eggs within the State or the territorial waters thereof unless he shall have obtained a licence in such behalf in a manner prescribed hereunder.”

¹⁸ IM, para. 3.71, p. 31.

¹⁹ Annex MM 97, vol. 4, pp. 40-41.

Section 3 provides:

“3. 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 specifies as Native Reserves for the purposes of section 3...

“All that area from Nosong Point in Kimanis Bay to Jesselton, including Pulau Tiga and Gaya Island.

Sipadan Island.

Kudat District, including the islands therein.”

4.22. The text of the Ordinance is quite clear. It applies to “the State and territorial waters thereof”. Native reserves are under a special régime, for well understood reasons. The British authorities did not want to interfere with traditional Bajau activities. And they certainly wanted to avoid confrontation between Bajaus and other potential turtle egg collectors. Under the Ordinance it was an offence for anyone not a native resident of North Borneo to collect turtle eggs on Sipadan. But even the natives were potentially subject to regulation under the Ordinance in their activities on the island, since the Governor was authorised to make “rules for the protection of the industry”. Moreover, as is shown in the Malaysian Memorial, disputes over turtle egg collection on Sipadan were resolved by the BNBC Administration, first as based in Lahad Dahu, later in Semporna. The Ordinance is a clear manifestation of BNBC authority over Sipadan. The island is specifically designated as lying within the territory of North Borneo and is singled out for a special administrative régime. The Netherlands authorities did not react to the duly published Ordinance.

4.23. Sipadan was also declared a bird sanctuary on 1st February 1933, following a proposal by the conservator of forests of Sandakan, implementing article 28 of the Land Ordinance 1928. Sipadan became a megapode preserve.²⁰ Again, the Netherlands did not react to the publication in the Official Gazette. The sanctuary was renewed by Ordinance No. 11 of 28 June 1963.²¹ Indonesia did not react any more than the Netherlands had done in 1917.

4.24. Lighthouses were constructed and maintained on Sipadan and Ligitan during the colonial period. The Malaysian Memorial gives full details on this point.²²

(v) Maritime delimitation by Indonesia: Act No. 4 of 1960

4.25. Act No. 4 concerning Indonesian Waters, promulgated by the President of the Republic of Indonesia on 18 February 1960, is an important element of the practice of the Parties. It is one of the founding acts of Indonesian sovereignty. Promulgated before the formation of Malaysia (vide the Malaysia Act, 1963), it partakes of the definition of *uti possidetis* so far as Indonesia is concerned.

4.26. The *Djuanda Declaration*, issued by the Government on 13 December 1957, formulated the Nusantara concept. The Indonesian Government announced its decision to extend the breadth of its territorial waters to 12 nautical miles. It further declared that:

“ ... all waters around, between and connecting the islands or parts of islands, that make up the landmass of the Indonesian Republic, disregarding their breadth, are true parts of the regional area of the Republic of Indonesia and therefore are parts of the internal or

²⁰ MM, para. 6.24, p. 69.

²¹ See vol. 2, Annex MCM 9, pp. 57-58.

²² MM, paras. 6.25-6.29, pp. 69-70.

national territorial waters under the absolute sovereignty of the State of the Republic of Indonesia.”²³

4.27. Three years later, Act No. 4 of 18 February 1960 enacted the Djuanda Declaration. It defined the outer limits of the Indonesian national waters by a list of baseline coordinates.²⁴ The Indonesian baselines for Kalimantan start at the east coast of Sebatik Island at the point determined by the 1891 Boundary Convention, i.e. 4° 10' N., 117° 53.7' E., point 36, denominated Tg. (tanjung) Saima in the Act. The line then runs southward to a point 4° 7.6' N., 117° 55.3' E., point 36A on Sebatik Island. It then runs due south to point 36B at 4° 3.7' N., 117° 55.5' E. It then joins point 37 at 3° 28.5' N., 117° 52.5' E. at Tg. Arang.

4.28. The Map attached to Act No. 4 confirms that the base line runs due south from Sebatik Island, and this can be seen very clearly from **Insert 7**, opposite, an enlargement of the relevant section of the Indonesian map.²⁵ When Indonesia was determined to extend its territorial sovereignty to “the outermost points of the outermost islands” (Section 1.2 of Act No. 4) — a considered decision on its part which triggered a major international debate on the issue — the baseline thus proclaimed stayed clear of Sipadan and Ligitan.

4.29. Act No. 4 was reiterated as Indonesia’s international stance on its territory many times and solemnly. It was referred to in Indonesia’s reservation attached to the ratification of the 1958 Geneva Convention on the High Seas. It was referred to in the Indonesian Declaration on the Continental Shelf of 17 February 1969; in the subsequent Act Concerning the Continental Shelf of 6 January 1973; in the Declaration Concerning the Exclusive Economic Zone of 21 March 1980, and in the Act Concerning the Exclusive Economic Zone of 18 October 1983.

²³ Mochtar Kusumaatmadja, *The Concept of the Indonesian Archipelago*, *The Indonesian Quarterly*, vol. X, no. 4, October 1982, pp. 12-26 at p. 13.

²⁴ Annex MM 107, vol. 4, pp. 62-67.

²⁵ Annex MM vol. 5, Map 7.

4.30. Act No. 4 was an important element in assessing the situation of *uti possidetis* in 1963 when Sabah became independent and joined the Federation of Malaysia. Indonesia correctly points out that the existence of territorial title “must be analysed at the time when each country attained independence (as per the principle of *uti possidetis juris*) – another key date in all territorial disputes between States which have had a colonial past –in order to establish what the prevailing situation was at the time”.²⁶ On 16 September 1963, the State of Sabah, as a new member of Malaysia, could rely on a territory determined by the principle of *uti possidetis*.

4.31. The situation in 1963 was very clear as to sovereignty over Sipadan and Ligitan. The islands had been clearly identified at the turn of the century, in particular by the *Quiros* expedition. They had been ceded by the United States to Great Britain by the Treaty of 2 January 1930. British administration had been peaceful and unchallenged all through the period as a result, in particular, of the exchange of letters with the United States of 1907. The Netherlands never tried to assert their sovereignty on the two islands. It confirmed in 1915 that the delimitation of Dutch possessions with British North Borneo stopped at Sebatik Island and did not continue out into the open sea. It never voiced a concern, even less a protest, at the numerous and public British acts of administration. Indonesia followed the same policy and accepted British administration of the islands. Three years before Sabah independence, the Indonesian Government, by a solemn act, Act No. 4 of 1960, published baselines which clearly excluded Sipadan and Ligitan from Indonesian territory. The implications of *uti possidetis juris* could not be more clear.

C. Post-colonial practice

4.32. Does post-colonial practice tell any different story? Or, more exactly, does post-colonial practice establish an agreement between the Parties to modify the boundary as it stood at the date of their respective independence?

²⁶ IM, para. 8.27, p. 160.

4.33. For the first 25 years of its independence, Indonesia showed no interest in Sipadan and Ligitan. It did not manifest any presence in the area, did not try to administer the islands, enacted no legislation and made no ordinances or regulations concerning the two islands or their surrounding waters. To Malaysia's knowledge, Act No. 4 is the first piece of legislation specifically mentioning the area beyond Sebatik by extending the territorial waters to 12 nm off the eastern coast: as noted, that Act specifically did not apply to the two islands.

4.34. Sabah became independent and joined the Federation of Malaysia in 1963. The Indonesian Memorial considers 18 September 1969 as the critical date and adds:

“Whatever the previous situation, it is therefore from 1969 that the respective claims of the Parties find themselves in effect ‘legally neutralised’. Whatever either Party may do or say after this date, these actions are not relevant to the proceedings unless the Parties agree otherwise.”²⁷

Thus, on Indonesia's own account, it has to point to conduct in the short period between 1963 and 1969 which is sufficient to modify the established administrative and territorial arrangements. It has clearly failed to adduce any evidence capable of discharging this burden.

4.35. Malaysia has shown, in the Memorial, how the administrative activities continued after independence, in particular in relation to navigational aids,²⁸ but also to the spectacular development of tourism, starting in the mid-seventies.²⁹ The lighthouses erected by the British were regularly maintained by Malaysian officials, according to a report of 29 July 1970 by Major Sutoto, of the Indonesian Navy.³⁰ The affidavits offered by Indonesian officials confirm the existence of the lighthouses on the islands and do not

²⁷ IM, paras. 8.23 & 8.26, p. 158 & p. 159 respectively.

²⁸ MM, para. 6.25-6.29, pp. 69-70.

²⁹ MM, para. 3.19-3.20, p. 18.

³⁰ Annex IM 138, vol. 4, pp. 217-223.

pretend Indonesia was maintaining them.³¹ Sipadan and Ligitan became Protected Areas under the Protected Areas Order in 1997. Access is limited today to protect the environment.³²

4.36. Indonesia failed to protest at the continuing administrative action of Britain, then Malaysia, on the two islands. It did not object to the construction of the light tower in 1960. It had no reason to, as it had clearly represented, the same year, in Act No. 4, that Ligitan and Sipadan lay far out of the official baselines communicated to the world as embodying Indonesia's territorial and maritime position.

4.37. Indonesia seeks to rely on the petroleum concessions granted by both Parties. It quotes the Court's judgment in the *Continental Shelf (Libya/Tunisia)* case.³³ In that case, the Court was not concerned with territorial sovereignty but with maritime delimitation, which is quite a different matter. Petroleum concessions were considered relevant because they were at the heart of the dispute. As the Court noted:

“...the line was not intended as a delimitation of a fisheries zone, or of a zone of surveillance. It was drawn by each of the two States separately, Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concessions, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya, has great relevance.”³⁴

4.38. The JAPEX concession can in no way be interpreted as a territorial claim. It does not concern territorial rights, but exclusively operations on the continental shelf, which is quite a distinct issue. It defines the “Contract Area” as...

³¹ IM, vol. 5, Affidavits, Annex D (Sailor 1st Class Ilyas, 1967), Annex H (Sergeant-Major Weku, 1968).

³² MM, para. 6.31, p. 71.

³³ IM, para. 6.29, p. 109.

³⁴ I.C.J.Reports 1982, p. 84 (para. 118).

“the continental shelves within the statutory mining territory of Indonesia covered by the Authority to Mine which is the subject of this Contract, which Contract Areas are outlined and described in Exhibit A and B attached hereto and made a part hereof. The Area as shown in Exhibit A shall be designated ‘Offshore Bunje Area’ and the Area shown in exhibit B shall be designated ‘Offshore Nanakan Area’.”³⁵

Exhibit A-2 describes the perimeter of the Area by reference to Greenwich coordinates and specifically excludes Tarakan Island and Bunju Island from the Area.³⁶ The terms used are very similar to those noted by the Arbitration Tribunal in *Eritrea and Yemen Territorial Sovereignty (Phase One)*. The Tribunal concluded that the concession there “was granted and implemented in exercise not of Yemen’s claims to sovereignty over the islands and their waters within the contract area but in the exercise of its rights to the continental shelf as they then were.”³⁷ The JAPEX/PERMINA concession likewise was granted in the exercise of Indonesia’s rights, as perceived by the Indonesian authorities, to the continental shelf and certainly not in relation to any claim to sovereignty over the islands and their waters within the contract area, much less beyond.

4.39. This does not mean that petroleum concessions are of no help in solving territorial disputes. It does mean they must be examined with caution, as their object and purpose is not territorial delimitation, still less territorial allocation, but rather granting rights over the continental shelf. *A priori*, they cannot be considered as “a highly relevant circumstance”.³⁸ Moreover for a petroleum concession to carry any weight in the context of a dispute about territorial title, there must have been at least some degree of implementation, of activities in the area, of *effectivités*. Otherwise, it stands as a mere paper claim. In the *Continental Shelf (Tunisia/Libya)* case, both parties relied on material activities within the disputed area and objections thereto. There a Danish supply ship had effected a series of soundings in the disputed area.³⁹ Libya had placed four buoys in view of drilling

³⁵ Annex IM 129, vol. 4, p. 144.

³⁶ Ibid., p. 158.

³⁷ 114 I.L.R. at p. 102.

³⁸ IM, para. 6.29, p.109.

³⁹ *I.C.J. Pleadings*, Vol. I, Memorial of Tunisia, p. 39, para. 1.22; Vol. II, Counter-Memorial of Libya, pp. 167-8, para. 53.

operations, which triggered a Tunisian protest.⁴⁰ It completed the drilling of a dry hole and installed oil wells in the area in 1971 and 1975-76.⁴¹ Tunisia placed three buoys in the disputed area. In 1976, a rig operated by an Italian company began drilling and prospecting the area. Later another rig took over drilling in the disputed sector. Both parties sent naval vessels, either to prevent or to protect the petroleum activities.⁴² In the present case, no such *effectivités* are alleged by Indonesia. There is no *de facto* line because there are no facts.

4.40. Above all, to be of any significance as manifestations of sovereignty, the petroleum concessions must clearly include the disputed islands. As the Arbitration Tribunal in the *Eritrea and Yemen Territorial Sovereignty (Phase One)* arbitration noted:

“In the view of the Tribunal, the Seismic Permit Agreement of itself does not constitute a claim by Yemen to sovereignty over the islands within its contract area, nor does Eritrea’s failure to protest the agreement indicate acquiescence in any such claim. However to some extent it presuppose some measure of title to any islands contained within the contract area.”⁴³

And referring to another contract, the Tribunal added:

“Since the agreement area does not include any of the islands in dispute, it is of limited interest for these proceedings...”⁴⁴

⁴⁰ Ibid., Vol. I, p. 41, para. 1.27.

⁴¹ Ibid., Vol. II, Counter-Memorial of Libya, p. 167, para. 52.

⁴² Ibid., Vol. I, Memorial of Tunisia, pp. 41-42, para. 127-134; Vol. II, Counter-Memorial of Libya, pp. 168-170, para. 55-57.

⁴³ 114 I.L.R. at pp. 104-105.

⁴⁴ Ibid., p. 108.

4.41. The two petroleum concessions mentioned in the Indonesian Memorial do not include the two islands. The Indonesian concession to Permina/Japex starts some 20 nautical miles east of Sipadan and runs eastward.⁴⁵ Indonesia was attentive to the inclusion or exclusion of islands from the area conceded, as the Permina/Japex contract of 6 October 1966 shows, since it specifically excludes certain islands from the contract area.⁴⁶ Insert 8 shows the area covered by the concession. The Malaysian TEISEKI concession lies north of the two islands. Neither agreement area includes any of the islands in dispute. They are thus of "limited interest for these proceedings". Moreover the relevant maps are on large scale.

4.42. Concessions may be an occasion for *effectivités* to develop on the islands, even if they are not included in the perimeter. The Arbitration Tribunal in *Eritrea and Yemen Territorial Sovereignty (Phase One)* noted the construction of an airstrip by a petroleum company on one of the disputed islands and attributed significance to it.⁴⁷ Nothing of the sort happened in regard to Sipadan and Ligitan, so far as Indonesia is concerned. Nothing done pursuant to the Indonesian concessions approached or affected the islands. There was no construction on the islands, no drilling in their territorial waters, or indeed anywhere close to the islands which might have drawn Malaysia's attention to the fact of a claim. None of this is surprising since, as shown above, the Indonesian concessions bore no relationship to the islands. In any event, as it happened, the concessions did not prove of any geological interest and lapsed.

4.43. Indonesia seems to imply that the petroleum concessions constituted some sort of an implicit agreement among the Parties as to the offshore territorial delimitation. But that calls for substantial evidence, including evidence of practice following the grant of the concessions. In the *Libya/Tunisia Continental Shelf* case, the Court pointed out:

⁴⁵ 4° 9' 30" N., 117° 32' 30" E.

⁴⁶ IM Annex 129, vol. 4, p. 158.

⁴⁷ 114 I.L.R. at p. 109.

“It should be made clear that the Court is not here making a finding of tacit agreement between the Parties – which, in view of their more extensive and firmly maintained claims, would not be possible – nor is it holding that they are debarred by conduct from pressing claims inconsistent with such conduct on some such basis as estoppel.”⁴⁸

4.44. In the present case, it must be proved that the petroleum concessions amounted to a complete reversal of the Indonesian position, just a few years after publication of Act No. 4. And that Malaysia entered an international agreement in total contradiction with its consistent practice, before and since.

4.45. If considered to be subsequent practice of the Parties, the oil concessions must at least meet the standard of subsequent practice recently examined by this Court in the *Kasikili/Sedudu* case.⁴⁹ Nothing of the sort appears from a close examination of the concessions. The petroleum authorities that issued them had no competence to determine or modify the international boundaries of their respective States or to interpret international treaties on these issues. They did not purport to do so. The Indonesian authorities issued concessions that lay far away from the disputed islands and in no way asserted any claim to sovereignty or to economic rights in the area around the islands. Neither Party proceeded on the basis that they were implementing a general principle regarding a 4° 10' N boundary out to sea. That was not the point of the concessions.

4.46. As to the other activities, a perusal of the affidavits produced by Indonesia⁵⁰ confirms that there were no significant activities in terms of subsequent practice. There were occasional patrols by the Indonesian Navy ships, but it was quite an exceptional practice (Affidavits C to H) and the patrols seemed uneventful. As to the

⁴⁸ I.C.J. Reports 1982, p. 84 (para. 118).

⁴⁹ Judgment, 13 December 1999, paras. 47-80.

⁵⁰ See IM, vol. 5.

Indonesian fishermen, a few would fish off Sipadan, generally sleeping on their boats. They would take refuge on the island only in case of bad weather (Affidavits I to M). One fisherman witnessed the presence of huts occupied by people coming from “Derawan Island”. In 1992, according to Indonesia, a group of Indonesian scouts spotted an old pier, an old house belonging to a Bajau and about 20 huts, presumably occupied by Bajaus. It is not suggested in the affidavit that the people observed on the island were not Malaysian citizens.

4.47. From 1988 on, navy patrols and diplomatic protests became frequent.⁵¹ For instance, on 6 June 1993, well after the critical date, the Bulungan Regency sent out a strong Indonesian party of 66 persons to Sipadan. They must have astonished the tourists in the 50 tourist huts they counted along with the 60 tourist employees and the 786 turtles. They noted that the Bajau tribe had “governed the island since 1933” and that the tourist activity started in 1990. On the island, there were a Malaysian wildlife guard and security officers from three travel agencies. The Indonesian team declared it was ready to defend the “sovereignty” of Indonesia, then left the island to report to the Regency. They do not seem to have come back.⁵² As to the island of Ligitan, Haji Zaenuddin Effendy, a fisherman, is the only one who mentions having been on the island when his boat drifted and became stranded (Affidavit L).

4.48. No Indonesians, private citizens or otherwise, claim to have occupied the island or to have had any economic activity on the island. Whatever off-shore activity there was was certainly far below the minimum standards set by the Court to qualify as subsequent practice in the sense of article 31, para. 3 (b) of the Vienna Convention. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court noted that :

“To establish such a practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by

⁵¹ MM, para. 4.5, p. 28; IM, paras. 8.70-8.96, pp. 171-182.

⁵² Annex IM 163, vol. 4, pp. 351-354.

the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.”⁵³

In that case, the Court considered that peaceful occupation, agricultural and pastoral activities by the Masubia tribesmen for nearly a century did not meet the standard of subsequent practice. Occasional and incidental Indonesian activities on or around Sipadan and Ligitan are a far cry from even that activity.

D. General Conclusions

4.49. To sum up the practice of the Parties, before and after independence, as regards Sipadan and Ligitan :

- (a) The Sultanate of Bulungan was a minor land-based polity. The Sultan never exercised any authority on the islands off mainland Borneo, contrary to the Sultan of Sulu, whose State was a maritime empire. There is no trace of any activity of the Sultanate of Bulungan or of its inhabitants related, directly or indirectly, to Ligitan and Sipadan during the pre-colonial period.
- (b) The British North Borneo authorities administered the two islands in a normal way, having regard to the particular geographical circumstances. In particular, they regulated the major economic activity, turtle egg collection, erected lighthouses and declared Sipadan a bird sanctuary. Malaysia continued this peaceful administration.
- (c) The Netherlands showed no interest, enacted no particular legislation and never objected to British administration of the islands.
- (d) Independent Indonesia did not show any interest whatsoever in the islands for over 25 years.

⁵³ Judgment, 12 December 1999, para. 74.

- (e) Indonesia formally proclaimed its base-lines and territorial waters by Act No. 4 in 1960. It excluded Sipadan and Ligitan from its territory by fixing the easternmost base-line point in the area on the east coast of Sebatik and the limit of its territorial waters 12 miles out at sea, some 35 nautical miles distant from Sipadan and even further from Ligitan.
- (f) Petroleum concessions in the sixties did not concern territorial delimitation and never included the two islands in conceded perimeters. No activity pursuant to the Indonesian concessions had any relation to the islands.
- (g) The affidavits provided by Indonesia prove that Indonesian *effectivités* certainly did not qualify as subsequent practice, as defined by the Court in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*.
- (h) When the first Indonesian claim to the islands was voiced in 1969, Malaysia immediately challenged it.
- (i) The practice of the parties confirms the interpretation of the 1891, 1915 and 1930 treaties as stated in the preceding Chapters. It does not indicate any subsequent agreement or practice to the contrary.

Chapter 5

OFFICIAL AND OTHER MAPS SUPPORT MALAYSIA'S TITLE TO THE ISLANDS

A. Introduction

5.1. Never in the Court's history, it seems, has a sovereignty claim depended so exclusively and so much on a single map, as Indonesia's claim to the two islands depends on the internal Dutch map. The arguments based on that map have already been comprehensively dealt with.

5.2. In addition, however, Indonesia relies on a number of other maps, Dutch and British, Indonesian and Malaysian. In its view, the maps of both parties "point consistently in the same direction as that which follows from the terms of the 1891 Convention".¹ Malaysia has already dealt with many of these maps in Chapter 10 of its Memorial, and it will not repeat the detailed account given there. As shown, the preponderance of the map evidence on both sides supports the Malaysian position. Of particular significance are two maps following upon the 1891 Treaty:

- (1) The first detailed and official Dutch map of the Southern and Eastern Division of Borneo, published in Batavia in 1913, which shows the 1891 boundary stopping at the east coast of Sebatik and specifically attributes the group of islands including Sipadan and Ligitan to the "Gouv^t van Britisch Noord-Borneo".²
- (2) Even more important is the 1915 Map, signed by both parties and annexed to the Agreement of 1915, which demarcated the boundary across Sebatik.³ The red line on the agreed map clearly stops at the east coast. As pointed out in Chapter 2, if there were any doubt at all as to the meaning of the 1891 Boundary Convention, it is resolved by this

¹ IM, para. 6.37, p. 112.

² See *Schetskaart van de Residentie Zuider- en Oosterafdeeling van Borneo*, Topografische Inrichting, Batavia, 1913: MM, Annexes, vol. 5, Map 1.

³ See above, page 47.

map, which constitutes an authoritative interpretation of the 1891 Convention by the parties to it. Moreover it is the *only* official, agreed map representing the effect of the 1891 Convention so far as Sebatik is concerned. This gives it a unique status for the purposes of the present case.

5.3. In an attempt to deny the effect of the 1915 Map, the Indonesian Memorial invokes a selection of maps to show either that the two islands were considered as belonging to Indonesia or at least that they were considered as falling outside the limits of Malaysia. In this Chapter, Malaysia will deal with the maps invoked by Indonesia, especially those which were not discussed in Chapter 10 of Malaysia's Memorial. It will also consider a number of further maps of Dutch and Indonesian provenance. It will then turn to consider the legal effects of maps, in accordance with the useful recent indications given by the Court in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*. Finally, a brief summary will be given as to the conclusions to be drawn from the map evidence taken as a whole.

B. Indonesia's arguments based on various maps

5.4. It is necessary to distinguish the maps placed by Indonesia before the Court by reference to their period as well as their provenance.

(a) Maps before 1891

5.5. Indonesia asserts that:

“Dutch cartography prior to the signature of the 1891 Convention shows that The Netherlands viewed the islands of Ligitan and Sipadan as being subject to its sovereignty.”⁴

In support it cites a single map by De Sturler of 1881.⁵ The map (which is non-official) is on an extremely small scale, covering the whole of South-East Asia from Burma to New Guinea. It says nothing at all precise about boundaries in any legal sense. Its depiction of north-east Borneo is highly approximate. It is

IM, paras. 6.41, p.113
IM, Map Atlas, Map 1.

not clear that it even depicts Sebatik, let alone smaller islands. It is useless as evidence on any question of detail.

5.6. Other Dutch maps are more helpful, as well as more accurate, in depicting the area and Dutch claims to it. For example, the Dutch claim which was the basis of the negotiations leading to the 1891 Boundary Convention is shown on the map reproduced at Indonesia's Map Atlas, Map 2. It clearly did not extend further east than Batu Tinagat and showed no allocation line of any kind. The map does not actually show Sipadan and Ligitan, but it plainly attributes all the islands east of Batu Tinagat to North Borneo, including Mabul, Si Amil and Danawan. British maps depicting the Dutch claim at this time are to similar effect.⁶

5.7. To summarise, to the extent that "Dutch cartography" before 1891 showed the coast accurately and in detail, it depicted the area where Sipadan and Ligitan are located as within the sphere of Sulu and later, British North Borneo. Indeed, there is, so far as Malaysia is aware, *no* Dutch map of this period which did show the islands and depicted them as belonging to the Netherlands or to Bulungan.

(b) Maps in the period 1891-1945

5.8. The first map in the period 1891-1945 which requires noting is the Dutch internal map.⁷ As to this, it has already been shown (a) that it was produced after the 1891 Convention was signed; (b) that there is no record of any official transmittal of the map to Great Britain, and (c) that Great Britain never accepted that map, by words or conduct.⁸ But for present purposes it is worth recalling its defects as a map said to depict a claim to two islands never mentioned in the negotiations. First of all, it does not show Sipadan at all: anyone looking at the map would have no way of knowing that Sipadan exists, let alone that it falls to the south of the line. Secondly, it does show an unnamed island which from its position relative to "Danoean" and Si Amil can only be Ligitan, but (wrongly) shows it to the north (as well as to the east) of the line.

⁶ See the map drawn by Stanford's for the BNBC in 1888: IM, Map Annex, Map 3. That map does not show any of the smaller offshore islands south of Bum Bum Island.

⁷ IM, Map Atlas, Maps 5 & 6.

⁸ See above, paras. 2.49-2.59.

Thirdly, its depiction of the local geography is highly inaccurate: Bum Bum island is not shown, and a navigator using the map would think it possible to sail between Danawan and the unnamed island of Ligitan, whereas the three features are of course part of a large reef structure.⁹ No one looking at the map would think it attributed Ligitan to the Netherlands. Nor does it say anything about Sipadan, because it does not show it. With their propensity for getting details of this terrain wrong, who can know where the drafters of the internal Dutch map would have put Sipadan, had they been aware of its existence?

5.9. Indonesia also produced another small-scale map, from “The Century Atlas”, a commercial publication of 1897.¹⁰ This shows, as a “Boundary of Dutch possessions”, a curved line running lengthwise down Sebatik, then turning to run eastwards for approximately 700 miles. It is the sole “evidence of general repute” produced by Indonesia for this period. Again the map is useless as evidence of anything in relation to a specific dispute concerning two small islands. Evidently the map-maker was aware that there had been an agreement dividing the island of Sebatik, but does not seem to have been aware of its content. Sebatik is in the wrong place, and the dividing line at no stage follows the 4°10' N parallel. The map shows one unnamed island to the south of its “Boundary”: there is in fact no island in the position shown, but the island shown is closer to the position of Ligitan rather than Sipadan. The map is very inaccurately drawn at the level of detail. It also shows some coastal islands south of the line (e.g. what appears to be Nunukan) in the red colour designated for British, not Dutch, territory.

5.10. Then there is Stanford’s map of 1903, on which Indonesia places great store.¹¹ The map shows the 1891 land boundary, accurately drawn, as a thick red line. It also shows the provinces of British North Borneo by a red dotted line. Those provincial boundaries extend well out to sea, not reflecting the 3 marine league limit of the Sulu Grant of 1878. Sipadan is shown to the south of the dotted line depicting the BNBC Province of Elphinstone. (The settlement shown as Port Elphinstone was later renamed Semporna.) The map does not name Ligitan but shows what can only be Ligitan to the north of the provincial line. It does not attribute Sipadan to any other State.

⁹ As shown in the aerial photograph which is at MM, p. 23.

¹⁰ IM, para. 6.58, p. 119; IM, Map Atlas, Map 7.

¹¹ IM, para. 6.52, p. 118 & Map 6.4, paras. 7.13-7.14, pp. 132-132, also IM, Map Atlas, Map 9.

Insert 10

**Survey Map of the Netherlands East Indies Archipelago
(1897-1904)**

5.11. Indonesia argues¹² that in accordance with the 1903 Stanford's map "[b]oth islands were clearly recognised as belonging to Dutch Borneo". There is no basis for that assertion. Ligitan (unnamed but recognisable by its relation to Danawan and "Si Anal" (another misprint)) lies within Elphinstone Province, Sipadan lies outside it. The international boundary line of 1891 is not extended out to sea. The map does not attribute Sipadan to any other State. At the time, as has been shown, sovereignty over Sipadan was with the United States. Indeed the map was produced in the year of the voyage of the *Quiros*, when Sipadan was specifically claimed for the United States, a claim subsequently recognised by Great Britain.

5.12. Quite contrary to the position taken by Indonesia in its Memorial, all the post-1891 Dutch maps that have been found in the course of research on the present dispute either (a) show the 1891 boundary stopping at the east coast of Sebatik, or (b) show a short projection of that boundary, in no case extending more than a few nautical miles off-shore, and apparently representing a territorial sea boundary. So far as Malaysia has been able to find, there is not a single Dutch map that gives any credence whatever to the Indonesian claim. The following may be noted, by way of example.

5.13. Malaysia has found in the Exhibits to the US Counter-Memorandum in the *Island of Palmas* case an additional Dutch map composed during the years 1897-1904. It has the following title: "Survey Map of the Netherlands East Indies Archipelago"¹³, with the following additional inscription: "Netherlands East Indies, composed during the years 1897-1904 by the Topographical Bureau at Batavia, (remodeled edition of the Atlas by J.W. Stemfoort and J.J. ten Siethoff) reproduced by the Topographical Service at The Hague during the years 1898-1907 under the direction of the Director C.A. Eckstein, published by the order of the Department of Colonies"¹⁴. A photo-reduced copy of the map appears opposite as **Insert 10**¹⁵. The map thus appears to have an official provenance or approval. It is on a scale of 1:6 500 000. Although this scale is

¹² IM, para. 6.56, p. 119.

¹³ Translated from Dutch: "*Overzichtskaart van den Nederlandsch Oost Indischen Archipel*".

¹⁴ Translated from Dutch: "*Nederlandsch Oost-Indië, Bij het topographisch Bureau te Batavia samengesteld in de jaren 1897-1904 (omgewerkte uitgave van den Atlas van J. W. Stemfoort en J. J. ten Siethoff), bij de topographische inrichting te 's Gravenhage gereproduceerd in de jaren 1898-1907 onder leiding van den directeur C. A. Eckstein, Uitgegeven op last van het Departement van Koloniën*".

¹⁵ The full sized map appears in MCM, vol. 2, Map 1, p. 59.

relatively small, the detail on the map is sufficiently clear to show the land boundary coming in from the west to cross the island of Sebatik and terminating at its east coast. There is no extension seaward. The orange line represents the district boundary. The small dots or crosses that appear in the sea just east of Sebatik are sandbanks and reefs. The map carries no suggestion of the existence of any Dutch claim to sovereignty over any islands east of Sebatik.

5.14. Following surveys in 1902-03 by the Macasser, the Department of Hydrography of the Dutch Ministry of the Navy published, in September 1905, a large nautical map (scale, 1:200,000). It is entitled "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary".¹⁶ On this rather detailed map (reproduced in vol. 2 of this Counter-Memorial, Map 2), the maritime boundary clearly stops on the east coast of Sebatik, while both Sipadan and Ligitan are depicted on the map along many other islands in northern Borneo. There is also an updated 1915 version of this map with the indication that extensive corrections were made, i.e. after the further 1915 Boundary Agreement. The 1915 map shows exactly the same picture as the 1905 map: the 1891 boundary stops at the east coast of Sebatik (see vol. 2 of this Counter-Memorial, Map 3).

5.15. By a formal decision of 1 February 1913, the Government of the Netherlands East Indies determined the administrative structure of the Southern and Eastern Borneo Residence. In the map accompanying the decision, no boundary east of Sebatik was shown, nor were the islands of Sipadan and Ligitan included on the map.¹⁷ An extract from the map is shown opposite as **Insert 11**.

5.16. Before the First World War, a project entitled "International Map of the World" was inaugurated, using a scale of 1:1,000,000. Individual sheets conformed to a standard size (4° of latitude by 6° degrees longitude); they were designated by a special sheet numbering system, and were produced by the

¹⁶ "Oostkust Borneo. Eiland Tarakan tot Nederlandsch-Engelse Grens", reported in *Catalogue of Indonesian Charts and Books*, Batavia, 1954.

¹⁷ See Government Gazette (*Staatsblad* 1913) No. 199.

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national mapping organisations of many countries, coordinated by a Central Bureau. Sheet NA 50, "Oost Borneo", was compiled and printed by the Topografische Dienst, Batavia, in 1935. The particular significance of this map for the present case is that it shows the area of northern Dutch Borneo in the form of a "border break" beyond the limiting 4°N parallel; this is in order to complete the coverage of Dutch territory without publishing the next adjacent sheet to the north. This map shows the border across Sebatik but not extending into the sea eastwards. Most importantly the "border break" is *not* extended eastward to embrace the islands of Sipadan and Ligitan. A fold-out copy of part of the map is shown as **Insert 9** opposite page 97 above, and the whole map is reproduced in volume 2 as Map 5.

5.17. The well-known *Atlas of the Tropical Netherlands* was painstakingly prepared by the Royal Geographical Society of the Netherlands in close collaboration with the Topographical Service of the Netherlands East Indies from 1915 on. The Atlas was eventually published in 1938.¹⁸ Its Map 25 shows Netherlands Borneo. Again, the state boundary (*Rijksgrens*) stops on the east coast of Sebatik (see vol. 2 of this Counter-Memorial, Map 6). As will be seen from the extract of the map set out on page 106 as **Insert 12**, far from showing the area of the islands off Semporna and claiming them as Dutch, the map has an insert of the town of Balikpapan, which is located in southern Borneo.

5.18. Then there is Sheet Noord (North) B-50, "North Borneo", produced hastily by the Topografische Dienst, Batavia, in the emergency of 1941. It is a monochrome map bearing the security classification GEHEIM (secret). In the area of Dutch territory towards the southern edge of the map, it incorporates surveys that were not available when the 1935 Map, discussed in paragraph 5.16 above, was compiled. Again, the boundary crosses Sebatik and stops at its eastern shore. Sipadan and Ligitan are shown on the map. As a detail, it may be noted that the abbreviation "I." (island) is used for them and for all other North Borneo islands. For Sebatik and East Nunukan, the abbreviation "P." (*pulau*) is used. It would not occur to anyone reading the map that the two islands belonged to the Netherlands. A fold-out extract (**Insert 13**) from the 1941 map is on page 107, and the whole map is reproduced in volume 2 of this Counter-Memorial as Map 7.

¹⁸ *Atlas van Tropisch Nederland*, published by the Royal Geographical Society of the Netherlands in collaboration with the Topographical Service of the Netherlands East Indies, 1938.

(c) Maps covering the period since 1945

5.19. The first map mentioned by Indonesia in this period is the 1953 British Colonial Map.¹⁹ This is a very generalised map of the Colony, showing the provincial boundaries. Indonesia cites it as an “interesting example” which “gives no indication of there being any islands at the locations of Sipadan and Ligitan forming part of the British colony”. The reason is quite simple: it shows hardly any of the dozens of offshore islands south of Bum Bum Island. The map *is* interesting, however, for another reason. It shows the 1891 boundary line, differently depicted from the provincial boundaries, stopping at the east coast of Sebatik. It also shows the 1930 Treaty line with the United States. But what is most significant is that it shows no closing lines for the provincial boundaries around Darvel and Sibuko Bays. In other words, it contains no outer limit of islands part of the Colony. Given that there are many islands south of Bum Bum Island, a reader of the map would infer that these (including Sipadan and Ligitan) were part of the Lahad Datu district rather than Tawau — as was indeed the case. There is no indication whatever that they belong to Indonesia. The heading to this section of the Indonesian Memorial, “British Maps showing Ligitan and Sipadan Islands as Part of the Dutch Possessions”, is completely belied by the map.

5.20. Then there is the British Ministry of Defence Tactical Planning Chart of 1973, which is said by Indonesia to depict “the 1891 line extending eastwards from the island of Sebatik”.²⁰ The map has a disclaimer (though Indonesia fails to note this). It does show the 1891 line extending approximately 3 nautical miles out to sea. It may be that the author of the map was inferring a territorial sea boundary which continued the line of the land boundary, and indeed it has already been seen that Dutch authorities in the 1920s entertained the same idea, although they did not think the matter was determined for them by the 1891 Boundary Convention.²¹ The map accurately shows Sipadan and Ligitan (both unnamed) further to the east, unaffected by the line drawn offshore from Sebatik. It does not support the Indonesian position, quite apart from the disclaimer.

¹⁹ IM, Map Atlas, Map 10.

²⁰ IM, para. 6.65, p. 122. For the map see IM, Map Atlas, Map 19.

²¹ See above, paragraphs 4.10 - 4.18.

5.21. Indonesia relies on a number of Malaysian maps, 8 in all, which in its view show the islands “as falling outside of Malaysia’s possessions”.²² One of those listed is Map 21 in the Indonesian Map Atlas. This is the official Malaysian map of 1979 showing its territorial waters and continental shelf, which plainly shows the two islands as Malaysian and which Indonesia strongly criticises.²³ The remaining 7 may be briefly reviewed as follows:

- (a) Map 11: Pulau Sebatik. This is a map produced in 1960 for the Director of National Mapping, Malaysia. It contains a disclaimer. A “boundary” is shown along the 4°10' N line but it extends only to the edge of the map, approximately 2 nautical miles from the coast of Sebatik. Although Indonesia claims that this map is “[o]f particular note”,²⁴ it is difficult to see why. The map stops in the immediate vicinity of Sebatik, and quite apart from the disclaimer it tells us nothing at all about the status of islands well to the east.
- (b) Map 12: Sabah. This is a 1964 map compiled by the Sabah Department of Lands and Surveys. It contains a disclaimer. It shows a red line running along the 4°10' N parallel for some 30 miles to the east of Sebatik. The line is represented as an international boundary until the point where it joins the north-running Tawau district boundary, where it stops. Sipadan is not shown on the map, but it is in fact to the east of the closing line; Ligitan is shown as part of the Semporna district. Neither island is shown “as falling outside of Malaysia’s possessions”.²⁵
- (c) Map 13: Tawau. This is a 1965 map produced by the British Ministry of Defence for the Director of National Mapping, Malaysia. It contains a disclaimer. A coloured line is shown as the international boundary to the east coast of Sebatik only. The 4°10' N line then continues as a black dashed line to the edge of the map (not as far as Sipadan or Ligitan). There is no indication of what that line represents. It is not the same as the legend for district boundaries. Indonesia describes the map as “[a]lso significant”,²⁶ but it shows nothing at all as to the status of islands not represented on it.

²² IM, paras. 6.66-6.76, p. 122-126.

²³ IM, paras. 8.59-8.63, pp. 168-169.

²⁴ IM, para. 6.70, p.124.

²⁵ IM, p. 122 (heading preceding para. 6.66).

²⁶ IM, para. 6.71, p. 124.

- (d) Map 14: Sabah. This is a black and white version of Map 12, discussed in sub-paragraph (b) above. The same comments apply to it.
- (e) Map 16: Oil Prospecting Licenses and Leases. This is the Malaysian oil concession map, which has already been discussed.²⁷ It is highly generalised and does not show either of the disputed islands.
- (f) Map 18: Sabah. This is a reprint of Map 12, discussed in sub-paragraph (b) above. The same comments apply to it.
- (g) Map 20: Sabah Population and Housing Census. This small-scale map, published by the Malaysian Department of Statistics in 1974, was intended to show in general terms the distribution of population in Sabah. It contains a disclaimer. It shows the international boundary stopping within 3 miles east of Sebatik: an innominate 4°10' N line then proceeds eastwards. It shows only a few of the islands off the coast and does not show Sipadan or Ligitan. It is highly generalised and evidently of no value on any question of detail, quite apart from the disclaimer.

Thus of the seven remaining maps mentioned by Indonesia, three (Nos. 12, 14 and 18) are identical, so there are in effect five. Of these five, four contain disclaimers. None of the five maps shows Sipadan. Only one shows Ligitan, and then clearly a part of Semporna district. To suggest that the maps show the islands as not Malaysian is unsupportable.

5.22. Two other maps in Indonesia's Map Atlas should be mentioned. The first is the map showing continental shelf boundaries, which was annexed to the 1969 Agreement regarding the Delimitation of the Continental Shelves between the Two Countries.²⁸ The map shows Sabah internal provincial boundaries, with Sipadan (unnamed) lying outside those boundaries. It does not show Ligitan as such, but it does apparently show the provincial boundary as cutting the star-shaped reef on which Ligitan is located. It uses a different set of marks for international boundaries, and the international boundary on Sebatik stops at the east coast. The map contains a disclaimer. For the purposes of the present case it is neutral. This is hardly surprising since the present dispute arose during the negotiations for the 1969 Agreement, and at the time they signed the map, the representatives of Malaysia and Indonesia were fully aware of each other's claims to the islands.

²⁷ See above, paragraphs 4.37-4.45, pp. 88-93.

²⁸ Annex IM 136, vol. 4, p. 203 & IM Map Atlas, Map 17.

5.23. Secondly, there is the Malaysian map of Semporna, issued in 1968, which shows “Treaty Limits of the Republic of the Philippines Province of Sulu” (i.e., those resulting from the Treaty of 1930) as a red hatched line. The east-west parallel line, at about 4°20’N, bears the annotation “Republic of Indonesia”.²⁹ The Map shows Ligitan and Sipadan as well as the other islands off Semporna. It contains a disclaimer. There are of course no islands in the area to the south of the red hatched line, so the meaning of the phrase “Republic of Indonesia” is quite unclear. If it was thought to reflect an allocation line, there are no islands to the south for it to allocate.

5.24. The map does not show any boundary between Malaysia and Indonesia. The only basis on which it might conceivably be thought to support Indonesia’s case (leaving to one side the effect of the disclaimer) would be if the red hatched line at 4°20’N were to be extended to the west, in which event it would attribute to Indonesia not merely Sipadan and Ligitan but also Si Amil, Danawan, Mabul, Kapilai and part of the mainland as well.

5.25. If some of the Malaysian maps on which Indonesia relies are unclear, it remains the case that no single Indonesian map, so far as can be discovered, supports the Indonesian claim (any more than do the pre-independence Dutch maps). One important official Indonesian map has already been fully discussed: it is the map accompanying Indonesian Act No. 4 on its maritime boundaries.³⁰ Among other Indonesian maps, the following are illustrative.

5.26. The map “Kalimantan Utara”, based on the “Internasional [*sic*] Map of the World” series, is believed to be the first Indonesian publication of this sheet, produced in Jakarta in 1965. It is clearly a copy of the 1941 map with some amendments, particularly to the spelling of names. The (rather crudely-drawn) border across Sebatik has been extended eastwards some 8 km across the sea. Sipadan and Ligitan are not affected. An extract from the map is shown as **Insert 14**, opposite. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 8.

²⁹ See IM Map Atlas, Map No. 15.

³⁰ See above for discussion, paragraphs 4.25-4.31, pp. 83-86.

5.27. In 1968, a new Indonesian edition of the same sheet was published. The even more crudely drawn boundary across P. Sebatik now extends only some 3 kms into the sea. An extract from the map is shown on the following page as **Insert 15**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 9.

5.28. The 1976 edition of Sheet NB 50, "Bandar Seri Begawan", was printed in 1977 in full colour and has bilingual marginal information (English and Bahasa Indonesia). The boundary across Sebatik, drawn rather roughly as a curving line, now stops at the eastern shore of the island. An extract from the map is shown on page 115 as **Insert 16**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 10.

5.29. Then there is a map entitled "Sibatik. Land Systems and Land Suitability". This monochrome 1:250,000 map was produced jointly by UK and Indonesian land evaluation authorities in 1987 (see volume 2 of this Counter-Memorial, Map 11). Unlike the earlier Indonesian maps referred to in this section, it carries a boundary disclaimer. The straight-line boundary across Sebatik is extended some 12 to 13 kms across the sea. The islands offshore North Borneo are not shown.

5.30. Kalimantan 1:1,500, 000 is a large commercially produced general map of Kalimantan by PT Pembina, dated 1992/1993. This has a narrow red line extending (but not due eastward) across the sea from the eastern end of the boundary on P Sebatik. This line does not correspond to any boundary symbol in the key to the map. Neither Sipadan nor Ligitan is shown, but they would probably lie to the north of the narrow red line. An extract from the map is shown on page 116 as **Insert 17**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 12.

C. The relevance of maps in determining disputed boundaries

5.31. Before summarising the effects of the various maps in terms of the two islands, some remarks are necessary on the value of map evidence.

5.32. In the first place, a vital distinction exists between, on the one hand, agreed maps which are annexed to boundary treaties or demarcation agreements in order to depict their effect, and on the other hand, maps (whether official or unofficial) which are not agreed and do not form part of internationally binding instruments relating to a boundary. Maps in the first category are of great importance and may be decisive. Maps in the second category are, at best, evidence of repute, and they are not to be treated in any way as if they were documents of title. The Court made this clear in the *Frontier Dispute (Burkina Faso/Mali) Case*, in a passage quoted in Malaysia's Memorial.³¹ It repeated the point, with added emphasis, in its judgment of 13 December 1999 in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*.

5.33. In that case, as the Court noted, the map evidence on balance supported Namibia's claim to the island. Thus "early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe",³² and the Court appears to have accepted Namibia's summation of the map evidence, to the effect that "the majority of the maps submitted in these proceedings, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, tend to place the boundary around Kasikili/Sedudu Island in the southern channel".³³ This was the case, in particular, with a British map of 1933 which was "in general use" in Botswana for many years.³⁴ Nonetheless the Court declined to accept that any legal conclusion for the course of the boundary (based on the interpretation of a boundary convention of 1890 to which no map was annexed) flowed from these facts. It said:

"In view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement between them or their successors

³¹ ICJ Reports 1986, at p. 582, quoted in MM, para. 10.1, p. 107.

³² Judgment of 13 December 1999, para. 74.

³³ *Ibid.*, para. 76.

³⁴ *Ibid.*, para. 82.

concerning the validity of the boundary depicted in a map (cf. *Temple of Preah Vihear*, Judgment, Merits, I.C.J. Reports 1962, pp. 33-35), and in the light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case. That evidence cannot therefore ‘endors[e] a conclusion at which a court has arrived by other means unconnected with the maps’ (*Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 583, para. 56), nor can it alter the results of the Court’s textual interpretation of the 1890 Treaty.”³⁵

Evidently, a very high standard of consistency, certainty and general acceptance of the mapping history of a disputed area has to be met if non-agreed maps are to be relevant to title.

5.34. The Arbitral Tribunal in the first phase of the *Yemen-Eritrea Arbitration*, also considered the question of maps in support of territorial claims, and reached essentially the same conclusion. In reviewing the substantial map evidence adduced in that case it stressed in particular its reluctance “without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labelling”.³⁶ More generally, it noted that even unequivocal (but non-agreed) maps adverse to one party or another were “as in all cases of maps, to be handled with great delicacy”.³⁷ Its conclusion as to the map evidence overall was rather dismissive:

“Then of course there are the maps. These islands are large enough to find a place quite often – though by no means always – on even relatively small-scale maps of the region. It is fair to assert that, thanks to the efforts of counsel and especially those of Yemen, the Tribunal will have seen more maps of every conceivable period and provenance than probably have ever been seen before, and certainly a very much larger collection than will have been seen at any time by any of the principal actors in the Red Sea scene. In fact, the difficulty is not so much the interpretation of a plethora of

³⁵ Ibid., para. 87.

³⁶ Award of 9 October 1998, para. 382.

³⁷ Ibid., para. 388. See generally *ibid.*, Chapter VIII for the review of the map evidence in that case.

maps of every kind and provenance, as it is the absence of any kind of evidence that these actors took very much notice of, or attached very much importance to, any of them. The Tribunal is of the opinion that in quite general terms Yemen has a marginally better case in terms of favourable maps discovered, and looked at in their totality the maps do suggest a certain widespread repute that these islands appertain to Yemen.”³⁸

5.35. Indonesia asserts³⁹ that the official publication of a map is an estoppel by conduct. This is completely inconsistent with the discussion of the status of maps in the decisions of the International Court and other tribunals in the cases mentioned above, and is unsustainable in principle. Even if a map could be considered a representation by the State concerned of a legal state of affairs, for it to constitute an estoppel it would be necessary (a) that it was unequivocal; (b) that it was intended to be relied on; (c) that it was actually relied on, and (d) that the reliance caused detriment to the State so relying.⁴⁰ None of those prerequisites is met here, for a combination of the following reasons. First, there is no pre-1948 British or post-independence Malaysian map which attributes the islands to Indonesia; even if maps could constitute legal representations none of these maps do. Secondly, most of the Malaysian maps contain disclaimers, indicating that they were not intended to be relied on. Thirdly, there is no evidence whatever that Indonesia relied on any of the maps, or that it suffered any detriment.

5.36. But as a matter of international law, maps as such (not signed or endorsed by treaty or equivalent action by the States concerned) do not constitute representations of law. If they did, the mapping authorities of States, with their many and diverse internal functions, would have become the unacknowledged legislators of mankind in the matter of boundaries. Under international law they do not have such a role, and given the customary conflicts and inconsistencies in mapping in many parts of the world, it is inevitable that they do not. A series of unequivocal maps may constitute evidence of general

³⁸ Award of 9 October 1998, para. 490.

³⁹ IM, paras. 6.67-6.69, p. 123.

⁴⁰ For example, in the *El Salvador-Honduras Land, Island and Maritime Frontier Case (Application for Permission to Intervene)*, ICJ Reports 1990 p. 92 at p. 118 (para. 63), the Chamber referred to the following “essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it”.

repute, but none of the maps relied on by Indonesia is unequivocal. By contrast, the map annexed to the 1915 Agreement, especially when it is read with that Agreement, is unequivocal, and unlike any of the maps relied on by Indonesia, it is an agreed map focussing on the boundary as such.

D. Conclusions from the map evidence as a whole

5.37. Applying these legal standards to the maps tendered to the Court, it will be seen that the maps on which Indonesia relies fall far short. As to Malaysia's official maps, Indonesia asserts that:

“... Malaysian official cartography consistently depicted the extension of the 4°10' N line of latitude out to sea as the southern limit of Malaysia's territorial possessions in the area.”⁴¹

This is simply not the case. As in the case of British maps concerning Bechuanaland/Botswana, there was no complete consistency. But it has been shown that none of the maps concerned attribute the islands to Indonesia. Moreover whenever Malaysia produced maps focusing on local use of the islands or actual regulation (e.g. in the context of its status as a native reserve for turtles or subsequently as a conservation zone) the islands are clearly and unequivocally shown as Malaysian.⁴²

5.38. Turning to the maps more generally, Indonesia asserts that the map evidence is “consistent and compelling”, shows “remarkable consistency”, and is “clearly confirmatory of its title”.⁴³ This is a remarkable assertion, considering that Indonesia has produced not a single Dutch or Indonesian map, on any scale, which shows the islands and attributes them to Indonesia. On the contrary, the Dutch maps of 1897-1904 and of 1914 clearly show the boundary terminating at the east coast of Sebatik and thus attribute them to British North Borneo. The Indonesian official archipelagic claim map of 1960 clearly does not treat them as Indonesian, when it would have been very much in Indonesia's interest to do so. Even Indonesian maps since 1969 do not show the islands as Indonesian. Moreover, of the comparatively few modern maps which might be interpreted in a contrary sense, each of them contains a disclaimer. Mostly these maps do not show the islands at all, or (for the earlier maps) show them in the

⁴¹ IM, para. 6.74, p. 125.

⁴² See e.g. MM, Annexes, vol. 5, Maps 13 & 18.

⁴³ IM, paras. 6.77-6.79, p. 126-127.

wrong place, and even if they are not shown as Malaysian they are not shown as Indonesian either.

5.39. Malaysia's claims to the islands depend on the chain of title by which they were acquired from the United States as successor to Spain and from its long, peaceful and uninterrupted administration, extending back to the period of the BNBC after 1878. It does not depend on maps. But the preponderance of the map evidence — and especially the 1915 map — supports Malaysia's case, and this is in stark contrast to the fact that no single Dutch or Indonesian map, to the present day, shows the islands as Indonesian. In fact, as we have seen, the Dutch and Indonesian maps are unequivocal and entirely consistent; no reader of those maps would think the two islands are claimed by Indonesia or are part of Indonesian Kalimantan.

SUBMISSIONS

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

Datuk Abdul Kadir Mohamad
Agent of Malaysia

Kuala Lumpur

2 August 2000

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APPENDIX 1

**The Regional History of Northeast Borneo in the
Nineteenth Century (with special reference to Bulungan)**

by

Prof. dr. Vincent J.H. Houben

The Regional History of Northeast Borneo in the Nineteenth Century

with special reference to Bulungan

Prof.dr.Vincent J.H. Houben

1. Purpose of this Report

1.1 As a professor of Southeast Asian history, with a specialisation in nineteenth century Indonesian history, I have been asked by the Government of Malaysia to provide an independent expert report on the East Borneo region in the latter part of the nineteenth century, commenting in particular on the status of Bulungan and its relations with the maritime zone. To this end I was given copies of the Indonesian and Malaysian Memorials on the Sipadan & Ligitan dispute. As these proved to reflect only part of the historical material available, additional materials were retrieved during research undertaken in the Dutch General State Archives in The Hague. Also I have reviewed additional literature not mentioned in the Memorials of both States (see the attached Bibliography). This report aims to provide a balanced insight into the regional history of East Borneo area in the period prior to the conclusion of the Boundary Convention of 1891, based on accepted methods of scholarly historical interpretation.

1.2 For almost twenty years I have been involved in academic teaching and research concerning Southeast Asian history, in particular Indonesia. During my MA study at Leiden University, which I started in 1976, I specialised in Indonesian history including two of its major languages, Indonesian and Javanese. Between 1982 and 1987 I wrote a doctoral dissertation at the same institution on the mid-nineteenth century history of the indigenous states of Yogyakarta and Surakarta. From 1986 until 1997 I was attached to Leiden University as a (senior) lecturer in Southeast Asian history. In 1997 I was appointed as ordinary professor of Southeast Asian studies and head of Department at Passau University, Germany. Over the years I

published several books and numerous articles in my field of specialisation and I am internationally recognised as a historian of Southeast Asia. A full CV is attached to this report.

2. General background: European presence in the region in the nineteenth century

2.1 European expansion in island Southeast Asia was a complex process involving several European actors and a great multitude of indigenous polities that interacted in various manners in different locations. Dutch colonial expansion in the Indonesian archipelago in the nineteenth century was built upon the experiences of the Dutch East Indies Company (1602-1800), but cannot be viewed as a mere continuation of it. From 1795 until 1814 a contraction of Dutch colonial power took place, as the Netherlands was incorporated into the French Napoleonic empire and thus became the enemy of the English, whose navy was in control of the seas after the Anglo-Dutch war of 1780-1784. In fact England annexed most of the Dutch possessions in Asia, including its main power base in Java. After the Convention of London of 1814, the Dutch were handed back most of their colonial territories in Asia, but Anglophobia remained present among Dutch officials throughout the nineteenth century. Effective Dutch control was restored in a number of main ports outside Java, but this proved to be a tedious process necessitating several military expeditions. In 1825, the Dutch colonial possessions in the Indonesian archipelago consisted of Java, the Moluccas, Banka, Timor and a number of coastal towns on the islands of Sumatra, Borneo and Celebes. In the island of Java a major Dutch-Javanese war erupted in 1825, which the Dutch could only win with great difficulty in 1830.

2.2 After 1830 the Dutch concentrated on the economic exploitation of Java, whereas in the Outer Islands the *status quo* had to be maintained. *Abstention* was made a leading principle of Dutch policy, strongly supported by the Colonial Office in The Hague and the centre of administration in the colony headed by the Governor-General of the Netherlands East Indies in Batavia. Local officials in the Outer Islands

who broke this rule were even threatened with dismissal. Commissioner Governor General J. van den Bosch wrote in 1834:¹

“Apart from Banka, Banda and I think for the time being also Sumatra, all the other possessions are trouble spots (*lastposten*) [...] it is advisable to cut down the infrastructure of those posts to the smallest size and the slightest costs, to liberalize altogether the trade there for our citizens and to make every effort to exploit and protect Java, Sumatra and Banka.”

Only occasionally was the policy of abstention interrupted, particularly when foreign intrusions into the Dutch sphere of influence were feared.

2.3 From 1894, the conquest of Lombok, until 1910 the Dutch made final advances to the Outer Islands. This signalled the end of the official policy of abstention, which subsequently became replaced by modern imperialism, a systematic extension of formal rule in all the areas that were considered to be part of the Netherlands East Indies. The colonial boundaries drawn at the end of the nineteenth and early twentieth centuries are identical with the boundaries of present-day Indonesia.

2.4 Colonial rule was exercised either through direct rule by European colonial officials or through a system of indirect rule. In the latter case indigenous leaders could retain their power, while at the same time being bound by contract to the colonial State. This was the rule in the Outer Islands, since through this system formal rule could be maintained in conjunction with the virtual absence of exercise of effective Dutch power, thus lowering administrative and military costs to a substantial degree. At the same time the indigenous ruler was forbidden to act independently on the international stage: all foreign relations were to be conducted by the Dutch themselves. During most of the nineteenth century each indigenous ruler had his own individual Contract with the Dutch; amendments were mostly made in case of a succession. In 1898 a standard agreement, the so-called Short Declaration, was introduced, by which any given indigenous ruler was compelled to relinquish all

¹ Van den Bosch as quoted in Colijn Vol.I (1909-1914) 2-3. Translated from Dutch.

rights in favour of the Dutch. This signified that the Dutch were willing and able to dictate the terms of their relationship with indigenous rulers, whereas earlier during the nineteenth century this had not been the case.

3. Dutch policies with respect to East Borneo

3.1 Borneo had long been an almost forgotten island. The Outer Islands as a whole were peripheral to the Dutch, but Borneo was a periphery within the periphery. Its status was unclear under the first Sumatra Treaty of 1824, it was not known as a resource-rich region and its interior was unknown until the early decades of the twentieth century. Dutch interference with Banjarmasin in the south dated from the seventeenth century, but at the beginning of the nineteenth century nothing was left of this. As Kielstra, a Dutch expert during the colonial era, pointed out: “the whole of Borneo was independent around 1810”.² Regaining a foothold in Banjarmasin after the British Interregnum proved to be far from easy: in 1817, a Contract was concluded but afterwards tensions erupted with the Sultan, resulting in a situation in which the Dutch Resident was no more than a political agent: a “living coat of arms to protect Dutch sovereignty towards foreigners”.³ A major war erupted in Banjarmasin in 1859, which lasted until 1863. From the hinterland resistance was continued even up to 1905. The situation with regard to Pontianak and Sambas (West Borneo) was not much better. Nominal subjugation of the Sultans in the area could not prevent a major military confrontation with Chinese mining communities, which lasted from 1850 until 1855.

3.2 Abstention was the leading principle of Dutch policy with regard to Borneo. In 1843 Minister J.C. Baud expressed this as follows:⁴

“With regard to Borneo the principle has been adopted in the last few years to limit ourselves to the occupation of Sambas, Pontianak and Banjarmasin,

² Kielstra 1920: 187.

³ Kielstra, 1920: 188.

⁴ Baud as quoted in Dutch in Colijn Vol.I (1907-1914) 31.

without further attempting to intervene directly in the administration of the interior nor trying to expand our authority in these regions.”

As is clear from the standard work of Irwin, Borneo became a theatre of Anglo-Dutch rivalry.⁵ In this respect it is very important to note that there were two clearly marked periods of Dutch activity on Borneo, one in the mid-1840s and another from 1877 onwards. Both episodes of Dutch action, which were in clear deviation from the official policy of abstention concerning the Outer Islands, were essentially reactions against what was perceived as an acute English threat. In West Borneo, provoked by the activities of James Brooke in Serawak and on Labuan, the Dutch decided to peg out their claims. Writing on the sequel to these activities, Fasseur notes that ambitious plans for the opening up of vast Borneo were developed, but that the Government of Borneo as established in 1846 remained an “administrative castle in the air” to be silently abolished several years later.⁶ The *Journal de la Haye* of 15 February 1847 stated that Holland certainly did not claim the whole of Borneo, since it did not develop rights on territories of the Sultan of Brunei, the Sultan of Sulu “and on all islands alongside the Northcoast of Borneo”.⁷

3.3 The Brooke concession also gave rise to some Anglophobia in Dutch governmental circles. The administration sought to bar foreign adventurers from areas that, although under Dutch sovereignty, were hardly known even off the coast. The Minister of Colonies, J.C. Baud, deplored that the Dutch did not even have an accurate survey of the islands and peoples that could be considered to be under Dutch rule. The British had pressed the Dutch for such a survey in connection with action by British naval ships against sea pirates in coastal waters, action that every now and then demanded punitive expeditions against their bases on land. Baud thought that the Dutch could make use of such a complete survey in order to fill any existing gaps in the sovereignty rights acquired, but this should be done silently and cheaply, for instance by the distribution of Dutch flags and coats of arms to indigenous rulers.⁸ In contracts with native rulers, in which these acknowledged Dutch sovereignty, the largest possible territory should be defined. In the background was a hidden agenda:

⁵ Irwin 1955.

⁶ Fasseur 1995: 55-56, at p. 55.

⁷ W.A. Baud 1983, vol.III: 150-151.

in private conversations with King William II, Baud cherished the hope that a part of the colonial possessions could on occasion be sold to a European power, for instance France or Belgium. This can be compared with later plans of the Minister of Colonies, Mr. J. Loudon, in 1873 to sell the western part of New Guinea to Italy.⁹

3.4 Pre-1890 activities closer to the North Borneo frontier were essentially of a reactive nature, like in the mid-19th century. The activities of Erskine Murray in the Sultanate of Kutei, formally under Dutch sovereignty since 1825, raised alarm on the Dutch side. In Berau, more to the north, Edward Belcher tried to get a foothold. Both persons failed where Brooke had succeeded. However, they did trigger a more active Dutch policy in the region, seeking to secure nominal title by renewed contracts with the local Sultans. The situation on Borneo's east coast was summarised in a 1938 standard work on Dutch colonial history. After a lengthy account of the disturbances in the relationship between the Dutch and the Sultanate of Banjarmasin, E.S. de Klerck stated:¹⁰

“In 1824, a treaty was concluded with Kota Waringin, ceded to the Company in 1789 by the Sultan of Banjarmasin, which treaty was to be renewed in 1878. In 1825, permanent relations were entered into with Kutei, a former prosperous Hindu colony. Murray's miscarried attempt to settle in that Sultanate in 1844 led to a military expedition, which resulted in a treaty with the above-mentioned state. Sambiliung and Gunung Tabur, which formerly formed one realm, called Berau, belonged to Banten up to 1788 and was afterwards ceded to the East India Company. However, it was not before 1834 that these petty states acknowledged the supremacy of the Government. In 1850 the relations between the latter and these states were finally settled by treaty. Bulungan, like the other states above mentioned played no role of any importance.”

⁸ Fasseur 1995: 64.

⁹ Lindblad 1989: 3; on Belgium, see: Martin 1866.

¹⁰ De Klerck 1938 (reprint 1975): 309.

3.5 The grant by the Sultan of Sulu to Dent and Overbeck in 1878 again provoked increased activity on the part of the Dutch. A recent study on the regional history of Southeast Kalimantan contains the following description of events:¹¹

“The arrival of British fortune hunters in Sabah in 1878 formed the second chain of events that called for a more vigorous policy. It awakened the Dutch government to its self-assigned task in the scantily surveyed north-east. Contracts were instantly concluded with the sultans of Bulungan, Gunung Tabur and Sambaliung and soon a small warship cruised the waters of St Lucia Bay, where the border between Dutch and British spheres of influence supposedly ran. The official recognition of the British North Borneo settlement as a chartered company in 1881 motivated the permanent stationing of a Dutch district officer, in the border area. Geologists from the Bureau of Mines traversed the sultanates, and before long the increasing attention on the part of private capital called for a more impressive demonstration of colonial authority in these autocratic indigenous states. But the forest was thick and land abundant and the Anglo-Dutch border dispute remained unsettled for years at length.”

3.6 Central Borneo remained an area of little interest to the Dutch colonial administration. As late as 1890 the Dutch Assistant-Resident even suggested that the Apo Kayan-area ought to be ceded to Serawak. Alarm was raised when the Dutch realised that Brooke’s influence reached beyond the borders of Serawak. The need to show the flag was the major reason behind the expeditions of C. Nieuwenhuis of 1894, 1896-97, 1898-1900 to Central Borneo.¹² Only by 1909 were Bulungan, the Tidung and other lands visited regularly.¹³

3.7 In one particular area of colonial activity the Dutch and English collaborated rather than entering into competition: this was the problem of sea piracy, which often involved the slave trade as well. Slavery itself was forbidden in the Dutch East Indies since 1863, and the combat against sea pirates had started much earlier. It was the task

¹¹ Lindblad 1988: 123.

¹² Nieuwenhuis 1900.

of the governmental navy (*Gouvernementsmarine*) to patrol the archipelago in order to guarantee safe passage for western ships. B.H.M. Vlekke, author of another standard survey history of the Dutch East Indies, wrote: ¹⁴

“Sea piracy regularly occurred on all seas of Indonesia. One punitive expedition after another was directed against the pirates of Tobelo in the Moluccas, against the radjas of Borneo’s Eastcoast, against the Acehnese and even against the Moros of the Philippines, although these stood under Spanish sovereign authority.”

4. Bulungan as an indigenous Sultanate on the East Coast

4.1 The regional history of Bulungan can best be reconstructed on the basis of 19th century European travel accounts (Hageman 1855, Von Dewall 1855), official colonial documents (particularly the Memoranda of Transfer, made up by local Residents, existent since 1877, and Mail reports), and literature on Malay state formation.

4.2 The existing literature on Northeast Borneo is unanimous in depicting Bulungan as a small entity. Jerome Rousseau describes Bulungan as a pre-colonial coastal state, with limited interaction with the inland Dayak peoples of the Kayan and Pujungan rivers.¹⁵ The lower Kayan River itself was called Bulungan.¹⁶ Clifford Sather defines Bulungan together with Berau as “petty kingdoms” on the east coast of Kalimantan.¹⁷ James Warren circumscribed Bulungan and Berau as “tiny realms”.¹⁸

4.3 From these denominations it is clear that Bulungan cannot be equated with major neighbouring indigenous states such as the Sultanates of Brunei and Sulu. Sulu, for instance, is characterised in the specialist literature as a segmentary state,

¹³ Rousseau 1990: 33-34. A close study of the Memoranda of Transfer and Mailreports of the late 19th and early 20th century confirms this.

¹⁴ Vlekke 1947: 341-342. Translation from Dutch.

¹⁵ Rousseau 1990: 10.

¹⁶ Rousseau 1990: 21.

¹⁷ Sather 1997: 30.

¹⁸ Warren 1981: 10.

which involves a duplication of organisational forms at different state levels (central-regional-local). Warren, the most important expert on Sulu history, writes on the nature of this and similar indigenous polities: ¹⁹

“Territorial dominion, a system of specialised offices, and a political hierarchy exercising some control over the use of force in the area of alleged dominion were implicit in the genesis of such traditional states (Sultanates) as Sulu, Cotabato, Brunei, and Kutai.”

4.4 Bulungan, on the other hand, was a small Malay Sultanate, analysed by A.C. Milner in his book *Kerajaan* (1982) as follows:

“Just as the Malay state lacked governmental or legal structures, so it differed from Western states in its geographical definition. Territorial borders were often unknown [...] The actual location of the Malay state, in fact, appears to have been a matter of little importance. [...] The Malay word often translated loosely as ‘government’, ‘state’ or ‘kingdom’ was *kerajaan*. [...] *kerajaan* connotes little more than ‘being in the condition of having a Raja’.”

In other words, the Malay Sultanate as a political entity was very weak, except when it developed into a major polity like Malacca.

4.5 Sulu and Bulungan were therefore entities of a different kind. It is clear that in pure scale Bulungan was tiny compared to large entities like Sulu and Brunei. Bulungan cannot be ranked as a segmentary state in the sense of a reduplicated organisation of persons but it did in fact develop particular territorial claims. Crucial is ultimately to what extent these claims could be validated by actual exercise of power. The range of power of Bulungan was very modest, as were the possibilities of the local Sultan to exercise real power.

¹⁹ Warren 1981: xxii.

4.6 Before 1800 Bulungan had been part of a bigger realm called Berau, that also included Sambaliung, Gunung Tabur and, conquered by the Malays, the Tidung lands. Around 1800 Bulungan became its own polity, separate from Berau. Only just before the conclusion of the first treaty with the Dutch in 1850, Bulungan was recognised by them as a separate Sultanate. The seat of the Sultan was Tanjung Palas at the left bank of the Kajan River, which by 1849 housed 2,000 to 3,000 people.²⁰ On the opposite bank of the river, at Tanjung Seilor, local Dutch officials installed themselves. Berau, Sambaliung and Bulungan constituted different political entities, each under its own Sultan, with which the Dutch government concluded separate treaties. The Tidung lands were supposed to belong to Bulungan, whereas Gunung Tabur and Sambaliung belonged to Berau, situated to the south of Bulungan.

4.7 The composition of Bulungan society was complex. Besides Malays one could find Dayak, Taosug (from the Sulu Archipelago) and Bugis (from South Sulawesi). The last-mentioned intermarried with prominent families and were assimilated.²¹

4.8 The coastal Sultanates of Kalimantan, to which Bulungan belonged, claimed larger areas than they could effectively control. According to Rousseau:²²

“While small and relatively weak, coastal sultanates had the trappings of states: they defined themselves as regional polities with a territory which in theory they controlled exclusively, and they had the right to impose taxes. [...] In practice, Borneo sultanates had a coastal nucleus: the areas close to the capital were under actual control of the Sultan and his followers, and were taxed on a regular basis. The state also controlled and taxed the trade that passed through this area. These small principalities did not effectively control all the territory which they nominally claimed, and they were often politically unstable.”

²⁰ Dewall 1855: 429.

²¹ Warren 1981: 10. Taosug were a class of traders from the Sulu realm. Bugis/Buginese conducted maritime trade throughout the archipelago and came originally from South Sulawesi.

²² Rousseau 1990: 284.

4.9 The extent of actual power by the centre in Bulungan was largely dependent on the individual capacities of each individual Sultan and was therefore subject to variation. In 1880, the Sultan of Bulungan was described by the Dutch as a weak, old man with almost no influence, wrestling with an elite connected to slave trade.²³ In 1894, Resident Joekes noted that Sultan Mohamad Alimuddin was an insignificant personality, causing the nobility to do as they pleased.²⁴ In 1916, Resident Rijkmans observed that the young Sultan of about 37 years old was physically unsuited for his position and that the actual administration was taken care of by datu Mandur.²⁵ In 1921, the Sultan was identified as someone of Dayak descent, a man who in the delta of the Bulungan river exercised some authority and had made big money from the Tarakan oil concessions.

5. Dutch interference with Bulungan

5.1 A close reading of the Memorials of Transfer by the local Residents clearly shows that the Dutch presence in the area was limited throughout the nineteenth century. In the Dutch Memorial of Transfer of 1877, Bulungan was classified as an entity under contract with the Netherlands East Indies. However, it did not belong to those areas where the Dutch appointed the head of government. Bulungan can therefore be classified as an indirectly ruled area. The first Contract of 1850 was followed by a second one in 1878, that was meant to further consolidate Dutch prestige and contained clauses regarding the prevention of sea piracy and debt slavery.

5.2 On land, local Dutch administration was arranged for in 1877, after the Assistant Resident of Kutei & Eastcoast Borneo had undertaken a journey of inspection along the East coast, to be followed by other journeys later on. In 1879, the Assistant Resident of Kutei was sent northwards, looking – sometimes in vain – for local heads from whom could taken down written statements that they considered to be under the authority of Bulungan. In 1882, a Dutch controller was stationed at Muara Tawau in St. Lucia Bay. This officer was then moved to Bulungan in 1889. A

²³ MoT 2 March 1880, ARA microfiche 267-2.

²⁴ MoT 22 April 1894, ARA microfiche 269-1.

²⁵ MoT 3 June 1916, ARA microfiche 271-1.

major issue in the Dutch documents at the time was the identification of the northern boundary of Bulungan, important because Dutch and British claims, based on their contracts with, respectively, Bulungan and Sulu, overlapped. Nowhere in the Dutch colonial documents was the issue of a sea-boundary discussed.

5.3 Increasing Dutch interference was not entirely uncontested. In 1921 the Sultan of Bulungan protested against the Short Declaration being forced upon him, even went to Holland to plead his case before the Minister of Colonies and retained his opposition until his death in October 1924.²⁶ In 1921 Resident Hens made clear that the Dutch colonial authorities, in their contacts with Bulungan, had systematically served their own needs against the English: “Nominally has the whole region, nowadays called the Boeloengan region, been considered to stand under the authority of the Sultan, not because he exercised any but because we had to prove our claims against those of British North Borneo and Serawak (border treaty)”.²⁷

6. Bulungan relations with maritime areas

Bulungan authority in the coastal strip

6.1 No fixed boundaries existed between the Sultanates bordering the coasts. According to local indigenous notions, a particular river basin (up to the watershed) constituted a political-economic unit. Between these basins often existed unclaimed forested or swampy lands. Trading systems normally were configured to river basins, although political considerations could induce people to cross watersheds.²⁸ Disagreements about claims of overlordship could, however, lead to tense relations between neighbouring states.

6.2 The existing primary and secondary sources provide no firm conclusions as to where Bulungan's power ended in northerly direction along the coast. Bulungan controlled principally the lower Kayan River basin. The status of the Tidung lands to

²⁶ 1924, Secret Appendix to MoT 1921 and subsequent MoTs.

²⁷ MoT 1921, ARA microfiche 273-1+/2.

²⁸ Rousseau 1990: 288.

the north, which comprised the basins of the Sibuku and Simengaris Rivers, was at the time unsettled. The economy of the Sibuku area was firmly linked with that of Sulu and was controlled by Taosug and Bugis traders. Warren wrote: "These trade centers were sometimes tributary to the Bugis, sometimes to the Taosug, and when occasion permitted sometimes independent of the authority of their stronger overlord."²⁹ Bulungan and Berau as a whole seemed to have been until as late as 1830 "distant Bornean dependencies" of Sulu.³⁰ This observation is confirmed by the statement of Von Dewall in 1855 that north of Berau the coast was under Sulu rule, apparently a gift of Brunei for its help in an internal conflict.³¹ Later the status of Bulungan and Berau vis-à-vis major states in the area is unclear, but it can be assumed that they acquired a more independent status.

Trade relations between Bulungan and the maritime zone

6.3 Northeast Borneo was the core of the Sulu Sultanate's procurement trade. Sulu datus settled at river mouths, in bays and on coastal islands along the coast stretching from Maruda Bay to Bulungan.³² In this trade slaves were exchanged for tripang, bird's nests, wax and other forest products. Taosug and Bugis middlemen who settled in the area dominated this trade. Yet, at the same time Warren adds that: "On the Sibucco, Sambakong, and Bulungan river the Sultanate's [i.e. Sulu] hegemony and trade were still plainly visible."³³ After the middle of the 19th century the trade, and thus Sulu's hegemony, declined: Warren states that until 1860 Bulungan's trade was dominated by the Sulu Sultanate.³⁴

6.4 In the mid-19th century direct trade between Sulu and Tidung fell off due to several reasons. Direct trade was apparently forbidden and relegated to Bulungan, once the Spanish erected a blockade of Jolo in the Sulu Archipelago.³⁵ Also, after the middle of the 19th century western naval presence in the region increased. Despite this, lucrative trade relations existed between Bulungan and Bajau people from the

²⁹ Warren 1981: 85.

³⁰ Warren 1981: xx.

³¹ Von Dewall 1855: 425.

³² Warren 1981: 75.

³³ Warren 1981: 85.

³⁴ Warren 1981: 87.

³⁵ Von Dewall 1855: 427.

Sulu Archipelago, who regularly landed with their boats on the shore to exchange slaves for forest products. Trade with the Bugis existed as well. The Bajau people were experienced seamen, whereas, as local oral tradition confirmed, the people of Berau never dared to move out on to sea. Likewise Bulungan did not possess its own perahus. During a famine in 1879 several thousand slaves were apparently taken to Bulungan from the Sulu Archipelago.³⁶ In 1880 Resident Meijer refers to the slave trade of the northerly realms of Berau and Bulungan, where the trade with the inhabitants of the Sulu Archipelago consisted of exchanging products against robbed human beings, that were being sold in Dutch territory.³⁷ Thus Bulungan itself started to play a central role in the slave trade of the region.

6.5 No historical sources indicate any relations between Bulungan and the islands of Sipadan and Ligitan. Dinawan/Danawan-island in the Semporna district was the main centre from which relations between the Bajau and the outside world were maintained. This island lies near the edge of the main Bajau Laut fishing grounds, i.e. the Ligitan reefs. Von Dewall stated that in 1849 Bajau boats came from Dinawan and established themselves further down the coast, while 50 other boats settled in the islands of Berau.³⁸ The Semporna Bajau Laut oral tradition claims that they have made regular voyages until the 1920s to the areas of eastern Kalimantan referred to by Von Dewall. Semporna was developed as a market centre by the BNBC from the mid-1880s onwards.

7. Conclusions

The main points of this historical report might be summarised as follows:

- i. From 1830 to 1894 the Dutch concentrated their colonial efforts on Java, whereas in the Outer Islands a policy of abstention was pursued. With regard to Borneo, the Dutch displayed sudden activity twice, reacting to the activities of Brooke, Murray and Belcher in the 1840s and to the 1878 Sulu grant to Dent & Overbeck. On those occasions they tried to assert their territorial claims with

³⁶ Warren 1981: 199-200.

³⁷ MoT Meijer 2 March 1880, ARA microfiche 267 1+ and 2.

³⁸ Von Dewall 1855: 445-447.

regard to what they considered to be their spheres of influence. Contracts with local power holders were part and parcel of such policy.

- ii. Dutch colonial interest in the maritime zone was rather limited. Combating sea pirates and slave trade was the main issue, for which collaboration with the English was sought.
- iii. The Sultanate of Bulungan was a small Malay coastal Sultanate with limited territorial reach. Until the middle of the nineteenth century, the Tidung lands to the north of Bulungan seem to have been dominated by Sulu and Bugis traders. Afterwards Bulungan seemed to have developed into the central slave market of the region despite increased naval patrols by both the British and the Dutch. Bajau from the Semporna area played most likely a central role in this slave trade.



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